No. 22-1472

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ASHLEY ALBERT; ASHLEY BAXTER; KARINA JAKEWAY; MELINDA JABBIE, on behalf of themselves and all others similarly situated,
Plaintiffs-Appellants,
v.
GLOBAL TEL*LINK CORP.; SECURUS TECHNOLOGIES, LLC; 3CINTERACTIVE CORP.,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Maryland,
Case No. 8:20-cv-01936-LKG
The Hon. Lydia Kay Griggsby

RESPONSE BRIEF OF DEFENDANTS-APPELLEES

MORGAN LEWIS & BOCKIUS, LLP
Jason R. Scherr
1111 Pennsylvania Avenue, NW
Washington, DC 20004
T: 202.739.6000
jr.scherr@morganlewis.com
Counsel for Defendant-Appellee Securus Technologies, LLC

ARNOLD & PORTER KAYE SCHOLER LLP
Jonathan I. Gleklen
601 Massachusetts Ave., NW
Washington, D.C. 20001-3743
T: (202) 942-5000
jonathan.gleken@arnoldporter.com
*Counsel for Defendant-Appellee Global Tel*Link Corp.*

WILLIAMS & CONNOLLY LLP
Jonathan B. Pitt
725 Twelfth Street, NW
Washington, DC 20005
T: 202.434.5000
jpitt@wc.com
Counsel for Defendant-Appellee 3Cinteractive Corp.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

COUNTERSTATEMENT OF THE ISSUES

1) Whether the District Court abused its discretion by denying Plaintiffs' Motion to Amend their Complaint when finding that: (1) Plaintiffs had or should have had a basis to make the amended allegations before filing the original complaint but unduly delayed for almost a year and a half until after Defendants' motion to dismiss their RICO claim was fully briefed and ruled on; (2) allowing such amendments would prejudice Defendants; and (3) Plaintiffs' amendments would be futile because none of the newly-pleaded allegations cures the fundamental defect in Plaintiffs' RICO claim that Plaintiffs' injury is too indirect to show proximate causation and any alleged harm to Plaintiffs depends upon the intervening decisions of the government actors alleged to have received misrepresentations.

2) Whether the Court correctly dismissed Plaintiffs' RICO claims when finding: (1) the alleged misrepresentations and/or omissions made to the non-party contracting governments are too remote to plausibly establish proximate causation under RICO; and (2) Plaintiffs' claims are speculative because they rely on predictions about intervening actions of non-party contracting governments as to what they may have done had Defendants not made the alleged misrepresentations.

COUNTERSTATEMENT OF THE CASE

A. PLAINTIFFS' COMPLAINT

On June 29, 2020, Plaintiffs filed their Complaint alleging that Defendants participated in a scheme to charge artificially inflated prices for certain calls that incarcerated individuals made to friends and family throughout the United States. JA22-140. Plaintiffs allege Defendants colluded to fix inflated prices paid by the call recipients for a certain subset of calls, and Defendants made misrepresentations and omissions using the mail and wires to convince the contracting governments to accept these high prices. JA26-27. Based on these allegations, Plaintiffs asserted that Defendants violated the Sherman Act, 15 U.S.C. § 1, and RICO, 18 U.S.C. § 1962(c)-(d). JA32. Only the RICO claims are at issue in this appeal.

Defendants Global Tel*Link Corp. ("GTL") and Securus Technologies, LLC ("Securus") provide calling services for incarcerated individuals (generally called "ICS"), that connect incarcerated individuals in correctional facilities to their friends and family throughout the United States. JA35. GTL and Securus compete fiercely with one another, as well as other ICS suppliers, to win ICS contracts with the state and local governments that operate correctional facilities. JA35, JA38. These contracts specify the rates that ICS providers will charge consumers for various types of calls with incarcerated individuals, as well as the government's site commissions (set as a percentage of fees paid by consumers) for each ICS call. JA38. Incarcerated

individuals and their families and friends cannot choose the ICS providers for a given facility; rather, state and local governments have the sole authority to choose the ICS providers with which they contract. JA37. State and local governments consider many factors when selecting the winning bids and negotiating the terms for ICS contracts, including their expected site commissions, the various products offered by the ICS provider for that site, and the rates at which those services will be offered. JA38. Only one type of ICS product—the "single call"—is challenged by Plaintiffs in this case. At various times, both Securus and GTL contracted to have technology developed by Defendant 3Cinteractive Corp. ("3Ci") to support those call products.

In connection with their RICO claims, Plaintiffs allege that, through the use of mail and wires, Defendants "made a series of material misrepresentations and omissions to both governments[1] and consumers about the magnitude of the

[1] Plaintiffs refer in their complaint to "Defendants," but they do not—and could not, consistent with Rule 11—allege that 3Ci engaged in any communications with local and state governments. Rather, Plaintiffs assert that Securus and GTL made misrepresentations or omissions to those governments through negotiations, contracts, and monthly reports, while alleging 3Ci maintained a *consumer-facing* website and presented billing statements to *consumers* containing such misrepresentations or omissions. JA34, JA74.

transaction fees associated with single calls operated by 3C[i]." JA31.[2] Specifically, Defendants purportedly made misrepresentations to contracting governments regarding the transaction fees paid to third parties for single-call products during the negotiations of ICS contracts, in written bids, in the ICS contracts, in monthly commission reports, and on the public websites. JA31, JA71.

According to Plaintiffs, had Defendants "honestly represented the value of the transaction fees" associated with single-call products, contracting governments would not have allowed Securus and GTL to charge $14.99 and $9.99 for the calls and "would have insisted on lower-priced single call programs when selecting bids for, and negotiating the terms of, ICS contracts." JA81; *see also* JA32, JA70, JA100. As a result, Plaintiffs allege that consumers "would have paid substantially less money" for these products. JA81; *see also* JA32, JA66, JA70, JA100. Plaintiffs make no allegations regarding the other products governed by the ICS contracts with state and local government agencies or the payment terms for such products, or the portion of total revenues or contract terms or negotiating attention associated with single-call products.

---

[2] Plaintiffs are not appealing the District Court's decision that the alleged misrepresentations and/or omissions to consumers are insufficient to state a claim under RICO. *See* Dkt. No. 19 (Appellants' Br.) at 4.

Plaintiffs assert that alleged misrepresentations by Defendants deprived the contracting governments of a competitive market where each individual government would have been able to negotiate more favorable contractual terms, including "higher site commission percentages." JA38 ("When the ICS market is competitive, ICS providers compete with each other for contracts with local and state governments by submitting bids …. In such circumstances, ICS providers attempt to secure those contracts by making bids that offer lower ICS call rates and higher site commission percentages.").

B. PROCEDURAL HISTORY

1. Initial Briefing and Order

This case was initially assigned to the Honorable Paul W. Grimm, United States District Judge. The day after Plaintiffs filed their Complaint, Judge Grimm issued his standard-form "Letter Order Regarding the Filing of Motions." JA11 (*See* District of Maryland ECF No. 3). The letter order outlined a procedure common in the District of Maryland, that before filing a motion to dismiss Defendants were required to submit a letter of no more than three pages describing the planned motion and explaining the factual and legal support for it. (District of Maryland ECF No. 3). Judge Grimm would then review the letter and decide whether to hold a phone conference to discuss the planned motion and to determine whether the issues may be resolved or otherwise addressed without the need for formal briefing. *Id*. Judge

Grimm employed this procedure "[i]n order to promote the just, speedy, and inexpensive resolution of this case." *Id.* (citing Fed. R. Civ. P. 1).

On September 18, 2020, Defendants filed the required letter summarizing their arguments for dismissal of the Sherman Act and RICO claims. JA15 (District of Maryland ECF No. 57 at 3). Defendants asserted, among other things, that Plaintiffs' RICO claims fail because Plaintiffs asserted only indirect harm from a fraud supposedly perpetrated on the contracting governments. (District of Maryland ECF No. 57 at 3). This alleged harm, Defendants explained, "is insufficient to support a RICO claim, because it is merely 'contingent or derivative of the [alleged] harm suffered' by the governments." *Id.* (quoting *Slay's Restoration, LLC v. Wright Nat'l Flood Ins. Co.*, 884 F.3d 489, 494 (4th Cir. 2018)). Defendants further observed that courts routinely dismiss RICO claims based on indirect injuries, particularly where government action (or inaction) is an intervening cause. *Id.* (citing *Barr Labs., Inc. v. Quantum Pharmics, Inc.*, No. 90-cv-4406, 1994 WL 1743983, at *7 (E.D.N.Y. Feb. 7, 1994)).

