

Nos. 22-3331

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

UMB BANK, N.A.,
PLAINTIFF-APPELLANT

V.

JESSIE BENTON; ANTHONY GUDE;
DARIA LYMAN; CYBELE MCCORMICK,
DEFENDANTS-APPELLEES

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI (CIV NO. 4:21-CV-00832)
(THE HONORABLE BETH PHILLIPS)*

BRIEF OF APPELLEES

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RULE 26.1 DISCLOSURE STATEMENT

All of the Defendant-Appellees are natural persons.

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INTRODUCTION

This case is an absurd twist on a strike suit and marks the *third* attempt by UMB to transform an ordinary—though meritless and untimely—state-law claim into something that it is *not*. Without a shred of evidence, UMB Bank, N.A. (“UMB”) accuses Jessie Benton, the 83-year-old daughter of famous Missouri artist Thomas Hart Benton, and her three “graying” children of a decade-long scheme to utilize the “public pressure” of a lawsuit against the bank to “harass, embarrass and injure UMB” to the point that UMB would be *forced* “to pay millions of dollars to Defendants so that they could avoid having to liquidate Trust assets to support their financial demands.” Am. Compl., JA472, JA479; JA506-07; R. Doc. 25, at 2, 9, 36-37.

According to UMB, the Defendants intended, through the filing of a lawsuit against UMB in the Circuit Court of Jackson County, Missouri (Case No. 19P8-PR01534), to manipulate public opinion so that the “public” would divert its business away from UMB, prompting UMB to either pay Defendants money or relinquish its position as trustee. Am. Compl., JA520, JA522-23; R. Doc. 25, at 50, 52-53. If it sounds implausible, that’s because it is.

Reaching to the heights of absurdity, UMB frivolously frames the “years-long campaign to apply public pressure” as having a fifty-year-old relationship to a bank robbery by three individuals whose criminal activity in 1973 has *nothing* to do with

the Defendants. Am. Compl., JA471-72; R. Doc. 25, at 1-2. UMB trudges through pages of irrelevant—and some patently false—allegations that are completely unrelated to its empty allegations of mail, wire, and bank fraud. Am. Compl., JA480-87; R. Doc. 25, at 10-17. And then, in a malicious and public attack, UMB likens the Defendants to *armed criminals*, asserting that “[i]nstead of guns, Defendants now employ different means: a scheme to defraud UMB of over \$300 million dollars.” Am. Compl., JA472; R. Doc. 25, at 2.

But it is not simply that UMB has made scurrilous and baseless accusations against the Defendants; rather, its accusations against Defendants—that their Trust-related lawsuit against the Bank is meant to “publicly pressure, harass, embarrass and injure UMB”—is a classic case of Freudian projection. UMB’s claims are clearly meant to “publicly pressure, harass, embarrass and injure” *the Defendants*. By dredging up and republicizing an irrelevant and outdated story from a 1973 edition of the Rolling Stone magazine, and by framing the Defendants’ litigation activities as part of a “scheme” against the bank, UMB is attempting to use the Racketeer Influenced and Corrupt Organizations Act (“RICO”), and its threat of treble damages, to intimidate and coerce the Defendants to give up or compromise their probate claims and the damages caused by UMB’s fiduciary breaches.

Fundamentally, this is a RICO reprisal suit. Although UMB has styled its claims as mail, wire, and bank fraud, its allegations focus entirely upon the

Defendants' litigation activities in the underlying state probate case. UMB alleges that the Defendants' litigation activities, including the routine process of investigating, developing, and discussing litigable claims, are each a "predicate act" of mail or wire fraud under 18 U.S.C. § 1961(1) since the Defendants' litigation activities included the incidental use of email and the state court's electronic filing service. And since UMB happens to be a bank, voila, the process of investigating, developing, and discussing the probate case is bank fraud, too.¹

The Court should not countenance such a perversion of the RICO statute. Indeed, UMB's retaliatory use of RICO invites a terrible precedent and template for bringing a similar claim even against the bank, itself. Not only that, allowing UMB's federal RICO claims to proceed would usurp and inappropriately bypass the state tribunal, where the underlying action is pending, and which properly controls the litigation.

This court stated,

Judges and lawyers often complain that the courts are inundated with a flood of litigation, but the fact remains that litigation is as American as apple pie. If a suit is groundless or filed in bad faith, the law of torts may provide a remedy. Resort to a federal criminal statute is unnecessary.

¹ What is worse, UMB accuses Defendants' litigation counsel as having joined the "scheme" and even goes so far as to impugn the Defendants' *experts*. Am. Compl. JA505-06; R. Doc. 25, at 35-36; Appellant's Br., at 8.

I.S. Joseph Co. v. J. Lauritzen A/S, 751 F.2d 265, 267–68 (8th Cir.1984). The proper and timely place, if anywhere, for the bank’s claims is in state court, after the underlying case is resolved.

And the Congressional intent in enacting RICO simply does not square with the absurd consequences and contraventions of well-settled public policy which would inevitably result from allowing the type of claim alleged here. Although “RICO is to be read broadly,” *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497–98 (1985), there can be no dispute that Congress did *not* intend to affect a wholesale preemption of every garden-variety fraud that is attempted through a series of wire or mail acts. *See Terry A. Lambert Plumbing, Inc. v. W. Sec. Bank*, 934 F.2d 976, 980 (8th Cir. 1991). Permitting the litigation activities alleged here to serve as RICO predicate acts would lead to just such an absurd result. *Every* lawsuit would give rise to a RICO reprisal suit.

In any event, *even if* retaliatory RICO reprisal suits were permitted under the statute (they are *not*), the mere recitation of the chain of causation alleged by UMB is proof that the Amended Complaint fails to assert a valid claim. UMB alleges that by filing the Missouri state case, the Defendants’ intended to “deceiv[e] *the public* in order to pressure UMB FC’s directors, UMB’s customers, and Kansas City area civic institutions with whom UMB partners, all of whom UMB depends on for its immediate and long-term financial viability and none of whom UMB could ignore

if Defendants' scheme were to succeed." Am. Compl., JA520; R. Doc. 25, at 50 (emphasis added).

Put another way, UMB claims that (1) the Defendants intended to deceive *the public*; (2) the Defendants intended that, as a result of the public being deceived, *the public* would threaten to divert their business from UMB; and that (3) as a result of the threats and "other pressure" exerted by members of the public, UMB's directors, customers and the civic institutions with whom it partners would pressure UMB to either pay Defendants money or relinquish its position as trustee. The chain of causation is so preposterous as to be absurd.

Even UMB admits that "when the chain of causation contains multiple steps," as it obviously does in this case, "the asserted injury is 'too remote' from the defendants' conduct." Appellant's Br., at 33-34 (quoting *Hemi Grp., LLC v. City of New York, N.Y.*, 559 U.S. 1, 9 (2010)). And this is true of cases where the scheme *succeeds*.

In this case, UMB has not even alleged that any specific "pressure" was actually brought to bear upon its directors, customers, or the civic institutions with whom it partners because of the alleged "predicate acts." UMB can muster only that "*if Defendants' scheme were to succeed,*" its domino theory of causation could unfold. Thus, not only does the chain of causation contain multiple steps, but those steps also lead to *nowhere*.

Finally, and perhaps most gallingly, UMB has *never even seen* the bulk of the communications upon which it relies. The “pattern” element of a RICO claim requires at least two acts of racketeering activity that amount to or pose a threat of *continued* criminal activity. In *Wisdom v. First Midwest Bank, of Poplar Bluff*, this Court explained that although mail and wire fraud can be a predicate act, mailings are “insufficient to establish the continuity factor unless they contain misrepresentations themselves.” 167 F.3d 402, 407 (8th Cir. 1999). In this case, since UMB has *never even seen* the privileged communications between the Defendants and their attorney, those communications cannot possibly establish RICO’s continuity factor. And since the heightened pleading requirements of Fed. R. Civ. P. 9(b) also apply, UMB also fails to satisfy the requirements of Rule 9(b)—that is, UMB cannot possibly plead the “who, what, when, where, and how” of any alleged misrepresentation.

In short, UMB’s RICO reprisal suit is a dressed-up common law claim lacking the essential features of a RICO claims. That, alone, is enough to demonstrate that the district court did not abuse its discretion. But as the district court properly found, UMB also lacks standing and has not (and cannot) allege a pattern of racketeering activity. Accordingly, for the reasons that follow, the district court’s dismissal should be *affirmed*.

STATEMENT OF THE CASE

From 1979 until March of 2021, UMB served as co-Trustee, then sole Trustee of the testamentary trusts created by renowned artist Thomas Hart Benton and his wife, Rita Benton. Am. Compl., JA476-77; R. Doc. 25, at 6-7. Defendants are the remaining descendants of Mr. and Mrs. Thomas Hart and Rita Benton. Am. Compl., JA476; R. Doc. 25, at 6.

