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.

REPLY 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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Statutes and Rules

Appellees' principal defense of the district court's dismissal of the RICO and all but one of the common-law claims is that a defendant on notice that a suit is *meritless* is *ipso facto* on notice that the suit has been *fraudulently filed*—even when the defendant has no access to evidence of bad faith. Appellees' principal defense of the district court's grant of summary judgment on the Baylor claim is that the mere possibility that an x-ray can be read as borderline positive *ipso facto* establishes that a lawsuit based on that x-ray has been filed in good faith—even when there is overwhelming independent evidence of a *lack* of good faith. Neither argument has any basis in law or logic. Nor do appellees offer any other persuasive defense of those rulings or of the others that are challenged on appeal.

ARGUMENT

I. THE DISTRICT COURT ERRED IN DISMISSING CSXT'S RICO CLAIMS AND COMMON-LAW CLAIMS

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

1. The claims are governed by a separate-accrual rule

Seven circuits have considered whether civil RICO claims are governed by a separate-accrual rule, and seven circuits have held that they are. *See* CB19-20.[*] Appellees do not dispute this. Instead, they contend that those holdings are mistaken and should not be followed. PB34-41. But "intercircuit conflicts are to

[*] We cite our opening brief as "CB__" (for "CSXT Brief") and appellees' brief as "PB__" (for "Peirce Brief").

be avoided if possible," *United States v. Scaife*, 749 F.2d 338, 344 (6th Cir. 1984), and this Court should not accept an invitation to place itself in conflict, alone, with seven other circuits unless the party extending the invitation makes an unusually strong case for the position that has been uniformly rejected. Appellees do not come close.

a. As an initial matter, appellees suggest that, by virtue of having adopted the "injury discovery" rule in *Pocahontas Supreme Coal Co. v. Bethlehem Steel Corp.*, 828 F.2d 211 (4th Cir. 1987), this Court has necessarily rejected the separate-accrual rule. PB34-35. The district court took the same position—that the separate-accrual rule is an alternative to, rather than a component of, the injury-discovery rule (JA791-94)—and our opening brief explains why that is wrong (CB19, 23-24). We respond here to two assertions that we have not previously addressed.

First, citing *Cherrey v. Diaz*, 1993 WL 118099 (4th Cir. Apr. 16, 1993) (per curiam), appellees argue that, "[d]espite having the opportunity to do so, this Court has not adopted a 'separate accrual' rule." PB34. But *Cherrey* determined merely that it was "unnecessary" to take a position on the separate-accrual rule, because the RICO suit would be untimely "[e]ven if we applied it." *Cherrey*, 1993 WL 118099, at *3 n.3.

Second, citing *Klehr v. A.O. Smith Corp.*, 521 U.S. 187 (1997), appellees argue that, "[i]n the same case where the Court classified the Fourth Circuit as applying the injury discovery rule, it also noted separately that 'some Circuits have adopted a "separate accrual" rule in civil RICO cases,' but never suggested that the two approaches were components of the same rule." PB35 (citing and quoting 521 U.S. at 185-86, 190). *Klehr* in fact supports *our* position. Toward the beginning of its opinion, the Supreme Court listed the three basic accrual rules that the circuits had until that time applied: "last predicate act"; "injury and pattern discovery"; and "injury discovery." 521 U.S. at 185-86. Had the "separate accrual" rule been an *alternative* to the "injury discovery" rule, as appellees claim, the Court would have listed it among the basic rules. Instead, the Court referred to it only later—and cited, as examples of cases applying the separate-accrual rule, a number of the same ones it had earlier cited as examples of cases applying the injury-discovery rule. *See id.* at 190. One such case was *Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir. 1996), which describes the separate-accrual rule as a "component[]" and a "part" of the injury-discovery rule.

b. In urging this Court to reject the separate-accrual rule, appellees begin with, and place primary reliance upon, what they claim are RICO's "underlying policies." PB35. But when interpreting a statute, courts do not begin with the statute's "policies"; they "begin with the language employed by Congress," *Gross*

v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2350 (2009) (internal quotation marks omitted), which is "the best evidence of Congressional intent," *McMellon v. United States*, 387 F.3d 329, 339 (4th Cir. 2004) (en banc). And no fewer than three circuits have concluded that the separate-accrual rule is compelled by RICO's "plain language." CB22. Those courts have reasoned that a single RICO violation may cause multiple injuries; that Congress tied the right to sue, not to the time of the RICO violation, but to the time when a plaintiff is "injured in his business or property by reason of a violation" (18 U.S.C. § 1964(c)); that a plaintiff is so injured whenever a new injury results from the same violation; and that a plaintiff's right to sue thus accrues at the time he discovered or should have discovered that injury. Appellees offer no response to this interpretation of RICO's text and suggest no interpretation of their own. Their decision, in a statutory case, to ignore both the text of the statute and courts' reading of the text is telling.

Appellees' arguments in any event fail on their own terms. The "policy rationales" on which appellees rely are those "underlying the Supreme Court's decision in *Rotella*." PB39. The accrual rule that *Rotella* rejected, however, did not—like the separate-accrual rule—turn solely on the discovery of *injury*, but rather turned on the discovery of "both an injury and a pattern of RICO activity."

Rotella v. Wood, 528 U.S. 549, 553 (2000). It was the "pattern" element to which the Court objected.

