11-1390-cv

To Be Argued By:
MARTIN KLOTZ

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

PATRICIA COHEN,

Plaintiff-Appellant,

—against—

S.A.C. TRADING CORP., S.A.C. CAPITAL MANAGEMENT, INC., S.A.C. CAPITAL MANAGEMENT, LP, S.A.C. CAPITAL MANAGEMENT, LLC, S.A.C. CAPITAL ADVISORS, LLC, S.A.C. CAPITAL ASSOCIATES, LLC, SIGMA CAPITAL MANAGEMENT, LLC, BRETT LURIE, EDWARD BAO,

Defendants,

STEVEN A. COHEN, DONALD T. COHEN, C.P.A., P.A.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK (NO. 1:09-CV-10230-RJH)
(HONORABLE RICHARD J. HOLWELL)

BRIEF FOR DEFENDANTS-APPELLEES

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GLOSSARY OF DEFINED TERMS

Term	**Defined as**
1AC	First Amended Complaint filed April 5, 2010
2AC	Second Amended Complaint filed July 29, 2010
1988 Financial Statement	Statement of Financial Condition as of July 1, 1988
1991 Alleged Fraud Proceedings	The proceedings in the Supreme Court of New York in 1991 arising from Patricia Cohen's motion to set aside the Settlement Agreement on the grounds, among other things, that it was "procured by fraud and economic duress"
1991 Motion	Patricia Cohen's March 21, 1991 motion in the Supreme Court of New York to set aside the Settlement Agreement
Amended Settlement Agreement	Amendment to Stipulation of Settlement and Separation Agreement Between Steven A. Cohen and Patricia Cohen dated December 15, 1989, executed on January 6, 1992
August 6 Order	Decision and Order of Hon. Walter M. Schackman, dated August 6, 1991
Br.	Brief and Special Appendix for Plaintiff-Appellant
Gruntal	Gruntal & Co. L.L.C., Steven Cohen's former employer
Complaint	Complaint filed December 9, 2009
Judgment of Divorce	Steven Cohen and Patricia Cohen's Judgment of Divorce, dated March 13, 1990
Kera Aff.	The affirmation dated May 8, 1991, filed by Martin Kera, Patricia Cohen's counsel in the 1991 Alleged Fraud Proceedings

Lurie Investment	The investment by Steven Cohen and Brett Lurie in real estate in New York City for conversion to co-op apartments
Opinion (or Op.)	Memorandum Opinion and Order of Hon. Richard J. Holwell, dated March 22, 2011
Patricia	Plaintiff Patricia Cohen
Patricia's Aff.	Patricia Cohen's affidavit dated March 20, 1991, filed in the 1991 Alleged Fraud Proceedings
Settlement Agreement	Stipulation of Settlement and Separation Agreement entered into on December 15, 1989 by Patricia Cohen and Steven Cohen
S.A.C. Capital	S.A.C. Capital Management, Inc.
SAC	SAC Trading Corporation
Steven	Defendant Steven A. Cohen

STATEMENT OF ISSUES

1. Did the District Court correctly conclude that the Second Amended Complaint does not allege a plausible claim that Steven Cohen defrauded Patricia Cohen during their divorce proceedings more than twenty years ago?

2. Did the District Court correctly conclude that each claim in the Second Amended Complaint is barred by the applicable statute of limitations?

3. May the District Court's decision dismissing the Second Amended Complaint with prejudice be affirmed on the several independent and alternative grounds raised by Defendants below?

STATEMENT OF THE CASE

This action arises from divorce proceedings between Plaintiff Patricia Cohen ("Patricia") and Defendant Steven A. Cohen ("Steven") that concluded more than twenty years ago. In 1989, Patricia Cohen and Steven Cohen entered into a Stipulation of Settlement and Separation Agreement (the "Settlement Agreement") setting forth the terms of their separation. (A121-85.) A divorce judgment, incorporating the Settlement Agreement, was entered on March 30, 1990. (A187-89.) In 1991, Patricia sought to set aside the Settlement Agreement on the grounds, *inter alia*, that it was "procured by fraud" because Steven allegedly concealed his true financial condition during the divorce. (A194-96.) The court presiding over the divorce permitted Patricia to withdraw that claim without prejudice but indicated that Patricia could pursue her fraud claim in a plenary action if she was "so advised." She elected not to do so.

In December 2009, almost twenty years later, Patricia filed this federal RICO action, again claiming that Steven had defrauded her by allegedly concealing his finances during the divorce. Patricia's initial complaint ("Complaint") was filed against Steven Cohen, Donald Cohen (Steven's brother and accountant), S.A.C. Trading Corp., S.A.C. Capital Management, LP, S.A.C. Capital Management, LLC, S.A.C. Capital Advisors, LLC, S.A.C. Capital Associates, LLC, Sigma Capital Management, LLC, and S.A.C. Capital Management, Inc. ("S.A.C. Capital"), and various related entities. That complaint was dismissed voluntarily by Patricia's original counsel within three weeks after its filing.

On April 7, 2010, Patricia, represented by new counsel, filed her First Amended Complaint ("1AC") against Steven Cohen, Donald Cohen, S.A.C. Capital, Brett Lurie (Steven's one-time lawyer and investment partner), Gruntal & Co. L.L.C. ("Gruntal") (Steven's former employer), and Edward Bao, a former executive of Gruntal. After Defendants Steven Cohen, Donald Cohen, and S.A.C. Capital moved to dismiss the complaint, and before responding to that motion, Patricia's second counsel moved to withdraw and stay the proceedings. Thereafter, Patricia retained yet another lawyer, who moved for leave to file a Second Amended Complaint ("2AC"). The 2AC, filed on July 29, 2010, names as Defendants Steven

Cohen, Donald Cohen, and Brett Lurie[1] (all other defendants, including the entity defendants, have been dropped), and asserts claims under the federal RICO statute and for common law fraud, conspiracy to commit common law fraud, breach of fiduciary duty, and unjust enrichment.

On August 20, 2010, Defendants Steven Cohen and Donald Cohen moved to dismiss the 2AC. On March 30, 2011, following oral argument, the District Court issued a 39-page Memorandum Opinion and Order (the "Opinion" or "Op.") (A325-63) dismissing the 2AC in its entirety and with prejudice. The District Court ruled that Patricia had failed to state a cognizable claim of fraud and that all claims were time-barred. The District Court did not separately address the RICO claims on the merits. This appeal followed.

STATEMENT OF FACTS

The following recitation of facts is based on the 2AC, documents incorporated therein by reference, and documents of which the District Court properly took judicial notice.[2]

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1 Lurie has never been served.

2 As it was required to do, the District Court accepted as true, for purposes of the motion to dismiss, Patricia's factual allegations, but correctly observed that it was "not bound to accept as true a legal conclusion couched as a factual allegation." (Op. at 9 (A333)) (quoting *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009)); *see also Achtman v. Kirby, McInerney & Squire LLP*, 464 F.3d 328, 337 (2d Cir. 2006) ("[c]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to [defeat] a motion to dismiss.") (quoting *Smith v. Local 819 I.B.T. Pension Plan*, 291

A. The Cohen Marriage, Lurie Investment And Divorce Proceedings

Patricia and Steven were married in 1979. (2AC ¶ 13 (A74).) By 1985, Steven had become a successful trader at Gruntal, a securities firm in New York. (*Id.* ¶¶ 12, 14 (A74).) In 1986, Steven created SAC Trading Corporation ("SAC"), of which he was President and 100% owner, his brother Donald Cohen, an accountant, its Treasurer, and defendant Brett Lurie, a lawyer, its Secretary. (*Id.* ¶ 16 (A74.) By this time, Steven and Patricia's marriage had deteriorated and the couple had discussed the possibility of a divorce. (*Id.* ¶ 15 (A74).)

In January 1986, Steven told Patricia that he intended to invest "millions of dollars" from SAC with Lurie to purchase real estate in New York City for conversion to co-op apartments (the "Lurie Investment"). (2AC ¶ 17 (A74).) During the next several months, he told her the investment was "going sour," and he and Donald told her that the entire, nearly $9 million value of the investment had been lost, although it could not be written off until the properties went into foreclosure or bankruptcy. (*Id.* ¶¶ 19-20 (A75).) According to the 2AC, Lurie repaid $5.5 million to Steven in and before January 1987, about which Steven, anticipating a divorce, allegedly never told Patricia. (*Id.* ¶ 21 (A75).)

F.3d 236, 240 (2d Cir. 2002).) The District Court also took judicial notice of Patricia's prior pleadings and admissions in earlier court proceedings (Op. at 10-11 (A334-35)), and Patricia does not dispute on appeal that this was proper. (Brief and Special Appendix for Plaintiff-Appellant ("Br.") at 23 n.12.)

In 1988, Steven and Patricia separated and a first set of divorce proceedings resulted in the Settlement Agreement, which was dated December 15, 1989, and filed with the divorce court. (2AC ¶ 22 (A75); Settlement Agreement (A121-85).) Ultimately, the Settlement Agreement was incorporated into a Judgment of Divorce dated March 13, 1990 ("Judgment of Divorce"). (Judgment of Divorce (A187-89).)

During the divorce proceedings, Steven provided Patricia a Statement of Financial Condition dated July 1, 1988 (the "1988 Financial Statement") that listed the couple's net worth as approximately $17 million, with the Lurie Investment listed at $8,745,169. (2AC ¶ 22 (A75); 1988 Financial Statement (A191-92).)

In connection with the divorce proceedings and the Settlement Agreement, Patricia was represented by her own lawyer. (2AC ¶¶ 23-24, 26 (A75-76).) The Lurie Investment – nominally the single largest asset and more than half of the parties' joint assets – was expressly the subject of discussion with Patricia and her counsel. (*Id.* ¶ 24 (A75).) Patricia and her lawyer allegedly relied, in agreeing to a settlement in December 1989, on Steven's and Donald's representations about the Lurie Investment – specifically, that it was valueless. (*Id.* ¶ 26 (A76).)