On December 17, 2019, the Defendants, acting on the advice and recommendation of counsel, approved the filing of a Petition in the Probate Division of the Jackson County Circuit Court. Am. Compl., JA488, JA613-59; R. Doc. 25, at 18 fn. 22, R. Doc. 25-8, at 1-47. In the probate case, the Defendants are represented by Withers, Brant, Igoe & Mullenix, P.C.; Langdon & Emison, LLC; and Boyda Law, LLC. Am. Compl., JA659; R. Doc. 25-8, at 47. Defendants' counsel include the Honorable Larry D. Harman (Ret.) and the Honorable Michael W. Matters (Ret.). *Id.* In the probate case, the Defendants allege, *inter alia*, that UMB breached the duty of loyalty, that UMB breached its duty to administer the Trust as a prudent person would, that UMB failed to comply with the express directions contained in the Trust documents, that UMB failed to utilize its special skill in the handling of the valuable artwork contained in the Trust (or that it never possess the requisite skill), that UMB failed to take reasonable steps to protect the valuable artwork contained in the Trust,

that UMB failed to maintain adequate and accurate records of the Trust, and that UMB engaged in acts of self-dealing.

On June 19, 2021—a year-and-a-half after commencement of the probate case—UMB filed a Notice of Removal of the probate case to the U.S. District Court for the Western District of Missouri, claiming that the case raised a federal question. *See Jessie Benton, et al. v. UMB Bank, N.A.*, Case No. 4:21-CV-00432-BCW. On October 1, 2021, the Honorable Brian C. Wimes remanded the action to state court on two grounds: (1) UMB’s notice of removal was untimely, and (2) the Defendants’ state law claims did not present “substantial” issues of federal law and hence, did not “arise under” the Copyright Act so as to be within the exclusive jurisdiction of Federal Court. *Id.*

UMB filed a *second suit* in federal court—a declaratory judgment action, once again seeking a separate federal forum for its defenses to the parallel State Court Action. *UMB Bank, N.A., v. Jessie Benton, et al.*, 4:21-cv-00710-SRB. On December 16, 2021, the Honorable Stephen R. Bough ordered that although the second action “arises under federal law, [the Defendants’] choice of forum and matters of judicial economy outweigh this consideration and therefore a stay of [the] case is warranted.” *UMB Bank, N.A. v. Benton*, No. 21-CV-00710-SRB, 2021 WL 5985172, at *1 (W.D. Mo. Dec. 16, 2021).

UMB then filed a *third lawsuit* in Federal Court. On November 26, 2021, UMB filed an original Complaint alleging that Defendants violated RICO by asserting and disseminating false allegations about UMB's actions as trustee. JA005-59; R. Doc. 1, at 1-55. On February 11, 2022, the Defendants filed a Motion to Strike, JA383-96; R. Doc. 27, a Rule 12(b)(1) Motion to Dismiss for Lack of Jurisdiction, JA410-27, R. Doc. 32, and a Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim. JA450-69; R. Doc. 33. However, rather than respond to the motions, UMB chose instead to file an Amended Complaint without addressing *any* of the deficiencies identified by the Defendants. JA471-527; R. Doc. 25. Accordingly, on March 4, 2022, the Defendants renewed their Motion to Strike, JA912-25; R. Doc. 27, their Rule 12(b)(1) Motion to Dismiss for Lack of Jurisdiction, JA939-56; R. Doc. 32, and their Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim. JA978-98; R. Doc. 33.

After the district court received briefing on the motions, it ordered supplemental briefing on the issues of whether the Amended Complaint alleges a "direct relation" between the allegedly false statements to the media about the probate case and UMB's loss of its position as trustee, and whether the allegedly false statements to the media exhibited an "intent to deceive." JA1203-05; R. Doc. 52. The parties submitted their supplemental briefs on June 7, 2022. JA1207-21, JA1223-34; R. Doc. 53, 54.

On June 29, 2022, the district court, in the exercise of its sound discretion, granted Defendants’ Rule 12(b)(6) Motion to Dismiss and dismissed this case. JA1236-58; R. Doc. 55. In a thorough and well-reasoned order, the district court held that, *inter alia*:

1. The Amended Complaint alleges, *at most*, three “predicate acts” for the purposes of establishing “continuity” under the “pattern of racketeering” element: (1) a December 14, 2019, telephone interview of Jessie Benton by The Wall Street Journal; (2) a December 19, 2019, telephone interview of Andre Boyda (Jessie Benton’s attorney) by KCUR; and (3) a December 19, 2019, telephone interview of Andre Boyda by The Kansas City Star, Order, JA1251; R. Doc. 55, at 16;
2. The emails between the Defendants and their attorney, *most of which UMB has never seen*, are insufficient to establish “continuity” since they do not contain misrepresentations themselves, Order, JA1245, JA1247; R. Doc. 55, at 10, 12;
3. The emails from Defendants to their attorneys are not pled with sufficient particularity to satisfy Rule 9(b)’s requirements—that is, they do not include the “who, what, when, where, and how” of the fraud, Order, JA1247; R. Doc. 55, at 12;
4. The serving of various pleadings in Benton I (the Missouri probate case) does not constitute a RICO predicate act, Order, JA1249-51; R. Doc. 55, at 14-16;
5. The Amended Complaint alleges “predicate acts” occurring over the course of only a few months, between December 2019 and February 2020, Order, JA1252; R. Doc. 55, at 17;
6. The Amended Complaint does not adequately allege either “closed-ended” or “open-ended” continuity since UMB alleges that it—and it alone—was the victim of a single scheme, orchestrated by a single set of perpetrators, designed with the sole goal of getting money from UMB or ousting UMB as a trustee, and the alleged predicate acts occurred over the course of only a few months, between December 2019 and February 2020, Order, JA1251-53; R. Doc. 55, at 16-18;

7. *Even if* UMB had adequately alleged a pattern of racketeering activity, it lacks standing to bring a claim under 18 U.S.C. § 1964(c) since the asserted injury (which resulted, indirectly, from *unspecified, unalleged* and purely hypothetical “public pressure”) is too remote from the Defendants’ conduct, Order, JA1253-55; R. Doc. 55, at 18-20;
8. For all of reasons stated above, the Amended Complaint also fails to adequately allege the “predicate act” of bank fraud. Order, JA1256; R. Doc. 55, at 21; and
9. Because the Amended Complaint fails to allege the elements of a RICO violation, it also fails to allege a RICO conspiracy. Order, JA1257; R. Doc. 55, at 22.

Having thrice failed in federal court, UMB filed a Motion to Vacate, Alter or Amend Judgment, JA20270-75; R. Doc. 64, and a Motion for Leave to File a Second Amended Complaint. JA2100-01; R. Doc. 66.

On October 19, 2022, the district court, in the exercise of its sound discretion, denied UMB’s Motion for Leave to File a Second Amended Complaint and its Motion to Vacate, Alter or Amend Judgment. JA2318-34; R. Doc. 78. In a second thorough and well-reasoned order, the district court held, *inter alia*, that:

1. Its original order dismissed all three RICO claims—Counts I, II, III—for, among other things, having (1) failed to adequately allege “continuity” under the “pattern of racketeering” element; and (2) failed to establish proximate cause, Order, JA2320; R. Doc. 78, at 3;
2. In its original order, the court did not “overlook” UMB’s threadbare “pattern” allegations; rather, it disregarded them since they were mere conclusory statements not entitled to a presumption of truth when considering the sufficiency of a Complaint, Order, JA2322; R. Doc. 78, at 5;

3. In any event, UMB's threadbare "pattern" allegations were wholly dependent upon the continued validity of the "predicate acts," most of which the court had properly rejected, Order, JA2322; R. Doc. 78, at 5;
4. In its original order, the court did not "ignore" UMB's threadbare "bank fraud" allegations; rather, since they incorporate "virtually *all* the specific averments," "they were discussed in extensive detail," *id.*;
5. Even if UMB had adequately alleged bank fraud, the "predicate acts" do not "plausibly establish[] a 'pattern' of racketeering activity," Order, JA2323; R. Doc. 78, at 6;
6. Contrary to UMB's assertion that the court must accept its threadbare and conclusory allegation that it was "forced to resign" as trustee, the court could "'draw on its judicial experience and common sense' when determining whether a plausible claim has been pleaded," Order, JA2324; R. Doc. 78, at 7 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009));
7. "[T]here are no sufficiently detailed allegations in the [Amended Complaint] from which the Court could reasonably infer any RICO predicate act committed by Defendants proximately caused the resignation," and that "[t]he absence of plausible allegations to support UMB's assertion [that] the public statements forced it to resign was a sufficient reason for dismissal, without considering any other materials," *id.*;
8. In any event, when addressing a motion to dismiss, the court was entitled to consider the public record wherein UMB expressly stated that it "wishes" to resign since (1) the document was filed in the Missouri state case, and (2) the document is necessarily "embraced" by the Amended Complaint wherein UMB alleges that the Missouri state case is the culmination of the Defendants' "scheme" and the cause of its alleged injuries, Order, JA2325; R. Doc. 78, at 8;
9. Regardless of whether UMB's bank fraud allegations are made pursuant to 18 U.S.C. § 1344(1) or (2), "UMB has not stated a plausible claim" since, *inter alia*, there is nothing in the [Amended Complaint] from which a person could reasonably infer that [the allegedly] false statements served in the ordinary course as the instrumentality of obtaining bank property, Order, JA2326, JA2328; R. Doc. 78, at 9, 11;

10. Allowing UMB to file its proposed Second Amended Complaint would unduly prejudice the Defendants since, despite the court's earlier admonition, UMB repeats "a great deal of scandalous, logically irrelevant material designed solely to cast spurious aspersions on Defendants" and adds *additional material* "that is *even more scandalous* and *even more disconnected* from the present case," Order, JA2329; R. Doc. 78, at 12 (emphasis added);
11. In any event, UMB's proposed amendment "is futile because the [proposed Second Amended Complaint] still fails to plead a proper civil RICO claim," Order, JA2330; R. Doc. 78, at 13.

