No. 09-2135

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CSX TRANSPORTATION, INCORPORATED,
Plaintiff-Appellant,

v.

ROBERT V. GILKISON;
PEIRCE, RAIMOND & COULTER, PC,
a/k/a Robert Peirce & Associates, P.C., a Pennsylvania
Professional Corporation; JOHN DOES;
ROBERT N. PIERCE, JR.; LOUIS A. RAIMOND;
MARK T. COULTER; RAY A. HARRON, Dr.,
Defendants-Appellees,

and

RICHARD CASSOFF, M.D., Party-in-Interest,

LUMBERMENS MUTUAL CASUALTY COMPANY, Intervenor.

BRIEF OF PLAINTIFF-APPELLANT

On Appeal from the United States District Court for the Northern
District of West Virginia in Case No. 5:05CV202 (Stamp, J.)

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CORPORATE DISCLOSURE STATEMENT

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements. Counsel has a continuing duty to update this information.

No. 09-2135 Caption: CSX Transportation, Inc. v. Robert Gilkison, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

CSX Transportation, Inc.. who is appellant, makes the following disclosure:
(name of party/amicus) (appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☒ NO

2. Does party/amicus have any parent corporations? ☒ YES ☐ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

CSX Corporation (parent company)

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☒ YES ☐ NO
If yes, identify all such owners:

CSX Corporation

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☒ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☒ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☒ NO
If yes, identify any trustee and the members of any creditors' committee:

/s/ Evan M. Tager (signature) January 11, 2010 (date)

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JURISDICTIONAL STATEMENT

Plaintiff-appellant CSX Transportation, Inc. ("CSXT") filed an amended complaint on July 5, 2007, alleging claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO") and state law. JA142-684. The district court had jurisdiction under 28 U.S.C. §§ 1331, 1332, and 1367(a). That court entered final judgment on September 15, 2009, JA2098, and CSXT filed a timely notice of appeal on September 29, 2009, JA2099-101. This Court has jurisdiction under 28 U.S.C. § 1291.

INTRODUCTION

This case involves a scheme in which asbestos claims were "manufactured for money" and in which "lawyers, doctors and screening companies were all willing participants." *In re Silica Prods. Liab. Litig.*, 398 F. Supp. 2d 563, 635 (S.D. Tex. 2005). The defendants carried out this scheme by arranging for x-rays to be taken in mass screenings by an unlicensed felon who produced low-quality films that dramatically increased the likelihood of a "positive" reading; by having the x-rays read by a since-discredited doctor who employed procedures that "do[] not remotely resemble reasonable medical practice," *id.* at 638, and reported finding evidence of asbestosis at an impossibly high rate; and by then inundating CSXT with thousands of claims that it could not adequately defend or even evaluate on an individual basis. To remedy the injuries caused by this claims-

manufacturing scheme, CSXT sued the responsible lawyers and doctor, alleging RICO violations and common-law fraud and conspiracy. With the exception of one discrete allegation of fraud, however, no jury has been permitted to decide whether CSXT's claims have merit, because the district court dismissed the vast majority of them as time-barred and granted summary judgment to the defendants on the surviving claims.

Those decisions are erroneous and should be reversed. In dismissing most of CSXT's claims as time-barred, and then denying leave to amend, the district court rejected an accrual rule adopted by all seven circuits to consider it, disregarded this Court's admonition that a limitations defense ordinarily should not be sustained at the pleading stage, relied on incorrect assumptions about when CSXT had access to information that might have put it on notice of the fraud, and ignored multiple features of mass asbestos litigation that make fraud difficult to detect. In granting summary judgment on the remaining claims (relating to an asbestos suit filed on behalf of Earl Baylor), the court mischaracterized CSXT's legal theory, overlooked critical evidence of fraud, and effectively viewed the record in a light most favorable to the movants rather than to CSXT.

The only fraud allegation on which CSXT received a jury trial involved the use of a positive x-ray of one employee, Danny Jayne, to support the claim of another employee, Ricky May, who was not sick. CSXT alleged that an employee

of the law firm that filed this asbestos claim—the same firm whose lawyers manufactured the claims underlying the RICO allegations—participated in the x-ray swapping scheme and that the firm should be held liable for his actions. A jury found that the firm's employee was not a participant in the fraud, but only after the district court unjustifiably prevented CSXT from offering highly probative evidence that he was. That ruling, too, was mistaken, and CSXT is therefore entitled to a new trial.

STATEMENT OF THE ISSUES

1. Whether the district court erred in dismissing as time-barred (a) CSXT's RICO and RICO conspiracy claims and (b) eight of CSXT's nine sets of common-law fraud and conspiracy claims.

2. Whether the district court abused its discretion by denying CSXT leave to amend its complaint.

3. Whether the district court erred in granting summary judgment to the defendants on the Baylor claims.

4. Whether the district court abused its discretion by excluding highly probative evidence that bore upon a core issue at the May-Jayne trial.

STATEMENT OF THE CASE

On December 22, 2005, CSXT filed a complaint against Robert V. Gilkison and Peirce, Raimond & Coulter, P.C. ("Peirce firm" or "firm"), asserting claims

arising from an x-ray swapping scheme. The complaint alleged fraud against Gilkison and the Peirce firm and various counts of negligence against the Peirce firm. The complaint also referred to potential fraud by "John Does." On March 16, 2007, the district court granted judgment on the pleadings to the Peirce firm on the negligence counts. JA115-26. On June 20, 2007, the court dismissed without prejudice the allegations concerning the John Does and granted CSXT leave to amend. JA132-41.

On July 5, 2007, CSXT filed an amended complaint against Gilkison; the Peirce firm; Peirce firm attorneys Robert Peirce, Jr., Louis A. Raymond, and Mark T. Coulter ("the lawyer defendants"); and Ray Harron. JA142-684. The amended complaint reasserted the fraud counts from the original complaint and asserted new claims arising from a broader fraudulent scheme that involved manufactured asbestos claims. The new claims were one count each of RICO and common-law fraud against the lawyer defendants and one count each of RICO conspiracy and common-law conspiracy against the lawyer defendants and Harron. The RICO and common-law counts asserted nine separate instances of fraud.

In orders issued on March 28 and April 2, 2008, the district court dismissed the RICO counts and eight of the nine sets of common-law claims as time-barred. JA691-704, 705-14. The common-law fraud and conspiracy claims that were not dismissed arose from an asbestos suit filed on behalf of Earl Baylor. On

November 3, 2008, in separate orders, the district court denied CSXT's motion for reconsideration and its motion for leave to file a second amended complaint. JA772-84, 785-95.

The allegations concerning the x-ray swap proceeded to trial. On August 14, 2009, the jury returned a verdict for the defendants. JA2067-70

On September 15, 2009, the district court granted summary judgment to the defendants on the Baylor claims. JA2083-97.

STATEMENT OF FACTS

A. Factual Background

1. The fraudulent claims-manufacturing scheme

Asbestosis, a form of pneumoconiosis, is a chronic inflammatory lung condition caused by long-term and heavy exposure to asbestos. The National Institute of Occupational Safety and Health maintains a standard protocol, known as the "B Reader Program," for interpreting chest x-rays to determine whether they show signs of pneumoconiosis. Doctors who become certified "B readers" analyze markings on x-rays called "opacities" and record their findings on standard International Labor Organization ("ILO") forms. JA147-48.

In this case, the Peirce firm orchestrated a screening process designed to produce false positive readings and then prosecuted claims against CSXT with no good-faith basis in fact. The defendants carried out this scheme by using an x-ray technician who produced low-quality films; having the x-rays read by a doctor who

provided positive reads at an impossibly high rate; and then overwhelming CSXT with thousands of resulting claims.

a. The Peirce firm's x-ray technician was James Corbitt. In August 1993, Corbitt was sentenced to 18 months in prison for theft of government property and tax fraud. JA193-201. For the decade following his release, he worked for the Peirce firm. JA103. Corbitt's "mobile screening company" consisted of an x-ray unit mounted on the back of a GMC straight truck, and his screenings were typically conducted in hotel parking lots. JA106. Because neither Corbitt nor his x-ray equipment was properly licensed, his screenings violated the laws of nearly every State in which he operated. JA203-04, 218-19. In 2001, after Corbitt was fined $10,000 by the State of Texas for illegal screenings, the Peirce firm paid half the fine to "keep him going so we could use him for the screenings." JA128. Corbitt's illegal x-rays were valuable to the Peirce firm because they were consistently underexposed and underinflated, producing white marks on the film that appeared to be signs of asbestosis where none actually existed. JA913-14, 1139-41.

b. The Peirce firm initially hired several different doctors to read the thousands of x-rays produced in its mass screenings. JA971 When it compared the percentage of positive reads for all the doctors, however, it discovered that one—Ray Harron—reported finding evidence of asbestosis at a dramatically

higher rate than any other. JA970-71. Between 1995 and 2003, therefore, the firm relied exclusively on Harron to read all the x-rays it produced. JA963-64.

Although numerous studies establish the prevalence of asbestosis in railroad workers at one to five percent, JA1003-28, the defendants estimated that Harron reported finding evidence of asbestosis in 65% of all workers screened, JA984, and a separate analysis found that his "percentage of positive X-ray reads is in excess of 90 percent and often approaches 100 percent," JA906-07. As Judge Jack of the Southern District of Texas has found, such a gross disparity "can only be explained as a product of bias—that is, of Dr. Harron finding evidence of the disease he was currently being paid to find." *Silica*, 398 F. Supp. 2d at 638. Judge Jack also found that Harron had produced these results through a "distressing and disgraceful procedure [that] does not remotely resemble reasonable medical practice." *Id.* (internal quotation marks omitted).