The Court reasoned that the rule was "unwarranted by the injury discovery rule's rationale," which is that "discovery of the injury, not discovery of the other elements of a claim, is what starts the clock." *Id.* at 555. The Court also rejected the injury-and-pattern rule because "[w]hatever disputes may arise about pinpointing the moment a plaintiff should have discovered an injury to himself would be dwarfed by the controversy inherent in divining when a plaintiff should have discovered a racketeering pattern." *Id.* at 559. Appellees quote (PB36) the Court's statement that the injury-and-pattern rule "would extend the potential limitations period for most civil RICO cases well beyond the time when a plaintiff's cause of action is complete," 528 U.S. 558, but they omit the immediately preceding language—that the rule would have that effect because it would "t[ie] the start of the limitations period to a plaintiff's reasonable discovery of a pattern rather than to the point of injury or its reasonable discovery," *id.*

Rotella thus makes clear that the problem with an injury-and-pattern discovery rule has nothing to do with *injury* discovery and everything to do with *pattern* discovery: the decision "reject[ed] pattern discovery as a basic rule." *Id.* at 560. RICO's separate-accrual rule is solely an injury-discovery rule, and thus is unaffected by *Rotella*. Any conceivable doubt on that score is resolved by the fact

that *Rotella* explicitly reserved judgment on the separate-accrual rule: "we need not and do not decide whether civil RICO allows for a cause of action when a second predicate act follows the injury, or what limitations accrual rule might apply in such a case." *Id.* at 558 n.4.

For these reasons, appellees' suggestion that *Rotella* undermined the consensus view on the separate-accrual rule (PB38-39) is baseless. Courts have continued to recognize and apply the rule post-*Rotella*, *see, e.g.*, *Takeuchi v. Sakhai*, 227 F. App'x 106, 107 n.1 (2d Cir. July 12, 2007); *Demes v. ABN Amro Servs. Co.*, 59 F. App'x 151, 153 (7th Cir. Feb. 20, 2003); *Warden v. Barnett*, 2001 WL 422590, at *1-*2 (5th Cir. Mar. 29, 2001), and at least two courts have explicitly concluded that *Rotella* did not abrogate it, *see Kuznyetsov v. W. Penn Allegheny Health Sys., Inc.*, 2010 WL 597475, at *3 (W.D. Pa. Feb. 16, 2010); *JSC Foreign Econ. Ass'n Technostroyexport v. Weiss*, 2007 WL 1159637, at *5 n.3 (S.D.N.Y. Apr. 18, 2007). Appellees place heavy reliance (PB39) on *DeShazo v. Nations Energy Co.*, 286 F. App'x 110 (5th Cir. May 29, 2008) (per curiam), but that decision did not indicate that *Rotella* had altered or abolished the separate-accrual rule, and—because the decision is non-precedential—it could hardly have brought about a change in the legal "landscape," as appellees contend (PB39).

Finally, insofar as policy considerations have any relevance, they weigh *in favor of* a separate-accrual rule, not against it. Without such a rule, a defendant

engaged in a lengthy course of unlawful conduct would be able to continue the scheme without risk of civil RICO liability whenever the victim did not file suit within four years of discovery of the *initial* injury. As the Second Circuit has explained, such an initial-injury rule would be inconsistent, not only with sound policy, but with the "congressional purpose" that victims of RICO violations be fully protected. *Bankers Trust Co. v. Rhoades*, 859 F.2d 1096, 1105 (2d Cir. 1988) (internal quotation marks omitted). No policy could be furthered by a rule that bars *any* RICO recovery by a victim of 25 racketeering acts when 24 of them fall within the limitations period.

c. In addition to relying on RICO's text, three circuits that have adopted the separate-accrual rule have looked to the Clayton Act, which embodies such a rule. *See* CB20. Urging the Court to reject this "analogy to the Clayton Act" (PB39), appellees quote the dictum in *Klehr* that the Clayton Act "does not necessarily provide all the answers," 521 U.S. at 193. While that is obviously true in a general sense, it is incontestable that Congress intended to pattern RICO's civil-enforcement provision on the Clayton Act and that each of the Supreme Court's decisions in this area relied heavily on that statute. *See Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 150-56 (1987); *Klehr*, 521 U.S. at 188-90; *Rotella*, 528 U.S. at 557-58. Indeed, the very reason that *Klehr* favorably contrasted RICO's separate-accrual rule with the last-predicate-act rule that it

rejected was that the former but not the latter was consistent with the Clayton Act. *See* CB21-22.

Appellees also contend that a separate-accrual rule makes sense for the Clayton Act but not for RICO, because the Clayton Act, unlike RICO, applies an injury-*occurrence* rather than an injury-*discovery* rule, and a separate-accrual rule "help[s] protect [antitrust] plaintiffs from the potentially harsh results that might flow from this pure injury occurrence rule." PB40. There are two problems with this argument.

First, the authority appellees cite (PB40)—*Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971)—does not suggest any connection between the Clayton Act's separate-accrual rule and its injury-occurrence rule. Instead, *Zenith* makes clear that the separate-accrual rule is necessary to vindicate "the congressional purpose that private actions serve as a bulwark of antitrust enforcement and that the antitrust laws fully protect the victims of the forbidden practices as well as the public." *Id.* at 340 (internal quotation marks and citations omitted). RICO was motivated by the same purpose. *See Bankers Trust*, 859 F.2d at 1105.