SUMMARY OF THE ARGUMENT

1.

RICO allows for private citizens to sue for treble damages if they have experienced injury to their business or property because of a violation of RICO. However, for a plaintiff to have standing to bring a RICO claim, it must show that the RICO violation was the direct and proximate cause of the injury to its business or property. The Supreme Court in *Holmes v. Sec. Inv. Prot. Corp.*, 503 U.S. 258 (1992), held that the phrase "by reason of" in RICO Section 1964(c) requires a "direct relationship" between the injury and the alleged conduct. If the link is indirect, remote or purely contingent, the plaintiff cannot maintain a RICO claim. Thus, as UMB put it: "when the chain of causation contains multiple steps, the asserted injury is 'too remote' from the defendants' conduct." Appellant's Br., at 33-34 (quoting *Hemi Grp., LLC v. City of New York, N.Y.*, 559 U.S. 1, 9 (2010)).

In this case, UMB alleges that the Defendants' statements and claims caused injury to UMB's business and property by a domino chain of events: (1) deceiving

members of the media; (2) the media's publication of the Defendants' alleged falsehoods; (3) the public's receipt of the publication of the Defendants' alleged falsehoods; (4) the public's abiding acceptance of the Defendants' alleged falsehoods; (5) the public's demand, as a result of their abiding acceptance of the Defendants' alleged falsehoods, that UMB's directors, customers, and civic institutions divert their business from UMB; (6) the acquiescence by such a consequential number of UMB's directors, customers, and civic institutions to the public's demand that they divert their business from UMB as to cause a loss of profits and/or goodwill, the loss of which is attributable to the Defendants' predicate acts, as distinct from other, independent, factors.

UMB's causal theory is thus based on a series of hypothetical, contingent, and inter-dependent causal events, including the theoretical actions of third and fourth parties. More importantly, UMB's causal allegations are purely hypothetical; UMB does not actually allege that the dominos fell. Accordingly, UMB's alleged injury is too remote from the Defendants' conduct. There is no proximate causal connection between the claimed predicate acts and the vague damages UMB has alleged.

Additionally, to have standing to bring a RICO claim, a plaintiff must not only plead a plausible "direct relationship" between the alleged injury and the injurious conduct, but it must also plead a concrete financial loss, and not mere injury to a valuable intangible property interest. This requirement is to ensure that the claims

are not based on extensive speculation and to avoid the difficulties associated with attempting to ascertain the amount of a plaintiff's damages that are directly caused by the violation. Claimed losses to "goodwill" and "business reputation," for example, are *not* the type of injuries compensable under RICO, unless they are concrete and actual.

In this case, UMB failed to plead a concrete financial loss as required to bring a RICO claim. UMB vaguely alleges that it would suffer harm "*if the Defendants' scheme were to succeed,*" but failed to allege specific, concrete details of any actual lost business opportunities, revenues, or goodwill resulting from the Defendants' actions. Additionally, even if UMB were to provide such specific, concrete details, the alleged injuries would still be too speculative, dependent on the hypothetical acts of third and fourth parties. Such hypothetical losses are incapable of calculation or discernment.

Indeed, to determine UMB's damages, the district court would have to conduct an intricate and uncertain inquiry involving a complex assessment to establish what portion of UMB's lost profits or decreased goodwill is the product of the Defendants' alleged RICO violation, as distinct from other, independent factors. Such an inquiry would be impossible since businesses lose and gain customers for many reasons, and UMB's alleged injuries may have been caused by other factors

such as poor business practices, market conditions, competition, or personnel changes.

Additionally, although UMB claims that it was “forced” to resign as trustee, its assertions are utterly contradicted by UMB’s own admission. After continuing to act as Trustee for more than a year after the last of the allegedly false statements was made to the media, UMB publicly stated that it “wished” to resign as trustee. Nor does UMB even allege facts establishing that it was made impossible, or even difficult, to continue as Trustee. Instead, it asserts, in pure conclusory fashion, that it suffered injury “by being forced to relinquish its position as trustee.”

Drawing on its judicial experience and common sense, the district court properly held that UMB’s resignation was “too remote” and that its mere conclusory statements were not entitled to a presumption of truth. The district court rightly found that it was not required to accept UMB’s conclusory and threadbare recitals.

2.

RICO defines a “pattern” of racketeering activity as requiring at least two acts of racketeering activity within ten years. However, this is a minimum requirement; the concept of a “pattern” requires that the racketeering predicates are “related” to one another, and that they amount to or pose a threat of “continuity,” or continued criminal activity. “Continuity” in this context refers to either a closed, but lengthy,

period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition.

To satisfy the RICO “continuity” element, a plaintiff must provide evidence of multiple predicate acts occurring over a substantial period (closed-end continuity) or evidence that the alleged predicate acts threaten to extend into the future (open-ended continuity). By contrast, a single transaction involving a single victim and taking place over a short period of time does not constitute the “pattern” of racketeering required for there to be a realistic threat of the long-term or ongoing criminal activity targeted by RICO.

In this case, UMB’s claims fail on multiple levels. First, UMB alleges the existence of a single “scheme” involving a single victim, the goal of which is to utilize a single lawsuit to force UMB to pay millions of dollars to the Defendants. Even if the allegation of a “scheme” were true, its implementation would not be considered a “pattern” of racketeering required for a RICO claim. One lawsuit filed against a single defendant does *not* constitute a “pattern” of racketeering.

Second, the alleged fraudulent actions, which occurred over a period of just six days, do not meet the continuity requirement for a RICO claim. Continuity of such a short duration does not constitute “close-ended” continuity. And since the lawsuit—and the accompanying media interviews—was a unitary event without repetition, the allegations do not constitute “open-ended” continuity.

UMB, however, asserts that the emails which passed back and forth between the Defendants and their attorney are sufficient for purposes of establishing continuity. However, “[t]hough mail fraud can be a predicate act, mailings are insufficient to establish the *continuity factor* unless they contain misrepresentations themselves.” *Wisdom*, 167 F.3d at 407. In this case, since neither UMB nor the public has ever seen the bulk of the communications upon which UMB relies (they are privileged communications), not only are the emails insufficient to establish the continuity factor, but they are also insufficient to satisfy the standards of Rule 11. At the very least, they fail to meet the heightened pleading requirements of Rule 9(b). Indeed, apart from the representations sourced to the Benton I petition, UMB does not identify *any* specific statements which are alleged to have been fraudulent.

3.

Although Federal Rule of Civil Procedure 15(a) states that courts should allow amendments to a complaint when necessary for justice, this rule does not apply if the proposed amendment would be futile. In this case, the district court rightly determined that UMB’s proposed amendments *do not* address the deficiencies in the RICO allegations and therefore would not be able to salvage the claims.

As the First Circuit stated, “[t]he mere assertion of a RICO claim ... has an almost inevitable stigmatizing effect on those named as defendants. In fairness to innocent parties, courts should strive to flush out frivolous RICO allegations at an

early stage of the litigation.” *Figueroa Ruiz v. Alegria*, 896 F.2d 645, 650 (1st Cir. 1990). Here, the district court did just that.

ARGUMENT

I. UMB Lacks Standing Under Title 18 U.S.C. § 1964(c)

“To have standing to make a RICO claim, a party must have 1) sustained an injury to business or property 2) that was caused by a RICO violation.” *Gomez v. Wells Fargo Bank, N.A.*, 676 F.3d 655, 660 (8th Cir. 2012) (quoting *Asa–Brandt, Inc. v. ADM Investor Servs., Inc.*, 344 F.3d 738, 752 (8th Cir.2003)). Applying these standards to UMB’s First and proposed Second Amended Complaint, the district court determined that the alleged RICO violations did not cause an injury to UMB’s business or property. The district court is right.

A. UMB’s Injuries Were Not Caused by Reason of a RICO Violation

RICO provides a private civil action to recover treble damages for injuries caused “by reason of a violation of” its substantive provisions. 18 U.S.C. § 1964(c). Section 1964(c), however, confers standing only upon those who have an experienced injury to his or her business or property “*by reason of*” a RICO violation.

In *Holmes*, the Supreme Court held that the phrase “by reason of” requires that the plaintiff “show that a RICO predicate offense ‘not only was a ‘but for’ cause of his injury, but was the proximate cause as well.’ ” *Hemi Grp.*, 559 U.S., at 9, (quoting *Holmes*, 503 U.S., at 268). To satisfy this test, a RICO claimant must

demonstrate that a there exists a “*direct relation* between the injury asserted and the injurious conduct alleged.” *Holmes*, 503 U.S., at 268 (emphasis added). Where the link between the predicate acts and the injury asserted is “indirect[],” “too remote,” or “purely contingent,” the plaintiff cannot maintain a claim under RICO. *Id.*, at 271, 274; *see also Newton v. Tyson Foods, Inc.*, 207 F.3d 444, 447 (8th Cir. 2000) (“A passed-through injury ... is too attenuated to confer standing, even where ... the plaintiff’s injury is one directly passed-through to the plaintiff by a target of the ... violation.”).