New York's Board of Professional Medical Conduct subsequently determined that Harron "committed acts that would constitute fraud * * * had they been committed in New York," the State in which he was first licensed. JA1297. Harron's medical license has since been revoked or surrendered in that State and others. JA892-97, 1267-308. At the same time, a number of courts have dismissed claims based on medical evidence produced by Harron, JA850; Revised Case Management Order, *In re: FELA Asbestos Cases*, No. 02-C-9500 (W. Va. Cir. Ct.

Sept. 17, 2009), and all major bankruptcy trusts have disallowed his B reads, JA129.

c. After using Corbitt and Harron to manufacture asbestos claims, the Peirce firm inundated CSXT with mass lawsuits that consolidated hundreds or even thousands of the claims. The firm filed seven such suits between August 2001 and February 2006. JA250-684. These cases were administered by the West Virginia Mass Litigation Panel, which imposed case-management orders that limited the scope of discovery and required CSXT to participate in mediation and settlement conferences for dozens of new claimants each month. JA678-84. Given these restrictions, the specter of mass trials, and the relatively small value of an individual claim, it was typically more cost-effective to settle early on. As the Peirce firm well knew, CSXT had neither the ability nor the incentive to conduct an extensive examination of each claim.

Some of the claimants attended multiple screenings and thus had more than one x-ray read by Harron. In the asbestos litigation, however, the Peirce firm was obligated to produce only the x-ray that served as the basis for the claim; CSXT did not have access to the earlier x-rays or corresponding ILO forms. It was not until November 2006, through discovery in *this* litigation, that CSXT was able to obtain the earlier x-rays and ILO forms for claimants with multiple x-rays. JA769.

After having those materials analyzed, CSXT learned of several instances in which Harron had first found a claimant unimpaired and then later, based on a different x-ray, opined that the claimant exhibited signs of asbestosis despite the objectively unchanged condition of his lungs. CSXT's amended complaint identified nine such instances. The resulting asbestos claims were filed in March 2000 (one), August 2001 (two), November 2001 (two), April 2002 (one), May 2003 (two), and February 2006 (one). JA250-684 The proposed second amended complaint identified seven more such instances, for which the resulting claims were filed in May 2003 (three), February 2006 (one), and July 2006 (three). JA734-745. Judge Jack's opinion exposing Harron in the *Silica* litigation was issued on June 30, 2005.

2. The Baylor fraud

The latest of the nine cases identified in the amended complaint was filed on behalf of Earl Baylor. That claim was filed on February 21, 2006, based on an x-ray taken in June 2003. JA153-54, 158.[1]

After Harron was discredited in the *Silica* case, the Peirce firm hired another B reader, Donald Breyer, to confirm Harron's readings of x-rays for claims that

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[1] The Peirce firm also took a third x-ray of Baylor at a separate screening, but it was too flawed even to be readable. JA63.

had not yet been filed, including Baylor's. The firm chose Breyer because, when conducting initial reads of x-rays, he reported signs of asbestosis more than 70% of the time—a rate similar to Harron's. JA1220. To increase the likelihood of a positive read still further, and in violation of established diagnostic protocols, the firm provided Breyer with copies of Harron's earlier reports. JA1177, 1180-82, 1186-87. Unsurprisingly, Breyer ratified Harron's opinions more than 90% of the time, including when Breyer read Baylor's x-ray. JA1180-81, 1186-87.

Several months after having the x-ray taken that Harron and Breyer ultimately read as positive, Baylor underwent a high-resolution CT scan at his physician's direction. JA875-78. The results were "unremarkable" and showed "no evidence to suggest interstitial lung diseases" like asbestosis. JA878. Because CT scans are diagnostically superior to x-rays, a negative CT scan generally rules out asbestosis. JA1106; A. Oikonomou & N.L. Muller, *Imaging of Pneumoconiosis*, 15 IMAGING 11 (2003). Indeed, Baylor's doctor found that his "lungs are clear bilaterally" and that "[t]here is no obvious pleural calcification seen to suggest prior asbestos exposure." JA878. The Peirce firm had a copy of the negative CT scan in its files when it filed suit on Baylor's behalf. JA870-78, 947, 1160-63.

The filing of an asbestos claim requires, not only reliable medical evidence, but evidence that the claimant was exposed to asbestos while working for the

defendant company. In connection with his claim, the Peirce firm directed Baylor to complete an "Asbestos Questionnaire," which asked him to provide, among other information, his "Claimed Exposures." JA92-95 That section of Baylor's questionnaire includes the handwritten words "Asbestos rope, cement, Asbestos valve packing." JA93. But the handwriting differs from that in the rest of the form. Baylor testified that the handwriting was not his; that no one had assisted him in completing the questionnaire; and that he never had any conversations with anyone at the Peirce firm about the questionnaire in general or asbestos exposure in particular. JA1199, 1203-06.

3. The May-Jayne fraud

At a June 2000 screening, a CSXT employee named Danny Jayne impersonated a CSXT employee named Ricky May. JA1720. Represented by the Peirce firm, May then used Jayne's positive x-ray to file claims against CSXT and other defendants. JA171. May was a Peirce firm "VIP," who used his position as a union leader to help recruit plaintiffs to the firm's mass screenings, and was represented in the asbestos litigation by Robert Peirce himself. JA1533, 1535, 1540-42. Robert Gilkison, a Peirce firm employee, arranged and attended the screening at which the swapped x-ray was produced. JA1632-33, 1721-24, 1799. May testified that the fraud was Gilkison's idea from the start, and Jayne testified

that May had attributed the idea to Gilkison when May first asked Jayne to participate in the scheme. JA1622, 1625, 1720.

B. Proceedings Below

CSXT's amended complaint alleged RICO violations and common-law fraud and conspiracy by the lawyer defendants and Harron in connection with the claims-manufacturing scheme and fraud by Gilkison and the Peirce firm in connection with the May-Jayne scheme. JA160-65, 171-76. The claims-manufacturing allegations identified nine separate instances of fraud, including the Baylor fraud. JA155-60.

In dismissing the RICO claims, the district court reasoned that CSXT should have known that the nine asbestos claims at issue were fraudulently filed "on or substantially near the date" of filing; that eight of the claims were filed more than four years (the RICO limitations period) before CSXT's amended complaint; that RICO requires two timely predicate acts; and that the RICO claims were therefore time-barred. JA695-700, 706-10. In dismissing all the common-law claims arising from the claims-manufacturing scheme except the Baylor fraud and conspiracy claims, the court similarly reasoned that CSXT should have known that the asbestos claims were fraudulently filed when they were brought and that all the claims except Baylor's were brought more than *two* years (the common-law limitations period) before the amended complaint. JA700-01, 710-11.

CSXT's proposed second amended complaint would have added more recent fraudulently filed claims as well as detailed allegations concerning the difficulty of discovering the fraud. JA716-65. In denying CSXT leave to file, the district court ruled, among other things, that amendment would be futile. JA785-96. That ruling was based on a different statute-of-limitations theory, according to which the RICO claims were time-barred, not because the *last* two predicates did not fall within the limitations period, but because CSXT was "charged with notice of its injury * * * when the *first* alleged[ly] * * * fraudulent lawsuit was filed." JA792-93 (emphasis added).

In granting summary judgment to the defendants on the Baylor claims, the district court ruled that CSXT could not prove reliance, because Breyer read Baylor's x-ray as positive after Harron did so, and that it could not prove fraudulent intent, because there was no evidence that the lawyer defendants knew that Baylor "did not have asbestosis." JA2083-97.

At the May-Jayne trial, the primary issue was whether Gilkison participated in the x-ray swapping fraud and, if so, whether the Peirce firm was vicariously liable for his conduct. Peirce testified that he had not known about the x-ray swap before it occurred; that Gilkison had told Peirce that he did not know about it either; and that, when Peirce found out about the fraud, he dissociated himself from May. JA1572-80. The district court nevertheless precluded CSXT from offering

evidence that, even after learning that the x-ray was a fake, Peirce continued to accept settlements on May's behalf of asbestos claims against other defendants that were based on the very same x-ray. JA1321-33, 1558-61. The jury ultimately found that Gilkison was not liable (and thus did not reach the question whether the Peirce firm was vicariously liable). JA2067-70.

SUMMARY OF ARGUMENT

I. In finding the RICO claims time-barred, the district court committed three separate errors of law. *First*, the court mistakenly rejected the "separate accrual" rule, under which a new RICO cause of action accrues with each new injury. That rule has been adopted by all seven circuits to consider the issue; it is the rule under RICO's analogue, the Clayton Act; and it follows from RICO's language. *Second*, the court disregarded this Court's teaching that a limitations defense raised in a Rule 12(b)(6) motion may be granted only in the unusual case in which all facts necessary to the defense clearly appear on the face of the complaint. *Third*, the court erroneously concluded that CSXT was placed on notice of the fraud by the mere filing of the asbestos claims. The court made incorrect assumptions about the information to which CSXT had access and failed to account for features of mass asbestos litigation that made an investigation of each individual claim infeasible. The second and third errors also require reversal of the district court's dismissal of the common-law claims.

II. Whether or not the district court erred in dismissing the RICO and common-law claims, CSXT should be granted leave to amend. Amendment would not be futile or prejudicial, and CSXT has not acted in bad faith.

III. CSXT has produced more than sufficient evidence for a reasonable jury to find that the lawyer defendants filed Baylor's asbestos claim without any good-faith basis in fact, and thus summary judgment was improper. The evidence of fraud includes (a) the defendants' use of an unlicensed technician who produced poor-quality x-rays that predictably led to false positive readings; (b) their use of a since-discredited doctor (Harron) who reported evidence of asbestosis at an impossibly high rate; (c) their use of a second doctor (Breyer) who found evidence of asbestosis at a similar rate and was provided with Harron's earlier reports before re-reading the x-rays so as to maximize the likelihood of ratifying Harron's conclusions; (d) the existence of a CT scan that ruled out asbestosis but was ignored by the lawyer defendants when they filed Baylor's claim (even though it was in their own files); and (e) a fabricated history of occupational exposure.

