No. 05-

IN THE
Supreme Court of the United States

E.I. DU PONT DE NEMOURS AND COMPANY,

Petitioner,

v.

LIVING DESIGNS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a defendant corporation and its litigation counsel can constitute an "enterprise" under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"), in light of the settled rules that (a) a RICO defendant must "conduct" or "participate" in the affairs of a larger enterprise and not just its own affairs and (b) a corporation must be represented in litigation by an attorney.

2. Whether, under 18 U.S.C. § 1964(c), civil RICO plaintiffs alleging mail and wire fraud as predicate acts must prove "reasonable reliance."

3. Whether an allegedly tainted litigation process resulting in a diminished settlement constitutes "injury" to "business or property" under 18 U.S.C. § 1964(c).

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1, the following is a list of all parties to the proceeding in the Ninth Circuit whose judgment is sought to be reviewed:

Anthurium Acres, successor in interest to Island Tropicals

E.I. du Pont de Nemours and Company

Fuku-Bonsai, Inc.

David W. Fukumoto

Living Designs, Inc.

David Matsuura, individually and d/b/a Orchid Isle Nursery

Stephen Matsuura, individually and d/b/a Hawaiian Dendrobium Farm

McConnell, Inc.

Mueller Horticultural Partners

Plant Exchange, Inc.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Petitioner E.I. du Pont de Nemours and Company ("DuPont") has no parent company, and no publicly held company owns 10% or more of DuPont's stock. DuPont is a publicly traded corporation listed on the New York Stock Exchange.

TABLE OF CONTENTS

Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Cited Authorities

Cited Authorities

Page

Cited Authorities

Statutes

Other Authorities

TABLE OF APPENDICES

E.I. du Pont de Nemours and Company ("DuPont") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals reversing the district court was published at 431 F.3d 353 (9th Cir. 2005) and is reproduced in the appendix at Pet. App. 1a-46a. The opinion of the district court granting, *inter alia*, DuPont's motion for judgment on the pleadings as to Plaintiffs' RICO claims was reported at 330 F. Supp. 2d 1101 (D. Haw. 2004) and is reproduced at Pet. App. 47a-117a. The order of the court of appeals denying rehearing and rehearing en banc was unpublished and is reproduced at Pet. App. 146a-149a.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 2005. An order denying petitioner's petition for rehearing and rehearing en banc was entered on January 19, 2006. This petition is timely filed and the Court has jurisdiction under 28 U.S.C. § 1254(1). *See* n.11, *infra*.

STATUTORY PROVISIONS INVOLVED

The entire text of 18 U.S.C. § 1961(4) (defining "enterprise"), 18 U.S.C. § 1962(c) (making unlawful the commission of racketeering acts by a person "employed by or associated with any enterprise . . ."), and 18 U.S.C. § 1964(c) (providing a civil remedy to a person "injured in his business or property by reason of a" RICO violation) are set forth in the appendix at Pet. App. 150a-151a.

STATEMENT OF THE CASE

This petition arises out of claims brought by farmers and nurserymen who allege that DuPont fraudulently induced the settlement of prior, separate lawsuits. Reversing the district court, the Ninth Circuit held that these fraud claims could

proceed under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO").

By holding that DuPont, as a RICO defendant, could form a RICO "enterprise" with litigation counsel acting on DuPont's behalf, the Ninth Circuit's decision exacerbates the circuit split already before this Court in *Mohawk Industries, Inc. v. Williams*, No. 05-465 (cert. granted Dec. 12, 2005). In *Mohawk*, this Court granted certiorari to decide "[w]hether defendant corporation and its agents constitute an 'enterprise' under RICO in light of the settled rule that a RICO defendant must 'conduct' or 'participate' in the affairs of a larger enterprise and not just its own affairs." 126 S. Ct. 830. If the Court holds that a corporation cannot form an "enterprise" with its agents (as urged by the *Mohawk* petitioner), then the Ninth Circuit's judgment should be reversed. Thus, at a minimum, this petition should be held pending resolution of *Mohawk*.

Even if the Court does not adopt a bright-line enterprise rule for corporate agents in *Mohawk*, the Ninth Circuit's decision in this case still should be reversed. Unlike most business activities – where a corporation can elect either to do the task itself or retain an agent – the rule has long been settled that a corporation can litigate only through an attorney. By holding that a corporation is "distinct" from its litigation counsel, the Ninth Circuit's ruling renders every litigating corporation part of a "litigation 'enterprise.'" Pet. App. 18a. Congress never intended RICO to regulate corporations and their lawyers as a RICO enterprise.

The second question likewise raises an issue already before the Court: the necessity of establishing reasonable reliance where, as here, a civil RICO claim is predicated on mail and wire fraud. The Ninth Circuit reiterated its rule that reliance is not the only means of establishing proximate cause for fraud-based RICO claims but acknowledged that this Court had granted certiorari on the reasonable reliance issue in *Bank of China, New York Branch v. NBM L.L.C.*, 125 S. Ct. 2956 (2005).

Pet. App. 20a n.8. Although the *Bank of China* petition was voluntarily dismissed shortly before the Ninth Circuit ruled (*see* 126 S. Ct. 675), this Court has granted certiorari in another RICO reliance case, *Anza v. Ideal Steel Supply Co.*, No. 04-433 (cert. granted Nov. 28, 2005). The Court's forthcoming decision in *Anza* likely will provide needed guidance on the reliance requirement for Plaintiffs' fraud-based RICO claims. For this reason as well, this petition should, at a minimum, be held pending *Anza*.

Furthermore, the question presented in *Anza* differs somewhat from this case because in *Anza*, a business competitor predicated its RICO claims on fraudulent statements made to third-party customers. *See* 126 S. Ct. 713. Thus, this Court could resolve *Anza* based on the fact that the allegedly fraudulent statements were directed to customers of the RICO plaintiff and that the RICO plaintiff itself did not rely on the fraud. If *Anza* is resolved on that basis, then the Court should grant this petition to address the separate reasonable-reliance issue where, as here, it is alleged that the fraudulent statements were heard and relied upon (reasonably or unreasonably) by the Plaintiffs themselves.

The third question is whether the purported harm in this case – an allegedly tainted litigation process resulting in a diminished settlement – constitutes an "injury" to "business or property" as required by RICO. In reversing the district court's holding that this harm constituted "the type of personal injury or injury to an intangible interest not remediable by RICO's civil provisions" (Pet. App. 113a), the Ninth Circuit refused to impose any meaningful limitation against recovering for injury to intangible interests or speculative damages. That interpretation of RICO conflicts with decisions from the Fifth and Seventh Circuits.

Accordingly, this petition should be held pending this Court's rulings on the enterprise issue in *Mohawk* and the reliance issue in *Anza*. If those rulings do not mandate reversal

of the Ninth Circuit's judgment here, the Court should grant this petition to resolve the questions presented on the merits.

1. The facts essential to the questions presented are few and uncontested. Plaintiffs here alleged a RICO "enterprise" comprised of DuPont and the attorneys that represented it in prior litigation; pled mail and wire fraud as the RICO predicate acts; and asserted that a tainted litigation process resulting in a diminished settlement constituted actionable RICO "injury" to "business or property." A more detailed discussion of the background of the case, however, is necessary to understand fully the dispositions below.

a. Plaintiffs assert that because DuPont allegedly failed to produce certain information in discovery and allegedly engaged in other litigation misconduct, they were fraudulently induced to settle prior products liability suits against DuPont. Pet. App. 9a-10a. Seeking to "affirm" the prior settlements and recover the difference between the prior settlements and the settlement amounts Plaintiffs claim they would have received but for DuPont's alleged fraud, Plaintiffs allege federal RICO and state common-law claims, including claims for "infliction of emotional distress." *Id.* at 10a.

Plaintiffs' prior product liability lawsuits were among a number of suits filed in the early 1990s stating various claims based on allegations that the DuPont fungicide Benlate® ("Benlate") had become contaminated with sulfonylurea herbicides ("SUs"). Pet. App. 5a. In addition to suits by Plaintiffs and others in Hawaii state court, Benlate cases also were filed against DuPont in Florida state court and in Georgia federal court. *Id.* at 5a-9a; *see also id.* at 53a.

In the Hawaii Benlate cases, there were discovery disputes between the plaintiffs and DuPont concerning the disclosure of the "ALTA data" (named after the laboratory that generated it). Pet. App. 56a-58a. In March 1994, the Hawaii state trial court overruled claims of work product asserted by DuPont and ordered the ALTA data produced. *Id.* at 57a. DuPont petitioned

the Hawaii Supreme Court for review, but its petition was denied on April 6, 1994. *Id.*

Soon after this ruling, in April and May of 1994, Plaintiffs here, through their Florida-based attorney Kevin Malone ("Malone"), settled their Benlate cases against DuPont. Pet. App. 6a. During the time between the settlements and the dismissals of Plaintiffs' lawsuits in October and November of 1994, certain other plaintiffs who had not settled their claims continued to pursue the ALTA data that DuPont had withheld on work-product grounds. After DuPont produced the ALTA data, the non-settling plaintiffs claimed that the data showed that Benlate was contaminated with SUs. *Id.* at 58a.

One Hawaii state Benlate case that went to trial was the *Kawamata* case. In January 1995, a jury returned a verdict in favor of the *Kawamata* plaintiffs. Pet. App. 7a & n.2.

After the *Kawamata* verdict, plaintiffs in a different case (the *Bush Ranch* case in the United States District Court for the Middle District of Georgia) brought a "fraud on the court" proceeding against DuPont, claiming that DuPont should have produced the ALTA data during discovery in *Bush Ranch* and that a DuPont expert witness had given false testimony. Pet. App. 9a. The *Bush Ranch* trial court imposed sanctions on DuPont, but the Eleventh Circuit reversed this order on the ground that it resulted from an unconstitutional process.[1]

b. Beginning in 1996 (after the *Bush Ranch* sanctions order was entered), Plaintiffs and others who already had settled their Benlate claims against DuPont filed "settlement fraud" actions, alleging that DuPont had fraudulently induced the settlements of their prior Benlate cases by concealing information and seeking to recover as damages the "diminished value" of the prior settlements. Pet. App. 9a-10a. As with the prior Benlate

1. *See In re DuPont – Benlate Litig.*, 99 F.3d 363 (11th Cir. 1996).

cases, "settlement fraud" lawsuits were filed in Hawaii, Florida, and Georgia.[2]

DuPont moved to dismiss the Hawaii cases based on the terms of the parties' settlement agreements. The district court granted DuPont's motions, but the Ninth Circuit reversed.[3] The Delaware Supreme Court ultimately agreed with the Ninth Circuit that the terms of the Delaware settlements did not support a Rule 12 motion for failure to state a claim. *DuPont v. Florida Evergreen Foliage*, 744 A.2d 457 (1999).

After the Delaware Supreme Court's decision, DuPont answered and filed detailed counterclaims in Florida and Hawaii. These counterclaims and the claimants' replies formed the basis for motions for judgment on the pleadings by DuPont.

In Florida, the United States District Court for the Southern District of Florida granted DuPont's motions for judgment on the pleadings in a "lead case" and the Eleventh Circuit affirmed.[4] DuPont then filed motions seeking to have this ruling applied to all of the Florida cases, which were granted.[5]

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2. The Georgia suits were dismissed with prejudice, based on the terms of the releases executed in connection with the prior settlements. The Eleventh Circuit affirmed. *Kobatake v. DuPont*, 162 F.3d 619 (11th Cir. 1998), *cert. denied*, 528 U.S. 921 (1999). The releases in *Kobatake* were governed by Georgia law. Most of the releases at issue in Hawaii and Florida (including Plaintiffs' releases) are governed by Delaware law.

3. *See Matsuura v. Alston & Bird*, 166 F.3d 1006, *amended on denial of reh'g*, 179 F.3d 1131 (9th Cir. 1999), *cert. dismissed*, 528 U.S. 1067 (1999); *Fuku-Bonsai, Inc. v. DuPont*, 187 F.3d 1031 (9th Cir. 1999).

4. *See Florida Evergreen Foliage v. DuPont*, 135 F. Supp. 2d 1271 & 165 F. Supp. 2d 1345 (2001), *aff'd sub nom. Green Leaf Nursery, Inc. v. DuPont*, 341 F.3d 1292 (2003), *cert. denied*, 541 U.S. 1037 (2004).

5. *Florida Evergreen Foliage v. DuPont*, 336 F. Supp. 2d 1239 (S.D. Fla. 2004), *appeals pending*, Nos. 04-14455 & 04-14506 (11th Cir.).

In Hawaii, DuPont filed similar motions for judgment on the pleadings. In response to these motions, the District of Hawaii certified certain state-law questions to the Hawaii Supreme Court, which that court answered in 2003. *See Matsuura v. DuPont*, 73 P.3d 687 (Haw. 2003).

During the pendency of the certification proceedings before the Hawaii Supreme Court, the Hawaii federal cases were reassigned. The district court denied DuPont's motion for a continuance pending the Hawaii Supreme Court's decision and set a trial date, after which DuPont re-filed its dispositive motions. In 2002, the court granted two of these motions. *See* Pet. App. 118a-144a.

After the Hawaii Supreme Court's decision in 2003, the parties submitted additional motions and briefing. In February of 2004, the district court heard and granted several motions by DuPont, including a motion for judgment on the pleadings as to all of Plaintiffs' RICO claims. *See Matsuura v. DuPont*, 330 F. Supp. 2d 1101 (D. Haw. 2004) (Pet. App. 47a-117a).

2. The district court analyzed Plaintiffs' fraud and other state-law claims before addressing their RICO claims.

a. Focusing first on Plaintiffs' claims that DuPont had fraudulently concealed the ALTA data, the district court held that Plaintiffs could not establish actual reliance on DuPont's allegedly false "work-product" representation. Rather than rely on the work-product claim, Plaintiffs successfully challenged it and obtained an order requiring production of the ALTA data before they decided to settle their cases. Pet. App. 86a-87a.

The district court also determined that Plaintiffs could not prove reasonable reliance. Pet. App. 87a-90a. In addition to undisputed evidence showing that Malone knew many of the facts giving rise to the fraud claims and did not trust DuPont's discovery disclosures, Malone stated in correspondence and in deposition testimony that he settled on the assumption he would

win the prior Benlate cases and that his clients had received "full value" in their settlements. *Id.* at 88a.[6]

b. Incorporating its ruling on the common-law fraud claims, the district court rejected Plaintiffs' RICO claims on the ground that they could not establish the reasonable reliance required to support their alleged predicate acts of mail and wire fraud. Pet. App. 106a-107a.[7]

In addition, the district court articulated three further grounds for rejecting Plaintiffs' RICO claims: (1) their failure to allege a RICO enterprise separate and distinct from DuPont; (2) their failure to allege an actionable RICO injury to business or property; and (3) the federal litigation privilege. Pet. App. 110a-116a.

c. Plaintiffs' alleged "enterprise" consisted of DuPont, DuPont employees, and attorneys representing DuPont in the prior Benlate cases.[8] Pet. App. 111a. According to Plaintiffs, DuPont's lawyers were acting "within the scope of their employment" when they committed the alleged predicate acts, such as serving false discovery responses and eliciting false testimony during the litigation of the Benlate cases. *Id.*

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6. This and other evidence also precluded Plaintiffs from establishing non-speculative damages: because Malone admittedly was convinced that he would prevail on liability, Plaintiffs could not show that they were damaged by the failure to produce additional liability evidence. Pet. App. 90a-98a.

7. The only "non-fraud" predicate act – obstruction of justice in a case to which Plaintiffs were not parties – was rejected due to Plaintiffs' inability to establish a "'direct relationship between the injury and the alleged wrongdoing.'" Pet. App. 107a-109a. The Ninth Circuit affirmed the district court's "indirect injury" ruling. *Id.* at 18a-19a & n.7.

8. Although Plaintiffs also alleged that expert witnesses retained by DuPont's litigation attorneys were part of the "enterprise," the Ninth Circuit did not treat these agents of the attorneys as presenting a separate enterprise issue.

The district court noted that in *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 169 (2001), this Court contrasted the enterprise theory before it with the "less natural" and "oddly constructed" enterprise theory in which "[the] corporation was the 'person' and the corporation, together with all its employees and agents, were the 'enterprise.'" Pet. App. 111a. Plaintiffs here alleged precisely this type of "oddly constructed" enterprise. Accordingly, and consistent with decisions from the Second and Seventh Circuits, Plaintiffs' RICO claims failed because their alleged "enterprise" was not sufficiently distinct from DuPont. *Id.* at 111a-112a.[9]

d. The district court also ruled that Plaintiffs had not alleged an "injury" to "business or property" as required under RICO. Plaintiffs' claimed harm – a "tainted litigation process that diminished their settlements" – amounted to "the type of personal injury or injury to an intangible interest not remediable by RICO's civil provisions." Pet. App. 113a-114a. In addition to finding that Plaintiffs' asserted harm constituted "mere injury to a valuable intangible property interest" (the interest in "litigation fair play"), the district court further held that the claimed injury was "only a speculative injury." *Id.*

e. Finally, the district court held that Plaintiffs' RICO claims were barred by the federal litigation immunity, which "bars subsequent civil litigation based on a party's litigation conduct." Pet. App. 114a-116a.

3. On Plaintiffs' appeal, the Ninth Circuit reversed virtually all of the district court's rulings and reinstated Plaintiffs' RICO claims. Pet. App. 4a.

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9. Two other courts have rejected similar RICO claims against DuPont that alleged an "enterprise" consisting of DuPont, its litigation counsel, and its expert witnesses. *See Palmas Y Bambu, S.A. v. DuPont*, 881 So. 2d 565, 575-577 (Fla. 3d DCA 2004), *review denied*, 895 So. 2d 406 (Fla. 2005); *Florida Evergreen Foliage v. DuPont*, 336 F. Supp. 2d 1239, 1260-1261 (S.D. Fla. 2004), *appeals pending*, Nos. 04-14455 & 04-14506 (11th Cir.).

a. The court of appeals first addressed the "enterprise" issue. Pet. App. 15a-18a. The Ninth Circuit acknowledged that, under *Cedric Kushner*, a RICO enterprise could not consist "only of DuPont and its employees." *Id.* at 16a. Nevertheless, the court of appeals held that DuPont could form an enterprise with the outside law firms retained to represent the company in the Benlate cases. *Id.* at 17a-18a.

According to the Ninth Circuit, the law firms hired by DuPont were "separate and distinct from DuPont" because "[t]hese law firms are required to conform to ethical rules and thus are not merely at the beck and call of their clients." Pet. App. 17a. The court of appeals reasoned as follows:

> [T]he rules of professional conduct require law firms to be distinct entities and to maintain their professional independence. In addition, even in the context of the attorney-client relationship, attorneys retain control over important functions; for example, in litigation, the attorney retains control over tactical and strategic decisions. Thus, the litigation "enterprise" necessarily must be distinct from the client retaining legal assistance.

Id. at 18a (citations omitted).

b. The Ninth Circuit next reversed the district court's holding that Plaintiffs could not establish the essential element of "reasonable reliance" in support of their alleged predicate acts of mail and wire fraud. Pet. App. 18a-21a. Although its prior decisions had "declined to announce a black-letter rule that reliance is the only way plaintiffs can establish causation in a civil RICO claim predicated on mail and wire fraud," the court of appeals declined to decide the cases under these governing precedents on the ground that such a ruling would be "premature" in light of this Court's then-recent grant of review of the reasonable reliance issue in *Bank of China, New York Branch v. NBM, L.L.C.*, 125 S. Ct. 2956, *cert. dismissed*, 126 S. Ct. 675 (2005). *Id.* at 20a n.8. Instead, the court's perfunctory

discussion merely accepted Plaintiffs' conclusory allegations of the legal elements of their RICO claims and noted self-serving testimony on an irrelevant, non-reliance issue. *Id.* at 20a-21a.

c. In addition, the Ninth Circuit reversed the district court's injury holding and ruled that a tainted litigation process constituted a cognizable RICO "injury" to "business or property." Pet. App. 21a-23a. Addressing the "property" requirement only, the court of appeals followed its recent ruling in *Diaz v. Gates*, 420 F.3d 897 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 1069 (2006), which requires nothing more than harm to a state-law "property interest" and a "financial loss" and, unlike the law in other circuits, does not further restrict cognizable injury claims under RICO in any other way. *Id.* at 22a. Under this liberal standard, Plaintiffs' alleged "fraudulent inducement" was deemed a sufficient "property interest" and their assertion that they settled for a "smaller percentage of their alleged damages" was deemed an adequate "financial loss." *Id.* at 22a-23a.

d. Finally, the Ninth Circuit also reversed the trial court's holding that the federal litigation privilege applied and barred the RICO claims. Pet. App. 23a-24a. The court of appeals ruled that such litigation immunity does not reach claims against a party based on "falsification, destruction, and misrepresentation of evidence." *Id.*[10]

4. DuPont moved for a stay of all further proceedings (including the time to petition for rehearing) pending this Court's rulings in *Mohawk* and *Anza*. When no ruling issued on that

10. The Ninth Circuit also reversed the district court's dismissal, on statute of limitations grounds, of the RICO claims asserted in the three later-filed lawsuits; its holding that Plaintiffs' damages were speculative as a matter of law; and its dismissal of Plaintiffs' fraud and other state law claims (with limited exceptions not applicable here). Pet. App. 24a-40a.

motion, DuPont filed a protective petition for rehearing and rehearing en banc.[11]

DuPont's motion for a stay and its petition for rehearing were denied in a single order dated January 19, 2006. DuPont's motion to stay the mandate pending the filing of this petition was denied on February 6, 2006. Because the court of appeals refused to stay the mandate, the district court has scheduled these cases for trial beginning in November, 2006.

REASONS FOR GRANTING THE PETITION

I. The Court Should Hold This Petition Pending Resolution Of *Mohawk* And Should Grant The Petition If The Court Declines To Adopt A Bright-Line Rule In *Mohawk* That A Corporation And Agents Acting On The Corporation's Behalf Do Not Constitute A RICO "Enterprise"

In *Mohawk*, this Court has granted certiorari to review the Eleventh Circuit's ruling that a corporate RICO "person" can form an "enterprise" with agents acting on the corporation's behalf. *See* 126 S. Ct. 830 (2005) (granting certiorari on the following question: "Whether defendant corporation and its agents constitute an 'enterprise' under RICO in light of the settled rule that a RICO defendant must 'conduct' or 'participate' in the affairs of a larger enterprise and not just its own affairs."). If the Court answers the question presented in the negative and rules that a corporate RICO defendant cannot form an

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11. In accordance with the Circuit Advisory Committee Note to Ninth Circuit Rule 40-1, DuPont's counsel was informed by the Ninth Circuit's clerk's office that the petition for rehearing deadline had been extended *sua sponte* until December 27, 2006. Although DuPont filed its petition in accordance with this extension (and despite the pendency of a written motion seeking a longer extension), the Ninth Circuit stated that DuPont's petition for rehearing was "untimely." Thus, DuPont is filing this petition within ninety days of the court of appeals' original decision and judgment on December 5, 2005, and the petition is timely without regard to the denial of rehearing.

"enterprise" with its own agents, then the Ninth Circuit's enterprise ruling should be reversed. Accordingly, this petition should be held pending resolution of *Mohawk*.

The *Mohawk* petitioner urges the adoption of two different bright-line rules, either of which would mandate reversal of the Ninth Circuit's decision here. *See Mohawk Indus., Inc. v. Williams*, Pet. Br., No. 05-465 (filed Feb. 2, 2006). First, the *Mohawk* petitioner contends that the definition of an "association-in-fact enterprise" – "any union or group of individuals associated in fact although not a legal entity" (18 U.S.C. § 1961(4)) – requires a group of "natural persons" and excludes corporations. *See id.* at 12-26. If this Court adopts this position, then DuPont (the sole RICO defendant here) cannot be part of an association-in-fact enterprise.

Second, the *Mohawk* petitioner urges this Court to follow the decisions of the Second, Third, and Seventh Circuits in holding that a corporation cannot form an enterprise with outside agents acting on the corporation's behalf. *Mohawk* Pet. Br., at 26-42. As the *Mohawk* petitioner shows (and as the Ninth Circuit acknowledged in this case), it is well-settled that a corporation cannot form an enterprise with its own employees. *See id.* at 30 & n.18 (citing decisions from the First, Second, Third, Fifth, Seventh, Ninth, and Tenth Circuits). Several courts have extended this rule to include outside agents acting on the corporation's behalf, explaining that a contrary rule would make RICO liability turn upon the degree to which an entity has vertically integrated itself. *See, e.g., Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 227 (7th Cir. 1997) (Posner, C.J.) ("What possible difference, from the standpoint of preventing the type of abuse for which RICO was designed, can it make that Chrysler sells its products to the consumer through franchised dealers rather than through dealerships that it owns . . . ?"). The district court applied this rule in holding that Plaintiffs had not alleged an "enterprise" separate and distinct from DuPont. *See* Pet. App. 111a-112a.

Even if the Court declines to adopt either of the bright-line rules urged by the *Mohawk* petitioner, however, certiorari should be granted to review the Ninth Circuit's "litigation enterprise" ruling in this case. Unlike the employee-hiring function at issue in *Mohawk* or the retailing function at issue in *Fitzgerald*, litigation is not a corporate activity that can be performed by the corporation itself. "Nothing is better settled than the proposition that a corporation cannot practice law." Grace M. Giesel, *Corporations Practicing Law Through Lawyers: Why the Unauthorized Practice of Law Doctrine Should Not Apply*, 65 Mo. L. Rev. 151, 151 (2000). As this Court has stated, "[i]t has been the law for the better part of two centuries . . . that a corporation may appear in the federal courts only through licensed counsel." *Rowland v. California Men's Colony*, 506 U.S. 194, 201-202 (1993) (citing, *inter alia*, *Osborne v. President of the Bank of the United States*, 22 U.S. (9 Wheat.) 738, 829 (1824)); *see also Kay v. Ehrler*, 499 U.S. 432, 435-36 & nn. 6-7 (1991) (explaining that "the word 'attorney' assumes an agency relationship" and noting that "an organization is not comparable to a *pro se* litigant because the organization is always represented by counsel, whether in-house or *pro bono*, and thus, there is always an attorney-client relationship").

This settled rule applies not only in federal court but also in virtually every state court system (including Florida and Hawaii, the two state courts in which DuPont is alleged to have engaged in litigation misconduct during the Benlate cases). In *Oahu Plumbing and Sheet Metal, Ltd. v. Kona Construction, Inc.*, 590 P.2d 570, 572-573 (Haw. 1979), for example, the Hawaii Supreme Court cited numerous authorities (including *Osborne*) for the proposition that "a corporation cannot appear and represent itself either in proper person or by its officers, but can do so only by an attorney admitted to practice law." In adopting this rule for the Hawaii state courts, the *Oahu* court explained the reasons for the bar against corporate *pro se* representation: (1) "a corporation, being an artificial entity, can act only through its agents . . . [c]ourts thus require that persons

trained in the law and familiar with court procedure act as the agents of corporations in litigation in order to protect the courts and to further the efficient administration of justice"; (2) just as non-attorneys cannot "represent other natural persons," neither can non-attorneys "represent corporations in litigation"; and (3) "[u]nlike lay agents of corporations, attorneys are subject to professional rules of conduct and are amenable to disciplinary action by the courts for violations of ethical standards." *Id.* at 573-574.

Following *Oahu*, the Florida appellate courts recognized similar bases for the rule against corporate self-representation in litigation: (1) as a "hydra-headed entity," a corporation must have "one designated spokesperson accountable to the court"; (2) attorneys are "subject to professional rules of conduct and thus amenable to disciplinary action by the court for violations of ethical standards"; and (3) "attorneys purportedly have the legal skills necessary to competently participate in litigation." *Szteinbaum v. Kaes Inversiones y Valores, C.A.*, 476 So. 2d 247, 248 (Fla. 3d DCA 1985); *see also Torrey v. Leesburg Regional Med. Ctr.*, 769 So. 2d 1040, 1042 (Fla. 2000).

Thus, in the courts in which DuPont was sued in the prior Benlate cases giving rise to Plaintiffs' current actions, DuPont could not defend itself except through attorney-agents. DuPont was required to retain attorneys so that it would be represented by independent agents "subject to professional rules of conduct and thus amenable to disciplinary action by the court for violations of ethical standards." *Szteinbaum*, 476 So. 2d at 248 (quoting *Oahu*, 590 P.2d at 574). The Ninth Circuit, however, relied on the ***very same*** professional and ethical obligations of attorneys to hold that these attorney agents were sufficiently distinct from DuPont to form a "litigation 'enterprise.'" *See* Pet. App. 17a ("These law firms are required to conform to ethical rules . . ."); *id.* 18a ("the rules of professional conduct

require law firms to be distinct entities and to maintain their professional independence").[12]

Nothing in the federal RICO statutes suggests that Congress intended for a corporation and its litigation counsel to constitute a RICO association-in-fact enterprise. Perjury (18 U.S.C. § 1621) and subornation of perjury (18 U.S.C. § 1622), the quintessential litigation acts necessarily involving the participation of an attorney, are specifically excluded from RICO's long list of predicate acts.[13] Similarly, courts routinely have rejected RICO claims predicated on alleged litigation misconduct.[14]

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12. In its brief on the merits, the *Mohawk* petitioner suggests that the Ninth Circuit's decision will have the effect of forcing corporations to perform more work through an "in house lawyer" rather than through an "outside attorney." *Mohawk* Br. of Pet., at 35 & n.21. Although the issue was not presented in this case, it is not at all clear that the "litigation enterprise" endorsed by the court of appeals below would be limited to cases in which corporations retain outside law firms, because "in house" counsel are subject to the same ethical and professional standards. *See, e.g.*, 1 Geoffrey C. Hazard Jr. and W. William Hodes, *The Law of Lawyering* § 17.7, at 17-24 (3d ed. & Supp. 2005-2) ("no matter what the prestige of in-house counsel is vis-à-vis outside counsel, the former are no less lawyers serving identifiable clients than the latter, and both are equally subject to the law of lawyering"); *Restatement (Third) of the Law Governing Lawyers* § 96, cmt. b (2000) (whether "inside" or "outside," an attorney's "responsibilities to a client organization" generally are "the same in both capacities").