Moreover, as UMB put it, “when the chain of causation contains multiple steps, the asserted injury is ‘too remote’ from the defendants’ conduct.” Appellant’s Br., at 33-34 (quoting *Hemi Grp.*, 559 U.S., at 9).

In this case, not only does the chain of causation contain multiple hypothetical and *implausible* steps, the harm, itself, as alleged, is purely hypothetical and contingent upon the acts of third and even fourth parties. UMB alleges that, commencing “in December 2019, when Defendants first publicly declared and publicized their fraudulent statements and claims,” the Defendants’ “racketeering predicate acts of mail and wire fraud have directly and proximately caused” injuries to UMB’s business and property[.]” Am. Compl., JA520, JA522-23; R. Doc. 25, at 50, 52-53. UMB states that the fraudulent statements and claims were directed, first, at “deceiving the public in order to pressure UMB FC’s directors, UMB’s customers,

and Kansas City area civic institutions with whom UMB partners[.]” Am. Compl., JA520, JA523; R. Doc. 25, at 50, 53. Then, according to UMB, upon hearing the Defendants’ fraudulent statements and claims, UMB FC’s directors, UMB’s customers, and Kansas City area civic institutions with whom UMB partners would then “distrust and divert their business from UMB, thereby creating financial and other pressure on UMB to either pay Defendants money or relinquish its position as trustee to fend off further attacks.” Appellant’s Br., at 33.

UMB’s causal theory is thus contingent on the separate and independent acts, *at least*, (1) those responsible for reporting on the radio and newspaper interviews; (2) the members of the public deceived by the reporting; and (3) the directors, customers, and civic institutions who, persuaded by public pressure, threaten to divert their business unless UMB pays the Defendants over \$300 million dollars or relinquishes its position as trustee.

Accordingly, since “the chain of causation contains multiple steps, the asserted injury is ‘too remote’ from the defendants’ conduct.” Appellant’s Br., at 33-34 (quoting *Hemi Grp.*, 559 U.S., at 9). Thus, the district did *not* err by holding that “there is no proximate causal connection between the viable predicate acts in the Amended Complaint and the compensable form of damage UMB has alleged.” Order, JA1255; R. Doc. 55, at 20.

This conclusion is confirmed by considering the rationale for RICO’s “direct relationship” requirement. In *Holmes*, the Supreme Court reasoned that “the 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.” *Holmes*, 503 U.S. at 269.

Anza v. Ideal Steel Supply Corp., is illustrative of the problem. The injury alleged in *Anza* was the plaintiff’s loss of sales resulting from defendant’s alleged fraudulent conduct. But as the Supreme Court stated, the plaintiff’s “lost sales could have resulted from factors other than petitioners’ alleged acts of fraud. Businesses lose and gain customers for many reasons, and it would require a complex assessment to establish what portion of [the plaintiff’s] lost sales were the product of [the defendant’s] decreased prices.” 547 U.S. 451, 459 (2006).

Here, too, UMB’s alleged injuries could have resulted from any number of factors. Lost profits are often the result of “poor business practices or the[] failure[] to anticipate developments in the financial markets.” *Holmes*, 503 U.S., at 272–73. In fact, since “[b]usinesses lose and gain customers for many reasons,” *Anza*, 547 U.S. at 459, UMB’s injuries, which are alleged in vague and conclusory fashion, could have resulted from unnumerable reasons that have nothing to do with the Defendants’ statements.

Moreover, although UMB alleges, in pure conclusory fashion, that “[e]ach of the Defendants’ racketeering predicate acts of mail and wire fraud have directly and proximately caused ... [i]njury to UMB’s business profits ... [and] to UMB’s goodwill,” UMB has not alleged facts of *any* specific business opportunities, revenue, or goodwill lost because of Defendants’ actions. Without any such allegations, UMB has not, and cannot, show that any of these harms were the direct result of any racketeering activity. For this additional reason, UMB has failed to allege facts that establish RICO standing.

Despite the way it has repeatedly pled its claims, UMB now argues that its injuries *do not* flow from a “lengthy chain of causation, but directly from Defendants’ illegal conduct.” Appellant’s Br., at 34. This, according to UMB, is because its “resignation and financial harms were the ‘foreseeable and natural consequence’” of the Defendants’ alleged “scheme.” *Id.*, at 34 (quoting *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 658 (2008)).

However, in *Bridge*, the Supreme Court did not dispense with the requirement of “direct relation” between the injury asserted and the injurious conduct alleged, it was merely explaining why “first-party reliance” was not a necessary element of civil RICO claim predicated on mail fraud. As for proximate cause, the Court in *Bridge* reiterated “a particular emphasis on the ‘demand for some direct relation between the injury asserted and the injurious conduct alleged,’” *Bridge*, 553 U.S.

639, 654 (quoting *Holmes*, 503 U.S., at 268–69), and included from *Anza*, its admonition that “[w]hen a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff’s injuries.” *Id.* (quoting *Anza*, 547 U.S. 461). The direct-relation requirement, the Court emphasized, “avoids the difficulties associated with attempting ‘to ascertain the amount of a plaintiff’s damages attributable to the violation, as distinct from other, independent, factors.’” *Id.* (quoting *Holmes*, 503 U.S., at 269).

In this case, as stated above, UMB does not even try linking the predicate acts of mail, wire or bank fraud to any actual damages; rather UMB simply states, in conclusory fashion, that the Defendants’ predicate acts directly and proximately caused its “ongoing injuries.” Am. Compl. JA520, JA522-23; R. Doc. 25, at 50, 52-53. But “that assertion is a legal conclusion about proximate cause—indeed, the very legal conclusion before [this Court].” *Hemi Grp.*, 559 U.S., at 14. UMB must *plausibly plead* that the predicate acts of mail, wire and/or bank fraud “led directly to its injuries.” *Id.* This it has not and cannot do.

Therefore, UMB lacks standing to assert RICO claims.

B. UMB Has Not and Cannot Plead Any Injury to its Business or Property

In addition to RICO’s “direct relationship” requirement, to have standing to bring a RICO claim, a plaintiff must also have “proof of concrete financial loss, and

not mere injury to a valuable intangible property interest.” *Gomez v. Wells Fargo Bank, N.A.*, 676 F.3d 655, 660 (8th Cir. 2012) (quoting *Regions Bank v. J.R. Oil Co., LLC*, 387 F.3d 721, 728 (8th Cir.2004); *see also Maio v. Aetna, Inc.*, 221 F.3d 472, 483 (3d Cir. 2000) (“a showing of injury requires proof of a concrete financial loss and not mere injury to a valuable intangible property interest” (quotation omitted)).

This requirement, much like the “direct relationship” requirement, ensures against claims that would require “extensive speculation.” *In re Taxable Mun. Bond Sec. Litig.*, 51 F.3d 518, 523 (5th Cir. 1995). Indeed, as the Supreme Court stated in *Anza*, damages requiring “intricate, uncertain inquiries,” including those that would involve “a complex assessment to establish what portion of [a plaintiff’s] lost sales were the product of [the defendant’s alleged RICO violation],” evidence the “discontinuity between the RICO violation and the asserted injury.” *Anza*, 547 U.S. at 459. *See also Bridge*, 553 U.S., at 654 (“The direct-relation requirement avoids the difficulties associated with attempting ‘to ascertain the amount of a plaintiff’s damages attributable to the violation, as distinct from other, independent, factors,’ *Holmes*, 503 U.S., at 269.”).

Thus, “[c]laimed losses to ‘goodwill’ and ‘business reputation,’ in addition to being highly speculative, are *not* the type of injuries compensable under RICO.” *Parker v. Learn Skills Corp.*, 530 F. Supp. 2d 661, 678 (D. Del. 2008) (emphasis added); *see also Marshall v. Goguen*, No. CV 21-19-M-DWM, 2022 WL 1641776,

at *10 (D. Mont. May 24, 2022) (“[S]peculative injuries do not serve to confer standing under RICO, unless they become concrete and actual.” (quoting *Steele v. Hosp. Corp. of Am.*, 36 F.3d 69, 71 (9th Cir. 1994))).

In this case, UMB fails to allege the existence of *any* concrete financial loss. Rather, UMB alleges, in pure conclusory fashion, that “*if Defendants’ scheme were to succeed*” at deceiving the public, Am. Compl., JA520; R. Doc. 25, at 50 (emphasis added), it would suffer harm in the form of (1) unearned trust administration fees, (2) lost business profits, (3) damaged goodwill, (4) the damages that *may* be awarded to the Defendants in the State Court Action, and (5) the costs incurred in defending the State Court Action. Am. Compl., JA0520-21; R. Doc. 25, at 50-51.

For starters, UMB has not alleged facts of any specific business opportunities, revenue, or goodwill lost because of Defendants’ actions. Nor can it claim as harm the damages that *may* be lawfully awarded by the Circuit Court of Jackson County, Missouri. For this reason, alone, UMB has failed to allege facts that establish RICO standing. *See e.g., Trump v. Clinton*, No. 22-CV-14102, 2022 WL 4119433, at *21 (S.D. Fla. Sept. 8, 2022). *See also Regions Bank*, 387 F.3d at 730 (holding that an “analysis of proximate causation requires identification of actual, not hypothetical harm.”).