The district court mistakenly believed that summary judgment was warranted because Breyer reread Baylor's x-ray after Harron had done so and because CSXT cannot prove that the lawyer defendants knew that Baylor did not have asbestosis. But CSXT does not have to prove that the defendants knew that Baylor did not have the disease; it has to prove only that they lacked a good-faith

basis for bringing the claim, and the evidence summarized above is easily sufficient to permit a jury to so find. As for Breyer's involvement, it is part of that very evidence—proving, not a good-faith basis for the Baylor asbestos claim, but a lack of it.

IV. The district court abused its discretion by precluding CSXT from offering evidence during the May-Jayne trial that, even after the x-ray swap became known, Peirce continued to accept settlements on May's behalf of asbestos claims against other defendants that were based on the same fraudulent x-ray. By directly contradicting Peirce's testimony that he wanted nothing more to do with May after learning of the swap, the evidence would have undermined Peirce's credibility and might have led the jury to disbelieve his testimony that Gilkison claimed to be unaware of the fraud. The evidence also made it more likely that the fraud was a calculated scheme by Gilkison and the Peirce firm to generate revenue for the firm and assist an important client, rather than a plan devised by May alone. Particularly in light of the high probative value of the evidence, no countervailing consideration justified its exclusion. And the exclusion was highly prejudicial. The evidence on the dispositive issue at trial—whether Gilkison was a knowing participant in the fraud—was fairly evenly balanced, and the case ultimately came down to whether the jury believed May and Jayne, on the one hand, or Gilkison and Peirce, on the other.

STANDARD OF REVIEW

The dismissal of the RICO and common-law claims is reviewed de novo. *Monroe v. City of Charlottesville*, 579 F.3d 380, 385 (4th Cir. 2009). The denial of leave to amend is reviewed for abuse of discretion. *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 376 (4th Cir. 2008). The grant of summary judgment on the Baylor fraud and conspiracy claims is reviewed de novo. *Shipbuilders Council of Am. v. U.S. Coast Guard*, 578 F.3d 234, 243 (4th Cir. 2009). The exclusion of evidence at the May-Jayne trial is reviewed for abuse of discretion. *United States v. Blake*, 571 F.3d 331, 350 (4th Cir. 2009).

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING CSXT'S RICO CLAIMS AND EIGHT OF ITS NINE SETS OF COMMON-LAW CLAIMS

The district court dismissed CSXT's RICO claims as time-barred and dismissed all but one of its nine sets of common-law fraud and conspiracy claims on the same ground. Both rulings are incorrect.

A. CSXT's RICO Claims Are Not Time-Barred

In holding that CSXT's RICO claims are time-barred, the district court committed three errors. *First*, in conflict with all seven circuits to consider the question (and after initially agreeing with them), the court rejected the "separate accrual" rule, under which a new RICO cause of action accrues with each new injury. *Second*, the court disregarded this Court's teaching that a complaint may be

dismissed on statute-of-limitations grounds under Rule 12(b)(6) only in the unusual case in which all facts necessary to the affirmative defense clearly appear on the face of the complaint. *Third*, the court mistakenly concluded that the allegations in CSXT's complaint establish that the RICO claims are untimely.

1. RICO's statute of limitations is governed by a separate-accrual rule

a. RICO makes it unlawful to conduct the affairs of an enterprise through a "pattern of racketeering activity" or to conspire to do so. 18 U.S.C. §§ 1962(c), (d). "Racketeering activity" includes mail and wire fraud, in violation of 18 U.S.C. §§ 1341 and 1343, and a "pattern of racketeering activity" means at least two acts of racketeering activity, the last of which occurred within ten years after the commission of the prior one. 18 U.S.C. §§ 1961(1), (5). RICO grants a civil cause of action to any person "injured in his business or property by reason of a violation of [the statute]." 18 U.S.C. § 1964(c).

Although RICO does not include an express statute of limitations for civil actions, the Supreme Court has held that the Clayton Act's four-year statute of limitations governs. *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143 (1987). The Supreme Court has not definitively resolved when the limitations period begins to run, but this Circuit has adopted an "injury discovery" rule, under which a RICO claim accrues when the plaintiff knows or should know of his

injury. *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211, 220 (4th Cir. 1987).

Because RICO claims arise, not from a single injury, but from a series of injuries that may occur over many years, the injury-discovery rule raises an additional question: Of *which* injury must the plaintiff have actual or constructive knowledge? This Court has not yet addressed that question. But every circuit to do so has applied a "separate accrual" rule, under which, as then-Judge Kennedy put it, "a cause of action accrues when new [predicate] acts occur within the limitations period, even if * * * other acts were committed outside the limitations period." *State Farm Mut. Auto. Ins. Co. v. Ammann*, 828 F.2d 4, 5 (9th Cir. 1987) (concurring opinion). The "corollary" of the separate-accrual rule, *id.*, is that a RICO plaintiff may *not* "recover for injuries caused by other earlier predicate acts that took place outside the limitations period," *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 190 (1997).

The separate-accrual rule is thus a component of the injury-discovery rule. Indeed, the Ninth Circuit has aptly described the separate-accrual rule—the rule that "a new cause of action accrues for each new and independent injury"—as the "second part" of the injury-discovery rule (the first being the requirement of actual or constructive knowledge of the injury). *Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir. 1996). At least six circuits in addition to the Ninth—the Second, Third,

Fifth, Seventh, Tenth, and Eleventh—likewise apply the separate-accrual rule. *See, e.g., Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1102-05 (2d Cir. 1988); *Annulli v. Panikkar*, 200 F.3d 189, 197-98 (3d Cir. 1999); *Love v. National Med. Enters.*, 230 F.3d 765, 773-75 (5th Cir. 2000); *McCool v. Strata Oil Co.*, 972 F.2d 1452, 1463-66 (7th Cir. 1992); *Bath v. Bushkin, Gaims, Gaines & Jonas*, 913 F.2d 817, 820-21 (10th Cir. 1990) (per curiam); *Bivens Gardens Office Bldg., Inc. v. Barnett Bank*, 906 F.2d 1546, 1551-53 (11th Cir. 1990). No circuit has rejected it.

b. The view of the circuits is not only unanimous but correct. To begin with, as other circuits have recognized, *Love*, 230 F.3d at 773-75; *Bivens Gardens*, 906 F.2d at 1552-53; *Bankers Trust*, 859 F.2d at 1103-05, a separate-accrual rule follows from "the clear legislative intent to pattern RICO's civil enforcement provision on the Clayton Act," *Malley-Duff*, 483 U.S. at 152. Because of the "similarities in purpose and structure between RICO and the Clayton Act," *id.*, and the "clear legislative record of congressional reliance on the Clayton Act when RICO was under consideration," *Rotella v. Wood*, 528 U.S. 549, 557 (2000), courts have looked to the Clayton Act as "the closest analogy" when filling gaps in RICO, *Malley-Duff*, 483 U.S. at 150. The Supreme Court did so, for example, not only in holding that RICO incorporates the Clayton Act's four-year limitations period in *Malley-Duff*, *id.* at 150-56, but also in holding that it incorporates the Clayton

Act's requirement of proximate causation in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 267-70 (1992).

RICO likewise incorporates a separate-accrual rule, because that rule applies under the Clayton Act. As the Supreme Court has explained, "[i]n the context of a continuing conspiracy to violate the antitrust laws, * * * *each time a plaintiff is injured* by an act of the defendants[,] a cause of action accrues to him to recover the damages caused by that act." *Zenith Radio Corp. v. Hazelton Research, Inc.*, 401 U.S. 321, 338 (1971) (emphasis added). In rejecting the "last predicate act" rule, under which the limitations period for a civil RICO claim begins to run anew upon the occurrence of each predicate act forming part of the same pattern, the Supreme Court relied on this very Clayton Act rule—that, "in the case of a continuing violation, * * * each overt act that is part of the violation and that injures the plaintiff * * * starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times." *Klehr*, 521 U.S. at 189 (internal quotation marks omitted). The Court concluded that the last-predicate-act rule was irreconcilable with the Clayton Act rule, because, under the latter but not the former, "the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period." *Id.* The Court then pointed out that the "'separate accrual' rule" that lower courts apply "in civil RICO cases" differs from the last-

predicate-act rule in that respect and is therefore consistent with the Clayton Act rule. *Id.* at 190.

As other circuits have recognized, the separate-accrual rule also follows from RICO's "plain language." *Love*, 230 F.3d at 773; *Bivens Gardens*, 906 F.2d at 1552; *Bankers Trust*, 859 F.2d at 1102. RICO grants a cause of action to any person "injured in his business or property" by a violation of the statute. 18 U.S.C. § 1964(c). By the very nature of the statute, "multiple injuries may be caused by a single RICO violation." *Love*, 230 F.3d at 773. With "these multiple injuries in mind," Congress "tied the right to sue * * *, not to the time of the defendant's RICO violation, but to the time when [the] plaintiff suffers injury to 'his business or property' from the violation." *Bankers Trust*, 859 F.2d at 1103. "[W]hen a new * * * injury is incurred from the same violation," therefore, "the plaintiff is again 'injured in his business or property'" and "his right to sue for damages from that injury accrues at the time he discovered or should have discovered that injury." *Id.*

c. In its orders dismissing CSXT's RICO claims, the district court did not explicitly address whether they are governed by a separate-accrual rule. But it did apply that rule implicitly. The RICO allegations are based on nine fraudulently filed asbestos claims. JA153-54. The court ruled that the RICO counts were time-barred because "[a] 'pattern of racketeering activity' requires * * * at least two acts of racketeering activity" and "eight of the nine [claims] were filed * * * more than

four years prior to [the] date the amended complaint was filed." JA699-700, 710. The court employed the same reasoning in its order denying reconsideration. JA781-82 & n.8. Had the court *not* been applying the separate-accrual rule, it would have dismissed the RICO counts—as the lawyer defendants urged in their motion (Doc. No. 231, at 21-22)—on the ground that the *earliest* of the nine fraudulently filed claims was brought more than four years before CSXT's lawsuit.