13. *See* 18 U.S.C. § 1961(1); *Rand v. Anaconda-Ericsson, Inc.*, 623 F. Supp. 176, 182 (E.D.N.Y. 1985), *aff'd*, 794 F.2d 843 (2d Cir. 1986).

14. *See, e.g., United States v. Pendergraft*, 297 F.3d 1198, 1208 (11th Cir. 2002) (collecting cases rejecting the rule that "serving litigation documents by mail can constitute mail fraud"); *Nolan v. Galaxy Scientific Corp.*, 269 F. Supp. 2d 635, 643-644 (E.D. Pa. 2003) (rejecting RICO claims based on litigation conduct and noting that a contrary decision "would have sweeping consequences indeed, potentially permitting any litigant to allege that the opposing party's submissions to the court

(Cont'd)

Allowing litigation conduct in one case to serve as the predicate for a derivative suit extends RICO far beyond its intended purpose and threatens an exponential expansion of collateral litigation. RICO was not enacted to supplement the extensive existing remedies that regulate alleged litigation misconduct.[15] Yet, under the Ninth Circuit's rule, every discovery response served by a corporate defendant may be the springboard for a later RICO suit alleging that the corporate "litigation 'enterprise'" engaged in mail fraud. Discovery abuse claims are readily and routinely alleged, particularly when a corporate defendant is litigating in multiple cases and thus subject to allegations of "inconsistent" discovery responses. By allowing such accusations to form the basis of RICO claims, the Ninth Circuit has invited a tsunami of satellite litigation.

The rule announced by the court of appeals, moreover, would significantly impact the relationship between attorneys and their corporate clients, particularly in terms of the attorney-client privilege and its "crime-fraud" exception. By subjecting every corporate defendant and its counsel to a later RICO suit based on alleged litigation misconduct, every attorney-client communication regarding a corporation's discovery response

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(Cont'd)

denying allegations were false and therefore constituted mail fraud"); *Livingston Downs Racing Ass'n, Inc. v. Jefferson Downs Corp.*, 257 F. Supp. 2d 819, 832-833 (M.D. La. 2002) (following *Pendergraft* in refusing to allow RICO claims to be based on litigation conduct and noting that "that many other courts have rejected the notion that filing litigation documents can serve as the basis of a RICO violation"); *Singh v. HSBC Bank USA*, 200 F. Supp. 2d 338, 339-340 (S.D.N.Y. 2002) (holding that statements in "motion papers filed in this Court" would be entitled to "absolute immunity as a matter of law."); *Old Time Enters., Inc. v. Int'l Coffee Corp.*, Civ. A. No. 89-1371, 1989 WL 98850, at *2 (E.D. La. Aug. 17, 1989), *aff'd*, 908 F.2d 970 (5th Cir. 1990).

15. *See, e.g., McMurtry v. Brasfield*, 654 F. Supp. 1222, 1225-1226 (E.D. Va. 1987); *Spiegel v. Continental Illinois Nat'l Bank*, 609 F. Supp. 1083, 1088-1090 (N.D. Ill. 1985), *aff'd*, 790 F.2d 698 (7th Cir. 1986).

or denial of liability in a responsive pleading potentially could be discoverable on the ground that it was "in furtherance of" mail fraud by the corporate "litigation 'enterprise.'"

Accordingly, if the Court does not adopt either of the "bright-line" rules urged by the *Mohawk* petitioner (thereby precluding any "enterprise" comprised of a corporate RICO defendant and its agents), it should grant certiorari in this case to address the Ninth Circuit's "litigation 'enterprise'" ruling.

II. The Court Should Hold This Petition Pending Resolution Of *Anza* And Should Grant The Petition If The Court Decides *Anza* In A Way That Does Not Reach The Reliance Issue In This Case

In *Anza*, this Court has granted certiorari to resolve the following question: "Whether a competitor is 'injured in his business or property by reason of a violation' of the Racketeer Influenced and Corrupt Organizations Act ('RICO') where the alleged predicate acts of racketeering activity were mail fraud but the competitor was not the party defrauded and did not rely on the alleged fraudulent behavior." 126 S. Ct. 713 (2005). Prior to *Anza*, this Court had granted certiorari on a broader reliance question: "Did the Court of Appeals for the Second Circuit err when it held that civil RICO plaintiffs alleging mail and wire fraud as predicate acts must establish 'reasonable reliance' under 18 U.S.C. § 1964(c)?" *Bank of China, New York Branch v. NBM L.L.C.*, 125 S. Ct. 2956 (2005).

Although the *Bank of China* petition was voluntarily dismissed (*see* 126 S. Ct. 675), the Court's decision to resolve these two cases – as well as the circuit conflicts giving rise to the grants of certiorari in the first place – indicate that it would be appropriate for this Court to clarify whether reasonable reliance must be established in a fraud-based civil RICO case (which is by far the most common type of civil RICO case litigated in the federal courts). Indeed, in *Bank of China*, the Court solicited and received the views of the United States on the reasonable-reliance issue. *See, e.g., Bank of China, New*

York Branch v. NBM, L.L.C., Br. for the U.S. as Amicus Curiae Supp. Resp., No. 03-1559 (filed Oct. 31, 2005). Against this backdrop, the decision in *Anza* could well govern the resolution of the reasonable reliance issue in this case, and certainly can be expected to shed light on it. Accordingly, the pendency of *Anza* provides another reason to hold this petition.

If the Court resolves *Anza* in a way that does not reach the reliance issue in this case (*e.g.*, by excusing reliance where fraudulent statements are made to third parties), this case presents an ideal vehicle to address the reasonable-reliance question accepted in *Bank of China*. In the decision below, the court of appeals recognized that the law of the circuit refused "to announce a black-letter rule that reliance is the only way plaintiffs can establish causation in a civil RICO claim predicated on mail or wire fraud." Pet. App. 19a (citing *Poulos v. Ceasars World, Inc.*, 379 F.3d 654, 666 (9th Cir. 2004)).

The Second, Fourth, Eighth, and Eleventh Circuits have reached a contrary view. Where, as here, civil RICO plaintiffs claim to have heard and relied upon a misrepresentation, reasonable reliance is required to ensure that the injury occurs "by reason of" the racketeering activity. *See, e.g., Pelletier v. Zweifel*, 921 F.2d 1465, 1508 (11th Cir. 1991) ("[u]nless an untrue statement is believed and acted upon, it can occasion no legal injury") (internal quotation marks omitted). Thus, in the context of "first-party" fraud-based RICO claims (where, unlike in *Anza*, the allegedly defrauding statements are made by the RICO defendant to the RICO plaintiff), these courts of appeals consistently have required proof that the RICO plaintiff reasonably relied on the misrepresentations. *See, e.g., id.*; *Bank of China v. NBM L.L.C.*, 359 F.3d 171, 176 (2d Cir. 2004); *Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996); *Appletree Square I, Ltd. Partnership v. W.R. Grace & Co.*, 29 F.3d 1283, 1286 (8th Cir. 1994).

This Court should adopt the majority rule. In fraud cases, the element of reasonable reliance constitutes a specific

application of the general requirement of proximate cause. *See Bank of China*, 359 F.3d at 176; *Restatement (Second) of Torts* § 546 (1977) ("causation in fact" shown when recipient "justifiably relies" on misrepresentation); *cf. Field v. Mans*, 516 U.S. 59, 66 (1995). If the hearer of a misrepresentation knew that the statement was false but undertook an injurious action anyway, there is no "direct relation" between the misrepresentation and the injury. *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). The injury is not "by reason of" the fraudulent statement, but rather the result of the plaintiff's own decision to disregard information already in his possession. To allow recovery in such circumstances would violate basic policies underlying all fraud-based claims, such as the ancient doctrine of *volenti non fit injuria* that bars any recovery for self-inflicted injuries.

In the decision below, the court of appeals attempted to evade review of this issue by offering a token discussion of an assumed "reasonable reliance" requirement. *See* Pet. App. 20a-21a. Both of its proffered applications, however, are manifestly deficient. Although Plaintiffs "alleged" reasonable reliance, it is well-settled that conclusory legal allegations need not be accepted as true.[16] Similarly, the "evidence" noted by the Ninth Circuit has nothing to do with the reasonable reliance element at all.[17] The court of appeals' conclusory treatment of

16. *See, e.g., Papasan v. Allain*, 478 U.S. 265, 286 (1986) ("we are not bound to accept as true a legal conclusion couched as a factual allegation"); *accord Dura Pharms., Inc. v. Broudo*, 125 S. Ct. 1627, 1635 (2005). The Eleventh Circuit affirmed application of this rule to a virtually identical conclusory allegation of reasonable reliance by other "settlement fraud" plaintiffs. *See Green Leaf Nursery*, 341 F.3d at 1304 n.12.

17. The court of appeals cited to self-serving statements by Malone that he did not know the "substance" of the withheld evidence. Pet. App. 21a. But no fraud claimant knows the "substance" of the true facts; something must be concealed for there to be a "misrepresentation" in the first place. The element of reasonable reliance, however, concerns (Cont'd)

this issue further confirms the need for a clear articulation by this Court of a reasonable reliance requirement in "first-party" fraud-based RICO claims.

If reasonable reliance is required for "first-party" fraud-based RICO claims, then Plaintiffs' RICO claims must be dismissed. Accordingly, in the event *Anza* is resolved on a ground that does not control here, the Court should grant this petition.

III. The Court Should Grant The Petition To Resolve a Conflict Between The Decision Below And Decisions Of The Fifth And Seventh Circuits Regarding RICO Injury

The civil RICO requirement of "injury" to "business or property by reason of" racketeering activity is oft-litigated and has given rise to a clear split among the courts of appeals. As the Seventh Circuit expressly acknowledged earlier this year, "[w]e are cognizant of the fact that our decision today is at odds with that of the United States Court of Appeals for the Ninth Circuit in *Diaz v. Gates*, 420 F.3d 897 (9th Cir. 2005) (*en banc*)." *Evans v. City of Chicago*, 434 F.3d 916, 930 n.26 (7th Cir. 2006) (further criticizing analysis in *Diaz* as "equal parts mischaracterization of the RICO statute and red herring").

By requiring RICO plaintiffs to demonstrate "injury" to "business or property," Congress incorporated words of "restrictive significance" from the equivalent provision of the Clayton Act. *Reiter v. Sonotome Corp.*, 442 U.S. 330, 339

(Cont'd)

the claimant's decision to act based on a misrepresentation. Where, as here, a fraud claimant knew that information was being withheld and vigorously challenged that party's refusal to produce it, that party cannot later claim to have "reasonably relied" on the very same work-product claim it previously (and successfully) challenged. *See id.* at 88a ("if the information was so important to the plaintiffs' cases they could have waited the few days for implementation of the Court order to produce the documents . . .").

(1979); *see Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268 (1992) (interpreting RICO and Clayton Act in tandem and stating that "[Congress] used the same words, and we can only assume it intended them to have the same meaning that courts already had given them."). Thus, in accordance with *Reiter*'s recognition that the requirement of injury to "business or property" excludes "recovery for personal injuries," the courts of appeals consistently have rejected RICO claims based on personal injuries. *See, e.g.*, *Evans*, 434 F.3d at 925-926; *Hamm v. Rhone-Poulenc Rorer Pharms., Inc.*, 187 F.3d 941, 954 (8th Cir. 1999); *Bast v. Cohen, Dunn & Sinclair, P.C.*, 59 F.3d 492, 495 (4th Cir. 1995); *Grogan v. Platt*, 835 F.2d 844, 847 (11th Cir. 1988).

Most courts of appeals have attached additional "restrictive significance" to the limitations on civil RICO claims under 18 U.S.C. § 1964(c) to preclude recovery for mere "injury to a valuable intangible property interest" or for losses that are "speculative and amorphous." *Evans*, 434 F.3d at 932 (citing, *inter alia*, *In re Taxable Mun. Bond Sec. Litig.*, 51 F.3d 518, 523 (5th Cir. 1995)). By precluding recovery for "intangible property interests," the Fifth and Seventh Circuit rule ensures that not every harm "for which a plaintiff might assert a state law claim is necessarily sufficient to establish a claim under RICO." *Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 607 (5th Cir. 1998) (footnote omitted); *see also DeMauro v. DeMauro*, 115 F.3d 94, 96-98 (1st Cir. 1997) (explaining that "injury to property" is not an "infinitely elastic concept").

The standard in the Ninth Circuit is diametrically different from that interpretation of RICO. Pursuant to its *en banc* ruling in *Diaz v. Gates*, 420 F.3d 897, 900 (9th Cir. 2005), *cert. denied*, 126 S. Ct. 1069 (2006), a civil RICO plaintiff need only demonstrate "harm to a specific business or property interest" and "some tangible financial losses."

In this case, the Ninth Circuit summarily applied the broad *Diaz* standard, requiring only "harm to a specific property

interest and a financial loss." Pet. App. 22a. The court made no effort to analyze whether the purported "property interest" at issue – "fraudulent inducement" – was merely a "valuable intangible property interest" (or explain why fraudulent inducement was a "property interest" at all). Nor did it address whether the claimed "financial loss" – Plaintiffs' decision to settle for a "smaller percentage of their alleged damages" in the prior Benlate cases – was "speculative and amorphous." *Id.* at 22a-23a.

These are precisely the reasons the district court held that Plaintiffs had not alleged "injury" to "business or property." Consistent with the more rigorous standard utilized by the Fifth and Seventh Circuits,[18] the district court ruled that Plaintiffs' alleged injury – "a tainted litigation process that diminished their settlements" – constituted "damage to an intangible property interest." Pet. App. 113a-114a. Echoing its earlier analysis of the speculative nature of all of Plaintiffs' damages, the district court further determined that Plaintiffs' harm was "only a speculative injury." *Id.* at 114a (citation omitted).

A proper application of the more rigorous "injury" standard utilized outside of the Ninth Circuit would have mandated affirmance of the district court's ruling. Contrary to the court of appeals' reasoning, "fraudulent inducement" is not "property" (in Hawaii or elsewhere) but a tort claim. *See Evans*, 434 F.3d at 930 n.26 (explaining that the Ninth Circuit's "injury" analysis confuses the "cause of action in tort" with its resulting harm). If the mere claim of "fraudulent inducement" suffices, then virtually all RICO plaintiffs asserting mail or wire fraud-based claims will have alleged a sufficient "injury" to "property."

18. The district court's decision also analogized Plaintiffs' alleged injury to a "type of personal injury." Pet. App. 113a. Indeed, Plaintiffs themselves recognized that the alleged facts and injury giving rise to the federal RICO claim also supported a claim for "intentional infliction of emotional distress," confirming that their current claims are derivative of personal injuries. *Id.* at 10a. The *Evans* court specifically disagreed with the Ninth Circuit regarding recovery of "pecuniary losses flowing from" personal injuries. 434 F.3d at 930-931 n.26.

Plaintiffs' "fraudulent inducement" claim epitomizes the type of intangible injury insufficient to support a RICO claim. Plaintiffs here seek to affirm the prior settlements of their Benlate cases and recover as damages the larger settlements they claim would have resulted from a "fair" litigation "process." This impalpable, hypothetical harm is not the "'concrete financial loss '" required under the standard employed in the Fifth and Seventh Circuits. *Evans*, 434 F.3d at 932 (citations omitted).

Similarly, the Ninth Circuit's mere recitation of Plaintiffs' damages claim does not answer the question whether that claim is "speculative and amorphous," as the district court here expressly held. The district court analyzed Plaintiffs' damages and concluded, based on the undisputed evidence,[19] that their claimed injury was speculative as a matter of law. Pet. App. 95a-96a. This ruling was a straightforward application of the rule against recovering damages that "'are not the certain result of the wrong.'"[20]

Plaintiffs' damages theory and evidence do not satisfy the more rigorous standard for non-speculative "injury" to "business or property" utilized by the Fifth and Seventh Circuits. Plaintiffs' claimed injury does not involve the type of concrete property interest required under the more restrictive standard but instead constitutes a speculative or amorphous claim for damages.

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19. Plaintiffs' alleged injury consisted of settling their prior Benlate cases too cheaply because of DuPont's alleged withholding of liability evidence. Pet. App. 22a. In letters written to his clients after DuPont had been accused of withholding information, however, Plaintiffs' attorney Malone stated that the allegedly withheld evidence would not have made a difference to their settlements because "I settled the cases on the assumption that we would win liability." *Id.* at 60a. During his deposition, Malone confirmed that he settled on the assumption that he would "win the cases." *Id.* at 60a.

20. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 567 n.5 (1981) (quoting *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931)); *accord Evans*, 434 F.3d at 932-933.

Accordingly, the Court should grant this petition to resolve the circuit split regarding cognizable "injury" under RICO.

CONCLUSION

The Court should hold the petition and, if neither the decision in *Mohawk* nor the decision in *Anza* mandate reversal of the Ninth Circuit's judgment, grant the petition and resolve the questions presented on the merits.

Respectfully submitted,

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APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED DECEMBER 5, 2005

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 02-16947

D.C. No.
CV-99-00660-MLR

LIVING DESIGNS, INC. AND PLANT EXCHANGE, INC.,
Hawai'i corporations,

Plaintiff-Appellant,

v.

E.I. DUPONT DE NEMOURS AND COMPANY,
a Delaware corporation,

Defendant-Appellee.

No. 02-16948

D.C. No.
CV-00-00615-MLR

ANTHURIUM ACRES, a Hawai'i general partnership, successor in interest to Island Tropicals; MUELLER HORTICULTURAL PARTNERS, a Hawai'i limited partnership,

Plaintiffs-Appellants,

Appendix A

v.

E.I. DUPONT DE NEMOURS AND COMPANY,
a Delaware corporation,

Defendant-Appellee.

No. 02-16951

D.C. No.
CV-00-00328-MLR

MCCONNELL, INC., a California corporation,

Plaintiff-Appellant,

v.

E.I. DUPONT DE NEMOURS AND COMPANY,
a Delaware corporation,

Defendant-Appellee.

Appendix A

No. 04-16354

D.C. Nos.
CV-96-01180-MLR
CV-97-00716-MLR
CV-99-00660-MLR
CV-00-00328-MLR
CV-00-00615-MLR

LIVING DESIGNS, INC. AND PLANT EXCHANGE, INC., Hawai'i corporations; DAVID MATSUURA, individually and dba Orchid Isle Nursery; STEPHEN MATSUURA, individually and dba Hawaiian Dendrobium Farm; FUKU-BONSAI, INC.; DAVID W. FUKUMOTO; LIVING DESIGNS, INC. and PLANT EXCHANGE, INC.; MCCONNELL, INC., a California corporation; ANTHURIUM ACRES, a Hawai'i general partnership, successor in interest to Island Tropicals; MUELLER HORTICULTURAL PARTNERS,

Plaintiffs-Appellants,

v.

E.I. DUPONT DE NEMOURS AND COMPANY,
a Delaware corporation,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Hawai'i
Manuel L. Real, District Judge, Presiding

Appendix A

Argued and Submitted
July 11, 2005—San Francisco, California

Filed December 5, 2005

Before: Sidney R. Thomas, Barry G. Silverman, and Richard R. Clifton, Circuit Judges

Opinion by Judge Thomas

OPINION

THOMAS, Circuit Judge.

In these consolidated cases, Plaintiffs Living Designs, McConnell, Inc., Anthurium Acres, Matsuura, and Fuku-Bonsai allege that Defendant E.I. DuPont de Nemours and Company ("DuPont") fraudulently induced the settlement of their prior products liability litigation. We reverse the district court's grant of judgment on the pleadings in favor of DuPont on Plaintiffs' claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"), and the district court's grant of summary judgment in favor of DuPont on Plaintiffs' state tort claims.

I

A

Outside of the agricultural community, plant disease-causing fungi are rarely the subject of casual dinner conversation, much less contentious litigation. Yet to farmers

worldwide, the problems posed by white mold, virulent black leg, foot rot, and scab are extremely serious matters. In the late 1950s and early 1960s, DuPont developed a systemic fungicide to combat these problems, which it marketed under the name of Benlate. At the zenith of its use, Benlate was one of DuPont's most successful commercial products.

However, into every product's life, a little rain must fall. In the case of Benlate, the rain became a torrent of litigation alleging that Benlate had become contaminated with the herbicide sulfonylureas ("SUs") during the manufacturing process, resulting in widespread crop damage.

In previous litigation filed in 1992 and 1993, Plaintiffs, who are commercial nurserymen, separately sued DuPont alleging that contaminated Benlate had killed their plants. *Matsuura v. Altson & Bird* (*Matsuura I*), 166 F.3d 1006, 1007, *amended by* 179 F.3d 1131 (9th Cir.1999).

> Many similar suits were filed by commercial growers across the nation. In early trials, DuPont falsely represented that soil tests had produced no evidence f contamination. During consolidated discovery proceedings in Hawai'i, which included the [Plaintiffs'] suits, DuPont falsely denied withholding evidence of Benlate contamination, and improperly invoked work product protection to resist disclosure of testing data.

Id.

Appendix A

Plaintiffs, represented by Florida attorney Kevin Malone, settled their Benlate product liability cases against DuPont in April of 1994.[1] Plaintiffs did not dismiss their claims with prejudice until October and November of 1994. *Matsuura v. E.I. du Pont de Nemours & Co.* (*Matsuura III),* 330 F.Supp.2d 1101, 1120 (D.Haw.2004). After Plaintiffs settled their product liability claims against DuPont, it became clear that DuPont had not revealed to Plaintiffs during discovery damaging test results that indicated that Benlate was indeed contaminated with SUs. There are three different categories of tests concealed, withheld, and lied about by DuPont in the course of litigating Benlate cases across the country.

> 1. *Alta Test Results.* The results of tests conducted by Alta Analytical Laboratories ("Alta") showed that farms where Benlate had been used were contaminated with SUs. "Alta laboratories was one of the few laboratories, if not the only one, capable of performing the sophisticated soil and water analysis to determine if Benlate was contaminated with [SUs]." *Matsuura v. E.I. du Pont de Nemours & Co.* (*Matsuura II*), 102 Hawai'i 149, 73 P.3d 687, 689 n. 5 (Haw.2003).
>
> 2. *Costa Rica field tests.* DuPont conducted field tests of Benlate in Monte Vista, Costa Rica in 1992. During the Costa Rica field tests, the plants

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1. Plaintiff Fuku-Bonsai signed a settlement agreement with DuPont on April 22, 1994. The month prior, on March 6, 1994, Fuku-Bonsai had been forced to file for bankruptcy under Chapter 11. The settlement between Fuku-Bonsai and DuPont was approved by the bankruptcy court on May 16, 1994.

treated with Benlate died, demonstrating that Benlate was harmful to plants. DuPont destroyed the plants subjected to these field tests and withheld evidence of the field test results. *Productora de Semillas, S.A. v. E.I. du Pont de Nemours, & Co.*, No. 97-12186 CA 23 (Fla.Cir.Ct. June 30, 2001) (order on Plaintiff's motion to strike defendant DuPont's pleadings and on Plaintiff's motion for sanctions against DuPont for the destruction of the Monte Vista Benlate test).

3. *BAM results.* These tests were performed on behalf of DuPont by A & L Midwest laboratories and by DuPont's in-house testing facilities. These tests also showed that Benlate was contaminated with SUs. *Kawamata Farms, Inc. v. United Agri Products*, 86 Hawai'i 214, 948 P.2d 1055, 1065 (1997) (referring to the Keeler documents).

DuPont first produced Alta test results showing Benlate contamination in May 1994 to Benlate plaintiffs who had not yet settled their cases, such as to plaintiffs in the *Kawamata/Tomono* case,[2] over which Judge Ibarra presided

2. *See Kawamata Farms*, 948 P.2d at 1065. In *Kawamata Farms*, the plaintiffs, sellers and distributors of agricultural products in Hawai'i, alleged that their plants, soil, and farm structures had been damaged by Benlate. In January 1995, a jury issued a verdict in favor of the plaintiffs on their negligence and products liability claims, awarding $1,180,000 in compensatory damages and $1,770,000 in punitive damages.

in the Third Circuit Court in Hawai'i. *Matsuura II*, 73 P.3d at 689.[3]

> Contrary to DuPont's prior representations, the tests confirmed that Benlate was contaminated. Additional evidence of Benlate contamination was produced in other Benlate litigation. Two district courts held that DuPont had intentionally engaged in fraudulent conduct by withholding this evidence. *See Kawamata Farms v. United Agri Prods.*, 86 Hawai'i 214, 948 P.2d 1055, 1083, 1087-88 (1996) (imposing $1.5 million punitive sanction for discovery abuse), *aff'd*, 86 Hawai'i 214, 948 P.2d 1055 (Haw.1997); *Bush Ranch v. E.I. DuPont de Nemours & Co.* (*In re DuPont*) ("*Bush Ranch* "), 918 F.Supp. 1524, 1556-58 (M.D.Ga.1995) (imposing sanctions potentially totaling $115 million), *rev'd on other grounds*, 99 F.3d 363 (11th Cir.1996). Although the Eleventh Circuit reversed the Georgia court on the ground that the sanctions were punitive and the court had not followed applicable criminal procedure, the court noted the "serious nature of the allegations" and stated that it assumed the U.S.

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3. The Hawai'i Supreme Court in *Kawamata Farms*, describes in detail the discovery disputes and Plaintiffs' gradual discovery of withheld evidence in this case. 948 P.2d at 1065-66. Although Plaintiffs in this case state that the Alta test results were produced on May 17, 1994, it should be noted that production of the test results demonstrating the Benlate contamination and DuPont's knowledge of the contamination occurred bit by bit from May through December of 1994.

Appendix A

> Attorney would conduct an investigation, *In re E.I. DuPont,* 99 F.3d at 369 n. 7. On remand, the district court asked the United States Attorney to "investigate and prosecute" DuPont for criminal contempt, *In re E.I. du Pont,* No. 4:95-CV-36 (HL) (M.D.Ga. Nov. 4, 1998) (order referring matter to U.S. Attorney), but the court ultimately approved a civil settlement resolving the matter, which required DuPont and Alston & Bird to make payments totaling $11.25 million, *see In re E.I. du Pont,* No. 4:95-CV-36 (HL) (M.D.Ga. Dec. 31, 1998) (consent order and final judgment).

Matsuura I, 166 F.3d at 1007-08.

DuPont was first sanctioned by Judge Elliot, who presided over the *Bush Ranch* litigation in the United States District Court for the Middle District of Georgia, on August 21, 1995 for (1) intentionally withholding evidence of the SU contamination of Benlate that was in its possession and which it was ordered to produce and (2) for falsely representing to the court and to plaintiffs that the Alta documents it withheld contained no evidence of SU contamination. *Bush Ranch,* 918 F.Supp. at 1555-1558.

B

After learning that DuPont fraudulently withheld evidence of Benlate's contamination, Plaintiffs filed the instant actions in the United States District Court for the District of Hawai'i, asserting claims under RICO and state common law claims of fraud, conspiracy, misrepresentation,

abuse of process, infliction of emotional distress, interference with prospective economic advantage, negligence, and spoliation of evidence. In sum, Plaintiffs alleged that DuPont fraudulently withheld evidence of Benlate's contamination to induce Plaintiffs to settle their underlying Benlate litigation. Plaintiffs allege they were harmed by DuPont's fraudulent conduct "because they would have requested more money or refused to settle had they known about the concealed data." *Matsuura II,* 73 P.3d at 691.

The district court[4] granted DuPont's judgment on the pleadings, ruling the suit was barred by releases signed by Plaintiffs as part of their settlement agreements with DuPont. *Matsuura I,* 166 F.3d at 1008. Furthermore, "the court held [Plaintiffs] could have rescinded the settlement agreements because of DuPont's fraud, but forfeited that remedy by failing promptly to tender the settlement proceeds." *Id.*

Plaintiffs appealed. We reversed, holding that Delaware law controlled and that the Delaware Supreme Court would likely interpret the releases as not barring a claim for fraudulent inducement. *Id.* at 1011. We also held that, under Delaware law, plaintiffs alleging that they were fraudulently induced to settle their claims have a choice of remedies: they may either (1) rescind the settlement agreement or (2) affirm their settlement agreements and sue for fraud. *Id.* at 1012.[5]

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4. The presiding judge at this stage of the litigation was Hon. David Ezra, Chief Judge of the District of Hawai'i.