Additionally, as shown above, UMB’s alleged damages are entirely dependent upon the acts of third and fourth parties and are utterly incapable of calculation. To

ascertain UMB's damages, the district court would be required to conduct an intricate and uncertain inquiry involving a complex assessment to establish what portion of UMB's lost sales or decreased goodwill is the product of the Defendants' alleged RICO violation, as distinct from other, independent, factors. Any inquiry into UMB's nebulous and intangible injuries would necessarily involve the impossible task of differentiating between a staggering number of other, independent factors and countless alternative explanations.

The "concrete financial loss" requirement, like the "direct relationship" requirement, is meant to ward off exactly the kinds of murky and hypothetical claims made by UMB. UMB insists, however, that although its intangible losses may be "difficult ... [to] prove," this Court should eschew the "concrete financial loss" requirement and grant standing even to those who allege a purely hypothetical and vague decrease in the "the expectancy of continued patronage." Appellant's Br., at 30 (quoting *Newark Morning Ledger Co. v. United States*, 507 U.S. 546, 555–56 (1993) (citation omitted)). All that should matter, according to UMB, is that in Missouri goodwill is recognized as a thing of value. Appellant's Br. at 32.

But the Court need not, and should not, overturn its prior precedents or upend the requirements of "standing" that are meant to curb abusive, meritless, and petty claims from being transformed into a federal RICO claim. As stated above, UMB has not alleged facts of *any* specific business opportunities, revenue, or measurable

goodwill lost because of Defendants' actions. Without any such allegations, UMB has not, and cannot, show that any of its alleged harms were the "direct result" of any racketeering activity. Accordingly, *even if* goodwill was otherwise cognizable under RICO, UMB has failed to allege facts that establish RICO standing.

UMB also argues that since it alleges, in conclusory fashion, that it was "forced to relinquish its position as trustee," Am. Compl., JA520-21; R. Doc. 25, at 50-51, it has "sufficiently alleged that Defendants' conduct injured its 'business or property.'" Appellant's Br., at 29. But here, again, UMB misses the point. UMB has not alleged or explained *why* or *how* or *by whom* it was "forced to resign," and its *conclusory* statement is not "entitled to a presumption of truth when considering the sufficiency of a complaint." *Zink v. Lombardi*, 783 F.3d 1089, 1098 (8th Cir. 2015). Indeed, since the public record reveals that UMB *voluntarily* resigned, its allegations are *false*.

In the Missouri state case, UMB filed a document, more than a year after the last of the allegedly false statements was made to the media, expressly stating that it "*wish[ed] to resign as Corporate Trustee of the Trust.*" JA1233; R. Doc. 54-1, at 1 (emphasis added). Since the submission is both a public record *and* was "embraced" by the Amended Complaint (since the Amended Complaint alleges that the Missouri

state case is the culmination of the Defendants’ “scheme” and the cause of its alleged injuries), it was properly considered by—though *not material to*—the district court.²

UMB criticizes the district court, accusing it of violating Rule 12(d) of the Federal Rules of Civil Procedure for having considered matters outside the Amended Complaint. Appellant’s Br., at 35. UMB’s criticism is entirely misplaced. In fact, the cases cited by UMB debunk its argument.

In *Ashford v. Douglas Cnty.*, this Court held that when considering a Rule 12(b)(6) motion, the court *may* consider “(1) materials that are part of the public record; (2) materials that do not contradict the complaint; *and* (3) materials that are necessarily embraced by the pleadings.” 880 F.3d 990, 992 (8th Cir. 2018) (quoting *Smithrud v. City of St. Paul*, 746 F.3d 391, 395 (8th Cir. 2014) (quotation omitted)). Thus, “Rule 12(b)(6) motions are not automatically converted into motions for summary judgment simply because one party submits additional matters in support of or [in] opposition to the motion.” *Gorog v. Best Buy Co.*, 760 F.3d 787, 791 (8th Cir. 2014) (quotation omitted).

In this case, UMB filed its resignation in the Circuit Court of Jackson County, Missouri on March 3, 2021. JA1233; R. Doc. 54-1. Therefore, since it is part of the

² The district court expressly held that “[t]he absence of plausible allegations to support UMB’s assertion [that] the public statements forced it to resign was a sufficient reason for dismissal, *without considering any other materials*. Order, JA2324; R. Doc. 78, at 7.

public record, the district court was free to consider it *without* converting the motion into a motion for summary judgment. *See Illig v. Union Elec. Co.*, 652 F.3d 971, 976 (8th Cir.2011) (“In addressing a motion to dismiss, ‘[t]he court may consider the pleadings themselves, material embraced by the pleadings, exhibits attached to the pleadings, and matters of public record.’ ” (quoting *Mills v. City of Grand Forks*, 614 F.3d 495, 498 (8th Cir.2010)) (emphasis added)); *Levy v. Ohl*, 477 F.3d 988, 991 (8th Cir. 2007) (holding that Rule 12(b)(6) motions are not automatically converted into motions for summary judgment simply because one party submits materials that are part of the public record).

The resignation letter is also necessarily embraced by the pleadings. The crux of UMB’s Amended Complaint is that by filing and maintaining the state court case, the Defendants “forced” UMB to resign. The state court case is the alleged culmination of the “scheme” and the cause of UMB’s injuries. In fact, the Petition from the probate case is so integral to this case that it is attached and “incorporated ... by reference” into the Amended Complaint. Am. Compl., JA488; R. Doc. 25, at 18 fn. 22. Accordingly, the district court was free to consider it *without* converting the motion to dismiss into a motion for summary judgment.

Finally, the resignation letter *does not* contradict the complaint. In *Zean v. Fairview Health Servs.*, this Court held that conclusory allegations made without factual support need not be considered when deciding whether outside material

contradicts the complaint. 858 F.3d 520, 527 (8th Cir. 2017). Here again, UMB’s allegations are stated in a purely conclusory fashion without *any* factual support. UMB (falsely) asserts that it was “compelled to resign in 2021,” Am. Compl., JA477; R. Doc. 25, at 7, and that it was “forced to relinquish its position as trustee for the Trust[.]” Am. Compl., JA520-21; R. Doc. 25, at 50-51. Accordingly, the district court was free to consider the public record *without* converting the motion into one for summary judgment.

Finally, *even if* the resignation letter should not have been considered by the district court without converting the motion, it would clearly constitute harmless error since the court *expressly held* that “[t]he absence of plausible allegations to support UMB’s assertion [that] the public statements forced it to resign was a sufficient reason for dismissal, *without considering any other materials*. Order, JA2324; R. Doc. 78, at 7 (emphasis added).³

In sum, the district court properly found that there were *no* well-pleaded allegations from which it “could reasonably infer any RICO predicate act committed

³ In any event, the allegation that the UMB was “forced” to resign is also deficient because its resignation, standing alone, does not imply damages. UMB does not (and *cannot*) allege that it was party to a contract establishing its right to compensation and/or continued employment by the Trust. Nor does the Amended Complaint allege that UMB would have continued as Trustee for some definite, or indefinite, period. Nor does UMB even allege that it would have profited by its continuing to serve as Trustee.

by Defendants proximately caused the resignation.” Order, JA2324; R. Doc. 78, at 7. “The allegations are either pure legal conclusions (e.g., “Defendants’ racketeering predicate acts ... directly and proximately caused the same series of ongoing injuries to UMB’s business and property”) or too vague to support a plausible inference of proximate cause (e.g., UMB was “compelled to resign” or “forced to relinquish its position as trustee”).” Order, JA2324; R. Doc. 78, at 7. And this, alone, the district court rightly reasoned, “was a sufficient reason for dismissal, *without considering any other materials.*” Order, JA2324; R. Doc. 78, at 7 (emphasis added).

II. UMB Has Failed to Allege a Pattern of Racketeering Activity

1.

RICO does not “cover all instances of wrongdoing. Rather, it is a unique cause of action that is concerned with eradicating organized, long-term, habitual criminal activity.” *Crest Const. IL Inc. v. Doe*, 660 F.3d 346, 353 (8th Cir. 2011) (citation omitted). Specifically, “[a] violation of § 1962(c) requires [plaintiffs] to show (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.” *Id.* The requirements “must be established as to each individual defendant.” *Craig Outdoor Adver., Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1027 (8th Cir.2008).

And the failure to establish “any one element of a RICO claim means the entire claim fails.” *Id.*⁴

RICO defines a “pattern of racketeering activity” as “requir[ing] at least two acts of racketeering activity” occurring within certain time frames. 18 U.S.C. § 1961(5). “However, this is only a minimum requirement; the concept of a ‘pattern’ requires proof ‘that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity.’” *Diamonds Plus, Inc. v. Kolber*, 960 F.2d 765, 769 (8th Cir. 1992) (quoting *H.J. Inc. v. Northwestern Bell Tele. Co.*, 492 U.S. 229, 238-39 (1989) (emphasis in original)).

“Continuity in this context refers ‘either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition.’” *Craig Outdoor Advert.*, 528 F.3d at 1028 (quoting *H.J., Inc.*, 492 U.S., at 241). “To satisfy the RICO continuity element, therefore, a plaintiff must provide evidence of multiple predicate acts occurring over a substantial period of time (closed-end continuity) or evidence that the alleged predicate acts threaten to extend into the future (open-ended continuity).” *Id.* “A plaintiff may establish open-ended continuity by showing that the predicate acts themselves involve a distinct threat of

⁴ UMB fails to properly allege that *each Defendant* committed at least two predicate acts, a flaw that is fatal to all counts of the Amended Complaint.

long-term racketeering activity or that the predicate acts constitute a regular way of conducting an ongoing legitimate business or a RICO enterprise.” *Id.*

By contrast, “a single transaction which involves only one victim and takes place over a short period of time does not constitute the pattern of racketeering required for long-term criminal activity under a RICO claim.” *Terry A. Lambert Plumbing, Inc. v. Western Sec. Bank*, 934 F.2d 976, 981 (8th Cir. 1991).