In denying leave to amend, however, the district court did an about-face and explicitly rejected the separate-accrual rule. The court said that there is a circuit conflict on the test "for determining the accrual date of a RICO cause of action"; that some courts apply the "separate accrual" rule while others apply the "injury discovery" rule; that a cause of action accrues under the former upon discovery of a "new injury" and under the latter upon discovery of the "initial injury"; and that this Court "has repeatedly and consistently applied the injury discovery rule" rather than the "separate accrual rule." JA791-94. The court recharacterized its dismissal of CSXT's RICO claims as having been based on the injury-discovery rule (as the court understood it), explaining that CSXT was "charged with notice of its injury by March 2000 when the first alleged objectively baseless and fraudulent lawsuit was filed." JA792-93

The district court's reasoning is flawed on multiple levels. To begin with, the injury-discovery rule and separate-accrual rule are not alternative tests; the

latter is a "component[]" of the former, *Grimmett*, 75 F.3d at 510. For that reason, there could not be (and is not) a circuit conflict on whether civil RICO claims are governed by an injury-discovery rule or a separate-accrual rule. In fact, in at least seven circuits they are governed by both.

At the same time, no circuit applies a rule other than the injury-discovery rule, and none applies a rule other than the separate-accrual rule, including the rule identified by the district court—namely, that a claim accrues when the plaintiff has actual or constructive knowledge of his "initial injury." JA794. As for this Circuit, while it certainly does apply the injury-discovery rule, it does not (and could not) apply that rule "[i]nstead" of the separate-accrual rule, as the district court mistakenly believed. JA794. This Court simply has never had occasion to decide whether a separate-accrual rule is a component of the injury-discovery rule. For the reasons explained above, the Court should now hold that it is.

2. A statute-of-limitations defense generally may not be sustained at the pleading stage

Statute of limitations is an affirmative defense, and thus ordinarily must be pleaded and proved by the defendant. *See* Fed. R. Civ. P. 8(c). As a consequence, "a motion to dismiss filed under [Rule] 12(b)(6), which tests the sufficiency of the complaint, generally cannot reach the merits of an affirmative defense, such as the defense that the plaintiff's claim is time-barred." *Goodman v. PraxAir, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007). A court may grant a limitations defense raised in

such a motion only in the "relatively rare" circumstance in which "all facts necessary" to the defense "'clearly appear[] *on the face of the complaint*.'" *Id.* This Court has reversed a Rule 12(b)(6) dismissal on limitations grounds when "the face of the complaint d[id] *not* allege facts sufficiently clear to conclude that the statute of limitations had run." *Id.* at 466 (emphasis added).

The district court failed to acknowledge these principles. Indeed, it stood them on their head. While this Court has made clear that a complaint must not be dismissed as time-barred under Rule 12(b)(6) except in the "relatively rare" case in which the complaint "clearly" establishes the defense, the district court's position was that dismissal on this basis is inappropriate only in "some cases" and that it is *not* inappropriate as long as the complaint "indicate[s]" that the claim is time-barred, JA697, 707. The district court thus effectively transformed a narrow exception into something akin to a broad rule.

3. The allegations in CSXT's complaint do not clearly establish that its RICO claims are time-barred under the separate-accrual rule

a. In dismissing the RICO claims as time-barred, the district court relied on the fact that a mediation order in the asbestos litigation had given CSXT "access to the original x-rays[] [and] medical records" in the nine cases at issue and on the supposed fact that the "medical records" included the ILO forms that "listed Dr. Harron's opinions regarding * * * the injury observed." JA698-99, 709.

The court reasoned that, because CSXT "had access to th[is] medical information * * * soon after the filing of each of the nine suits," CSXT "is charged with notice of its injuries on or substantially near the date those cases were filed." JA699.

This reasoning is seriously flawed. As CSXT alleged in its amended complaint, the nine claims at issue were those "in which Dr. Harron first determined a claimant's x-ray not to have markings consistent with asbestosis, but then later, based on a second x-ray, determined that the patient exhibited signs of asbestosis despite the objectively unchanged condition of the patient's lungs." JA153. The "medical information" to which CSXT had access "soon after the filing of each of the nine suits" could not have put CSXT on notice of those facts.

To begin with, nothing on the face of the complaint "clearly" establishes, *Goodman*, 494 F.3d at 464, or even "indicate[s]," JA697, that the "original x-rays" to which CSXT had access under the mediation order included the initial (negative) x-rays or that the "medical records" included the ILO forms reflecting Harron's readings of those x-rays. The district court appears to have assumed that they did, but a court's assumptions are not grounds for dismissing a complaint, much less on the basis of an affirmative defense.

As it turns out, moreover, the court's assumptions are incorrect. If the RICO case had been permitted to proceed past the pleading stage, the evidence would have shown that, as to claims for which there was more than one x-ray, the lawyer

defendants produced only the *positive* x-rays in discovery—*i.e.*, the x-rays that served as the basis for the claimants' suits—and generally turned over only the *positive* corresponding ILO forms in advance of settlement negotiations. The evidence would also have shown that, as to the nine claims at issue here, the earlier (negative) x-rays and corresponding ILO forms were not turned over to CSXT until November 14, 2006, in connection with *this* litigation. *See* JA769. The district court's erroneous assumptions to the contrary are a sufficient basis for reversing the dismissal of the RICO claims.[2]

b. It is possible that the district court did not assume that CSXT had access to both sets of x-rays and ILO forms and that the court deemed access to the *positive* x-ray and ILO form alone sufficient to establish a time bar. But the court provided no explanation of *why* such access would trigger the limitations period, much less why it would do so as a matter of law. In fact, CSXT could *not* have been placed on notice of fraud by the mere receipt of positive x-rays and ILO forms, particularly given the nature of mass asbestos litigation in West Virginia. Three features of that litigation bear emphasis here.

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[2] CSXT requested oral argument on the motion to dismiss, which would have afforded the district court an opportunity to verify its assumptions, but the court denied CSXT's request. JA704.

First, CSXT was simply overwhelmed with claims. The seven mass lawsuits identified in the amended complaint asserted separate claims on behalf of more than 3,800 individual plaintiffs. JA250-676. The sheer number precluded an extensive investigation as to each claimant. Indeed, CSXT's complaint alleges that it was a part of the defendants' fraudulent scheme to "inundate CSXT * * * with thousands of asbestosis cases without regard to their merit." JA142.

Second, the mass lawsuits were litigated before the West Virginia Mass Litigation Panel, which employed exceptional pre-trial procedures necessitated by a volume of filings that "threaten[ed] to cripple the common law system of adjudication." *State v. MacQueen*, 479 S.E.2d 300, 303 (W. Va. 1996). These procedures, which included drastic limitations on the scope of discovery and mandatory participation in settlement negotiations, settlement conferences, and mediation sessions, JA678-84, made it even more difficult to investigate each individual claim.

Third, the push for quick resolution of claims, the omnipresent threat of mass trials, and the costs of litigation all placed pressure on CSXT to accept most settlement offers. Indeed, given the relatively small value of an individual claim, the rational course was usually to accept the settlement offers even without an extensive examination of each claim. *See, e.g.*, S. Carroll *et al.*, *The Abuse of Medical Diagnostic Practices in Mass Litigation: The Case of Silica* 26 (RAND

Inst. for Civil Justice 2009), *available at* http://www.rand.org/pubs/technical_reports/2009/RAND_TR774.pdf. Five of the six claimants at issue here who settled their claims, for example, did so for $12,500 or less; the other settled for $25,000. JA156-59.

For these reasons, the allegations in the complaint are consistent with the conclusion that CSXT was on notice of the fraud no earlier than when it learned of the *Silica* decision discrediting the Peirce firm's B reader. *See* JA153. That decision was "a critical turning point" in mass tort litigation, allowing "for the first time" a look "behind the curtain of secrecy" in which the screening process had been shrouded. D. Maron & W. Jones, *Taming an Elephant: A Closer Look at Mass Tort Screening and the Impact of Mississippi Tort Reforms*, 26 MISS. C.L. REV. 253, 261 (2007). The *Silica* decision was not issued until June 30, 2005—barely two years before CSXT filed its RICO claims and therefore well within the limitations period. No other allegations in the complaint suggest that CSXT had actual or constructive knowledge of the fraud any earlier, and there is thus no basis for concluding that "all facts necessary" to the statute-of-limitations defense

"clearly appear[] *on the face of the complaint*." *Goodman*, 494 F.3d at 464 (internal quotation marks omitted).[3]

c. Even if the complaint did establish, on its face, that the discovery to which CSXT had access should have alerted it that the claims at issue were fraudulently filed, dismissal of the RICO counts still would be improper. The district court sustained the statute-of-limitations defense because, of the nine fraudulently filed claims, only Baylor's was brought less than four years before CSXT's amended complaint. JA700-01. But the two claims closest in time to Baylor's—those of James Petersen and Donald Wiley—were filed on May 19, 2003, only four years *and 47 days* before the amended complaint. JA157, 402.

