

they did not provide a consulting fee of \$250,000. Although the amount requested was far less than the \$10 million demanded by the defendants in *Inigo*, and the amount the victims were at risk of losing was only a few million dollars, the Sixth Circuit held that § 2B3.2 applied.

[14] In sum, in determining whether § 2B3.2 should be applied, the focus is on the economic effect on the particular victim, not the absolute magnitude of the threat. Here, Tobin's actions threatened the viability of the band. If she had carried out the destructive course of action that she threatened (and indeed, implemented to a certain extent), the band would have faced the reasonable probability of its demise.⁸ The district court thus properly applied U.S.S.G. § 2B3.2 to Tobin's conduct.

III.

We have considered all of Tobin's claims and find them to be without merit. For the reasons discussed above, we affirm the judgment of conviction and sentence imposed by the district court.



Jose and Rosa ROLO; and Dr. William and Roseanne Tenerelli

v.

CITY INVESTING COMPANY LIQUIDATING TRUST; AmBase Corporation; Carteret Bancorp, Inc.; Federal Deposit Insurance Corporation, as Successor to Resolution Trust Corporation, in its capacity as Receiver of Carteret Savings Bank, FA; The Home Insurance Company; George T. Scharffenberger; Marshall Manley; Edwin I. Hatch; Eben W. Pyne; Reubin O'D. Askew; Howard L. Clark, Jr.; Charles J. Simons; Peter R. Brinkerhoff; David F. Brown; Robert F. Ehrling; Cravath, Swaine & Moore; David G. Ormsby; Federal Deposit Insurance Corporation, in its capacity as Receiver of Southeast Bank, NA; Paine-

8. We note also that the Sentencing Guidelines do not limit § 2B3.2 to "profit-generating enterprises." There is nothing in the language of the

webber Incorporated; Merrill Lynch, Pierce, Fenner & Smith, Inc.; The Prudential Insurance Company of America; National Bank of Canada; Citicorp Real Estate, Inc.; First National Bank of Boston; Federal National Mortgage Association; Federal Home Loan Mortgage Corporation; Chase Federal Bank, FSB; Citizens and Southern Trust Company (Florida), NA; Regions Bank of Louisiana, as Successor to Secor Bank, FSB; Oxford First Corp.; The Oxford Finance Companies, Inc.; Lasalle Business Credit, Inc.; as Successor to Stanchart Business Credit, Inc.; Harbor Federal Savings and Loan Association; Greyhound Financial Corporation; Lloyds Bank PLC; and John Does 1-10.

Jose Rolo, Rosa Rolo, Dr. William Tenerelli, and Roseanne Tenerelli, and proposed intervenor plaintiffs Dominick J. Capezza, Estrelita Capezza, Jacques Cormier, Anite Cormier, Steven Kalinowski, Bernard Kalinowski, Charles R. Panellino, and Clarisse Panellino, Appellants in 95-5768.

Proposed intervenor plaintiffs Dominick J. Capezza, Estrelita Capezza, Jacques Cromier, Anite Cormier, Steven Kalinowski, Bernard Kalinowski, Charles R. Panellino, and Clarisse Panellino, Appellants in 96-5128.

Nos. 95-5768, 96-5128.

United States Court of Appeals,
Third Circuit.

Argued Sept. 16, 1996.

Decided Aug. 31, 1998.

As Amended Oct. 2, 1998.

Purchasers of lots and homes brought action against 35 named defendants based on alleged fraudulent marketing scheme to sell real estate, asserting claims under Racketeer Influenced and Corrupt Organizations Act (RICO), Interstate Land Sales Full Diselo-

Guideline or the commentary to suggest that the provision is limited in the way Tobin suggests.

sure Act, federal securities laws, and common law fraud. The United States District Court for the District of New Jersey, Dickinson R. Debevoise, J., 845 F.Supp. 182, dismissed claims. Appeal was taken, and the Court of Appeals remanded. The District Court, 897 F.Supp. 826, again dismissed claims. Purchasers appealed. The Court of Appeals, Roth, Circuit Judge, held that: (1) denying leave to amend was not abuse of discretion; (2) no private cause of action existed for aiding and abetting RICO violation; and (3) purchasers failed to plead with sufficient particularity mail and wire fraud serving as predicate acts for their civil RICO claims.

Affirmed.

1. Federal Courts ⇌669

Motion in which plaintiffs sought leave to serve amended complaint and to add and/or intervene additional parties, following dismissal of their claims, was cognizable under rule governing relief from judgment, and thus tolled time for filing notice of appeal, given plaintiffs' reasonable belief that district court had construed mandate on remand as precluding consideration of motion to file amended complaint and that motion for relief from judgment might offer broader relief. Fed.Rules Civ.Proc.Rule 60(b)(6), 28 U.S.C.A.; F.R.A.P.Rule 4, 28 U.S.C.A.

2. Federal Civil Procedure ⇌2647.1

Request for relief from judgment cannot be used as a substitute for an appeal. Fed. Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

3. Federal Courts ⇌763.1

Court of Appeals has plenary review over appeal from the dismissal of action.

4. Federal Courts ⇌817, 829

Court of Appeals may review the district court's dismissal of plaintiffs' motion for leave to amend the complaint and denial of motion for post-judgment relief for abuse of discretion only. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

5. Federal Courts ⇌952

Denying leave to amend was not abuse of discretion, given that proposed amended complaint primarily sought to replead facts and arguments that could have been pleaded much earlier in proceedings, given duration

of case and substantial effort and expense of resolving motion to dismiss first amended complaint, and given that new legal analysis established in case underlying remand for reconsideration of dismissal did not form basis for proposed amendments. 18 U.S.C.A. § 1964; Fed.Rules Civ.Proc.Rules 15(a), 60(b)(6), 28 U.S.C.A.

6. Federal Civil Procedure ⇌828.1

Decision whether to grant or to deny a motion for leave to amend rests within the sound discretion of the district court.

7. Federal Civil Procedure ⇌392

In the absence of any apparent or declared reason, such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies, or undue prejudice to the opposing party, request to add or drop parties should be freely granted.

8. Federal Civil Procedure ⇌2641

Relief from judgment is extraordinary and requires a showing of exceptional circumstances. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

9. Limitation of Actions ⇌95(3)

Under "injury and pattern discovery" method of accrual for civil claims under Racketeer Influenced and Corrupt Organizations Act (RICO), plaintiffs have four years in which to file suit from the time that they discover or should have discovered either their injury or the defendants' pattern of racketeering activity. 18 U.S.C.A. § 1961 et seq.

10. Limitation of Actions ⇌104(1)

Purchasers could not rely on fraudulent concealment to toll statute of limitations for their civil claims under Racketeer Influenced and Corrupt Organizations Act (RICO) based on alleged fraudulent marketing scheme in sales of real estate, given absence of evidence that purchasers were reasonably diligent in supervising defendants' actions with regard to their property. 18 U.S.C.A. § 1964.

11. Racketeer Influenced and Corrupt Organizations ⚡64

No private cause of action existed for aiding and abetting a violation of Racketeer Influenced and Corrupt Organizations Act (RICO), and therefore defendants who allegedly assisted others who purportedly were engaged in fraudulent marketing scheme to sell real estate could not be held liable to purchasers under RICO. 18 U.S.C.A. § 1964.

12. Action ⚡3

General criminal aiding and abetting statute has no application to private causes of action. 18 U.S.C.A. § 2.

13. Racketeer Influenced and Corrupt Organizations ⚡64

Inasmuch as the text of Racketeer Influenced and Corrupt Organizations Act (RICO) does not encompass a private cause of action for aiding and abetting a RICO violation, Court of Appeals has no authority to imply one. 18 U.S.C.A. § 1964.