5. Our interpretation of Delaware law was confirmed as correct in *E.I. Du Pont de Nemours & Co. v. Florida Evergreen Foliage,* 744 A.2d 457 (Del.1999).

Appendix A

Proceedings continued on remand in federal court. As summarized by the Hawai'i Supreme Court:

> On March 1, 2001, the [Plaintiffs] filed a "Motion for Collateral Estoppel to Preclude Defendant from Re-Litigating Previously Adjudicated Findings of Fraud, Discovery Abuse, and Intentional Withholding of Evidence in the *Kawamata Farms* case" (motion for collateral estoppel). Therein, the [Plaintiffs] seek to preclude DuPont from "re-litigating" the following issues: (1) that DuPont fraudulently and intentionally withheld the Alta test results from Benlate litigants; (2) that DuPont intentionally withheld the Keeler documents from Benlate litigants; and (3) that the Alta test results included analytical findings, which some experts would construe as evidence that Benlate was contaminated with SUs. The [Plaintiffs] claim that issues (1) and (2) have already been decided in *Kawamata Farms* and that issue (3) was decided by the Eleventh Circuit in *Bush Ranch II*.

Matsuura II, 73 P.3d at 691. In response, DuPont filed two "related or counter motions." *Id*. First, DuPont filed a "Motion for Judgment on the Pleadings as to All Plaintiffs' Claims Based on Litigation Conduct," asserting that Plaintiffs' claims were barred by the doctrine of litigation immunity and that Hawai'i has not recognized a separate tort of spoliation of evidence. *Id.* Second, DuPont filed a "Motion for Summary Judgment Based on Plaintiffs' Inability as a Matter of Law to Establish Reasonable Reliance," asserting

that reasonable reliance is an element of a fraudulent inducement claim and that Plaintiffs were unable, as a matter of law, to establish that they reasonably relied on DuPont's representations made during litigation. *Id.*

On May 10, 2001, less than one week before the hearing on the substantive motions, DuPont filed a motion to certify questions of Hawai'i state law to the Hawai'i Supreme Court. Judge Ezra agreed and certified three questions to the court. *Matsuura II*, 73 P.3d at 692. The Hawai'i Supreme Court responded on July 29, 2003. The questions and the Hawai'i Supreme Court's answers are as follows.

The first question certified asked: "Under Hawai'i law, is a party immune from liability for civil damages based on that party's misconduct, including fraud, engaged in during prior litigation proceedings?" *Id.* at 688. The Hawai'i Supreme Court submitted the following answer: "Under Hawai'i law, a party is not immune from liability for civil damages based upon that party's fraud engaged in during prior litigation proceedings." *Id.* at 700.

The second certified question asked: "Where plaintiffs' attorneys and others have accused the defendant of fraud and dishonesty during the course of prior, related litigation, are plaintiffs thereafter precluded as a matter of law from bringing a cause of action for fraudulent inducement to settle because they should not have relied on the Defendant's representations?" *Id.* at 688-89. The Hawai'i Supreme Court submitted the following answer: "In an action for fraudulent inducement where plaintiffs' attorneys and others have accused the defendant of fraud and dishonesty during the

course of prior dealings, plaintiffs are not precluded as a matter of law from establishing that their reliance on the defendant's representations was reasonable." *Id.* at 704.

The third and final certified question asked: "Does Hawai'i law recognize a civil cause of action for damages for intentional and/or negligent spoliation of evidence?" *Id.* at 689. The Hawai'i Supreme Court responded:

> Because the facts alleged cannot support their spoliation claim, this court need not resolve whether Hawai'i law would recognize a tort of spoliation of evidence. Therefore, insofar as the third certified question does not appear to be "determinative of the cause," it was inappropriate for certification under HRAP Rule 13. Accordingly, we decline to answer it.

Id. at 706 (citations omitted).

Prior to the Hawai'i Supreme Court's response to the certified questions, visiting Judge Manuel Real of Los Angeles, who replaced Chief Judge Ezra as the judge assigned to this case, denied DuPont's motion for continuance of the trial date and for limited stay of discovery pending the Hawai'i Supreme Court's ruling and invited DuPont to refile its motions for judgment on the pleadings and for summary judgment. DuPont refiled its motions. On September 4, 2002, prior to the Hawai'i Supreme Court's ruling on the certified questions, the district court granted DuPont's motions for summary judgment as to Plaintiffs' fraud claim on the grounds that Plaintiffs could not establish reasonable reliance as a matter of law.

Appendix A

After the Hawai'i Supreme Court ruled on the certified questions, Plaintiffs moved to vacate the district court's grant of summary judgment. DuPont filed a counter-motion on July 16, 2003, asking the district court to re-affirm its earlier ruling.

On February 25, 2004, the district court heard these motions and other motions filed by DuPont, which included: (1) a motion for summary judgment on the speculative nature of Plaintiffs' alleged damages; (2) a motion for summary judgment on Plaintiffs' "Alta fraud" claims; (3) a motion for summary judgment on Plaintiffs' "non-fraud" claims; (4) a motion for judgment on the pleadings as to Plaintiffs' RICO claims; and (5) a motion for judgment on the pleadings on Hawai'i's litigation privilege. The district court granted DuPont's motions for summary judgment and for judgment on the pleadings. *Matsuura III*, 330 F.Supp.2d at 1101. The district court instructed DuPont to draft a proposed order, which the district court adopted almost verbatim and then published. Plaintiffs timely appealed.

II

We review a dismissal on the pleadings pursuant to Federal Rule of Civil Procedure 12(c) de novo. *Turner v. Cook*, 362 F.3d 1219, 1225 (9th Cir.2004). Judgment on the pleadings is proper when, taking all the allegations in the pleadings as true and construed in the light most favorable to the nonmoving party, the moving party is entitled to judgment as a matter of law. *See id.* We review a district court's grant of summary judgment de novo. *Yakutat, Inc. v. Gutierrez*, 407 F.3d 1054, 1066 (9th Cir.2005). "We must

determine, viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 408 F.3d 596, 602 (9th Cir.2005). We review the district court's exclusion of evidence in a summary judgment motion for an abuse of discretion. *Orr v. Bank of America*, 285 F.3d 764, 773 (9th Cir.2002).

III

The district court erred in granting judgment on the pleadings as to the Plaintiffs' RICO claims.

A

The district court erred in granting judgment on the pleadings as to the RICO claims asserted by Fuku-Bonsai and Matsuura. The elements of a civil RICO claim are as follows: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (known as 'predicate acts') (5) causing injury to plaintiff's 'business or property.' " *Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir.1996) (citing 18 U.S.C. § § 1964(c), 1962(c)).

1

The district court held that Fuku-Bonsai and Matsuura had failed to allege a distinct enterprise. *Matsuura III*, 330 F.Supp.2d at 1129-31. 18 U.S.C. § 1962(c) provides:

Appendix A

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

"[T]o establish liability under § 1962(c) one must allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Cedric Kushner Promotions, Ltd. v. King,* 533 U.S. 158, 161, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001); *see also Rae v. Union Bank,* 725 F.2d 478, 481 (9th Cir.1984). The term "enterprise" is defined in 18 U.S.C. § 1961(4) as "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

Perhaps taking a page out of a John Grisham novel,[6] Fuku-Bonsai and Matsuura have alleged that the "person" was DuPont and the "enterprise" consisted of DuPont, the law firms employed by DuPont, and expert witnesses retained by the law firms. To be sure, if the "enterprise" consisted only of DuPont and its employees, the pleading would fail for lack of distinctiveness. *See Cedric Kushner,* 533 U.S. at 164, 121 S.Ct. 2087. However, there is no question that law firms retained by DuPont are distinctive entities. *See United States v. Blinder,* 10 F.3d 1468, 1473-74 (9th Cir.1993). And

6. In his novel *The Firm,* author John Grisham describes a law firm owned by an organized crime family. JOHN GRISHAM, THE FIRM (Doubleday 1991).

there is no question that DuPont and the law firms together can constitute an "associated in fact" RICO enterprise. *Id.* at 1473 (Holding that "a group or union consisting solely of corporations or other legal entities can constitute an 'association in fact' enterprise").

The more difficult question is whether the enterprise formed by the group of DuPont, the law firms it employed, and the expert witnesses that the law firms retained is separate and distinct from DuPont, the RICO "person" alleged in Plaintiffs' complaint. We conclude that they are. The associated in fact enterprise formed by this union is "a being different from, not the same as or part of, the person whose behavior [RICO] was designed to prohibit." *Rae,* 725 F.2d at 481. This is not a situation where the enterprise cannot be either formally or practically separable from the person. *See United States v. Benny,* 786 F.2d 1410, 1416 (9th Cir.1986). DuPont—a company that offers products and services for markets including agriculture, nutrition, electronics, communications, safety and protection, home and construction, transportation, and apparel—retained law firms for the purpose of defending DuPont in Plaintiffs' lawsuits. These law firms are required to conform to ethical rules and thus are not merely at the beck and call of their clients. As we recently observed:

> Membership in the bar is a privilege burdened with conditions. An attorney is received into that ancient fellowship for something more than private gain. He becomes an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice.

Gadda v. Ashcroft, 377 F.3d 934, 942-43 (9th Cir.2004) (citations and quotations omitted).

Just as a corporate officer can be a person distinct from the corporate enterprise, DuPont is separate from its legal defense team. *See Sever v. Alaska Pulp Corp.,* 978 F.2d 1529, 1534 (9th Cir.1992); *Benny,* 786 F.2d at 1415-16. Indeed, the rules of professional conduct require law firms to be distinct entities and to maintain their professional independence. Model Rules of Prof'l Conduct R. 5.4. In addition, even in the context of the attorney-client relationship, attorneys retain control over important functions; for example, in litigation, the attorney retains control over tactical and strategic decisions. *New York v. Hill,* 528 U.S. 110, 114-15, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000); Model Rules of Prof'l Conduct R. 1.2 cmt. 1. Thus, the litigation "enterprise" necessarily must be distinct from the client retaining legal assistance. In sum, given the allegations of the complaint, the district court erred in concluding that Plaintiffs failed to allege a distinct RICO enterprise.

2

The district court also concluded that the predicate acts alleged by Plaintiffs did not support a RICO claim because (a) the mail and wire fraud predicate acts failed due to Plaintiffs' inability to establish reasonable reliance; and (b) the obstruction of justice predicate acts failed to meet the RICO requirements of direct injury and continuity.[7] *Matsuura III,* 330 F.Supp.2d at 1128-29.

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7. We hold that the district court did not err in concluding that Plaintiffs failed to allege a direct relationship between the injury (Cont'd)

Appendix A

The district court concluded, without analysis, that Plaintiffs were required to prove that they reasonably relied on DuPont's fraudulent misrepresentations to state a meritorious civil RICO case predicated on mail and wire fraud. *Id*. at 1128-29. Under 18 U.S.C. § 1964(c), civil RICO plaintiffs must demonstrate causation, specifically that they were injured "by reason of" the alleged racketeering activity of the defendant. 18 U.S.C. § 1964(c). "It is well settled that, to maintain a civil RICO claim predicated on mail [or wire] fraud, a plaintiff must show that the defendants' alleged misconduct proximately caused the injury." *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 664 (9th Cir.2004) (citing *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992)). Although, in some cases, "reliance may be a milepost on the road to causation," *id.* (quoting *Blackie v. Barrack*, 524 F.2d 891, 906 n. 22 (9th Cir.1975))., we have in the past declined to announce a black-letter rule that reliance is the only way plaintiffs can establish causation in a civil RICO claim predicated on mail or wire fraud. *Id*. at 666. We need not address whether this is a case where Plaintiffs can establish causation only by

(Cont'd)

and the alleged wrongdoing. Plaintiffs alleged that the predicate act consisted of DuPont's obstruction of justice in the *Bush Ranch* case. "[P]laintiff[s] who complain[ ] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [are] generally said to stand at too remote a distance to recover." *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957, 963 (9th Cir.1999) (quoting *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 268-69, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992)).

demonstrating that they reasonably relied on DuPont's fraud,[8] because Plaintiffs adequately pleaded reasonable reliance in their amended complaint. Plaintiffs alleged in their complaint that they "reasonably relied on [DuPont] to obey statutes, court orders, court rules, rules of evidence, written agreements, representations to the court by officers of the court, and representations made under oath to the court by [DuPont]'s officers and agents." First Am. Compl. ¶ 165. Regardless of whether Plaintiffs were required to plead reasonable reliance to satisfy the causation element of their RICO claims, they did, and thus the district court erred in granting judgment on the pleadings on this question.

Although the district court styled its order as one granting judgment on the pleadings, it appeared to be considering this issue on the record. *Matsuura III*, 330 F.Supp.2d at 1128-29 ("As discussed above, Plaintiffs cannot prove that they reasonably relied on DuPont's alleged fraud."). Therefore, we assume that the district court converted the Rule 12(c) motion into a motion for summary judgment.[9] If so, then the

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8. Indeed, it would be premature for us to do so, as the Supreme Court recently granted a petition for a writ of certiorari to address the following question: "Did the Court of Appeal for the Second Circuit err when it held that civil RICO plaintiffs alleging mail and wire fraud as predicate acts must establish 'reasonable reliance' under 18 U.S.C. § 1964(c)?" *Bank of China, New York Branch v. NBM L.L.C.*, __ U.S. __, 125 S.Ct. 2956, 162 L.Ed.2d 886 (2005).

9. If the district court considers matters outside the pleadings, the district court treats the Rule 12(c) motion as one for summary judgment and must give all parties a "reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Fed.R.Civ.P. 12(c). Plaintiffs do not dispute that they received such an opportunity.

district court erred, because there were genuine issues of material fact that precluded the grant of summary judgment on this question. The district court held that the Plaintiffs' attorney, Malone, knew or had knowledge of many of the alleged facts indicating fraudulent conduct. However, this is a disputed issue. Plaintiffs tendered evidence that Malone did not know the substance of the evidence that DuPont was withholding at the time of settlement. Therefore, there exists a triable factual issue as to reasonable reliance.

In sum, the district court improperly granted judgment on the pleadings on the question of reasonable reliance and, to the extent that the district court converted the Rule 12(c) motion into a Rule 56 motion for summary judgment, it also erred because there were genuine issues of material fact on the question.

3

The district court determined that Plaintiffs did not assert that they had suffered an injury to their business or property, as required under 18 U.S.C. § 1964(c). *Matsuura III*, 330 F.Supp.2d at 1131. Rather, the district court determined that because Plaintiffs' injury consisted of "a tainted litigation process that diminished their settlements," Plaintiffs suffered "the type of personal injury or injury to an intangible interest not remediable by RICO's civil provisions." *Id.; see also id.* at 1132 (holding that Plaintiffs' allegations "fail to allege a cognizable RICO injury and therefore fail as a matter of law"). Plaintiffs argue that they:

> settled product liability claims, accepted deflated settlements, and dismissed those causes of action,

> only to find out later that they had been defrauded.[Plaintiffs'] underlying claims were specifically focused on injury to their nursery businesses and their property (including damaged plant inventory) caused by defective Benlate, and DuPont's fraud and racketeering activities further damages those business and property interests when they were duped into accepting low settlements.

Brief for Appellants at 75.

This court "typically look[s] to state law to determine 'whether a particular interest amounts to property.'" *Diaz v. Gates*, 420 F.3d 897, 899 (9th Cir.2005) (en banc) (per curiam) (quoting *Doe v. Roe*, 958 F.2d 763, 768 (7th Cir.1992)). "Without harm to a specific business or property interest—a categorical inquiry typically determined by reference to state law—there is no injury to business or property within the meaning of RICO." *Id.* at 900. Financial losses, in and of themselves, are insufficient to confer standing under RICO. *Id.* at 900 n. 1.

Plaintiffs allege that they suffered both a harm to a specific property interest and a financial loss. The harm Plaintiffs allege is fraudulent inducement, which is actionable under Hawai'i law. *Matsuura II*, 73 P.3d at 700-01. The financial loss Plaintiffs claim is that they settled their claims for a smaller percentage of their alleged damages than they could have received absent DuPont's fraudulent inducement. *See Matsuura III*, 330 F.Supp.2d at 1131. Therefore, the district court erred in determining that Plaintiffs' "allegations

. . . fail to allege a cognizable RICO injury and therefore fail as a matter of law," *Matsuura III*, 330 F.Supp.2d at 1132.

4

The district court determined that Plaintiffs' RICO claims fail as a matter of law because they are based on immune litigation conduct. *Matsuura III*, 330 F.Supp.2d at 1133. The district court reasoned that (1) Plaintiffs' "RICO claims are based on DuPont's conduct in Benlate litigation;" (2) "federal litigation immunity . . . bars subsequent civil litigation based on a party's litigation conduct;" and (3) "there is no stated or clear Congressional intent to abrogate litigation immunity." *Id.* at 1132-33.

Common law immunizes *witnesses* in judicial proceedings from subsequent litigation based on their testimony. *See Briscoe v. LaHue*, 460 U.S. 325, 330-31, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983); *Franklin v. Terr*, 201 F.3d 1098, 1101 (9th Cir.2000); *Holt v. Castaneda*, 832 F.2d 123, 124 (9th Cir.1987). Plaintiffs allege that DuPont's RICO liability is predicated on its falsification, destruction, and misrepresentation of evidence. DuPont has not cited any federal case which holds that a party's litigation conduct in a prior case is entitled to absolute immunity and cannot form the basis of a subsequent federal civil RICO claim. *See Florida Evergreen Foliage v. E.I. Dupont De Nemours & Co.*, 336 F.Supp.2d 1239, 1267 (S.D.Fla.2004).[10] In fact, the

10. The two cases cited by DuPont—*United States v. Pendergraft*, 297 F.3d 1198 (11th Cir.2002), and *Raney v. Allstate Ins. Co.*, 370 F.3d 1086 (11th Cir.2004)—are inapposite, as they deal (Cont'd)

RICO statute, itself, provides that conduct relating to prior litigation may constitute racketeering activity. 18 U.S.C. § 1961(1)(B) (defining racketeering activity as including an act indictable under 18 U.S.C. § 1512, which relates to tampering with a witness, victim, or informant). Therefore, the district court erroneously determined that Plaintiffs' "RICO claims, which are based on immune litigation conduct, fail as a matter of law." *Matsuura III,* 330 F.Supp.2d at 1133.

B

The district court erred in holding that the statute of limitations precluded relief as to Plaintiffs Living Designs, McConnell, Inc., and Anthurium Acres. Living Designs, McConnell, Inc., and Anthurium Acres did not file their complaints asserting their RICO claims until, respectively, September 24, 1999, May 5, 2000, and September 21, 2000. The district court determined that Plaintiffs had constructive notice of DuPont's fraud no later than August 21, 1995, the

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(Cont'd)

with whether certain conduct is wrongful within the meaning of the Hobbs Act, 18 U.S.C. § 1951, which criminalizes interfering with commerce through the use of threats or violence. In *Pendergraft,* the Eleventh Circuit held that defendants' "threat to file litigation against Marion County, even if made in bad faith and supported by false affidavits, was not 'wrongful' within the meaning of the Hobbs Act." 297 F.3d at 1208. In *Raney,* the Eleventh Circuit, relying on *Pendergraft,* affirmed the dismissal of plaintiff's RICO claim because conspiracy to extort money through the filing of malicious lawsuits is not wrongful within the meaning of the Hobbs Act, 18 U.S.C. § 1951, and therefore plaintiff failed to allege a predicate act cognizable under RICO. 370 F.3d at 1088.

date that DuPont was sanctioned for fraud by Judge Elliott in the *Bush Ranch* case. *Living Designs, Inc. v. E.I. du Pont de Nemours & Co.*, No. 99-00660 MLR/LER (D.Haw. Sep. 5, 2002) (order granting DuPont's motion for summary judgment as to plaintiffs' RICO claims based on the statute of limitations). Therefore, the district court concluded that Plaintiffs' RICO claims were barred by the four year statute of limitations. *Id.*

The limitations period for civil RICO actions begins to run when a plaintiff knows or should know of the injury which is the basis for the action. *Id.* at 1109. Thus, Plaintiffs' RICO claims accrued when Plaintiffs had actual or constructive knowledge of DuPont's fraud. "Ordinarily,[this court] leave[s] the question of whether a plaintiff knew or should have become aware of a fraud to the jury." *Beneficial Standard Life Ins. Co. v. Madariaga,* 851 F.2d 271, 275 (9th Cir.1988). "The plaintiff is deemed to have had constructive knowledge if it had enough information to warrant an investigation which, if reasonably diligent, would have led to discovery of the fraud." *Pincay,* 238 F.3d at 1110 (quoting *Beneficial Standard Life,* 851 F.2d at 275) (internal quotation marks omitted).

Plaintiffs have tendered sufficient evidence to raise a genuine issue of material fact as to when they knew of or should have discovered the fraud. The district court relied solely on the entry of Judge Elliot's sanction order. However, the district court erred in determining that, as a matter of law, the attention received by Judge Elliott's ruling could be imputed to the Plaintiffs. *O'Connor v. Boeing North American, Inc.*, 311 F.3d 1139, 1152- 53 (9th Cir.2002) ("The

district court erred in concluding as a matter of law that newspaper reports concerning the Defendants' facilities were sufficiently 'numerous and notorious' to impute knowledge of them to Plaintiffs. The district court held that a 'reasonable, prudent subscriber' of newspapers in the area, and a 'reasonably diligent person living in the area for a substantial period of time between' 1989 and 1991 would have become aware of the release of contaminants from SSFL. This evaluation of the awareness in Plaintiffs' various communities of a specific fact or event was uniquely an issue for the jury to resolve."). Further, Plaintiffs tendered evidence that their attorney did not realize the import of the order until much later. This, along with other evidence in the record, is sufficient to create a triable factual issue as to whether these parties should have known about the alleged fraud when Judge Elliot's sanction order was issued.

C

For these reasons, the district court erred in granting judgment on the pleadings as to the RICO claims. We express no opinion on the merits of the claims, but simply conclude that DuPont is not entitled to judgment on the pleadings for the reasons given by the district court.

IV

The district court erred in holding that DuPont was entitled to summary judgment under Hawai'i law because of Plaintiffs' "inability to prove either the fact or amount of damages with reasonable certainty." *Matsuura III*, 330 F.Supp.2d at 1125.

Appendix A

Under Hawai'i law, in order to maintain a claim for relief grounded in fraud, "the plaintiff must have suffered substantial actual damage, not nominal or speculative." *Zanakis-Pico v. Cutter Dodge, Inc.*, 98 Hawai'i 309, 47 P.3d 1222, 1233 (2002) (quoting Prosser, *Law of Torts* at 648 (3d ed.1964)) (emphasis omitted). "[P]laintiffs suing in fraud are required to show both that they suffered actual pecuniary loss and that such damages are definite and ascertainable, rather than speculative." *Id.* The aim of compensation is to place the plaintiffs in the same position they would have occupied had they not been defrauded. *Id*. In the context of a breach of contract case, the Hawai'i Supreme Court stated regarding the amount of proof needed to establish the fact and amount of damages:

> [A] distinction is made in the law between the amount of proof required to establish the fact that the injured party has sustained some damage and the measure of proof necessary to enable the jury to determine the amount of damage. *It is now generally held that the uncertainty which prevents a recovery is uncertainty as to the fact of damage and not as to its amount.* However, the rule that uncertainty as to the amount does not necessarily prevent recovery is not to be interpreted as requiring no proof of the amount of damage. *The extent of plaintiff's loss must be shown with reasonable certainty and that excludes any showing or conclusion founded upon mere speculation or guess.*

Chung v. Kaonohi Ctr. Co., 62 Haw. 594, 618 P.2d 283, 290-91 (1980) (emphasis added), *abrogated on other grounds by Francis v. Lee Enters., Inc.*, 89 Hawai'i 234, 971 P.2d 707 (1999) (quoting *Ferreira v. Honolulu Star-Bulletin*, 44 Haw. 567, 356 P.2d 651, 656 (1969)).

Regarding the requirement that the amount of damages be shown with reasonable certainty, the Hawai'i Supreme Court has recognized that "[t]he problem of how to measure damages, and how to establish them in fraud cases, is always a difficult one since the person defrauded has, because of the fraud, not pursued alternative courses of action, and the results of those untaken courses therefore remain speculative." *Leibert v. Finance Factors, Ltd.*, 71 Haw. 285, 788 P.2d 833, 837 (1990). Thus, the Hawai'i Supreme Court has stated that the evidence necessary to show damages with reasonable certainty depends on the circumstances of each individual case. *Chung*, 618 P.2d at 291 (rejecting other jurisdictions' *per se* rule that the absence of prior income and expense experience of a new or unestablished business renders the loss of anticipated profits too speculative to be proven with reasonable certainty and holding that "where a plaintiff can show future profits in a new or unestablished business with reasonable certainty, damages for loss of such profits may be awarded"). Where the fact of damage is established, Hawai'i law will not insist upon a higher degree of certainty as to the amount of damages than the nature of the case admits, particularly where the uncertainty was caused by the defendant's own wrongful acts. *Coney v. Lihue Plantation Co.*, 39 Haw. 129, 1951 WL 7080, at * 5 (1951); *see also Chung*, 618 P.2d at 291. Thus, the Hawai'i Supreme Court has stated that "[d]amages which cannot be accurately

measured should not for that reason be denied, but the amount should be left to the jury." *Id.* at * 4, 1951 WL 7080 (quoting *Ah Quai v. Puuki*, 11 Haw. 158 (1897)).

Although the Hawai'i state courts have not articulated what must be proven in order to bring a meritorious settlement fraud claim, the district court, relying on a 1911 New York case, determined that "a 'settlement fraud' plaintiff must prove . . . that the settled claim had merit." *Matsuura III*, 330 F.Supp.2d at 1123.[11] That plaintiffs must demonstrate that their settled claim had merit is inconsistent with the aim of compensation in fraud cases, which is to restore plaintiffs to the position they would be in absent the fraud and to provide plaintiffs with the benefit of the bargain, *see Leibert*, 788 P.2d at 836-37, particularly as a party's decision to settle is often made as a result of a cost-benefit analysis rather than an assessment of the claim's merits.

In *DiSabatino v. United States Fidelity & Guaranty Co.*, 635 F.Supp. 350, 355 (D.Del.1986),[12] the United States District Court for the District of Delaware explained why

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11. The other case cited by the district court to support this assertion is a 1944 case decided by the Indiana Supreme Court, *Automobile Underwriters, Inc. v. Rich*, 222 Ind. 384, 53 N.E.2d 775, 777 (1944). *Matsuura III*, 330 F.Supp.2d at 1123 n. 19.

12. We favorably cited *DiSabatino* the first time this case was before us. *Matsuura I*, 166 F.3d at 1008 n. 4.

The district court in *DiSabatino* expressed its disapproval of *Automobile Underwriters, supra* at n. 3, to the extent that it required a plaintiff in an action based on settlement fraud to prove that he or she had a good cause of action against the tortfeasor at the time of settlement.

the court does not require plaintiffs alleging that the settlement of their tort claim was procured by fraud to prove that they had a good cause of action against the tortfeasor at the time of the fraud:

> Whether a good cause of action existed at the time of the settlement was a material fact that the parties already considered in reaching a settlement. Requiring a plaintiff to prove in a court of law the existence of a good cause of action for a tort would be inconsistent with affirmance of a settlement agreement. Evidence of the legal and factual strength of the claim merely goes to the value of the claim that was compromised in determining damages from the fraud.

The sound approach is one in which the trier of fact determines "the probable amount of settlement in absence of fraud after considering all known or foreseeable facts and circumstances affecting the value of the claim on the date of settlement . . ." *Id.* at 355; *see also Matsuura I,* 166 F.3d at 1008 n. 4 (citing *DiSabatino,* 635 F.Supp. at 354-55 for the assertion that "damages for fraud are conceptually different from damages for the underlying tort claims and are not too speculative to calculate"). To put it another way, the relative strength of the claim in the absence of fraud should be used by the trier of fact to determine the amount of the defrauded party's damages. Whether the defrauded party could have won its case if it proceeded to trial is irrelevant to this calculation. The critical consideration is the settlement value of the case on the date settlement was reached. Such a determination is not beyond the power of a jury to determine.

The use of probability analysis, for example, in calculating settlement values is not uncommon.

Here, the district court erroneously required Plaintiffs to present admissible evidence regarding the merits of their underlying product liability claims. *Matsuura III,* 330 F.Supp.2d at 1124 ("Plaintiffs had made no effort, however, to prove either the merits of their underlying product liability claims or what those claims would have been worth had their [sic] been no fraud by DuPont."). DuPont is also wrong in suggesting that Plaintiffs were required to provide such evidence.

Therefore, the question becomes whether there is a genuine issue of fact regarding whether Plaintiffs suffered damages as a result of DuPont's fraud. Plaintiffs have tendered evidence that knowledge of the withheld evidence on the date of settlement would have increased the settlement value of the case substantially. They cite comparable settlements of much larger amounts[13] and expert testimony.[14]

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13. DuPont argues that evidence of these settlements and verdicts is inadmissable under Fed. R. Evid. 408. However, DuPont did not raise this issue before the district court and the district court did not rule on the admissibility of this evidence. Therefore, DuPont has waived this argument for the purposes of this appeal. *Doi v. Halekulani Corp.,* 276 F.3d 1131, 1140 (9th Cir.2002). However, DuPont is not precluded from asserting the argument on remand, and we express no opinion on the merits of the question.