It is completely unrealistic to believe, and nothing in the complaint comes close to establishing, that a defendant would be able to seek, obtain, and review discovery within 47 days of the commencement of the action—especially in a case, like that one, in which there were more than 1,400 plaintiffs. JA402-592. Indeed, because the case that included those claims was not referred to the Mass Litigation

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[3] Because the complaint does not establish that CSXT knew or should have known that *any* of the nine asbestos claims—including the first—was fraudulently filed more than four years before the RICO counts were filed, the dismissal of the RICO counts must be reversed regardless of whether a separate-accrual rule is applied.

Panel until July 25, 2003, *less* than four years before the amended complaint, JA90-91, no discovery in the case could have occurred *more* than four years before. Even assuming that the availability of discovery triggered the limitations period, therefore, CSXT could not have known that the Peterson and Wiley claims were fraudulently filed more than four years before CSXT filed its RICO claims.

When CSXT made this point in its motion for reconsideration, the district court was compelled to alter its rationale. In the order denying reconsideration, the court said that "the date when CSX[T] received access to these claimants' medical information is not dispositive of the statue of limitations issue" and that, "[i]nstead, the critical issue is that CSX[T] was put on inquiry notice of the claims * * * when th[e] lawsuit w[as] filed." JA782. But the district court did not explain how the mere filing of a lawsuit can trigger the limitations period, as a matter of law, for a claim that the filing of the suit was *fraudulent*. In fact, it cannot.

Being sued does not ordinarily constitute an injury. Even a lawsuit that is ultimately found to lack merit is not by itself sufficient to put the defendant on notice that the suit lacked a good-faith basis, particularly because a plaintiff's good faith is presumed. Something more is required, and nothing more appears on the face of the amended complaint. At the very least, therefore, the defendants cannot show that CSXT should have known that the last three asbestos claims were

fraudulently filed more than four years before it sued, and thus the RICO claims are not time-barred.[4]

B. CSXT's Common-Law Claims Are Not Time-Barred

Although the limitations period for the common-law claims is two years rather than four, W. Va. Code § 55-2-12, a similar injury-discovery rule applies, *Stemple v. Dobson*, 400 S.E.2d 561, 564 (W. Va. 1990). The common-law claims therefore cannot be dismissed unless CSXT's pleading conclusively establishes that it knew or should have known that the asbestos claims were fraudulently filed

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[4] Indeed, the RICO claims are timely as long as any *one* predicate act is within the limitations period. In its dismissal orders, the district court took the position that at least two predicates must fall within the limitations period, JA699-700, 710, but nothing in the logic of the separate-accrual rule supports that view. The point of the rule is that a new cause of action accrues with each new *injury*, even when the pattern—and thus the RICO violation as a whole—straddles the limitations cut-off. As the Supreme Court has put it, the rule provides that "the commission of *a* separate, new predicate act within a 4-year limitations period permits a plaintiff to recover for the additional damages caused by *that act*." *Klehr*, 521 U.S. at 190 (emphasis added). Nor does the district court's position find any support in the statutory language. A "pattern of racketeering activity" requires "at least two acts of racketeering activity, * * * the last of which occurred within ten years * * * after the commission of a prior act." 18 U.S.C. § 1961(5). Once a timely predicate has been alleged, the pattern element thus requires only that there be at least one other predicate within the preceding ten years; it does not require, as the district court effectively did, another predicate within the preceding *four* years.

more than two years before it filed suit. The amended complaint does not establish any such actual or constructive knowledge.

The district court determined that the "statute of limitations analysis" it applied to CSXT's RICO claims "similarly applies" to the common-law claims. JA700, 710. As we have explained, that analysis depended upon mistaken assumptions about the materials to which CSXT had access and disregarded features of mass asbestos litigation that severely limited CSXT's ability to discover the fraud. For the same reasons that the RICO claims are not time-barred, therefore, the district court erred in ruling that the common-law claims arising from the same conduct are untimely.

Nor does anything else in the complaint establish a time bar. The complaint does refer to the *Silica* decision that exposed Harron's misconduct, JA153, but that decision was issued only two years *and five days* before the common-law claims were filed. The question whether a person exercising reasonable diligence would have learned of the decision's findings within five days of its issuance—especially when three of those days fell over the July Fourth weekend—is a question of fact for the jury, not a question of law for the court, much less one to be decided on the basis of the complaint.

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING LEAVE TO AMEND

The district court also abused its discretion, to the severe prejudice of CSXT, by denying leave to amend. Fed. R. Civ. P. 15(a) commands that leave to amend "shall be freely given when justice so requires." Recognizing that it would be "entirely contrary to the spirit of the [rules] for decisions on the merits to be avoided on the basis of * * * mere technicalities," the Supreme Court has emphasized that Rule 15(a)'s "mandate is to be heeded." *Foman v. Davis*, 371 U.S. 178, 181-82 (1962). This Court has thus made clear that leave to amend "should be denied only when the amendment would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would have been futile." *Sciolino v. City of Newport News*, 480 F.3d 642, 651 (4th Cir. 2007) (internal quotation marks omitted). None of these grounds for precluding amendment were present here.

A. Amendment Would Not Be Futile

The proposed second amended complaint identified seven additional asbestos claims as the basis for both RICO predicates and common-law claims. *See* JA734-45. One of the claims was filed in the same lawsuit as the Baylor claim (as to which the district court found no time bar); three were filed *after* the Baylor claim (and thus necessarily raise no time bar); and three were filed in the same lawsuit as the Peterson and Wiley claims (as to which discovery commenced less

than four years before CSXT filed its RICO claims). The district court determined that these additional allegations of fraud would be futile, but that conclusion depended on the court's rejection of a separate-accrual rule. *See* JA791-93. Because RICO does incorporate a separate-accrual rule, these fraudulently filed claims constitute additional injuries for which CSXT may recover. Even if the RICO claims are time-barred, moreover, these instances of fraud give rise to additional common-law claims.

The proposed second amended complaint also included additional detail concerning the restrictions on CSXT's ability to obtain discovery in the underlying suits. *See, e.g.*, JA732-33, 766-75. These allegations would not be futile either. To the contrary, they raise a clear issue of fact as to when it was reasonable for CSXT to have discovered the fraud, and thus they would ensure that the second amended complaint could not be dismissed at the pleading stage.

B. There Was No Bad Faith Or Dilatory Motive

Although the district court concluded that CSXT was dilatory in not including the new allegations in its first amended complaint, JA794, "delay alone[,] without any specifically resulting prejudice, or any obvious design by dilatoriness to harass the opponent, should not suffice as reason for denial." *Pittston Co. v. United States*, 199 F.3d 694, 706 (4th Cir. 1999) (internal quotation marks omitted). That CSXT was entitled to include these allegations in the first

amended complaint, therefore, cannot alone justify denial of leave to amend. Indeed, CSXT had a good-faith basis for not including them earlier: it did not receive the claimants' initial x-rays until November 14, 2006, JA769, and thus was unable to process and evaluate the hundreds of x-rays until after the district court's deadline for the amended complaint had passed. Even if CSXT could have moved for leave to amend earlier, moreover, it was not obliged to do so. Amendment became necessary only after the district court unexpectedly found that a time bar was established on the face of the complaint, and "diligence in filing [a] motion to amend after the district court entered * * * judgment dispels any inference of bad faith." *Laber v. Harvey*, 438 F.3d 404, 428 (4th Cir. 2006) (en banc).

C. Amendment Would Not Be Prejudicial

The district court believed that granting leave to amend would prejudice the defendants, JA795, but this Court has never found that amendment would cause unfair prejudice unless it would require the district court to reopen discovery or the defendant to make a fundamental change in litigation strategy. *See, e.g., Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 43 F.3d 922, 940-41 (4th Cir. 1995); *Sandcrest Outpatient Servs., P.A. v. Cumberland County Hosp. Sys., Inc.*, 853 F.2d 1139, 1148-49 (4th Cir. 1988). Neither factor is present here.

Shortly after the first amended complaint was filed, the district court ordered that discovery "be STAYED pending resolution of any and all motions to dismiss."

JA686. When the court entered its orders of dismissal, therefore, no discovery had occurred on the RICO or common-law claims. Because CSXT filed its motion for leave to amend only a few weeks later, several months before discovery commenced on the Baylor claims, allowing CSXT to amend would not have reopened or extended discovery in a manner that unfairly prejudiced the defendants.

Nor would amendment require the defendants to change their litigation strategy or otherwise subject them to unfair surprise. To the contrary, because CSXT's first amended complaint alleged that the Peirce firm had concealed certain fraudulently filed claims within its mass lawsuits, the defendants were on notice that CSXT might uncover additional such claims and that they could become an issue in the litigation. The defendants were thus "from the outset made fully aware of the events giving rise to the action," and amendment accordingly "could not in any way prejudice the preparation of [the] defendant[s'] case." *Laber*, 438 F.3d at 427 (internal quotation marks omitted).

If there was any prejudice in connection with amendment, it was to CSXT in *denying* leave to amend. One reason that courts have found it permissible to raise a limitations defense in a Rule 12(b)(6) motion, on the basis of the "bare allegations in the pleading," is that "the plaintiff is not seriously prejudiced by having the complaint dismissed at a relatively early stage," inasmuch as the

plaintiff "generally will be permitted to amend the pleading if the defect can be cured." 5B Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1357, at 714 (3d ed. 2004). Granting leave to amend is thus particularly warranted, and denying it particularly unfair, when a court dismisses on the ground that the plaintiff has failed to allege sufficient facts to rebut anticipatorily an as-yet-unasserted affirmative defense.

III. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE DEFENDANTS ON THE BAYLOR CLAIMS

After dismissing CSXT's RICO claims and most of its common-law claims as time-barred, the district court granted summary judgment to the defendants, on the merits, on the sole remaining common-law fraud and conspiracy claims: those relating to Earl Baylor. That ruling was erroneous too. There is more than sufficient evidence for the Baylor claims to go to a jury, and the grounds on which the court relied in concluding otherwise are baseless.[5]

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[5] The defendants in whose favor the district court entered summary judgment on the Baylor claims were Peirce (fraud and conspiracy), Raimond (conspiracy), and Harron (conspiracy). CSXT had voluntarily dismissed its common-law fraud claim against Raimond and its common-law fraud and conspiracy claims against Coulter after the other eight sets of common-law claims were dismissed, *see* Doc. No. 537, at 2 n.2, and Harron was not named as a defendant in the common-law fraud count.

A. There Is Sufficient Evidence For The Claims To Be Decided By A Jury

By filing suit in a West Virginia court, an attorney certifies his belief, formed "after an inquiry reasonable under the circumstances," that the complaint is not being filed "for any improper purpose" and that "the allegations and other factual contentions" in the complaint "have evidentiary support." W. Va. R. Civ. P. 11(b). The filing of a suit thus constitutes a representation that the attorney "has conducted a reasonable inquiry into the facts and the law," "is satisfied that the [suit] is well grounded in both," and "is acting without any improper motive." *Hinchman v. Gillette*, 618 S.E.2d 387, 401 (W. Va. 2005) (Davis, J., concurring) (internal quotation marks omitted). As the lawyer defendants have acknowledged, in the context of asbestos litigation, that certification means, among other things, that the attorney has a good-faith belief that the claimant had (1) a positive x-ray reading consistent with asbestosis, (2) occupational exposure to asbestos while working for the defendant company, and (3) a sufficient latency period between the alleged exposure and the onset of asbestosis. JA1158; Doc. No. 585, at 8-9.

As far as the Baylor claims are concerned, there is abundant evidence that this representation by the lawyer defendants was fraudulent in at least three critical respects. *First*, the positive x-ray reading resulted from an unreliable screening mechanism designed by the lawyer defendants to generate false positives. *Second*, the lawyer defendants failed to conduct a reasonable inquiry before filing suit, and

thus failed to uncover medical records *in their own files* that effectively ruled out asbestosis. *Third*, the only evidence that Baylor had been exposed to asbestos while working for CSXT was a questionnaire that Baylor himself confirmed was fabricated. When viewed in a light most favorable to CSXT and with all reasonable inferences drawn in its favor, as it must be, *George & Co. LLC v. Imagination Ent. Ltd.*, 575 F.3d 383, 392 (4th Cir. 2009), this evidence is easily sufficient for a rational jury to find fraud.

1. The lawyer defendants manufactured unreliable medical evidence

a. To obtain the x-rays that served as the basis for the asbestos claims it filed against CSXT, including Baylor's, the lawyer defendants used an unlicensed x-ray technician, James Corbitt, who had previously been convicted of fraud, JA194-98. Corbitt conducted mass screenings in hotel parking lots, in a mobile x-ray unit mounted on a truck, JA106, and consistently produced underexposed and underinflated films that facilitated false positive readings, JA913. Underexposure "makes all white shadows on a radiograph look whiter" and thus "tends to make small opacities of the type seen in asbestosis look more dense and widespread than they would on a properly exposed radiograph." JA913-14, 1139-40. Underinflation "has a similar effect," because "the reduced amount of air in the lungs makes the lung tissue appear more dense and whiter than on properly exposed radiographs." JA914, 1140-41. When Corbitt was fined $10,000 by the

State of Texas in 2001 for conducting illegal screenings, the Peirce firm paid half the fine "so [it] could use him for the screenings." JA128.

b. To obtain a positive reading of these x-rays, including Baylor's, the lawyer defendants turned to Ray Harron, a physician who "worked exclusively for plaintiffs' lawyers," having retired from clinical practice in 1995. *Silica*, 398 F. Supp. 2d at 603-04. With respect to all the claimants at issue here, Harron never conducted a physical examination, never took a medical history, and never even met the patients he claimed were ill. Instead, he received packages containing hundreds of chest x-rays produced at mass screenings, and he based each opinion on a single x-ray. JA880-83. Harron never attempted to confirm his observations with more powerful and reliable imaging tools, such as high-resolution CT scans., nor did he conduct any follow-up examinations.

According to the defendants, Harron reported finding evidence of asbestosis in approximately 65% of the x-rays the Peirce firm sent him. JA984. A separate analysis concluded that he had actually reported evidence of asbestosis in more than 90% of the x-rays he read. JA906-07. The latter figure is closer to Judge Jack's finding that Harron's positive asbestosis rates were as high as 99.11%. 398 F. Supp. 2d at 607-08. By contrast, reliable and well-known studies have consistently measured the prevalence of asbestosis among railroad workers as no higher than one to two percent. JA1003-28. As Judge Jack observed in her *Silica*

decision, such a gross disparity "can only be explained as a product of bias—that is, of Dr. Harron finding evidence of the disease he was currently being paid to find." 398 F. Supp. 2d at 638.

The lawyer defendants deliberately ignored these clear indications of fraud. Indeed, although they initially hired several doctors to read the thousands of x-rays produced at their mass screenings, the lawyer defendants decided to use Harron exclusively after determining that he reported evidence of asbestosis at a dramatically higher rate than any other doctor. JA963-64, 970-71. Thus, rather than steering clear of a doctor with an impossibly high rate of positive reads, the lawyer defendants *increased* their use of Harron's unreliable findings because they stood to profit from the false asbestos claims that resulted. And they continued to do so until Harron was exposed as a "willing participant[]" in a "scheme" in which diagnoses were "manufactured for money." *Silica*, 398 F. Supp. 2d at 635.

Harron read three different x-rays of Baylor's chest. The first he read as negative, JA230; the second he could not read, because of its poor quality, JA64; and the third he read as positive, JA231—despite the fact that the third x-ray reflected no change in the condition of Baylor's lungs since the first (negative) x-ray was taken.

c. After Harron was discredited, the lawyer defendants had to find a new doctor to read the firm's x-rays. In light of the extraordinary findings of gross

misconduct by their initial B reader, one might have thought that they would go to great lengths to select an independent expert who was beyond reproach. But far from being chastened by the *Silica* decision, the lawyer defendants decided to retain someone who could be counted on to ratify Harron's readings. As their primary B reader, the lawyer defendants ultimately settled on Donald Breyer, who, like Harron, was a full-time litigation doctor. JA1170-71. The firm promised to pay Breyer "whatever you want." JA1174.

The lawyer defendants also provided Breyer with copies of Harron's earlier reports, which Breyer reviewed in conjunction with his own B-reads. JA1177, 1180-82, 1186-87. This was a violation of established diagnostic protocols and obviously interfered, as it was intended to, with Breyer's ability to provide an independent evaluation. JA890, 1080, 1121. Even Harron agreed that Breyer should not have been given the prior reports. JA890.

It is hardly surprising, therefore, that Breyer ratified Harron's findings more than 90% of the time, including when Breyer read Baylor's x-ray. JA1183-84, 1219. For x-rays that had *not* previously been read, Breyer reported evidence of asbestosis more than 70% of the time. JA1184-85, 1220. That astonishing rate is similar to Harron's, and at least 14 times the prevalence reported in the medical literature.

Breyer's interpretation of Baylor's x-ray, moreover, was implausible on its face. Breyer claimed that the x-ray was a "Quality 1" film—the highest quality rating—and thereby made his positive reading more valuable to the Peirce firm. JA97. Even Harron admitted that the x-ray in fact was at best a "Quality 3" film—the lowest readable rating. JA886-89.

2. The lawyer defendants did not conduct a reasonable investigation

Not only was the Baylor claim based on patently unreliable medical evidence, but even the most cursory investigation would have uncovered reliable medical evidence that disproved it. Yet the lawyer defendants failed to conduct *any* investigation.

The x-ray of Baylor that Harron and Breyer determined had markings consistent with asbestosis was taken in June 2003. JA231. Five months later, Baylor underwent a high-resolution CT scan, not by a lawyer-retained litigation doctor, but by a specialist at the request of his family physician. JA878. Because CT scans are diagnostically superior to x-rays, a negative chest CT rules out asbestosis. JA1106; Oikonomou & Muller, *supra*. The results of Baylor's CT scan were decisive:

> FINDINGS: The lungs are clear bilaterally. There is no evidence to suggest interstitial lung disease. * * * There is no obvious pleural calcification seen to suggest prior asbestos exposure. * * *
>
> IMPRESSION: Unremarkable CT of the chest[.]

JA878.

Peirce has acknowledged that this negative CT scan is "a significant piece of evidence," JA947-48, and Robert Daley of the Peirce firm has conceded that it should have been considered before an asbestos claim was filed, JA1161-63. Peirce has also conceded that the firm received a copy of the CT scan from either Baylor or his physician, JA949, and that it had the copy in its computer files before the Baylor claim was filed, JA870-74, 942, 1161. Although the lawyer defendants have maintained that they do not recall seeing the CT scan and that they were unaware of its findings, Doc. No. 585, at 9-10, they had an obligation to conduct "an inquiry reasonable under the circumstances" before bringing suit, W. Va. R. Civ. P. 11(b), and by filing the Baylor claim they represented that they had done so. Peirce has acknowledged that he was the lawyer responsible for ensuring compliance with this obligation in Baylor's case, JA945, yet he has admitted that neither he nor anyone else reviewed the firm's own files prior to filing a complaint, JA943, and that no one did so before filing the Baylor claim, JA942.