14. Federal Civil Procedure ⚡636

Purchasers failed to plead with sufficient particularity mail and wire fraud serving as predicate acts for their civil claims under Racketeer Influenced and Corrupt Organizations Act (RICO), based on alleged fraudulent marketing scheme to sell real estate, when purchasers described scheme in detail but did not make specific allegations as to fraudulent tactics used against them personally, or how such tactics caused them injury. 18 U.S.C.A. §§ 1341, 1343, 1964.

15. Federal Civil Procedure ⚡636

Plaintiffs must plead with particularity the circumstances of alleged fraud; they need not, however, plead the date, place or time of the fraud, so long as they use an alternative means of injecting precision and some measure of substantiation into their allegations of fraud. Fed.Rules Civ.Proc. Rule 9(b), 28 U.S.C.A.

16. Federal Civil Procedure ⚡636

Purpose of rule requiring that circumstances of alleged fraud be pleaded with particularity is to provide notice of the precise misconduct with which defendants are charged and to prevent false or unsubstantiated charges. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

17. Federal Civil Procedure ⚡636

Courts should apply rule requiring that fraud be pleaded with particularity with some flexibility and should not require plaintiffs to plead issues that may have been concealed by the defendants. Fed.Rules Civ. Proc.Rule 9(b), 28 U.S.C.A.

Herbert I. Deutsch, Roy A. Heimlich (Argued), Deutsch & Frey, New York, NY, William J. O'Brien, Delany & O'Brien, Voorhees, NJ, for Appellants Jose Rolo; Rosa Rolo; William Tenerelli; Roseanne Tenerelli; Dominick J. Capezza; Estrelita Capezza; Jacques Cormier; Anite Cormier; Steven Kalinowski; Bernard Kalinowski; Charles R. Panellino and Clarisse Panellino.

Douglas S. Eakeley (Argued), Lowenstein, Sandler, Kohl, Fisher & Boylan, Roseland, NJ, Paul M. Dodyk, Cravath, Swaine & Moore, New York, NY, for Appellees Am-Base; City Investing Company Liquidating Trust; Carteret Bancorp Inc.; George T. Scharffenberger; Marshall Manley; Edwin I. Hatch; and Eben W. Pyne.

Nicholas deB. Katzenbach (Argued), Princeton, NJ, Peter N. Perretti, Jr., Riker, Danzig, Scherer, Hyland & Perretti, Morristown, NJ, for Appellees Cravath, Swaine & Moore and David G. Ormsby.

Alan J. Kluger (Argued), Steve I. Silverman, Kluger, Peretz, Kaplan & Berlin, Miami, FL, Joseph A. Boyle, Kelley, Drye & Warren, Parsippany, NJ, for Appellee Greyhound Financial Corporation.

John W. Little, III, Gerry S. Gibson (Argued), Steel, Hector & Davis, West Palm Beach, FL, Joseph J. Schiavone, Budd, Lerner, Gross, Rosenbaum, Greenberg & Sade, Short Hills, NJ, for Appellee Federal National Mortgage Association.

Steven M. Edwards, Davis, Scott, Weber & Edwards, New York, NY, for Appellees David F. Brown and Robert F. Ehrling.

Elizabeth J. Sher, Pitney, Hardin, Kipp & Szuch, Morristown, NJ, for Appellee Home Insurance Co.

Peter W. Homer, Homer & Bonner, Miami, FL, for Appellee Citizens and Southern Trust Company National Association.

Cite as 155 F.3d 644 (3rd Cir. 1998)

Joseph L. Buckley, Mark E. Duckstein, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, Newark, NJ, Robert T. Wright, Jr., Shutts & Bowen, Miami, FL, for Appellees Reubin O'D. Askew; Howard L. Clark, Jr.; Charles J. Simons; and Peter R. Brinkerhoff.

James J. Hagan, Bruce D. Angiolillo, Simpson, Thacher & Bartlett, New York, NY, James M. Altieri, Shanley & Fisher, Morristown, NJ, for Appellee Painewebber, Inc.

Warren H. Colodner, Kirkpatrick & Lockhart, New York, NY, for Appellee Merrill, Lynch, Pierce, Fenner & Smith, Inc.

Steven H. Reisberg, Willkie, Farr & Gallagher, New York, NY, Robert E. Bartkus, Pinto, Rodgers and Kopf, Morristown, NJ, for Appellee Prudential Insurance Company of America.

L. Louis Mrachek, Roy E. Fitzgerald, Gunster, Yoakley, Valdes-Fauli & Stewart, West Palm Beach, FL, for Appellee National Bank of Canada.

George J. Wade, Shearman & Sterling, New York, NY, Steven M. Richman, Herrick, Feinstein, Princeton, NJ, for Appellee Citicorp Real Estate.

Steven I. Adler, Cole, Schotz, Meisel, Forman & Leonard, Hackensack, NJ, for Appellee The First National Bank of Boston.

Gerald J. Houlihan, Houlihan & Partners, Miami, FL, for Appellee Chase Federal Bank.

Robert L. Young, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, Orlando, FL, for Appellee Harbor Federal Savings and Loan Association.

David T. Eames, Bodian & Eames, New York, NY, for Appellee Lloyds Bank, PLC.

Edward B. Deutsch, McElroy, Deutsch & Mulvaney, Morristown, NJ, for Appellee Regions Bank LA, as Successor to SECOR Bank, FSB.

Kevin M. Hart, Stark, & Stark, Princeton, NJ, for Federal Deposit Insurance Corporation, in its capacity as Receiver of Southeast Bank, NA and Federal Deposit Insurance Corporation, as Successor to Resolution Trust, in its capacity as Receiver of Carteret Savings Bank, FA.

John H. Denton, Connell, Foley & Geiser, Roseland, NJ, for Appellee Federal Deposit Insurance Corporation, as Successor to Resolution Trust, in its capacity as Receiver of Carteret Savings Bank, FA.

J. Marbury Rainer, Parker, Hudson, Rainer & Dobbs, Atlanta, GA, for Appellee LaSalle Business Credit, as Successor to Stanchart Business Credit, Inc.

George Kielman, Federal Home Loan Mortgage Corporation, Legal Department, McLean, VA, Gerald T. Ford, Landman, Corsi, Ballaine & Ford, Newark, NJ, for Appellee Federal Home Loan Mortgage Corporation.

Alan I. Moldoff, Adelman, Lavine, Gold & Levin, Philadelphia, PA, for Appellees Oxford Fin Co., and Oxford First Corp.

Before: BECKER, NYGAARD and ROTH, Circuit Judges.

OPINION OF THE COURT

ROTH, Circuit Judge:

This case arises from the sale of residential realty in Florida. Plaintiffs, Jose and Rosa Rolo and Dr. William and Rosanne Tenerelli, purchased lots and homes from General Development Corporation ("GDC") and its subsidiary GDV Financial, Inc. ("GDV"). They claim that they were deceived by a fraudulent marketing scheme which induced them to purchase residential lots and homes at inflated prices. This case and its related proceedings have a long and convoluted history. The present appeal is the third time this Court has considered this case.

Plaintiffs originally filed suit in 1989 in the United States District Court for the District of New Jersey alleging claims under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq* (RICO), the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1701 *et seq* ("Land Sales Act"), federal securities laws, and common law fraud against thirty-five named defendants. They also sought to represent a putative class consisting of all persons who purchased houses or homesites from GDC or GDV over the period from 1957 to 1990 and

who are members of the North Port Out-of-State Lot Owners Association ("NPA").