On October 6, 2020, Judge Grimm held a conference to discuss Defendants' pre-motion letter. JA15 (District of Maryland ECF No. 59). Citing Defendants' letter, Judge Grimm noted that because Plaintiffs were fully aware of Defendants' positions on the Complaint's deficiencies, he did not expect Plaintiffs to ask for leave to amend only after Defendants prepared an extensive motion to dismiss. *See also*

Appellants' Br. at 11. That would waste everyone's time and money. Instead, Judge Grimm advised, if he were to dismiss any of Plaintiffs' claims, he planned to do so with prejudice. Judge Grimm thus offered Plaintiffs the chance to amend at that time—before Defendants filed their motion to dismiss—to try to correct any of the pleading deficiencies raised by Defendants.

Plaintiffs expressly declined that invitation and chose instead to stand on their pleading without any amendment. The parties thereafter negotiated a briefing schedule for Defendants' anticipated motion, and on October 13, 2020, Plaintiffs confirmed by stipulation that they "have opted to not amend their complaint prior to the filing of Defendants' motion(s) to dismiss." JA144.

From October 2020 to January 2021, the Parties briefed the motion to dismiss. In their motion and reply, Defendants pointed to the same key pleading deficiencies described in their pre-motion letter. JA16 (District of Maryland ECF Nos. 72-1, 76). As to the RICO claims, Defendants argued that Plaintiffs' allegations failed to satisfy RICO's proximate-cause requirement because Plaintiffs' claimed injuries were too indirect and speculative. JA16 (District of Maryland ECF 72-1 at 24-28).

After briefing was complete, this case was reassigned from Judge Grimm to the Honorable Lydia Griggsby. The District Court thereafter issued an opinion on Defendants' motion to dismiss on September 30, 2021. JA148-165. In that opinion, the District Court denied Defendants' motion on the Sherman Act claim but granted

it on the RICO claims, agreeing with Defendants that "the RICO claims in the complaint that are based upon alleged misrepresentations and/or omissions made to the contracting governments are too remote to establish proximate causation under RICO …. [a]nd so, Plaintiffs simply cannot show that they have been directly injured by any misrepresentations and/or omissions made to these governments." JA163-164. The District Court also concluded that "Plaintiffs only speculate about what actions the contracting governments might have taken if defendants had not made the alleged misrepresentations and/or omissions." JA164. Accordingly, the Court dismissed Plaintiffs' RICO claim with prejudice. *See Carter v. Norfolk Cmty. Hosp. Ass'n, Inc.*, 761 F.2d 970, 974 (4th Cir. 1985) ("A district court's dismissal under Rule 12(b)(6) is, of course, with prejudice unless it specifically orders dismissal without prejudice.").

2. Plaintiffs' Motion for Leave to Amend

Plaintiffs thereafter informed Defendants that they intended to seek leave to amend their Complaint for the purpose of supplementing their allegations as to causation and directness—the same deficiencies noted in Defendants' original letter, and on which the Court dismissed Plaintiffs' RICO claims. Given Plaintiffs' previous chances to amend, their decision instead to put Defendants to the burden of moving to dismiss, and the Court's order dismissing Plaintiffs' RICO claims with prejudice, Defendants did not consent to Plaintiffs' proposed amendments. On

October 29, 2021, Plaintiffs filed a motion seeking leave to amend their Complaint or, in the alternative, for partial final judgment or to certify this case for interlocutory appeal. JA18 (District of Maryland ECF No. 103).

As required, Plaintiffs also submitted with their motion a Proposed Amended Complaint showing their proposed amendments ("PAC"). JA166-299. These amendments apparently sought to address the defects in Plaintiffs' dismissed RICO claim. JA327. Most of Plaintiffs' proposed amendments are derived from declarations Plaintiffs obtained from two former employees of Securus and GTL *before* filing their original Complaint. JA300-311. Plaintiffs added allegations, including graphics, that in their estimation, "further clari[f]y[] how Plaintiffs' injuries could not be derivative of economic injury to contracting governments." Appellants' Br. at 53; *see also* JA194. Plaintiffs' proposed amendments also include "new" allegations that legislation from six states "ensure that ICS contracts do not charge consumers excessive prices for ICS calls." JA185-186. These allegations are irrelevant because Plaintiffs do not allege that they received calls from individuals incarcerated in any of these six states. Regardless, five of the six states enacted this legislation *before* Plaintiffs filed their Complaint. *Id.* And, the referenced legislation is not specific to single-call products, but discusses ICS telephone services generally. *Id.* Plaintiffs also include requests by six state and local governments regarding "reducing prices for consumers when entering into new

contracts for ICS." JA186-187. Again, while Plaintiffs do not allege that they received calls from persons incarcerated in these states, five of the six governmental entities made these requests *before* Plaintiffs filed their Complaint, and these requests refer to ICS generally, not single-call products. *Id.*

In their PAC, Plaintiffs also sought to add statements ostensibly made by unidentified government officials and Defendants' unidentified competitors, purporting to show that certain contracting governments consider the price of ICS products as a class (but not single-call products) as a factor when negotiating ICS contracts. JA 235-236. Between October 8, 2021 and October 22, 2021, Plaintiffs "***attempted*** to reach more than 40 city and/or county officials in different jurisdictions across the country, along with ***attempting*** to contact competitors and other witnesses with knowledge of procurement and/or industry practices relating to single-call products." JA313-314 (emphasis added). Notably, not one of the proposed new allegations cites to a contracting government—let alone a contracting government responsible for a facility from which a Plaintiff received calls—specifically representing that but for Defendants making alleged misrepresentations regarding the cost of single-call products, that contracting government would have negotiated a lower price for Defendants' single-call product.

On April 12, 2022, the District Court held oral argument on Plaintiffs' motion for leave to amend their Complaint. JA318-412. During the 90-minute oral

argument (JA321-322), the District Court carefully considered Plaintiffs' motion for leave to amend their Complaint, including the new allegations in Plaintiffs' PAC, as well as Plaintiffs' RICO causation argument. At the end of the argument, the Court provided a thorough and detailed oral ruling explaining its rationale. JA383-392.

When considering whether Federal Rule of Civil Procedure 15(a) is procedurally appropriate, the District Court observed: "what the plaintiffs are seeking to do here … is essentially to cure concerns the Court raised and found with regard to the original complaint …. This is a 12(b)(6) situation and we're also after a motion that not only has been filed, but fully briefed and resolved by the Court." JA328-329. Regarding undue delay, the Court found: "[T]here's no dispute this amendment does come more than a year after this complaint was filed. There's also no dispute that there was a process early on in the case to address the motion that the defendants eventually filed to dismiss claims in this case, including the RICO Act claim and to allow the plaintiffs to certainly react to that motion or potential motion early on in the case." JA384. With respect to prejudice, the District Court engaged in a discussion with Defendants regarding the prejudice they would incur if Plaintiffs' motion were granted, (JA353-355), and the District Court observed: "We've been through one round of motions to dismiss really on this exact same [RICO causation] issue and now we're going to revisit it again. And we kind of revisited it today in oral argument so we know where that is going to end up."

JA387. As to futility, the District Court explained that it previously found Plaintiffs' RICO claim was legally deficient, and the District Court's "view on that issue would [not] be changed based upon the proposed amendments." JA386.

Regarding proximate cause, the Court explained: "the question here is given the factual allegations and the alleged misrepresentations[,] which as the Court understands apparently pertain to the pricing, what's going to be charged and why we're proposing that be the price, whether those types of misrepresentations in this fact pattern and the injury to the Government because of them is connected to whatever injury would be connected to [Plaintiffs]." JA340. In response to Plaintiffs' newly proposed flow-chart graphic regarding financial harm, the District Court explained:

> So some of this sounds like it may depend[] on what you're characterizing … the harm would be to the Government and whatever the misrepresentations were to the Government to presumably induce them to enter into the agreements. The flow chart doesn't seem to be talking about that. The flow chart in your amended complaint seems to start with okay, we now have a consumer who purchased this service after the agreements have been entered into and you show how then that process would go along and what money would go to the governments versus the money paid by the plaintiffs.

JA339; *see also* JA341 ("But again, the chain of events as the Court understands it still starts with whatever statements were made to the Government officials when they were in negotiations with the defendants to enter into these agreements.").

On April 13, 2022, the District Court issued a written order denying Plaintiffs' motion for leave to amend, finding Plaintiffs unduly delayed in seeking amendment, Plaintiffs' amendment would prejudice Defendants, and Plaintiffs' amendment would be futile. JA413-419. Specifically, the District Court found "none of the new allegations that plaintiffs seek to add to the complaint alter the fact that plaintiffs' alleged injuries in this case appear to be contingent upon the harm allegedly suffered by contracting governments that actually entered into inmate calling services agreements with defendants." JA417. The District Court also granted Plaintiffs' motion for entry of partial final judgment, entered final judgment as to Plaintiffs' RICO claims, and stayed further proceedings in the matter, pending the resolution of Plaintiffs' appeal. JA417-419.