However, the Settlement Agreement expressly provided that Steven made "no representation as to the value of" the Lurie Investment in the Settlement Agreement. (Settlement Agreement ¶ 14.4 (A165-66).) The Settlement Agreement also stated:

> Each party acknowledges that respective counsel have advised that *under the Equitable Distribution Law of the State* they are each

> entitled to a full disclosure and valuation of all property owned by the other party and that the complete financial disclosure which would be required if this matter continued in litigation has not been obtained, but both parties have advised their counsel that they are aware of these facts and desire to curtail discovery, are unwilling to litigate the issues and desire to proceed with this Agreement on the limited financial data supplied to date and their own knowledge of the other party's financial affairs.

(*Id.* ¶ 14.5 (A166) (emphasis added).) The parties explicitly agreed that the Settlement Agreement was "entire and complete" (*id.* ¶ 19.4 (A172)) and that "[n]o representations or warranties have been made by either party to the other, or by anyone else, except as expressly set forth in this Agreement" (*id.* ¶ 19.5 (A172)). Finally, the Settlement Agreement contained a mutual release. (*Id.* ¶ 14.10 (A167).)

B. Patricia's 1991 Action To Set Aside The Settlement Agreement On the Basis Of Fraud And Duress

On March 21, 1991, barely a year after the Judgment of Divorce, Patricia brought a motion (the "1991 Motion") in the Supreme Court of New York to set aside the Settlement Agreement on the grounds of, among other things, "fraud and economic duress" (the "1991 Alleged Fraud Proceedings"). (1991 Motion ¶ 3 (A194-96).) In support of that motion, Patricia and her lawyer filed sworn affidavits asserting that Steven had misrepresented his financial condition in the divorce. (A198-213; A215-240.) Patricia's March 20, 1991 affidavit ("Patricia's Aff.") asserted:

> Although the Separation Agreement was executed on December 15, 1989, plaintiff *would not disclose his income for 1989* and insisted upon filing a separate income tax return. Because we were still married, and there were fifteen days left in the year, plaintiff could have filed a joint return with me. However, he chose to file under married filing separately even though it meant paying a higher tax. I must assume that he did this because he did not want to disclose his substantially increased income. This failure to disclose by itself should be sufficient to set aside the maintenance and support provisions of the Separation Agreement.

(Patricia's Aff. ¶ 4 (A199-200) (emphasis added).) Patricia's then-counsel, Martin Kera, also filed an affirmation dated May 8, 1991, on Patricia's behalf ("Kera Aff."), explicitly alleging that Steven had concealed his financial circumstances:

> [Mrs. Cohen] is entitled to an inference that *plaintiff did not disclose his finances* because it would reveal that he made more money than he is stating in his affidavit in opposition. . . . He does not want to truthfully disclose his income. He didn't want to disclose it during the matrimonial proceedings and he is refusing to disclose it now before the Court.
>
> *Defendant and I believe that Mr. Cohen has not truthfully stated his income.* Upon information and belief, Mr. Cohen did one of the following: (1) had payments of his income made to his wholly owned corporation, S.A.C. Trading Corp., (2) had payments of his income made directly to his brother Donald, who is his accountant, or (3) deferred payment of his compensation to a later year so that his income tax return during 1989 did not show his true income. . . . I have subpoenaed Mr. Cohen's earnings records from Gruntal. They show earnings of over $7.5 million for 1990 but only $3,060.52 in 1991 through April 15, 1991. Obviously, Mr. Cohen is receiving his money other than directly from Gruntal.

(Kera Aff. ¶¶ 3-4 (A215-16) (emphasis added).)

In opposing Patricia's motion, Steven submitted an affidavit stating that the Lurie Investment was "presently involved in bankruptcy proceedings" and "I am writing it off as totally worthless." (2AC ¶ 31 (A77).) Patricia alleges that this statement was false, but supplies no basis for this assertion other than the fact that, allegedly, Lurie had paid $5.5 million to Steven four years earlier, by January 1987. (*Id.* ¶¶ 21, 32 (A75, 77).) Patricia also alleges that Steven's affidavit "succeed[ed] in preventing [her] from investigating the Lurie real estate deal" (*id.* ¶ 34 (A77)) even though she admits that the supposed fraud of which she now complains was revealed in a publicly available court file to which she had access (*id.* ¶¶ 39, 44 (A78-79)).

On August 6, 1991, the Supreme Court (Schackman, J.) ruled as follows:

> That part of [Patricia's] motion to set aside the separation agreement on the grounds that it was procured by fraud and economic duress is permitted to be withdrawn without prejudice to institute a separate plenary action on this basis if [Patricia] is so advised.

(August 6 Order at 1 (A244).) Patricia chose not to commence such an action. Rather, on January 6, 1992, the parties executed an amended Settlement Agreement, providing for increased child support payments, and reaffirming the fairness of the couple's prior division of marital property, Patricia's waiver of separate maintenance, and her release of all claims ("Amended Settlement Agreement"). (Amended Settlement Agreement (A246-64).)

C. The Four Alleged "Schemes" In The 2AC

The 2AC alleges four different "schemes," each allegedly involving multiple predicate offenses under RICO, but only one of which is alleged to have victimized Patricia. The first, the so-called "Scheme Against Patricia," is based on the alleged misstatement by Steven and Donald of the value of the Lurie Investment, specifically because these defendants allegedly failed to disclose the earlier repayment by Lurie of $5.5 million. This alleged scheme was purportedly carried out through mail fraud, in violation of 18 U.S.C. § 1341, in that the 1988 Financial Statement, Settlement Agreement and Steven's 1991 affidavit were each allegedly mailed to Patricia or her lawyer through the U.S. Mail. (2AC ¶¶ 23, 29, 33, 70, 72-76 (A75-77, A83-84).)

The second alleged scheme, the "Insider Trading Scheme," consisted of Steven's and Donald's alleged $10 million profit from non-public information concerning General Electric Co.'s acquisition of RCA in 1985, in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. (2AC ¶¶ 46-52, 77, 79 (A79-80, A84).) Patricia alleges that, in furtherance of the Insider Trading Scheme, Steven invested the illegally obtained $10 million with Lurie in 1986 so as to avoid reporting it to the I.R.S. as income, in violation of the anti-money laundering statute. (*See id.* ¶¶ 53-54, 78 (A80-81, A84).)

The third alleged scheme, the "Co-Op Scheme," involved Lurie's alleged defrauding of co-op buyers to obtain profits from co-op conversions, perpetrated through SAC and using the U.S. Mail. (2AC ¶¶ 55-63, 71-73 (A81-84).) Lurie was ultimately convicted of fraud in connection with the Co-Op Scheme and served a significant jail sentence. (*Id.* ¶¶ 2, 62 (A73, 82).) Patricia "believes" Steven "agreed with the scheme." (*Id.* ¶ 57 (A81).)

The fourth alleged scheme, the "Second Securities Fraud Scheme," consists of Steven's alleged manipulation of the price of an "undisclosed common stock" while head of a proprietary trading group at Gruntal in 1991, in violation of the federal securities laws. (2AC ¶¶ 64-67, 77 (A83-84).)

Based on the above four alleged schemes, Patricia asserts claims under the federal RICO statute and for common law fraud, conspiracy to commit fraud, breach of fiduciary duty, and unjust enrichment.

D. Patricia's Inconsistent Accounts Of The "Scheme Against Patricia"

Each of Patricia's three complaints is based on the same source of information, the 1987 court file of litigation between Steven Cohen and Brett Lurie over the Lurie Investment. Despite the common source of information, Patricia's three complaints offer different and inconsistent versions of how Patricia was supposedly defrauded in the divorce.

In her original Complaint, Patricia alleges, without explanation, that Steven undervalued the Lurie Investment by "approximately $1 million," but focuses principally on other allegedly undisclosed assets. (Complaint ¶¶ 31-34, 52 (A23-24, A34).) In the First Amended Complaint, the claims of other undisclosed assets are abandoned, and Patricia concedes that the Lurie Investment was in fact worthless as

Steven allegedly said, but she argues that Steven deliberately or recklessly "dissipated" this asset and that she should be entitled to half of the original investment amount. (1AC ¶ 70 (A59).) Only in the 2AC does the allegation surface of an undisclosed "repayment" of $5.5 million by January 1987. (2AC ¶ 21 (A75).)

Moreover, the allegation of a $5.5 million repayment is both suspect and inconsistent with other allegations of the 2AC. Brett Lurie, the sole source of information about the so-called "repayment," was later convicted of fraud in connection with the co-op conversion project that was the subject of Steven's investment. (2AC ¶ 62 (A82).) Lurie was also the defendant in a lawsuit brought by Steven to collect money Lurie owed him when Lurie submitted his affidavit. (*Id.* ¶ 39 (A78).) Further, Patricia herself concedes that the total amount Steven invested with Lurie in 1986 was "almost $9 million" (*id.* ¶ 20 (A75)), and almost $9 million is precisely what Steven listed on the 1988 Financial Statement as the face value of the Lurie mortgages he held after the conclusion of his litigation with Lurie (1988 Financial Statement at 2 (A192)). There is no supposed "repayment" of $5.5 million unaccounted for, and it appears either that Lurie withdrew this claim of "repayment" or that Patricia, reviewing his affidavit more than 20 years later, misunderstood what he was saying.

SUMMARY OF ARGUMENT

The District Court, in a careful 39-page opinion, dismissed Patricia Cohen's claims because she did not allege a plausible theory of fraud and, even if she had, it would be time-barred. Nothing Patricia says in her opening brief reveals any error in the District Court's decision. As discussed below, the Second Amended Complaint was properly dismissed.

