

1 THE HONORABLE JOHN C. COUGHENOUR

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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 PERKUMPULAN INVESTOR CRISIS
10 CENTER DRESSEL - WBG,

11 Plaintiff,

12 v.

13 DANNY MK WONG, *et al.*,

14 Defendants.

CASE NO. C09-1786-JCC

ORDER

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16 This matter comes before the Court on the motion to dismiss filed by Defendant Jared
17 Sherer and joined by Defendants Donald and Michelle Sherer¹ (Dkt. Nos. 388) and Plaintiff's
18 opposition thereto (Dkt. Nos. 412). Upon review, the Court concludes that Plaintiff's RICO
19 claim is barred under section 107 of the Private Securities Litigation Reform Act and
20 DISMISSES that claim with prejudice.² In light of the dismissal of Plaintiff's sole federal claim,
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23 ¹ Defendant Michelle Sherer withdrew her own initial motion to dismiss and requested permission to file a
24 renewed motion. The Court grants the motion to withdraw (Dkt. No. 440) and STRIKES the initial motion from the
docket. (Dkt. No. 430.) Lastly, the Court GRANTS the Sherer Defendants' requests to file overlength briefs. (Dkt.
No. 429, 431.)

25 ² While Michelle and Donald Sherer, two of the "RICO Defendants," joined Jared Sherer's motion, the
26 remaining RICO Defendants did not move for dismissal on PSLRA grounds. Nonetheless, because the same analysis
applies to the RICO conduct of every RICO Defendant, the Court dismisses that claim as to the non-moving
defendants as well. *See Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733, 743 (9th Cir. 2008) (quoting *Silverton v.*
Dep't of Treasury, 644 F.2d 1341, 1345 (9th Cir.1981) *cert. denied*, 454 U.S. 895 (1981) (holding that where court

1 the Court declines to exercise its supplemental jurisdiction over this matter and dismisses the
2 remaining claims without prejudice. The Court also rules on the parties' sanctions motions (Dkt.
3 No. 485, 487, 499) and motion to seal (Dkt. No. 526) as explained herein.

4 **I. BACKGROUND**

5 **A. The Dressel Ponzi Scheme**

6 The instant matter “sounds in allegations of international financial fraud.” (Dkt. No. 169
7 at 2.) Plaintiff Perkumpulan Investor Crisis Center Dressel – WBG (“Perkumpulan”) represents
8 Indonesian investors whom Defendants allegedly defrauded of hundreds of millions of dollars.
9 Defendants were the operators of Dressel Investment Limited, which Plaintiff describes as a
10 “classic Ponzi scheme” that began its fraudulent efforts in 2001 and ultimately collapsed in 2007.
11 According to Plaintiff’s complaint, Defendants represented to thousands of Indonesian
12 individuals that the Dressel principals were qualified investment professionals capable of
13 delivering annual returns between twenty-four and twenty-eight percent. In reliance upon these
14 representations, Plaintiff alleges, Indonesian individuals invested tens of thousands of dollars
15 each in Dressel’s fraudulent scheme. Rather than investing the money as promised, Defendants
16 allegedly operated a Ponzi scheme on the basis of “lies and deception,” whereby they used newer
17 investors’ funds to repay earlier investors and stole large amounts of the money for personal use.
18 (Dkt. No. 381 at ¶¶ 4.7–4.8.)

19 Plaintiff includes as “RICO” or “Ponzi Scheme” defendants Donald and Michelle Sherer,
20 Kenneth McCabe, Danny Wong, Joseph Yau, Dwight Williams, Luis Garza, Kelly and David
21 Thacker, and former-defendant Frank Ho. (*Id.* at ¶ 4.2.) These individuals together operated the
22 investment scheme through Dressel BVI and an Indonesian corporation, PT Wahana Bersama
23 Globalindo (“WBG”), which served as “the marketing agent and principal representative of
24

25 grants motion to dismiss as to one defendant, court may dismiss claims against non-moving or non-appearing
26 defendants who are “in a position similar to that of moving defendants”); *Columbia Steel Fabricators, Inc. v.*
Ahlstrom Rec, 44 F.3d 800, 802 (9th Cir. 1995) (“We have upheld dismissal with prejudice in favor of a party which
had not yet appeared, on the basis of facts presented by other defendants which had appeared.”)).

1 Dressel BVI.” (*Id.* at ¶ 4.3.) Dressel, with WBG as its sales agent, allegedly solicited Indonesian
2 individuals to invest in two separate funds: (1) the Strategic Portfolio Management Scheme Fund
3 (“SPORTSMANS Fund”), which promised a dividend yield of twenty-four percent per annum
4 for a minimum investment of \$5,000; and (2) the Global Markets Portfolio Fund (“GMP Fund”),
5 which promised a divided yield of twenty-eight percent per annum for a minimum investment of
6 \$10,000. (*Id.* at ¶ 4.4.) Defendants solicited Indonesian investors at presentations given by the
7 Ponzi Scheme Defendants in Indonesia; through brochures distributed to potential investors;
8 through the Dressel website; and through WBG marketing personnel, who allegedly worked at
9 the Ponzi Scheme Defendants’ direction. (*Id.* at ¶¶ 4.5, 4.12–4.31; *see* Dkt. No. 169 at 3–6.)