SUMMARY OF ARGUMENT

The District Court was well within its discretion to deny Plaintiffs' motion for leave to amend their Complaint. First, the District Court properly found that Plaintiffs unduly delayed seeking leave to amend when they had ample prior opportunities to seek to amend their defective RICO claim with information already in their possession but made the decision to wait more than a year after filing and until after the Court dismissed their RICO claim with prejudice to add that information. Second, the District Court appropriately found that granting Plaintiffs leave to amend would prejudice Defendants given the amount of time elapsed and

the significant time, money, and resources already spent resolving the defective claim.

Third, and most significantly, the District Court correctly denied Plaintiffs leave to amend because it found Plaintiffs' amendments would be futile. The District Court carefully considered Plaintiffs' amendments and their impact on the defective RICO proximate causation argument, which was discussed at length during the April 12, 2022 oral argument. The District Court concluded that "none of the new allegations that plaintiffs seek to add to the complaint alter the fact that plaintiffs' alleged injuries in this case appear to be contingent upon the harm allegedly suffered by the contracting governments that actually entered into the inmate calling services agreements with defendants …. Given this, the proposed amendments are not likely to survive a renewed motion to dismiss and, thus, are futile." JA417.

The District Court's dismissal of Plaintiffs' RICO claims for Plaintiffs' inability to establish proximate causation was correct. Plaintiffs' injuries premised upon alleged misrepresentations or omissions made to the contracting governments are indirect and too remote. Proximate cause turns on the directness of the relationship between the injurious conduct and the alleged harm. If Plaintiffs' alleged injury is not directly related to the asserted RICO violation, the injury is not sufficiently direct.

Here, Defendants are alleged to have made misrepresentations constituting mail and wire fraud to the contracting governments, who then, based on such alleged fraudulent information, entered into contracts with Defendants for allegedly inflated single-call and commission rates. Plaintiffs claim that they suffered injury when they paid for the allegedly inflated call rates. Plaintiffs argue that had Defendants not made such misrepresentations, the contracting governments would have negotiated contracts providing for lower single-call rates and higher commissions. Plaintiffs do not allege facts concerning what would have happened with any of the other contract terms negotiated between contracting governments and Defendants in this but-for scenario.

Plaintiffs claim that the alleged injurious conduct—*i.e.*, misrepresentations to the contracting governments—led governments to agree to contracts with allegedly unfair terms, resulting from an unfair process. Plaintiffs' own theory is thus that the alleged misrepresentations directly impacted the contracting governments. As a result, any harm to others alleged to stem from those contracts, including Plaintiffs' alleged injury by paying the resulting "inflated rates" for single-call products, is indirect. But for the non-party contracting governments negotiating and entering into contracts with Defendants, Plaintiffs would have no injury. As a result, Plaintiffs' injury is too remote, and Plaintiffs' RICO claim has a fundamental defect that cannot be remedied. Plaintiffs make multiple unsuccessful attempts to fit their

injury within the legal framework of RICO proximate causation, but none of these alter the conclusion that Plaintiffs' alleged injuries are indirect.

Plaintiffs also fail to establish proximate causation under RICO because their theory of liability relies on the independent and intervening actions of third-party contracting governments. Because the contracting governments are independent third parties, Plaintiffs can only speculate as to how those governments would have acted had they not received the fraudulent misrepresentations alleged by Plaintiffs, and how such actions (or inaction) may or would have impacted the pricing terms for single-call products within the ICS contracts. These state and local governments' actions are therefore an intervening cause or independent factor that precludes Plaintiffs from establishing proximate causation. The District Court properly concluded that Plaintiffs cannot satisfy the proximate cause element of their RICO claims because "Plaintiffs only speculate about what actions the contracting governments might have taken if defendants had not made the alleged misrepresentations and/or omissions." JA164.

Accordingly, the District Court's decision denying Plaintiffs' RICO claim should be affirmed.

ARGUMENT

I. The District Court Was Well Within Its Discretion To Deny Plaintiffs' Motion For Leave To Amend Their Complaint.

This Court should affirm the District Court's decision denying Plaintiffs leave to amend their Complaint. The District Court's decision is reviewed for abuse of discretion. *See Equal Rights Ctr. v. Niles Bolton Assocs.*, 602 F.3d 597, 603 (4th Cir. 2010) (affirming district court's decision denying leave to amend based on prejudice and futility because the District Court did not abuse its discretion on at least one of those bases). The abuse of discretion standard of review "mandates a significant measure of appellate deference to the judgment calls of trial courts." *United States v. Pittman*, 209 F.3d 314, 316 (4th Cir. 2000).

Although Federal Rule of Civil Procedure 15(a)(2) allows Plaintiffs to amend with "the court's leave," this relief is not automatic and is granted only "when justice so requires." Fed. R. Civ. P. 15(a)(2). That determination "rests within the sound discretion of the district court." *Nat'l Bank of Washington v. Pearson*, 863 F.2d 322, 327 (4th Cir. 1988). Courts may deny a motion for leave "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 be futile." *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 509 (4th Cir. 1986) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). The District Court did not abuse its discretion when it found that: (1) Plaintiffs unduly delayed seeking amendment after multiple opportunities to cure the

defects in their RICO claim; (2) the amendment would be prejudicial to Defendants; and (3) the proposed amendment would be futile.

A. Plaintiffs Unduly Delayed Seeking Leave To Amend.

"Delay is 'undue' when it places an unwarranted burden on the court or when the plaintiff has had previous opportunities to amend." *Est. of Oliva ex rel. McHugh v. New Jersey*, 604 F.3d 788, 803 (3d Cir. 2010); *see also United States ex rel. Nathan v. Takeda Pharm. N. Am., Inc.*, 707 F.3d 451, 461 (4th Cir. 2013) (affirming denial of motion to amend "[i]n view of the multiple opportunities Relator has been afforded to correct his pleading deficiencies and the deference due to the district court's decision").

Courts in this Circuit frequently refuse to permit amendments when, as here, the defects in the Complaint were identified in a pre-motion letter, but the plaintiff declined the opportunity to amend. *See, e.g.*, *Cooke v. Caliber Home Loans, Inc.*, No. 18-cv-3701, 2020 WL 1434105, at *8 (D. Md. Mar. 24, 2020) (denying leave to amend because plaintiff "was given an opportunity to amend her Complaint to resolve the deficiencies raised in the pre-motion filing letters, [and] she chose not to amend"); *cf. Graham v. Sec'y of the Army*, No. 17-cv-502, 2019 WL 1968044, at *4 n.4 (E.D.N.C. May 2, 2019) (denying leave to amend because plaintiff was aware of defects in complaint yet "declined to amend his complaint"); *Reynolds v. Dep't of Recreation & Parks*, No. 823 F.2d 548, 1987 WL 36725, at *1 (4th Cir. July 1, 1987)

(table decision) (stating that when plaintiff failed to amend despite knowing deficiencies with claim, "that ended the claim").

The District Court's finding that Plaintiffs unduly delayed seeking leave to amend was supported by evidence that Plaintiffs waited almost a year and a half after filing their Complaint and after they "had ample opportunity to make the proposed amendments." JA416; *see also* JA384. At the start of this case, Plaintiffs were well aware of Defendants' arguments—with which the District Court ultimately agreed—as to why and how Plaintiffs' RICO claims were flawed. In their September 18, 2020 pre-motion letter, Defendants explained that Plaintiffs' alleged injuries are "too indirect" to show proximate cause under RICO because Plaintiffs alleged only indirect harm from the misrepresentations allegedly made to governments. JA15 (District of Maryland ECF No. 57 at 3). Given this deficiency, Judge Grimm offered Plaintiffs the chance to amend and advised them that, if they declined, any dismissal would be with prejudice. This is not strictly a question of waiver, but the record is clear that Plaintiffs were on notice of the District Court's expectations—that is a relevant factor to the court exercising its discretion to permit amendment. As the District Court recognized, Plaintiffs' decision to delay seeking leave to amend their Complaint to fix the legal deficiencies in their RICO claim outlined in Defendants' September 18, 2020 pre-motion letter "weigh[ed] against allowing plaintiffs to amend their complaint at this time." JA416.

Delay also is undue when "the party seeking amendment knows or should have known of the facts upon which the proposed amendment is based but fails to include them in the original complaint …." *Vogel v. Boddie-Noell Enters., Inc.*, No. 11-cv-515, 2013 WL 1010354, at *5 (D. Md. Mar. 13, 2013) (quoting *State Distribs. Inc. v. Glenmore Distilleries Co.*, 738 F.2d 405, 416 (10th Cir. 1984) and denying plaintiffs' motion for leave to amend, finding that the information underlying the proposed amendment was available to the plaintiffs "at or before the time their original complaint was filed."); *see also Est. of Oliva ex rel. McHugh*, 604 F.3d at 803 (affirming district court's denial of leave to amend because proposed amendment "was or should have been apparent to [the plaintiff] from at least the time that he filed his second amended complaint"); *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1366 (10th Cir. 1993) (affirming district court's denial of leave to amend to add defendant "because Plaintiffs knew or should have known" about the defendant "long before" they sought leave to amend).