First, the District Court correctly held that Patricia has not plausibly alleged that Steven's oral representations to her that the Lurie Investment was "worthless" in 1989 were fraudulent. The only basis she has to suggest otherwise is that, according to Lurie's 1987 affidavit, Steven allegedly received a payment of $5.5 million in and before January 1987. But, as the District Court correctly held, even if this allegation is credited, the receipt of income (the alleged repayment) in one year says nothing about the value of an asset (the Lurie Investment) in a subsequent year.

Patricia's principal argument on appeal – that the District Court "ignored" New York's Equitable Distribution Law (Br. at 9), which supposedly required Steven to disclose the disposition of assets received in earlier years – was not even mentioned in the 2AC or raised below. It is totally improper for Patricia to make this new argument the centerpiece of her appeal. Patricia's reliance on the Equitable Distribution Law is also completely misplaced. The Equitable Distribution Law does not require, as Patricia suggests, that divorcing spouses identify all income received during the marriage and where it came from. Nor does Patricia offer anything but sheer speculation that the 1988 Financial Statement, which listed over $8 million in assets other than the Lurie Investment, did not disclose what happened to the alleged $5.5 million repayment. Finally, and in any event, Article 14.5 of the Settlement Agreement states expressly that Steven and Patricia, advised by counsel, waived the right to a "full disclosure and valuation of all property owned by the other party" under "the Equitable Distribution law of the State." (Settlement Agreement ¶ 14.5 (A166).) If anything, Patricia's new reliance on the Equitable Distribution Law further underscores that Patricia is unable to plead a plausible claim of fraud.

Second, the District Court correctly held that Patricia's claims are all time-barred because she was on notice of those claims and should have discovered them long before the limitations period. In 1991, Patricia not only suspected, but *affirmatively alleged* in court papers, that Steven concealed his financial circumstances from her during their divorce negotiations. On that basis, Patricia argued in 1991 that the Settlement Agreement should be set aside on the grounds that, *inter alia*, it "was procured by fraud." The court overseeing the divorce permitted Patricia to withdraw the fraud claim without prejudice but indicated – in August 1991 – that she could assert the fraud claim in a plenary action if she was "so advised." Patricia chose not to do so. Thus, by 1991, Patricia was on at least inquiry notice of her claim that Steven had allegedly defrauded her in the divorce. In fact, she was accusing him of just that.

Moreover, in 1991 and at all times since, Patricia was completely capable of discovering, and should have discovered, the so-called “secret” Lurie “repayment.” As the 2AC concedes, the facts on which Patricia bases her current lawsuit have been publicly available since 1987 in the Lurie litigation court file – a court file with Steven’s name on it that was kept in the very same court in which Patricia accused Steven of fraud in 1991. The same facts could also readily have been learned through discovery in either the divorce proceeding or the 1991 Alleged Fraud Proceedings.

Seeking to avoid the implications of inquiry notice, Patricia argues that the statute of limitations should be tolled on the basis of the doctrines of equitable tolling and/or fraudulent concealment. But, as with her new argument based on the Equitable Distribution Law, these arguments were not made before the District Court. Indeed, in her briefs below, Patricia expressly disavowed reliance on either equitable tolling or fraudulent concealment, and accordingly those arguments are waived. In any event, the arguments lack merit, as they are based on the erroneous contention that Steven was Patricia’s “fiduciary” until 1992 – two years *after* their divorce was finalized. Likewise, Patricia, once on notice of the alleged fraud, cannot avail herself of the fraudulent concealment doctrine, particularly where she does not allege how she was prevented from discovering the facts on which she now bases her claims.

Third, the District Court's decision may be affirmed for several additional reasons that the District Court did not need to reach. Patricia's claim that she reasonably relied on Steven's alleged misrepresentations fails as a matter of law. Patricia's RICO claim fails because she identifies no "pattern" of racketeering activity (but instead a fraud connected to a single divorce proceeding), she fails to connect the alleged misconduct to a RICO "enterprise," and she does not allege a property interest protected under RICO.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT PATRICIA DID NOT PLAUSIBLY ALLEGE THAT STEVEN DEFRAUDED HER.

As the District Court stated, "[e]ach of the claims alleged in the 2AC sounds in fraud" and is therefore "subject to the heightened pleading standards of Rule 9(b)." (Op. at 12 (A336).) To satisfy Rule 9(b), Patricia must "(1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent." (*Id.* (citing *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290 (2d Cir. 2006) (quotation marks omitted)).) The same is required for RICO predicate fraud acts. (Op. at 12 (A336) (citing *Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 185 (2d Cir. 2008)).)

In addition, even under the general pleading standards of Rule 8(a), a complaint must allege "more than a sheer possibility that a defendant has acted unlawfully" (Op. at 15 (A339) (citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009))), and must contain "factual allegations . . . enough to raise a right to relief above the speculative level" (Op. at 15 (A339) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007))).

As discussed below, the District Court considered each of the three allegedly fraudulent statements identified in the 2AC and correctly concluded that fraud had not been adequately alleged. (Op. at 12-15 (A336-39).)

A. Defendants' Alleged Statement In 1986 That The "Entire Value of the Lurie [I]nvestment" Had Been "Lost"

As the first of her fraud claims, Patricia alleges that "in 1986 Steven and Donald told [her] that Steven had lost the entire value of the Lurie investment." (2AC ¶ 20 (A75).) She alleges that this statement was "false" because "Lurie had actually repaid $5.5 million to Steven by January 1987." (2AC ¶ 21 (A75).) As the District Court explained, this allegation "makes no sense" because the "truth of a statement about the value of an asset in 1986 cannot possibly turn on income received in or by 1987." (Op. at 13 (A337).) Patricia cannot and does not take issue with this holding on appeal.

B. Steven's Alleged Statement During The Negotiations For The Settlement Agreement That The Lurie Investment Was Worthless

Patricia next alleges that in 1988 and 1989, "[d]uring the discussions surrounding the Separation Agreement," Steven told Patricia that the Lurie Investment was "lost – 'a losing trade.'" (2AC ¶ 24 (A75-76).) This appears to be the principal alleged misstatement that Patricia addresses on appeal. (*See, e.g.*, Br. at 9, 13 (focusing on Steven's alleged statement that the Lurie Investment was "worthless").) According to Patricia, this statement was fraudulent because Steven did not disclose that he previously received $5.5 million in payments from Brett Lurie in and before January 1987. (Br. at 13-14.)

The District Court concluded that "this, too, makes little sense." (Op. at 13 (A337).) That Lurie allegedly repaid $5.5 million to Steven by *January 1987* says nothing about the current value of the Lurie Investment in *1989*. (*Id.*) As the District Court explained:

> There is no logical inconsistency between the fact that the owner of a real estate asset received $5.5 million in income from it at one time and a statement that the value of the asset as a going concern a year later is zero. The latter is simply a statement that the asset had no net worth at that time.

(*Id.* at 14 (A338).) In short, even if her allegation is credited, Patricia's case rests on a *non sequitur*. Just because someone receives money in one year from an investment does not prevent the value of that investment from becoming zero in a later year. A statement that a loan is worthless is not inconsistent with having received a payment on that loan in the past.

"Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal*, 129 S. Ct. at 1949 (citations and internal quotation marks omitted); *see also Harris v. Mills*, 572 F.3d 66, 72 (2d Cir. 2009) (following *Iqbal*). The 2AC is devoid of factual content supporting the assertion that Steven's statements concerning the value of the Lurie Investment were false at the time they were made, much less any facts giving rise to "a strong inference of fraudulent intent," which are necessary to support a claim sounding in fraud. (Op. at 12 (A336) (citing *Moore v. PaineWebber, Inc.*, 189 F.3d 165, 173 (2d Cir. 1999)).)

On this appeal, Patricia does not appear to take serious issue with this reasoning. Instead, separate and apart from what Steven said during the negotiations over the Settlement Agreement, Patricia asserts that he had a legal and affirmative obligation to disclose that he received $5.5 million from Lurie in 1987 pursuant to New York's Equitable Distribution Law, N.Y. Dom. Rel. Law § 236. (Br. at 9, 14.) That is wrong.

As an initial matter, despite suggesting that the District Court "ignored" the Equitable Distribution Law (Br. at 9), this is the first time that Patricia has even mentioned this allegation. It is not in the 2AC and was not raised below. Because

Patricia has raised this argument for the first time on appeal, it should be rejected for that reason alone. *See, e.g.*, *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 132 (2d Cir. 2008) ("[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal.'") (quoting *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006)); *Wal-Mart Stores, Inc. v. Visa USA Inc.*, 396 F.3d 96, 124 n.29 (2d Cir. 2005) ("The law in this Circuit is clear that where a party has shifted his position on appeal and advances arguments available but not pressed below, . . . waiver will bar raising the issue on appeal." (internal quotation marks and citation omitted)).[3]

In any event, the argument has no merit. The Equitable Distribution Law quoted by Patricia requires disclosure of "a list of all assets *transferred* in any manner during the preceding three years." (Br. at 9 (emphasis added).) By its

[3] Apparently anticipating a waiver argument, Patricia suggests that her failure to raise the Equitable Distribution Law as a basis for a non-disclosure claim is due to *Defendants'* alleged failure to argue, until oral argument and with the benefit of briefing, that Steven was under no duty to disclose the value of the Lurie Investment. (Br. at 13-14.) That is wrong. *See* Reply Brief in Further Support of Defendants' Motion to Dismiss the Second Amended Complaint at 9-10 (Dkt. No. 56) ("Mr. Cohen was never under an obligation to tell Plaintiff what the Lurie investment was worth in or before 1987. His only obligation was to tell her what assets he had as of the date of the Financial Statement, July 1, 1988."); *see also* Brief in Support of Defendants' Motion to Dismiss the Second Amended Complaint at 22 (A293) ("The alleged fact that Lurie earlier repaid $5.5 million to Steven Cohen is not inconsistent with Mr. Cohen's later statements during the divorce that the Lurie Investment had become worthless.").

terms, this provision, if it applied, would not require the disclosure of the $5.5 million *received* by Steven from Lurie. To the extent Patricia contends that Steven should have disclosed what happened to the $5.5 million – assuming it was received and then transferred, in whole or in part – the Equitable Distribution Law requires only disclosure of block transfers of significant assets, not a detailed accounting of all expenditures over the previous three years. N.Y. Dom. Rel. Law § 236(B)(4) ("transfers in the routine course of business which resulted in an exchange of assets of substantially equivalent value need not be specifically disclosed where such assets are otherwise identified in the statement of net worth.").