10 Perkumpulan’s complaint alleges in detail the role of each Ponzi Scheme Defendant.
11 Donald and Michelle Sherer allegedly served as the “Director in Charge” and “Office Manager”
12 of Dressel from 2001 to 2005, respectively. Plaintiff alleges that the Sherers played a crucial role
13 in operating the Dressel Ponzi Scheme. Both individuals traveled to Indonesia to solicit
14 Indonesian investors in person and signed investment certificates after receiving investors’ funds.
15 In 2005, the Sherers purported to resign from Dressel, but Plaintiff alleges that they continued to
16 spend investors’ stolen funds and even demanded “hush” payments from other members of the
17 scheme. (*See id.* at ¶¶ 3.11–3.12.) Additionally, the Sherers allegedly engaged in sham litigation
18 intended to conceal their role in the scheme. (*Id.*)

19 Defendants Danny Wong, Joseph Yau, Luis Garza, and former-defendant Frank Ho, are
20 individuals who allegedly played major roles in the Dressel scheme.³ Perkumpulan alleges that
21 Danny Wong became a Director of Dressel in 2001 and largely masterminded the Ponzi Scheme
22 while living in Asia. Joseph Yau and Frank Ho allegedly worked as associates of Mr. Wong in
23 carrying out Dressel’s activities in Asia. According to Perkumpulan, both Danny Wong and

25 ³ Mr. Garza only appeared in this lawsuit in March 2014, approximately four years after Plaintiff filed its
26 first complaint and after the Court found him to be in default. He now asks the Court to set aside the entry of default
and to dismiss the RICO claims against him. (Dkt. Nos. 544, 546.) Because the analysis herein applies to Mr. Garza
as a RICO defendant, the Court denies his pending motions as moot and dismisses the claims against him.

1 Joseph Yau traveled to Indonesia to solicit investors in person and had repeated communications
2 with investors to assuage their concerns about the fraudulent investments. (*Id.* at ¶¶ 3.5–3.7.) Mr.
3 Garza allegedly worked as WBG’s Surabaya branch manager and, at the direction of Danny
4 Wong, Joseph Yau, and other Ponzi Scheme Defendants, directed and/or sent wire transfers of
5 stolen funds so as to enrich himself and others. (*Id.* at ¶¶ 3.28, 4.2, 4.12, 4.44–4.47.) Mr. Garza
6 also oversaw the Mexican operations of the Dressel Scheme and allegedly engaged in sham
7 litigation intended to keep the fraud from being disclosed after the fact. (*Id.*) Additionally,
8 Defendant Dwight Williams is a Utah lawyer who allegedly served as legal counsel to Danny
9 Wong and Dressel BVI, and represented himself to others as Dressel’s General Counsel. Mr.
10 Williams, like other Ponzi Scheme Defendants, traveled to Indonesia to solicit investors for the
11 Dressel scheme. Perkumpulan further alleges that Mr. Williams drafted correspondence to
12 potential investors commending Danny Wong’s “business character” so as to lend legitimacy to
13 the Dressel Ponzi Scheme and its directors. (*Id.* at ¶ 3.8.)

14 Finally, Plaintiff names as RICO Defendants Kelly and David Thacker, and Kenneth
15 McCabe. The Thackers were “owners and directors” of Dressel who misrepresented themselves
16 as experts to Indonesian investors, when in reality they were unqualified and planned to steal
17 investors’ funds. Perkumpulan alleges that the Thackers met with Indonesian investors in person,
18 met with Dressel’s marketing agents in Seattle, and met with WBG representatives in Indonesia
19 in “an ongoing effort to solicit investors in the Dressel Ponzi Scheme and to fleece Indonesian
20 investors.” (*Id.* at ¶¶ 3.9–3.10.) Defendant Kenneth McCabe was also a director of Dressel and
21 “later became a 50% shareholder.” As explained in more detail below, Mr. McCabe held himself
22 out to prospective investors as “an international expert on finance and economics” at numerous
23 in-person presentations and signed investor certificates for Dressel BVI. (*Id.* at ¶ 3.13.) Together,
24 these defendants operated the Dressel Ponzi Scheme, allegedly defrauding Indonesian investors
25 of hundreds of millions of dollars.

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1 Plaintiff's complaint lists in detail the alleged misrepresentations made to investors. In
2 May 2001 at a presentation in Jakarta, Indonesia, for example, Defendants Donald Sherer and
3 Joseph Yau misrepresented their qualifications to prospective investors. Mr. Sherer allegedly
4 told potential investors that he was an investment professional when he was in fact a disbarred
5 attorney who worked as a bus driver. Mr. Yau similarly portrayed himself as a former investment
6 banker who joined Dressel because "he wanted to do something on his own," when in reality he
7 had been censured by Hong Kong financial authorities. Neither Sherer nor Yau mentioned this
8 public censure. (*Id.* at ¶ 4.13.) Later in 2001, Donald Sherer represented to prospective investors
9 that Dressel had a "fiduciary and moral obligation to be as safe as we can" in investing funds
10 entrusted with Dressel's operators; that he had years of experience in the foreign exchange
11 industry; and that he had taught financial management for years. (*Id.* at ¶ 4.14.) Plaintiff alleges
12 that these statements, too, were false. (*Id.*)

13 And so the alleged misrepresentations continued. In 2004, Donald and Michelle Sherer,
14 along with Danny Wong and Dwight Williams, solicited new Indonesian investors at another
15 presentation. There, they represented that "the Indonesian investors would be the 'partners' of
16 Dressel BVI; that the investment performance of Dressel BVI was better than Merrill Lynch; and
17 that Dressel had profits averaging 40 percent per annum," which enabled Dressel to pay
18 investors twenty-four to twenty-eight percent returns. (*Id.* at ¶¶ 4.14–4.21.) Beyond the in-person
19 presentations and WBG marketing efforts, Plaintiff alleges, Defendants espoused many of the
20 same misrepresentations in brochures provided to investors and on its website, which was hosted
21 from the United States. (*See id.* at ¶¶ 4.22–4.31.) For example, Dressel's website described
22 Dressel as a legitimate investment opportunity and misrepresented the qualifications of Donald
23 and Michelle Sherer, Kenneth McCabe, and David Thacker. (*Id.* at ¶¶ 4.26–4.31; *see also id.* at
24 ¶¶ 4.22–4.25 (detailing misrepresentations in brochures.)) Plaintiffs allege that such
25 representations were intended to deceive the Indonesian investors and conceal the fact that the
26 defendants were in reality operating a Ponzi Scheme to steal investors' money. (*Id.* at ¶ 4.21.)