The district court dismissed plaintiffs' claims in their entirety. *Rolo v. City Investing Co. Liquidating Trust*, 845 F.Supp. 182 (D.N.J.1993). The court held that plaintiffs' RICO claims were time-barred; plaintiffs had failed to plead adequately the existence of a RICO conspiracy; and they had failed to satisfy the essential requirements for pleading aider and abettor liability under RICO. Although the court found that plaintiffs' complaint stated claims under the Land Sales Act for aiding and abetting against some defendants, but not others, all of their Land Sales Act Claims were time barred. The district court dismissed plaintiffs' Securities Act claims on the grounds that the sales contracts and mortgage notes were not securities within the meaning of § 10 of the 1934 Act or Rule 10b-5. Having dismissed all of plaintiffs' federal claims, the court declined to exercise pendent jurisdiction over plaintiffs' common law fraud claims. Finally, the district court denied plaintiffs' Motion to file a Second Amended Complaint that would have restructured and reformulated their action. Following a remand for reconsideration of plaintiffs' claims in light of our decision in *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258 (3d Cir.1995), the district court reaffirmed its dismissal of each of plaintiffs' claims and its denial of further leave to amend the complaint. *Rolo v. City Investing Co. Liquidating Trust*, 897 F.Supp. 826 (D.N.J.1995).

The present appeal is from the district court's decision on remand. Plaintiffs assert that the district court erred in dismissing their RICO claims and abused its discretion by denying them leave to amend their complaint. We conclude that there were adequate grounds to dismiss each of plaintiffs' RICO claims and that the district court did not abuse its discretion by denying plaintiffs further leave to amend their complaint. Accordingly, we will affirm the district court's decision on remand in its entirety.

1. The Complaint also includes a seventh group, the "John Doe" Defendants, those individuals

I. BACKGROUND

A. *The Fraudulent Scheme*

Plaintiffs allege that GDC and GDV engaged in a fraudulent marketing scheme to sell real estate in violation of several federal criminal and civil statutes. The First Amended Complaint alleges that GDC improved only a small portion of the 1,000 square mile tract of land that it owned in Florida and that it had no intention of developing the land further. Prospective purchasers were told, however, that the entire tract would be developed. According to plaintiffs, GDC targeted unsophisticated purchasers, particularly those who spoke English only as a second language. Prospective purchasers were invited to attend lavish "investment seminars" at which GDC represented that the value of the real estate continually appreciated, that there was a good resale market for the lots and houses, and that the real estate was an excellent investment. The Complaint further alleges that much information was concealed from prospective purchasers, including the very low resale value of the lots, the artificial nature of the original sale prices of the lots, and the fact that most purchasers defaulted within two years, allowing GDC to cancel their contracts and resell the same lots over and over again. According to plaintiffs, similar tactics were also used to sell homes to those who already owned lots.

B. *The Defendants*

The Amended Complaint names thirty-five defendants and classifies them according to the nature of their participation in the allegedly fraudulent scheme, placing some defendants in more than one category. The district court adopted this classification and divided the defendants into six categories:¹ City Defendants, Inside Director Defendants, Director Defendants, Financing Defendants, Mortgagee Defendants and Lot Contract Defendants. The Complaint did not specifically include the lawfirm Cravath, Swaine & Moore ("Cravath") or David Ormsby, a Cravath partner, in any of these categories. The Complaint alleges that in rendering legal services to GDC and GDV,

who were involved in the alleged conspiracy but who were not known to the appellants.

Cravath and Ormsby assisted the defendants in concealing their fraudulent scheme. Ormsby also acted as GDC's secretary from 1985-1988.

The City Defendants include City Investing Company, later City Trust, ("City"), its subsidiaries and several of its directors.² The Complaint alleges that City had an ownership interest in and controlled GDC. After the sales fraud was initially discovered, the City Defendants attempted to distance themselves from GDC. With the assistance of Cravath, City Investing sought to disassociate itself from GDC by transferring itself into a liquidating trust, City Trust. The City Defendants and Cravath arranged for City to sell 62% of GDC stock to the public and retain 38% in City Trust for later distribution. GDC also borrowed in excess of \$100 million,³ which was remitted to City as a dividend.

The Inside Director Defendants include Edwin Hatch, Marshall Manley, Eben Pyne and George Scharffenberger, individuals who served as directors of GDC and City Trust for various periods from September 1985 onwards. The Director Defendants, Reubin O'D. Askew, Howard L. Clark, Jr., Charles J. Simons, and Peter R. Brinkerhoff, are persons who served as "outside directors" of GDC for various periods dating from September 1985. Also included in this category are David F. Brown and Robert F. Ehrling, who served as both officers and directors of GDC during this period. Both Brown and Ehrling were convicted of criminal charges in connection with their involvement in the fraudulent scheme. Their convictions were subsequently reversed on appeal. *See infra*.

2. Specifically, the City Defendants include: City Trust, George Scharffenberger, Marshall Manley, Edwin Hatch, Eben Pyne, Ambase Corp., The Home Insurance Co., Carteret Bancorp, Inc., and Carteret Savings Bank, FA.

3. It is unclear from the district court's opinion who lent this money to GDC. *See Rolo*, 845 F.Supp. at 204.

4. The First Amended Complaint lists seven entities under the heading "Financing Conspirators." These entities are: Southeast Bank, N.A., PaineWebber Inc., Merrill Lynch, Pierce, Fenner & Smith, Inc., The Prudential Insurance Company of America, Citicorp Real Estate, Inc., National Bank of Canada and First National Bank of Boston.

The Complaint alleges that the Inside Director Defendants along with the Director Defendants controlled the City Defendants and used them in furtherance of the fraudulent scheme.

The Financing Defendants include banks and financial institutions,⁴ who provided a variety of financial services to the other defendants. Some, for example, underwrote the \$125,000,000 in notes issued by GDC in its 1988 public offering. Others loaned GDC money and extended credit to the company. Another "warehoused" new GDV mortgages until they could be pooled and sold, while also lending GDV money using these mortgages as collateral. The Complaint alleges that these defendants knew or should have known of GDC's sales fraud.

The mortgagee defendants, including the Federal National Mortgage Association ("Fannie Mae") and the Federal Home Loan Mortgage Corporation ("Freddie Mac") and a number of private institutions,⁵ purchased pools of mortgages on GDC houses. The Complaint alleges that these defendants knew or recklessly disregarded information that the GDC mortgages were overvalued. The Complaint also alleges that Fannie Mae and Freddie Mac stopped purchasing GDV mortgages in 1985 because GDV's practices did not meet their standards, but that these defendants permitted GDV to repurchase the mortgages through a confidential agreement. In addition, they did not strip GDV of its privileges to sell mortgages under the Federal Home Mortgage Act.

The Lot Contract Defendants,⁶ purchased pools of monthly payments due to GDC from

5. The First Amended Complaint lists nine entities under the heading of "Mortgagee Conspirators." In addition to Fannie Mae and Freddie Mac, allegations were made against the following institutions: Chase Federal Bank, FSB, Citizens and Southern Trust Co., N.A. n/k/a NationsBank Trust Co., Secor Bank, FSB n/k/a Regions Bank of Louisiana, The Home Insurance Co., Carteret Bancorp, Inc., Carteret Savings Bank, FA and Prudential. The FDIC also appeared as successor to the Resolution Trust Corporation in its capacity as receiver of Carteret Savings Bank, FA.