Second, appellees' argument proves too much. The uniform view of the courts has been that civil RICO actions are governed by an injury-discovery rule. If that rule made it unnecessary to incorporate Clayton Act principles, then the

entire interpretive methodology—looking to the Clayton Act as "the closest analogy" when filling gaps in RICO, *Malley-Duff*, 483 U.S. at 150—would have to be rejected, at least in statute-of-limitations cases in which the Clayton Act rule favors the plaintiff. On appellees' view, for example, RICO plaintiffs should not require as long a limitations period as antitrust plaintiffs, and thus *Malley-Duff* should not have held that the Clayton Act's four-year period applies to RICO as well. Yet the Supreme Court has relied on the Clayton Act in that and other RICO cases.

d. Appellees also contend that CSXT waived the argument that civil RICO claims are governed by a separate-accrual rule. PB25-26. That contention is groundless. As we explain below, the district court *applied* the separate-accrual rule in dismissing CSXT's RICO claims and denying reconsideration; and appellees do not dispute that CSXT explicitly invoked the rule in requesting reconsideration and seeking leave to amend (Doc. No.275, at 3-6; Doc. No. 278, at 8 n.2). Appellees assert that CSXT waived reliance on the separate-accrual rule by not invoking it explicitly in opposing the motions to dismiss (PB25), but they cite no authority for the proposition that an argument is forfeited unless it is raised at every stage of the district court proceedings. In any event, the general rule that a court of appeals will decline to decide an issue that was not raised below "does not apply where the district court * * * addressed the * * * issue," *Blackmon-Malloy v.*

U.S. Capitol Police Bd., 575 F.3d 699, 707 (D.C. Cir. 2009), because the policy justifications for the waiver rule "are simply not present" when the decisionmaker gave "consideration [to] the issue," *Lane Hollow Coal Co. v. Dir., OWCP*, 137 F.3d 799, 806 (4th Cir. 1998) (internal quotation marks omitted). Given that a claim need only have been "pressed *or* passed upon below" to be preserved for appeal, *United States v. Williams*, 504 U.S. 36, 41 (1992) (emphasis added; internal quotation marks omitted), nothing prevents this Court from applying the separate-accrual rule when the district court itself did so at the first and second stages of the proceedings and CSXT explicitly invoked the rule at the second and third stages.

Contrary to appellees' contention (PB26-27), the district court applied the separate-accrual rule in its dismissal rulings (albeit without identifying the rule by name). *See* CB22-23. Had the court been applying the initial-injury rule, it would have dismissed on the ground that the *earliest* of the asbestos claims was filed more than four years before CSXT filed its amended complaint. Instead, the court dismissed because one of the *last* two claims was not within the limitations period. That reasoning cannot be understood as anything other than an application of the separate-accrual rule.

In seeking reconsideration, CSXT argued that its RICO claims should not have been dismissed under the accrual rule the court applied, because CSXT did

not have access to discovery for a number of the asbestos claims until less than four years before its RICO claims were filed. Doc. No. 266, at 6-7; Doc. No. 267, at 5-6. In denying reconsideration, the district court again applied the separate-accrual rule, this time ruling that the RICO claims were barred, not because CSXT had access to discovery for eight of the nine claims more than four years before filing its amended complaint (as the court had ruled in its orders of dismissal), but because eight of the nine claims were *filed* more than four years earlier. JA781-82 & n.8.

In seeking leave to amend its complaint, CSXT argued that amendment would not be futile under the accrual rule the court applied, because the proposed second amended complaint alleges four new asbestos claims that were filed less than four years before CSXT's RICO claims were filed. Doc. No. 278, at 7. In ruling that amendment would be futile, the district court, for the first time, explicitly *rejected* the separate-accrual rule, 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.

CSXT's position in this Court is that the district court (1) misapplied the separate-accrual rule in dismissing its RICO claims; (2) misapplied the separate-accrual rule (in a different way) in denying reconsideration; and (3) erroneously refused to apply the separate-accrual rule in denying leave to amend. Those

contentions are properly before the Court, because, at each of the three stages of the district court proceedings, the separate-accrual rule was either applied by the court, invoked by CSXT, or both.

2. The complaint does not establish a time bar

The district court should not have dismissed CSXT's RICO claims as time-barred, because appellees cannot show that all facts necessary to that affirmative defense clearly appear on the face of the complaint. As our opening brief explains, that is true for three separate reasons. First, the district court mistakenly believed that, at or near the time the asbestos claims were filed, CSXT had access to both negative and positive x-rays and ILO forms for each claimant. CB25-27. Second, even if the court understood that CSXT had access only to *positive* x-rays and ILO forms, that information could not have placed CSXT on notice of fraud as a matter of law with respect to any of the claims, especially given the nature of mass asbestos litigation in West Virginia. CB27-30. Third, even if the discovery to which CSXT had access should have alerted it that a claim was fraudulently filed, CSXT first had access to discovery for claimants James Petersen and Donald Wiley less than four years before the RICO claims were filed. CB30-32.

Appellees offer no response to the first or the third point, tacitly conceding that the dismissal may have rested on an erroneous factual assumption and that the asbestos claims filed on behalf of Petersen and Wiley were new injuries of which

CSXT could not have been aware even under appellees' principal theory of constructive knowledge (more on which below). Appellees do address the second point, but their response is unpersuasive and cannot support dismissal regardless of whether a separate-accrual rule is applied. *See* CB30n.3.

a. Appellees' primary position is that, as a matter of law, CSXT was on notice that an asbestos claim was fraudulently filed as soon as CSXT obtained the x-ray and ILO form for the claimant. PB28-31. "To discover its alleged injury," according to appellees, "CSX[T] had to do nothing more than review the x-rays and ILO forms to find * * * that the claimants *did not have asbestosis*." PB30 (emphasis added). The statute of limitations was triggered, appellees assert, when CSXT "discovered or should have discovered * * * that [the] x-rays actually *did not evidence asbestosis*." *Id.* (emphasis added). This argument is fundamentally flawed.