1 When investors relied on Defendants’ misrepresentations and invested in Dressel’s funds,
2 the investor signed a “Portfolio Management Agreement” that named Dressel as Portfolio
3 Manager. (*Id.* at ¶ 4.6.) For some time, investors received the promised returns. But by
4 September 2006, Dressel stopped making payments to investors and the alleged Ponzi scheme
5 began to unravel. Danny Wong attempted to assuage investors’ concerns, writing letters and
6 assuring investors in person that Dressel was fully functioning and intended to honor its
7 contractual obligations. But the assurances rang hollow. Plaintiff alleges that ultimately, Dressel
8 proved unable to meet its commitments and that Indonesian investors lost the funds they had
9 contributed to Dressel. (*Id.* at ¶¶ 4.51–4.58.)

10 As early as 2005, and more prominently in the wake of Dressel’s collapse, Defendants
11 allegedly sought to conceal their wrongdoing and protect themselves from legal liability. Among
12 other things, Plaintiff alleges that the defendants engaged in extensive money laundering
13 throughout the course of the scheme to conceal the stolen nature of the funds. (*Id.* at ¶¶ 4.8, 4.24,
14 4.49, 4.54.) Additionally, the Sherer Defendants left Dressel in 2005, leaving it in the hands of
15 Defendants David and Kelly Thacker. Thereafter, the Thackers, Danny Wong, and Dwight
16 Williams formed the Asset Recovery Trust with the purported goal of recovering Dressel assets
17 from the Sherer Defendants. Since its formulation, the Trust has been engaged in extensive
18 litigation, filing a lawsuit against the Sherers in Utah in 2005, and having been named as
19 defendants in at least three lawsuits by Donald and Michelle Sherer. Purportedly, each of the
20 lawsuits have been filed to protect the investors’ interests. Plaintiff believes otherwise. Its
21 complaint alleges that “[a]ll of these pre-existing lawsuits are tainted by the pre-existing
22 associations of those involved[.]” and concludes that “[t]here has been an ongoing effort to
23 deceive the Dressel investors into believing that their rights were being legitimately advocated in
24 the United States. None of these existing suits represents a good-faith effort to recover the stolen
25 assets.” (*Id.* at 4.70.)

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1 **B. The Instant Lawsuit**

2 Plaintiff filed the above-captioned lawsuit in 2009. Its complaint initially raised the
3 following claims: (1) a Racketeer Influenced and Corrupt Organizations Act (“RICO”) claim, *see*
4 18 U.S.C. § 1964(c), against the “Ponzi Scheme Defendants”; (2) a RICO claim against the
5 “Regal Financial Bank Defendants”⁴; (3–4) state-law fraud claims against the Ponzi Scheme and
6 Regal Financial Bank Defendants; (5–6) state-law breach of fiduciary duty claims against the
7 Ponzi Scheme and Regal Financial Bank Defendants; (7) a common law conspiracy claim
8 against all Defendants; (8–9) negligence claims against the Regal Financial Bank Defendants;
9 (10) an unjust enrichment claim against the Ponzi Scheme Defendants; and (11–12) negligence
10 and negligent misrepresentations claims against Tanner LC. (Dkt. No. 1 at ¶¶ 6.1–17.8.)

11 In 2013, the Court granted Plaintiff leave to file an amended complaint. In that pleading,
12 most of Plaintiff’s allegations and claims remained the same—it merely added defendants and
13 claims it believed necessary as a result of discovery obtained during the pendency of this lawsuit.
14 Specifically, Plaintiff supplemented its allegations regarding the scheme’s use of Tanner LC’s
15 accounting services and added Randy Sellars—a Tanner LC accountant who worked on the
16 Dressel account—and Professional Business Advisors, LLC, as defendants to this matter. (Dkt.
17 No. 350 at 2–3.) Plaintiff also named as additional defendants individuals who hold title to
18 certain assets in Alaska, which according to Plaintiff, constitute assets obtained with proceeds of
19 the fraudulent scheme. (*Id.* at 3.) Those individuals include Jared Sherer, Robert Jinks, the Asset
20 Recovery Trust, Zarahemla Trusts One and Two, Intrepid Trust, Elite Portfolio, LLC, PADRM
21 Gold Mine LLC, Rafael Benita Garza, and Global Consulting Services A.S. de C.V. (Dkt. No.
22 375 at 3.) As explained by Plaintiff, “the purpose of [the] amendment is for the defrauded
23 investors to be able to seize whatever remains of their funds invested in Dressel” if they succeed
24 on their other claims. (Dkt. No. 350-2 at 106.)

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26 ⁴ As discussed below, the “Regal Financial Bank” Defendants have already been dismissed from this matter. Accordingly, the Court declines to recount their alleged involvement in detail.

1 In the course of the lawsuit, the Court dismissed Plaintiff's claims against Ponzi Scheme
2 Defendant Frank Ho. The Ninth Circuit affirmed that dismissal in late 2013. (Dkt. No. 534.)
3 Additionally, the parties have resolved by private settlement Plaintiff's claims against the "Regal
4 Financial Bank Defendants" and Defendants Tanner LC, Randy Sellers, and Professional
5 Business Advisors. (Dkt. No. 214, 540.) Finally, Ponzi Scheme Defendants Danny Wong and
6 Joseph Yau have failed to appear or otherwise defend against this lawsuit. The other Ponzi
7 Scheme Defendants have proceeded both with and without representation.

8 In an already long-running dispute, the filing of Plaintiff's amended complaint brought
9 forth a barrage of motions by all parties in a manner that the undersigned has not witnessed in
10 more than thirty-two years on the bench. Now pending before this Court are multiple motions to
11 dismiss (Dkt. Nos. 377, 388, 404, 430, 432, 441, 546), as well as summary judgment motions
12 (Dkt. Nos. 509, 516), discovery and other ancillary motions (Dkt. Nos. 426, 427, 440, 457, 477,
13 485, 506, 526, 538, 544), and motions for sanctions filed by multiple parties (Dkt. Nos. 426, 487,
14 499). The Court has reviewed every pending motion, but upon due consideration and after
15 undertaking its own research, concludes that Plaintiff's RICO claim is barred under section 107
16 of the Private Securities Litigation Reform Act. Because Plaintiff's sole federal claim is
17 insufficient as a matter of law, the Court declines to rule on the remainder of the parties'
18 dispositive and discovery motions, dismisses Plaintiff's RICO claim with prejudice, and declines
19 to exercise its supplemental jurisdiction over the remaining state law claims. The Court addresses
20 the parties' motions for sanctions below.