14. Assuming that the district court concluded that the testimony of J. Anderson Berly, III—a trial attorney retained by Plaintiffs to render expert opinions about the materiality and impact

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(Cont'd)
of DuPont's withholding of evidence—was inadmissible under Fed. R. Evid. 702, *see Matsuura III*, 330 F.Supp.2d at 1124, 1124 n. 21, such constituted an abuse of discretion.

"Rule 702 allows admission of 'scientific, technical, or other specialized knowledge' by a qualified expert if it will 'assist the trier of fact to understand the evidence or to determine a fact in issue.' " *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999), require the district court to perform its gatekeeping role to determine the admissibility of all forms of expert testimony, even the non-scientific testimony at issue here. *Hangarter v. Provident Life & Acc. Ins. Co.*, 373 F.3d 998, 1017 (9th Cir.2004). The Supreme Court has emphasized that "[t]he inquiry envisioned by Rule 702 is . . . a flexible one," *Daubert*, 509 U.S. at 594, 113 S.Ct. 2786, and must be "tied to the facts of a particular case," *Kumho Tire*, 526 U.S. at 150, 119 S.Ct. 1167 (quotation marks omitted). "Concerning the reliability of non-scientific testimony such as [Berly's], the '*Daubert* factors (peer review, publication, potential error rate, etc.) simply are not applicable to this kind of testimony, whose reliability depends heavily on the *knowledge and experience* of the expert, rather than the methodology or theory behind it.'" *Hangarter*, 373 F.3d at 1017 (quoting *Mukhtar v. California State Univ.*, 299 F.3d 1053, 1059 (9th Cir.2002)) (emphasis in original).

There is no indication that the district court weighed Berly's knowledge and experience in reaching its decision as to whether the testimony was admissible. The district court applied an incorrect legal analysis in assessing the reliability of Berly's testimony in accordance with Rule 702, and thus abused its discretion in excluding Berly's testimony. For the same reason, we conclude that the district court also abused its discretion in excluding the report of Plaintiffs'
(Cont'd)

This evidence is sufficient to create a triable issue of fact and is not so speculative that damages are incapable of calculation.

DuPont argues that attorney Malone settled the cases with the belief that he would have won at trial. That Malone believed he could win against DuPont before DuPont's fraud was exposed is not particularly relevant to the issue of how much more Malone could have settled Plaintiffs' cases for if he, at the time of settlement, had the test data that DuPont had fraudulently withheld. Malone also testified that he believed the Plaintiffs received "full value" for their cases. This is certainly relevant evidence, but it does not establish full settlement value as a matter of law. Malone also testified that if the Alta data that DuPont had fraudulently withheld had been revealed to Plaintiffs at the time of settlement, Plaintiffs' cases would have been stronger and their settlement value would have been higher.[15] Indeed, the import

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expert James F. Ventura. We remand to the district court to allow it to determine whether Ventura's and Berly's expert testimony is admissible in the first instance, applying the correct legal framework. *See Sullivan v. U.S. Dept. of Navy,* 365 F.3d 827, 834 (9th Cir.2004). We express no opinion as to the merits of that inquiry.

15. Although some of Malone's testimony concerns how the threat of punitive damages would have affected the settlement value of Plaintiffs' cases, most of Malone's testimony concerns how the evidence withheld by DuPont would have weakened DuPont's defenses, particularly its arguments that no SUs had ever been found in their field testing or analytical chemical testing of Benlate and that Plaintiffs were comparatively negligent, and thus would have

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of Malone's testimony is the subject of vigorous debate between the parties, and the record can support inferences for each position. It is not our task to weigh the evidence. Rather, at this stage of the proceedings, we are required to view the evidence in the light most favorable to the Plaintiffs. Doing so, we conclude there is a genuine issue of material fact regarding whether Plaintiffs suffered damages as a result of DuPont's fraud. The district court erroneously granted summary judgment for DuPont based on its determination that Plaintiffs failed to prove the fact of damages with reasonable certainty.

V

The district court erred in granting summary judgment on the common law fraud claim on the basis that the Plaintiffs could not establish that the alleged fraud was material or that the Plaintiffs reasonably relied upon DuPont's representations to their detriment.

(Cont'd)

increased the settlement value of Plaintiffs' cases. Thus, the district court erroneously characterized Malone's testimony as suggesting only "that DuPont's alleged wrongdoing, if known, would have provided [Malone] with the opportunities to seek punitive sanctions and punitive damages against DuPont" and therefore "would have provided him with enhanced bargaining power in the settlement negotiations." *Matsuura III*, 330 F.Supp.2d at 1124. Likewise, DuPont's assertion that Plaintiffs seek only the enhanced sanctions value of having discovered the fraud, rather than the honest settlement value in the absence of fraud, is erroneous.

Appendix A

A

"The materiality of undisclosed information . . . cannot be determined in a vacuum." *TSA Int'l Ltd. v. Shimizu Corp.*, 92 Hawai'i 243, 990 P.2d 713, 728 (1999) (internal quotation marks omitted). "An omitted fact is material if there is a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable [claimant]." *Id.* (internal quotations omitted). Here, the Plaintiffs have tendered sufficient evidence to create a triable issue of fact on materiality. As we have discussed, Plaintiffs tendered evidence that the settlement value of their cases would have increased substantially had the withheld information been produced on the date of settlement. DuPont argues that the information was available elsewhere, that Plaintiffs' attorney had access to the information, and that the Plaintiffs deliberately chose to settle without obtaining the information, but these defenses are fact questions to be resolved by a jury.

B

Under Hawai'i law, Plaintiffs' reliance on DuPont's misrepresentation must be reasonable. *Matsuura II*, 73 P.3d at 701. "As a general principle . . . the question of whether one has acted reasonably under the circumstances is for the trier of fact to determine." *Id.* (quoting *Richardson v. Sport Shinko*, 76 Hawai'i 494, 880 P.2d 169, 178 (1994)). "[W]here reasonable minds might differ as to the reasonableness of plaintiff's conduct, the question is for the jury." *Id.* (quoting *Young v. Price*, 47 Haw. 309, 388 P.2d 203, 208 n. 10 (1963)) (internal quotation marks omitted).

Appendix A

The Hawai'i Supreme Court, answering the certified question posed to it by the district court of whether Plaintiffs were unable as a matter of law to establish that their reliance on DuPont's representations was reasonable, stated that "we are persuaded that reasonable minds could differ as to the reasonableness of the [Plaintiffs'] reliance on DuPont's representations." *Id.* at 704. Although the record has been developed more fully since the Hawai'i Supreme Court considered this matter, our analysis is the same. Although DuPont has raised serious questions about the reasonableness of the reliance and about whether Plaintiffs actually relied upon DuPont's representations, these are factual questions to be resolved by a jury.

VI

The district court also erred in granting summary judgment on Plaintiffs' non-fraud common law claims other than the claims of negligence and spoliation.

A

The settlement agreement does not preclude Plaintiffs' non-fraud causes of action. Delaware laws governs the construction and effect of Plaintiffs' settlement contracts with DuPont. *Matsuura I,* 166 F.3d at 1008 n. 3. The district court determined that *E.I. DuPont de Nemours & Co. v. Florida Evergreen Foliage,* 744 A.2d 457 (Del.1999), in which the Delaware Supreme Court determined that the general release in the settlement agreement between DuPont and a similarly situated plaintiff did not bar plaintiff's subsequent action against DuPont for fraud in the inducement of the release,

did not control the question of whether Plaintiffs' non-fraud claims were barred by the terms of the settlement agreements between DuPont and Plaintiffs. *Matsuura III*, 330 F.Supp.2d at 1126-27. The district court reasoned that (1) Plaintiffs' "non-fraud do not satisfy the 'fraud exception' articulated by the Delaware Supreme Court," and (2) the covenants not to sue that are contained in the settlement agreements and which are broader than the general release clauses bar any claims related to the settled claims and therefore Plaintiffs' non-fraud claims. *Id.* at 1126-27.

DuPont's argument that the decisions of this court in *Matsuura I* and the Delaware Supreme Court in *Florida Evergreen* "unambiguously were limited to the scope of the *release clause*, and nowhere mentioned the separate *covenant not to sue* in the parties' settlement agreements" is erroneous. Although the covenant not to sue is not quoted in our decision in *Matsuura I*, DuPont argued that the covenant not to sue barred Matsuura's fraud claims in its brief to the *Matsuura I* court. 1997 WL 33547005 (arguing in its brief that "[t]he Matsuuras further agreed not to commence any action against DuPont 'based upon or in any way related to any causes of action, claims, demands, actions, obligations, damages, or liabilities which are the subject of this Release,' " and that "Plaintiffs agreed not to commence or participate in any action based upon or 'in any way related to' a released claim against DuPont in the future."). We rejected DuPont's argument. Thus, the covenant not to sue does not bar Plaintiffs' non-fraud claims.

In addition, although the Delaware Supreme Court does in some instances refer to a "fraud exception," *Florida*

Evergreen, 744 A.2d at 461, the court's reasoning for creating the fraud exception applies to non-fraud claims arising out of fraudulent conduct. As stated by the Delaware Supreme Court:

> There is some merit to the contention that parties entering into a general release are chargeable with notice that any uncertainty with respect to the contours of the dispute which led to the litigation, including that which is provable and that which is not, is resolved through the release. *See Hob Tea Room v. Miller,* Del.Supr., 89 A.2d 851, 856 (1952) (construing the effect of a general release that the Court characterized as "unmistakably lucid"). It is quite another thing, however, to conclude that a person is deemed to have released a claim of which he has no knowledge, when the ignorance of such a claim is attributable to fraudulent conduct by the released party. 66 Am.Jur.2d *Release* § 30 (1973). At a minimum, if one party is to be held to release a claim for fraud in the execution of the release itself, the release should include a specific statement of exculpatory language referencing the fraud.

Florida Evergreen, 744 A.2d at 460-61. In addition, just as DuPont's fraudulent inducement of settlement "subsists separate from, and necessarily occurred after, any conduct DuPont may have engaged in with respect to its manufacture or distribution of Benlate," *id.* at 462, so do other claims stemming from the same fraudulent conduct. Also similar to a claim for fraudulent inducement, other tort claims stemming

from the same fraudulent conduct are not ones that ordinarily would be knowingly released. *Matsuura I*, 166 F.3d at 1011.

In sum, it appears probable that, under Delaware law, the settlement contracts do not bar Plaintiffs' non-fraud claims.

B

The district court did not err in dismissing Plaintiffs' negligence claims, stating "[t]here is no basis for allowing derivative litigation over claims that an opponent's prior litigation conduct in another case amounted to negligence." *Matsuura III*, 330 F.Supp.2d at 1128. In a footnote, Plaintiffs argue only that "Hawai'i common law creates a duty not to make negligent misrepresentations, and a breach of such a duty is actionable." Brief for Appellants at 79 n. 47 (citing *Zanakis-Pico v. Cutter Dodge, Inc.*, 98 Hawai'i 309, 47 P.3d 1222, 1234 (2002)).

Because "litigation conduct is governed by statute, rules of procedure, and ethical rules," *Matsuura III*, 330 F.Supp.2d at 1127, the statutes and rules themselves, must impose a duty of care on parties or their legislative history must manifest an intent on the part of the legislature to do so. *Lee v. Corregedore*, 83 Hawai'i 154, 925 P.2d 324, 342-43 (1996); *Hulsman v. Hemmeter Dev. Corp.*, 65 Haw. 58, 647 P.2d 713, 719-20 (1982). Plaintiffs have not argued or demonstrated that the procedural rules create a duty of care or that their legislative history manifest an intent to do so. As the district court's judgment lays out, the Federal Rules of Civil Procedure do not create duties on which an opposing party

may base a negligence claim. *Matsuura III*, 330 F.Supp.2d at 1127-28 (citing 28 U.S.C. § 2702(b)). A violation of Hawai'i Rules of Civil Procedure, which appear to be modeled on the Federal Rules of Civil Procedure, *Swink v. Cooper,* 77 Hawai'i 209, 881 P.2d 1277, 1282 (1994) (noting that HRCP 26(e) is modeled on FRCP 26(e)), likewise appears not to create a separate cause of action.

C

The district court also erroneously dismissed Plaintiffs' non-fraud claims on the grounds of the litigation privilege. *Matsuura III*, 330 F.Supp.2d at 1128. In *Matsuura II*, the Hawai'i Supreme Court stated that "Hawai'i courts have applied an absolute litigation privilege in defamation actions for words and writings that are material and pertinent to judicial proceedings." 73 P.3d at 692. The court examined the policy considerations behind the privilege and decided not to expand the protection of the privilege to claims outside of defamation actions, holding that "[u]nder Hawai'i law, a party is not immune from liability for civil damages based upon that party's fraud engaged in during prior litigation proceedings." *Id*. at 700, 706. The court appears to emphasize that many of the policies weighing against the application of the privilege do so only when fraud was committed in the prior proceedings. *Id*. at 693-99. In accordance with the Hawai'i Supreme Court's analysis, so long as a cause of action for fraud is asserted, the litigation privilege does not protect subsequent litigation asserting other causes of action stemming from the fraud allegedly committed in prior proceedings. Thus, we hold that Plaintiffs' non-fraud claims are not barred by the litigation privilege under Hawai'i law.

Appendix A

D

In their opening brief, Plaintiffs do not raise the issue that the district court erroneously dismissed Plaintiffs' spoliation claims, and only briefly assail the district court's ruling in its reply brief. As such, Plaintiffs have waived this claim.

VII

Plaintiffs request that this court exercise its supervisory power under 28 U.S.C. § 2106 to reassign this case to a different district court judge on remand. In the ordinary course,

> Absent allegations of bias, the factors this court considers in deciding whether "unusual circumstances" exist and remand to a different judge is appropriate are: (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

United States v. Atondo-Santos, 385 F.3d 1199, 1201 (9th Cir.2004) (quoting *United States v. Working*, 287 F.3d 801,

809 (9th Cir.2002)). A finding of either the first or second factor supports remanding to a different district court judge. *Id.*

Although we do not question the impartiality of the visiting district judge, there are some unusual factors that indicate to us that a reassignment is advisable to preserve the appearance of justice. The visiting district judge adopted the 64 page proposed summary judgment order tendered by DuPont with only a few minor changes. Those changes consisted of additional language complaining about the volume of material involved.

The judge then directed that the ghost-written order be published. Although adopting findings or an order drafted by the parties is not prohibited, we have criticized district courts that "engaged in the 'regrettable practice' of adopting the findings drafted by the prevailing party wholesale." *Maljack Productions, Inc. v. GoodTimes Home Video Corp.*, 81 F.3d 881, 890 (9th Cir.1996) (quoting *Sealy, Inc. v. Easy Living, Inc.*, 743 F.2d 1378, 1385 n. 3 (9th Cir.1984)).

In addition, the visiting district judge took the highly unusual step of reversing *sub silento* the thoughtful certification order previously entered by the district court. In its lengthy order, the district court analyzed the pending dispositive motions in detail and concluded that case involved novel issues of state law. It therefore certified the questions to the Hawai'i Supreme Court and stayed further proceedings, finding in its order that "[t]he viability of the state causes of action in this case turns on the answers to these questions."

When the case was reassigned to the visiting judge, the judge reversed course. Rather than waiting for the Hawai'i Supreme Court to respond to the questions propounded by the district court, the visiting district judge decided that the litigation should proceed. The visiting district judge then denied motions to stay the proceedings pending the certification response by the Hawai'i Supreme Court, invited DuPont to renew its summary judgment motion, and then acted without waiting for the Hawai'i Supreme Court to issue its decision. After the Hawai'i Supreme Court issued its lengthy opinion responding to the certification request, the visiting district judge declined to take the Hawai'i Supreme Court's opinion into consideration, observing that "I'm not a trial court of the Hawai'i courts of appeal." Transcript of Proceedings Before Manuel L. Real, February 25, 2004 at 24. The district court took this action even though the previous judge had certified to the Hawai'i Supreme Court that the viability of the state causes of actions depended on the Hawai'i Supreme Court's response.

Considering these actions in the aggregate, we conclude that the appearance of justice requires reassignment on remand. We are also mindful of the expense involved in utilizing visiting judges. Therefore, we remand this case to the Chief Judge of the District of Hawai'i to determine the assignment of the case on remand.

Given the resolution of this case, we need not reach any of the other questions urged by the parties. We need not, and do not, reach the merits of any of the issues remanded to the district court.

REVERSED AND REMANDED.

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 02-16947
D.C. No. CV-99-00660-MLR

JUDGMENT

LIVING DESIGNS, INC. AND PLANT EXCHANGE, INC., Hawaii corporations,

Plaintiff - Appellant,

V.

E.I. DUPONT DE NEMOURS AND COMPANY, a Delaware corporation,

Defendant - Appellee.

No. 02-16948
D.C. No. CV-00-00615-MLR

JUDGMENT

ANTHURIUM ACRES, a Hawaii general partnership, successor in interest to Island Tropicals; et al.,

Plaintiff - Appellants,

Appendix A

V.

E.I. DUPONT DE NEMOURS AND COMPANY,
a Delaware corporation,

Defendant - Appellee.

No. 02-16951
D.C. No. CV-00-00328-MLR

JUDGMENT

MCCONNELL, INC. a California corporation,

Plaintiff - Appellant,

V.

E.I. DUPONT DE NEMOURS AND COMPANY,
a Delaware corporation,

Defendant - Appellee.

Appendix A

No. 04-16354
D.C. No. CV-96-01180-MLR
CV-97-00716-MLR
CV-99-00660-MLR
CV-00-00328-MLR
CV-00-00615-MLR

JUDGMENT

LIVING DESIGNS, INC. AND PLANT EXCHANGE, INC., Hawaii corporations; et al.,

Plaintiffs - Appellants,

V.

E.I. DUPONT DE NEMOURS AND COMPANY, a Delaware corporation,

Defendant - Appellee.

Appeal from the United States District Court for the District of Hawaii (Honolulu).

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Hawaii (Honolulu) and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is **REVERSED & REMANDED**.

Filed and entered 12/05/05

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT, DISTRICT OF HAWAII DATED JUNE 7, 2004

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

Nos. CV96-1180-MLR, CV97-0716-MLR, CV99-0660-MLR, CV00-0328-MLR, CV00-0615-MLR, CV97-1185-MLR.

David MATSUURA, Individually and dba Orchid Isle Nursery, and Stephen Matsuura, Individually and dba Hawaiian Dendrobium Farm,

Plaintiffs,

v.

E.I. DU PONT DE NEMOURS AND COMPANY, a Delaware Corporation,

Defendants.

Fuku-Bonsai, Inc., a Hawaii Corporation and David W. Fukumoto,

Plaintiffs,

v.

E.I. du Pont de Nemours and Company, a Delaware Corporation, et al.,

Defendants.

Appendix B

Living Designs, Inc. and Plant Exchange, Inc.,
Hawaii Corporations,

Plaintiffs,

v

E.I. du Pont de Nemours and Company,
a Delaware Corporation,

Defendants.

McConnell, Inc., a California Corporation,

Plaintiff,

v.

E.I. du Pont de Nemours and Company,
a Delaware Corporation,

Defendants.

Anthurium Acres, a Hawaii general Partnership, Successor
in interest to Island Tropicals; Mueller Horticultural
Partners, a Hawaii Limited Partnership,

Plaintiffs,

v.

E.I. du Pont de Nemours and Company,
a Delaware Corporation,

Defendants,

Appendix B

E.I. du Pont de Nemours and Company,
a Delaware Corporation,

Plaintiff/Counterclaim Defendant,

v.

Exotics Hawaii Kona, Inc. and Harvey Tomono,

Defendants/Counterclaim Plaintiffs.

JUDGMENT

REAL, District Judge.

The Court has reviewed fully the proceedings in each of the motions considered herein and has considered the memorandum submitted by defendant entitled Opinion and Order. It is an accurate and complete review of all the proceedings before the Court involving in excess of six file cabinet drawers of motions and points and authorities. In addition the Court has heard the arguments of counsel on all the issues involved in this litigation. The Court has also considered the objections of the plaintiffs which, in effect, are only a re-argument of their position already considered by the Court in hearings recited herein. The adoption of the memorandum is to accurately recite the facts and the basis for the rulings made in this order.

Appendix B

THE LITIGATION

The following motions are before the Court: (1) "DuPont's Motion for Judgment on the Pleadings as to All Plaintiffs' Claims Based on Litigation Conduct"[1] ("Litigation Conduct Motion"); (2) "DuPont's Motion for Judgment on the Pleadings as to Plaintiffs' RICO Claims"[2] ("RICO Motion"); (3) DuPont's Motion for Summary Judgment on Plaintiffs' Claims Regarding the So-Called 'ALTA Fraud' "[3] ("ALTA Motion"); (4) "DuPont's Motion for Summary Judgment on the Speculative Nature of Plaintiffs' Damages"[4] ("Speculative Damages Motion");

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1. This motion was filed in *Fuku-Bonsai, Inc. v. DuPont* (Case No. CV97-00716-MLR/LEK) on March 22, 2001; in *Matsuura v. DuPont* (Case No. CV96-01880-MLR/LEK) on April 19, 2001; in *Living Designs, Inc. v. DuPont* (Case No. CV99-00600-MLR/LEK), *McConnell, Inc. v. DuPont* (Case No. CV00-00328-MLR/LEK), and *Anthurium Acres v. DuPont* (Case No. CV00-00615-MLR/LEK) on March 13, 2002; and heard in all of these cases on June 21, 2002. These cases will be collectively referred to as "the *Matsuura* Consolidated Cases" and the plaintiffs in these actions will be collectively referred to as "the *Matsuura* Plaintiffs."

2. This motion was filed in the *Matsuura* Consolidated Cases on April 12, 2002 and heard on June 21, 2002.

3. This motion was filed in the *Matsuura* Consolidated Cases on April 15, 2002 and heard on June 21, 2002.

4. This motion was filed in *Matsuura v. DuPont* (Case No. CV96-01880-MLR/LEK) on July 3, 2002; in *Fuku-Bonsai, Inc. v. DuPont* (Case No. CV97-00716-MLR/LEK) on September 18, 2002; (Cont'd)

(5) "DuPont's Motion for Summary Judgment on Plaintiffs' Remaining Non-Fraud Claims"[5] ("Non-Fraud Motion"); (6) "Plaintiffs' Motion to Vacate September 4, 2002 Reasonable Reliance Order, Deny Defendant Du Pont's Reasonable Reliance and Litigation Immunity Motions, and Set Case for Consolidated Trial"[6] ("Plaintiffs' Motion to Vacate"); and (7) "DuPont's Counter Motion for An Order Clarifying and Superseding 'Order Granting DuPont's Motion for Summary Judgment on Plaintiffs' Inability, As a Matter of Law, to Establish Reasonable Reliance'"[7] ("Counter Motion for a New Reasonable Reliance Order").

This Judgment addresses all seven motions, granting the motions filed by DuPont and denying Plaintiffs' Motion to Vacate. As requested in the Counter Motion for a New

(Cont'd)

and in *Living Designs, Inc. v. DuPont* (Case No. CV99-00600-MLR/LEK), *McConnell, Inc. v. DuPont* (Case No. CV00-00328-MLR/LEK), and *Anthurium Acres v. DuPont* (Case No. CV00-00615-MLR/LEK) on October 2, 2002; and heard in all of these cases on February 25, 2004.

5. This motion was filed in the *Matsuura* Consolidated Cases on October 1, 2002 and heard on October 29, 2002.

6. This motion was filed in the *Matsuura* Consolidated Cases on July 31, 2003 and heard on February 25, 2004.

7. DuPont filed this motion pursuant to LR 7.9 as a "Counter Motion" to Plaintiffs' Motion to Vacate. This motion was filed in the *Matsuura* Consolidated Cases, as well as in *DuPont v. Exotics Hawaii Kona, Inc.* (Case No. CV97-01185-MLR/LEK), on September 16, 2003, and was heard in all of the cases on February 25, 2004.

Reasonable Reliance Order, this Judgment supersedes this Court's prior "Order Granting DuPont's Motion for Summary Judgment on Plaintiffs' Inability, as a Matter of Law, to Establish Reasonable Reliance," filed September 4, 2002 ("September 4 Order"). As a result of this ruling, the Court dismisses with prejudice all of the claims asserted by the *Matsuura* Plaintiffs against DuPont, as well as all of the fraud-based counterclaims asserted against DuPont by the defendants/counterclaim plaintiffs in Case No. CV97-01185-MLR/LEK.[8]

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8. The following claims have been asserted by the *Matsuura* Plaintiffs against DuPont and are by this Judgment dismissed with prejudice: (1) fraud, (2) federal RICO (Section 1962(c)), (3) federal RICO (Section 1962(d)), (4) conspiracy, (5) abuse of process, (6) infliction of emotional distress, (7) interference with prospective economic advantage, (8) negligence, (9) spoliation of evidence, and (10) punitive damages. (The Court further notes that the *Matsuura* Plaintiffs abandoned their claims for abuse of process, infliction of emotional distress, and interference with prospective economic advantage in their Final Pre-Trial Statement filed on July 29, 2002.) With respect to the defendants/ counterclaim plaintiffs in *DuPont v. Exotics Hawaii Kona, Inc.* (Case No. CV97-01185-MLR/LEK), DuPont's Counter Motion for a New Reasonable Reliance Order is the only motion under consideration in this Judgment dealing with their claims. The Court's order granting the Counter Motion disposes only their fraud-based counterclaims; none of the motions that are the subject of this ruling addresses their non-fraud counterclaims. Finally, DuPont's counterclaims against the *Matsuura* Plaintiffs, and its affirmative claims in *DuPont v. Exotics Hawaii Kona, Inc.*, for breach of settlement agreement and related claims are not affected by this ruling and remain pending.

Appendix B

I. FACTUAL BACKGROUND

Many of the same undisputed facts are relevant to the different legal issues presented by the various pending motions. This background section sets forth the facts bearing on all of the motions, organized as follows: (a) the underlying cases; (b) the ALTA discovery disputes; (c) the Plaintiffs'[9] settlements and dismissals with prejudice; (d) post-settlement "discovery fraud" proceedings; and (e) relevant proceedings in these cases, including the certified question proceedings before the Hawaii Supreme Court.

These cases arise from product liability cases filed by the Plaintiffs in 1992 and 1993 against E.I. du Pont de Nemours and Company ("DuPont") relating to their use of the DuPont fungicide known as Benlate® ("Benlate"), and which were settled in April, May, and October, 1994. These product liability cases, which were litigated in Hawaii state court, will be referred to as the "Underlying Cases." The Underlying Cases were among other Benlate cases that had been brought against DuPont in federal court in Georgia and state courts in Florida and Hawaii.

With one exception,[10] all of the Plaintiffs were

9. With the exception of the defendants/counterclaim plaintiffs in *DuPont v. Exotics Hawaii Kona, Inc.* (Case No. CV97-01185-MLR/LEK), the plaintiffs in the Underlying Cases are now Plaintiffs in the current cases. For ease of reference, all of these parties will be referred to as "Plaintiffs."

10. Harvey Tomono, a defendant/counterclaim plaintiff in *DuPont v. Exotics Hawaii Kona, Inc.* (Case No. CV97-01185-MLR/ (Cont'd)

represented in the Underlying Cases by a Florida attorney named Kevin Malone ("Malone"). In the Underlying Cases, as well as other Benlate cases, the Benlate plaintiffs alleged that Benlate was contaminated with an herbicide that damaged their crops and contaminated their lands. Before the underlying cases were settled there were extensive allegations in the Underlying Cases and other Benlate cases around the country that DuPont had engaged in massive discovery abuse and other instances of litigation misconduct. Plaintiffs, particularly their counsel, monitored the other Benlate cases and were, at the time of the settlements, aware of the allegations that had been leveled against DuPont in those other cases.[11]

II. The ALTA Discovery Disputes

Plaintiffs' claims focus to a large extent on scientific testing conducted for DuPont by an outside consultant, ALTA Laboratories ("ALTA"). For various Benlate cases, ALTA

(Cont'd)

LEK), was represented in his underlying case by Hawaii attorneys Judith Pavey and Howard Glickstein. Defendant/counterclaim plaintiff Exotics Hawaii Kona, Inc. was represented by Malone.

11. It is well-settled that the knowledge of Plaintiffs' underlying attorneys is imputed to Plaintiffs as a matter of law. *See, e.g., Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship,* 507 U.S. 380, 397, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993) (client is "considered to have notice of all facts, notice of which can be charged on the attorney") (quoting *Link v. Wabash Ry.*, 370 U.S. 626, 633-34, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962)); *Jones Stevedoring Co. v. Director, OWCP,* 133 F.3d 683, 689 (9th Cir.1997) (imputation of knowledge from attorney to client is "bedrock" principle of representative litigation).

analyzed soil and plant samples from Benlate plaintiffs' properties to determine whether a form of herbicide called sulfonylurea ("SU") was present. According to Plaintiffs: (1) certain data generated by ALTA as a result of this testing which was not produced until May 1994 ("the ALTA Data") contained information that Plaintiffs needed to know to evaluate settlement (*i.e.*, the data allegedly showed that the soils of other Benlate plaintiffs were contaminated with SU herbicides manufactured by DuPont); (2) DuPont fraudulently concealed the ALTA Data by claiming that it was protected work product; and (3) assuming the ALTA Data had been disclosed, Plaintiffs would have received significantly more money in their settlements.