Plaintiffs' proposed amendments derived heavily from two declarations Plaintiffs obtained from a former Securus employee and a former GTL employee that were executed on May 18, 2020, and June 14, 2020, respectively—*i.e.*, *before* Plaintiffs filed their original Complaint on June 29, 2020. JA300-311. Much of the original Complaint had been drawn from these same declarations, without naming the declarants. *See, e.g.*, JA42, JA67, JA85-86. These "new" allegations were thus

not new at all; they were merely attributed the second time around—which means the District Court already considered and rejected the content of these declarations. As to the portions of the declarations not previously included in the Complaint, Plaintiffs sat on this information until the District Court's ruling on the motion to dismiss. Only after their RICO claims were dismissed did Plaintiffs seek to use this reserved content—content they had possessed since before filing their original Complaint—in an effort to cure the defects highlighted in the District Court's motion to dismiss opinion.[3] Plaintiffs are free to make the strategic decision to withhold the information in their possession until a later stage of the proceedings, but having made that decision, they cannot with a straight face suggest their subsequent reliance on the very same information they opted to conceal is "timely." Taking this into account, the District Court appropriately found that Plaintiffs unduly delayed in seeking leave to amend because they waited until after the District Court dismissed their RICO claims with prejudice to add factual allegations solely related to their defective RICO claims that Plaintiffs were in possession of prior to filing their original Complaint. JA416; *see also United States ex rel. Nathan*, 707 F.3d at 461.

---

[3] Likewise, the majority of Plaintiffs' proposed amendments regarding legislation related to ICS from six states and requests made by six different state and local governments to obtain reduced rates for ICS contracts should have been known to Plaintiffs before they filed their Complaint, as the legislation was enacted, and the requests were made prior to the filing of Plaintiffs' original Complaint. *Vogel*, 2013 WL 1010354, at *5.

B. Granting Plaintiffs' Proposed Amendments Would Have Prejudiced Defendants.

The District Court also did not abuse its discretion in finding that "Defendants would [] be prejudiced by the proposed amendments, given the lapse of time and significant resources already expended to resolve their motion to dismiss." JA417. "To allow plaintiff to amend after defendants have made a successful dispositive motion prejudices defendants." *See Forstmann v. Culp*, 114 F.R.D. 83, 87 (M.D.N.C. 1987) (citation omitted). The District Court properly exercised its discretion in denying Plaintiffs' motion for leave, as it would be a waste of Defendants' time, money, and effort to allow Plaintiffs an opportunity to bring back a claim that was properly dismissed, especially when the legal deficiency in that claim is the very same legal deficiency that was raised at inception, was fully briefed, and ultimately was ruled on. As the District Court recognized during oral argument, it would be prejudicial to give Plaintiffs another opportunity to amend when the Parties and the District Court have "been through one round of motions to dismiss really on this exact same [RICO causation] issue …. And we [] revisited it today in oral argument so we know where that is going to end up." JA387.

C. Plaintiffs' Proposed Amendments Are Futile.

The District Court did not abuse its discretion in finding Plaintiffs' proposed Amendments are futile. "Futility is apparent if the proposed amended complaint fails to state a claim under the applicable rules and accompanying standards." *See*

Katyle v. Penn Nat'l Gaming, Inc., 637 F.3d 462, 471 (4th Cir. 2011); *see also Van Leer v. Deutsche Bank Secs., Inc.*, 479 Fed. Appx. 475, 479 (4th Cir. 2012); *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 376 (4th Cir. 2008) ("Because Relators' proposed amended complaint does not properly state a claim under Rule 12(b)(6) and lacks sufficient particularity under Rule 9(b), we find the district court correctly determined that further amendment would be futile."); *Sulton v. Baltimore Cty.*, No. 18-cv-2864, 2021 WL 82925, at *2 (D. Md. Jan. 11, 2021) (where a proposed amended complaint "fails to include allegations to cure defects in the original pleading," the amendment is futile and should be rejected).

The most fundamental defect in Plaintiffs' motion for leave to amend is not that the amendment comes too late, but that the proposed amendment would not survive a motion to dismiss because Plaintiffs do not and cannot allege a viable RICO claim. The Court dismissed Plaintiffs' RICO claims because they are "too remote to establish proximate causation under RICO." JA163. Here, Plaintiffs' failure stems from the fact that their alleged injuries are indirect, and they accordingly fail to plead plausible allegations on proximate causation, meaning their RICO claims would again be dismissed under Rule 12(b)(6). JA417 (quoting *Hemi Grp., LLC v. City of New York*, 559 U.S. 1, 6 (2010) and *Holmes v. Secs. Lnv'r Prot. Corp.*, 503 U.S. 258, 271 (1992)). When considering whether to allow Plaintiffs to amend their Complaint, the District Court properly found that "none of the new

allegations that plaintiffs seek to add to the complaint alter the fact that plaintiffs' alleged injuries in this case appear to be contingent upon the harm allegedly suffered by the contracting governments that actually entered into the inmate call services agreements with defendants …. Given this, the proposed amendments are not likely to survive a renewed motion to dismiss and, thus, are futile." JA417; *see also* JA386 (During oral argument, the District Court explained that it previously found Plaintiffs' RICO claim was legally deficient, and the District Court's "view on that issue would [not] be changed based upon the proposed amendments."). Again, the District Court was well within its discretion to deny leave to amend on this basis.

On the merits, Plaintiffs' proposed amendments do not plausibly allege that their alleged injuries are direct—*i.e.*, not too remote or derivative of the harm suffered by the contracting governments. For example, some of the new allegations (and charts of hypothetical alternatives based on the original allegations of injury) merely show the chronology of the payments: the consumer paid GTL or Securus for a call, and then GTL or Securus paid a percentage of that charge to the government as a site commission. JA191, JA193. Plaintiffs claim this demonstrates that their alleged harm (increased call prices) is not derivative of the harm they allege was incurred by the contracting governments (lower site commissions) and that these alleged harms are independent of each other and move in "opposite directions."

Appellants' Br. 53-54. But, as the District Court correctly observed during oral argument:

> So some of this sounds like it may depend[] on what you're characterizing … the harm would be to the Government and whatever the misrepresentations were to the Government to presumably induce them to enter into the agreements. The flow chart doesn't seem to be talking about that. The flow chart in your amended complaint seems to start with okay, we now have a consumer who purchased this service after the agreements have been entered into and you show how then that process would go along and what money would go to the governments versus the money paid by the plaintiffs.

JA339. To try to make their RICO claim viable, Plaintiffs skip over the alleged harm to the contracting governments when entering into agreements with Defendants—the absence of which necessarily obviates Plaintiffs' alleged injury. In effect, this further demonstrates that Plaintiffs' alleged injury is not direct and thus insufficient to establish proximate causation within the RICO context. JA417.

Plaintiffs' proposed amendments also fail to establish a sufficiently direct relationship between Defendants' alleged misrepresentations and their claimed injuries because they still only speculate about what would have happened had the contracting governments learned the "truth" about Defendants' alleged misrepresentations. JA164 ("Plaintiffs only speculate about what actions the contracting governments might have taken if defendants had not made the alleged misrepresentations and/or omissions."). Relying on the two declarations underlying

most of their proposed amendments, statements from unidentified contracting governments and Defendants' competitors, as well as on select statutes and regulations from states in which none of the individuals from whom Plaintiffs received calls were incarcerated, Plaintiffs argue that the majority of contracting governments would have lowered single-call prices absent Defendants' misrepresentations. Appellants' Br. at 10, 20, 36. And, their argument continues, because the majority of contracting governments purportedly would have insisted on lower prices, Defendants would have reduced those prices *nationwide*. *Id.*

Plaintiffs' proposed amendments do not make this prediction any less speculative. Based on declarations from two former employees of Defendants—only one of whom ever even worked for a contracting government—Plaintiffs cannot plausibly predict what the contracting governments for the incarcerated individuals who placed calls to Plaintiffs "would have done," or that they "would have" insisted on lower prices. Even more speculative is Plaintiffs' prediction that if a majority of contracting governments had demanded lower prices, that necessarily would have resulted in lower prices for contracting governments nationwide. Appellants' Br. at 10, 20, 36. The selected statutes and regulations Plaintiffs cited in their PAC, as well as the requests made by certain state and local governments regarding lowering ICS rates, only speak to ICS generally. These proposed amendments do not speak to what contracting governments would have done

specifically with respect to single-call products (if anything) had they known Defendants allegedly misrepresented the cost of the transaction fees. Likewise, none of the new statements apparently obtained from unidentified government officials during interviews with Plaintiffs' counsel even purport to state that but for Defendants' alleged misrepresentations regarding their cost of providing single-call products, the contracting government would have negotiated a lower rate for Defendants' single-call product. JA313-314.