Added complexity enters where, as here, a plaintiff seeks to plead RICO’s pattern element through predicate acts of fraud. *Menzies v. Seyfarth Shaw LLP*, 943 F.3d 328, 338 (7th Cir. 2019). The heightened pleading requirements of Fed. R. Civ. P. 9(b) “requires a plaintiff to provide precision and some measure of substantiation to each fraud allegation.” *Id.*

Additionally, “[t]hough mail fraud can be a predicate act, mailings are insufficient to establish the *continuity factor* unless they contain misrepresentations themselves.” *Wisdom*, 167 F.3d at 407 (emphasis added).⁵

⁵ UMB accuses the district court of harboring a “mistaken view of the law.” Appellant’s Br., at 20. Quoting this Court’s decision in *Schmuck v. United States*, 489 U.S. 705, 715 (1989), UMB asserts that innocent mailings—ones that contain *no* false information—“may supply the *mailing element*.” *Id.* (Emphasis added.) However, whether intentionally or not, UMB is conflating the *mailing element* of a mail fraud claim with the *continuity element* of a RICO claim. This Court has held that, although innocent mailings may supply the *mailing element* of a wire fraud claim, “mailings are insufficient to establish the *continuity factor* [of a RICO claim] unless they contain misrepresentations themselves.” *Wisdom*, 167 F.3d at 407 (emphasis added).

In this case, UMB's claims fail on every level. For starters, when all the scandalous verbiage is weeded out, UMB alleges a scheme to file an allegedly meritless lawsuit for the vague purpose of "pressuring, harassing, embarrassing and injuring" a *single victim* "in the eyes of the public," Am. Compl., JA486; R. Doc. 25, at 16, in an effort to "force UMB" "to pay millions of dollars to Defendants." Am. Compl., JA507; R. Doc. 25, at 37. Even if this were plausible (which it is *not*), UMB alleges a single transaction, involving only one victim, taking place over a short period of time. Thus, the "scheme," even if it were true, does not constitute a "pattern of racketeering" required for long-term criminal activity under a RICO claim.

Second, and more precisely to the point, even if this were the *kind* of scheme that is actionable under RICO, the alleged "predicate acts" do *not* satisfy RICO's "continuity" requirement. Take, for example, the single communication alleged to have been exchanged between the Defendants and their attorney from 2014 through the spring of 2017. UMB nakedly alleges, without a shred of evidence, that the communication was made "for the purposes of finding information Defendants could use to pressure UMB to pay them money[.]" Am. Compl., JA507; R. Doc. 25, at 37. But UMB does not specify in what respect the communication was fraudulent or how it was used in furtherance of the scheme to pressure UMB to pay the Defendants money. In fact, UMB *has never even laid eyes on the communication*.

And, in any event, since Missouri expressly grants trust beneficiaries the right to “request ... information” from the trustee “related to the administration of the trust,” Mo. Ann. Stat. § 456.8-813.1(2), the requests are *not a crime*, let alone a predicate act under 18 U.S.C. § 1961(1) (enumerating a list of criminal activities that is to be considered racketeering activity).

The remainder of the UMB’s allegations involve conduct occurring primarily between August 2019 and December 2019. But those, too, fail to establish continuity.

UMB alleges that Defendants Benton and Gude committed bank and wire fraud on August 30, 2019, when they shared an email with their attorney that included an attachment whose title referred to the “Desert Artist.” Am. Compl., JA514-15; R. Doc. 25, at 44-45. However, UMB does not allege that the email contained any misrepresentation. Rather, UMB asserts that the Defendants would later “falsely claim in the Benton I Petition” that the *Desert Artist* “was misdirected from the Nelson by UMB and/or Mr. and Mrs. Crosby Kemper, Jr.” *Id.*⁶

Likewise, although UMB alleges that Jessie Benton committed bank and wire fraud on December 13-15, 2019, when her attorney sent her an email regarding

⁶ However, a plain reading of the Benton I Petition reveals that this is a gross distortion of the record. Defendants *do not* allege that the Desert Artist “was misdirected from the Nelson by UMB and/or Mr. and Mrs. Crosby Kemper, Jr.” *See* JA633-34; R. Doc. 28-8, at 21-22.

“talking points,” UMB does not, *and cannot*, identify any misrepresentation in the email itself. Am. Compl. JA515; R. Doc. 25, at 45.

The same is also true of the allegations that Defendants committed bank and wire fraud when their attorney sent an email “attaching the ‘Final Version of Petition with Red Line,’ ” and when the Defendants “authorized their attorneys to file the Benton I Petition...” Am. Compl., JA512; R. Doc. 25, at 42. UMB has *never seen these communications*. And, as with all the others, UMB does not allege any misrepresentation in the emails themselves.

Other allegations are even more ludicrous. UMB claims, for example, that the Defendants committed bank and wire fraud on December 19 and 26, 2019, when the Associated Press and NPR *reported* on the Benton I Petition. Am. Compl., JA513; R. Doc. 25, at 43. The bank also alleges that the Defendants’ committed bank and wire fraud when their attorney “[sought] UMB’s consent to an amendment to the Benton I Petition” to remove certain of the allegations. Am. Compl., JA514; R. Doc. 25, at 44. But at the same time, UMB asserts the amended petition *removed* some of the allegations that it claims are false. *Id.*

In sum, as the district court rightly held, *none* of the cited emails, all of which occur in the ordinary course of nearly *every* lawsuit, are sufficient to establish the *continuity factor* of a RICO claim. Thus, all that remained are the following: (1) a telephone call between Defendant Benton and The Wall Street Journal over the

weekend of December 14 and 15, 2019, Am. Compl., JA508; R. Doc. 25, at 38; (2) the filing of the Benton I Petition on December 17, 2019, Am. Compl., JA509; R. Doc. 25, at 39; and (3) two statements given by Andre Boyda on December 19, 2019, to KCUR and The Kansas City Star, Am. Compl., JA510; R. Doc. 25, at 40.

But as the district court rightly held, these communications, which occurred over a period of only six days, do not allege “organized, long-term, habitual criminal activity,” *Crest Const. II*, 660 F.3d at 353 (quotation omitted), over a “substantial period of time,” *H.J. Inc.*, 492 U.S. at 242, as contemplated by RICO. *See, e.g., Primary Care Investors, Seven, Inc. v. PHP Healthcare Corp.*, 986 F.2d 1208, 1215-16 (8th Cir.1993) (stating that “[m]any cases in which courts have found a ‘substantial period of time’ have involved schemes extending for a number of years” and holding that eleven months is insufficient to satisfy the closed-ended continuity requirement and noting that other Circuits consistently hold that schemes less than one year are too short). Nor do they involve a plausible and distinct threat of long-term racketeering activity or constitute a regular way of conducting an ongoing legitimate business or a RICO enterprise. Accordingly, UMB has not, and cannot, allege a pattern of racketeering activity.⁷

⁷ UMB accuses the district court of having wrongfully assessed the accuracy of its “continuity” allegations in contravention of Fed. R. Civ. P. 12(b)(6). Appellant’s Br., at 25. The district court, however, merely observed since the alleged “predicate acts” fail to establish continuity, UMB’s threadbare assertion of continuity need not be

2.

UMB attempts to extend the time frame of alleged racketeering activity into the future by claiming that the ongoing nature of the probate case establishes, in the alternative, “open-ended continuity.” It does so by alleging the following predicate acts: (1) the serving of the Defendants’ written responses to UMB’s First Set of Interrogatories in the State Case on January 14 and February 28, 2020; and (2) the filing of the Defendants’ First Amended Petition in the State Case on October 28, 2021. Am. Compl., JA512-24; R. Doc. 25, at 43-44. But the filing of the Benton I Petition, *even if* it contained false statements, is not a “predicate act.”

“For starters, we know that telling a lie or committing perjury is not *per se* a RICO predicate act for one simple reason: it is not included among the list of predicate acts in 18 U.S.C. § 1961(1).” *Midwest Grinding Co. v. Spitz*, 976 F.2d 1016, 1021 (7th Cir. 1992). *See also Rand v. Anaconda–Ericsson, Inc.*, 623 F.Supp.

taken as true. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted); *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009). UMB also accuses the district court of having wrongfully focused on “whether Defendants knew that their representations were false and whether they reached a third party.” Appellant’s Br., at 21. But the court *did not* focus on whether Defendants knew that their representations were false and whether they reached a third party. Rather, when deciding whether certain of the emails were sufficient to establish the *continuity factor* (i.e., whether the email contains a misrepresentation itself), the district court merely observed that where the emails are between the Defendants and their attorneys, the communications could not have contained a misrepresentation. Order, JA1245; R. Doc. 55, at 10 (citing *Wisdom*, 167 F.3d at 407).