21 **II. DISCUSSION**

22 **A. Legal Standard**

23 A party may move to dismiss a complaint that fails to state a claim upon which relief can
24 be granted. FED. R. CIV. P. 12(b)(6). To survive a motion to dismiss, a complaint must contain
25 sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face.
26 *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009). A claim has facial plausibility when the plaintiff

1 pleads factual content that allows the court to draw the reasonable inference that the defendant is
2 liable for the misconduct alleged. *Id.* at 678. A claim that fails to present a “cognizable legal
3 theory” or sufficient facts to support a cognizable claim will be dismissed under Rule 12(b)(6).
4 *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121 (9th Cir. 2008). Finally, the
5 Court dismisses a claim with prejudice only where “the pleading could not possibly be cured by
6 the allegation of other facts.” *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000).

7 **B. The Defendants’ Motions to Dismiss**

8 Before turning to the Private Securities Litigation Reform Act analysis, the Court
9 addresses Plaintiff’s threshold argument that the joinder of Michelle and Donald Sherer to Jared
10 Sherer’s motion to dismiss is improper. Plaintiff asserts that Mr. and Mrs. Sherer waived the
11 RICO/PSLRA defense by not raising it in their motion to dismiss Plaintiff’s original complaint
12 and that their joinder is inappropriate because Jared Sherer has no standing to challenge the
13 Plaintiff’s RICO claims. (Dkt. No. 412 at 10–12.) As to the latter argument, the Court agrees that
14 Jared Sherer is not a RICO defendant and accordingly could not successfully challenge the RICO
15 claim. However, such a conclusion does not preclude the Court from considering the motion’s
16 RICO arguments as to Michelle and Donald Sherer, since those individuals jointly filed the
17 motion to dismiss and undisputedly have standing to raise such challenges.

18 As to the former argument, the Court again agrees that *pro se* defendants Michelle and
19 Donald Sherer could have done a better job in their defense of this case by raising the PSLRA
20 failure to state a claim argument in their motion to dismiss Plaintiff’s initial complaint. However,
21 the Court does not find raising it in response to Plaintiff’s amended complaint to be problematic.
22 Federal Rule of Civil Procedure 12(h)(2) expressly provides that a “[f]ailure to state a claim”
23 defense “may be raised” in any initial pleading, by a motion under Rule 12(c) (motion for
24 judgment on the pleadings), or at trial.” FED. R. CIV. P. 12(h)(2); *see also* FED. R. CIV. P.
25 12(g)(2) (limitation on successive 12(b) motions does not apply to failure to state a claim
26 defenses raised in accordance with Rule 12(h)(2) or (3)). Even if the Court agreed that the instant

1 motion was a “procedurally defective” motion to dismiss—which it does not, since the motion
2 was not preceded by an answer to the amended complaint—Michelle and Donald Sherer could
3 simply file a motion for judgment on the pleadings on the same ground, which would require the
4 same analysis under the same standard of review. *See MacDonald v. Grace Church Seattle*, 457
5 F.3d 1079, 1081 (9th Cir. 2006) (treating procedurally defective motion to dismiss as motion for
6 judgment under the pleadings); *Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th
7 Cir. 1989) (Rule 12(b)(6) motion to dismiss and Rule 12(c) motion for judgment on the
8 pleadings are “functionally identical” and require the same standard of review).

9 The Court sees no reason to prolong this long-running dispute on such technical grounds,
10 since the instant motions resulted in neither prejudice nor surprise, Plaintiff chose to brief the
11 substantive issues for the Court’s consideration, and the same standard of review applies whether
12 construed as a motion to dismiss or motion for judgment on the pleadings. *Cf. National City*
13 *Bank, N.A. v. Prime Lending, Inc.*, No. C10-0034, 2010 WL 2854247, at *2 (E.D. Wash. July 19,
14 2010) (explaining that “judicial economy favors ignoring the motions’ technical difficulties”—
15 that it was a successive 12(b) motion—where plaintiffs did not dispute that “Defendants would
16 simply be able to renew their motion as a Rule 12(c) motion for judgment on the pleadings after
17 filing an answer”). The Court also provides defendants some leeway in their approach to this
18 case given their *pro se* status. Accordingly, the Court proceeds to analyze the Sherers’ PSLRA
19 argument.

20 **C. RICO and the Private Securities Litigation Reform Act**

21 Congress enacted the Racketeer Influenced and Corrupt Organizations Act of 1970
22 (“RICO”) to “seek the eradication of organized crime in the United States[.]” *Organized Crime*
23 *Control Act of 1970, Statement of Findings and Purpose*, Pub.L. No. 91–452, 84 Stat. 922
24 (1970). The most oft-used provision, which Plaintiff relies upon here, prohibits “person[s]
25 employed by or associated with” an enterprise engaged in or affecting interstate commerce from
26 conducting the enterprise’s affairs through a “pattern of racketeering activity.” 18 U.S.C. §

1 1964(c). “Racketeering activity” includes a long list of statutorily defined predicate acts such as
2 mail and wire fraud, bank fraud, money laundering, and transacting in stolen property. *See* 18
3 U.S.C. § 1961(1)(B). In addition to its criminal prohibitions, RICO provides a private cause of
4 action that entitles a successful private plaintiff to treble damages and reasonable attorney’s fees.
5 To establish the basic elements of a civil RICO claim, a private plaintiff must allege (1) conduct
6 (2) of an enterprise (3) through a pattern (4) of racketeering activity. *Sedima S.P.R.L. v. Imrex*
7 *Co.*, 473 U.S. 479, 496 (1985). The plaintiff must also allege that he was injured in his business
8 or property “by reason of” the RICO violation. 18 U.S.C. § 1964(c).