Courts have rejected less speculative predictions. In *Rojas v. Delta Airlines, Inc.*, for example, the court rejected the plaintiffs' prediction about what *one government entity* would have done had it "known the truth" about the defendants' misrepresentations. 425 F. Supp. 3d 524, 542 (D. Md. 2019). Here, Plaintiffs claim to be predicting what *thousands of government entities* would have done had they known the truth. "The element of proximate causation … is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation." *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 460 (2006); *see also Slay's Restoration*, 884 F.3d at 494 (finding proximate cause lacking because the plaintiffs' injuries were based on speculation about the actions of numerous intervening entities). And, critically, even an allegation that "the majority of contracting governments would have lowered single call prices" would not help the named Plaintiffs in this case,

because the PAC is silent about what the contracting governments that entered into the agreements under which *these plaintiffs* were charged would have done.

Contrary to Plaintiffs' assertions, these new allegations do not establish that Plaintiffs' causation allegations are not speculative. Appellants' Br. at 52. Because Plaintiffs' proposed amendments do not change the unavoidable fact that the injuries they allegedly suffered are too remote to establish proximate causation under RICO, the District Court properly rejected Plaintiffs' proposed amendments as futile. JA417.

II. The District Court Correctly Dismissed Plaintiffs' RICO Claims.

The District Court properly dismissed Plaintiffs' RICO claims because Plaintiffs failed plausibly to allege that misrepresentations by Defendants to the contracting governments were the proximate cause of Plaintiffs' alleged injuries. The District Court's decision is reviewed de novo. *Al-Abood ex rel. Al-Abood v. El-Shamari*, 217 F.3d 225, 238 (4th Cir. 2000); *see also Ryder v. Hyles*, 27 F.4th 1253, 1258 (7th Cir. 2022) (affirming dismissal of RICO claim due to plaintiffs' failure to plausibly allege injury to business or property as required by the statute).

To survive a motion to dismiss, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *accord Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). This "plausibility" standard is "more than a sheer possibility that a defendant has acted

unlawfully." *Iqbal*, 556 U.S. at 678. "Factual allegations must be enough to raise a right to relief above the speculative level," *Twombly*, 550 U.S. at 555, and courts "are not bound to accept as true a legal conclusion couched as a factual allegation," *Iqbal*, 556 U.S. at 678 (internal quotation marks and citation omitted); *accord Painter's Mill Grille, LLC v. Brown*, 716 F.3d 342, 350 (4th Cir. 2013). This evaluation is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. Like common-law fraud claims, RICO claims based on mail and wire fraud must meet the heightened pleading standard of Federal Rule of Civil Procedure 9(b). *Orteck Int'l Inc. v. TransPacific Tire & Wheel, Inc.*, No. CIVA DKC 2005-2882, 2006 WL 2572474, at *16 (D. Md. Sept. 5, 2006).

The "mere assertion" of a RICO claim imposes an "inevitable stigmatizing effect on those named as defendants," so courts "strive to flush out" defective RICO allegations "at an early stage of the litigation." *Figueroa Ruiz v. Alegria*, 896 F.2d 645, 650 (1st Cir. 1990); *see also Sky Med. Supply Inc. v. SCS Support Claims Servs., Inc.*, 17 F. Supp. 3d 207, 220–21 (E.D.N.Y. 2014) ("[A]lthough civil RICO may be a 'potent weapon,' plaintiffs wielding RICO almost always miss the mark … Accordingly, courts have expressed skepticism toward civil RICO claims.") (internal citation omitted).

Contrary to Plaintiffs' assertions (Appellants' Br. at 3), the District Court meaningfully addressed Plaintiffs' RICO causation arguments in the motion to dismiss briefing (JA162-165), during oral argument on Plaintiffs' motion for leave to amend (JA338-344, JA347-353, JA355-363, JA370-372, JA379-382, JA385-387), and again in its opinion denying leave to amend (JA416-417). The District Court spent the majority of a 90-minute oral argument focused on the RICO causation issue. JA385 ("[T]he Court has had a pretty thorough discussion with the parties today about the concerns about causation and remoteness or directness of the claim because that really is what this discussion is about."). After thoroughly examining that issue—and even considering RICO causation with Plaintiffs' proposed amendments—the District Court properly dismissed Plaintiffs' RICO claim because Plaintiffs cannot plausibly establish proximate causation.

A. Plaintiffs' Injuries Are Indirect And Too Remote To Establish Proximate Cause Under RICO.

The District Court correctly held that "the RICO claims in the complaint that are based upon alleged misrepresentations and/or omissions made to the contracting governments are too remote to establish proximate causation under RICO." JA163. RICO provides a private right of action to "[a]ny person injured in his business or property by reason of a violation" of RICO's substantive restrictions. 18 U.S.C. § 1964(c); *see also Anza*, 547 U.S. at 453. The "by reason of" requirement in Section 1964(c) requires a RICO plaintiff to demonstrate that the predicate act was "not only

the 'but for' cause of his injury, but was the proximate cause as well." *Holmes*, 503 U.S. at 268; *see also Hemi Grp.*, 559 U.S. at 9. "[R]egardless of how foreseeable a plaintiff's claimed injury might be … the injury for which a plaintiff may seek damages under RICO cannot be contingent on or derivative of harm suffered by a different party." *Slay's Restoration*, 884 F.3d at 493–95. Proximate causation under RICO turns "on the directness of the relationship *between the conduct and the harm*." *Hemi Grp.*, 559 U.S. at 12 (emphasis added). The "central question," then, when "a court evaluates a RICO claim for proximate causation … is whether the alleged violation led directly to the plaintiff's injuries." *Anza*, 547 U.S. at 461. This is the case only when the alleged "injury is sequentially the direct result" of the unlawful conduct, which is "generally at the first step in the chain of causation." *Slay's Restoration*, 884 F.3d at 494 (internal quotation marks and citation omitted).

As the District Court observed during the April 12, 2022 oral argument, "[w]e all agree that those are the legal standards that apply [to RICO causation]. And it sounds to the Court like there's really a disagreement about whether the legal theory here, based upon the facts here, are going to fit within that framework or not." JA386. Plaintiffs' attempts to fit their facts within this legal framework fail. Appellants' Br. at 25-35.

When a plaintiff's theory depends on direct injury to another such that there would be no injury to the plaintiff absent injury to that other person, plaintiff's injury

is derivative rather than direct. *Holmes*, 503 U.S. at 271 (1992). Plaintiffs devote a substantial portion of their brief to arguing that Plaintiffs' alleged financial injury of paying inflated prices is not derivative of what Plaintiffs contend is the contracting governments' financial injury, receiving reduced commissions—ignoring the ostensible injuries a scheme of the sort alleged would cause to governments in the nature of unfair terms and unfair process. Appellants' Br. at 17-19; 25-30; 33-35. As a result, Plaintiffs incorrectly conclude that Plaintiffs' injuries must be direct. *Id.* at 25-35. This argument holds no water. *See Firestone v. Galbreath*, 976 F.2d 279, 285 (6th Cir. 1992) (affirming RICO dismissal for lack of standing where plaintiffs suffered "indirect" injury and observing that "actual monetary loss" does not equate to "direct injury"; rather "direct injury refers to the relationship between the injury and the defendants' actions, not the plaintiffs' pocketbooks").

First, Plaintiffs are wrong that any RICO injury to the contracting governments requires a "concrete financial loss." Appellants' Br. at 31. The Fourth Circuit has not called for a "concrete financial loss" for RICO claims—that standard comes from other circuits, primarily the Ninth Circuit. *See Bailey v. Atl. Auto. Corp.*, 992 F. Supp. 2d 560, 579-580 (D. Md. 2014); *see also Borg v. Warren*, 545 F. Supp. 3d 291, 312 (E.D. Va. 2021) (citing Ninth, Third, and Second Circuits for same). Quite to the contrary, the District of Maryland specifically held in *In re Am. Honda Motor Co., Inc. Dealerships Rels. Litig.* that while "[d]ifferent circuits [for

example, the Second and Ninth Circuits] accordingly have fashioned rules allowing standing only, for example, to plaintiffs complaining of commercial harm or 'concrete financial loss' …. [o]ther than the statutory requirement that a plaintiff's injury must be in the nature of harm to business or property, however, RICO imposes no 'heightened' standing threshold." 941 F. Supp. 528, 539 (D. Md. 1996) (internal citations omitted) (not adopting the "concrete financial loss" standard for RICO standing).