The undisputed evidence, however, shows that: (1) prior to Plaintiffs' settlements, their own expert witness had already concluded that ALTA had found SU contamination in Benlate; (2) Plaintiffs knew about the existence of the ALTA Data before they settled with DuPont and did not rely on DuPont's claims of work product protection but vigorously contested (and ultimately vitiated) those claims; and (3) even after the data were produced in the Hawaii Benlate litigation in May 1994, Benlate plaintiffs continued to settle their claims against DuPont (including Fuku-Bonsai, Inc., a Plaintiff here who was represented by Malone, and Harvey Tomono, a Plaintiff here who was represented by Hawaii attorneys Judith Pavey and Howard Glickstein).

As early as a deposition on February 10, 1994, Plaintiffs' analytical chemistry expert, Dr. Jodie Johnson, testified that, in his opinion, ALTA had found SUs in soil samples removed from the farms of plaintiffs in a Hawaii case (the *Kawamata/*

Tomono case) and a Florida case (the *Lambert* case). Scott Lieberman, an attorney in Malone's law firm, attended Dr. Johnson's deposition.

At his deposition on March 2, 1994, ALTA scientist Robert Bethern testified about the ALTA Data, which consisted of test data generated in connection with a Benlate case filed in federal court in Georgia (the *Bush Ranch* case) and additional testing from the *Lambert* case in Florida. According to Bethem, those test results contained "peaks" in the retention time for some SUs-the same type of information on which Plaintiffs' expert Dr. Johnson had based his opinions during the underlying litigation that ALTA had found SUs.

An expert report prepared by Dr. Johnson and dated March 30, 1994 concluded that, based upon his "review of the [ALTA] analytical test results" then available, "[s]ulfonylurea herbicides have been found in the soil samples taken from the Hawaiian growers' fields, as well as a Florida growers' field" and in "[a]reas of the Benlate facilities at the Belle, W.Va. site . . ." Therefore, more than a month before the earliest settlement at issue in these cases, Plaintiffs' own expert had concluded that ALTA's testing showed widespread contamination of Benlate with SUs, which is what Plaintiffs allege was revealed by the ALTA Data that was produced in May 1994.

DuPont objected to the production of the ALTA Data on work product grounds. The undisputed facts, however, show that Plaintiffs did not rely on DuPont's work product

designation but instead challenged the objection by moving to compel production of the ALTA Data.

Among other pleadings showing that Plaintiffs challenged DuPont's work product claim over the ALTA Data is a motion to compel dated March 15, 1994, in which Plaintiffs expressly joined. This motion to compel sought the production of ALTA documents identified by Robert Bethem during his March 2, 1994 deposition, and directly attacked DuPont's alleged "litigation strategy" of "cloak[ing] everything with 'attorney-client, work product' privilege claims, unless it serve[s] DuPont's purposes . . . ."

In March 1994, after extensive discovery proceedings, the Hawaii state court ordered DuPont to produce the ALTA Data, finding that the Hawaii Benlate plaintiffs had a substantial need for the ALTA Data and that it was therefore not entitled to work product protection. DuPont filed an emergency Petition for Writ of Mandamus in the Hawaii Supreme Court challenging the ruling, but that petition was denied on April 6, 1994. By early April 1994, therefore, it was clear that the ALTA Data would be produced in the Hawaii Benlate litigation, and the documents physically were produced in Hawaii on May 17, 1994.

Most Plaintiffs here executed their settlement agreements in April of 1994, during the final stages of the discovery battle, after the documents were ordered produced but just before they were actually produced on May 17, 1994. Plaintiff Fuku-Bonsai, Inc., however, executed its settlement agreement on May 25, 1994, after the data had been produced, and other Hawaii clients of Malone continued to execute

settlement agreements as late as July 28, 1994. Counterclaim Plaintiff Harvey Tomono settled his claims in October 1994, after his own counsel had obtained production of and made arguments about the ALTA Data in the Hawaii state court proceedings, and after allegations concerning DuPont's alleged ALTA fraud had been publicly made in the *Kawamata/ Tomono* case.

These later settlements show that Plaintiffs did not reasonably rely on the absence of the ALTA Data or on any assumption as to what the data otherwise might disclose. Notwithstanding the disclosures, Malone continued to recommend, administer, arrange for the execution of, and complete the settlements, just as he had done before the ALTA production.

Malone was deposed on June 13-14, 2002. During his deposition, he confirmed that "when we settled we dismissed the cases and whatever ongoing disputes were ongoing were terminated by the termination of the lawsuits." Malone Dep. Tr., at 425. Malone was referring specifically to the discovery disputes concerning the allegedly concealed ALTA Data.

Malone's Expressed Distrust of DuPont

During the underlying litigation, Malone and his experts made assertions about DuPont's trustworthiness and the veracity of its discovery responses. For example, in a letter dated March 23, 1993, one of Malone's retained experts described incomplete discovery responses as a "normal DuPont tactic" and asserted that "the truth and DuPont are really strangers to each other." On September 23, 1993,

Malone wrote Wayne Parsons (his Hawaii co-counsel) that two key DuPont witnesses "will lie if needed to protect DuPont."

Malone made similar statements as he began settlement negotiations with DuPont. For example, during a break in the trial of a Benlate case in Florida state court (the *KHD v. DuPont* case, in which Malone represented the plaintiff), Malone wrote a letter to DuPont's counsel about the possibility of settling his cases in which he stated, "Frankly, I do not trust DuPont . . . ."

Malone's Statements About Proving Liability

Malone prevailed on liability in the *KHD v. DuPont* case and in another Florida Benlate case, *Fred Henry v. DuPont.* On March 23, 1993, Malone wrote to one of his expert witnesses, stating, "At this point, proving that DuPont was negligent in failing to test Benlate and proving that Benlate was defective is not a big problem for us. The fact that the plaintiffs have won six cases in a row demonstrates that we are in good shape in that regard." Similarly, Malone stated in a letter to DuPont that "it will be difficult or impossible in light of the documents and other evidence for DuPont to prevail on the question of liability in regards to Benlate." In other letters written to his clients and DuPont in the fall of 1993 and the early winter of 1994-months before Plaintiffs' settlements-Malone touted his victories in *KHD* and *Fred Henry* as proving that he could easily establish Benlate's defectiveness in future cases.

Appendix B

Malone Settled for the "Full Value" of his Clients' Claims

According to a letter Malone wrote to one of his clients in 1996-a letter that was not produced to DuPont until 2002- "I settled the cases under the assumption that we would win liability." At Malone's deposition in June of 2002, he stood by this statement:

Q: Your letter continues: "The big difference between my clients and most of the other plaintiffs is that we, in fact, got full value or very close to full value for our cases when we settled." Is that statement true in your opinion?

A: I believed it to be true when I wrote this letter.

Q: "As you know, I tried two cases against DuPont and won them both. Accordingly, when I settled all these cases I did it under the assumption that we would, in fact, win the cases if we tried the rest of them." Is that statement true?

A: I believe it was true when I wrote this.

Q: Well, ***that's true today, isn't it;*** when you settled the cases you did it on the assumption that you would, in fact, win the cases if you tried the rest of them?

A: ***Yes***.

Malone Dep. Tr., at 450-51 (emphasis added). Malone testified that he arranged to settle the cases to avoid the delays inherent in taking his Benlate cases to trial, not because of the risk he would not prove liability. *Id.* at 155-156, 342-343, 498-499.

Provisions of the Settlement Agreements

Malone's Hawaii clients executed settlement contracts in April, May, and July of 1994. The release clauses of these settlement contracts provide:

> [A]ny and all causes of action, claims, demands, actions, obligations, damages, or liability, whether known or unknown, that [Plaintiffs] ever had, now has, or may hereafter have against [DuPont], by reason of any fact or matter whatsoever, existing or occurring at any time up to and including the date this Release is signed (including, but not limited to, the claims asserted and sought to be asserted in the [Underlying Cases]).

The settlement contracts also contain the following "covenant not to sue":

> [Plaintiffs] covenant[ ] that [Plaintiffs] will not commence, prosecute, or permit to be commenced or prosecuted against [DuPont] any action or other proceeding based upon or in any way related to any causes of action, claims, demands, actions, obligations, damages, or liabilities which are the subject of this Release.

Because the covenant not to sue covers any action "based upon or in any way related to" the claims that were the subject of the agreement, the covenant not to sue is broader than the release clause.

The settlement contracts further obliged the Plaintiffs to dismiss the Underlying Cases with prejudice. In late November 1994, after DuPont's payment of the second and final installment of the settlement amounts, dismissals with prejudice were filed in all but one of the Underlying Cases, expressly stating that "[t]here are no remaining parties and/or issues."

On October 19, 1994, Plaintiff Harvey Tomono executed a similar settlement agreement in favor of DuPont, promising not to sue on any claims "based upon or in any way related to" the released claims. Tomono's claims were later dismissed with prejudice on October 28, 1994 through the filing of a dismissal with prejudice that was identical to those filed in the other Underlying Cases.

There is no evidence that DuPont made any misrepresentations in the settlement negotiations between the parties. Furthermore, the Plaintiffs' settlement agreements contain no warranties or promises by DuPont regarding the accuracy or completeness of the information it disclosed or the documents it produced in discovery.

Post-Settlement "Discovery Fraud" Proceedings

In March of 1995, after the production of the ALTA Data in Hawaii and further proceedings in the Hawaii Benlate

cases, certain Benlate plaintiffs in the Georgia case styled *Bush Ranch v. du Pont* initiated a "fraud on the court" proceeding against DuPont in federal district court, claiming that the ALTA Data should have been produced in that case. *See In re duPont-Benlate Litig.*, 918 F.Supp. 1524 (M.D.Ga.1995), *rev'd,* 99 F.3d 363 (11th Cir.1996). Around the same time, other Benlate plaintiffs who had been involved in that litigation prepared a draft complaint alleging claims for fraud, federal RICO, and related claims against DuPont for its alleged concealment of the ALTA Data, which they submitted to DuPont by letter dated April 3, 1995.

In the *Bush Ranch* case, a show-cause proceeding was held in May of 1995. *See* 918 F.Supp. at 1528. The *Bush Ranch* case had been the first Benlate case to go to trial (the case was tried and settled in 1993), and the show-cause proceedings were highly-publicized. Malone's clients started asking him whether the "ALTA Fraud" had any impact on their prior settlements. In a letter to Plaintiff Fuku-Bonsai, Inc. dated May 19, 1995, Malone stated that this additional evidence would not have made a difference in the settlements because the settlements were negotiated based on the assumption that his clients would prevail on liability:

> I am in receipt of a letter you sent me concerning ongoing litigation concerning DuPont. Succinctly put, ***I do not think that any of these new developments are of any significance to us.*** We settled our cases ***based upon the assumption that we would win our cases.*** The dollar amounts we

> settled for represented, in my opinion, ***full value for the cases.*** Accordingly, there is no need to consider seeking further damages.

(Emphasis added.)

On August 21, 1995, in a seventy-nine page order, the *Bush Ranch* district court ruled that DuPont improperly had withheld the ALTA Data and imposed severe sanctions on DuPont, sanctions that were ultimately reversed as having resulted from an unconstitutional process. *See* 99 F.3d 363. On August 24, 1995, a few days after the *Bush Ranch* trial court had announced its ruling, Malone wrote to DuPont about the ruling, stating:

> Overall my clients have accepted their settlements and have moved on with their lives. However, every time something major hits the newspapers, such as Judge Elliott's recent ruling, a certain number of clients become disgruntled and wish to discuss reopening their cases.

Significantly, at the time the *Bush Ranch* trial court entered its order, the one-year period for Plaintiffs to move to set aside their dismissals with prejudice for fraud had not yet expired. None of the Plaintiffs, however, sought relief from the prior judgments, nor have they sought to set aside the settlements or the underlying dismissals with prejudice in this litigation. Instead, Plaintiffs now contend that they are "affirming" their settlements and suing DuPont for additional damages for fraud.

Appendix B

The "Costa Rica Testing Fraud" Allegations

Plaintiffs allege claims against DuPont about a Benlate test it allegedly conducted in Costa Rica. According to these "Costa Rica Testing Fraud" allegations, DuPont scientists traveled to Costa Rica to secretly test Benlate on plants, the test went badly for DuPont and the plants died, and DuPont thereafter destroyed the plants and concealed the tests in discovery.[12] These allegations were made public in the summer of 1996, as the result of discovery motions filed by plaintiffs in a Florida state Benlate case. On September 6, 1996, the first "settlement fraud" case was filed against DuPont in federal district court in Georgia, in which allegations were made about the ALTA Data, the alleged Costa Rica test, and other testing data called the "BAM documents"[13] that are identical to the allegations made in these cases.

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12. The undisputed evidence shows that Malone knew that DuPont scientists had traveled to Costa Rica, as shown by a letter he wrote to DuPont accusing it of misconduct during a visit to the property of one of his Costa Rican Benlate clients. Also, two DuPont scientists testified about this trip in a Florida Benlate trial in 1993 (including in one case in which Malone was the plaintiffs' co-counsel). Finally, DuPont identified as an expert witness in one of Malone's Florida state court cases a person (Mr. Leon Vargas) who Plaintiffs now allege was one of the central actors in the alleged Costa Rican Testing Fraud. Although Malone requested to depose Mr. Vargas, Malone never did take his deposition.

13. Plaintiffs' "BAM" fraud allegations maintain that DuPont failed to produce all testing documents showing that Benlate was allegedly contaminated with triazine herbicides and other alleged

(Cont'd)

Appendix B

Even after this settlement fraud case had been filed against DuPont, Malone continued to insist that additional evidence would not have made a difference in his clients' settlements. As Malone stated in a letter to a client dated September 24, 1996:

> . . . I do not think that it is worthwhile to consider pursuing DuPont for withholding evidence.
>
> * * * * * *
>
> The big difference between my clients and most of these other Plaintiffs is that ***we, in fact, got full value for our cases when we settled.*** As you know, I tried two cases against DuPont and won them both. Accordingly, when I settled all these cases, ***I did it under the assumption that we would, in fact, win the cases if we tried the rest of them.*** This being the case, these settlements were negotiated giving DuPont perhaps a small discount for the time value of money, but otherwise ***settling for an amount consistent with***

(Cont'd)
contaminants such as "atrazine, simazine, cyanazine, [and] pendamethalin." Malone, however, identified all of these alleged Benlate "contaminants" in his opening statement in the Florida *KHD* case. Additionally, the *Kawamata* plaintiffs in the Hawaii Benlate litigation admitted that DuPont had produced the BAM documents to them. DuPont's alleged discovery misconduct was not in failing to produce the documents but in failing to specifically identify the documents in interrogatory responses. Finally, Plaintiffs themselves have admitted in discovery in this litigation that the BAM documents were produced to Malone in at least some of his Florida cases.

> ***what we thought a jury would award when we won the case.*** Most of the Plaintiffs represented by other lawyers settled their cases for a relatively small fraction of the full value of these cases because their lawyers were not as confident that they would win or were not willing to spend the money necessary to litigate the cases properly.
>
> * * * * * *
>
> . . . I doubt that we could ever convince a jury that your settlement with DuPont would have been higher if we had known about DuPont's other testing.

(Emphasis added.) With respect to at least some of his clients (including Plaintiff Anthurium Acres), Malone stated that the settlements represented a "windfall":

> . . . . Even though I am quite confident that Benlate caused problems on anthurium farms, ***we also know full well that a large part of the problems experienced by these farms must be attributed to bacterial blight*** . . . . [N]o matter what figures may have been generated concerning the "total losses" of an anthurium farm, we must acknowledge the fact that a jury would have awarded the farmers only some percentage of that total amount because the jury would not give you the amount of your losses which were attributable to the blight.

> To be perfectly honest, I think that the anthurium growers got ***somewhat of a windfall*** out of these Benlate cases, because I think the amount that I obtained for you in settlement includes not only damages sustained as a result of Benlate, but also ***some damages which should have been attributed to the blight***. . . .

(Emphasis added.)

Plaintiffs allege that their underlying attorneys (notably, Malone) were deceived by DuPont's alleged scheme to defraud and that, as a result, the attorneys recommended unreasonably low settlements to them, which they accepted. The undisputed evidence shows, however, that Malone continued to insist that the allegedly concealed evidence would not have made a difference in their settlements and that they had received "full value" in settling their cases, even after the current "settlement fraud" allegations were a matter of public record.

Proceedings in these Cases, Including the Certified Question Proceedings before the Hawaii Supreme Court

On March 8, 2001, in related settlement fraud litigation pending in the United States District Court for the Southern District of Florida, the court granted two motions for judgment on the pleadings filed by DuPont, finding that (1) the litigation immunity barred all of the plaintiffs' state law claims based on conduct during and related to prior litigation; and (2) the plaintiffs' fraud claims failed due to

their inability to prove reasonable reliance. *See Florida Evergreen Foliage v. Du Pont,* 135 F.Supp.2d 1271 (S.D.Fla.2001), *aff'd sub nom. Green Leaf Nursery v. DuPont,* 341 F.3d 1292 (11th Cir.2003).

DuPont subsequently filed dispositive motions in these cases, raising these same issues. On June 18, 2001, Chief Judge Ezra of this Court certified to the Hawaii Supreme Court the following questions:

1. Under Hawai'i law, is a party immune from liability for civil damages based on that party's misconduct, including fraud, engaged in during prior litigation proceedings?

2. Where plaintiffs' attorneys and others have accused the defendant of fraud and dishonesty during the course of prior, related litigation, are plaintiffs thereafter precluded as a matter of law from bringing a cause of action for fraudulent inducement to settle because they should not have relied on the Defendant's representations?

3. Does Hawai'i law recognize a civil cause of action for damages for intentional and/or negligent spoliation of evidence?

Matsuura v. du Pont, 102 Hawai'i 149, 73 P.3d 687, 688-689 (2003). The Hawaii Supreme Court agreed to resolve these questions; its answers to these questions are discussed in detail later in this judgment.

Appendix B

Continuing Discovery Proceedings in These Cases

During the pendency of the certified question proceedings, and at Plaintiffs' urging, discovery and pretrial proceedings continued in these cases.[14] As a result, Plaintiffs were ordered in May of 2002 to produce documents from Malone's files. After this production, Malone was deposed on June 13 and 14, 2002.

Several of the more significant discoveries from Malone's files, such as his letters to his clients stating that he assumed in settlement negotiations that he could establish liability against DuPont and that he obtained in settlement "full value" for his clients, already have been discussed. Malone's letters also discuss the nature of the opening settlement demands he made on DuPont in settlement negotiations. In one letter, Malone stated:

> [I]n going back to my handwritten notes, it appears that my initial settlement demand as to Mueller Horticultural Partners was $6,600,000. My initial demand as to Island Tropicals was $14,000,000. ***These demands, of course, were very much higher than any number which we had any hope of obtaining.*** They were just an initial starting point.

(Emphasis added).

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14. DuPont moved to stay all proceedings in these cases pending resolution of the certified questions by the Hawaii Supreme Court. The *Matsuura* Plaintiffs objected to a stay, insisting that the cases proceed to trial. This Court denied DuPont's motion for a stay.

Appendix B

During his deposition, Malone testified that, in settling their claims, Plaintiffs relinquished their right to discover additional information from DuPont. Testifying about the ALTA Data, Malone testified as follows:

Q: And then Item e, you also request all Benlate-any ALTA Lab test results for all Benlate litigations cases universally; correct?

A: Yes.

Q: And this is a request that you submitted in April of 1994; correct?

A. Yes.

Q. April 11th; correct?

A. Yes.

Q. Now, I understand you settled these cases that are listed on this Exhibit 35 as well as all of your other cases in or about April 22nd, or so, of 1994; correct?

A. Yes.

Q. And when you settled those cases did you cease seeking the production of documents in discovery in all those cases?

A. Yes, once we settled we stopped the discovery process.

* * * * * *

Q. In any event, it was clear that you did not expect any documents or any information produced in response to your Request to Produce in the *Far West* case after you settled those cases?

A. ***Correct.***

Q. And to the extent you had discovery requests outstanding in any of your cases, those discovery requests were ended by your settlement of those cases?

A. ***Yes.***

Q. And to the extent you had any discovery disputes about whether documents were owed to you in any of those cases, those discovery disputes were, likewise, ended by your settlement?

A. ***Yes.***

Malone Dep. Tr., at 415-416 (emphasis added). This testimony confirms that the settlements discharged DuPont's obligations to produce information and any discovery claims relating to the information.

During his deposition, Malone articulated reasons why the concealed evidence would have, in his view, enhanced the "settlement value" of his clients' cases, including that discovery of the concealed evidence would have created the possibility of his clients obtaining sanctions against DuPont for discovery misconduct. *See, e.g., id.* at 58-62, 103-106, 121-125, 160-169, 506-512.

Prior Dispositive Rulings

As urged by the *Matsuura* Plaintiffs, the Court adhered to a pretrial schedule such that the *Matsuura* Consolidated Cases could be tried later in 2002. Accordingly, the Court considered and ruled upon dispositive motions filed by the parties, including the reasonable reliance motion filed by DuPont that had given rise to the reasonable reliance issue certified to the Hawaii Supreme Court.

In the September 4 Order, this Court granted DuPont's reasonable reliance motion, finding the following facts to be undisputed:

> In the Underlying Cases, as well as the other Benlate cases, the plaintiff growers alleged that Benlate was contaminated with an herbicide that damaged their crops and soil. The Underlying Cases settled. Around the time of settlement, there were extensive allegations in the Underlying Cases and other Benlate cases around the country that DuPont had engaged in discovery abuses. Plaintiffs here were monitoring many of these other Benlate cases pending in the country.

> The alleged abuses included DuPont's failure to disclose unfavorable scientific information it had obtained as well as certain affirmative misrepresentations. These alleged abuses took place from 1992, prior to the filing of the Underlying Cases, and continued during and past the time that the Underlying Cases settled and were dismissed with prejudice. These allegations are detailed in the parties' papers, but a few matters bear mentioning here.
>
> In *Bush Ranch* . . ., DuPont allegedly failed to disclose data from a study performed by ALTA Laboratories. The ALTA data included information showing sulfonylurea herbicide contamination from DuPont in the *Bush Ranch* plaintiffs' soil. Additionally, in certain of the Hawaii state court cases, including *Kawamata v. UnitedAgri Products,* CV 91-437, and *Tomono v. DuPont,* CV 92-247, (" *Kawamata/Tomono* "), DuPont claimed work product privilege protection for the ALTA data, despite having previously waived the privilege. When DuPont was finally on the verge of having to turn over the ALTA data, Plaintiffs settled their Underlying Cases.
>
> Prior to the time Plaintiffs dismissed their cases with prejudice, there were rampant discovery abuse allegations against DuPont in the Benlate cases monitored by Plaintiffs. . . .

Sept. 4 Order, at 2-3.

Based on these undisputed facts, the Court ruled as follows:

> The problem with Plaintiffs' argument is that Plaintiffs, as well as other Benlate plaintiffs across the country of whom Plaintiffs were aware, had been accusing DuPont of dishonest discovery responses prior to the date the Underlying Cases settled. Plaintiffs did not insist on a warranty in their settlement agreements or any other kind of assurance at the time of settlement. Instead, Plaintiffs chose to turn a blind eye to the glaring allegations of discovery misconduct. Even assuming Plaintiffs actually relied on DuPont's misrepresentations, such reliance could not have been reasonable as a matter of law.

Id. at 7.

The Court also granted a motion by DuPont for summary judgment on limitations grounds on several of the Plaintiffs'[15] federal RICO claims, ruling as follows:

> Plaintiffs and their lawyers were on notice of the alleged ALTA testing fraud that forms the basis of their RICO claims as early as late 1993, and by various dates throughout 1994, when they were themselves litigating discovery fraud issues in

15. This motion was filed in the three latest-filed cases, *Living Designs, Inc. v. DuPont* (Case No. CV99-00600), *McConnell, Inc. v. DuPont* (Case No. CV00-00328), and *Anthurium Acres v. DuPont* (Case No. CV00-00615).

> their underlying Benlate cases. This Court need not determine whether Plaintiffs' RICO claims accrued on these earlier dates, however, because by August 21, 1995-when Judge Elliott issued his widely-publicized ALTA sanctions ruling against DuPont in the *Bush Ranch* case-any reasonable Benlate plaintiff was placed on constructive notice of a potential "settlement fraud" claim.

Order Granting DuPont's Mot. for Summ. J. as to Plfs.' RICO Claims Based on the Statute of Limitations, at 12 ("RICO Limitations Order"). This Court further ruled in the RICO Limitations Order that the accrual of Plaintiffs' federal RICO claims was not affected by Plaintiffs' alleged discovery of another fraud:

> Plaintiffs argue that their alleged discovery, in 1996, of facts giving rise to another fraud (the so-called Costa Rica testing fraud) saves their RICO claims. *See* Plaintiffs' CSOF 2. This argument is without merit. Plaintiffs allege but one RICO injury-a reduced settlement payment in 1994. The mere fact that one of the alleged predicate acts may have been discovered within the four-year limitations period does not render timely an otherwise stale RICO claim. *Klehr* [*v. A.O. Smith Corp.*], 521 U.S. [179,] 190, 117 S.Ct. 1984, 138 L.Ed.2d 373 [(1997)] (a RICO plaintiff "cannot use an independent, new predicate act as a bootstrap to recover for injuries caused by other earlier predicate acts that took place outside the limitations period.").

Id. at 15-16.

Appendix B

The Hawaii Supreme Court Answers the Certified Questions

In *Matsuura v. du Pont*, 102 Hawai'i 149, 73 P.3d 687 (2003), the Hawaii Supreme Court answered or otherwise addressed the three certified questions.

On the reliance question, the Supreme Court ruled, as this Court had found in its September 4 Order, that "under Hawai'i law, to prevail on a claim of fraudulent inducement, plaintiffs must prove that their reliance upon a defendant's representations was reasonable." *Id*. at 700-701. The Hawaii Supreme Court, however, refused to adopt a "bright line" reasonable reliance rule. It rejected DuPont's argument, based on *Florida Evergreen Foliage v. DuPont*, 135 F.Supp.2d 1271 (S.D.Fla.2001), *aff'd sub nom. Green Leaf Nursery v. DuPont*, 341 F.3d 1292 (11th Cir.2003), that a settlement fraud claimant can never show reasonable reliance if the settled dispute included accusations of fraud or dishonesty. The Hawaii Supreme Court also rejected Plaintiffs' argument that reliance on an attorney's representations is *per se* reasonable. *Id*. at 701-704.

The Hawaii Supreme Court answered the certified question in the negative:

> Considering the policies raised and the arguments advanced by the parties, we are persuaded that reasonable minds could differ as to the reasonableness of the Matsuuras' reliance upon DuPont's representations. Therefore, we submit

the following answer to the second certified question:

> In an action for fraudulent inducement where plaintiffs' attorneys and others have accused the defendant of fraud and dishonesty during the course of prior dealings, plaintiffs are not precluded as a matter of law from establishing that their reliance on the defendant's representations was reasonable.

Id. at 704.

The Hawaii Supreme Court did not, however, resolve the issue of whether the Plaintiffs had presented evidence sufficient to get to a jury under Federal Rule of Civil Procedure 56. As is typical in the certified-question context, the Hawaii Supreme Court applied facts "derived primarily" from the district court's certification order, which summarized the facts to place the legal issues in context. *Id.* at 689 n. 3.

On the spoliation question, the Hawaii Supreme Court refused to decide whether Hawaii would recognize a separate spoliation tort, because the destruction of plants in Costa Rica, as alleged by Plaintiffs, did not establish an "inability to prove" the underlying lawsuits due to spoliation, as required for spoliation in those jurisdictions recognizing the tort:

> In their underlying lawsuits, the Matsuuras alleged damages from the use of Benlate. Thus, in order

> to constitute a valid claim of spoliation of evidence, the Matsuuras must prove that the *destruction of the plants* from the Costa Rica field test resulted in their inability to prove that Benlate damaged their plants and fields. However, the Matsuuras indicate that documents and other information pertaining to the Costa Rica field test-including photos and videotape of the plants-demonstrated the harmful effects of Benlate. Additionally, the Matsuuras indicate that the Alta test results and the Keeler documents both indicated that Benlate was contaminated with herbicides. Moreover, the plaintiffs in *Kawamata Farms* were successful in proving substantially identical claims without the benefit of any evidence from the Costa Rica field test. Therefore, given that the Matsuuras' allegations indicate that evidence *other than the plants from the Costa Rica field test* demonstrated the harmful effects of Benlate, the destruction of the Costa Rica plants did not result in their inability to prove their suit.

Id. at 706 (emphasis in original).[16]

On the litigation privilege question, the Supreme Court ruled that the privilege does not preclude allegations of fraud.

16. This ruling by the Hawaii Supreme Court cited and is consistent with the Southern District of Florida's spoliation ruling in *Florida Evergreen Foliage v. DuPont,* 165 F.Supp.2d 1345, 1359-1361 (S.D.Fla.2001) (noting that, "[a]t best," the Costa Rica evidence constituted "similar fact evidence" that was "cumulative of the evidence already available to the Plaintiffs"), *aff'd sub. nom Green Leaf Nursery v. DuPont,* 341 F.3d 1292, 1308-1309 (11th Cir.2003).