Even assuming, *arguendo*, that access to an x-ray and ILO form could have placed CSXT on inquiry notice as a matter of law that a claimant did not have asbestosis, such constructive knowledge could not trigger the limitations period, because CSXT's RICO claims do not rest on the premise that the asbestos claims *lacked merit*. They rest on the premise—as appellees elsewhere concede (PB54)—that the claims were *fraudulently filed*, in that appellees lacked a good-faith basis for filing the claims. JA160. Unlike a lawsuit that lacks a good-faith basis, a

lawsuit that is merely meritless does not constitute a legally cognizable injury. If it were otherwise, every losing plaintiff would be subject to Rule 11 sanctions. That is obviously not the law.

It is equally not the law that a meritless suit is sufficient by itself to place the defendant on notice that the suit was fraudulently filed, especially since a plaintiff's good faith is presumed. Unsurprisingly, appellees do not cite a single authority in support of their theory or even attempt to explain the logic behind it. There is no logic behind it. Almost all meritless lawsuits are filed in good faith. For that reason, facts beyond those demonstrating that a suit lacks merit are necessary before a defendant can be found to be on notice that the suit might be fraudulent. And the amended complaint does not come close to establishing that CSXT had access to any such facts at or near the time the asbestos claims were filed.

Quite to the contrary, the nature of mass asbestos litigation in West Virginia made it particularly difficult to determine whether a claim was fraudulently filed (or, for that matter, whether it was meritless). As our opening brief (CB27-29) and the brief of *amicus curiae* West Virginia Chamber of Commerce explain, CSXT was inundated with thousands of claims; there were drastic limitations on discovery; and the system placed enormous pressure on CSXT to settle quickly. Appellees do not dispute any of this. It is therefore puzzling that they nonetheless

argue that, "as a matter of law," the limitations period began to run, at the latest, when CSXT "enter[ed] into binding legal settlements" with three of the claimants in 2002 and 2003. PB29. The three cases were settled for a total of $32,000. JA156-57. That amount hardly justifies the inference that, before settling, any reasonable defendant would have conducted an investigation sufficient to uncover appellees' fraudulent scheme. And even if a jury could draw that inference in appellees' favor at trial, the district court was required to draw all reasonable inferences in *CSXT's* favor at the pleading stage. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009).

b. Appellees' fall-back position is that the limitations period began to run more than four years before CSXT's RICO claims were filed because decisions and articles from the early 2000s supposedly "evidence a general knowledge in the industry of screening procedures such as those conducted by the Peirce Firm and alleged problems in asbestosis litigation." PB31. This argument is no less flawed. Among other things, appellees' "evidence" does not appear on the face of the amended complaint; a "general knowledge" of screening procedures and unspecified "alleged problems" with asbestos litigation hardly compels the conclusion, much less at the pleading stage, that this *particular* plaintiff (CSXT) knew or should have known that these *particular* claims were fraudulently filed; and the allegations in the complaint are consistent with the conclusion that CSXT

was not on notice of the fraud until, at the earliest, Judge Jack's decision in the *Silica* case in June 2005—"a critical turning point" in mass tort litigation that "for the first time" allowed a look "behind the curtain of secrecy" that had guarded litigation screening, ATRA Br. 11-12 (quoting law-review article by Maron and Jones).

In support of their fall-back argument, appellees cite four statute-of-limitations cases. PB31-33. But three are securities-fraud cases in which the plaintiff was held to be on inquiry notice based on materials relating to the particular investment at issue that were in the plaintiff's possession; the fourth was decided on a fully developed summary judgment record. This case has much more in common with cases like *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161 (2d Cir. 2005), and *Staehr v. Hartford Financial Services Group, Inc.*, 547 F.3d 406 (2d Cir. 2008). *Staehr*—which reversed a decision on which appellees relied in the district court (Doc. No. 237, at 5)—held that the plaintiffs had *not* been placed on inquiry notice by "general articles" about certain industry-wide problems. 547 F.3d at 429. The sources on which appellees rely are of the same basic type, in that they concern asbestos litigation in general.

c. Appellees also contend that dismissal should be affirmed even if this Court adopts the separate-accrual rule, because "the only injury for which CSX[T] could recover would be the non-time-barred claim related to Baylor" and the

district court correctly granted summary judgment on that claim. PB41. This contention is wrong for two separate reasons: as we explain above, the Baylor claim is not the only "non-time-barred claim"; and as we explain below, the grant of summary judgment was in any event erroneous.

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

Appellees' arguments for dismissing CSXT's common-law claims (PB33-34) are largely the same ones they make for dismissing its RICO claims and are mistaken for the same reasons. Appellees do make one additional argument with respect to the common-law claims (which are governed by a two-year statute of limitations): that Harron testified in the *Silica* litigation approximately 29 months before CSXT filed its amended complaint. PB34n10. But this argument fails for the obvious reason that nothing on the face of the complaint establishes that CSXT knew or should have known about Harron's testimony before the *Silica* decision was issued several months later.

C. Dismissal Cannot Be Affirmed On Any Alternative Ground

None of the alternative grounds for affirmance urged by appellees have merit.

First, CSXT's claims are not barred by the *Noerr-Pennington* doctrine. Appellees contend that there must be "factual allegations" in CSXT's complaint establishing that the "sham" exception to that doctrine applies (and thus that the

doctrine itself does not). PB43. But that gets things backwards: *Noerr-Pennington* is an affirmative defense, *N.C. Elec. Membership Corp. v. Carolina Power & Light Corp.*, 666 F.2d 50, 52 (4th Cir. 1981), and a district court accordingly may not dismiss on that ground unless all facts necessary to the defense clearly appear on the face of the complaint. That is not remotely the case here. On the contrary, as the district court correctly recognized in rejecting appellees' *Noerr-Pennington* argument (JA702-03), the whole point of CSXT's complaint is that the asbestos claims were objectively baseless and subjectively intended to abuse the judicial process.