9 Section 107 of the Private Securities Litigation Reform Act of 1995 (“PSLRA”) sought to
10 curtail abusive litigation by eliminating securities fraud as a predicate act in civil RICO claims.⁵

11 Section 1964(c), which establishes RICO’s civil cause of action, now provides in relevant part:

12 Any person injured in his business or property by reason of a violation of section
13 1962 of this chapter may sue therefor in any appropriate United States district
14 court and shall recover threefold the damages he sustains and the cost of the suit,
15 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.

16 18 U.S.C. § 1964(c) (emphasis added). In amending this provision, “Congress reasoned [that]
17 securities laws generally provide an adequate remedy for securities fraud and that imposition of
18 the treble damages provided by RICO was unfair in those cases.” *MJK Partners, LLC v.*
19 *Husman*, 877 F. Supp. 2d 596, 603 (N.D. Ill. 2012); *see Bald Eagle Area School District v.*
20 *Keystone Financial Inc.*, 189 F.3d 321, 327 (3d Cir. 1999) (explaining that the focus of the RICO
21 amendment was on “completely eliminating the so-called ‘treble damage blunderbuss of RICO’
22 in securities fraud cases”) (quotation omitted).

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25
26 ⁵ The so-called “RICO Amendment” contains one limited exception. A private plaintiff may rely on securities-fraud conduct in a civil suit if the defendant was criminally convicted of the securities fraud. *See* 18 U.S.C. § 1964(c). This exception is not relevant to the instant case.

1 In practice, “Congress intended not only to eliminate securities fraud as a predicate
2 offense in a civil RICO action, but also to prevent plaintiffs from attempting to plead other
3 specified offenses, such as mail or wire fraud, as predicate acts under civil RICO if such offenses
4 are based on conduct that would have been actionable as securities fraud.” *Id.*; *Howard v.*
5 *America Online Inc.*, 208 F.3d 741, 749–50 (9th Cir.), *cert. denied*, 531 U.S. 828 (2000)
6 (plaintiff cannot assert RICO claim based on predicate acts that sound in securities fraud even if
7 the claim is pleaded as a matter of mail or wire fraud). The PSLRA exclusion similarly applies
8 even if the RICO plaintiff could not actually assert a securities fraud claim. *Howard*, 208 F.3d at
9 749–50; *Swartz v. KPMG LLP*, 401 F. Supp. 2d 1146, 1151 (W.D. Wash. 2004) *aff’d*, 476 F.3d
10 756, 761 (9th Cir. 2007). And finally, Courts have consistently concluded that where a plaintiff
11 alleges a “single scheme” and any predicate act is barred under the PSLRA, the entire RICO
12 claim is precluded. *See In re Libor-Based Financial Instruments Antitrust Litig.*, 935 F. Supp.2d
13 666, 730 (S.D.N.Y. 2013); *Gilmore v. Gilmore*, No. C09-6230, 2011 WL 3874880, at *4
14 (S.D.N.Y. Sept. 1, 2011), *aff’d*, 503 Fed. Appx. 97 (2d Cir. 2012) (where defendants’ acts were
15 part of a single fraudulent scheme, plaintiff could not divide the scheme into its component parts,
16 as “such surgical presentation . . . would undermine the Congressional purposes” behind the
17 RICO amendment).

18 In light of the PSLRA, the Court must examine whether Perkumpulan’s RICO claim is
19 based on conduct of the type that would have been actionable as fraud in the purchase or sale of
20 securities. A review of Plaintiff’s allegations, accepted as true, demonstrates that Perkumpulan
21 seeks to recover RICO’s “bonanza of treble damages” and attorneys’ fees for conduct that
22 Congress expressly sought to remove from the statute’s reach. *See Bald Eagle*, 189 F.3d at 330.

23 **1. The Investment Contracts Constitute Securities**

24 The Court first determines whether Plaintiff’s claim involves “securities” in the specific
25 sense of the term. Under United States securities laws, an “investment contract” is delineated a
26 security. *See S.E.C. v. Edwards*, 540 U.S. 389, 393 (2004); 15 U.S.C. §§ 77b(a)(1), 78c(a)(10).

1 The definition of an investment contract is “a flexible rather than a static principle, one that is
2 capable of adaption to meet the countless and variable schemes devised by those who seek the
3 use of the money of others on the promise of profits.” *Edwards*, 540 U.S. at 393 (quoting *S.E.C.*
4 *v. W.J. Howey, Co.*, 328 U.S. 293 (1946)). The Ninth Circuit has distilled the Supreme Court’s
5 definition of an investment contract into a three-part test requiring “(1) an investment of money
6 (2) in a common enterprise (3) with the expectation of profits induced by the efforts of others.”
7 *S.E.C. v. Rubera*, 350 F.3d 1084, 1090 (9th Cir. 2003) (Congress did not intend the definition of
8 security to be restrictive, but defined the term “sufficiently broadly to encompass virtually any
9 instrument that might be sold as an investment”); *see S.E.C. v. R.G. Reynolds Enters., Inc.*, 952
10 F.2d 1125, 1130 (9th Cir. 1991).

11 Here, Perkumpulan itself argues that the Dressel fraud involved “securities.” (Dkt. No.
12 412 at 17) (“the [Dressel] defendants executed a United States-based RICO conspiracy that
13 involved a securities fraud abroad”). Nor could there be any dispute that the solicited
14 investments in the instant scheme constitute securities as subject to the United States securities
15 laws. Plaintiff’s complaint alleges that its defrauded members (1) invested money (2) in one of
16 two funds run by the Dressel enterprise, known as the “SPORTSMANS” and “GMP” funds, (3)
17 upon the promise of receiving between twenty-four and twenty-eight percent returns and while
18 relying upon the misrepresented experience and expertise of Dressel’s managers. (*See* Dkt. No.
19 381 at ¶¶ 1.1–1.2, 3.5–3.13, 4.3–4.34.) Each time an investor did so, Dressel issued an
20 investment certificate out of one of its administrative offices in the United States or Asia. (*Id.* at
21 ¶¶ 4.6, 4.9.) Based on these allegations in the complaint and Plaintiff’s own concessions, the
22 Court is satisfied that Dressel’s investment certificates were “securities.”