73 P.3d at 692-700. The court did not, however, reject the privilege as to non-fraud claims. *Id.* at 693-697.

Post-Hawaii Supreme Court Motions

After the Hawaii Supreme Court issued its ruling, the *Matsuura* Plaintiffs moved to vacate the September 4 Order and for an order denying the Litigation Conduct Motion. DuPont filed a Counter Motion that (1) requested the entry of a new reasonable reliance order to supersede the September 4 Order; (2) re-cast its Litigation Conduct Motion to seek the dismissal of Plaintiffs' non-fraud claims on grounds of the litigation privilege; and (3) requested rulings on other pending dispositive motions, including the Litigation Conduct Motion, RICO Motion, the ALTA Motion, and the Non-Fraud Motion (which motions were, at the time, under advisement), as well as DuPont's Speculative Damages Motion.

Plaintiffs' Motion to Vacate, DuPont's Counter Motion for a New Reasonable Reliance Order, and DuPont's Speculative Damages Motion were heard by the Court on February 25, 2004. After argument on the respective motions, the Court announced its rulings. At the close of the hearing, the Court announced rulings on the other motions (the Litigation Conduct Motion, the RICO Motion, the ALTA Motion, and the Non-Fraud Motion).

III. SUMMARY JUDGMENT STANDARD

Rule 56(c) provides that summary judgment shall be entered when the materials on file "show that there is no

genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party has the initial burden of demonstrating to the Court that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Although courts view the evidence and make any inferences in the light most favorable to the party opposing summary judgment, *Diaz v. AT & T*, 752 F.2d 1356, 1362 (9th Cir.1985), the moving party need not produce evidence negating the existence of an element for which the opposing party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322, 106 S.Ct. 2548.

Once the movant has met its burden, the opposing party must come forward with specific facts showing a need for trial. Fed.R.Civ.P. 56(e). The opposing party cannot stand on its pleadings, nor simply assert that it will discredit the movant's evidence. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contr. Ass'n*, 809 F.2d 626, 630 (9th Cir.1987). There is no genuine issue of fact "where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 254, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) (evidence should be viewed "through the prism of the substantive evidentiary burden").

IV. ANALYSIS

The legal bases for the Court's rulings on the various motions overlap in significant respects. This legal discussion

first addresses Plaintiffs' fraud-based claims, followed by a discussion of their "non-fraud" claims, although some of the issues discussed with respect to the fraud-based claims (*e.g.*, the issue of speculative damages) apply to all of Plaintiffs' claims. Finally, the Court addresses the issues unique to the federal RICO claims.

Plaintiffs' Fraud Claims

In *Matsuura*, the Hawaii Supreme Court restated the essential elements of a fraudulent inducement claim under Hawaii law:

> To constitute fraudulent inducement sufficient to invalidate the terms of a contract, there must be (1) a representation of a material fact, (2) made for the purpose of inducing the other party to act, (3) known to be false but reasonably believed true by the other party, and (4) upon which the other party relies and acts to his or her damage. . . .
>
> . . . [U]nder Hawai'i law, to prevail on a claim of fraudulent inducement, plaintiffs must prove that their reliance upon a defendant's representations was reasonable.

Matsuura, 73 P.3d at 700-701 (internal quotation marks, alterations, and citations omitted). Furthermore, every element of fraud claim must be established by "clear and convincing evidence." *Shoppe v. Gucci America, Inc.*, 14 P.3d 1049, 1067 (2000); *see also TSA Int'l Ltd. v. Shimizu Corp.*, 92 Hawai'i 243, 990 P.2d 713, 725-26 (1999).

Appendix B

V. REASONABLE RELIANCE

Plaintiffs Cannot Establish Materiality or Actual Reliance With Respect to the ALTA Data

The undisputed evidence precludes Plaintiffs from establishing either the materiality of or their actual reliance on DuPont's alleged misrepresentations concerning the ALTA Data.

Under Hawaii law, "the alleged false representation must relate to a past or existing *material* fact." *TSA Int'l*, 990 P.2d at 725 (emphasis in original); *Stahl v. Balsara*, 60 Haw. 144, 587 P.2d 1210, 1213 (1978). In *TSA*, the Hawaii Supreme Court described the "materiality" element as follows:

> The materiality of undisclosed information . . . cannot be determined in a vacuum. In business transactions, the alleged undisclosed information must be evaluated in the context in which it was omitted. An omitted fact is material if there is a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable [claimant].

Id. at 728 (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976), and *Walter v. Holiday Inns, Inc.*, 985 F.2d 1232, 1239 (3d Cir.1993)). In *Walter*, summary judgment was granted because the plaintiffs did not show that the misrepresentations and omissions "would have been material

to their decision to sell their partnership interest." *Id.* at 730 (citing 985 F.2d at 1236).

Similarly, in *TSA*, the concealed information was not material in light of other information available to the plaintiff:

> TSA has not shown that the information contained in the undisclosed appraisals was unique or unavailable through other sources, or that the undisclosed materials were more reliable than those obtained by TSA. The record indicates that TSA requested and obtained a "comprehensive research and analysis" regarding the value of the Hotel. This analysis was prepared by The Halstrom Group, Inc., a real estate consulting and appraisal firm, over two years before the execution of the Basic Agreement.

Id. at 731. Based in part on the "availability of similar information to TSA," the Hawaii Supreme Court affirmed the grant of summary judgment in that case. *Id.* at 732.

On the issue of actual reliance, a misrepresentation must be proved "upon which the other party relies and acts to his or her damage." *Hawaii Community Fed. Credit Union v. Keka*, 94 Hawai'i 213, 11 P.3d 1, 18 (2000) (internal quotation marks omitted); *accord Hawaii's Thousand Friends v. Anderson*, 70 Haw. 276, 768 P.2d 1293, 1301 (1989) (" *HTF* "). In *HTF*, the Hawaii Supreme Court reversed a jury verdict in favor of a fraud plaintiff (HTF) who alleged that the defendants had made false representations in an advertising campaign, stating as follows:

Appendix B

> [T]he evidence revealed that soon after defendants' advertising campaign began, HTF commenced investigation due to its suspicions that defendants were engaging in fraudulent conduct. . . .
>
> * * * * * *
>
> The record in this case indicates that HTF was immediately suspicious of the representations made in defendants' advertising campaign. There is no evidence indicating that HTF relied on defendants' representations, nor any evidence to show that HTF suffered any pecuniary damages as a result of defendants' misrepresentations.

768 P.2d at 1301.

In *Giuliani v. Chuck*, 1 Haw.App. 379, 620 P.2d 733 (1980), property buyers (the Guilianis) asserted a fraud claim against the seller's attorney (Mr. Chuck) based on his allegedly fraudulent conduct in preparing closing documents that did not conform to the initial contract. The Guilianis, however, had refused to sign the closing documents and had successfully brought an action to rescind the contract. *See id.* at 735. Under these facts, they could not establish actual reliance:

> We especially find the Guilianis' amended complaint insufficient to allege a cause of action in fraud. The party asserting such a claim must have relied on the claimed misrepresentation.

> Here, the facts as alleged by the Guilianis establish quite the contrary. Rather than relying on the documents prepared by Chuck or any of his statements, the Guilianis refused to execute the documents and pursued their legal remedies vigorously.

Id. at 738 (citations omitted).

Here, the undisputed facts preclude a finding of materiality or actual reliance on DuPont's alleged misrepresentations concerning the ALTA Data. As in *TSA*, the information available to Plaintiffs precludes them from showing that the ALTA Data "would have assumed actual significance" in their settlement deliberations. Plaintiffs already had sufficient information for their expert to conclude that ALTA had found SU herbicides in the soils of other Benlate plaintiffs. Furthermore, Plaintiffs were on notice (from the March 2, 1994 deposition of ALTA scientist Bethem) that the forthcoming ALTA Data would provide more information from which their expert could draw that same ultimate conclusion.

Plaintiffs' claim that DuPont fraudulently represented the "work product" status of the ALTA Data likewise fails on reliance and materiality grounds. Plaintiffs did not rely on this designation but challenged it. Furthermore, when the Hawaii trial court overruled DuPont's work product claim, and when, on April 6, 1994, the Hawaii Supreme Court denied DuPont's petition for a writ of mandamus, DuPont's work product claim, even assuming it was fraudulent, was no longer a material representation.

Appendix B

Most of the Plaintiffs elected to settle their claims without awaiting the production of the ALTA Data. Plaintiff Fuku-Bonsai (and other Malone clients), however, continued to agree to settlements after the ALTA Data was produced on May 17, 1994. Plaintiff Harvey Tomono, who was represented by other counsel, did not settle until October 28, 1994, after the ALTA Fraud allegations had been publicly made in the Hawaii Benlate litigation. Moreover, Plaintiffs waited until October and November of 1994 to dismiss their claims with prejudice, months after the ALTA Data were produced and the significance of that information argued in the Hawaii Benlate litigation. In sum, the undisputed evidence shows that Plaintiffs did not rely on DuPont's alleged misrepresentations concerning the ALTA Data and did not consider those representations to be material when they agreed to settle the Underlying Cases.

Plaintiffs Cannot Establish Reasonable Reliance on DuPont's Alleged Misrepresentations

Reliance on a misrepresentation must be reasonable. *Matsuura*, 73 P.3d at 701 (citing, *inter alia*, *Fujimoto v. Au*, 95 Hawai'i 116, 19 P.3d 699, 740 (2000)). In Hawaii, as elsewhere, the reasonableness of a party's reliance can be determined as a matter of law. *See TSA Int'l*, 990 P.2d at 726 (affirming summary judgment where plaintiff "could not have reasonably relied on" defendant, given facts indisputably known to plaintiff); *Stahl*, 587 P.2d at 1214 (affirming JNOV on fraud claim where nature of representations made reliance "utterly unreasonable").

Appendix B

The Hawaii Supreme Court's refusal to adopt a "bright line" rule does not preclude summary judgment here. The undisputed evidence, important aspects of which were not made available until after certification to the Hawaii Supreme Court, shows that Plaintiffs' underlying attorney, Kevin Malone, knew or had notice of many of the alleged facts supporting Plaintiffs' current fraud claims; that he actually possessed or otherwise knew about many of the allegedly withheld documents at the time of settlement; that he was confident he would win his cases against DuPont based on the evidence he already had; that he did not trust DuPont's discovery disclosures or statements by DuPont's attorneys; and that he repeatedly stated that his clients (including Plaintiffs) received "full value" in the settlement of their underlying claims. At the very least, if the information was so important to the plaintiffs' cases they could have waited the few days for implementation of the Court order to produce the documents they now claim were not disclosed.

The Court has considered, and rejects, Plaintiffs' argument that summary judgment on reasonable reliance grounds is inconsistent with *Matsuura*. While the Hawaii Supreme Court held that a settlement fraud claim is not barred as a matter of law if there were allegations of fraud and dishonesty in the settled litigation, the undisputed evidence here goes far beyond such allegations. The Hawaii Supreme Court, acting as it did as a state supreme court on certified questions, did not analyze the evidence but instead relied on the district court's factual summary. It is well-settled that the determination as to whether parties have met their respective summary judgment burdens under Federal Rule of Civil Procedure 56 is a matter of federal procedural law.

E.g., Gasaway v. Northwestern Mut. Life Ins. Co., 26 F.3d 957, 960 (9th Cir.1994) ("In diversity cases, procedural issues related to summary judgment are controlled by federal law. Federal law alone governs whether evidence is sufficient to raise a question for the trier-of-fact.") (internal quotation marks and citations omitted).

Furthermore, there are significant differences between the record that was before the Hawaii Supreme Court and the record that is now before this Court. The primary evidence submitted by Plaintiffs in opposition to DuPont's original summary judgment motion consisted of the declarations of their underlying attorneys. These declarations were included in the record that was transmitted to the Hawaii Supreme Court. After certification, however, this Court granted DuPont's motion to strike those declarations on federal procedural grounds.[17] Consequently, those declarations have no probative value here.

This Court's striking of the attorney declarations, combined with the submission of significant additional evidence that was not before the Hawaii Supreme Court

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17. When DuPont originally filed its reasonable reliance motion in 2001, and when it re-filed the motion in 2002, Plaintiffs relied heavily on declarations from Malone and his Hawaii co-counsel. DuPont moved to strike the declarations on the ground that they had been submitted in violation of a prior order entered in the *Matsuura* Consolidated Cases that prohibited these attorneys from testifying as retained experts, due to the *Matsuura* Plaintiffs' violation of Federal Rule 26(a)(2)(B). *See* Order Granting in Part and Denying in Part DuPont's Mot. to Preclude Expert Testimony for Violation of Court Order (D.Haw. Mar. 22, 2002).

(notably, the "full value" letters and Malone's deposition testimony), are important distinctions between the records before the two courts. Summary judgment is thus proper on the issue of reasonable reliance.

VI. Plaintiffs' Damages

All tort claims require that damages be proved with reasonable certainty. Therefore, the issue of speculative damages applies to all of the *Matsuura* Plaintiffs' current claims, whether or not sounding in fraud.

In Hawaii and elsewhere, a tort plaintiff must establish the "fact of damage" with certainty and cannot recover "speculative" damages. *See, e.g., Weinberg v. Mauch,* 78 Hawai'i 40, 890 P.2d 277, 287 (1995) ("[I]t is of the essence in an action . . . that the plaintiff suffer damages as a consequence of the defendant's conduct, and these damages cannot be speculative or conjectural losses."); *Chung v. Kaonohi Center Co.,* 62 Haw. 594, 618 P.2d 283, 290-291 (1980) (the "fact of damage" must be certain, and the "amount" of damage must be established with "reasonable certainty"); *see also Roxas v. Marcos,* 89 Hawai'i 91, 969 P.2d 1209, 1259 n. 33 (1998) (collecting cases).

In a fraud case, the plaintiff must show "substantial actual damage" from the alleged fraud:

> In order to have a claim based on deceit, the plaintiff must have suffered ***substantial actual damage***, not nominal or speculative. Prosser, *Law of Torts,* at 748 (3d ed.1964). The courts have

> often expressed this requirement in terms of pecuniary damage, as does the *Restatement of Torts* § 519 (1938). The aim of compensation in deceit cases is ***to put the plaintiff in the position he would have been had he not been defrauded***
>
> . . . .
>
> Pecuniary damages, being narrow in scope, are those damages (either general or special) which can be accurately calculated in monetary terms such as loss of wages and cost of medical expenses. In fraud or deceit cases, the measure of pecuniary damages is usually confined to either the 'out-of-pocket' loss or the 'benefit of the bargain' (difference between the actual value at time property is sold and the value it would have had if the representations had been true). . . . We do not reach the question of which measure is applicable in this case since the plaintiffs do not appear to have alleged any pecuniary loss from the alleged misrepresentations.

Ellis v. Crockett, 51 Haw. 86, 51 Haw. 45, 451 P.2d 814, 820 (1969) (footnotes omitted, emphasis added); *HTF,* 768 P.2d at 1301. "[P]laintiffs suing in fraud are required to show both that they suffered actual pecuniary loss and that such damages are definite and ascertainable, rather than speculative." *Zanakis-Pico v. Cutter Dodge, Inc.*, 98 Hawai'i 309, 47 P.3d 1222, 1234 (2002); *see also* W. Page Keeton, et al., *Prosser and Keeton on Torts* § 110, at 765 & n. 1 (5th ed.1984) ("there can be no recovery if the plaintiff is none the worse off for

the misrepresentation, however flagrant it may have been, as where for example he receives all the value that he has been promised and has paid for") (cited in *Ellis*, 451 P.2d at 820).

The Issue of Speculative Damages in Settlement Fraud Cases

In the "settlement fraud" context, specific rules have developed to ensure that plaintiffs satisfy their burden of proving damages with reasonable certainty. Although some jurisdictions (including California) have rejected all such claims as inherently speculative,[18] the "New York" line of cases allows settlement fraud claims to proceed where the plaintiff can prove both a meritorious underlying claim and that the value of the settled claim exceeded the amount of the fraudulently-induced settlement.[19] The seminal case on

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18. *See, e.g., Taylor v. Hopper,* 207 Cal. 102, 276 P. 990 (1929) ("The compromise in the case before us was of a disputed claim, unliquidated in amount, and there is no practicable measure of damages for the action sought to be maintained."); *Cedars-Sinai Medical Ctr. v. Superior Court*, 18 Cal.4th 1, 74 Cal.Rptr.2d 248, 954 P.2d 511, 519 (1998) ("we have considered the uncertainty of determining hypothetically whether a particular plaintiff would have prevailed on a legal claim as a sufficient reason for refusing to recognize a tort remedy") (citing, *inter alia, Taylor*).

19. This line of cases was favorably cited by both the Ninth Circuit Court of Appeals and the Delaware Supreme Court in prior proceedings in this and related litigation. *See Matsuura v. Alston & Bird*, 166 F.3d 1006, 1008 n. 4 (9th Cir.1999) (favorably citing, *inter alia, Slotkin v. Citizens Cas. Co. of N.Y.*, 614 F.2d 301, 312-314 (2d

(Cont'd)

this issue is a 1911 decision by New York's highest court where the defendant had fraudulently induced the settlement of a wrongful death claim for $500:

> Fraud and deceit alone do not warrant the recovery of damages. Deceit and injury must concur.
>
> * * * * * *
>
> An alleged value of the claim based upon the accident and the death or facts sufficient to warrant the reasonable belief of the plaintiff that she had a just claim is of a nature too speculative and wagering to be recognized by the law in this action for fraud. The jury in considering the question of damages should first ascertain whether or not the plaintiff was originally entitled to a recovery of some amount. Otherwise they could not determine whether, by executing the release, she parted with value, and, if they could not determine that, they could not decide whether or not she was damaged. Through what method or by what means would they be able to know that the sum of $500 was not equal to the fair value of

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(Cont'd)

Cir.1979)) (New York law), and *Automobile Underwriters v. Rich,* 222 Ind. 384, 53 N.E.2d 775, 777 (1944) (following *Gould v. Cayuga Co. Bank,* 99 N.Y. 333, 2 N.E. 16, 19 (1885)) and *Du Pont v. Florida Evergreen Foliage,* 744 A.2d 457, 464-465 (Del.1999) (following *DiSabatino v. U.S.F. & G.,* 635 F.Supp. 350 (D.Del.1986) (following, *Slotkin,* 614 F.2d at 313, and *Automobile Underwriters,* 53 N.E.2d at 777)).

> the right of action until they knew that the right of action had validity and would entitle her to some amount? She was entitled to the fair value of this disputed claim but that value must be ascertained through a rule possessing reasonable certainty and working a reasonably just result. If the jury determine that she was not originally entitled to recover, then their verdict would be for the defendant. If they determine that she was entitled to recover, then they would proceed to measure the damages, and the rule by which they should be guided therein has been clearly expressed by us in *Gould v. Cayuga County National Bank*, 99 N.Y. 333, 2 N.E. 16. Assuming that the parties meant to avoid litigation and compromise their dispute, and that the true facts and defendant's contradiction of them were disclosed, how much could the plaintiff have reasonably demanded and the defendant reasonably have allowed as s final compromise above and beyond the $500, in fact allowed and received? That the jury must answer.

Urtz v. New York Cent. & H.R.R. Co., 202 N.Y. 170, 95 N.E. 711, 712-13 (1911).[20] Therefore, under this rule, a "settlement fraud" plaintiff must prove not only that the settled claim had merit, but also that the value of the claim exceeded the amount of the fraudulently-induced settlement. This proof

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20. The case *Urtz v. New York Cent. & H.R.R. Co.*, 202 N.Y. 170, 95 N.E. 711, 712-13 (1911) was cited by the *Matsuura* Plaintiffs' damages expert (J. Anderson Berly, III, Esq.) in his supplemental expert report.

must be made by evidence showing damages with reasonable certainty; a subjective valuation of the underlying claim "is of a nature too speculative and wagering to be recognized by the law in this action for fraud." *Id.* at 713.

Plaintiffs' Claimed Damages

Consistent with the New York rule, the *Matsuura* Plaintiffs stated in their pre-trial statement that the proper measure of damages in this case is "the difference between that received under the release and the value of the settlement or recovery achieved had there been no fraud by the released party." *See also Ellis*, 451 P.2d at 820 ("The aim of compensation in deceit cases is to put the plaintiff in the position he would have been had he not been defrauded."). Plaintiffs have made no effort, however, to prove either the merits of their underlying product liability claims or what those claims would have been worth had their been no fraud by DuPont. Furthermore, while Plaintiffs' damages expert asserts that the missing evidence caused the claims to be undervalued in settlement, he provides no basis for that assertion.[21]

Consistent with his prior letters to his clients, Malone confirmed during his deposition that he settled the cases

21. The *Matsuura* Plaintiffs' damages expert, J. Anderson Berly, III, Esq., admitted at his deposition that he employed no method to quantify the materiality of the evidence allegedly withheld by DuPont, but instead relied on a "sixth sense" derived from general trial attorney experience. Furthermore, Berly does not have any knowledge, much less sufficient knowledge under Fed.R.Evid. 702, regarding the facts necessary to support his opinions. Berly's opinion could not survive a Daubert consideration of the testimony.

based on the assumption he could prove liability with the evidence he already had, and further that his clients received "full value" when they settled their product liability claims. Therefore, even assuming the *Matsuura* Plaintiffs had set out to prove "the difference between that received under the release and the value of the settlement or recovery achieved had there been no fraud by the released party," they would not have been able to prove "fact of damage" with any certainty.[22]

Malone did testify that DuPont's alleged wrongdoing, if known, would have provided him with the opportunity to seek punitive sanctions and punitive damages against DuPont. This, he testified, would have provided him with enhanced bargaining power in the settlement negotiations (presumably to obtain something in excess of "full value" on Plaintiffs' claims). This hypothetical "sanctions threat" cannot be sustained as a legally permissible theory of damages for two reasons.

22. In their opposition to DuPont's Motion for Summary Judgment on the Speculative Nature of Plaintiffs' Damages, the *Matsuura* Plaintiffs did not offer any calculation showing their damages under the legal measure of damages. While they introduced verdicts and settlements from certain other Benlate cases that post-dated their settlements, the Court finds that those other verdicts and settlements, which were reached or negotiated as a result of the efforts of other counsel, in other cases, and under different circumstances, are not probative of what the *Matsuura* Plaintiffs should have received under the legal measure of damages. Furthermore, the information submitted by the *Matsuura* Plaintiffs on the damages issue has no probative value because it consists of either hearsay or conclusory factual assertions, such as conclusory statements by the *Matsuura* Plaintiffs as to their alleged damages that are not supported by any calculations or financial data.

First, the theory is based not on pecuniary losses caused by the alleged fraud, as required under the legal measure of damages. The theory is based instead on a claim that Plaintiffs were not permitted to reap a windfall based on the exposure of DuPont's alleged wrongdoing prior to the settlements. Absent the wrongdoing, there could have been no sanctions or punitive damages based on the wrongdoing. As Malone testified at his deposition:

> Q. If you had requested that ALTA test data in September of 1993, and as soon as you requested it it was produced, there would be no event to be sanctioned; correct?
>
> A. If they produced it as soon as we requested it I believe you are correct.
>
> Q. So there would be no sanctions in that case?
>
> A. Probably not.

Malone Dep. Tr., at 439-440. Plaintiffs' damages cannot be based on any claim that they would have used the threat of sanctions to negotiate a higher settlement. "The aim of compensation in deceit cases is to put the plaintiff in the position he would have been had he not been defrauded." *E.g., Ellis,* 451 P.2d at 820.

Second, any effort to translate into a damages theory the unrealized possibility of leveraging, in settlement, the threat of future sanctions requires multiple levels of conjecture and speculation about what trial courts, DuPont and Plaintiffs

would each have done and would have done in conjunction with and in reaction to one another. The *Matsuura* Plaintiffs have not provided the Court with any authorities recognizing such a theory.

DuPont is entitled to summary judgment on all of the *Matsuura* Plaintiffs' claims due to their inability to prove either the fact or amount of damages with reasonable certainty.

VII. Plaintiffs' Non-Fraud Claims

After the Court entered the September 4 Order dismissing Plaintiffs' fraud-based claims, but prior to the Hawaii Supreme Court's ruling in *Matsuura*, DuPont moved for summary judgment on Plaintiffs' "non-fraud" claims. Apart from the issues specific to the *Matsuura* Plaintiffs' federal RICO claims, which are discussed in Section III.C. below, the Non-Fraud Motion raised three grounds for dismissing Plaintiffs' remaining claims: (1) the provisions of the parties' settlement agreements, (2) Plaintiffs' failure to state actionable claims for spoliation, and (3) Plaintiffs' failure to state actionable negligence claims. Also, DuPont's Counter Motion for a New Reasonable Reliance Order re-cast its Litigation Conduct Motion to seek the dismissal of the *Matsuura* Plaintiffs' non-fraud claims.

Plaintiffs executed their settlement contracts in April, May, and October of 1994. Plaintiffs have retained the settlement proceeds paid to them by DuPont and have affirmed their settlement agreements as binding and effective.

Appendix B

The Settlement Contracts

With the exception of Plaintiff Harvey Tomono's settlement agreement, the release clauses in the settlement contracts provide:

> In consideration of Defendant's payment of the Case Settlement Amount . . . , Plaintiff hereby releases Defendant [DuPont] from any and all causes of action, claims, demands, actions, obligations, damages, or liability, whether known or unknown, that Plaintiff ever had, now has, or may hereafter have against Defendant, by reason of any fact or matter whatsoever, existing or occurring at any time up to and including the date this Release is signed (including, but not limited to, the claims asserted and sought to be asserted in the [settled] Action).

Tomono's release clause is similar but does not discharge "unknown" claims.

All of the settlement contracts at issue contain the following "covenant not to sue":

> Plaintiff covenants that Plaintiff will not commence, prosecute, or permit to be commenced or prosecuted against [DuPont] any action or other proceeding based upon or in any way related to any causes of action, claims, demands, actions, obligations, damages, or liabilities which are the subject of this Release.

The settlement contracts further obliged Plaintiffs to dismiss the Underlying Cases with prejudice. Those cases were dismissed in October and November 1994.

With the exception of Plaintiff Tomono's agreement, all of the settlement contracts at issue contain Delaware choice-of-law clauses providing that the agreements "shall be governed and construed in accordance with the laws of the State of Delaware." Accordingly, Delaware law governs the construction and effect of those contracts.[23] *Matsuura,* 166 F.3d at 1008 n. 3; *Florida Evergreen,* 135 F.Supp.2d at 1277-78. While Mr. Tomono's settlement contract contains no choice of law provision and is therefore governed by Hawaii law,[24] no argument has been advanced that the law of Delaware and Hawaii differs with respect to the construction and effect of settlement agreements.

The Release Clauses

While Delaware fully recognizes the efficacy of a general release of all claims, *Hob Tea Room v. Miller,* 89 A.2d 851, 856-57 (Del.1952), the Delaware Supreme Court held in the

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23. As Judge Ezra ruled when he certified questions to the Hawaii Supreme Court, and as the Hawaii Supreme Court's ruling on those questions makes clear, Hawaii law governs Plaintiffs' tort claims. *See Matsuura v. DuPont,* Civil No. 96-01180, Order Granting Certification of Questions to the Hawaii Supreme Court, etc., at 12-16 (D.Haw. May 24, 2001).

24. Mr. Tomono's settlement agreement is governed by Hawaii law because that is the state with the most significant relationship to the transaction. *UARCO, Inc. v. Lam,* 18 F.Supp.2d 1116, 1123 (D.Haw.1998).

related *Florida Evergreen Foliage* case that claims for fraudulent inducement of contract are not discharged by a general release, provided that (1) the elements of fraud are proven and (2) the fraud claims were not within the contemplation of the settling parties. *Du Pont v. Florida Evergreen Foliage,* 744 A.2d 457 (Del.1999).

By definition, non-fraud claims do not satisfy the "fraud exception" articulated by the Delaware Supreme Court. *See, e.g., id.* at 458-61 (characterizing the issue as "recognizing a fraud exception for general releases"). Therefore, Plaintiffs' non-fraud claims were released.

The Covenants Not to Sue

Plaintiffs' non-fraud claims are also barred by the covenants not to sue, each of which "covenants that Plaintiff will not . . . prosecute . . . against [DuPont] any action . . . based upon or in any way related to any causes of action [or] claims . . . which are the subject of" the settlement agreements. Courts in Delaware and elsewhere have ruled that this language embraces any logical or causal connection. *See, e.g., Crescott Inv. Assocs. v. Davis,* Civ. A. No. 10839, 1989 WL 155469, at *11 (Del.Ch. Dec. 26, 1989) ("related" is broadly defined as "connected by reason of an established or discoverable relation," and "relate to" means "to stand in some relation ···") (internal quotation marks omitted) (citing, *inter alia, Webster's Ninth New Collegiate Dictionary* (1987)); *Hawai'i Laborers' Trust Funds v. Maui Prince Hotel,* 81 Hawai'i 487, 918 P.2d 1143, 1150 n. 11 (1996) (law "relates to" an employment benefit plan "if it has a connection with or reference to such a plan") (internal quotation marks

omitted) (citing, *inter alia, Black's Law Dictionary* 1288 (6th ed.1990)); *Continental Cas. Co. v. Wendt,* 205 F.3d 1258, 1262-64 (11th Cir.2000) ("the common understanding of the word 'related' covers a very broad range of connections, both causal and logical") (*quoting Gregory v. Home Ins. Co.,* 876 F.2d 602, 605-06 (7th Cir.1989)). Plaintiffs' current claims exist only because of, and are expressly based on, the products liability claims and the settlement of those claims. Therefore, Plaintiffs' non-fraud claims are related to the settled claims and are therefore barred by the covenants not to sue.