Second, CSXT's claims are not barred on the ground that CSXT had "access to the * * * information on which the [asbestos] claims were based." PB44. The fraud occurred when appellees filed the asbestos claims and misrepresented that they had a good-faith basis for them. CSXT obviously did not have, and could not have had, access to the "information" identified by appellees—the x-rays and other discovery materials—until *after* the misrepresentations were made. By that time, it had already relied on the misrepresentations by treating the claims like all the others in the mass asbestos docket. *See* CB48. In the cases appellees cite (PB44-45), the courts held that the plaintiff could not have relied on the defendant's misrepresentation because the plaintiff had or should have had access to conflicting information *before* the plaintiff took the actions in question. As we have

explained, the discovery materials here could not have placed CSXT on notice of fraud even *after* the asbestos claims were filed; but even if they could, they self-evidently could not have done so *before*.

Third, CSXT can prove a pattern of racketeering activity. Relying on a footnote in *Sedima, S.R.P.L. v. Imrex Co.*, 473 U.S. 479, 496 n.14 (1985), appellees assert that CSXT cannot establish a pattern because their activity was "sporadic." PB46. But the same footnote makes clear that a pattern of racketeering activity requires only "continuity plus relationship," as the Supreme Court subsequently held explicitly in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989). And as in *H.J. Inc.* itself, *see id.* at 249-50, there can be no question that the allegations in CSXT's complaint satisfy those requirements. Appellees do not contend otherwise. Instead, they argue for an additional requirement that a certain percentage of a RICO defendant's overall activities must be criminal. PB45-46. But they cite no authority for such a rule, and the absence of any is doubtless attributable to the fact that Congress could not have intended to immunize criminal activity disguised within an otherwise legitimate enterprise.

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

Appellees offer no persuasive reason why CSXT should be denied leave to file a second amended complaint.

First, amendment would not be prejudicial. "Courts typically find prejudice only when the amendment unfairly affects the defendants in terms of preparing their defense to the amendment," which "[m]ost often * * * occurs when the amended claims arise out of a subject matter different from what was set forth in the complaint and raise significant new factual issues." *Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1208 (10th Cir. 2006) (McConnell, J.) (internal quotation marks omitted). That obviously is not the case here. *See* CB37. Given the similarity of the claims and the substantial overlap in the evidence, appellees' assertion that the additional fraud claims "would have increased discovery at least seven-fold" (PB49) is a gross exaggeration. And while "[a] need to *reopen* discovery" can "support[] a district court's finding of prejudice," *Lockheed Martin Corp. v. Network Solutions, Inc.*, 194 F.3d 980, 986 (9th Cir. 1999) (emphasis added), there was no such need here, because discovery had not yet commenced when leave to amend was sought. *See* CB36-37.

Second, there was no bad faith or dilatory motive. Appellees argue that the district court properly denied leave to amend "based on a dilatory motive," which, they say, "implies intent" and differs from mere "undue delay." PB47-48. The problem with this argument is that the court did not *find* that CSXT had acted with a "dilatory motive," bad faith, or any other objectionable mental state; it simply found that CSXT had "acted in a dilatory *manner*" (JA794 (emphasis added))—

i.e., with delay. Nor would there have been any basis for a finding of bad faith or dilatory motive, since "diligence in filing [a] motion to amend after the district court enter[s] * * * judgment dispels any inference of bad faith." *Laber v. Harvey*, 438 F.3d 404, 428 (4th Cir. 2006) (en banc). And "delay alone," without "prejudice" or an "obvious design by dilatoriness to harass the opponent," is not a basis for denying leave to amend. *Pittston Co. v. United States*, 199 F.3d 694, 706 (4th Cir. 1999) (internal quotation marks omitted). As we have shown, there was neither prejudice nor a bad motive here.

Third, amendment would not be futile. Appellees argue that it would be because "the district court properly found CSX[T]'s claims to be time-barred" and "the record evidence establishes that it was the Peirce Firm's general practice to send x-rays read by Dr. Harron for a re-reading—demonstrating good faith and precluding a finding of fraud." PB49. But the district court's finding of a time bar depended on its erroneous rejection of a separate-accrual rule (JA791-94); and the "record evidence" could not possibly "preclude[e] a finding of fraud" with respect to the new claims, for the simple reason that the denial of leave to amend prevented the parties from *developing* record evidence on those claims.

III. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE BAYLOR FRAUD CLAIM

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

1. The first ground for the district court's grant of summary judgment on the Baylor claim was that CSXT could not prove reliance. JA2091-92. Our opening brief explains why that is wrong. CB48-49. Rather than defending this ground of decision on its own terms, or responding to our criticisms, appellees recharacterize it. They argue that the court properly granted summary judgment because "no fraudulent misrepresentation as alleged by CSX[T] occurred." PB52. According to appellees, the misrepresentation alleged by CSXT is a "false assertion of a good faith basis for Baylor's claim *based on Dr. Harron's B-Read*," and that representation was never made because Breyer re-read Baylor's x-ray before suit was filed. PB52-53 (emphasis added).