6. The Lot Contract Defendants include the following entities: Oxford First Corp. and the Oxford Finance Companies, Inc., Greyhound Financial Corporation, StanChart Business Credit,

the sale of residential property in Florida. Some of these defendants authorized GDC to service their contracts, including collection from and negotiations with the lot owners. Others collected their payments from owners directly. Under GDC's agreements with these defendants, substitution pools were used as a security. When a contract or note went into default, GDC would replace it with a performing contract. Thus, these defendants incurred no losses from defaults and had no incentive to ensure that loans reflected the true value of the property. The Complaint alleges that these defendants had conducted extensive financial review of GDC and knew or should have known of GDC's fraudulent scheme, but chose to remain silent in order to protect their own interests.

The defendants must also be divided into two additional categories, the primary and secondary defendants. The primary defendants are those defendants who, plaintiffs allege, participated in the operation and management of the affairs of GDC through a pattern of racketeering activity. The primary defendants are City Trust, George Scharffenberger, Marshall Manley, Edwin Hatch, Eben Pyne, David F. Brown, and Robert F. Ehrling. All of the remaining defendants are categorized as secondary defendants, who, it is alleged, aided and abetted the pattern of racketeering activity devised and controlled by the primary defendants. The plaintiffs allege that the actions of the secondary defendants are also in violation of RICO.

C. Procedural History

Plaintiffs filed their original complaint on August 8, 1989, in the United States District Court for the District of New Jersey against GDC and its subsidiary, GDV, asserting claims under RICO, § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5, the Land Sales Act, various state RICO statutes, and breach of fiduciary obligations. On Sep-

Inc., Lloyds Bank, PLC, Harbor Federal Savings and Loan Association, Merrill Lynch, Pierce, Fenner & Smith, Inc., National Bank of Canada, Citicorp Real Estate, Inc. and First National Bank of Boston.

7. Specifically, plaintiffs assert claims under § 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j, the Racketeer Influenced

and Corrupt Organizations Act, 18 U.S.C. § 1964, and the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1703(a), as well as common law fraud claims. The district court had jurisdiction over the statutory claims pursuant to 15 U.S.C. § 78aa, 18 U.S.C. § 1964, and 15 U.S.C. § 1719, and exercised pendent jurisdiction over the common law claims.

tember 7, 1989, plaintiffs filed an amended complaint, adding claims for breach of contract and fraud.

Defendants moved to dismiss the First Amended Complaint, and in January 1990 the district court dismissed the case in its entirety finding that plaintiffs had failed to plead fraud with the particularity required by Fed.R.Civ.P. 9(b). Plaintiffs were given 120 days in which to file a second amended complaint. Before plaintiffs filed their amended complaint, on April 16, 1990, the case was administratively terminated because GDC had filed a petition for bankruptcy under Chapter 11.

In November 1990, plaintiffs filed the present action. As in their earlier action, plaintiffs allege that the defendants participated in a fraudulent marketing scheme in violation of several federal criminal and civil statutes.⁷ Although plaintiffs listed GDC and GDV as defendants in this action, they did not serve either company with a copy of the summons or the complaint. *Rolo v. General Development Corp.*, 949 F.2d 695, 698 (3d Cir.1991). Plaintiffs asserted before the district court their intention "to delete all references to GDC and GDV as defendants." *Rolo v. General Dev. Corp.*, Civ. Action No. 90-4420, slip op. at 15 (D.N.J. April 26, 1990). Accordingly, neither the district court nor this Court, in its 1991 decision, treated GDC or GDV as defendants in this case. *Rolo*, 949 F.2d at 698.

About two weeks after the filing of this case, plaintiffs filed a proof of claim with the bankruptcy court, on behalf of all members of the NPA, a group of more than 5,000 individuals who had purchased property from GDC and its agents. *Id.* In support of their claim, plaintiffs reiterated the allegations detailed in their complaint, which was attached to their proof of claim. *Id.* During the bankruptcy proceedings, the bankruptcy judge

and Corrupt Organizations Act, 18 U.S.C. § 1964, and the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1703(a), as well as common law fraud claims. The district court had jurisdiction over the statutory claims pursuant to 15 U.S.C. § 78aa, 18 U.S.C. § 1964, and 15 U.S.C. § 1719, and exercised pendent jurisdiction over the common law claims.

denied class treatment of plaintiffs' claims and approved settlements in which over 60,000 homesite and house purchasers participated. *See In re GDC*, No. 90-12231-BKC-AJC, slip op. at 1, 6 (Bankr.S.D.Fla. Aug. 16, 1991).

Proceedings in this case were stayed by the district court from December 1990 until March 1993, pending disposition of GDC and GDV's bankruptcy proceedings. *Rolo*, 949 F.2d at 699. In April 1991 the district court denied reconsideration of its stay order and "further directed that the action be stayed on the terms set forth in the December Order pending the resolution of the criminal cases against Brown and Ehrling."⁸ *Id.* The following month, the district court also stayed plaintiffs' request for a preliminary injunction to bar Ambase and City Investment from liquidating and distributing their assets. *Id.* These stay orders were the subject of the first appeal before this Court.⁹

On May 13, 1991, plaintiffs filed their First Amended Complaint, which no longer named either GDC or GDV as a defendant, but added a number of additional defendants. This complaint also dropped plaintiffs' claim for breach of contract. Later the same month, the defendants moved to dismiss the First Amended Complaint pursuant to Rule 12(b)(2) and 12(b)(6). In June, plaintiffs voluntarily withdrew their claims for breach of an implied covenant of good faith, negligence and negligent misrepresentation.

In their response to the defendants' Motion to Dismiss, plaintiffs first raised their

challenge to the enterprise/person distinction under RICO. Although this argument raised allegations not contained in the amended complaint, the plaintiffs did not formally request further leave to amend the complaint. In considering the plaintiffs' response, the district court treated these amended RICO allegations as a Second Amended Complaint. In a lengthy Opinion and Order dated December 27, 1993, the district court granted defendant's motions to dismiss under Rule 12(b)(6), and granted the motions to dismiss pursuant to Rule 12(b)(2) for lack of personal jurisdiction of Scharffenberger, Manley, Hatch, Pyne, Askew, Brinkerhoff, Clark and Simons. The dismissal of all of plaintiffs' claims rendered the Motion for Class Certification moot. The court dismissed the plaintiffs' complaint without granting leave to file a further amended complaint. Plaintiffs appealed the dismissal of their claims to this Court. Following oral argument, on November 8, 1994, we issued a Judgment Order affirming the decision of the district court for "substantially the reasons" set out in the district court opinion. *Rolo v. City Investing Co. Liquidating Trust*, 66 F.3d 312 (3d Cir. 1994).

On November 18, 1994, plaintiffs filed a Petition for Rehearing and Suggestion for Rehearing In Banc. Their Petition requested this Court to reconsider its jurisprudence on the person/enterprise distinction, which was applied to claims brought under RICO. *See, e.g., Hirsch v. Enright Refining Co.*, 751 F.2d 628, 633 (3d Cir.1984) (concluding that

scheme reasonably calculated to deceive persons of ordinary prudence and comprehension was devised." *Id.* at 1553. Both Brown and Ehrling are named as defendants in the action presently before this Court.