Moreover, Patricia's contention that the Equitable Distribution Law required Steven to disclose "where it [the $5.5 million] went" (Br. at 10) assumes that that money was somehow "gone," as opposed to being reflected and accounted for in the statement of assets that was provided. Again, Patricia does not allege any factual basis for this assumption. As the District Court observed, it is "hardly obvious" that the Financial Statement – which lists $9 million in assets in *addition* to the Lurie investment – did not disclose the $5.5 million in cash Steven allegedly received from Lurie, or other assets acquired with this money. (Op. at 14 (A338).) The listed assets include cash, securities, accrued trading profits, and an apartment that could readily explain where the $5.5 million payment went if it was indeed received as Patricia alleges. (1988 Financial Statement (A191).)

Beyond the lack of merit to Patricia's Equitable Distribution Law claim, and its having been waived, the statute is simply inapplicable here for a more fundamental reason. The Equitable Distribution Law applies only to contested divorce proceedings. N.Y. Dom. Rel. Law § 236(B)(4) (requiring exchange of net worth statements upon demand or "after joinder of issue"). The Cohen divorce was not a contested divorce proceeding in which statements of net worth were required to be exchanged. To the contrary, the Cohens entered into the Settlement Agreement before the divorce complaint was even filed. (*See* Settlement Agreement, Recital D (A123).) The parties did so to avoid the expense of litigation and discovery and expressly waived their respective rights under the Equitable Distribution Law. To that end, Article 14.5 of the Settlement Agreement explicitly provides:

> Each party acknowledges that respective counsel have advised that under the Equitable Distribution law of the State they are each entitled to a full disclosure and valuation of all property owned by the other party and that the complete financial disclosure which would be required if this matter continued in litigation has not been obtained, but both parties have advised their counsel that they are aware of these facts and desire to curtail discovery, are unwilling to litigate the issues and desire to proceed with this Agreement on the limited financial data supplied to date and their own knowledge of the other parties financial affairs.

(Settlement Agreement ¶ 14.5 (A166).) The Equitable Distribution Law is, accordingly, completely irrelevant.[4]

C. Steven's Statement That He Had "Fully Disclosed" All His Property To Patricia

Finally, Patricia alleges that Steven falsely represented "that he had 'fully disclosed' all his property to her" because he allegedly did not disclose on the July 1, 1988 Financial Statement that he had received $5.5 million from Lurie in and before January 1987. (2AC ¶ 29 (A76).) The District Court correctly rejected this allegation, reasoning that Patricia provides no "explanation as to why, on a Financial Statement titled 'as of July 1, 1988', Steven had an obligation to disclose funds he had received more than one year before that date." (Op. at 14 (A338).)

As the District Court explained, a financial statement "summarizes an individual's or organization's financial condition on a *specified date* or for a specified period by reporting assets and liabilities." (Op. at 15 (A339) (emphasis in original) (quoting Black's Law Dictionary (9th ed. 2009)).) That Steven allegedly received $5.5 million by January 1987 "says nothing about his assets as of the specified date – July 1, 1988 or whenever he represented in the negotiations that the

[4] *Roussos v. Roussos*, 1980 N.Y. Misc. LEXIS 2736 (N.Y. Sup. Ct. Dec. 17, 1980), on which Plaintiff relies, is not to the contrary. There, the court explained that the "statement of net worth is compulsory in all *contested* actions." *Id.* at *3 (emphasis added). The Cohen divorce was not such an action.

Financial Statement was complete." (*Id.*) If the money was paid to Steven in or before January 1987, he could have subsequently lost it, spent it, or incorporated it into the other assets (such as the personal residence) that were disclosed in the Financial Statement. Patricia's mere speculation that Steven still had but did not disclose the $5.5 million is simply not "enough to raise a right to relief above the speculative level." (Op. at 15 (A339) (quoting *Twombly*, 550 U.S. at 555).)

Patricia asserts that her claim that "Steven still had the money at the time of their separation" is premised on the fact that he listed "it" as an asset on the Financial Statement. (Br. at 15.) That does not make any sense. It is undisputed that Steven held mortgages on Lurie's properties, with a face value of almost $9 million, at all relevant times. Listing those mortgages, while disavowing any representations about their value, has nothing to do with whether Steven had earlier received payments from Lurie. Nor is Patricia correct that the District Court based its analysis of this issue "upon the incorrect assumption that the Lurie Investment *was not listed* on the 1988 Financial Statement." (Br. at 15 (emphasis in original).) The District Court was well aware that the "Statement of Financial Condition" as of July 1, 1988 listed "Queens Corp–Brett Lurie Investment" as an asset. (Op. at 3 (A327); *see also id.* at 12-15 (A336-39).)

In short, the District Court correctly held that Patricia did not allege facts giving rise to a plausible claim for fraud. Nothing Patricia argues on appeal undermines that conclusion.

II. THE DISTRICT COURT PROPERLY HELD THAT ALL OF PATRICIA'S CLAIMS ARE TIME-BARRED.

Even if Patricia could allege a plausible claim that Steven had defrauded her during their divorce in the late 1980s, that claim would be long since time-barred. Many years ago, the Supreme Court observed that statutes of limitations:

> are founded upon the general experience of mankind that claims, which are valid, are not usually allowed to remain neglected. The lapse of years without any attempt to enforce a demand creates, therefore, a presumption against its original validity, or that it has ceased to subsist. . . . [T]hey thus become statutes of repose, protecting parties from the prosecution of stale claims, when, by loss of evidence from death of some witnesses, and the imperfect recollection of others, or the destruction of documents, it might be impossible to establish the truth.

Riddlesbarger v. Hartford Ins. Co., 74 U.S. 386, 390 (1868). The New York Court of Appeals has similarly described statutes of limitation as "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Blanco v. AT&T*, 689 N.E.2d 506, 513 (N.Y. 1997) (citations omitted).

If ever there were a case that is barred by the statute of limitations, this is it. Patricia waited nearly *twenty years* to sue her ex-husband for allegedly defrauding her into entering the Settlement Agreement. This, despite the fact that at the time of the divorce proceedings she made the same charge (fraud) against the same person (Steven) based on the same alleged premise (misrepresenting and hiding his financial wherewithal) resulting in the same injury (causing her to accept less in the divorce). It is far too late now for Patricia to try to revive her fraud claim.

The District Court correctly dismissed all of Patricia's claims on this basis. After a thorough 23-page analysis of the statute of limitations (Op. at 15-38 (A339-62)), the District Court summarized its reasoning as follows:

> [I]n 1991, Patricia both suspected that Steven had defrauded her and was in possession of documented discrepancies between Steven and Donald's various statements regarding the most valuable and important part of Steven's assets [the Lurie Investment]. Since those circumstances should have set off alarm bells, Patricia was placed on notice of facts which should arouse suspicion, and had received information sufficient to alert a reasonable person to the probability that [s]he ha[d] been misled. Patricia therefore had a duty in 1991 to investigate what Steven was hiding. As the court presiding over her 1991 action made clear, Patricia was free to do so. But she did not. That is fatal to her fraud claim here.

(*Id.* at 28 (A352) (citations and internal quotation marks omitted).)

A. The District Court Correctly Concluded That Patricia Was On Inquiry Notice In 1991 When She Affirmatively Alleged That Steven Defrauded Her In The Divorce Proceedings.

The statute of limitations for civil RICO actions is four years. *See Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987). In a civil RICO action, "a plaintiff's action accrues against a defendant for a specific injury on the date that plaintiff discovers or should have discovered that injury." *Bankers*

Trust Co. v. Rhoades, 859 F.2d 1096, 1103 (2d Cir. 1998); *see also In re Merrill Lynch Ltd. P'ships Litig.*, 154 F.3d 56, 58 (2d Cir. 1998). This Court has made clear that where "the facts needed for determination . . . can be gleaned from the complaint and papers . . . that are integral to the complaint, resolution of the issue on a motion to dismiss is appropriate." *Dodds v. Cigna Sec., Inc.*, 12 F.3d 346, 352 n.3 (2d Cir. 1993).

"Where the circumstances are such as to suggest to a person of ordinary intelligence the probability that he has been defrauded, a duty of inquiry arises, and if he omits that inquiry when it would have developed the truth, and shuts his eyes to the facts which call for investigation, knowledge of the fraud will be imputed to him." *Armstrong v. McAlpin*, 699 F.2d 79, 88 (2d Cir. 1983) (citation and internal quotation marks omitted). Moreover, in a fraud-based RICO action, "[k]nowledge of an injury is imputed on the basis of inquiry notice in two ways: (1) if the plaintiff 'makes no inquiry once the duty arises, knowledge will be imputed as of the date the duty arose;' but (2) if 'some inquiry is made [after the duty arises], we will impute knowledge of what [a plaintiff] in the exercise of reasonable diligence [ ] should have discovered concerning the [injury], and in such cases the limitations period begins to run from the date such inquiry should have revealed the [injury].'" *Marshall v. Milberg LLP*, 2009 WL 5177975, at *3 (S.D.N.Y. Dec. 23, 2009) (quoting *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 167-68 (2d Cir. 2005)).