Appellees' new theory fares no better than the district court's. The misrepresentation for which CSXT seeks to recover is that the lawyer defendants had a good-faith basis for the allegations in their complaint that CSXT negligently caused Baylor to develop asbestosis. JA164, 630, 652-57. CSXT has never contended, and could not contend, that either the complaint itself or appellees in filing it made any explicit or implicit representation about the identity of any B reader. The representation alleged to be fraudulent is simply that there was a good-

faith basis for the allegations in the complaint, and there can be no question that that representation "occurred." But even if the representation were, as appellees seem to suggest, that there was a good-faith basis for the Baylor claim *based on Breyer's B read*, a jury would still be able to find that the representation was fraudulent given the evidence, among other things, that Breyer was as unreliable as Harron and merely rubber-stamped his B read. *See* CB42-44.

2. The second ground for the district court's grant of summary judgment was that CSXT could not prove fraudulent intent. As our opening brief explains, that is wrong because a jury could easily find that the lawyer defendants knowingly and intentionally filed the Baylor claim without a good-faith basis given the evidence that they (a) fabricated Baylor's exposure history, (b) failed to conduct a reasonable investigation before filing suit, and (c) manufactured a positive reading of Baylor's x-ray. CB49-53. Appellees offer no persuasive response.

Fabricated exposure history. The "Claimed Exposures" on Baylor's "Asbestos Questionnaire"—"Asbestos rope, cement, Asbestos valve packing"—were provided by someone other than Baylor and were false. *See* CB46-47. Appellees do not deny this. Instead, they contend that "the record establishe[s] an exposure history * * * independent from the Questionnaire." PB58. But the evidence on which they rely is illusory; at the very least, it is not nearly substantial

enough to overcome the force of the questionnaire and preclude a jury finding that Baylor's exposure history was fabricated.

Appellees first assert that employees performing Baylor's job were "often exposed to asbestos, including through changing the * * * brakes on their own equipment," and that Baylor testified that he "changed the brakes" on his equipment. PB58. But the testimony of the expert on whom appellees rely was that there was "potential * * * [for] expos[ure] to asbestos from the *application* of brakes, *not so much from the changing of the brakes*, but from the actual *application* of the brakes." JA1196 (emphasis added). Appellees' own evidence thus refutes their assertion. In any event, evidence that certain categories of railroad workers were "often" exposed to asbestos, or had the "potential" to be, hardly establishes that Baylor himself was.

Appellees next claim that it was their "practice * * * not to open a file for a railroad client unless, at the initial x-ray screening, he indicated a history of exposure to asbestos." PB59. But Baylor testified that he never had conversations with anyone at the Peirce firm about asbestos exposure. JA1204-06. In combination with the altered questionnaire, that testimony is powerful evidence that, whatever appellees' general "practice" may have been, it was not followed in Baylor's case.

Relying on evidence that the questionnaire "was not provided to CSX[T] as part of Baylor's case," appellees also argue that "[a] document that was not provided to CSX[T] obviously cannot be a basis for a fraud claim." PB59-60 (emphasis omitted). But it obviously can. Contrary to appellees' suggestion, we do not contend that information in the questionnaire constituted a fraudulent representation to CSXT. We contend that the lawsuit's implied representation that Baylor had an exposure history was fraudulent and that a questionnaire with a *fabricated* exposure history is compelling evidence of that—particularly when the other evidence of exposure is weak if not non-existent.

Failure to investigate. The lawyer defendants filed suit without reviewing a CT scan in their own files that showed that Baylor did not have asbestosis, and without requesting Baylor's medical records. *See* CB44-46. Appellees offer no defense of their failure to request the medical records, but do offer two defenses of their failure to review the CT scan. Neither is remotely sufficient to preclude a jury finding that the lawyer defendants failed to conduct a reasonable investigation.

Appellees' first argument is that there is no evidence that the lawyer defendants "w[ere] aware of the CT scan" when the Baylor claim was filed. PB58n.21 (emphasis omitted). But that is precisely our point. Because the lawyer defendants had an obligation to conduct "an inquiry reasonable under the

circumstances," W. Va. R. Civ. P. 11(b), their ignorance of what was in their own files establishes, not a good-faith basis for the suit, but a lack of one. *See* CB45.

Appellees' second argument is that the doctors who reviewed the CT scan agreed that it showed what "could be" scarring that "could be" caused by asbestos exposure. PB58n.21. But the doctors' ultimate conclusions were that they "didn't see any evidence of [asbestosis] on the images" (Knox) and that "there is not enough information on [the CT scan] to reasonably reach an opinion that this represents asbestosis" (Cooper). JA991, 1144. Whatever the CT scan actually showed, moreover, the lawyer defendants did not even consider it before filing suit, even though it was sitting in their files and even though it is a far more reliable diagnostic tool than an x-ray.

Manufactured medical evidence. The borderline-positive x-ray on which the Baylor claim was based resulted from a process designed to generate false positives: the lawyer defendants used an x-ray technician who produced an underexposed and underinflated film; had the x-ray read by a since-discredited doctor (Harron) who provided positive reads at an impossibly high rate; and had the x-ray re-read by a doctor (Breyer) who did the same. *See* CB40-44. None of the evidence identified by appellees precludes a jury finding that the lawyer defendants manufactured unreliable medical evidence.

Appellees first contend that, because they "sought a second medical opinion that Baylor's x-ray evidenced signs of asbestosis prior to filing suit," a jury could not make "a finding of fraudulent intent." PB56. But the evidence described in our opening brief would permit a jury to find that Breyer merely rubber-stamped Harron's B read; that he was as unreliable as Harron; and thus that Breyer's involvement is proof rather than disproof of a lack of good faith. *See* CB42-44.