8. Prior to the filing of this case GDC, its Chairman David Brown, and President Robert Ehrling, were indicted for their involvement in this scheme. GDC pled guilty to fraud and established a \$169 million fund to pay its customers. It also filed for bankruptcy under Chapter 11. *United States v. Brown*, 79 F.3d 1550, 1555 (11th Cir.1996). A civil action has also been brought by the United States against GDC. No. 90-0879-Civ.Nesbitt (S.D.Fla.). For their participation in the scheme, Brown and Ehrling were charged with 73 total counts of mail fraud, interstate transportation of persons in furtherance of a fraud, and conspiracy. Brown was convicted on one conspiracy count and Ehrling was convicted on 39 counts. *Id.* Both received jail sentences for their participation in the conspiracy. On appeal, however, the Eleventh Circuit Court of Appeals reversed their convictions finding that "insufficient evidence was presented that a

9. On appeal, we held that the district court's order staying this action pending final resolution of the related bankruptcy and criminal proceedings was not an appealable order under the collateral-order doctrine. *Rolo*, 949 F.2d at 700. Moreover, we concluded that plaintiffs could not demonstrate exceptional circumstances sufficient to warrant the grant of mandamus relief. *Id.* at 702. In contrast, however, the order staying consideration of the request for preliminary injunction could be appealed interlocutorily, and the district court erred in deferring consideration of the merits of the requested injunction. *Id.* at 703-04.

defendant corporation could not be liable under § 1962 in that “the ‘person’ subject to liability cannot be the same entity as the ‘enterprise’ ”). While plaintiffs’ Petition was pending, another panel of this Court decided *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258 (3d Cir.1995), holding that under RICO, officers or employees “may properly be held liable as persons managing the affairs of their corporation as an enterprise.” 46 F.3d at 261. This holding endorsed the position taken by plaintiffs in their Petition for Rehearing. By Order dated April 4, 1995, we granted plaintiffs’ Petition, vacated our earlier Judgment Order, vacated the order of dismissal issued by the district court, and remanded the case to the district court for reconsideration in light of the decision in *Jaguar Cars. Rolo v. City Investing Co. Liquidating Trust*, No. 94-5057, 94-5058, slip op. at 2, 66 F.3d 312 (3d Cir.1995). We did not retain jurisdiction over the case.

Following the remand, the parties disputed whether reconsideration in light of the holding in *Jaguar Cars* was necessary as there were other, independent grounds to support dismissal of all of plaintiffs’ claims. Plaintiffs also advised the district court that they intended to seek leave to file a further amended complaint, to add and drop parties, and to restate their claims in light of *Jaguar Cars*. By letter dated April 12, 1995, the district court requested briefing from the parties regarding the appropriate actions for the court to take on reconsideration. As requested by the district court, the parties filed their initial briefs on June 1, 1995. The following day, plaintiffs also served their formal motion for leave to serve a proposed Second Amended Complaint¹⁰ and to add and drop parties. By letter dated June 8, 1995, the district court adjourned the Motion for leave to serve an amended complaint until the court had completed the reconsideration mandated by this Court.

10. Although the district court had treated certain allegations contained in the plaintiffs’ response to the Motion to Dismiss as a Second Amended Complaint, the proposed Amended Complaint would have been the Second Amended Complaint, and we will refer to it as such in this Opinion.

On August 24, 1995, the district court once again dismissed this case in its entirety, holding all other grounds for dismissing plaintiffs’ claims were unaffected by *Jaguar Cars. Rolo*, 897 F.Supp. at 833. The district court also dismissed plaintiffs’ Motion to file a Second Amended Complaint and to add and drop parties. *Id.* Within ten days after the court’s final order, plaintiffs moved for relief pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, seeking leave to serve their proposed Second Amended Complaint and to add and/or intervene additional parties. Following oral argument on the motion, on October 23, 1995, the district court ruled from the bench, denying relief pursuant to Rule 60(b). On November 1, 1995, plaintiffs filed their notice of appeal from the district court’s decisions dismissing the complaint and denying postjudgment relief pursuant to Rule 60(b). Specifically, plaintiffs appeal from the dismissal of their RICO claims and from the denial of leave to amend the complaint.

II. JURISDICTION AND STANDARDS OF REVIEW

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291, as the appeal arises from a final decision of the district court dismissing all of the remaining claims of the First Amended Complaint, dismissing plaintiffs’ motion for leave to serve a Second Amended Complaint, and denying plaintiffs’ motion, pursuant to Rule 60(b), for leave to serve a further amended complaint. The district court had subject matter jurisdiction over plaintiffs’ federal claims pursuant to 28 U.S.C. § 1331 and exercised pendent jurisdiction over their state claims.¹¹

Defendants contend, however, that we may not hear this appeal because plaintiffs did not file a timely notice of appeal. Rule 4 of the Federal Rules of Appellate Procedure provides that a notice of appeal must be filed within 30 days after the date of entry of the order appealed, but that if a party files a

11. This case was filed prior to the enactment of the supplemental jurisdiction statute, 28 U.S.C. § 1367 in 1990, which combined the concepts of pendent and ancillary jurisdiction. See *In re: Prudential Ins. Co. of America Sales Practices Litigation*, 148 F.3d 283, 301 (3d Cir.1998).

“timely motion” for relief under Rule 60(b), the time for appeals runs from the entry of the order disposing of the motion. In this case, the district court dismissed plaintiffs’ claims on August 24, 1995. Plaintiffs moved for relief pursuant to Rule 60(b) within the 10 day time limit provided by Rule 4(a)(4)(F) of the Federal Rules of Appellate Procedure. The district court denied their Rule 60(b) Motion on October 23, 1995, and plaintiffs filed their notice of appeal on November 1, 1995, within the 30 day time limit provided by the rule.

[1, 2] Defendants assert that plaintiffs’ motion was not properly cognizable pursuant to Rule 60(b) and therefore the motion did not toll the time for filing a notice of appeal. Defendants argue that the Rule 60(b) Motion sought only to persuade the district court to reconsider issues that it had already fully considered and rejected. Defendants correctly state that a request for relief pursuant to Rule 60(b) cannot be used as a substitute for an appeal. *Martinez–McBean v. Government of the V.I.*, 562 F.2d 908, 911 (3d Cir. 1977). See also *Union Switch & Signal v. United Electrical, Radio & Machine Workers of America, Local 610*, 900 F.2d 608, 615 (3d Cir.1990) (finding that a party’s characterization of their motion is not dispositive, instead the court must look to the “purpose the motion seeks to achieve”). In response, plaintiffs contend that they filed a Rule 60(b) Motion rather than an immediate appeal because they believed that the district court had construed this Court’s mandate as precluding consideration of their Motion to file a Second Amended Complaint. Plaintiffs considered the change in the law following the original dismissal of their case coupled with the district court’s narrow construction of our mandate to constitute “exceptional circumstances” meriting review pursuant to Rule 60(b)(6).

Although plaintiffs’ Rule 60(b) Motion was ultimately unsuccessful, it was not so deficient that it was not cognizable pursuant to Rule 60. Plaintiffs could reasonably believe that the district court had dismissed plaintiffs’ Request for Leave to file an amended complaint because the district judge believed that our mandate had limited review to the issues created by the decision in *Jaguar Cars* and that a Rule 60 motion might offer broad-

er relief. Plaintiffs’ position is buttressed by the fact that within a relatively short time frame, controlling precedent was reversed after the prior dismissal had been affirmed by judgment order, but before completion of their appeal, which concluded when the prior dismissal was vacated on rehearing. Accordingly, plaintiffs’ notice of appeal was timely filed and their present appeal is properly before us.

[3, 4] We have plenary review over plaintiffs’ appeal from the dismissal of their action. *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1411 (3d Cir.1993). We may review the district court’s dismissal of their motion for leave to amend the complaint and denial of their motion for post-judgment relief under Rule 60(b) for abuse of discretion only. *In re Burlington Coat Factory Securities Litigation*, 114 F.3d 1410, 1434 (3d Cir.1997); *Resolution Trust Corp. v. Forest Grove, Inc.*, 33 F.3d 284, 288 (3d Cir.1994).

III. DISCUSSION

A. Denial of Leave to Amend

Plaintiffs argue that the district court must have misconstrued this Court’s April 4, 1995, mandate remanding the case to the district court for reconsideration in light of the decision in *Jaguar Cars* because, they contend, it refused to consider their motion for leave to serve a Second Amended Complaint. Plaintiffs also argue that the district court abused its discretion when it denied their Rule 60(b) Motion seeking leave to amend. We find that the district court neither misunderstood our mandate nor abused its discretion by denying plaintiffs further leave to amend the complaint.