As Patricia acknowledges, the "same" inquiry notice standard discussed above applies to her common law fraud and breach of fiduciary duty claims. (Br. at 30 n.15; *see also* Op. at 36 (A360) ("The parties generally concede that application of the statute of limitations to Patricia's RICO claim goes hand-in-hand with application of the statute of limitations to Patricia's common law fraud claim.").) The statute of limitations for those claims under New York law is the greater of (i) six years or (ii) two years from when plaintiff discovered the fraud, or "could with reasonable diligence have discovered it." N.Y. CPLR § 213(8); *id.* § 203(g); *see also Dinger v. Kling Agency, Inc.*, 237 A.D.2d 326, 327 (N.Y. App. Div. 1997).

Patricia cannot seriously contest that she was on inquiry notice – if not actual notice – in 1991 that she had been allegedly defrauded into entering the Settlement Agreement. Indeed, in her appeal brief, she admits that she accused Steven of not one, but two, such "frauds" in her 1991 Motion: "Steven's hidden income for 1989 and Steven's misrepresentation of his 1989 earnings from Gruntal & Co." (Br. at 20.) In other words, she claimed then, as she does now, that Steven allegedly "had hidden assets" from her in the divorce. (*Id.* at 22; *see also id.* at 20-21.)

Nevertheless, Patricia contends that she was not on notice in 1991 "about the RICO fraud she complains of here." (Br. at 30.) Rather, according to Patricia, the "frauds" she alleged in 1991 "arose from an entirely separate transaction." (*Id.*) That argument is untenable. The "transaction" at issue both in 1991 and in the current lawsuit is exactly the same: the Settlement Agreement. She alleged in 1991 that she had been defrauded into entering the Settlement Agreement and she makes the same claim now.

To be sure, the "allegations are not identical." (Op. at 20 (A344).) In 1991, Patricia alleged that Steven hid money received from his employer in 1989. In 2009, Patricia alleges that Steven hid other money (the $5.5 million from the Lurie Investment) received in 1987. What Patricia appears to be arguing is that, even though she knew or suspected enough to make the former charge in 1991, the statute of limitations did not begin to run at that time because she did not have actual knowledge of the allegedly additional undisclosed money from the Lurie Investment. But that argument slices things too thinly, and does not wash.

Inquiry notice, not actual notice, is all that is required to trigger the statute of limitations, and, as the District Court stated, one "does not have to have notice of the entire fraud being perpetrated to be on inquiry notice." (Op. at 21 (A345) (quoting *Dodds*, 12 F.3d at 352); *see also Brimo v. Corporate Express, Inc.*, 229 F.3d 1135, 2000 WL 1506083, at *2 (2d Cir. Oct. 6, 2000) ("It is not necessary that this information put a plaintiff on notice of the entire wrongdoing."); *Bankers Trust*, 859 F.2d at 1102; *In re Merrill Lynch*, 154 F.3d at 58. Where Patricia's own 1991 pleadings and affidavits indicate that she was suspicious of fraud in connection with a transaction – the divorce settlement – that she now contends was fraudulent in other, similar respects, "[i]t is of no moment" that she did not discover until later "the full enormity" of the alleged fraudulent scheme. (Op. at 22 (A346) (quoting *Klein v. Bower*, 421 F.2d 338, 343 (2d Cir. 1970)).) Rather, Patricia "had by [her] own admission sufficient knowledge [at that time] to put [her] on notice as to any alleged fraud. Therefore, the statutory period began to run then and did not await [her] leisurely discovery of the full details of the alleged scheme." *Id.*

Here, as the District Court correctly recognized, "this is a case where, some twenty years ago, Patricia alleged the same kind of fraud—hiding assets—by the same person—Steven—in the same negotiations at the same time." (Op. at 25 (A349).) She even alleged in 1991, as she does now, that Steven had used his brother and/or SAC to divert and conceal assets from her. (Kera Aff. ¶ 4 (A216).)[5] Patricia's prior allegations of fraud are plainly sufficient to show that she was on inquiry notice of her current fraud claims at that time. (Op. at 19-20 (A343-44) (discussing *Ainbinder v. Kelleher*, 1997 WL 420279, at *5 (S.D.N.Y. July 25, 1997) ("the plaintiff's own words indicate[d] that he had actual knowledge of the alleged fraud" outside the limitations period), and *Ezra Charitable Trust v. Frontier Insurance Group, Inc.*, 2002 WL 87723, at *5-6 (S.D.N.Y. Jan. 23, 2002) (holding that plaintiff was on inquiry notice based on prior securities fraud lawsuit filed by

5 In fact, in her First Amended Complaint, Patricia alleged that the purported nondisclosures of income from 1987 and 1989 were both part of the same "sham" as each other. (1AC ¶¶ 64-65 (A57).)

plaintiffs represented by same counsel making “similar allegations” against defendant).)[6] Indeed, one would be hard pressed to imagine a clearer case of inquiry notice than this.

Moreover, as the District Court points out (Op. at 28 (A352)), although the specific issues on which Patricia focused in 1991 related to income received in 1989, she was *also* aware in 1991 of potential issues relating to the Lurie Investment. This asset constituted more than half the couple’s joint property, making it an obvious focus of attention if Patricia harbored any actual suspicions of fraud, as she claimed at that time. (*Id.*; 1988 Financial Statement (A191-92).) Information about this asset was largely in Steven’s possession, and Steven had pointedly refused to make any binding representations about its value, despite describing it as worthless. (Settlement Agreement ¶ 14.4 (A166).) It would have been reckless in the extreme for either Patricia or her counsel to make no investigation of the Lurie Investment as part of their attempt to void the Settlement Agreement on grounds of fraud.

Neither *Staehr v. Hartford Financial Services Group, Inc.*, 547 F.3d 406, 427 (2d Cir. 2008), nor *Dietrich v. Bauer*, 76 F. Supp. 2d 312, 345 (S.D.N.Y. 1999),

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[6] *See also* Op. at 19 (A343) (citing *Berry Petroleum Co. v. Adams & Peck*, 518 F.2d 402, 410 (2d Cir. 1975); *Calzaturifico Rangoni S.p.A. v. United States Shoe Corp.*, 868 F. Supp. 1414, 1416, 1420-21 (S.D.N.Y. 1994); *Weiss v. La Suisse, Societe D’assurances Sur La Vie*, 381 F. Supp. 2d. 334, 339 (S.D.N.Y. 2005); *Korwek v. Hunt*, 646 F. Supp. 953, 958 (S.D.N.Y. 1986)).

supports Patricia's effort to avoid the statute of limitations. In *Staehr*, this Court found that an action filed in California against Hartford by third parties concerning a "broker-insurer commission scheme" was sufficient to "alert a reasonable investor that something is wrong" and "trigger a duty to inquire" about Hartford, even though the California lawsuit did not discuss the particular "bid-rigging scheme that is one of the bases" of the *Staehr* complaint. *Staehr*, 547 F.3d at 434-35. The Court reversed, however, because it "ha[d] not been demonstrated that this obscure and unpublicized lawsuit" filed by a third party was "reasonably accessible." *Id.* at 435.

Here, by contrast, there is no question that Patricia was aware of her own prior court filings and that they demonstrated that she knew "something was wrong" and was thus on inquiry notice. (*See* Op. at 23-24 (A347-48) (distinguishing *Staehr*).) As the District Court stated, the "proper analogy" here is not between the prior lawsuit in *Staehr* and the court file for Steven's lawsuit against Lurie (allegedly undiscovered by Patricia at the time), but between the prior third-party lawsuit in *Staehr* and Patricia's own 1991 lawsuit against Steven. (*Id.* at 23 (A347).) And if a prior lawsuit by a third party alleging that a defendant fraudulently failed to disclose one piece of information places a plaintiff on inquiry notice of other, related frauds, then *a fortiori* a party's own prior lawsuit alleging one type of fraud places that party on inquiry notice of other, related frauds committed by the same defendant. (*Id.* at 23-24 (A347-48).)

Dietrich is similarly distinguishable, as the District Court held. In that case, the court found that the plaintiff was not on inquiry notice because his suit and a "prior suit" involved "different frauds at different times: the prior suit alleged fictitious sales whereas the suit at bar related to market manipulation and the illegal sale of unregistered stock." (Op. at 25 (A349).) That is not the case here. In 1991, as now, Patricia alleged that Steven "misled her regarding his assets during the negotiations leading to the Settlement Agreement and that he had used SAC to divert and conceal some of his assets from her." (*Id.* at 27 (A351).) In 1991, as she alleges again now, Patricia "both suspected that Steven had defrauded her and was in possession of documented discrepancies between Steven and Donald's statements regarding the most valuable and important part of Steven's assets" (the Lurie Investment). (*Id.* at 28 (A352).) She was therefore "placed on notice of facts which should arouse suspicion" and had "received information sufficient to alert a reasonable person to the probability that [s]he had been misled." (*Id.* (quotations omitted).) Inquiry notice requires no more.

B. The District Court Correctly Held That Patricia Should Have Uncovered The Alleged Fraud From Publicly Available Court Files Prior To The Limitations Period.

Having found that Patricia was on inquiry notice in 1991 of the fraud she now alleges, the District Court also correctly concluded that Patricia should have uncovered – at that or any time prior to the expiration of the limitations period – the supposed $5.5 million payment on which the current action is predicated. (Op. at 28-29 (A352-53).)

According to Patricia, the facts on which her current claims are based were discovered in the "court file in *Steven Cohen and SAC Trading Corp. v. Brett Lurie and Conversion Funding Corp.*, No. 8981/87 (New York Supreme Court, New York County)." (2AC ¶ 39 (A78).) Indeed, she affirmatively alleges that she "learn[ed] of the scheme to hide the $5.5 million" that underlies all her claims "when she saw the *Cohen v. Lurie* court file." (*Id.* ¶ 44 (A79).) Accordingly, the facts giving rise to this action have been publicly available *since 1987* in the public court file of a case in which Steven was the named plaintiff brought in the very same court in which Patricia herself accused Steven of fraud in 1991.