Second, Plaintiffs are wrong that the alleged harm necessarily incurred by contracting governments on Plaintiffs' theory—*i.e.*, entering into an ICS contract with allegedly unfair terms resulting from an unfair process—is not a cognizable injury under RICO. Appellants' Br. at 31. Courts have found that the act of entering into a contract that contains unfair terms based on fraudulent misrepresentations is indeed a RICO injury. *See, e.g., Simmons v. Reich*, No. 19-CV-3316, 2020 WL 7024345, at *9 (E.D.N.Y. Nov. 30, 2020) ("Plaintiffs allege that Defendants made fraudulent misrepresentations in connection with their loan agreements, causing them to take out loans with illegally high interest rates. Assuming their allegations are true, Plaintiffs sustained an injury when they assumed these loan obligations."); *Chainani v. Dime Sav. Bank FSB*, No. 94-CV-7549, 1996 WL 622031, at *3-4 (S.D.N.Y. Oct. 28, 1996) (plaintiff that was fraudulently induced into signing a loan agreement suffered RICO injury at the time she assumed the loan obligation).

Plaintiffs also claim that the contracting governments were directly harmed by the alleged fraud. *See* Appellants' Br. at 35.

Third, even accepting Plaintiffs' false premise that a financial injury is required to state a cognizable injury under RICO, Plaintiffs' own hypothetical just as easily demonstrates such a direct financial injury to the contracting governments and that Plaintiffs' injury flows from that alleged harm. *Id.* at 29. What runs in "opposite directions" is not the alleged injuries between Plaintiffs and the contracting governments (Appellants' Br. at 29); rather, it is the internal priorities within the contracting governments as to how much of their telecommunications expense should be funded by taxpayers and how much from the recipients of calls from incarcerated individuals using single-call ICS products. Every dollar that Plaintiffs allege "would have" been available to reduce end-user charges in their hypothetical examples is a dollar that necessarily also "would have" been available to defray the costs incurred by the contracting government to provide telecommunications and other services within their facilities. What it means to argue that governments "would have insisted" on lower end-user prices for single-call ICS products is to assert that those contracting governments would have chosen to allocate 100% of the potential savings to subsidizing those callers' services rather than contributing to the costs of operating the facility. But if these contracting governments had "known the truth" as Plaintiffs conceive it—that several dollars of

each call remained available for negotiation—then those governments' agreement to retain *none* of that differential in the form of site commissions or price concessions on other products in the same contract most certainly constitutes a direct financial injury to the contracting governments.

Accordingly, the District Court recognized that Plaintiffs' theory depends on allegations of primary harm to governments for which Plaintiffs' harm is derivative. *See* JA417 ("[N]one of the new allegations that plaintiffs seek to add to the complaint alter the fact that plaintiffs' alleged injuries in this case appear to be contingent upon *the harm allegedly suffered by the contracting governments that actually entered into inmate calling services agreements with defendants*.") (emphasis added). Plaintiffs also recognized this type of harm to governments in their theory of liability: "When the ICS market is competitive, ICS providers compete with each other for contracts with local and state governments by submitting bids …. In such circumstances, ICS providers attempt to secure those contracts by making bids that offer lower ICS call rates and higher site commission percentages." JA38. Plaintiffs allege that because of Defendants' misrepresentations, the contracting governments were purportedly deprived of a competitive marketplace to negotiate more favorable contractual terms, including ICS call rates and commissions. *Id.*

Fourth, and most importantly, on Plaintiffs' theory it is the contracting governments, not Plaintiffs, who allegedly suffered a direct injury from Defendants'

purported misrepresentations. It is the government who entered into a contract with Defendants that governed the rates for single calls, related transaction fees, and the commissions the governments would receive. Even Plaintiffs acknowledge that a plaintiff's injury is derivative "when a person other than the plaintiff was directly injured such that there would be no injury to the plaintiff in the absence of the injury to that person." Appellants' Br. at 25-26 (citing *Holmes*, 503 U.S. 258). This is particularly true here. Plaintiffs' purported injury in paying inflated rates for single-call products only exists because of the contract the non-party governments entered that included single-call products among the product suite (and governed the pricing of those products). The contract "is sequentially the direct result of" Defendants' alleged misrepresentations. *Slay's Restoration*, 884 F.3d at 494. It is the first step in the causation chain. *Id.*

Plaintiffs read too narrowly the Sixth Circuit authority they characterize to say "a 'derivative victim' is a victim whose 'injury was passed on by another party that had a more direct relationship with the defendant.'" Appellants' Br. at 18 (quoting *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 615 (6th Cir. 2004)).[4] While a

[4] Insofar as *Trollinger* found employee wage claims against their employer to be direct rather than indirect, it has no bearing here. 370 F.3d at 615-16. The *Trollinger* court merely observed that a labor union negotiating on behalf of the employees did not obviate or supersede the "direct employment relationship" between the employees and Tyson. *Id.*

financial injury "passed on" by middlemen is one type of derivative injury, the key here is that what makes Plaintiffs' alleged injury indirect is that it goes beyond the first step in the causal chain. *Id.* at 614; *see also Slay's Restoration*, 884 F.3d at 494. Like in *Hemi Group* and *Slay's Restoration*, Plaintiffs' injuries are not sequentially the direct result of Defendants' conduct. Rather, according to Plaintiffs, Defendants made alleged misrepresentations to the contracting governments, which exercised independent judgment when contracting with either GTL or Securus on terms that included (among others) the rates to be charged to consumers to make a single call, and the related transaction fees, which then allegedly caused Plaintiffs' injuries. As such, Plaintiffs' alleged injuries are derivative of the contracting governments' purported harm in entering into the contract for single-call products. *See Slay's Restoration*, 884 F.3d at 493–95.

Plaintiffs also try to make their theory viable by skipping over the purported harm the contracting governments incurred when entering into the contracts and beginning with the alleged injury Plaintiffs suffered when purchasing the single-call products from Defendants. Appellants' Br. at 17-19; 25-30; 33-36. For example, Plaintiffs cite to the antitrust "indirect purchaser rule" to bypass the purported direct harm the contracting governments suffered, and instead, argue that because Plaintiffs are direct purchasers, they have antitrust standing, and must therefore also have RICO standing. *Id.* at 25-27. This premise is faulty. Plaintiffs conflate standing

under direct purchaser antitrust law with the proximate cause needed for a RICO claim based on mail and wire fraud. But these are separate issues. "RICO not only imposes a statutory standing limitation on claimants who seek recovery for derivative or indirect injuries, but it also incorporates other traditional proximate-cause limitations on claimants …. [and] a RICO plaintiff who can show a direct injury may still lose the case if the injury does not satisfy other traditional requirements of proximate cause …." *Trollinger*, 370 F.3d at 614-15 (internal citation omitted).

As the District Court explained during oral argument when examining Plaintiffs' theory, "the question here is given the factual allegations and the alleged misrepresentations[,] which as the Court understands apparently pertain to the pricing, what's going to be charged and why we're proposing that be the price, whether those types of misrepresentations in this fact pattern and the injury to the Government because of them is connected to whatever injury would be connected to [Plaintiffs]." JA340. The District Court further elaborated that "the chain of events as the Court understands it still starts with whatever statements were made to the Government officials when they were in negotiations with the defendants to enter into these agreements," not with Plaintiffs purchasing single-call products directly from Defendants. JA341. Because the chain of events to prove Plaintiffs' RICO claim begins with Defendants' alleged misrepresentations to the contracting

governments and the resulting contracts governing single-call products, Plaintiffs' arguments that they directly purchased single-call products from Defendants does not convert their alleged derivative injuries into direct harm for RICO proximate causation. The unavoidable step in Plaintiffs' theory is the *reason* Plaintiffs claim to have "directly" paid inflated prices—*i.e.*, that someone else exercised its judgment on the basis of alleged misrepresentations, and made decisions that Plaintiffs say caused the prices to be inflated. That causal link cannot be removed by Plaintiffs' *ipse dixit*; it is an essential link in their theory of liability, demonstrating the indirect linkage of the claimed injury (alleged overpayment by Plaintiffs) to the claimed cause (alleged misrepresentations to non-party governments).

As such, Plaintiffs' argument that a RICO scheme may directly injure multiple parties is immaterial. Appellants' Br. at 33-35. On Plaintiffs' theory, the contracting governments—which Plaintiffs contend were directly harmed by the alleged fraud, *see id.* at 35—would be the direct victims of the alleged fraud because they were supposedly fraudulently induced to enter into the contracts; any alleged injuries to Plaintiffs followed from there. *See, e.g.*, *Williams & Cochrane, LLP v. Quechan Tribe of the Fort Yuma Indian Reservation*, No. 17-cv-01436, 2018 WL 6018504, at *13 (S.D. Cal. Nov. 16, 2018) (dismissing RICO claim for lack of proximate causation when an intermediary suffered a different harm than the plaintiff because the intermediary was still the "direct victim" of the fraud). As the Supreme Court

held, "[t]here is no need to broaden the universe of actionable harms to permit RICO suits by parties who have been injured only indirectly." *Anza*, 547 U.S. at 460. Under RICO's proximate causation standard, the focus is not on whether Plaintiffs' alleged injuries were a "foreseeable result" of Defendants' conduct—or even whether those alleged injuries may have been "the *intended* consequence[]" of that conduct—but rather on "the *directness of the relationship* between the conduct and the harm." *Slay's Restoration*, 884 F.3d at 493 (quoting *Anza*, 547 U.S. at 470) (emphases in original). Here, based on Plaintiffs' legal theory, only the contracting governments could have suffered an alleged direct injury when they entered into a contract with purportedly unfair terms based on Defendants' alleged misrepresentations. Plaintiffs' alleged injuries resulting from the contact are indirect and too remote to establish proximate causation under the RICO legal framework.