Our mandate was designed to offer the district court broad flexibility to reconsider its earlier ruling in light of our decision in *Jaguar Cars*. Our April 4, 1995, Order provided in pertinent part:

The petition for rehearing is granted, the orders of the district court from which the appeal were taken are vacated, and the matters are remanded to the district court for reconsideration in light of *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d

258 (3d Cir.1995). We do not retain jurisdiction.

Rolo, No. 94-5057, 94-5058, slip op. at 2, 66 F.3d 312. The district court was free to reconsider its original ruling, dismissing the request for leave to amend, and also to consider the new motion for leave to amend, in light of the decision in *Jaguar Cars*.

Plaintiffs contend that the district court thought that under this Court's mandate, it could not consider their Motion for Leave to Amend. The district court's August 24, 1995, Opinion states that plaintiffs' Motion for Leave to Amend is "dismissed." *Rolo*, 897 F.Supp. at 833. The court wrote, "the remand order did not contemplate that plaintiffs be allowed to reconstitute and restructure their action through the vehicle of an amended complaint and the addition and deletion of parties" and that "the motion to serve a second amended and supplemental complaint and to add and drop parties should not be considered." *Id.* at 827-28. On the other hand, the district court discussed the proposed amended complaint, noting that it would fundamentally alter the nature of the claims and concluding that it did "not believe that the Third Circuit intended the reconsideration to be on the basis of an amendment to an already much amended complaint." *Id.* at 831. The district judge did not "consider the mandate as requiring consideration of the Proposed Complaint or any other proposed amended complaint." *Id.* at 832. Similarly, at oral argument on plaintiffs' Rule 60(b) Motion, the Judge stated, "I concluded that the remand order did not require and the circumstances did not warrant hearing a motion for leave to file a further amended and supplemental complaint and to substitute new plaintiffs." *Rolo v. City Investing Co. Liquidating Trust*, No. 90-4420 slip op. at *24 (D.N.J. Oct. 23, 1995) (transcript of hearing denying plaintiffs' Rule 60(b) motion).

Under these circumstances, we conclude that the actions of the district court are consistent with this Court's mandate. The court considered the impact of *Jaguar Cars* and determined that, in light of the procedural posture of the case, our mandate did not require that leave to amend be granted when there were other adequate grounds for upholding the decision to dismiss the complaint.

[5-8] In addition, the district court did not abuse its discretion by denying plaintiffs leave to amend pursuant to Rule 15(a) or Rule 60(b)(6). Rule 15(a) of the Federal Rules of Civil Procedure provides that a party may seek leave of the court to amend a pleading and that such leave "shall be freely given when justice so requires." The decision whether to grant or to deny a motion for leave to amend rests within the sound discretion of the district court. *Howze v. Jones & Laughlin Steel Corp.*, 750 F.2d 1208, 1212 (3d Cir.1984). The Supreme Court has stated, however, that, "[i]n the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendment previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, etc.—the leave sought should, as the rules require, be 'freely given.'" *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). The same standard applies when considering a request to add or drop parties. In contrast, relief under Rule 60(b) is extraordinary and requires a "showing of exceptional circumstances." *Marshall v. Board of Education*, 575 F.2d 417, 425-26 (3d Cir.1978).

In this case, the plaintiffs' proposed Second Amended Complaint primarily seeks to replead facts and arguments that could have been pled much earlier in the proceedings. In *Gasoline Sales, Inc. v. Aero Oil Company*, 39 F.3d 70 (3d Cir.1994), affirming the district court's refusal to grant leave to amend, we reasoned:

... as the district court stated, "three attempts at a proper pleading is enough" and a "plaintiff has to carefully consider the allegations to be placed in a complaint before it is filed." [Plaintiff] is not seeking to add claims it inadvertently omitted from its prior complaints or which it did not know about earlier. Rather [plaintiff] is modifying the allegations in hopes of remedying factual deficiencies in its prior pleadings, even to the point of contradicting its prior pleadings.

Id. at 74. This description is equally applicable to the procedural posture of this case. Plaintiffs have not only had the opportunity

to file an amended complaint, but the district court also accepted certain allegations contained in their response to defendants' motion to dismiss as a Second Amended Complaint. Plaintiffs have already had ample opportunity to plead their allegations properly and completely.

The duration of this case, and the substantial effort and expense of resolving defendants' Motion to Dismiss the First Amended Complaint also support the district court's denial of leave to amend. Although the district court did not make specific factual findings on this question, these factors could constitute undue delay, bad faith or prejudice to the defendants. See *Adams v. Gould*, 739 F.2d 858, 863-64 (3d Cir.1984). Finally, in our Judgment Order of November 8, 1994, which was later vacated, we ruled that the district court had not erred in denying plaintiffs leave to amend. *Rolo v. City Investing Co. Liquidating Trust*, Nos. 94-5057, 94-5058, slip op. at 2 (3d Cir. Nov. 8, 1994). Because the new legal analysis established in *Jaguar Cars* does not form the basis for plaintiffs' requested amendments, the district court did not abuse its discretion by summarily dismissing plaintiffs' renewed Motion for Leave to Amend.

B. Statute of Limitations

In its original opinion dismissing this case, the district court concluded that plaintiffs' RICO claims against the primary defendants could not survive because plaintiffs had "failed to plead that the RICO 'persons' (GDC's officers, directors and controlling shareholders) were separate and distinct from the 'enterprise' (GDC)." *Rolo*, 897 F.Supp. at 832. In the alternative, the district court found that these claims could also be dismissed on the grounds that they were time barred. *Id.* Plaintiffs' aiding and abetting claims under RICO were dismissed because they did not meet the "operation or management" test of *Reves v. Ernst & Young*, 507 U.S. 170, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993), and for "failure to plead anything more than general and conclusory allegations of knowledge or participation in a scheme." *Rolo*, 897 F.Supp. at 833. Following our decision in *Jaguar Cars*, the enterprise/person distinction no longer constituted a grounds for dismissing their RICO claims

against the primary defendants. The district court found that other, independent reasons supported dismissal of all plaintiffs' RICO claims. The court concluded that plaintiffs' RICO claims could be dismissed as to all defendants on the grounds that they were not timely filed. *Rolo*, 897 F.Supp. at 833. In addition, the grounds for the dismissal of the aiding and abetting claims against the secondary defendants were unaffected by the decision in *Jaguar Cars. Id.*

Although RICO does not contain an express statute of limitations for civil actions, the Supreme Court has held that RICO claims are subject to the four year statute of limitations applicable to civil enforcement actions under the Clayton Act, 15 U.S.C. § 15b. *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 152-56, 107 S.Ct. 2759, 97 L.Ed.2d 121 (1987). Accordingly, to be timely, plaintiffs' claims can have accrued no earlier than November 8, 1986, for the claims contained in the original complaint and May 13, 1987, for those claims contained in the First Amended Complaint.

At the time plaintiffs filed both their original complaint and their First Amended Complaint, this Court recognized the "last predicate act" method for calculating the accrual of civil RICO claims. Under the "last predicate act" method of accrual:

Civil RICO claims accrue at the time when the plaintiff knew or should have known that the elements of a civil RICO action existed. However, if further predicate acts occur that are part of the same pattern of racketeering, regardless of whether they injure the plaintiff or if the plaintiff suffers further injury from a predicate act that is part of the same pattern of racketeering, even if that predicate act occurred outside the limitations period, the statute of limitations begins to run from the date that the plaintiff knew or should have known of the last such act or the last such injury.