Even the 2AC itself shows that Patricia should have discovered the *Lurie* court file before the end of the limitations period. In the 2AC, Patricia alleges that she began an investigation into Steven after reading an article regarding Gruntal in 2006. (2AC ¶¶ 35-39 (A77-78).) In the course of that investigation, Patricia says that in 2008 she "inadvertently" found the "court file" revealing the alleged $5.5 million payment. (*Id.* ¶ 39 (A78).) Based on those allegations, the District Court explained:

> [W]here Patricia's own complaint alleges that investigating Gruntal led to the discovery of the 1987 Settlement, the Court has every reason to conclude that Patricia was in a position to make the same discovery in 1991 when she had even more reason, to investigate Gruntal and the

> file detailing the 1987 Settlement was as publicly available as it was in 2008.

(Op. at 29 (A353).) While Patricia criticizes this reasoning as "hindsight," it is based on her own complaint allegations and the fact that the *Lurie* file was public at the time she first accused Steven of fraud in the divorce.

On appeal, Patricia tries to create a fact issue as to whether a reasonably "diligent inquiry" should have revealed the facts contained in the publicly available *Lurie* court file. (Br. at 24.) To that end, she argues that she "conducted discovery of Steven's income," "found no fraud," and "withdrew that part of the 1991 Motion seeking to 'modify or set aside the provision of the separation agreement waiving maintenance on the basis of the purported unconscionability of the separation agreement.'" (*Id.* at 23 (quoting August 6 Order at 1 (A242)); *see also* Br. at 24.)

But the facts do not line up with Patricia's argument. *First,* the only "discovery" Patricia purportedly conducted was to "subpoena[] Mr. Cohen's earnings records from Gruntal." (Br. at 23.) Although she claims that "no discovery on . . . Steven in 1991" could have "unearthed" the "Lurie repayment," that is clearly wrong. (*Id.* at 32.) The 2AC alleges that the *Lurie* court file *itself* was sufficient to uncover the alleged fraud. Moreover, the same facts could easily have been obtained through document requests, interrogatories, or a deposition of Steven Cohen, Brett Lurie, or other witnesses had Patricia actually pursued discovery.

Second, it is also not true that Patricia "came away empty handed." (Br. at 23.) Indeed, she found sufficient evidence for her attorney to submit a sworn affirmation attesting that "Defendant and I believe that Mr. Cohen has not truthfully stated his income." (Kera Aff. ¶ 4 (A216).)

Third, Patricia mischaracterizes the divorce court's August 6 Order. In her brief, Patricia quotes from the third paragraph of the order, which addresses her withdrawn argument that the Settlement Agreement was *unconscionable*. (Br. at 23.) But the court addressed Patricia's *fraud* allegations in the first paragraph of its order. The court stated:

> That part of defendant's motion to set aside the separation agreement on the grounds it was procured by fraud and economic duress is permitted to be withdrawn *without prejudice to institute a separate plenary action on this basis if defendant is so advised.*

(August 6 Order at 1 (A242) (emphasis added).) Patricia did not institute a separate plenary action, opting instead to settle her claims in an Amended Settlement Agreement. (Amended Settlement Agreement (A246-64).)

The premise of Patricia's argument – that she satisfied her duty of "due diligence" in 1991 – is thus mistaken. So, too, is her conclusion. The statute of limitations does not turn on what Patricia actually did or did not do in connection with her "investigation." Rather, the question is what would a "plaintiff in the exercise of reasonable diligence" have discovered. *Marshall*, 2009 WL 5177975, at *3; *accord In re Merrill Lynch*, 154 F.3d at 60; *Dodds*, 12 F.3d at 350.

Patricia's reliance on the "diligence-discovery rule of accrual" articulated in *Corcoran v. New York Power Authority*, 202 F.3d 530 (2d Cir. 1999), is misplaced. In *Corcoran*, the Court explained that the *accrual* of an action "may be postponed until the plaintiff has or with reasonable diligence should have discovered the critical facts of both his injury and its cause." *Id.* at 544. However, the Court also explained that discovery of the "critical" facts of injury and causation:

> requires only knowledge of, or knowledge that could lead to, the basic facts of the injury, i.e., knowledge of the injury's existence and knowledge of its cause or of the person or entity that inflicted it. . . . [A] plaintiff need not know each and every relevant fact of his injury or even that the injury implicates a cognizable legal claim. Rather, a claim will accrue when the plaintiff knows, or should know, enough of the critical facts of injury and causation to protect himself by seeking legal advice.

Id. (citation and internal quotation marks omitted). Patricia's fraud claim against Steven in 1991 – in which she alleged both that she was injured in the divorce, and that the injury was caused by Steven's alleged nondisclosure of income – easily satisfies this standard. Not only did she "seek[] legal advice" in connection with that injury, but she asserted a claim against Steven on that basis. *Id.* Her claims accrued by that time, and she was on at least inquiry notice of them.

The other cases on which Patricia principally relies are equally unavailing. In *Rothman v. Gregor*, 220 F.3d 81 (2d Cir. 2000), the plaintiffs initially filed a securities fraud claim against GT Interactive Software Corp. and its officers alleging that they had misrepresented the company's income. *Id.* at 84. In a subsequent amended complaint, plaintiffs named GT's accounting firm, Arthur Andersen, as a defendant, but the district court dismissed that claim as untimely. *Id.* at 96. This Court reversed because the facts necessary to plead Arthur Andersen's scienter had been gleaned from a "PC Data Report," which plaintiffs argued was "customized for them, costly to obtain and not readily accessible to the public." *Id.* at 97-98. But this is not a case where Patricia had no basis to allege that Steven defrauded her until 2009; she made that very claim herself in 1991. Nor can she claim that the facts on which this action is based were "not readily accessible to the public." They had been sitting in a publicly available court file with Steven's name on it since 1987.

Robertson v. Seidman & Seidman, 609 F.2d 583 (2d Cir. 1979), another securities fraud case involving an accounting firm, is similarly distinguishable. There, plaintiff admitted that he suspected fraud in late 1972 or early 1973, hired a lawyer, conducted an investigation, and even intervened in a lawsuit brought against the underwriters and marketmakers that allegedly manipulated the stock of a public company. *Id.* at 588. Plaintiff, however, did not know that the company's accounting firm, Seidman & Seidman, was involved in the fraud until later. *Id.* at 591-92 (noting that the "facts did not implicate Seidman & Seidman"). Indeed, the Court found it "significant" that the Securities and Exchange Commission was not able to name "these accountants as participants in the fraud" until 1976. *Id.* at 592. Here, by contrast, Patricia knew in 1991 exactly who had allegedly defrauded her – Steven Cohen – and could have discovered from publicly available court filings how she now alleges that he did so.

Finally, as the District Court observed, the fact that the *Lurie* file has been publicly available since 1987 also distinguishes this case from *Perlberger v. Perlberger*, 1999 WL 79503, at *3-4 (E.D. Pa. Feb. 12, 1999). (*See* Op. at 29 n.2 (A353).) Patricia does not even attempt to explain away that distinction. (Br. at 28-29.)[7]

Simply put, the same publicly available court file that contains the key facts giving rise to this lawsuit "was as publicly available [in 1991] as it was in 2008." (Op. at 29 (A353).) Patricia should have discovered those facts in 1991 when she accused Steven of defrauding her during the divorce, or at some point "prior to the limitations period." (Op. at 28 (A352) (citation and internal quotation marks omitted.)

C. No Tolling Doctrines Rescue Patricia's Stale Claims.

In Points III and IV of her appeal, Patricia argues that her claims are not time-barred because the statute of limitations was tolled. (Br. at 33-47.) However,

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[7] *Harding v. Naseman*, 2008 WL 4900562 (S.D.N.Y. Nov. 14, 2008), is likewise inapposite. In that case, plaintiff was told in 2006 that she had been defrauded in her divorce by the defendant's second ex-wife, and a fact issue existed as to whether she could have discovered on her own that she had been defrauded before that time. *Id.* at *9. Here, Patricia knew in 1991 that she had a fraud claim arising from the divorce and asserted it against Steven at that time.

Patricia expressly disavowed reliance on principles of tolling before the District Court. In opposing Defendants' motion to dismiss, she stated in no uncertain terms that "*Patricia does not rely on equitable tolling*" and "*Patricia does not, and need not, rely on the doctrine of 'fraudulent concealment'* or any other tolling doctrines." (Plaintiff Patricia Cohen's Response to the Defendant's Motion to Dismiss the Second Amended Complaint at 12 (Dkt. No. 55) (emphasis added).) That should end the matter, for having waived these tolling arguments, Patricia should not now be heard to assert them on appeal. *See, e.g.*, *In re Nortel Networks*, 539 F.3d at 132; *Wal-Mart*, 396 F.3d at 124 n.29.

If, however, Patricia's tolling arguments are considered, they have no merit for the reasons discussed below.

1. Steven's fiduciary relationship with Patricia ended at least by the time they were divorced in 1990 and cannot be a basis for tolling the statute of limitations until 2009.

Patricia argues that the statute of limitations should be tolled based on a fiduciary relationship she allegedly had with Steven until 1992. (Br. at 11.) This argument is totally meritless, as it ignores the fact that the Cohen divorce was finalized in 1990 and she sued Steven for fraud in 1991.

Patricia and Steven's divorce was finalized on March 13, 1990. (Judgment of Divorce (A187-89).) At that time, if not before, their fiduciary relationship as husband and wife ended. *Cf. Morris v. Crawford*, 304 A.D.2d 1018, 1021 (N.Y.

App. Div. 2003) ("the fiduciary relationship between partners terminates upon notice of dissolution"); *Westchester Religious Inst. v. Kamerman*, 262 A.D.2d 131, 132 (N.Y. App. Div. 1999) (officers of a corporation "openly repudiated their fiduciary obligations" at the time they left their "positions of trust").[8] Once the marriage was over, the limitations period for any claims Patricia might have had against Steven was no longer tolled. *See Golden Pacific Bancorp v. Fed. Deposit Ins. Corp.*, 273 F.3d 509, 518 (2d Cir. 2001).