VIII. Plaintiffs' Spoliation Claim

In *Matsuura,* the Hawaii Supreme Court refused to decide the issue of whether Hawaii would recognize a separate spoliation tort, because the destruction of plants in Costa Rica, as alleged by Plaintiffs, did not establish an "inability to prove" the underlying lawsuits due to spoliation, as required for spoliation in those jurisdictions recognizing the tort. As stated by the Hawaii Supreme Court:

> In their underlying lawsuits, the Matsuuras alleged damages from the use of Benlate. Thus, in order to constitute a valid claim of spoliation of evidence, the Matsuuras must prove that the *destruction of the plants* from the Costa Rica field test resulted in their inability to prove that Benlate damaged their plants and fields. However, the Matsuuras indicate that documents and other information pertaining to the Costa Rica field test-including photos and videotape of the plants-

> demonstrated the harmful effects of Benlate. Additionally, the Matsuuras indicate that the Alta test results and the Keeler documents both indicated that Benlate was contaminated with herbicides. Moreover, the plaintiffs in *Kawamata Farms* were successful in proving substantially identical claims without the benefit of any evidence from the Costa Rica field test. Therefore, given that the Matsuuras' allegations indicate that evidence *other than the plants from the Costa Rica field test* demonstrated the harmful effects of Benlate, the destruction of the Costa Rica plants did not result in their inability to prove their suit.

73 P.3d at 706 (emphasis in original). All of the Plaintiffs base their spoliation claims on the destruction of plants from the alleged Costa Rica field test. Because all of the Plaintiffs allege that evidence other than those plants proved the harmful effects of Benlate, the destruction of the plants did not result in their inability to prove the Underlying Cases. The *Matsuura* Plaintiffs' spoliation claims fail as a matter of law.

IX. Plaintiffs' Negligence Claims

An action for negligence requires the violation of a recognized duty of ordinary care running from the defendant to the plaintiff. *Dairy Road Partners v. Island Ins. Co.*, 92 Hawai'i 398, 992 P.2d 93, 114 (2000). No common law duty provides a standard of care for conduct in litigation. Instead, litigation conduct is governed by statute, rules of procedure, and ethical rules.

Appendix B

For a statutory violation to give rise to an actionable negligence claim, the statute must either expressly provide for a cause of action or "manifest an intent on the part of the legislature to impose a duty of care." *Hulsman v. Hemmeter Dev. Corp.*, 65 Haw. 58, 647 P.2d 713, 720 (1982) (actionable claim cannot be based on statute imposing duty on seller of firearm not to sell to a person who is mentally ill); *see also Lee v. Corregedore,* 83 Hawai'i 154, 925 P.2d 324, 343 (1996) (Veterans Rights and Benefits statute "does not specify standards of conduct on the part of Veterans' Services Counselors necessary to avoid liability for negligence, nor can such standards of conduct be inferred from the chapter's language. The legislative history reveals no intent to create a standard of care . . . ."); *Struzik v. Honolulu,* 50 Haw. 241, 437 P.2d 880, 885 (1968) (no actionable duty based on statute requiring maintenance of sidewalk areas fronting one's property).

The rules of civil procedure do not create duties on which negligence claims can be based. The Federal Rules of Civil Procedure were promulgated under the statutory mandate that "[s]uch rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b) (Rules Enabling Act). State procedural rules modeled after the Federal Rules of Civil Procedure, such as Hawaii's, are intended to have the same effect.

Courts consistently reject causes of action predicated on the violation of procedural rules. *See, e.g., Jones v. General Motors Corp.,* 24 F.Supp.2d 1335, 1338 (M.D.Fla.1998) ("discovery violations in other lawsuits cannot form the basis

for an independent cause of action"[25]); *Rogers v. Furlow,* 729 F.Supp. 657, 659 (D.Minn.1989) ("a violation of the Federal Rules of Civil Procedure does not give rise to an independent federal cause of action"); *Maiden v. Rozwood,* 461 Mich. 109, 597 N.W.2d 817, 830 (1999) ("a breach of duty owed to the court does not give rise to a cause of action in tort by the adverse party"); *OMI Holdings, Inc. v. Howell,* 260 Kan. 305, 918 P.2d 1274, 1288 (1996) ("the ethics rules do not impose a legal duty on the attorney owing to either a client or a third party"). Hawaii principles are in accord. *See Orth v. Basker,* 30 Haw. 520 (1928) (rejecting civil liability for perjury: "If she so violated the law, the penalties of perjury available for her punishment; but there is no civil liability for damages in an action for malicious prosecution.").

While Plaintiffs have consistently maintained that fraud claims should be treated differently, such an argument does not apply to negligence. There is no basis for allowing derivative litigation over claims that an opponent's prior litigation conduct in another case amounted to negligence. Plaintiffs' negligence claims are dismissed with prejudice.

X. The Litigation Privilege

While the Hawaii Supreme Court rejected the application of the litigation privilege to allegations of fraud, the court's analysis shows that it did not reject the application of the

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25. "If GM violated discovery rules by failing to produce documents in previous cases, then GM should have been sanctioned by the courts hearing those cases. Plaintiffs in this case do not have a private right of relief for GM's alleged past discovery misconduct." *Id.*

privilege to non-fraud claims. *Matsuura*, 73 P.3d at 692-700. The court discussed the "interrelated policies associated with the litigation privilege," recognizing that these policy considerations generally weigh against allowing derivative tort actions. *See id.* at 693-699. It was only where "fraud" was alleged that the opinion rejected the litigation privilege. *Id.* at 694 ("in the present case, the defendants are alleged to have fraudulently distorted the evidence presented in a prior proceeding") (emphasis added); *id.* at 696-697 ("when there is an allegation of fraud, the policy of reinforcing the finality of judgments does not favor limiting liability in a subsequent proceeding") (emphasis added).

Plaintiffs' non-fraud claims, by definition, do not implicate the concerns about fraud articulated by the Hawaii Supreme Court. There is no basis in the ruling to deny DuPont's motion to dismiss non-fraud claims on grounds of the privilege.[26]

XI. The *Matsuura* Plaintiffs' Federal RICO Claims

As discussed above, Plaintiffs cannot prove that they reasonably relied on DuPont's alleged fraud. Accordingly, the *Matsuura* Plaintiffs cannot establish the predicate acts of mail and wire fraud. *See Florida Evergreen Foliage v. Du Pont,* 135 F.Supp.2d 1271 (S.D.Fla.2001), *aff'd sub nom.*

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26. DuPont's Litigation Conduct Motion and RICO Motion (discussed in the following section) were filed as motions for judgment on the pleadings under Fed.R.Civ.P. 12(c). Judgment on the pleadings is appropriate where, taking all allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law. *Nelson v. City of Irvine*, 143 F.3d 1196, 1200 (9th Cir.1998).

Green Leaf Nursery v. DuPont, 341 F.3d 1292 (11th Cir.2003). To the extent their federal RICO claims are based on those predicate acts, and as this Court ruled in the September 4 Order, they are dismissed with prejudice.

The federal RICO claims are defective for other reasons as well: (1) the *Matsuura* Plaintiffs' injury from DuPont's alleged litigation misconduct in the federal *Bush Ranch* case, a case to which they were not parties, is too indirect to confer RICO standing; (2) the obstruction predicates are insufficient to satisfy RICO's continuity requirements; (3) Plaintiffs impermissibly allege a RICO "person"-DuPont-that is legally indistinguishable from a RICO "enterprise" comprised of DuPont and its agents and employees; (4) Plaintiffs fail to allege an actionable RICO injury; and (5) Plaintiffs' RICO claims are barred by the federal litigation privilege.

Aside from mail and wire fraud, the only other predicate acts supporting the *Matsuura* Plaintiffs' RICO claims are obstruction of justice and witness intimidation. "[F]ederal obstruction and witness intimidation claims are only applicable to federal proceedings." *Florida Evergreen II*, 165 F.Supp.2d at 1354 (citations omitted). As for federal proceedings, Plaintiffs' allegations are limited to the *Bush Ranch* case. The other cases were brought in state courts.

No specific act of witness intimidation in connection with the *Bush Ranch* case or any other federal case is alleged. The only specific allegations of witness intimidation involve state courts. Plaintiffs' allegations of witness intimidation therefore fail as a matter of law.

Appendix B

With the other predicate acts eliminated, Plaintiffs' RICO claim is confined to the allegation that DuPont obstructed justice in the *Bush Ranch* case. With respect to this predicate act, however, Plaintiffs have failed to allege "a direct relationship between the injury and the alleged wrongdoing ···" *Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris, Inc.*, 241 F.3d 696, 701 (9th Cir.2001). The Southern District of Florida dismissed identical RICO claims as "too remote to satisfy civil RICO's proximate cause requirements," stating as follows:

> The parties who were directly injured by DuPont's actions in the *Bush Ranch* case were the *Bush Ranch* plaintiffs and the allegedly defrauded court. . . . Even accepting Plaintiffs' allegations as true and interpreting them in the light most favorable to the Plaintiffs, it is clear that DuPont's actions were directed primarily at the *Bush Ranch* litigants.

Florida Evergreen I, 165 F.Supp.2d at 1355. The Eleventh Circuit affirmed, rejecting the argument that identically-situated plaintiffs could avoid application of the indirect injury rule merely by alleging that DuPont specifically intended to harm them. *Green Leaf*, 341 F.3d at 1307-1308; *accord Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957 (9th Cir.1999) (applying "remoteness" test to RICO claims by indirect victim).

Plaintiffs' federal RICO claims, as confined to predicate acts of federal obstruction of justice, do not satisfy RICO's

proximate cause requirements and therefore fail as a matter of law.

An actionable RICO claim requires a "pattern" of racketeering activity, which is defined as "a series of related predicates extending over a substantial period of time." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 242, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). In *H.J.*, the Supreme Court recognized that this "continuity" requirement would not be satisfied by alleged predicate acts "extending over a few weeks or months and threatening no future criminal conduct." *Id.* The Ninth Circuit has confirmed that "[a]ctivity that lasts only a few months is not sufficiently continuous." *Howard v. Am. Online Inc.*, 208 F.3d 741, 750 (9th Cir.2000); *see also Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364, 366-67 (9th Cir.1992).

Here, the obstruction predicate acts occurred over a period of less than two months. The earliest predicate act in the *Bush Ranch* case occurred on or about June 28, 1993 (when DuPont served discovery responses that allegedly failed to disclose the ALTA raw data, the BAM test results, or evidence relating to the alleged Costa Rica field tests). The *Bush Ranch* case settled-thereby terminating any alleged racketeering activities in that case-on August 16, 1993. *In re DuPont-Benlate Litig.*, 99 F.3d at 365. Thus, Plaintiffs' alleged "pattern" of racketeering lasted only a "few weeks," too short to satisfy RICO's "continuity" requirement. *H.J.*, 492 U.S. at 242, 109 S.Ct. 2893; *Howard;* 208 F.3d at 750; *Wollersheim*, 971 F.2d at 366-67.

Appendix B

"The central role of the concept of enterprise under RICO cannot be overstated. It is precisely the criminal infiltration and manipulation of organizational structures that created the problems which led to the passage of RICO." *United States v. Neapolitan,* 791 F.2d 489, 500 (7th Cir.1986). To make out a claim under 18 U.S.C. § 1962(c), as Plaintiffs attempt to do, requires a showing of RICO "enterprise" that is separate and apart from the pattern of racketeering activity engaged in by the RICO "persons." *United States v. Turkette,* 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981).

A RICO "enterprise" is more than a "conspiracy" between "persons," as RICO's severe penalties were not intended to reach "simple conspiracies to perpetrate the predicate acts of racketeering." *Chang v. Chen,* 80 F.3d 1293, 1299 (9th Cir.1996) (citation omitted). Instead, an enterprise requires "an ongoing organization, formal or informal, and . . . evidence that the various associates function as a continuing unit." *Turkette,* 452 U.S. at 583, 101 S.Ct. 2524.

The United States Supreme Court recently reaffirmed this "distinctiveness" requirement:

> We do not quarrel with the basic principle that to establish liability under 1962(c) one must allege and prove the existence of two distinct entities: (1) a person; and (2) an enterprise that is not simply the same person referred to by a different name . . . [***T]he person and the victim, or the person and the tool, are different entities, not the same.***

Cedric Kushner Promotions, Ltd. v. King, 533 U.S. 158, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001) (emphasis added). Notably, while *Cedric Kushner* had no occasion to resolve the question presented here,[27] it did observe (unanimously) that an enterprise theory in which "the corporation was the person and the corporation, together with all its employees and agents, were the enterprise" is a "less natural" and "oddly constructed" notion of enterprise. 533 U.S. at 204, 121 S.Ct. 2151.

That "oddly constructed" formulation of enterprise is precisely what Plaintiffs allege here. The Amended Complaints allege a single RICO "person": DuPont. Yet the alleged enterprise consists again of DuPont, along with DuPont law firms, DuPont employees, and DuPont expert witnesses. Plaintiffs' allegations show that the participants in this alleged enterprise were DuPont agents acting "within the scope of their employment" with DuPont. Plaintiffs further allege that the enterprise's objective was to perpetrate "a fraudulent scheme to diminish or extinguish DuPont's legal liability." It was obviously DuPont itself-not some separate enterprise-that faced legal liability in the Benlate litigation.

Plaintiffs' enterprise theory is thus the same as those routinely rejected in cases such as *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339 (2d Cir.1994), in which Riverwoods alleged the existence of an "enterprise" consisting of Marine Midland Bank, its holding

27. In *Cedric Kushner,* a corporation was the enterprise and the corporation's president/sole-shareholder was the liable "person." 533 U.S. 158, 121 S.Ct. 2087.

company, and its employees. This "enterprise" allegedly committed mail and wire fraud when it restructured certain bank loans. The Second Circuit concluded that there was in fact no "separate" enterprise, just bank employees and agents conducting the bank's affairs. *Id.* at 344-45; *see also Richmond v. Nationwide Cassel, L.P.,* 52 F.3d 640 (7th Cir.1995) (enterprise requirement not met where pleadings "clearly allege only that the defendants were conducting their own (and each other's) affairs").

The same analysis was applied by the District of Hawaii in *Sea-Land Service, Inc. v. Atl. Pac. Int'l,* 57 F.Supp.2d 1048 (D.Haw.1999). The Plaintiffs alleged that a corporation (TAG) was both the RICO "person" and the RICO "enterprise." When pressed on the distinctiveness requirement, Sea-Land asserted that TAG conducted alleged racketeering activities with "certain of its employees (and others acting in concert with them)." *Id.* at 1055-56 (citations omitted). This was insufficient to allege an enterprise. Noting that "a corporate defendant cannot be both the RICO person and the RICO enterprise under section 1962(c)," the Court held that "the inclusion of" the additional entities or individuals "does not save" the RICO claim. *Id.*

Plaintiffs' RICO claims fail the distinctiveness test and are hereby dismissed.

Federal RICO allows recovery only for "injury" to "business or property," 18 U.S.C. § 1964(c), language that the Supreme Court has found to have "restrictive significance." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979); *see also Sedima*

S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985). The injury Plaintiffs assert-a tainted litigation process that diminished their settlements-is not "injury" to "business or property" cognizable under the RICO statute. Rather, it is the type of personal injury or injury to an intangible interest not remediable by RICO's civil provisions.

Plaintiffs allege that DuPont withheld in litigation data and information that it was obliged to produce. Lacking this data, Plaintiffs allegedly settled their cases for unreasonably low sums. They do not, however, assert injury to their "business," because they are not in the business of litigation. They are in the business of farming and operating nurseries. *See Ove v. Gwinn*, 264 F.3d 817, 825 (9th Cir.2001) (RICO plaintiffs failed to establish injury to " *their* business or property . . ."); *Grant, Inc. v. Greate Bay Casino Corp.*, 3 F.Supp.2d 518, 534 (D.N.J.1998) ("loss of an opportunity to gamble under favorable conditions does not constitute injury to business since plaintiffs are not . . . in the business of gambling"), *aff'd in part and rev'd in part on other grounds*,232 F.3d 173 (3d Cir.2000).

Nor do Plaintiffs allege an injury to "property." The term "property" in RICO does not encompass any and all monetary losses. The Ninth Circuit standard requires "proof of concrete financial loss, and not mere injury to a valuable intangible property interest." *Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir.1990); *see also Imagineering Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1310 (9th Cir.1992); *Oscar v. Univ. Students Co-op Ass'n*, 965 F.2d 783, 785 (9th Cir.1992) (neither the loss of "peace of mind" nor the devaluation of

enjoyment of a leasehold constitutes the type of property interests for which RICO affords recovery); *Ove,* 264 F.3d at 825 ("right to receive honest services" is not cognizable RICO injury); *cf. Cleveland v. United States,* 531 U.S. 12, 121 S.Ct. 365, 148 L.Ed.2d 221 (2000) (refusing to interpret "property" expansively under the federal mail fraud statute to include fraudulently obtained government license, noting that other laws expressly govern defendant's conduct).

Under Ninth Circuit precedent, the loss of litigation fair play-the injury alleged here-is damage to an intangible property interest, constituting "only a speculative injury, which is not compensable under RICO." *Imagineering,* 976 F.2d at 1311. *See also Sheperd v. American Honda Motor Co. Inc.*, 822 F.Supp. 625, 629 (N.D.Cal.1993) (rejecting car dealer's RICO claims alleging conspiracy to divert best-selling vehicles to other dealerships; alleged injury "speculative" because plaintiff "failed to allege a sufficiently concrete financial loss").

Like the tainted bidding process in *Imagineering,* Plaintiffs' allegedly tainted litigation process is not the tangible sort of harm redressed by RICO. Plaintiffs' allegations therefore fail to allege a cognizable RICO injury and therefore fail as a matter of law.

Plaintiffs' RICO claims are based on DuPont's conduct in Benlate litigation. The federal litigation immunity, however, bars subsequent civil litigation based on a party's litigation conduct. *See Briscoe v. LaHue,* 460 U.S. 325, 330-31, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983) ("The immunity of parties and witnesses from subsequent damages liability

for their testimony in judicial proceedings was well established in English common law"); *Holt v. Castaneda,* 832 F.2d 123, 125 (9th Cir.1987) (police officer immune from civil liability because of common law immunity afforded to participants in judicial processes); *Collins v. Walden,* 613 F.Supp. 1306, 1314-1315 (N.D.Ga.1985) (immunity covers all "participants in the process of gathering evidence for use at trial"). *See also Franklin v. Terr,* 201 F.3d 1098, 1100-02 (9th Cir.2000) (joining the First, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits in rejecting a "conspiracy" exception to the *Briscoe* immunity rule).

The issue presented here is whether the litigation immunity applies under RICO or whether Congress evinced a "clear legislative intent" to abrogate that immunity. *Pulliam v. Allen,* 466 U.S. 522, 529, 104 S.Ct. 1970, 80 L.Ed.2d 565 (1984). The Ninth Circuit Court of Appeals has answered this question. In *Chappell v. Robbins,* the Ninth Circuit held that "[i]n passing RICO, Congress did not evince a 'clear legislative intent' to displace common-law immunities." 73 F.3d 918, 925 (9th Cir.1996).

Chappell involved allegations that a former California state senator had taken bribes from the insurance industry and then sponsored a bill that would allow the industry to extract excessive profits from consumers. *Id.* at 920. The district court dismissed RICO claims against Robbins upon finding that Robbins' actions fell within the common law legislative immunity. *Id.* at 919. Upon review, the Ninth Circuit affirmed. *Id.* at 918. *Chappell* court further stated:

> We are required by *Pulliam* to find a clear indication that Congress affirmatively intended to

> abrogate immunity. Unlike in the statute at issue in *Pulliam,* here Congress has said nothing on the subject. While *Pulliam* does not establish an irreducible minimum for how explicit Congress must be in order for us to find an intent to abrogate, Congress must leave us more than tea leaves from which to discern intent.

Id. at 924; *see also Cullinan v. Abramson,* 128 F.3d 301, 308 (6th Cir.1997) (immunity doctrines are not replaced by "a statute as amorphous as RICO").

Just as *Chappell* found no Congressional intent for RICO to abrogate legislative immunity, there is no stated or clear Congressional intent to abrogate litigation immunity. *Chappell,* 73 F.3d at 924. Nor is there any legislative history basis for concluding otherwise.

Plaintiffs' RICO claims, which are based on immune litigation conduct, fail as a matter of law.

THE RULINGS

A. DuPont's Motion for Judgment on the Pleadings as to All Plaintiffs' Claims Based on Litigation Conduct (as subsequently re-cast by DuPont as seeking the dismissal of Plaintiffs' non-fraud claims only), is GRANTED;

B. DuPont's Motion for Judgment on the Pleadings as to Plaintiffs' RICO Claims, is GRANTED;

Appendix B

C. DuPont's Motion for Summary Judgment on Plaintiffs' Claims Regarding the So-Called "ALTA Fraud", is GRANTED;

D. DuPont's Motion for Summary Judgment on the Speculative Nature of Plaintiffs' Damages, is GRANTED;

E. DuPont's Motion for Summary Judgment on Plaintiffs' Remaining Non-Fraud Claims, is GRANTED;

F. DuPont's Counter Motion for An Order Clarifying and Superseding "Order Granting DuPont's Motion for Summary Judgment on Plaintiffs' Inability, As a Matter of Law, to Establish Reasonable Reliance," is GRANTED.

Plaintiffs' Motion to Vacate September 4, 2002 Reasonable Reliance Order, Deny Defendant Du Pont's Reasonable Reliance and Litigation Immunity Motions, and Set Case for Consolidated Trial is hereby DENIED.

Pursuant to this Judgment and Fed.R.Civ.P. 54(b), the Court finds that there is no just reason for delay and hereby directs the entry of judgment, the uncontroverted facts set forth herein and dismissing with prejudice all of the *Matsuura* Plaintiffs' claims against DuPont.

APPENDIX C — ORDER GRANTING DUPONT'S MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFFS' RICO CLAIMS BASED ON THE STATUTE OF LIMITATIONS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII FILED SEPTEMBER 5, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

FOR FILING IN ALL CASES:

Civil No. 99-00660 MLR/LEK
Civil No. 00-00328 MLR/LEK
Civil No. 00-00615 MLR/LEK

HEARING:
DATE: June 20, 2002
TIME: 10:00 A.M.

JUDGE: THE HONORABLE
MANUEL L. REAL

LIVING DESIGNS, INC. and PLANT EXCHANGE, INC., Hawaii Corporations,

Plaintiffs/
Counterclaim Defendants,

v.

E.I. du PONT de NEMOURS and COMPANY, a Delaware Corporation,

Defendant/
Counterclaim Plaintiff.

Appendix C

MCCONNELL, INC., a California Corporation,

Plaintiff/
Counterclaim Defendant,

v.

E.I. du PONT de NEMOURS and COMPANY,
a Delaware Corporation,

Defendant/
Counterclaim Plaintiff.

ANTHURIUM ACRES, a Hawaii general Partnership, Successor in interest to Island Tropicals; MUELLER HORTICULTURAL PARTNERS, a Hawaii Limited Partnership,

Plaintiffs/
Counterclaim Defendants,

v.

E.I. du PONT de NEMOURS and COMPANY,
a Delaware Corporation,

Defendant/
Counterclaim Plaintiff.

Appendix C

ORDER GRANTING DUPONT'S MOTION FOR SUMMARY JUDGMENT AS TO PLAINTIFFS' RICO CLAIMS BASED ON THE STATUTE OF LIMITATIONS

The Court heard "DuPont's Motion for Summary Judgment as to Plaintiffs' RICO Claims Based on the Statute of Limitations" on June 20, 2002. Stephen T. Cox, Esq., A. Camden Lewis., Esq., Carl H. Osaki, Esq., and Kris A. LaGuire, Esq. appeared on behalf of Plaintiffs Living Designs, Inc. and Plant Exchange, Inc. (collectively, "Living Designs"), McConnell, Inc. ("McConnell"), and Anthurium Acres, a Hawaii general partnership and successor in interest to the Hawaii limited partnership Mueller Horticultural Partners ("Anthurium Acres"). Warren Price, III, Esq., A. Stephens Clay, Esq., and James F. Bogan, III, Esq. appeared on behalf of Defendant E.I. du Pont de Nemours and Company ("DuPont"). After considering DuPont's motion and the supporting and opposing memoranda, the arguments of counsel, and the entire record in each of these cases, the Court GRANTS this motion and dismisses Plaintiffs' civil RICO claims with prejudice.

FACTS ESTABLISHED AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED

Plaintiffs filed their respective complaints asserting their RICO claims on September 24, 1999 (Living Designs), May 5, 2000 (McConnell), and September 21, 2000 (Anthurium Acres). DuPont's Concise Statement of Facts in Support of its Motion for Summary Judgment as to Plaintiffs' RICO Claims Based on the Statute of Limitations ("DuPont's

CSOF") No. 1; Plaintiffs' Concise Counter-Statement of Facts Regarding DuPont's Motion for Summary Judgment as to Plaintiffs' RICO Claims Based on the Statute of Limitations ("Plaintiffs' CSOF") No. 1. The statute of limitations governing civil RICO claims is four years. *Rotella v. Wood*, 528 U.S. 549, 552 (2000). For purposes of this analysis, therefore, the Court must examine whether Plaintiffs' RICO claims accrued prior to or during the September 24, 1995 through September 21, 1996 time period.

The three complaints at issue allege that DuPont misled Plaintiffs into settling their underlying Benlate cases for less than fair value by withholding in discovery scientific testing data. DuPont's CSOF 2; Plaintiffs' CSOF 2. Plaintiffs assert that this data would have helped to demonstrate that Benlate was defective. *Id.* The complaints focus on scientific testing conducted for DuPont by an outside consultant, ALTA Laboratories ("ALTA").[1] *Id.* For various Benlate cases, ALTA analyzed soil and plant samples from claimant's properties to determine whether a form of herbicide called sulfonylurea ("SU") was present. *Id.* The complaints allege that DuPont concealed certain ALTA data from samples analyzed that allegedly revealed SU contamination of Benlate. *Id.*

The first Benlate case to go to trial, the *Bush Ranch* case in the United States District Court for the Middle District of Georgia, settled in August 1993. DuPont's CSOF 3; Plaintiffs'

1. Plaintiffs point out that their complaints also involve allegations pertaining to another alleged fraud (the so-called Costa Rica testing fraud), but do not dispute that their complaints are devoted in large measure to their allegations about DuPont's alleged concealment of the ALTA data. Plaintiffs' CSOF 2.

CSOF 3. In March 1995, the *Bush Ranch* parties and counsel returned to the Middle District of Georgia alleging that DuPont had defrauded the court by failing to produce the ALTA data. *Id*. Based on these allegations, certain other Benlate plaintiffs who had been involved in this Georgia Benlate litigation and who had settled their claims prepared a draft complaint alleging claims for fraud, federal RICO and related claims against DuPont for its alleged concealment of the ALTA data. Yi Decl. Ex. TTT; Transcript of June 20, 2002 hearing, pp. 45-46. By letter dated April 3, 1995, those plaintiffs provided a copy of that draft complaint to counsel for DuPont. *Id*.

From May 2 to May 12, 1995, Federal District Judge Robert Elliott convened a show-cause proceeding. *In re E.I. DuPont de Nemours and Co. - Benlate Litig.*, 918 F.Supp. 1524, 1528 (M.D. Ga. 1995), *rev'd*, 99 F.3d 363 (11th Cir. 1996) ("*In re Benlate Litig.*"); DuPont's CSOF 3; Plaintiffs' CSOF 3. On August 21, 1995, Judge Elliott issued a 79-page ruling declaring that DuPont had wrongfully failed to produce the ALTA data in the original *Bush Ranch* case and in other Benlate cases (the *Lambert, Whitworth*, and *Kawamata/ Tomono* cases); this ruling (which was subsequently reversed by the Eleventh Circuit) imposed a punitive sanction of $115 million on DuPont. *In re Benlate Litig.*, 918 F. Supp. 1528-1540, 1557; DuPont's CSOF 4; Plaintiffs' CSOF 4.

On August 24, 1995, Kevin A. Malone, counsel for Plaintiffs in their underlying Benlate cases, sent a letter to DuPont counsel about the ruling and its implications for those of his clients who had previously settled their Benlate claims.

DuPont's CSOF 5; Plaintiffs' CSOF 5. In that letter, Malone stated:

> Overall my clients have accepted their settlements and have moved on with their lives. However, every time something major hits the newspapers, such as Judge Elliott's recent ruling, a certain number of clients become disgruntled and wish to discuss reopening their cases. Since neither Du Pont nor I want this to occur, it is mutually advantageous that we accommodate my clients as best we can in regard to their tax needs so as to minimize any dissatisfaction they may have with the resolution of their cases.

Id.