Appellees rely on Breyer's self-serving testimony that Harron's ILO forms "did not impact his findings" (PB56n.20), but they do not dispute that the Peirce firm provided Breyer with the forms; that this was a violation of established protocols; and that Breyer reviewed Harron's ILO forms in conjunction with his B reads, sometimes before Breyer completed his own forms (JA689-90). Appellees also do not dispute that Breyer ratified Harron's findings more than 90% of the time and that, for x-rays that had not previously been read, Breyer reported evidence of asbestosis more than 70% of the time, a rate that is similar to Harron's and anywhere from 14 to 70 times the prevalence reported in the medical literature. This compelling evidence of Breyer's unreliability and lack of independence would permit a jury to find that the circumstances surrounding the re-reading of Baylor's x-ray, particularly when considered with all the other evidence, were *not* "equally consistent with honest intentions" and did *not* merely reflect the "adversarial process" at work. PB56-57 (internal quotation marks omitted).

Appellees also contend that there was no fraudulent intent because "CSX[T]'s expert and [its] own answers to interrogatories admit that Baylor's x-ray could in good faith be read as positive." PB55. That contention is fundamentally mistaken.

CSXT's expert (Dr. Cooper) testified, based on the diagnostically superior CT scan that the lawyer defendants had in their files but failed to consider, that no reasonable doctor could conclude that Baylor had asbestosis. JA1144. It is thus somewhat odd for appellees to rely on his supposed "admission" that the diagnostically inferior x-ray could be read to indicate asbestosis. In any event, there was no such "admission." Dr. Cooper testified only that he would not have second-guessed his own partner, Dr. Henry, in the hypothetical event that Dr. Henry had read Baylor's underexposed and underinflated x-ray as borderline positive. JA1125.

As for the supposed "admission" of CSXT itself, it is worth quoting the interrogatory answer on which appellees rely:

> CSXT does not affirmatively contend that the Lawyer Defendants' hypothetical contention that a B reader or doctor who decided to interpret the 2003 film in spite of its objective defects could have reasonably concluded that he or she saw 1/0 profusion is impossible. The highly subjective nature of B read interpretations at the 0/1 - 1/0 level of profusion, especially on underexposed and underinflated films, enhanced the Lawyer Defendants[']' opportunity to perpetrate fraud in this case. The subjective and variable nature of low level profusion analysis on poor quality x-rays such as Mr. Baylor's makes clear why even Dr. Harron has admitted that reads cannot form the

> sole basis for a claim of asbestosis. CSXT does contend that neither Dr. Harron nor Dr. Breyer provided reasonable or reliable reviews of the 2003 x-ray * * *.

JA922. Far from being an "admission" that warrants summary judgment, that answer succinctly explains why the Baylor claim should go to a jury.

It is theoretically possible that a reliable B reader in possession of no other information could find that Baylor's x-ray reflected a 1/0 level of profusion—which, as Raimond himself acknowledges, is "the weakest positive" reading, where "the doctor equivocates" and there is a "possibility that it could be negative." JA 969; *see also* Franzblau Br. 9. But it hardly follows that the lawyer defendants had a good-faith basis for the asbestos claim that was based on that x-ray, because of the evidence that (1) the lawyer defendants manipulated the medical evidence to take advantage of the subjectivity inherent in reading x-rays with the lowest profusion level by (a) intentionally obtaining an underexposed and underinflated x-ray and (b) using unreliable B readers who found evidence of asbestosis at an impossibly high rate; (2) the lawyer defendants ignored a diagnostically superior CT scan that ruled out any reasonable possibility of asbestosis; and (3) the lawyer defendants fabricated an exposure history. A jury could easily find that this evidence proves fraud.

B. Summary Judgment Cannot Be Affirmed On Any Alternative Ground

None of the alternative grounds for affirmance urged by appellees have merit.

First, the release granted as part of Baylor's earlier settlement does not preclude CSXT from proving reliance or damages. That CSXT might have had an *additional* defense to Baylor's claim does not alter the fact that CSXT relied on the representation that the claim was filed in good faith by treating it like other claims (*see* CB48) and expended money in defending it. Nor, as appellees seem to imply, would the assertion of the defense have been certain to bring the litigation to an immediate conclusion. The Peirce firm has consistently argued that a release of this type is unenforceable, *see, e.g.*, Pl.'s Mem. in Opp. to Def.'s Mot. for Summ. J., *Fortner v. CSX Transp., Inc.*, No. 01-C-162M (W. Va. Cir. Ct. Sept. 5, 2005), and the judge who presided over Baylor's asbestos claim refused to enforce a release in a different case, *see Black v. CSX Transp., Inc.*, No. 06-C-51 (W. Va. Cir. Ct. July 13, 2006). CSXT had no occasion to litigate the issue in Baylor's case, because it succeeded in having the action dismissed on grounds of venue. *See In re FELA Asbestos Cases*, 665 S.E.2d 687 (W. Va. 2008) (per curiam).

Although the issue is not strictly relevant, we note that there is no merit to appellees' suggestion (PB60-61) that CSXT concealed the release from them. CSXT informed appellees that it was prohibited by law from disclosing the release

and related documents because of privacy concerns, but would provide them if Baylor authorized their disclosure. Pl.'s Resps. to Lawyer Defs.' First Reqs. for Prod. of Docs. 9 (Jan. 23, 2009). CSXT promptly produced the documents when the necessary authorization was obtained.

Second, the Baylor fraud claim is not barred by the *Noerr-Pennington* doctrine. A jury could find that the sham exception applies—*i.e.*, that the claim was objectively baseless and filed with an improper purpose (JA703)—for the same reasons it could find that appellees lacked a good-faith basis for the claim.