Nevertheless, Patricia asserts that the fiduciary relationship continued until 1992 because "Patricia had an ongoing relationship with Steven" and Patricia was "dependent upon Steven for financial data." (Br. at 40.) But they did not have an "ongoing" marriage, the type of relationship that gives rise to a fiduciary duty. Rather, any "ongoing" relationship Steven had with Patricia at that time was of a contractual – not fiduciary – character pursuant to the Settlement Agreement itself. Contrary to Patricia's suggestion, the Settlement Agreement was "finalized" in

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[8] The proposition that ex-husbands generally do *not* continue to owe their ex-wives a fiduciary duty after the end of the marriage is so axiomatic that we could find no New York cases discussing the issue. Other state courts, however, have made this point clear. *See, e.g.*, *Grossnickle v. Grossnickle*, 935 S.W.2d 830, 846 (Tex. Ct. App. 1996) (no fiduciary duty exists between spouses after the termination of the marriage); *Gerow v. Covill*, 960 P.2d 55, 64 (Ariz. Ct. App. 1998) ("a fiduciary relationship between spouses does exist with respect to community assets until the marriage is terminated."); *Smith v. Smith*, 860 P.2d 634, 643 (Idaho 1993) (the fiduciary duty "continues until the moment of the marriage's termination.").

December 1989, not when it was *amended* in January 1992. The only reason Patricia was "dependent upon Steven for financial data" in 1991 was because she had sued him for fraud. Far from staying in a relationship of confidence and trust, by 1991, Steven and Patricia were divorced and litigation adversaries. They were not fiduciaries.[9]

Patricia apparently wishes to extend the fiduciary relationship until 1992 so that "she cannot be found to have breached a duty of 'due diligence' by not suspecting Steven had concealed assets from her during the fiduciary relationship." (Br. at 41.) That also makes no sense. Even assuming that Steven and Patricia were fiduciaries until 1992 – which they were not – Patricia *did* accuse Steven in court

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9 *See, e.g.*, *World Wrestling Entm't, Inc. v. Jakks Pac., Inc.*, 530 F. Supp. 2d 486, 528 (S.D.N.Y. 2007) ("it is not reasonable to rely on fiduciaries once the plaintiff is aware of facts that would lead a reasonable person to no longer trust its fiduciary"); *Addeo v. Braver*, 956 F. Supp. 443, 451-52 (S.D.N.Y. 1997) ("Once plaintiffs were thereby left with reason to be suspicious of [their fiduciary], it was no longer reasonable for them to defer to his representations."); *Butala v. Agashiwala*, 916 F. Supp. 314, 320 (S.D.N.Y. 1996) ("Whatever duties the defendants owed to the plaintiffs, their alleged failure to disclose facts would not excuse the plaintiffs' lack of diligence in investigating the facts of which they were unquestionably aware.") (citations omitted). Patricia suggests that these cases are not good law because they do not cite this Court's holding in *Golden Pacific*, but Patricia does not explain why that matters. *Golden Pacific* is not contrary to *Jakks*, *Addeo*, or *Butala*, and stands for the unremarkable proposition that "the limitations period for claims arising out of a fiduciary relationship does not commence until the fiduciary has openly repudiated his or her obligations or the relationship has been otherwise terminated." 273 F.3d at 518 (citations and internal quotation marks omitted). Here, that occurred by 1990 at the latest when Steven and Patricia were divorced.

filings and sworn affidavits in 1991 of concealing assets from her in the divorce negotiations. She was on inquiry notice of fraud and the limitations period began to run at that time. As the District Court noted, "Patricia fails to cite any case in which a court has found that the fact that a defendant owed a plaintiff a fiduciary duty renders inquiry notice inapplicable." (Op. at 30 (A354).)

Sargiss v. Magarelli, 909 N.E.2d 573, 576 (N.Y. 2009), is not "directly on point." (Br. at 37.) As Patricia acknowledges, in that case, "the wife did not allege fraud in the divorce court." (*Id.*) Moreover, in that case, "there [wa]s no indication that plaintiff had knowledge of the alleged fraud prior to her daughter's discovery of certain financial documents" and "it [wa]s unclear how plaintiff could have discovered the alleged fraud earlier than she did." *Sargiss*, 909 N.E.2d at 532. Here, Patricia knew enough to allege fraud in 1991, and the facts she now claims were unknown to her were sitting in publicly available court files since 1987.[10]

Finally, even assuming that Patricia was correct, and the statute of limitations was tolled until 1992, it would make no difference. Patricia did not file this action until 2009, long after all applicable statutes of limitations had expired. Tolling means that the limitations period did not begin until after the fiduciary relationship

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[10] *Manes v. Manes*, 277 A.D. 2d 359 (N.Y. App. Div. 2000), *Chapin v. Chapin*, 12 A.D.3d 550 (N.Y. App. Div. 2004), and *Murphy v. Murphy*, 212 A.D.2d 583 (N.Y. App. Div. 1995), are similarly distinguishable. None of those cases involved an ex-wife who, twenty years earlier, had filed a fraud action against her ex-husband in connection with the couple's divorce.

ended, not that it is postponed indefinitely. *See, e.g.*, *Golden Pacific*, 273 F.3d at 518. Indeed, if the law were otherwise, no claim arising from a fiduciary relationship could ever be time-barred.

2. Patricia's reliance on the fraudulent concealment doctrine is misplaced.

Under Second Circuit law, to properly plead fraudulent concealment, Patricia must allege three elements with particularity: "(1) wrongful concealment by [defendants], (2) which prevented [plaintiff's] discovery of the nature of the claim within the limitations period, and (3) due diligence in pursuing the discovery of the claim." *In re Merrill Lynch*, 154 F.3d at 60. Moreover, "Plaintiff must plead each of these elements with particularity as required by Rule 9(b)." *Nat'l Group for Commc'ns & Computers Ltd. v. Lucent Techs. Inc.*, 420 F. Supp. 2d 253, 265 (S.D.N.Y. 2006).

Most fundamentally, Patricia's fraudulent concealment theory is totally inapplicable because by 1991, at the latest, Patricia was on notice of – indeed had launched – a claim of fraud. "The doctrine of fraudulent concealment [for tolling the statute of limitations] does not come into play, whatever the lengths to which a defendant has gone to conceal the wrongs, if a plaintiff is on notice of a potential claim." *Cantor Fitzgerald Inc. v. Lutnick*, 313 F.3d 704, 713 (2d Cir. 2002) (alteration in original); *accord 131 Main St. Assocs. v. Manko*, 179 F. Supp. 2d 339, 348 (S.D.N.Y. 2002); *Porwick v. Fortis Benefits Ins. Co.*, 2004 WL 2793186, at *6 (S.D.N.Y. Dec. 6, 2004).

Putting that aside, Patricia makes no allegations of due diligence at all. To the contrary, the 2AC concedes that despite her suspicion of fraud in 1991, she never made any attempt from 1991 to September 2007 to investigate a potential fraud claim. (2AC ¶¶ 35-38 (A77-78).) Not only in the divorce proceedings, but also in the subsequent fraud proceedings, and in the plenary action the court invited her to bring, Patricia had the ability to compel the production of party and non-party documents, take depositions, and obtain further details of Steven's finances to support her claim of fraud, including the publicly available Lurie file.

Patricia also offers no explanation for how Steven prevented her from investigating her fraud claim for some 16 years after the 1991 Motion. Indeed, Patricia does not even allege a single act of concealment that postdates 1991. Patricia's fraudulent concealment claim therefore fails to save her untimely claims.

III. THIS COURT MAY AFFIRM ON SEVERAL INDEPENDENT GROUNDS THAT THE DISTRICT COURT DID NOT NEED TO REACH.

On appeal, this Court may affirm the District Court's dismissal on any independent and adequate grounds raised by Defendants below. *See Scott v. Fischer*, 616 F.3d 100, 105 (2d Cir. 2010); *Thyroff v. Nationwide Mut. Ins. Co.*, 460 F.3d 400, 405 (2d Cir. 2006). Those grounds are addressed below.

A. Patricia's Fraud Allegations Are Defective Because Patricia Did Not Reasonably Rely On Any Statements Relating To The Value Of The Lurie Investment.

An essential element of fraud is reasonable reliance. *See Wynn v. AC Rochester*, 273 F.3d 153, 156 (2d Cir. 2001). According to Patricia, Steven's allegedly false representations concerning the value of the Lurie Investment "induced" her to "agree to the Settlement Agreement." (2AC ¶ 70 (A86).) But Article 14.4 of the Settlement Agreement expressly provides that:

> *Husband makes no representation as to the value* of the interest in a second and third mortgage on various properties involved in cooperative conversions in Queens, New York in which the investment was listed on his statement of financial condition dated as of July 1, 1988 at a value of $8,745,169 [the Lurie Investment].

(Settlement Agreement § 14.4 (emphasis added) (A165-66).) Similarly, Article 19.5 of the Settlement Agreement states that Patricia is not relying "upon any representation or warranty not expressly set forth herein." (*Id.* ¶ 19.5 (A172).)