Davis v. Grusemeyer, 996 F.2d 617, 623 (3d Cir.1993) (citation omitted). Relying in part upon this accrual method, plaintiffs contend that the district court erred in concluding that their RICO claims were not timely filed.

During the pendency of this appeal, the Supreme Court held that the last predicate act accrual method was not a proper interpretation of the RICO statute of limitations. *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 117 S.Ct. 1984, 138 L.Ed.2d 373 (1997). The Court declined, however, to determine which of the remaining accrual methods is the appropriate one.

[9] The accrual method that provides plaintiffs with the longest period of time in which to file their claims is the “injury and pattern discovery” method, which has also been applied in this Circuit. See *Keystone Ins. Co. v. Houghton*, 863 F.2d 1125, 1130 (3d Cir.1988). Under this method, plaintiffs have four years in which to file suit from the time that they discover or should have discovered their injury and the defendants’ pattern of racketeering activity.

[10] Given that plaintiffs purchased their properties in the 1970s, it seems likely that they should have discovered the defendants’ allegedly fraudulent activities prior to 1986 or 1987, when their complaints were filed.¹² We will not, however, address this issue directly as other adequate grounds exist for dismissing the plaintiffs’ RICO claims.

C. Aiding and Abetting Liability

[11] The claims against the vast majority of defendants are secondary claims, contentions that these defendants assisted the primary defendants in defrauding the plaintiffs. The district court dismissed the complaint as to these defendants, because the plaintiffs had failed to plead that the alleged aiders and abettors had “participated in the operation or management” of the alleged enterprise, as required by the Supreme Court’s decision in *Reves v. Ernst & Young*, 507 U.S. 170, 183, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993). *Rolo*, 897 F.Supp. at 829. The district court also found that had the allegations of the Amended Complaint satisfied the *Reves* requirement, these allegations would be insufficient because they fail to meet the essential pleading requirements for aiding

12. In addition, plaintiffs’ claim that they could not have discovered their claims due to the fraudulent concealment of the defendants is unavailing. In *Klehr*, the Court clarified that in order to use fraudulent concealment to toll the statute of limitations, plaintiffs must have been

and abetting claims and are barred by RICO’s four year statute of limitations. *Id.* (citing *Walck v. American Stock Exchange, Inc.*, 687 F.2d 778, 791 (3d Cir.1982)). We will affirm the district court’s dismissal of the plaintiffs’ RICO aiding and abetting claims without reaching either of the district court’s grounds for dismissing these allegations because we are convinced that a private cause of action for aiding and abetting a RICO violation cannot survive the Supreme Court’s decision in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994).

In *Central Bank*, the Supreme Court addressed the question of whether a private plaintiff may bring a cause of action for aiding and abetting under the Securities Exchange Act of 1934, § 10(b). The Court’s analysis began and ended with a review of the language of the statute. “It is inconsistent with the settled methodology in § 10(b) cases to extend liability beyond the scope of conduct prohibited by the statutory text.” *Id.* at 177, 114 S.Ct. 1439. Reasoning that the text of § 10(b) does not reach aiding and abetting a violation of § 10(b), the Court concluded that “the statute itself resolves the case.” *Id.* at 177–78, 114 S.Ct. 1439. The Court rejected the argument that Congress had intended to permit private actions for aiding and abetting, stating “Congress knew how to impose aiding and abetting liability when it chose to do so.” *Id.* at 176, 114 S.Ct. 1439. The Court explained,

Congress has not enacted a general civil aiding and abetting statute. . . . [W]hen Congress enacts a statute under which a person may sue and recover damages from a private defendant for violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors.

Id. at 181, 114 S.Ct. 1439. The Court refused to entertain arguments based upon reference to general tort principles or the policy considerations supporting inference of a Rule

reasonably diligent in protecting their interests. 117 S.Ct. at 1993. Whether or not plaintiffs should have discovered their claims prior to 1986, there is no evidence that plaintiffs were reasonably diligent in supervising the defendants’ actions with regard to their property.

10b-5 aiding and abetting cause of action. *Id.* at 181, 188, 114 S.Ct. 1439.

The Court also rejected the argument that a private cause of action for aiding and abetting in violation of § 10(b) could be implied by reference to 18 U.S.C. § 2, the criminal aiding and abetting statute. The Court wrote,

[W]hile it is true that an aider and abettor of a criminal violation of any provision of the 1934 Act, including § 10(b), violates 18 U.S.C. § 2, it does not follow that a private civil aiding and abetting cause of action must also exist. We have been quite reluctant to infer a private right of action from a criminal prohibition alone. . . .

Id. at 190, 114 S.Ct. 1439. Thus, the Court concluded that because the text of § 10(b) itself does not prohibit aiding and abetting, a private plaintiff may not maintain a suit for aiding and abetting in violation of § 10(b).

[12] We conclude that the same analysis controls our construction of the civil RICO provision, 18 U.S.C. § 1964. Section 1964(c) establishes a civil remedy in favor of “[a]ny person injured in his business or property by reason of a violation of section 1962.” Like § 10(b), the text of § 1962 itself contains no indication that Congress intended to impose private civil aiding and abetting liability under RICO. Criminal liability for aiding and abetting a violation of § 1962 is imposed by reference to the general aiding and abetting statute, 18 U.S.C. § 2. This provision has no application to private causes of action. *See Central Bank of Denver*, 511 U.S. at 181–82, 114 S.Ct. 1439. Thus, reference to 18 U.S.C. § 2 cannot provide the basis for the imposition of civil liability for aiding and abetting a RICO violation.

[13] Similarly, despite the existence of cogent policy arguments in support of extending civil liability to aiders and abettors of RICO violations, under *Central Bank of Denver*, we must “interpret and apply the law as Congress has written it, and not [] imply private causes of action merely to effectuate the purported purposes of the statute.” *In re Lake States Commodities, Inc.* 936 F.Supp. 1461, 1475 (N.D.Ill.1996). Because the text of the RICO statute does not encompass a private cause of action for aiding and abetting a RICO violation, “in accordance

with the policies articulated in *Central Bank of Denver*”, we have no authority to imply one. *Hayden v. Paul, Weiss, Rifkind, Wharton & Garrison*, 955 F.Supp. 248, 255–56 (S.D.N.Y.1997); *see also In re Lake States*, 936 F.Supp. at 1475–76; *Department of Economic Dev. v. Arthur Andersen & Co.*, 924 F.Supp. 449, 475–77 (S.D.N.Y.1996). On this basis, we will affirm the district court’s dismissal of the RICO claims against all of the secondary defendants.

We reach this result despite our discussion of aiding and abetting liability in *Jaguar Cars*, a case decided after *Central Bank of Denver*. *See* 46 F.3d at 270. In *Jaguar Cars*, the opinion did not address the impact of *Central Bank of Denver* on earlier cases that had recognized a private cause of action for aiding and abetting under RICO. The decision in *Jaguar Cars* focused on whether there had been sufficient evidence to find the defendant liable for aiding and abetting a RICO violation. *See* 46 F.3d at 270. The parties did not challenge the existence of a cause of action for aiding and abetting, and we did not raise the issue *sua sponte*. Although, under this Court’s Internal Operating Procedures, we are bound by, and lack the authority to overrule, a published decision by a prior panel, *see* I.O.P. 9.1, we conclude that the discussion of a private cause of action for aiding and abetting a RICO violation in *Jaguar Cars* does not control our analysis in this case. The decision in *Central Bank of Denver* was not called to the attention of the panel in *Jaguar Cars*, and the panel’s opinion neither explicitly nor implicitly decided the impact of *Central Bank of Denver* on the continued availability of a private cause of action for aiding and abetting a RICO violation.