Third, the summary judgment record does not establish a lack of personal involvement on the part of Peirce or Raimond. As to Peirce, appellees contend that he "did nothing more than oversee the filing of the [Baylor] complaint by other members of the Peirce Firm." PB62. But in fact Peirce testified that the "other member[]" of the firm—Robert Daley—"did [no] work other than sign the complaint" (because Daley was "admitted in West Virginia" and Peirce was not); that Peirce had "responsibility" for the preparation and filing of the complaint; and that Peirce had "responsibility" for "ensuring that the claims made in that complaint were well founded in fact and law." JA944-45. An act claimed to be fraudulent must be either "the act of the defendant or induced by him." *Lengyel v. Lint*, 280 S.E.2d 66, 69 (W. Va. 1981). If Peirce did not "induce" the filing of the Baylor claim, then no one did. At the very least, a jury could so find. In any

event, CSXT seeks to hold Peirce liable for conspiracy as well (JA164-65), and appellees offer no theory under which he could not be liable for *that* tort, even assuming that his role was as limited as they contend.

As to Raimond, CSXT seeks to hold him liable only as a co-conspirator. *See* CB38n.5. Raimond was a member of the conspiracy because he devised the firm's mass-litigation screening program that resulted in Baylor's x-ray and B read. *See* Doc. No. 574, at 11, 25-26. Appellees do not dispute this. Instead, they contend that Raimond's retirement from the firm before the filing of Baylor's claim constitutes a withdrawal from the conspiracy. PB63. But "[w]ithdrawal must be shown by evidence that the defendant acted to defeat or disavow the purposes of the conspiracy," *United States v. West*, 877 F.2d 281, 289 (4th Cir. 1989), and appellees point to no evidence establishing that Raimond took any such action as a matter of law. Appellees rely on a decision in which the Second Circuit ruled that the closing of an account constituted withdrawal from a conspiracy (PB63), but the same court has explicitly held that "resignation from [an] enterprise does not, in and of itself, constitute withdrawal from a conspiracy as a matter of law," *United States v. Berger*, 224 F.3d 107, 119 (2d Cir. 2000) (internal quotation marks omitted).

Fourth, Breyer's B read is not a "superseding intervening cause of any alleged injury to CSX[T]," such that CSXT cannot recover from Harron. PB63.

The allegation against Harron is that he conspired with the lawyer defendants to defraud CSXT by generating and filing the Baylor claim. JA164-65. A plaintiff can recover from a co-conspirator for any "acts causing injury undertaken in furtherance of the conspiracy," *Dunn v. Rockwell*, 2009 WL 4059061, at *12 (W. Va. Nov. 24, 2009) (internal quotation marks omitted), and CSXT sustained damages in defending the Baylor claim, which was not only an act in furtherance of the conspiracy but its object. But even if CSXT were permitted to recover from Harron only for injuries proximately resulting from his own "improper conduct" (PB63), as appellees maintain, Harron would still be liable. Breyer's involvement could sever the causal link between Harron's B read and CSXT's injuries only if Breyer's B read were truly independent, and there is abundant evidence that it was not. *See* CB42-44.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION BY EXCLUDING EVIDENCE AT THE MAY-JAYNE TRIAL

At the May-Jayne trial, Peirce testified that he had no knowledge of the x-ray swap; that Gilkison said he had no knowledge either; that Peirce believed Gilkison was telling the truth; and that Peirce dissociated himself from May when Peirce learned about the fraud. *See* CB54-55. The district court nevertheless precluded CSXT from offering evidence that Peirce had continued to represent May on claims against other defendants, based on the same fraudulent x-ray, and

that the Peirce firm had continued to accept settlements on those claims on May's behalf. *See* CB55. Appellees offer no persuasive defense of the court's ruling.

First, CSXT's claim has not been waived, as appellees maintain (PB65). CSXT sought to have the evidence admitted both before trial, on the ground that it proved the Peirce firm's participation in the fraud (JA1326), and during trial, on the ground that it undermined Peirce's credibility (JA1561).

Second, the refusal to admit the evidence was an abuse of discretion. Had it been admitted, the evidence could have undermined Peirce's testimony that Gilkison claimed to be unaware of the fraudulent claim against CSXT and could have made it more likely that the jury would find that the fraud was a calculated scheme by Gilkison and the Peirce firm. *See* CB56-57. Contrary to appellees' contentions, therefore, the evidence did "involve Mr. Gilkison," Peirce's credibility was not "unrelated to * * * Mr. Gilkison's * * * involvement * * * in the May fraud," and the evidence did "relate to claims against CSX[T]." PB65.

Third, the error was not harmless. In arguing otherwise, appellees rely on supposed "testimony by May about Gilkison's lack of any role in the fraud" and "the fact that CSX[T] was permitted to cross-examine Mr. Peirce about the Firm's apparent continued representation of May on a carpal tunnel case." PB66. But May did *not* testify that Gilkison "lack[ed] * * * any role in the fraud," *see* JA1656-58; on the contrary, he testified that "[t]he idea [for the fraud] came from

Mr. Gilkison" and that Gilkison "gave [him] the idea," JA1622, 1625. As for the permitted cross-examination about the "carpal tunnel case," that was no substitute for the evidence that was excluded, because Peirce's testimony was that he had no knowledge of the carpal-tunnel case and that it was already over by the time he learned of the x-ray swap. JA1561-65. Unlike the excluded evidence, therefore, the carpal-tunnel evidence had no tendency to prove that Peirce was both untruthful and a knowing participant in the fraud.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted,

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Dated: March 26, 2010

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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Dated: March 26, 2010

CERTIFICATE OF SERVICE

I hereby certify that, on the 26th day of March, 2010, a true and accurate copy of the foregoing Reply 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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