23 2. Plaintiff Relies on Conduct Actionable as Securities Fraud

24 The Court next addresses whether the defendants’ alleged conduct “would have been
25 actionable as fraud in the purchase or sale of securities.” 18 U.S.C. § 1964(c). Courts making this
26 determination often turn to section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5

1 to provide the basic guideposts of such an analysis. Those authorities make it “unlawful for any
2 person . . . [t]o use or employ, in connection with the purchase or sale of any security,” “any
3 device, scheme, or artifice to defraud.” *See* 15 U.S.C. § 78j(b); *S.E.C. v. Zandford*, 535 U.S. 813
4 (2002); *In re Libor-Based Financial Instruments Antitrust Litig.*, 935 F. Supp. 2d 666, 726
5 (S.D.N.Y. 2013) (the SEC may assert a cause of action for securities fraud [under Rule 10b-5] if
6 it alleges that the defendant: “(1) made a material misrepresentation or a material omission as to
7 which he had a duty to speak, or used a fraudulent device; (2) with scienter; (3) in connection
8 with the purchase or sale of securities”). The Supreme Court has endorsed a “broad reading” of
9 the phrase “in connection with,” holding that “it is enough that the scheme to defraud and the
10 sale of securities coincide.” *Zandford*, 535 U.S. at 820; *see Rezner v. Bayerische*
11 *HypoUndVereinsbank AG*, 630 F.3d 866, 871–72 (9th Cir. 2010). Ultimately, whether
12 Perkumpulan itself could bring a successful claim subject to the securities laws is irrelevant. The
13 appropriate inquiry is whether the conduct alleged is of the type generally actionable under the
14 securities laws. *See, e.g., Howard*, 208 F.3d at 749 (affirming dismissal under RICO Amendment
15 where plaintiffs conceded that they had no standing to pursue securities fraud claim); *MLSMK*
16 *Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 277 (2d Cir. 2011) (“We conclude that
17 section 107 of the PSLRA bars civil RICO claims alleging predicate acts of securities fraud, even
18 where a plaintiff cannot itself pursue a securities fraud action against the defendant.”).

19 Here, Defendants’ alleged conduct is of the type generally actionable under the United
20 States securities laws and “would have been actionable” under RICO if not for the PSLRA. *See*
21 18 U.S.C. § 1964(c). In its complaint, Plaintiff specifically alleges that the RICO Defendants
22 made “material misrepresentations” to investors (a) at multiple in-person meetings in Indonesia;
23 (b) through hard-copy brochures provided to investors; and (c) through its website, e-mails, and
24 letters mailed to investors and to WBG, which were then passed on to investors. (*See* Dkt. No.
25 381 at ¶¶ 1.2, 4.5, 4.7, 4.13–4.31, 4.42, 4.50, 4.52–4.58, 4.62–4.65, 6.3, 6.5.) The
26 misrepresentations included statements regarding the false qualifications of the Dressel

1 managers, the expected returns on the funds, the types of investments that were to be made with
2 investors' money, and the fact that the investment schemes were legitimate. (*Id.* at ¶¶ 4.5, 4.7,
3 4.13–4.31.) Perkumpulan further alleges that the RICO Defendants had a fiduciary duty to
4 provide truthful information and manage the investors' funds as fiduciary agents, (*see id.* at ¶
5 4.6), and that each Defendant acted with the requisite scienter—that is, that “[i]n making these
6 misrepresentations, the Ponzi Scheme Defendants intended to deceive [investors] by making
7 them believe that Dressel BVI was a legitimate investment program and that the Dressel
8 directors had the qualifications they claimed to have.” (*Id.* at ¶ 6.5; *see id.* at ¶ 6.9.) Finally,
9 Plaintiff's allegations make clear that these fraudulent statements were made at the very time that
10 Defendants induced individuals into investing and afterwards, so as to perpetuate and
11 subsequently hide the scheme. Indeed, Plaintiff alleges that the fraudulent statements were made
12 for the *purpose* of inducing individuals to invest in this “classic Ponzi scheme.”⁶ (*Id.* at ¶¶ 1.2,
13 4.4, 4.7–4.8, 4.32, 6.5.) The Court accordingly concludes that Perkumpulan alleges conduct that
14 (a) is generally actionable as fraud in the purchase or sale of securities and (b) would have been
15 actionable under civil RICO as fraud in the purchase or sale of securities prior to the PSLRA's
16 enactment. Plaintiff may not rely on such conduct to support its RICO claim.⁷

18 ⁶ For example, Plaintiff explains in its complaint that one investor, Halim Chandra, learned of the
19 investment opportunity in August 2004. After being assured that the investment funds were “legitimate” and
20 reviewing the Dressel brochures and website, Mr. Chandra “relied on the affirmative misrepresentations” contained
21 in the brochure and website and decided to invest \$60,000 in the SPORTSMAN fund. He then signed the “Portfolio
Management Agreement for Strategic Portfolio Management Scheme” and received an investment certificate. (Dkt.
No. 381 at ¶ 4.32.) Thus, by Plaintiff's own allegations, investors relied upon fraudulent misrepresentations in
deciding to *purchase* the investments Dressel was selling.