176, 182 (E.D.N.Y.1985) (“Perjury, however, is not a RICO predicate act.”), *aff’d on other grounds*, 794 F.2d 843, 849 (2d Cir. 1986), *cert. denied*, 479 U.S. 987, 107 S.Ct. 579, 93 L.Ed.2d 582 (1986); *Sellers v. General Motors Corp.*, 590 F.Supp. 502, 507 (E.D.Pa.1984). And, even in those cases allowing perjury to serve as a predicate act, the defendant had either been *convicted* of perjury before the RICO action commenced, *Kearny v. Hudson Meadows Urban Renewal Corp.*, 829 F.2d 1263, 1467 (3d Cir.1987), or had perjury established as a matter of record in a prior proceeding, *Levit v. Brodner*, 75 B.R. 281 (N.D.Ill.1987). Neither has occurred here.

In any event, 18 U.S.C. § 1503 applies only to perjury offered in *federal court* proceedings. *See O’Malley v. New York City Transit. Auth.*, 896 F.2d 704, 708 (2d Cir.1990) (finding that plaintiff failed to state a violation of § 1503 where the alleged acts took place in state courts, “not in a federal court as required by § 1503”). Here, all the *alleged* “perjury” took place in *state court*, which removes it from the purview of a RICO claim. *See Thomas v. Daneshgari*, 997 F. Supp. 2d 754, 762 (E.D. Mich. 2014) (“Although Plaintiffs also allege various bad acts by Defendants in Bankruptcy Court, the allegations of perjury stem from Defendants’ alleged conduct in the arbitration and state court proceedings. Thus, Plaintiffs’ perjury allegations do not properly allege a predicate act, sufficient to give rise to a RICO claim”).

Moreover, even if the filings in State court could be considered predicate acts, there is a robust consensus among federal courts that serving litigation documents by mail or wire cannot constitute fraud for purposes of establishing a RICO predicate act. *Hallmark Cards, Inc. v. Monitor Clipper Partners, LLC*, No. 08-0840-CV-W-ODS, 2010 WL 5129288, at *7 (W.D. Mo. Nov. 22, 2010) (quoting *United States v. Pendergraft*, 297 F.3d 1198, 1208 (11th Cir. 2002)); *see also Kim v. Kimm*, 884 F.3d 98, 104 (2d Cir. 2018) (“[A]llegations of frivolous, fraudulent, or baseless litigation activities ... cannot constitute a RICO predicate act.”); *Snow Ingredients, Incorporated v. SnowWizard, Incorporated*, 833 F.3d 512, 525 (5th Cir. 2016) (holding that “bad faith litigation” cannot serve as a RICO predicate act); *Gabovitch v. Shear*, 70 F.3d 1252 (1st Cir. 1995) (rejecting a civil RICO claim where “simply by alleging that defendants’ litigation stance in the state court case was ‘fraudulent,’ plaintiff is insisting upon a right to relitigate that entire case in federal court (while the case remains pending in the state [] court)”).

And as the district court rightly pointed out, “[t]here are sound policy reasons for this consensus: if filing litigation documents could form the basis for a RICO action, every unsuccessful lawsuit could spawn a retaliatory action,” which would “inundate the federal courts with procedurally complex RICO pleadings,” “engender wasteful satellite litigation,” and spawn “ad infinitum litigation with each party claiming that the opponent’s previous action was malicious and meritless,” *Kim*, 888

F.3d at 104 (citations omitted; cleaned up); *see also Paul S. Mullin & Assocs. v. Bassett*, 632 F. Supp. 532, 540 (D. Del. 1986) (“The Court finds absurd plaintiffs’ apparent suggestion that a lawyer’s act in posting a letter which states a client’s legal position in a dispute can constitute mail fraud. If such were the situation, every dispute in which the parties’ counsel exchanged letters could give rise to RICO litigation. Such activity simply is not fraudulent.”); *Nolan v. Galaxy Scientific Corp.*, 269 F.Supp.2d 635, 643 (E.D. Pa. 2003) (“This court is unwilling to expand RICO liability for mail fraud in such a dramatic fashion as to include litigation papers and pre-litigation statements of legal position.”).

On very similar facts, a number of courts have found that allegations focused upon the litigation activities involved in defendants’ “false” and “frivolous” lawsuit against the plaintiffs cannot properly form the basis for a RICO predicate act. *See, e.g., Daddona v. Gaudio*, 156 F.Supp.2d 153, 162 (D.Conn.2000) (finding allegations “at best amount to vague abuse of process or malicious prosecution claims” where complaint lists “a variety of ‘predicate acts,’ all of which involve the filing of complaints and other legal documents”); *Nakahara v. Bal*, No. 97–cv–2027, 1998 WL 35123, at *6–7, *8, (S.D.N.Y. Jan. 30, 1998) (finding that plaintiffs’ mail and wire fraud claims are at most “a potential yet still inchoate claim for malicious prosecution or abuse of process” where “the gravamen of [plaintiffs’] Complaint ...

is patently directed at [the defendant's] filing of, or participation in, the various legal actions pending against [plaintiffs]").⁸

Indeed, in *this case*, UMB's Amended Complaint includes false statements that are intended "solely to cast spurious aspersions on Defendants," Order, JA2329; R. Doc. 78, at 12, for the wrongful and malicious purpose of forcing the Defendants to give up or compromise their probate claims and the damages caused by UMB's fiduciary breaches. Assuming, for the sake of argument, that the filing of a civil suit, and the email correspondence regarding the same, may be considered a RICO "predicate act," UMB and its attorneys are presently engaged in an ongoing violation of RICO for which *they* could be liable for treble damages. *See Curtis & Assocs.*, 758 F. Supp. 2d at 173 (stating that if the court were "to permit plaintiffs' Complaint in this action to move forward, defendants could conceivably countersue plaintiffs for RICO conspiracy violations based upon the many allegations and statements by plaintiffs in this action which defendants might similarly contend are frivolous or false").

⁸ Additionally, as one court rejecting this very use of civil RICO warned: If a litigant's or attorney's pleading and correspondence "could lead to drastic RICO liability in a private right of action, litigants might hesitate to avail themselves of the courts and available legal remedies or be unable to find representation to help vindicate their rights." *Curtis & Assocs., P.C. v. Law Offices of David M. Bushman, Esq.*, 758 F. Supp. 2d 153, 173 (E.D.N.Y. 2010), *aff'd sub nom. Curtis v. Law offices of David M. Bushman, Esq.*, 443 F. App'x 582 (2d Cir. 2011).

But again, this Court has already held that a plaintiff may *not* artfully plead claims for malicious prosecution as a RICO claim. “If a suit is groundless or filed in bad faith, the law of torts may provide a remedy. Resort to a federal criminal statute is unnecessary.” *I.S. Joseph Co.*, 751 F.2d at 267–68. *See also Auburn Med. Ctr., Inc. v. Andrus*, 9 F. Supp. 2d 1291, 1298 (M.D. Ala. 1998) (finding that “engaging in [allegedly fraudulent and baseless] litigation does not constitute mail fraud for purpose of supporting a RICO claim” and that as “plaintiff’s mail fraud claims are, in fact, artfully pleaded claims for malicious prosecution ... they cannot form the basis of a RICO claim”); *Nakahara v. Bal*, No. 97 CIV. 2027 (DLC), 1998 WL 35123, at *8 (S.D.N.Y. Jan. 30, 1998) (allegations of mail and wire fraud relating to the filing of fraudulent documents in litigation “constitute at most an incipient claim for malicious prosecution” and “fail as a matter of law to establish the requisite predicate acts for purposes of their asserted RICO claim”).

Accordingly, the district court did not err by joining most other federal courts in holding that Defendants’ litigation papers—including the Original and Amended Petitions in the probate case—are *not* RICO predicate acts.⁹

⁹ Even if the litigation-related filings *did* constitute RICO predicate acts, UMB utterly fails to allege any connection between the filings and the harm it claims to have suffered. The amended petition *removed* some of the allegations that UMB claims are false, Am. Compl., JA514; R. Doc. 25, at 44, and there are *no* allegations that the Defendants’ written responses to UMB’s First Set of Interrogatories were ever shared with or seen by the public.

3.

Finally, UMB makes a last-ditch attempt at creating continuity by asserting that its Amended Complaint includes a “wide range of conduct spanning years that makes up the *bank fraud* allegations.” Appellant’s Br., at 24 (emphasis added). This includes, according to UMB, its allegation that Defendants communicated with their attorney, Andre Boyda, in late 2014, “for the purposes of finding information Defendants could use to pressure UMB to pay them money[.]” Am. Compl., JA507; R. Doc. 25, at 37.

But here, again, the communications between the Defendants and their attorney are *privileged*. UMB have *never* seen them and has no firsthand—or even secondhand—knowledge of what they contain. Thus, rather than identify the precise statements that it alleges were fraudulent, UMB mere characterizes entire documents, *none of which it has seen*, and alleges, in vague and sweeping language, that each of those documents was created in furtherance of the alleged scheme. Such vague allegations are clearly insufficient to meet the particularity requirement of Rule 9(b).