Plaintiffs' argument that no other party has standing to recover for Plaintiffs' injuries is erroneous. Appellants' Br. at 30-31. Plaintiffs rely on *Holmes* to argue that recovery under RICO is limited to "direct" victims because "directly injured victims can generally be counted on to vindicate the law as private attorneys general." *Holmes*, 503 U.S. at 269-70; Appellants' Br. at 30. Here, if there were a RICO violation, the governments would be the directly injured victims who entered into contracts that established the governments' commissions and the rates consumers pay for single-call ICS products, and related transaction service fees. As

the supposed directly injured victims, the governments would have standing to recover damages flowing from the alleged harm suffered as a result of the alleged misrepresentations.

Plaintiffs' argument that misrepresentations to third parties can directly injure Plaintiffs also is unavailing. Appellants' Br. at 31-33. Defendants are not challenging *Bridge's* holding that misrepresentations to a third-party could be actionable in a proper case. *Bridge v. Phx. Bond & Indem. Co.*, 553 U.S. 639, 646 (2008) (finding an injured party "may recover through RICO whether or not it is the direct recipient of the false statements").[5] Here, Plaintiffs' RICO claim fails not just because someone other than Plaintiffs directly received the allegedly false statements, but because Plaintiffs cannot prove proximate causation. As the District Court explained during the April 12, 2022 oral argument: "I don't think the issue is whether or not you can have a RICO claim based upon material misrepresentations or omissions to some third-party other than the plaintiff …. [The issue is] whether those types of misrepresentations [regarding pricing] in this fact pattern and the injury to the Government because of them is connected to whatever injury would be connected to [Plaintiff]." JA340.

---

[5] Notably, the Supreme Court in *Bridge* also acknowledged that "the absence of first-party reliance may in some cases tend to show that an injury was not sufficiently direct to satisfy § 1964(c)'s proximate-cause requirement, but it is not in and of itself dispositive." *Bridge*, 553 U.S. at 659.

Plaintiffs' series of attempts to fit their facts within the legal framework of their RICO claim are unsuccessful. The District Court correctly dismissed Plaintiffs' RICO claims because it found Plaintiffs' alleged injury was indirect and too remote to establish proximate causation under RICO.

B. Plaintiffs Cannot Establish RICO Proximate Causation Because Their Liability Theory Relies On The Independent And Intervening Actions Of Third-Party Contracting Governments.

The District Court correctly found that Plaintiffs cannot establish RICO proximate causation because Plaintiffs' theory of liability depends on speculation about the independent and intervening actions of the third-party contracting governments. JA164. Because the contracting governments are independent third parties, "Plaintiffs only speculate about what actions the contracting governments might have taken if defendants had not made the alleged misrepresentations and/or omissions." *Id.* Stated otherwise, the fact that Plaintiffs' RICO claim turns on a prediction about how non-party governments would or may have behaved had they—the non-parties—been told other or different facts demonstrates that Plaintiffs themselves are not the ones directly impacted by the challenged statements.

Courts, including the Supreme Court, find proximate causation lacking under RICO when the alleged injuries are indirect and result from intervening causes. In *Hemi Group*, for example, the Supreme Court found no proximate causation because "[m]ultiple steps … separate the alleged fraud from the asserted injury" and there

are "independent factors" that account for the plaintiff's injury. 559 U.S. at 15 (stating that "theory of liability rests on the independent actions of third and even fourth parties"). In doing so, the Supreme Court contrasted the circumstances in *Bridge*, 553 U.S. 639, in which there were "no independent factors that account[ed] for [the plaintiffs'] injury." *Hemi Grp.*, 559 U.S. at 3 (quoting *Bridge*, 553 U.S. at 658) (alterations in original). And in *Slay's Restoration*, the Fourth Circuit affirmed the district court's dismissal of the plaintiff's RICO claim, holding that the "potential intervening causes" of the plaintiff's injuries precluded the plaintiff from establishing proximate causation. 884 F.3d at 495.

In this regard, Plaintiffs' RICO claims closely resemble those dismissed by the District of Maryland in *Rojas*, in which plaintiff's injury was premised on the theory that a government entity would have acted differently "had it known the truth":

> [T]o the extent that Plaintiffs attempt to rely on misrepresentations that Defendants allegedly made to [government representatives], there is no 'sufficiently direct relationship' between these statements and the harm to Plaintiffs …. '[The] theory of liability rests on the independent actions of third-parties' by assuming that the … government would have taken those steps had it known the truth, so the causal link is too attenuated for those alleged misrepresentations to serve as the basis for Plaintiffs' RICO claim.

425 F. Supp. 3d at 542 (dismissing RICO claim) (quotations omitted).

Like in *Rojas*, the alleged overcharge that Plaintiffs paid here derives from the

initial purported harm that Plaintiffs contend the governments suffered by allegedly entering into fraudulently induced contracts with unfavorable terms. *See id.* at 543. Not only are Plaintiffs' alleged injuries indirect, they also are too speculative to satisfy RICO's proximate cause requirement. Plaintiffs' theory is that the various contracting governments agreed to terms that they "would not have permitted" had they been negotiating in an untainted competitive marketplace. JA32, JA70; *see also* JA81, JA100. Thus, to determine what, if any, harm Plaintiffs suffered as a result would require individual (and extraordinarily speculative) inquiries as to what price level and commission rates each contracting government would have negotiated "had it known the truth." *Rojas*, 425 F. Supp. 3d at 542.[6]

Plaintiffs' allegations that former executives believed contracting governments *would have* required Securus and GTL to lower the prices of single calls does not make the alleged harm any less speculative. JA32, JA70, JA81, JA100. Indeed, what Defendants' former executives believed contracting governments would have done is itself pure conjecture. Plaintiffs have failed to identify a single governmental entity that specifically represented with respect to single-call products that had they not received Defendants' alleged

---

[6] Plaintiffs' feeble attempt to distinguish *Rojas* because their complaint did not contain declarations from former employees and the Mexican governments apparently had knowledge of the fraudulent scheme does not make *Rojas* and its reasoning regarding proximate cause any less applicable. Appellants' Br. at 41-42.

misrepresentations, they would have negotiated different terms in the ICS contract.[7]

And Plaintiffs compound the speculation by asserting that "enough governments would have demanded lower single call prices to force Defendants to reduce them." Appellants' Br. at 36. But Plaintiffs do not allege that the specific governments that negotiated the rates they paid would have done so, even if some governments might have.[8] Even among the governments that might have negotiated different terms had they "known the truth," there is no way to predict which terms might change or how. So even if one assumed without basis that these Plaintiffs suffered injury-in-fact because the governments that negotiated the contracts

---

[7] Plaintiffs cannot even do this in their PAC after interviewing "more than 40 city and/or county officials in different jurisdictions across the country, along with attempting to contact competitors and other witnesses with knowledge of procurement and/or industry practices relating to single-call products." JA313-314.

[8] Plaintiffs do not allege that the *specific contracting governments* that negotiated the contracts for the calls identified in paragraphs 26-29 of the original Complaint would have acted differently in the absence of the alleged fraudulent statements. JA34. Thus, Plaintiffs have not adequately alleged fact-of-injury, and they cannot overcome that defect because this case is pled as a putative class action. *See Lewis v. Casey*, 518 U.S. 343, 357 (1996) (The fact "[t]hat a suit may be a class action … adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.'") (citations omitted); *Baehr v. Creig Northrop Team, P.C.*, 953 F.3d 244, 252–53 (4th Cir. 2020) ("In a class action, we analyze standing based on the allegations of personal injury made by the named plaintiffs. A putative class thus cannot establish Article III standing without a sufficient allegation of harm to the named plaintiff in particular.") (internal quotations and citations omitted).

establishing the rates *they* paid would have received better terms because of what *other governments* would have negotiated, Plaintiffs' injuries would depend on a highly attenuated chain of causation that would require reconstructing the decision-making process of myriad contracting governments to ascertain if (and how), without the alleged fraudulent misrepresentations, those governments would have acted differently, and then what impact such different behavior would or might have on Defendants' negotiations with yet other contracting governments that set the rates paid by Plaintiffs, among other contract terms. *See, e.g.*, *Brandenburg v. Seidel*, 859 F.2d 1179, 1189-90 (4th Cir. 1988) (affirming dismissal for lack of proximate cause where "the causal connection was in factual terms an extremely attenuated one" and noting that "cause-in-fact connection, standing alone, does not suffice to establish liability" under RICO).