There were extensive ALTA-related disputes and rulings in Benlate litigation from 1993 to 1995, many of them recounted in Plaintiffs' respective complaints. *Id.* at 6. These include: Hawaii state court Judge Ibarra issued an order in 1994 in the *Kawamata/Tomono* litigation requiring DuPont to turn over the ALTA data; Judge Ibarra's $1.5 million sanctions ruling on the ALTA issue on January 19, 1995; and Judge Ibarra's reading to the *Kawamata/Tomono* jury of a "remedial instruction" because of the ALTA issue in January 1995. *Id.*

On September 23, 1994, the *Kawamata/Tomono* plaintiffs accused DuPont of engaging in fraud by concealing the ALTA data. *Id.* at 7. Plaintiffs concede that the allegations raised in this September memorandum "are substantially

similar to [their] current claims regarding the alleged fraudulent concealment of the ALTA Data," and Plaintiffs' current counsel has stated to two courts that DuPont's alleged ALTA fraud was uncovered in September 1994. *Id.*

At least two of the three Plaintiffs were themselves participants in certain ALTA disputes by virtue of their underlying Benlate cases having been consolidated with *Kawamata/Tomono* in late 1993. *Id.* at 8. Plaintiffs (except Living Designs) joined the *Kawamata/Tomono* plaintiffs' motion to compel DuPont to produce documents related to tests regarding whether Benlate was contaminated, and for sanctions for failure to produce such documents in response to prior orders. *Id.* at 9. Moreover, these Plaintiffs and their counsel, at least until the time they settled their claims in 1994, actively monitored Benlate cases and discovery disputes, including in particular monitoring the ALTA testing disputes and rulings. *Id.* at 10. Judge Ibarra issued an order on March 1, 1994 directing DuPont to produce Benlate test documents. *Id.* at 11. DuPont produced the subject ALTA data in Hawaii on May 17, 1994. *Id.*

On March 30, 1994, an analytical chemistry expert retained by Malone stated in a report that SUs were found in soil samples removed from the farms of Hawaii growers and a Florida grower. *Id.* at 13. This expert based this opinion on his review of ALTA data produced prior to March 30, 1994. *Id.* While Plaintiffs deny knowing about this report prior to their settlements and further deny that this expert was acting on their behalf when he reached this conclusion (Plaintiffs' CSOF 13), it is undisputed that this expert had been retained

by Malone prior to March 30, 1994[2] and that he had developed, based on the disclosure of other ALTA data, an SU contamination theory by that date. *Id.*

The ALTA disputes and rulings were the subject of extensive media coverage nationally and in Hawaii throughout 1994 and the first eight months of 1995. *Id.* at 14. Judge Elliott's August 1995 sanctions ruling, in particular, received front-page coverage in national and Hawaii news media. *Id.*

Other similarly-situated Benlate "settlement fraud" plaintiffs, with knowledge of the same ALTA information and represented by the same underlying counsel and the same present counsel as Plaintiffs here, filed their RICO claims in 1996, arguably within the four-year period provided by RICO. *Id.* at 15.

Plaintiffs settled their underlying cases on April 26 and 27, 1994, and filed stipulations dismissing their underlying actions on November 21, 1994. *Id.* at 17. Plaintiffs, however, did not file their RICO claims until September 24, 1999 (Living Designs), May 5, 2000 (McConnell), and September 21, 2000 (Anthurium Acres). *Id.* at 1.

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2. In response to another summary judgment motion filed by DuPont, these Plaintiffs "[a]dmitted that Kevin Malone had retained Dr. Jodie Johnson [the expert at issue] as an analytical chemistry expert." Plaintiffs' Responses to Defendant's Allegedly Undisputed Facts ("Plaintiffs' ALTA CSOF") No. 11.

Appendix C

STANDARD OF REVIEW

Rule 56(c) provides that summary judgment shall be entered when:

> [T]he pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c). The moving party has the initial burden of demonstrating to the Court that there is no genuine issue of material fact. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Courts must view the evidence and make any inferences in the light most favorable to the party opposing summary judgment. *See Diaz v. American Telephone & Telegraph,* 752 F.2d 1356, 1362 (9th Cir. 1985). However, the moving party need not produce evidence negating the existence of an element for which the opposing party will bear the burden of proof at trial. *See Celotex,* 477 U.S. at 322.

Once the movant has met its burden, the opposing party has the affirmative burden of coming forward with specific facts evidencing a need for trial. *See* Fed. R. Civ. P. 56(e). The opposing party cannot stand on its pleadings, nor simply assert that it will be able to discredit the movant's evidence at trial. *See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Assn,* 809 F.2d 626, 630 (9th Cir.1987); Fed. R. Civ. P. 56(e). There is no genuine issue of fact "where the record taken as a whole could not lead a rational trier of fact to find for the

nonmoving party." *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986) (citation omitted).

CONCLUSIONS AS A MATTER OF LAW

The statute of limitations governing civil RICO claims is four years. *Rotella v. Wood*, 528 U.S. 549, 552 (2000). This is a discovery-based statute of limitations. The Supreme Court has held that "discovery of the injury, not discovery of the other elements of the claim, is what starts the clock." *Id.* at 555. Under this rule, the RICO limitations period begins to run once plaintiff knows or should know of the injury he asserts, irrespective of whether he then knows of an alleged pattern of racketeering. *Id.*; *Pincay*, 238 F.3d at 1109 (quoting *Grimmett v. Brown*, 75 F.3d 506, 510 (9th Cir. 1996)).

Therefore, constructive knowledge of the alleged injury is sufficient to start the clock running, and such knowledge exists when the plaintiff would have discovered the alleged injury through the exercise of reasonable diligence. *Pincay*, 238 F.3d at 1109-1110. When the plaintiff has access to information sufficient to cause a reasonable person to make an inquiry, and that inquiry would have uncovered the injury, that plaintiff is deemed to have constructive knowledge. *Id*.

In the particular context of civil RICO, the Supreme Court has held that a RICO plaintiff is under an affirmative duty to exercise reasonable diligence in investigating a potential claim. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 194-95 (1997). Moreover, the statute of limitations may not be tolled under any equitable doctrine, including fraudulent concealment, unless the plaintiff has pled and can prove that

he actually exercised reasonable diligence and was thwarted from discovering his alleged injury. *Id.* If a plaintiff fails to exercise reasonable diligence, he cannot avoid summary judgment by asserting that he was unable to discover an alleged injury. *Id.*

In determining when an action has accrued under a discovery-based federal statute of limitations such as that governing federal RICO, the question of when the alleged injury was or should have been discovered is a legal question when uncontroverted evidence demonstrates a plaintiff discovered or should have discovered the fraud alleged. *See Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1417 (9th Cir. 1987) (summary judgment appropriate where uncontroverted evidence demonstrates plaintiff discovered or should have discovered fraud but failed to sue); *Pincay v. Andrews*, 238 F.3d 1106, 1109 (9th Cir. 2001) ("if no reasonable jury could find that [plaintiffs] did not have constructive knowledge of their injuries . . . the [defendants] are entitled to judgment as a matter of law").

1. August 1995 is the latest date by which Plaintiffs were on constructive notice of their RICO claims

The undisputed evidence, detailed above, shows that Plaintiffs and their lawyers were on notice of the alleged ALTA testing fraud that forms the basis of their RICO claims as early as late 1993, and by various dates throughout 1994, when they were themselves litigating discovery fraud issues in their underlying Benlate cases. This Court need not determine whether Plaintiffs' RICO claims accrued on these earlier dates, however, because by August 21, 1995 — when

Appendix C

Judge Elliott issued his widely-publicized ALTA sanctions ruling against DuPont in the *Bush Ranch* case — any reasonable Benlate plaintiff was placed on constructive notice of a potential "settlement fraud" claim.[3]

As discussed above — and in Plaintiffs' own complaints — Judge Elliott's August 1995 opinion forms much of the basis for the racketeering activity alleged in these cases. In each of the complaints, the opinion is quoted at length and attached as an exhibit.

Plaintiffs deny knowing "about Judge Elliott's ruling at any time before about 1998" (Plaintiffs' CSOF 5), but the undisputed evidence shows that Malone and at least certain of his other clients were following these events. It is undisputed that Plaintiffs' underlying attorney, Kevin Malone, as well as some of his other clients, had actual knowledge of Judge Elliott's ruling days after it was

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3. In response to another summary judgment motion filed by DuPont, these Plaintiffs have admitted that they had actual knowledge of their ALTA fraud allegations by the time this opinion was published. In support of DuPont's Motion for Summary Judgment on Plaintiffs' Claims Regarding the So-Called ALTA Fraud, DuPont set forth as an undisputed fact that "[i]n the *Kawamata/Tomono* trial, the plaintiffs presented the 'ALTA fraud' to the court in a September 23, 1994 memorandum." Concise Statement of Facts in Support of DuPont's Motion for Summary Judgment on Plaintiffs' Claims Regarding the So-Called "ALTA Fraud" ("DuPont ALTA CSOF") No. 20. In response, Plaintiffs stated, "Admitted. Plaintiffs further state, however, that the matters stated in this 'fact' are [sic] not known by them until the fraud hearings and order by Judge Elliott in 1995, after their settlement and after dismissals were filed in their cases." Plaintiffs' ALTA CSOF 20.

published. As discussed above, in August 1995, Malone faxed a letter to a DuPont attorney about the ruling and its implications for those of his clients who had previously settled their Benlate claims.

Furthermore, other similarly-situated Benlate plaintiffs represented by Malone in the underlying Benlate litigation timely filed a materially indistinguishable RICO complaint (prepared by Plaintiffs' current counsel) in this Court as early as December 1996. The existence of an earlier-filed suit making parallel allegations arising out of the same facts supports the Court's conclusion that Plaintiffs' claims are barred on grounds of constructive notice. *See, e.g., Armstrong v. McAlpin,* 699 F.2d 79, 88 (2d Cir. 1983) (plaintiff's action time-barred where SEC complaint was filed more than two years before plaintiff sued; plaintiffs action had copied factual report made public at the time of the SEC suit); *Berry Petroleum Co. v. Adams & Peck,* 518 F.2d 402, 410 (2d Cir. 1975) (fraud action held time-barred where "much of the fraud" had been alleged in an earlier case filed within the limitations period); *Pilarczyk v. Morrison Knudsen Corp.,* 965 F. Supp. 311 (N.D.N.Y. 1997) (plaintiff's claim time-barred where prior lawsuit alleged same misrepresentations and therefore placed plaintiff on inquiry notice of potential claims), *aff'd,* 162 F.3d 1148 (2d Cir. 1998).

It has also been established that the public attention received by Judge Elliott's ruling was immediate and pervasive. Both the national press (including the Wall Street Journal) and Hawaii press gave the ruling instant and detailed coverage. No reasonably attentive person — and certainly none who had just litigated the issue of whether the ALTA

data should be produced in discovery — could reasonably have missed these events.

Where the events underlying a case are as publicized as those here, courts have not hesitated to find that such publicity puts a RICO plaintiff on notice of his alleged injury pursuant to the "injury discovery" rule. *See Cont'l Ins. Co. v Pierce County Wash.*, 690 F. Supp. 930, 936-37 (W.D. Wash. 1987) (plaintiffs' RICO claims barred because publicity surrounding arson convictions put plaintiff on inquiry notice more than four years before case was filed). "A person exercising reasonable diligence would learn of notorious news . . . even if that person could not or did not read the actual newspapers." *O'Connor v. Boeing N. American, Inc.*, 92 F. Supp. 2d 1026, 1046-7 (C.D. Cal. 2000). "[W]here the facts giving rise to a fraud action are in the public domain, courts regularly impute constructive knowledge to plaintiffs for the purposes of triggering the statute of limitations." *Bibeault v. Advanced Health Corp.*, Fed. Sec. L. Rep. ¶ 90,487 (S.D.N.Y. May 12, 1999); *see also Sterlin v. Biomune Sys.*, 154 F.3d 1191, 1203-04 (10th Cir. 1988) (article in Barron's put plaintiff on inquiry notice as to his securities fraud claims); *Prudential Ins. Co. of America v. U.S. Gypsum Co.*, 146 F. Supp. 2d 643 (D.N.J. 2001) (RICO claims in asbestos cases estopped as reasonable prudence is required in matters of public controversy); *Gluck v. Amicor, Inc.*, 487 F. Supp. 608, 614 (S.D.N.Y. 1980) (articles in Wall Street Journal and Miami Herald regarding SEC investigation of defendant put plaintiff on inquiry notice and started statute of limitations).

Plaintiffs argue that their alleged discovery, in 1996, of facts giving rise to another fraud (the so-called Costa Rica testing fraud) saves their RICO claims. *See* Plaintiffs' CSOF 2. This argument is without merit. Plaintiffs allege but one RICO injury — a reduced settlement payment in 1994. The mere fact that one of the alleged predicate acts may have been discovered within the four-year limitations period does not render timely an otherwise stale RICO claim. *Klehr,* 521 U.S. at 190 (a RICO plaintiff "cannot use an independent, new predicate act as a bootstrap to recover for injuries caused by other earlier predicate acts that took place outside the limitations period.").

Therefore, the undisputed facts establish that, as a matter of law, the four-year RICO clock on Plaintiffs' claims started running no later than August 21, 1995, and expired before Plaintiffs sued.

2. Plaintiffs cannot invoke tolling because they had and failed to discharge an affirmative duty of due diligence to investigate their claims from 1993 to 1995

Plaintiffs argue that the RICO statute of limitations was tolled, but the fact that other Benlate "settlement fraud" plaintiffs were able to discover and appreciate the ALTA story in a timely manner negates this contention. As the Supreme Court held in *Klehr,* RICO requires that a plaintiff diligently investigate potential injuries; civil RICO "actions seek not only to compensate victims but also to encourage those victims themselves diligently to investigate and thereby to uncover unlawful activity." *Klehr,* 521 U.S. at 195.

Appendix C

To invoke tolling, a RICO plaintiff, beyond showing that the defendant somehow affirmatively concealed the existence of injury, must plead and prove that he actually exercised reasonable due diligence and was nevertheless unable to discover the injury. *Klehr,* 521 U.S. at 194. Failure to show due diligence forecloses tolling as a matter of law. *Id.; see also Volk v. D.A. Davidson & Co.*, 816 F.2d 1406, 1416 (9th Cir. 1987) (sustaining summary judgment of RICO claim on statute of limitations grounds; plaintiffs could not show fraudulent concealment because they failed to exercise due diligence after receiving annual report indicating problems with partnership in which plaintiffs invested).

Here, Plaintiffs have not even pled, much less proffered evidence of, facts that would establish fraudulent concealment of the facts on which their RICO claims are based. Had these Plaintiffs exercised the diligence that other "settlement fraud" plaintiffs demonstrably did, they too could have asserted claims within the statutory period. They did not. Therefore, their civil RICO claims are time-barred.

CONCLUSION

For the reasons stated above, the court GRANTS DuPont's Motion for Summary Judgment as to Plaintiffs' RICO Claims Based on the Statute of Limitations. Plaintiffs' RICO claims are hereby DISMISSED WITH PREJUDICE. Pursuant to Federal Rule of Civil Procedure 54(b), the court determines that there is no just reason for delay and directs that judgment be entered immediately on Plaintiffs' RICO claims.

Appendix C

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, August 15, 2002 .

s/ [illegible]
JUDGE OF THE ABOVE-ENTITLED COURT

APPENDIX D — ORDER GRANTING DUPONT'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' INABILITY, AS A MATTER OF LAW, TO ESTABLISH REASONABLE RELIANCE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII FILED SEPTEMBER 4, 2002

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

FOR THE FOLLOWING CASES:

CASE NOS. CV96-01180-MLR/LEK
CV97-00716-MLR/LEK
CV97-01185-MLR/LEK
CV99-00660-MLR/LEK
CV00-00328-MLR/LEK
CV 00-00615-MLR/LEK

DAVID MATSUURA, Individually and dba ORCHID ISLE NURSERY, and STEPHEN MATSUURA, Individually and dba HAWAIIN DENDROBIUM FARM,

Plaintiffs,

vs.

E.I. du PONT de NEMOURS AND COMPANY, a Delaware Corporation,

Defendant.

Appendix D

FUKU-BONSAI, INC., a Hawaii Corporation
and DAVID W. FUKUMOTO,

Plaintiffs,

vs.

E.I. du PONT de NEMOURS and COMPANY,
a Delaware Corporation, et al.,

Defendants.

E.I. du PONT de NEMOURS and COMPANY,
a Delaware Corporation,

Plaintiff,

vs.

EXOTICS HAWAII KONA, INC., CHIAKI KATO
and HARVEY TOMONO,

Defendants.

LIVING DESIGNS, INC. and PLANT EXCHANGE, INC.,
Hawaii Corporations,

Plaintiffs,

vs.

E.I. du PONT de NEMOURS and COMPANY,
a Delaware Corporation,

Defendant.

Appendix D

MCCONNELL, INC., a California Corporation,

Plaintiff,

vs.

E.I. du PONT de NEMOURS and COMPANY,
a Delaware Corporation,

Defendant.

ANTHURIUM ACRES, a Hawaii general Partnership, Successor in interest to Island Tropicals; MUELLER HORTICULTURAL PARTNERS, a Hawaii Limited Partnership,

Plaintiffs,

vs.

E.I. du PONT de NEMOURS and COMPANY,
a Delaware Corporation,

Defendant.

Appendix D

ORDER GRANTING DUPONT'S MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' INABILITY, AS A MATTER OF LAW, TO ESTABLISH REASONABLE RELIANCE

E.I. du Pont de Nemours and Company ("DuPont") filed its Motion for Summary Judgment on Plaintiffs' Inability, as a Matter of Law, to Establish Reasonable Reliance ("Reasonable Reliance Motion" or "Motion") on March 13, 2002 in three of the above six consolidated cases.[1] The Motion is identical to the Reasonable Reliance Motion filed previously in each of the three other cases,[2] with certain immaterial factual differences. The Motion came on for hearing on June 20, 2002. The Court, having considered the written submissions of the parties, the oral argument of counsel, and the documents on file in these cases, hereby GRANTS DuPont's Motion for Summary Judgment on Plaintiffs' Inability, as a Matter of Law, to Establish Reasonable Reliance.

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1. *Living Designs, Inc. v. E.I. du Pont de Nemours & Co.*, CV99-00660 MLR/LEK; *McConnell, Inc. v. E.I. du Pont de Nemours & Co.*, CV00-00328 MLR/LEK; and *Anthurium Acres v. E.I. du Pont de Nemours & Co.*, CV00-00615 MLR/LEK.

2. The Motion was filed in *Matsuura v. E.I. du Pont de Nemours & Co.*, CV96-01180 MLR/LEK; *Fuku-Bonsai, Inc. v. El du Pont de Nemours & Co.*, CV97-00716 MLR/LEK; and *E.I. du Pont de Nemours & Co. v. Exotics Hawaii Kona, Inc. ("Exotics Hawaii Kona")*, CV97-011185 MLR/LEK, on April 19, 2001, April 10, 2001, and May 3, 2001, respectively.

Appendix D

I. Background

These cases arise from the settlement of certain products liability cases against DuPont relating to the use of a fungicide known as Benlate. These products liability cases, which were litigated in Hawaii state court, will be referred to as the "Underlying Cases." The Underlying Cases were similar to other Benlate cases that had been brought in federal court in Georgia and state court in Florida.

In the Underlying Cases, as well as the other Benlate cases, the plaintiff growers alleged that Benlate was contaminated with an herbicide that damaged their crops and soil. The Underlying Cases settled. Around the time of settlement, there were extensive allegations in the Underlying Cases and other Benlate cases around the country that DuPont had engaged in discovery abuses. Plaintiffs here were monitoring many of these other Benlate cases pending in the country.

The alleged abuses included DuPont's failure to disclose unfavorable scientific information it had obtained as well as certain affirmative misrepresentations. These alleged abuses took place from 1992, prior to the filing of the Underlying Cases, and continued during and past the time that the Underlying Cases settled and were dismissed with prejudice. These allegations are detailed in the parties' papers, but a few matters bear mentioning here.

In *Bush Ranch v. DuPont*, CV95-36 JRE ("*Bush Ranch*"), a case in the United States District Court for the Middle District of Georgia, DuPont allegedly failed to disclose data

from a study performed by ALTA Laboratories. The ALTA data included information showing sulfonylurea herbicide contamination from DuPont in the *Bush Ranch* plaintiffs' soil. Additionally, in certain of the Hawaii state court cases, including *Kawamata v. United Agri Products,* CV 91-437, and *Tomono v. DuPont,* CV 92-247, ("*Kawamata/Tomono*"), DuPont claimed work product privilege protection for the ALTA data, despite having previously waived the privilege. When DuPont was finally on the verge of having to turn over the ALTA data, Plaintiffs settled their Underlying Cases.

Prior to the time Plaintiffs dismissed their cases with prejudice, there were rampant discovery abuse allegations against DuPont in the Benlate cases monitored by Plaintiffs. Indeed, Judge EIliot, who presided over the *Bush Ranch* litigation, issued an order sanctioning DuPont for misconduct relating to the ALTA data. Plaintiffs had actual knowledge of the *Bush Ranch* order, as it was mentioned in a letter from Plaintiffs' attorney Kevin Malone to DuPont. Similarly, Judge Ibarra, who presided over the *Kawamata/Tomono* litigation, issued an order sanctioning DuPont for discovery abuses.

Certain of the plaintiffs from the Underlying Cases are now asserting claims[3] against DuPont for inducing them to settle those cases for less money than they were allegedly worth. Plaintiffs' claims include fraud, racketeering in

3. With the exception of *Exotics Hawaii Kona,* the plaintiff growers from the Underlying Cases are now Plaintiffs in the present cases. In *Exotics Hawaii Kona,* the plaintiff growers are actually Counterplaintiffs in the current case. For ease of reference, all plaintiffs from the Underlying Cases will be referred to as "Plaintiffs" in the present cases.

violation of the RICO Act (based on mail fraud, wire fraud, obstruction of justice, and witness tampering), and negligence, among others. The present Order applies to all claims founded on fraud, including claims for fraud and violations of the RICO Act (at least insofar as the RICO violations are predicated on mail fraud and wire fraud).

II. Summary Judgment Standard

Summary judgment is proper where the evidence "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

III. Choice of Law

The parties dispute which state's law applies. Plaintiffs (with the exception of the claimants *in Exotics Hawaii Kona)* assert that Delaware law applies. DuPont asserts that Hawaii law applies. Plaintiffs' choice of law argument is premised on the notion that the Delaware choice of law clause that appears in the settlement agreement in most (but not all) of the Underlying Cases covers the fraud claims that arise out of the settlement. But the fraud claims are distinct from the property claims at issue in the Underlying Cases. The Underlying Cases contained claims for products liability and negligence. Although there was a fraud claim in the Underlying Cases, that claim was based on misrepresentations about the Benlate product itself, as opposed to discovery matters that arose after the Underlying *Cases* had commenced. Delaware law does not control these cases.

Appendix D

Absent a controlling choice of law clause, Hawaii has the greatest interest in having its substantive law govern this case. Plaintiffs are located in Hawaii, the damage allegedly caused by Benlate occurred in Hawaii, and the Underlying Cases were litigated in Hawaii state court. Indeed, this Court's prior certification of questions of state law to the Supreme Court of Hawaii, and that court's acceptance of such questions, further supports the notion that Hawaii law controls here.

IV. Elements of Fraud Under Hawaii Law

Hawaii law requires the following for a fraud claim: a defendant's misrepresentation of fact, knowledge or reckless disregard of the falsity, the defendant's intent to induce reliance by the plaintiff, and reasonable reliance by the plaintiff. *TSA Int'l Ltd. v. Shimizu Corp.*, 990 P.2d 713, 726 (Haw. 1999). Plaintiffs argue that Hawaii requires only actual reliance, not reasonable reliance, for a fraud claim. The cases cited by Plaintiffs for the proposition that Hawaii requires only actual reliance, and not reasonable reliance, do not actually state this. *E.g. Shoppe v. Gucci American, Inc.*, 14 P.3d 1049, 1067 (Haw. 2000). Rather, these cases merely list the elements of fraud and sometimes fail to include "reasonableness" as part of reliance. *Id.* But Plaintiffs point to no case that affirmatively states that there is no reasonableness requirement.

V. Lack of Reasonable Reliance

DuPont argues that, at the time Plaintiffs executed their settlement agreement and dismissed their claims with

prejudice, they knew or should have known that DuPont's discovery responses were not trustworthy, given the rampant accusations of discovery abuse. In other words, according to DuPont, Plaintiffs chose to ignore the allegations of discovery abuse and opt for a quick cash settlement. Plaintiffs respond that they were reasonable in relying on DuPont's misrepresentations given that they were made subject to perjury, sanctions, and/or professional disciplinary rules.

The problem with Plaintiffs' argument is that Plaintiffs, as well as other Benlate plaintiffs across the country of whom Plaintiffs were aware, had been accusing DuPont of dishonest discovery responses prior to the date the Underlying Cases settled. Plaintiffs did not insist on a warranty in their settlement agreements or any other kind of assurance at the time of settlement. Instead, Plaintiffs chose to turn a blind eye to the glaring allegations of discovery misconduct. Even assuming Plaintiffs actually relied on DuPont's misrepresentations, such reliance could not have been reasonable as a matter of law. *See Florida Evergreen Foliage v. E.I. du Pont de Nemours & Co.*, 135 F. Supp. 2d 1271, 1289-97 (S.D. Fla. 2001); *Florida Evergreen Foliage v. E.I. du Pont de Nemours & Co.*, 165 F. Supp. 2d 1345, 1351-54 (S.D. Fla. 2001).

Appendix D

VI. Conclusion

For the reasons stated above, DuPont's Motion is GRANTED. All fraud-based claims are hereby dismissed with prejudice. These include claims for fraud and violations of the RICO Act (insofar as those claims are based on mail and wire fraud).

DATED: August 27, 2002

s/ Manuel L. Real
MANUEL L. REAL
UNITED STATES DISTRICT JUDGE

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED JANUARY 19, 2006

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 02-16947

D.C. No. CV-99-00660-MLR

LIVING DESIGNS, INC. and PLANT EXCHANGE, INC., Hawaii corporations,

Plaintiff - Appellant,

v.

E.I. DUPONT DE NEMOURS AND COMPANY, a Delaware corporation,

Defendant - Appellee.

No. 04-16354

D.C. Nos. CV-96-01180-MLR
CV-97-00716-MLR
CV-99-00660-MLR
CV-00-00328-MLR
CV-00-00615-MLR

LIVING DESIGNS, INC. and PLANT EXCHANGE, INC., Hawaii corporations; DAVID MATSUURA, individually and dba Orchid Isle Nursery; STEPHEN MATSUURA, individually and dba Hawaiian Dendrobium Farm; FUKU-BONSAI, INC.; DAVID W. FUKUMOTO; LIVING

Appendix E

DESIGNS, INC. and PLANT EXCHANGE, INC.; MCCONNELL, INC., a California corporation; ANTHURIUM ACRES, a Hawaii general partnership, successor in interest to Island Tropicals; MUELLER HORTICULTURAL PARTNERS,

Plaintiffs - Appellants,

v.

E.I. DUPONT DE NEMOURS AND COMPANY, a Delaware corporation,

Defendant - Appellee.

No. 02-16951

D.C. No. CV-00-00328-MLR

MCCONNELL, INC., a California corporation,

Plaintiff - Appellant,

v.

E.I. DUPONT DE NEMOURS AND COMPANY, a Delaware corporation,

Defendant - Appellee.

Appendix E

No. 02-16948

D.C. No. CV-00-00615-MLR

ANTHURIUM ACRES, a Hawaii general partnership, successor in interest to Island Tropicals; MUELLER HORTICULTURAL PARTNERS, a Hawaii limited partnership,

Plaintiffs-Appellants,

v.

E.I. DUPONT DE NEMOURS AND COMPANY, a Delaware corporation,

Defendant-Appellee.

ORDER

Before: THOMAS, SILVERMAN, and CLIFTON, Circuit Judges.

The motion of E.I. DuPont De Nemours and Company for an extension of time in which to file a petition for rehearing and rehearing en banc is DENIED. The motion of E.I. DuPont De Nemours and Company for a stay of the mandate is DENIED.

The panel has voted to deny the petition for rehearing, as untimely and on the merits, and to reject the suggestion for rehearing en banc.

Appendix E

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING STAY OF MANDATE FILED FEBRUARY 6, 2006

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 02-16947

D.C. No. CV-99-00660-MLR
District of Hawaii,
Honolulu

LIVING DESIGNS, INC. AND PLANT EXCHANGE, INC., Hawaii corporations,

Plaintiff - Appellant,

v.

E.I. DUPONT DE NEMOURS AND COMPANY, a Delaware corporation,

Defendant - Appellee.

ORDER

Before: THOMAS, Circuit Judge.

The renewed motion of E.I. DuPont De Nemours and Company for a stay of mandate is DENIED.

APPENDIX G — RELEVANT STATUTES

Section 1961(4) of Title 18 to the United States Code provides:

> As used in the chapter –
>
> * * *
>
> "enterprise" means any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity . . . .

Section 1962(c) of Title 18 to the United States Code provides that:

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

Section 1964(c) of Title 18 to the United States Code provides that:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefore in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee,

except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.