In any event, UMB’s “bank fraud” allegations against the Defendants do not rise to the level of stating a plausible claim under 18 U.S.C. § 1962. In *Loughrin v. United States*, the Supreme Court held that although a false or fraudulent statement need not be made *directly* to a bank, section 2 requires, at a minimum, that a false

statement—one which would have the effect of *naturally* inducing a bank to part with money in its control—eventually goes to the bank. 573 U.S. 351, 363-65 (2014). Otherwise, “where no false statement will ever go to a financial institution, the fraud is not the means of obtaining bank property.” *Id.* at 365. *See also Schoedinger v. United Healthcare of Midwest, Inc.*, 557 F.3d 872, 879 (8th Cir. 2009) (“While a plaintiff’s detrimental reliance is not an element of a RICO claim predicated on mail fraud, “materiality of falsehood is an element of the federal mail fraud, wire fraud, and bank fraud statutes” (quoting *Neder v. United States*, 527 U.S. 1, 25 (1999)); *United States v. Goodman*, 984 F.2d 235, 237 (8th Cir.1993) (a scheme to defraud must be “reasonably calculated to deceive persons of ordinary prudence and comprehension”).

In *Loughrin*, for example, the defendant executed a scheme to convert altered or forged checks into cash by using them to purchase merchandise at a big-box retailer. *Id.* at 353. The defendant would then leave the store, only to turn around and return the goods for cash. The retailer, oblivious to the scheme, would submit the fraudulent check to a federally insured bank for payment. Then, upon receipt by the bank, the check would “trigger[] the disbursement of bank funds just as if presented by the fraudster himself.” *Id.* at 364.

The Supreme Court held that since the defendants’ false statements, in the form of forged and altered checks, would, *in the ordinary course of business*, be

forwarded by the retailer to a bank for payment, which would then “naturally induc[e] a bank (or custodian) to part with its money,” the fraudulent check scheme violated § 1344(2) *even though* the defendant had not made a misrepresentation to the bank itself—say, at the teller’s window—and *even though* the defendant might not have intended that his scheme reach the bank. *Id.* at 364-66. It is enough, the Court held, that (1) in the ordinary course of events, (2) the lie *naturally* reaches the bank, and (3) *naturally induces the bank into parting with its money*. *Id.* at 365 fn. 8.

In this case, as the district court rightly observed, UMB does not allege that *any* of the statements made by the Defendants actually reached the bank or would have had the effect of naturally and directly inducing the bank to part with its money. UMB does not allege, for example, that the filing of a lawsuit has the natural effect of inducing UMB to pay the damages alleged, nor does UMB allege that it normally parts with its money when allegations regarding its mismanagement of a trust are disclosed to the media. Accordingly, though § 1344(2) does not require that the defendant intend to deceive a bank or that the false statements be made *directly* to the bank, § 1344(2) nevertheless requires more than is alleged in the Amended Complaint (or the proposed Second Amended Complaint). *See* Order, JA2326; R. Doc. 78, at 6 (“UMB has not stated a *plausible* claim.” (Emphasis added.))

Finally, as this Court explained, the bank fraud statute “is not ‘a plenary ban

on fraud’ and does not ‘federaliz[e] frauds that are only tangentially related to the banking system.’ ” *H & Q Properties, Inc. v. Doll*, 793 F.3d 852, 856 (8th Cir. 2015) (quoting *Loughrin*, 134 S.Ct. at 2392–93). In this case, the alleged “scheme” is only tangentially related to the banking system. Thus, even assuming UMB has sufficiently pleaded *some* kind of fraudulent conduct (it has *not*), it has not adequately alleged bank fraud.

Rather than engage with the district court’s substantive analysis, UMB misdirects and claims that the district court erred by “erroneously require[ing] an intent to deceive the bank[.]” Appellant’s Br., at 16. However, as UMB admits on the *very next page* of its brief, the district court clarified that its dismissal was *not* based on UMB’s failure to allege an “intent to deceive the bank,” but rather, it was based on the fact that “[t]here is nothing in the [Amended Complaint] from which a person could reasonably infer [that] the[] [Defendants’] false statements served in the ordinary course as the instrumentality of obtaining bank property.” Order, JA2328; R. Doc. 78, at 11. And although UMB claims that “that is precisely what UMB alleged,” Appellant’s Br., at 16, it can muster only that by incorporating more than 75 paragraphs of the Amended Complaint, Count II alleges “some loss to [UMB], or at least an attempt to cause loss.” *Id.* Obviously, the district court needn’t treat UMB’s bare assertion as having adequately stated a claim for bank fraud. *Twombly*, 550 U.S. at 555 (citation omitted); *Iqbal*, 556 U.S. at 677–78.

4.

UMB falsely accuses the Defendants of having committed bank, mail, and wire fraud, beginning in 2014, by “instruct[ing]” their attorney to investigate whether UMB was acting in compliance with its fiduciary obligations. Although UMB has never laid eyes on the communication, it alleges, *without any factual support*, that “Defendants instructed [their attorney] to collect information and documents from UMB in order to find ways to pressure, harass, embarrass and injure UMB into paying Defendants monies to which they were not entitled.” Am. Compl., JA511; R. Doc. 25, at 41. And now, in order to bolster its appeal, UMB claims that the unseen 2014 email establishes the start of the Defendants’ “scheme” because the Defendants *also* “made false representations to UMB as to the reasons for requesting documents from UMB.” Appellant’s Br., at 27. Not only is this utterly false, but it is also a complete fabrication of UMB’s Amended Complaint.

Nowhere does UMB allege that the Defendants made false representations to UMB. Nor does UMB even allege that the Defendants’ attorney made false representations to UMB. Rather, all of the allegations center on communications *between the Defendants and their attorney*. Am. Compl., JA506-15; R. Doc. 25, at 36-44.

For example, the Defendants are alleged to have prepared a “List of Grievances” with their attorney regarding UMB’s trust administration. Am. Compl.,

JA507; R. Doc. 25, at 37. Next, the Defendants are alleged to have communicated with their attorney about the *Desert Artist* painting. *Id.* Next, the Defendants are alleged to have communicated with their attorney regarding “talking points” for use when discussing the State case during media inquiries. Am. Compl., JA508; R. Doc. 25, at 38. Finally, the Defendants are alleged to have communicated with their attorney regarding the “Final Version of Petition with Red Line.” *Id.*

These actions, all of which occur commonly in the ordinary course of lawyers retention under Missouri’s statutory trust law, do not amount to the kind of organized, long-term, habitual criminal activity punishable under RICO § 1964(c). And UMB’s dishonest and distorted description of the Amended Complaint is not enough to change that.

III. The District Court Did Not Abuse its Discretion in Denying UMB’s Post-Judgement Motion for Leave to File a Second Amended Complaint

Federal Rule of Civil Procedure 15(a) provides that “court[s] should freely give leave [to amend a complaint] when justice so requires.” Fed. R. Civ. P. 15(a). But as this Court explained, district courts “need *not* grant leave to amend, however, if granting such leave would be futile.” *H & Q Properties, Inc. v. Doll*, 793 F.3d 852, 857 (8th Cir. 2015) (emphasis in original). In this case, after reviewing UMB’s proposed Second Amended Complaint, the district court held that the proposed

amendments do *not* cure the above-described deficiencies present in UMB's RICO allegations.

Indeed, the primary deficiencies—a lack of standing and the failure to allege continuity—*cannot* be remedied simply by expanding upon the implausible and artfully pled “scheme.” And although the proposed Second Amended Complaint stretches UMB's shamefully artful story to 79 pages and 245 paragraphs, it nevertheless continues to allege that UMB—and UMB alone—was the victim of a single scheme, orchestrated by a single set of perpetrators, designed with the single goal of ousting UMB as a trustee on a single trust of which Defendants were the beneficiaries. Accordingly, UMB has failed to show how an amendment could save it.

Additionally, the district court rightly found that “relatively few” of the new allegations “relate to the categories of predicate acts contained in the [first Amended Complaint],” and that “[the] new allegations either make no substantive changes or fail to explicitly remedy all the issues identified in the Court's prior order.” Order, JA2331; R. Doc. 78, at 14. As for the allegations in paragraphs 33 to 61 of the proposed Second Amended Complaint, the district court properly found that they are either *expressly permitted* by Missouri state law or relate to litigation activities that do not constitute a RICO predicate act. *Id.*

On appeal, rather than contend with the district court’s analysis of its proposed amendment, UMB bluntly asserts, *without discussion*, that the Second Amended Complaint “correct[s] [any] errors and states plausible claims for relief.” Appellant’s Br., at 45. With respect, UMB is wrong. It’s proposed Second Amended Complaint utterly fails to state a *plausible* claim for relief.

CONCLUSION

For the reasons explained above, this Court should *affirm* the district court’s dismissal of the First Amended Complaint and should *affirm* the district court’s denial of UMB’s Motion for Leave to File a Second Amended Complaint.

Dated: February 14, 2023

Respectfully submitted,

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CERTIFICATE OF VIRUS FREE

The undersigned counsel certifies under Eighth Circuit Rule 28A(h)(2) that the Appellees' Brief has been scanned for computer viruses and that the document is virus free.

Dated: February 14, 2023

/s/ Andrew Schermerhorn
Andrew Schermerhorn

CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Federal Rule of Appellate Procedure 32(a)(7) because, excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(f), this motion contains 12,844 words. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

Dated: February 14, 2023

/s/ Andrew Schermerhorn
Andrew Schermerhorn

CERTIFICATE OF SERVICE

I hereby certify that, on February 14, 2023, a true and correct copy of the foregoing Motion was served with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

Dated: February 14, 2023

/s/ Andrew Schermerhorn
Andrew Schermerhorn