D. *Failure to Plead Fraud with the Requisite Particularity*

[14] The Amended Complaint alleges that the primary defendants, those defendants who actually participated in the operation and management of the fraudulent scheme, committed mail and wire fraud as predicate racketeering acts. Because the Complaint alleges that these defendants participated in the operation or management of the racketeering enterprise, the allegations against the primary defendants conform with

the requirements for liability under RICO established by *Reves v. Ernst & Young*. Originally, the district court dismissed these claims for failure to plead that the RICO “persons” were separate and distinct from the RICO “enterprise.” *Rolo*, 897 F.Supp. at 829. Following the decision in *Jaguar Cars*, the district court reaffirmed its dismissal of these claims against the primary defendants, finding that they were time barred. *Id.* at 833. We will affirm the dismissal of these claims without reaching the statute of limitations question because plaintiffs’ allegations fail to satisfy the pleading requirements established by Fed.R.Civ.P. 9(b).

[15–17] Rule 9(b) states, “In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.” Thus, under Fed.R.Civ.P. 9(b), plaintiffs must plead with particularity the “circumstances” of the alleged fraud. They need not, however, plead the “date, place or time” of the fraud, so long as they use an “alternative means of injecting precision and some measure of substantiation into their allegations of fraud.” *Seville Indus. Machinery v. Southmost Machinery*, 742 F.2d 786, 791 (3d Cir.1984). The purpose of Rule 9(b) is to provide notice of the “precise misconduct” with which defendants are charged and to prevent false or unsubstantiated charges. *Id.* Courts should, however, apply the rule with some flexibility and should not require plaintiffs to plead issues that may have been concealed by the defendants. See *Christidis v. First Pennsylvania Mortg. Trust*, 717 F.2d 96, 99 (3d Cir.1983).

In *Seville*, the plaintiff met this standard because the subject and nature of each alleged misrepresentation was adequately plead. 742 F.2d at 791. We found that,

Seville adequately satisfied the requirements of Rule 9(b) by incorporating into the complaint a list identifying with great specificity the pieces of machinery that were the subject of the alleged fraud. . . . The Complaint sets forth the nature of the alleged misrepresentations, and while it does not describe the precise words used, each allegation of fraud adequately describes the nature and subject of the alleged misrepresentation.

Id. In contrast, in *Saporito v. Combustion Engineering*, 843 F.2d 666 (3d Cir.1988), cert. granted and judgment vacated on other grounds, 489 U.S. 1049, 109 S.Ct. 1306, 103 L.Ed.2d 576 (1989), the plaintiffs failed to satisfy this standard. The plaintiffs’ complaint alleged that “. . . defendants and/or persons under their direction or control provided notice to certain C–E employees other than plaintiffs during the [options period], that C–E was in the process of planning and promulgating [a Voluntary Separation Incentive Plan].” *Id.* at 673. This Court held that their Complaint was deficient because it did not adequately allege who made the statements (“defendants and/or persons under their direction or control”) or who received the allegedly fraudulent information (“certain C–E employees other than the plaintiffs”). *Id.* at 675.

In this case, plaintiffs have alleged numerous misrepresentations, and the fraudulent scheme is described in some detail. For example, the Complaint alleges that “[d]uring standard sales presentations, the moderators acting for GDC would misrepresent the supply, demand and value of the lots” by stating that the prices for the lots would increase the following day and that the number of lots for sale had decreased due to prior purchases. Amended Complaint at ¶ 84. The moderators also allegedly misrepresented GDC’s intentions and abilities with regard to development of the communities. Amended Complaint at ¶¶ 82–115. Similarly, the Complaint alleges that in the trips sponsored by GDC to the communities, GDC “arranged with hotel staff to screen incoming telephone calls” and to “turn away calls from independent Realtors.” Amended Complaint at ¶ 123.

While many of the allegations relating to the allegedly fraudulent scheme are quite detailed, the Complaint lacks any specific allegations about the presentations made to any of the named plaintiffs. The Complaint includes no information about the actual presentations made to either the Rolos or the Tenerellis, including who made the presentation, when it took place, or with reference to what property it was made. The same is true with regard to the allegedly fraudulent mailings. The content of the mailings is described in reasonably specific terms, but

when, by whom, and to whom a mailing was sent, and the precise content of each particular mailing are not detailed. The Complaint also includes some general allegations such as, “[a]t the time plaintiffs purchased their Lots, when they purchased houses from GDC, and thereafter, the material facts alleged in paragraphs 87 and 138 herein were unknown to them and were actively concealed from them by the defendants.” Amended Complaint at ¶ 143. It remains unclear, however, who misrepresented and concealed the information, when and how. For example, plaintiffs allege that GDC concealed its fraud through a Customer Service Office. It is unclear from the Complaint, however, whether the Rolos or Tenerellis ever contacted this office. The Complaint only alleges what happened to “most purchasers,” “the vast majority of complaints” and what happened “typically.” Amended Complaint at ¶ 145.

Under Rule 9(b), failure to plead fraud with particularity with respect to what happened to a specific plaintiff prevents the defendants from being able to prepare a defense as to this particular allegation of fraud. To link their own injuries to the alleged RICO enterprise, plaintiffs must allege what happened to them. At the least, this includes specific allegations as to which fraudulent tactics were used against them and should include some allegations of what was said to them to induce them to purchase their properties from GDC. Although the First Amended Complaint links the Rolos and Tenerellis to the scheme in a general way, as purchasers of GDC properties, the manner in which the fraudulent scheme allegedly caused them injury has not been adequately pled. Plaintiffs appear to have confused this complaint with a class action complaint.¹³ The class must, however, be certified before it may become a class action. Until the putative class is certified, the action is one between the Rolos, the Tenerellis and the defendants. Accordingly, the First Amended

13. For example, in one of the paragraphs alleging mail fraud, many individuals are listed as plaintiffs, including “Paul and Agnes Duncan.” Amended Complaint at ¶ 396. Paul and Agnes Duncan are not parties to this case.

14. Because plaintiffs have already had ample opportunity to plead their allegations fully and in

Complaint must be evaluated as to these particular plaintiffs. Because the Complaint fails to allege what actually happened to either the Rolos or the Tenerellis, plaintiffs have not pled fraud with the specificity required by Rule 9(b), and the district court’s dismissal of their complaint as to the primary defendants will be affirmed on this basis.¹⁴

CONCLUSION

The district court did not abuse its discretion by denying plaintiffs leave to amend their complaint when they had already had ample opportunity to plead their claims fully. Nor did the district court err in dismissing plaintiffs’ RICO claims. The claims against the secondary defendants, alleging liability for aiding and abetting a RICO conspiracy, cannot survive the Supreme Court’s decision in *Central Bank of Denver*. Plaintiffs’ claims against the primary defendants also fail because their allegations are not pled with the particularity required by Rule 9(b). Accordingly, we will affirm the district court’s dismissal of this case in its entirety.



**ATACS CORPORATION; AIRTACS
Corporation, Appellants in 97-
1812,**

v.

**TRANS WORLD COMMUNICATIONS,
INC., Appellant in 97-1813.
Nos. 97-1812, 97-1813.**

United States Court of Appeals,
Third Circuit.

Argued June 5, 1998.

Decided Sept. 8, 1998.

Unsuccessful bidder for subcontract on project involving construction of communica-

the proper form, we will not remand this case to the district court in order to provide them with a further opportunity to amend their defective complaint. *Cf. Saporito*, 843 F.2d at 675-76 (remanding in order to provide plaintiffs with the opportunity to amend their complaint to provide greater specificity).