Such speculative claims cannot satisfy RICO's proximate causation requirement. *See Rojas*, 425 F. Supp. 3d at 542; *see also Anza*, 547 U.S. at 458 ("[T]he less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors.") (quoting *Holmes*, 503 U.S. at 269). Because the cost of the single-call products is the result of the independent action of a third-party not before the court, *i.e.*, a price agreed upon by the correctional facilities, Plaintiffs simply cannot satisfy the proximate cause standard in 18 U.S.C. § 1964(c). *See Mayor &*

City Council of Baltimore v. Wells Fargo Bank, N.A., 677 F. Supp. 2d 847, 849-50 (D. Md. 2010) ("When claimed injuries are 'highly indirect' and result from 'the independent action of some third party not before the court,' too much speculation is required to connect the links in the chain of causation.") (internal citation omitted); *Sierra Club v. U.S. Def. Energy Support Ctr.*, No. 11-cv-41, 2011 WL 3321296, at *5 (E.D. Va. July 29, 2011) (same).

In an attempt to detract from this fundamental flaw in Plaintiffs' liability theory, Plaintiffs argue that the District Court's rejection of intervening causes concerning the antitrust claim applies to Plaintiffs' RICO claims. Appellants' Br. at 42-43. In fact, the District Court should have dismissed Plaintiffs' antitrust claims for lack of proximate causation for the same reason that it dismissed the RICO claims, but the District Court's decision on the antitrust issues is not before this Court.

Plaintiffs' intervening cause arguments regarding reliance and foreseeability are also immaterial. Appellants' Br. at 43-46. *Bridge* does not hold that governmental reliance on the alleged fraudulent misrepresentations will never constitute an intervening cause (Appellants' Br. 43-44); rather, it observed only that when the party relying on the alleged misrepresentations was not itself injured, "there are no independent factors that account for respondents' injury" and thus, "no more immediate victim" than the plaintiff. 553 U.S. at 658; *see also Hemi Grp.*, 559

U.S. at 14-15 (distinguishing *Bridge* as involving a "straightforward" and direct theory of causation where bids were awarded on an automatic, rotational basis without an intermediate step reliant on the independent judgment or actions of third parties). As to foreseeability, cases like *Painters v. Takeda* merely held that prescribing physicians do not constitute an intervening cause because the physicians themselves were not injured, and—more importantly—the alleged misrepresentations were made directly to the patient plaintiffs, who relied on them. Appellants' Br. at 46 (citing *Painters & Allied Trades Dist. Council 82 Health Care Fund v. Takeda Pharms. Co.*, 943 F.3d 1243, 1251-52, 1257-59 (9th Cir. 2019). Here, the correctional facilities had discretion to negotiate ICS contracts and exercise their independent judgment regarding their own priorities for favoring higher or lower rates or higher or lower commissions as among the single-call and other products and services for which they contracted. *See* JA38; *supra* at 34-35.

Plaintiffs' RICO claims were properly dismissed by the District Court because Plaintiffs cannot plausibly establish proximate causation.

C. Plaintiffs' RICO Claims As To Defendant 3Ci Also Fail Because Plaintiffs Do Not Allege That 3Ci Participated In The Alleged Fraudulent Misrepresentations.

For the reasons discussed above, the Court should affirm dismissal of the RICO claims as to all Defendants. But even if the Court were to disagree with those arguments, it should nevertheless still affirm the dismissal of all RICO claims

against Defendant 3Ci for the additional reason that Plaintiffs fail to allege 3Ci's involvement in any predicate act (*i.e.*, mail or wire fraud).[9] Plaintiffs cannot rest their RICO claims against 3Ci on other Defendants' alleged fraudulent communications; rather, viable claims against 3Ci could arise only from allegations that 3Ci itself engaged in such communications. *See Adams v. NVR Homes, Inc.*, 193 F.R.D. 243, 250 (D. Md. 2000); *see also Am. Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283, 1291 (11th Cir. 2010) (in RICO case premised on mail and wire fraud, "plaintiff must allege facts with respect to each defendant's participation in the fraud").

Plaintiffs offer no factual allegations that 3Ci communicated with, let alone made misrepresentations to, any government facility. All they can muster is the conclusory allegation that websites maintained by 3Ci were "directed" and "accessible" to government entities. JA71, JA74, JA73, JA77, JA80.[10] There is no legal support for the notion that having allegedly false or misleading information on a website that is "directed" and "accessible" to someone—vague terms Plaintiffs

---

[9] This Court can affirm "on any ground apparent from the record," even if it was not the basis for relief relied upon by the lower court. *Moore v. Frazier*, 941 F.3d 717, 725 (4th Cir. 2019) (citing *Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 660 (4th Cir. 2004)).

[10] Notably, Plaintiffs' allegations as to which misrepresentations or omissions 3Ci is alleged to have participated in do not differ between the operative complaint, JA25–143, and proposed amended complaint, JA166–299.

neither define nor support—constitutes a predicate act under RICO. These conclusions, moreover, are bereft of factual predicate. Plaintiffs offer no allegations that the information in the websites at issue was sent to any government facility, or that any facility viewed, referenced, or relied upon them in deciding to contract for single-call products with Securus or GTL. Accordingly, a RICO claim against 3Ci predicated on alleged fraudulent communications to government facilities—the only theory Plaintiffs pursue on appeal[11]—cannot lie. *See Iqbal*, 556 U.S. at 664 ("mere conclusions[] are not entitled to the assumption of truth"); *see also Rojas*, 425 F. Supp. 3d at 538 (heeding *Iqbal's* instruction to "ignore allegations in a complaint that are merely legal conclusions" in dismissing RICO claim).

Plaintiffs do not, and could not plausibly and particularly, allege that 3Ci communicated material misrepresentations to any government facility, much less that any such facility relied upon such communications in contracting with Securus or GTL for singe-call products. Regardless of whether Plaintiffs' RICO claims against other Defendants are revived, their dismissal as to 3Ci should be affirmed.

---

[11] Plaintiffs' only other RICO allegations as to 3Ci pertain to alleged misrepresentations to consumers, via billing statements and websites, as to the fee breakdown of the single-call products at issue. JA80–84, JA99, JA113. Plaintiffs, however, "do not appeal the District Court's holding that such misrepresentations were insufficient to state a claim for lack of materiality and reliance." Appellants' Br. at 4.

CONCLUSION

For the foregoing reasons, this Court should affirm (1) the District Court's denial of Plaintiffs' motion to amend, and (2) the District Court's dismissal of Plaintiffs' RICO claims.

REQUEST FOR ORAL ARGUMENT

In light of the complexity of the issues raised herein, and the importance of articulating clear and uniform legal standards concerning RICO proximate causation, Defendants respectfully request oral argument.

Date: July 21, 2022

Respectfully Submitted,

/s/ Jason R. Scherr

MORGAN LEWIS & BOCKIUS, LLP
Jason R. Scherr
1111 Pennsylvania Avenue, NW
Washington, DC 20004
T: 202.739.6000
jr.scherr@morganlewis.com

Counsel for Defendant-Appellee Securus Technologies, LLC

ARNOLD & PORTER KAYE SCHOLER LLP
Jonathan I. Gleklen
601 Massachusetts Ave., NW
Washington, D.C. 20001-3743
T: (202) 942-5000
jonathan.gleken@arnoldporter.com

*Counsel for Defendant-Appellee Global Tel*Link Corp.*

WILLIAMS & CONNOLLY LLP
Jonathan B. Pitt
725 Twelfth Street, NW
Washington, DC 20005
T: 202.434.5000
jpitt@wc.com

Counsel for Defendant-Appellee 3Cinteractive Corp.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 11,939 words, excluding the parts of the brief exempted by Rule 32(c)(f). This brief complies with the typeface requirements of Rule 32(a)(5)(A) and the type-style requirements of Rule 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Word version 2018 in 14-point Times New Roman font.

Dated: July 21, 2022

/s/ Jason R. Scherr

Jason R. Scherr

Counsel for Defendant-Appellee Securus Technologies, LLC

CERTIFICATE OF SERVICE

I hereby certify that on July 21, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the U.S. Court of Appeals for the Fourth Circuit by using the CM/ECF system. All participants are registered CM/ECF users, and will be served by the appellate CM/ECF system.

/s/ Jason R. Scherr
Jason R. Scherr
Counsel for Defendant-Appellee Securus Technologies, LLC