Nor did the lawyer defendants take any steps to obtain Baylor's other medical records. Daley conceded that the records could have been obtained with Baylor's release, JA1164-65, but it was the firm's standing practice not to request a client's personal medical records, JA937-38, 940, 1153-55.

In short, without reviewing their own files or requesting a copy of their client's own medical history, the lawyer defendants went ahead and sued CSXT, relying solely on B reads generated through a process designed to generate false positives. That constitutes more than sufficient evidence from which a jury could find fraud.

3. The lawyer defendants fabricated the exposure history

As the lawyer defendants have acknowledged, an asbestos claim requires, not only a positive ILO reading consistent with asbestosis, but occupational exposure to asbestos while the claimant was working for the defendant company. As far as the Baylor claim is concerned, there is evidence that the lawyer defendants manufactured both.

Like the Peirce firm's other clients, Baylor completed an "Asbestos Questionnaire" that requested information about, among other things, "Claimed Exposures." That section of Baylor's questionnaire includes the handwritten words "Asbestos rope, cement, Asbestos valve packing." JA93. No other claimed exposures are indicated. And the handwriting is starkly different from that in the remainder of the form.

When asked about those words at his deposition, Baylor repeatedly and unequivocally stated that "[t]hat's not my writing." JA1199; *see also* JA1203-06. He also testified that these additions to the form do not appear to be in his wife's

handwriting or that of anyone else he can identify; that no one assisted him in completing this or any other form; and that he never had any conversations with anyone at the Peirce firm about the questionnaire in general or asbestos exposure in particular. JA1199, 1203-06. Baylor testified, moreover, that he never worked with any rope or cement products during his time at CSXT, and thus the information that was added to the form not only did not come from Baylor but was false. JA1200, 1210.

The alteration of the questionnaire, together with Baylor's testimony that he never spoke with anyone at the Peirce firm about his exposure history, is highly probative evidence that there was no basis for the lawyer defendants' representation, when they filed the claim, that Baylor had been exposed to asbestos while working at CSXT. Indeed, it is evidence that the lawyer defendants fabricated the exposure history. Both alone and in combination with the evidence described above, this evidence would permit a jury finding of fraud and thus precludes summary judgment.

B. The Grounds On Which The District Court Relied Are Erroneous

Ignoring much of the evidence described above, the district court ruled that, as a matter of law, CSXT could not prove two elements of common-law fraud: reliance and fraudulent intent. Both rulings are wrong.

1. CSXT can prove reliance

The district court reasoned that (a) CSXT "could not have relied" on the "fraudulent scheme" alleged in the complaint because (b) that scheme entailed fraudulent B reads by Harron and (c) the Baylor claim was not filed until a different reader—Breyer—determined that Baylor's x-ray was positive. This reasoning is flawed at every step.

First, a plaintiff does not have to prove its reliance on a "fraudulent scheme." As the district court elsewhere recognized, the required element is that the plaintiff "relied upon the *misrepresentation*." JA2091 (quoting *Martin v. ERA Goodfellow Agency, Inc.*, 423 S.E.2d 379, 381 (W. Va. 1992)) (emphasis added). Here, the misrepresentation was the lawyer defendants' certification that they had a good-faith basis for the Baylor claim. There can be no question that, as the defendant in the Baylor asbestos case, CSXT relied on that misrepresentation by treating the claim like every other one in the mass asbestos docket.

Second, the fraudulent scheme alleged by CSXT in any event does not *merely* entail fraudulent B reads by Harron. The complaint alleges that the lawyer defendants "purposefully hired unreliable doctors *such as* Dr. Ray Harron" and that they "*most commonly* used Dr. Harron." JA148, 152 (emphases added). CSXT could not have specifically named Breyer in the amended complaint, because his involvement was not divulged until after discovery had commenced on

the Baylor claims. Doc. No. 537, at 18-19 & n.6. We are unaware of any authority, and the district court cited none, requiring that a plaintiff seek to amend its complaint each time it learns of a new participant in the fraudulent scheme.

Third, insofar as the district court can be understood to have held that the lawyer defendants did have a good-faith basis for the Baylor claim because *they* relied on Breyer's B read rather than Harron's, the court was still mistaken. For one thing, the lawyer defendants *did* rely on Harron's B read. They hired Breyer, not because they believed that he would provide an "independent" opinion, but because they expected—justifiably, as it turned out—that he would rubber-stamp Harron's readings, and they even provided him with Harron's reports to facilitate the process. For another, Breyer himself was no more reliable than Harron. Like Harron, Breyer was a full-time litigation doctor who, even when he was not rubber-stamping Harron's B reads, found evidence of asbestosis at a rate at least 14 times the rate reflected in the medical literature. In any case, the district court's surmise raises at most a factual dispute and provides no justification for granting summary judgment.

2. CSXT can prove fraudulent intent

a. The district court concluded that CSXT could not prove that the lawyer defendants "acted with actual intent to defraud" because there is no

evidence that they "knew that Mr. Baylor did not have asbestosis." JA2092. The court's premise is fundamentally mistaken, and thus so too is its conclusion.

CSXT's theory of fraud is not that the lawyer defendants represented that Baylor had asbestosis when in fact they knew that he did not. Its theory, as the complaint specifically alleges, is that "the lawyer defendants represented to CSXT that there existed some good faith basis in fact for the claim[] when, in reality, they knew no such basis existed." JA164. And there is abundant evidence that the defendants knew that the Baylor claim lacked a good-faith basis.

In fact, the very same evidence that proves the lack of a good-faith basis—the manufacture of a positive ILO reading, the failure to conduct a reasonable investigation, and the fabrication of the exposure history—proves that the defendants *knew* that they had no good-faith basis for the claim. It also proves an intent to defraud (assuming that there must be such an intent apart from the defendants' actual or constructive knowledge of falsity). A reasonable jury could therefore find that the lawyer defendants knowingly and intentionally filed the Baylor claim without any good-faith basis. Indeed, the defendants can plead ignorance with respect to any particular instance of fraud, including the Baylor fraud, only because of their deliberate use of an unreliable screening process, which produced false positives at a staggeringly high rate, and their failure to conduct an adequate investigation before filing each claim.

b. The evidence on which the district court relied (JA2092-93) does not preclude a jury finding that the lawyer defendants lacked a good-faith basis for the Baylor claim. *First*, as to Breyer's "opin[ion] that Mr. Baylor's x-ray exhibited signs of asbestosis" (JA2092), a jury could find that Breyer merely rubber-stamped Harron's B read; that he was as unreliable as Harron; and thus that Breyer's involvement proves, not a good-faith basis for the claim, but a lack of it.

Second, although the radiologist who read Baylor's CT scan, Dr. Christopher Knox, admitted in his deposition that, *as a general matter*, asbestos exposure "could be" one of the "thousands of causes" of scarring, JA996, *with respect to Baylor in particular* he testified unequivocally that he "didn't see any evidence of [asbestosis] on the images [he] looked at" and that the "small amount" of scarring "wouldn't affect [that] finding." JA996, 997. CSXT's expert Dr. Kevin Cooper went even further, testifying that "there is not enough information on [the CT] to *reasonably* reach an opinion that this represents asbestosis." JA1144 (emphasis added). In any event, whatever the lawyer defendants might say about the CT scan *now*, they did not even consider it before filing the Baylor claim, even though it was sitting in their files.

Third, Dr. Cooper also testified that, if his partner, Dr. Henry, had read Baylor's x-ray as positive, Dr. Cooper "would [not] think that would be inappropriate." JA1122. But testimony that Dr. Cooper would not have second-

guessed his trusted colleague in the hypothetical event that Dr. Henry had read Baylor's x-ray as positive hardly establishes that the defendant lawyers had a good-faith basis for filing a manufactured and inadequately investigated claim.

c. Even if the misrepresentation here were not that there was a good-faith basis for the claim but that Baylor had asbestosis, it still would not be necessary for CSXT to prove that the lawyer defendants "knew that Mr. Baylor did *not* have asbestosis." JA2092 (emphasis added). Contrary to the district court's mistaken assumption, "[i]t is not essential that the defendant *know for a fact* that the statement or act alleged to be fraudulent is false." *Poling v. Pre-Paid Legal Servs., Inc.*, 575 S.E.2d 199, 208 (W. Va. 2002) (internal quotation marks omitted; emphasis added). Instead, "[a]n action for fraud may lie" when the defendant "[1] knows the statement to be false, [2] makes the statement without knowledge as to its truth or falsity, *or* [3] makes it under circumstances such that he should have known of its falsity." *Id.* (internal quotation marks omitted; emphasis added). Even if the evidence did not support a finding that the defendants "knew" that Baylor did not have asbestosis—and we believe that it does, particularly when viewed in the light most favorable to CSXT, with all inferences drawn in its favor, as the procedural posture requires—the evidence would clearly support a finding that the defendants made the representation that Baylor had asbestosis "without

knowledge as to [its] truth or falsity" or "under circumstances such that [they] should have known of its falsity." *Id.*

IV. THE DISTRICT COURT ABUSED ITS DISCRETION BY EXCLUDING HIGHLY PROBATIVE EVIDENCE DURING THE MAY-JAYNE TRIAL

The May-Jayne claims concern a fraud in which Danny Jayne impersonated Ricky May during a mass screening, so that May could use an x-ray of Jayne's lungs as the basis for filing claims against CSXT and other asbestos defendants. No one disputes that Jayne fraudulently obtained the x-ray for May, and no one disputes that May used it to file the claims. JA1323-24, 2055. The issue at trial was whether Gilkison participated in the fraud and, if so, whether the Peirce firm was liable for its employee's conduct.