22 ⁷ Additionally, Plaintiff may not rely on the remaining predicate acts that it alleges—money laundering;
23 distributing the proceeds of unlawful activity; engaging in monetary transactions in property derived from specified
24 unlawful activity; interstate and foreign travel in aid of racketeering enterprises; and transportation and concealment
25 of stolen moneys—because it expressly alleges that all of this conduct was undertaken to keep the Ponzi scheme
26 going. (Dkt. No. 6.14–6.19.) Courts have repeatedly found that the RICO amendment “bars RICO claims based on
conduct that perpetuates a Ponzi scheme.” *Picard v. Kohn*, 907 F. Supp. 2d 392, 398 (S.D.N.Y. 2012); *see Bald
Eagle Area Sch. Dist. v. Keystone Fin., Inc.*, 189 F.3d 321, 330 (3d Cir. 1999) (concluding that “[a] Ponzi scheme . .
. continues only so long as new investors can be lured into it so that the early investors can be paid a return on their
'investment.' Consequently, conduct undertaken to keep a securities fraud Ponzi scheme alive is conduct undertaken
in connection with the purchase and sale of securities.”); *MLSMK*, 651 F.3d at 277 n.11 (quoting *Bald Eagle* with
approval).

1 To avoid this conclusion, Perkumpulan argues that its hypothetical securities fraud claim
2 would be legally insufficient—and thus, not “actionable” in its eyes—under the Supreme Court’s
3 decision in *Morrison v. Nat’l Australia Bank, Ltd.*, which established that § 10(b) of the
4 Securities Exchange Act does not apply extraterritorially. 561 U.S. 247 (2010). The thrust of the
5 argument is that while Defendants allegedly committed a domestic RICO violation,⁸ the
6 predicate acts upon which that claim is based constitute *extraterritorial* securities fraud—*i.e.*,
7 fraud for which neither Perkumpulan nor the S.E.C. could obtain relief under the securities laws
8 in light of *Morrison*. Upon review of Plaintiff’s argument and additional research, the Court
9 finds this reading of the RICO Amendment and *Morrison* unpersuasive.

10 The only other court to address this issue persuasively rejected the same argument as
11 contrary to the language and purpose of the statute. In *Picard v. Kohn*, the plaintiff-trustee
12 brought a RICO claim against foreign defendants that allegedly played a role in Bernie Madoff’s
13 infamous Ponzi scheme. Like Perkumpulan, the trustee sought to avoid the PSLRA’s clear
14 preclusion of securities fraud, arguing that “the Securities Exchange Act [under *Morrison*], and
15 thus the RICO amendment, does not apply to financial products that, like those the defendants
16 sold here, did not trade on an American exchange.” 907 F. Supp. 2d 392, 399 (S.D.N.Y. 2012).
17 The trustee reasoned that “even though he can neither prosecute foreign securities fraud nor base

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20 ⁸ The Court now questions this premise. There is a certain irony to Perkumpulan’s argument that
21 Defendants’ predicate acts are “extraterritorial,” given that it previously argued that its “wire fraud” predicate acts
22 were sufficiently domestic to survive an extraterritoriality challenge. In a previous Order, the Court denied a motion
23 to dismiss Plaintiff’s complaint on extraterritoriality grounds. (Dkt. No. 169.) In doing so, the Court declined to rely
24 on *Morrison* and instead examined whether the alleged predicate acts, such as wire fraud, were extraterritorial in
25 nature under *Pasquatin v. United States*, 544 U.S. 349 (2005). The Ninth Circuit subsequently clarified in *United*
26 *States v. Xu*, 706 F.3d 965 (9th Cir. 2013), that RICO does not apply extraterritorially in light of *Morrison*. Under
Xu, the Court is directed to analyze the “focus” of the RICO claim to determine whether its application is
extraterritorial, which is the *pattern* of racketeering activity. Such an analysis is in direct contrast to the analysis of
whether the predicate acts themselves are extraterritorial in nature. Under the appropriate analysis, where a fraud is
predicated on extraterritorial activity, it is beyond RICO’s reach even if proceeds of the fraud ultimately reach the
United States. *Xu*, 706 F.3d at 978. In light of *Xu* as intervening authority, the Court need not accept as law of the
case its previous holding regarding the domestic nature of the Dressel Ponzi scheme. Because the Court finds
Plaintiff’s RICO claim to be barred under the PSLRA, however, it sees no need to revisit the extraterritoriality issue.
Instead, the Court notes its skepticism that Plaintiff’s claims would be sufficiently “domestic” to state a claim in
light of *Morrison* and *Xu*.

1 a RICO claim on domestic securities fraud [under the PSLRA], he can base a RICO claim on the
2 prosecution of foreign securities fraud.” *Id.* Judge Rakoff rejected this argument outright,
3 explaining that the plaintiff’s approach would result in a “RICO exception to the Exchange Act’s
4 territorial reach, allowing artfully pled prosecution of foreign conduct that constitutes securities
5 fraud whenever such conduct potentially relates to alleged RICO enterprise activity occurring in
6 the United States.” *Id.* Such an exception would be implausible and “too clever by half,” the
7 court concluded, because it would “in many cases allow artful pleading to eviscerate either the
8 territorial reach of the Securities Exchange Act or the purpose of the ‘RICO Amendment’ to the
9 PSLRA.” *Id.*

10 This Court is in agreement with the *Picard* court’s reasoning. The PSLRA explicitly
11 removes securities-fraud type *conduct* from the civil RICO arsenal,⁹ regardless of whether the
12 plaintiff or the S.E.C. could successfully pursue a securities fraud *claim* based on the same
13 alleged conduct. *See MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 275 (2d Cir.
14 2011) (“when Congress stated that ‘no person’ could bring a civil RICO action alleging conduct
15 that would have been actionable as securities fraud, it meant just that . . . It did not mean ‘no
16 person except one who has no other actionable securities fraud claim.’”) (citation omitted);
17 *Howard*, 208 F.3d at 749. It is of no moment that Plaintiff believes its securities claims would
18 fail under *Morrison*. The reason is that the securities laws are better suited to the task of
19 providing or precluding a cause of action and remedy for securities fraud. *See MJK Partners*,
20 877 F. Supp. at 603 (“Congress reasoned [that] securities laws generally provide an adequate
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23 ⁹ The PSLRA House Report contained the following title for section 107, the RICO Amendment:
24 “Inapplicability of [RICO] to Private Securities Actions.” H.R. Conf. Rep. No. 104–369, at 47 (1995), *reprinted in*
25 1995 U.S.C.C.A.N. 730, 747. Numerous courts have noted that Congress’s intent was “to eliminate securities fraud
26 as a predicate act of racketeering in a civil RICO action.” *See MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651
F.3d 268, 275 (2d Cir. 2011); *Fezzani v. Bear, Stearns & Co.*, No. 99 Civ. 0793, 2005 WL 500377, 2005 U.S. Dist.
LEXIS 3266 (S.D.N.Y. Mar. 2, 2005) (accepting argument, which was later approved in *MLSMK*, 651 F.3d at 279,
that it “was Congress’s intention that the applicability of the RICO amendment to a plaintiff’s civil RICO claim
would not depend on the plaintiff’s ability to bring a private securities law action[.]”).