Those disclaimers establish as a matter of law that Patricia did not rely and could not have relied – much less reasonably relied – on Steven's alleged oral representations about "the value of the Lurie investment" (2AC ¶ 68 (A86)), when she agreed to enter into the Settlement Agreement. *See Harsco Corp. v. Segui*, 91 F.3d 337, 345 (2d Cir. 1996) (contractual language acknowledging that no representations have been made "destroys the allegations in plaintiff's complaint that the agreement was executed in reliance upon contrary . . . oral representations") (internal quotation and citation omitted, alteration in original); *Unicredito Italiano SpA v. JPMorgan Chase Bank*, 288 F. Supp. 2d 485, 498-99 (S.D.N.Y. 2003) (dismissing fraud claim because statements "on their face" precluded reasonable reliance).[11]

Cohen v. Cohen, 1 A.D. 2d 586 (N.Y. App. Div. 1956), is precisely on point, although the names of the parties are entirely coincidental. In the earlier *Cohen* case, a wife claimed that she was induced to abandon certain litigation claims by her husband's misrepresentation that he would effect a reconciliation with her, even though their separation agreement included an express disclaimer by the husband about "the continuation of the [parties'] marital status." *Id.* at 586. Reasoning that this disclaimer was as broad as the claimed misrepresentation, the court held that the plaintiff could not reasonably have relied on the defendant's alleged oral misrepresentation. *Id.* at 587-88. Here, too, where the parties expressly acknowledged in the Settlement Agreement that Steven made no representation about the value of the Lurie Investment, Patricia cannot now sue on an alleged oral representation about the value of this asset.

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[11] Nor were the matters to which these disclaimers applied peculiarly within Steven's knowledge, as Patricia herself alleges that the facts about the Lurie Investment were publicly available from "court files." (2AC ¶ 39 (A78).)

B. The 2AC Does Not State A RICO Claim.

1. Patricia has not pleaded a "pattern" of racketeering activity.

Patricia's RICO claims fail because she has not adequately alleged the "pattern" element.

As the Supreme Court has cautioned, a "pattern of racketeering activity" means at least two predicate acts that "are related, *and* that . . . amount to or pose a threat of continued criminal activity." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 239 (1989) (emphasis in original). Courts across the country routinely hold that allegations that a spouse's singular goal to conceal marital property in a divorce do not satisfy the "pattern" element, and thus that a contentious divorce does not give rise to a RICO claim. *See, e.g.*, *Rosner v. Rosner*, 766 F. Supp. 2d 422, 426 (E.D.N.Y. 2011); *Ruttenberg v. Ruttenberg*, 2009 WL 424548, at *4 (N.D. Ill. Feb. 18, 2009) (collecting cases); *Martinez v. Martinez*, 207 F. Supp. 2d 1303, 1306-07 (D.N.M. 2002), *aff'd in relevant part*, 62 F. App'x 309, 313 (10th Cir. 2003); *Hibbard v. Benjamin*, 1992 WL 300838, at *3 (D. Mass. Sept. 21, 1992); *Streck v. Peters*, 855 F. Supp. 1156, 1166 (D. Haw. 1994); *Dibbs v. Gonsalves*, 921 F. Supp. 44, 50 (D.P.R. 1996).

These holdings are consistent with the proposition that alleged RICO schemes involving a single victim and a natural termination point – such as a divorce action – establish neither the "open-ended" nor "closed-ended" continuity necessary to allege a "pattern." *See, e.g.*, *United States v. Aulicino*, 44 F.3d 1102, 1113 (2d Cir. 1995) (no pattern alleged where "a defendant had a piece of property the sale of which, even if by fraudulent means, provided a natural end to his project"); *Acme American Repairs, Inc. v. Katzenberg*, 2010 WL 3835879, *6 (E.D.N.Y. Sept. 24, 2010) ("courts in this Circuit have held that RICO allegations involving minimal variety in predicate acts, a limited number of participants or victims, and a discrete scheme with a narrow purpose are generally insufficient to establish a close-ended continuity pattern"); *accord Gross v. Waywell*, 628 F. Supp. 2d 475, 494 (S.D.N.Y. 2009).

Here, the only relevant alleged scheme that harmed Patricia, the so-called "Scheme Against Patricia," involved a single alleged victim and was limited to a single divorce action with a natural end point. That single scheme does not satisfy the pattern element.

In an effort to extend the scope of the pattern, the 2AC alleges three additional schemes – the Insider Trading Scheme, the Co-Op Scheme, and the Second Securities Fraud Scheme – as RICO predicate acts. (*See* 2AC ¶¶ 68-79 (A83-84).) This effort is misguided.

As an initial matter, the alleged securities fraud violations underlying the Insider Trading Scheme and the Second Securities Fraud Scheme cannot constitute RICO predicate acts because federal securities law violations are not RICO predicate acts. The Private Securities Litigation Reform Act amended the RICO statute to provide that "no person may rely upon any *conduct that would have been actionable as fraud in the purchase or sale of securities* to establish a violation of section 1962." 18 U.S.C. § 1964(c) (emphasis added). The alleged securities fraud violations are therefore irrelevant to Patricia's RICO claims. *See MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 274-78 (2d Cir. 2011) (holding that the RICO Amendment bars all RICO claims that would have been actionable as fraud in the purchase or sale of securities); *Thomas H. Lee Equity Fund V, L.P. v. Mayer Brown, Rowe & Maw LLP*, 612 F. Supp. 2d 267, 281 (S.D.N.Y. 2009) (same).

More fundamentally, neither of the alleged securities fraud schemes, nor the alleged "Co-Op Scheme," advances Patricia's "pattern" claim because only predicate acts that *allegedly injured plaintiff* can be considered as part of the "pattern." *See Ray Larsen Assocs., Inc. v. Nikko Am., Inc.*, 1996 WL 442799, at *7 (S.D.N.Y. Aug. 6, 1996). This rule follows from the principle that only predicate acts that proximately harm the plaintiff can give rise to a RICO claim. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985) ("[P]laintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property *by the conduct constituting the [RICO] violation.*") (emphasis added). *See also Murray v. Mulgrew*, 2010 U.S. Dist. LEXIS 29159, at *8 (D.D.C. Mar. 26, 2010) (plaintiff failed to allege causal relationship between her husband's actions in stealing money from NatWest bank and her injury in form of a reduced award in divorce action).

Here, none of the other three alleged schemes involves racketeering activity directed against Patricia, none had anything to do with her, and none injured her. Indeed, Patricia herself recognizes this, limiting her RICO prayer for relief to the alleged violations "in carrying out the Scheme Against Patricia." (2AC ¶ 89 (A86).) The other alleged schemes therefore are irrelevant, do not extend the scope of the alleged "pattern," and no RICO claim can be based upon them.

2. Patricia has not alleged any RICO injury to her business or property.

The RICO statute limits private actions to those by "[a]ny person injured in his *business or property* by reason of a violation of [the RICO Act's substantive provisions]." 18 U.S.C. § 1964(c) (emphasis added). Here, Patricia does not allege any injury to a "business," and thus her RICO claim must be predicated on alleged injury to her "property." Patricia, however, cannot establish such injury because her claim is premised on a mere expectancy interest, *i.e.*, an alleged entitlement to a greater share of assets in the divorce action (Br. 17-18; 2AC ¶ 71 (A87)), which is wholly insufficient to confer RICO standing. *See Sheridan v. Mariuz*, 2009 WL 920431, at *8 (S.D.N.Y. Apr. 6, 2009); *Capasso v. CIGNA Ins. Co.*, 765 F. Supp. 839, 842 (S.D.N.Y. 1991); *Pohlot v. Pohlot*, 664 F. Supp. 112, 116 (S.D.N.Y. 1987).

Thus, Patricia has not even established the basic threshold for a RICO claim – standing to sue based on an injury to her business or property.

3. The 2AC does not adequately allege a RICO "enterprise."

Patricia asserts that SAC is the sole RICO enterprise involved in the alleged Scheme Against Patricia. (Br. at 3 n.5.) The 2AC, however, does not plead any facts indicating that the alleged RICO enterprise was necessary to the alleged concealment of assets by Steven in the divorce action, or that such alleged concealment was committed through the means of the enterprise, or that the alleged predicate acts of mail and wire fraud aimed at Patricia were related in any way to the activities of the enterprise. At most, the 2AC alleges that Steven did not truthfully disclose his assets in the affidavits he filed in divorce court and in oral statements he made to Patricia. It was not his position in SAC or his access to SAC's finances that solely enabled him to commit this alleged fraud. If Steven misstated his finances (which he did not), he did so in his personal capacity. He did not need, or use, the alleged enterprise to commit that alleged act.

As the statute says, the predicate acts must be committed "through" – that is, "by means of, by consequence of, by reason of, by the agency of, or by the instrumentality of" – the RICO enterprise. *See United States v. Brandao*, 539 F.3d 44, 53 (1st Cir. 2008). That is not the case here. Thus, the alleged enterprise was not needed to carry out the particular fraud about which Patricia complains. For this reason, as well, Patricia's RICO "enterprise" allegations are legally deficient.

C. The 2AC Fails To State A Claim For Breach Of Fiduciary Duty.

Patricia's breach of fiduciary duty claim is also meritless.

As to Steven, there was no fiduciary duty because Patricia's accusations of fraud in the divorce action are inconsistent with the trust and confidence necessary to establish a fiduciary relationship. *See Capasso*, 765 F. Supp. at 841 ("There was no fiduciary duty here. During the divorce proceedings, Nancy Capasso demonstrated her distrust of Carl Capasso. . . . None of this behavior is consistent with the trust and confidence that are the prerequisites for a fiduciary relationship.").

Nor did Donald, as Patricia's accountant (much less as her former accountant), owe her a fiduciary duty. "New York courts 'do not generally regard the accountant-client relationship as a fiduciary one.'" *Block v. Razorfish Inc.*, 121 F. Supp. 2d 401, 403 (S.D.N.Y. 2000); *accord DG Liquidation, Inc. v. Anchin, Block & Anchin LLP*, 300 A.D.2d 70, 71 (N.Y. App Div. 2002). Patricia alleges no special facts or circumstances that would warrant departure from the general rule here.

CONCLUSION

For the reasons discussed above, Steven Cohen and Donald Cohen respectfully submit that the District Court's decision dismissing, with prejudice, the Second Amended Complaint should be affirmed in its entirety.

October 28, 2011

Respectfully submitted,

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October 28, 2011

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