The theme of the defense was that the x-ray swap "was a fraud perpetrated on the Peirce Firm[] as well as on CSX[T]." JA1396. Consistent with that theme, Peirce testified that he immediately dissociated himself and his firm from May when Peirce learned that the x-ray was fraudulent. The district court nevertheless prohibited CSXT from offering evidence that Peirce did *not* in fact dissociate himself from May. That ruling was an abuse of discretion, necessitating a new trial.

A. Peirce Repeatedly Testified That He Dissociated Himself And His Firm From May When Peirce Learned That May's X-Ray Was Fraudulent

Gilkison's job at the Peirce firm was to recruit clients and supervise the firm's mass screenings; he arranged and attended the June 2000 screening at which the swapped x-ray was produced. JA1632-33, 1721-24, 1739, 1800. May—the principal beneficiary of the swap—was a union leader and Peirce firm "VIP" who had helped recruit plaintiffs to the mass screenings. JA1533. When May's claim was filed against CSXT, Peirce personally handled the settlement negotiations, waived the customary fees, and paid the costs himself. JA1536, 1540-42.

May testified that the fraud was Gilkison's idea from the start. JA1622, 1625. Jayne corroborated May, testifying that May had attributed the idea to Gilkison when May first asked Jayne to participate in the scheme and that Jayne's concern about getting caught was allayed by Gilkison's presence at the screening. JA1720, 1726-27. Gilkison admitted that May had told him beforehand that Jayne would sit for his x-ray, and that May told him afterward that Jayne had in fact done so. JA1798-801, 1803. Gilkison insisted, however, that he had never believed May. JA1808-09.

Peirce testified as well. He claimed that he had no personal knowledge that May's x-ray was fraudulent and that Gilkison "said he had no knowledge" either, "gave me the impression that he did not know about the scheme," and "said he did

not know anything about it and he sounded surprised to hear about it." JA1536, 1545-46, 1548. Peirce testified that he thought that Gilkison "was being truthful" and that Gilkison "genuinely did not believe that Ricky May did it." JA1547. Peirce also claimed that, when Peirce learned of the fraud in mid-2004, he "wanted nothing to do with [May]," "wanted [no] part[] [of] him," and "wanted to get rid of the guy," and that he instructed his staff and associates to "[s]tay away from him" and "[not] go near the guy." JA1542, 1544-45, 1547.

B. The District Court Abused Its Discretion By Excluding Evidence Of The Peirce Firm's Continuing Representation Of May

Contrary to his testimony, Peirce did *not* dissociate himself from May in mid-2004, when Peirce claimed to have first learned of the x-ray swap. Instead, he continued to represent May on other claims, *based on the very same fraudulent x-ray*, against an asbestos manufacturer and an asbestos trust. Indeed, the Peirce firm continued to accept settlements on May's behalf from these defendants in the summer of 2004, and it did not repay the fees and costs it deducted from the settlements until 2009, when the trial in this case was imminent. JA2071-78.

The district court nevertheless prohibited CSXT from examining Peirce concerning the firms' continued representation of May or offering documentary proof of that representation. JA1321-33, 1558-61. After stating that it was "a difficult issue" and that "argument[s] can be made both ways," the court excluded

the evidence under Fed. R. Evid. 401 and 403. JA1560. The court's sole justification for the ruling was that the evidence "doesn't involve CSX[T]." *Id.*

This was a clear abuse of discretion. The evidence was admissible under Rule 401; it was not inadmissible under Rule 403; and its exclusion was highly prejudicial. A new trial is therefore required.

1. The evidence was admissible under Rule 401

Rule 402 provides that evidence relevant under Rule 401 is admissible, and Rule 401 "presents a low barrier to admissibility." *United States v. Williams*, 445 F.3d 724, 736 (4th Cir. 2006) (internal quotation marks omitted). Rule 401 defines "relevant evidence" as "evidence having *any* tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" (emphasis added). To be admissible, therefore, "evidence need only be worth consideration by the jury, or have a plus value." *Williams*, 445 F.3d at 736 (internal quotation marks omitted).

Under this broad definition, the evidence of Peirce's continuing relationship with May was manifestly relevant, in at least two respects. *First*, "evidence of credibility is relevant evidence." 22 Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5177, at 144 (1978). By directly contradicting Peirce's testimony that he wanted nothing more to do with May after learning of the fraudulent x-ray swap, the excluded evidence would have undermined Peirce's

credibility, not only by showing his testimony to be false but also by showing him to be someone who knowingly prosecuted fraudulent claims against asbestos defendants. If the jury were persuaded that Peirce was not credible, it might have disbelieved all his testimony, including that in which he vouched for Gilkison. *Second*, Peirce's credibility aside, that the Peirce firm continued to accept settlements on May's behalf even after the fraud was exposed made it more likely that the fraud was a calculated scheme by Gilkison and the Peirce firm to generate revenue for the firm and assist May, their "VIP" union contact, rather than a plan devised by May alone.

2. The evidence was not inadmissible under Rule 403

Rule 403 is "a rule of inclusion, generally favoring admissibility." *United States v. Udeozor*, 515 F.3d 260, 264-65 (4th Cir. 2008) (internal quotation marks omitted). Relevant evidence may be excluded under Rule 403 only "if its probative value is *substantially outweighed* by the danger of unfair prejudice" or certain other considerations. Fed. R. Evid. 403 (emphasis added). Courts should therefore strike the balance against admission "only sparingly." *United States v. Aramony*, 88 F.3d 1369, 1378 (4th Cir. 1996).

This is not one of the rare cases in which the balance favored exclusion, and the district court provided no justification for concluding otherwise. For the reasons we have explained, the probative value of the evidence that the Peirce firm

had a continuing relationship with May was high; indeed, it decisively refuted the defendants' "innocent victim" defense. Without elaboration, the district court nevertheless ruled the evidence inadmissible based on considerations of "consumption of time" and the dangers of "unfair prejudice" and "confusion to the jury." JA1560. But there is no reason to suppose that eliciting the testimony at issue from Peirce or offering the documentary evidence would have consumed more than an hour of trial time, even taking into account questioning by opposing counsel. As for the danger of unfair prejudice, Rule 403 authorizes the exclusion of evidence on that ground "only when there is a genuine risk that the emotions of the jury will be excited to irrational behavior," *Westfield Ins. Co. v. Harris*, 134 F.3d 608, 615 (4th Cir. 1998) (internal quotation marks omitted), a circumstance that clearly is not present here. And any risk of confusing the jury could have been obviated, as it commonly is, by a limiting instruction that explained the purposes for which the evidence could be considered. *See, e.g.*, *Zeus Enters. v. Alphin Aircraft, Inc.*, 190 F.3d 238, 243 (4th Cir. 1999).

3. The exclusion of the evidence was highly prejudicial

In its verdict, the jury found that Gilkison was not liable for fraud and therefore did not reach the question whether the Peirce firm was vicariously liable for his actions. JA2067. The verdict thus reflects a finding that Gilkison was not a knowing participant in the fraud. It also demonstrates that the exclusion of the

evidence of the Peirce firm's continuing representation of May was prejudicial, because the evidence could have led the jury to find that Gilkison *was* a knowing participant in the fraud. It could have led to that finding, *first*, because the evidence undermined Peirce's credibility and thus might have caused the jury to disbelieve his testimony that Gilkison claimed to be unaware of the fraud and that Peirce thought Gilkison was telling the truth, and *second*, because the Peirce firm's continued acceptance of settlements on May's behalf made it more likely that the fraud was a calculated scheme by Gilkison and the Peirce firm.

The evidence on whether Gilkison was a knowing participant in the fraud was fairly evenly balanced, and the case ultimately came down to whether the jury believed May and Jayne, on the one hand, or Gilkison and Peirce, on the other. "The credibility of the witnesses on each side in this case was [thus] crucial to the jury's verdict, and it cannot be said with certainty that the improperly [excluded evidence] did not tip the credibility balance in favor of the defendants." *Davidson v. Smith*, 9 F.3d 4, 7 (2d Cir. 1993). That is particularly true given that that there were only two days of testimony, so that no one piece of evidence—whether admitted or excluded—could be deemed unimportant. CSXT is therefore entitled to a new trial.

STATEMENT CONCERNING ORAL ARGUMENT

CSXT requests oral argument. This appeal raises important, complex, and recurring issues, including one that this Court has not previously considered. Oral argument will enable the parties to address those issues adequately and respond to the Court's questions and concerns.

CONCLUSION

The judgment of the district court should be reversed and the case remanded with instructions to (1) reinstate the RICO and common-law claims; (2) allow CSXT to amend its complaint; (3) permit the Baylor claims to proceed to trial; and (4) retry the May-Jayne claims.

Respectfully submitted,

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Dated: January 11, 2010

STATUTORY ADDENDUM

TITLE 18—CRIMES AND CRIMINAL PROCEDURE
CHAPTER 96—RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

§ 1961. Definitions

As used in this chapter— * * *

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity

* * *

§ 1962. Prohibited activities

* * *

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

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

§ 1964. Civil remedies

* * *

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or

sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

* * *

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-2135 **Caption:** CSXT Transportation, Inc. v. Robert Gilkison, et al.

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[*Appellant's Opening Brief, Appellee's Response Brief, and Appellant's Response/Reply Brief may not exceed 14,000 words or 1,300 lines; Appellee's Opening/Response Brief may not exceed 16,500 words or 1,500 lines; any Reply or Amicus Brief may not exceed 7,000 words or 650 lines; line count may be used only with monospaced type*]

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/s/ Evan M. Tager
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Dated: January 11, 2010

CERTIFICATE OF SERVICE

I hereby certify that, on the 11th day of January, 2010, a true and accurate copy of the foregoing Brief of Plaintiff-Appellant was filed with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users, and was served by overnight delivery on:

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