1 remedy for securities fraud[.]”). Thus, in cases where plaintiffs have sought to avoid the RICO
2 Amendment by alleging only “aiding and abetting” type securities fraud as a RICO predicate
3 act—which if brought under the securities laws, would fail to state a claim—courts have refused
4 to allow such artful pleading as a way of obtaining RICO’s treble damages. *See MLSMK*, 651
5 F.3d at 277 n.11. One court explained its reasoning in a way that is particularly applicable to
6 situation at hand:

7 It would be strange indeed if Congress, in a statute that otherwise bars private
8 causes of action under RICO for predicate acts that describe conduct actionable as
9 securities fraud, nevertheless chose to allow enhanced RICO remedies—treble
10 damages and attorneys’ fees—against *only* the very parties that Congress
11 simultaneously made immune from private suit under the securities laws.

12 *Thomas H. Lee Equity Fund, LP v. Mayer Brown, Rowe & Maw LLP*, 612 F. Supp. 2d 267
13 (S.D.N.Y. 2009) (emphasis in original). It would be similarly strange and inappropriate to permit
14 Perkumpulan to invoke RICO’s civil cause of action for extraterritorial securities fraud when the
15 securities laws themselves do not make such a claim available.¹⁰

16 In the course of its argument, Perkumpulan asserts that in the above cases, the S.E.C.
17 could have brought an action, whereas here, the S.E.C. would also be precluded from initiating
18 an enforcement action given the extraterritorial nature of the conduct. In making this argument,
19 Perkumpulan urges the Court not to rely on the Second Circuit’s decision in *MLSMK Inv. Co. v.*
20 *JP Morgan Chase & Co.*, 651 F.3d 268 (2d Cir. 2011). In that case, the Court addressed the
21 question of whether the PSLRA bar “applies to claims based on conduct that could be actionable
22 under the securities laws even when the [particular] plaintiff cannot bring a cause of action under
23 the securities laws[.]” *MLSMK*, 651 F.3d at 274 (quotations omitted). There, the plaintiff based
24 its RICO claim on conduct that was not actionable under the securities laws by a private plaintiff,

25 ¹⁰ Plaintiff’s proffered approach would also be “precisely the opposite” of the purpose underlying the RICO
26 Amendment, which sought to completely eliminate the use of securities fraud in RICO actions. *See* GREGORY P.
JOSEPH, *CIVIL RICO: A DEFINITIVE GUIDE* 122–23 (2010). This is because Plaintiff’s argument would create a
loophole to “expand, rather than restrict, the use of securities claims as predicate acts.” *Id.*

1 since the conduct was merely “aiding and abetting” securities fraud. *Id.* Notwithstanding that
2 fact, the Second Circuit concluded in a thorough analysis that the PSLRA “bars civil RICO
3 claims alleging predicate acts of securities fraud, even where a plaintiff cannot itself pursue a
4 securities fraud action against the defendant.” *Id.* at 277. The Court also rejected the plaintiff’s
5 argument that its RICO claim was necessarily permissible under the PSLRA because a securities
6 claim based on the defendant’s conduct would not withstand a 12(b)(6) analysis under a specific
7 securities fraud theory. *Id.* n.11. The Court’s decision in *MLSMK* did not depend solely on the
8 fact that the S.E.C. could have successfully brought the securities fraud claim.

9 Perkumpulan’s argument is a red herring. First, the Court has not relied on the specific
10 holding of *MLSMK*, but merely discussed it among numerous other cases for the basic
11 propositions in the “RICO Amendment” context. Furthermore, Plaintiff’s conclusion would be
12 unavailing even if the Court adopted its proposed approach and determined that its ability to
13 bring a securities-fraud-based RICO claim depended on *Morrison*’s extraterritoriality analysis. In
14 its attempt to shoehorn a securities fraud claim into its RICO cause of action, Perkumpulan fails
15 to note that after the Supreme Court decided *Morrison*, Congress expressly sought to preserve
16 the S.E.C.’s enforcement authority as it relates to extraterritorial securities fraud. *See S.E.C. v.*
17 *Tourre*, No. C10-3229, 2013 WL 2407172, at *1, 4 (S.D.N.Y. June 4, 2013) (noting that the
18 Dodd-Frank Act “effectively reversed *Morrison* in the context of SEC enforcement actions” and
19 declining to require a *Morrison* analysis for fraudulent conduct that occurred after the Dodd-
20 Frank Act was passed); *S.E.C. v. Gruss*, No. C11-2420, 2012 WL 3306166, at *3 (S.D.N.Y. Aug.
21 13, 2012) (“Section 929P(b) of the Dodd–Frank Act allows the SEC to commence civil actions
22 extraterritorially in certain cases.”); 15 U.S.C. § 77v(c). Thus, it appears that its claims would be
23 “actionable” as fraud in the purchase or sale of securities by the S.E.C. even if the Court were to
24 engage in Plaintiff’s proposed analysis.

25 Finally, whether the S.E.C. could prevail is beside the point. As explained above (and
26 even in *MLSMK*), the PLSRA analysis does not depend on whether one could ultimately prevail

1 on a securities fraud claim under a Rule 12(b)(6)-style analysis. Instead, the question is whether
2 the conduct alleged is of the type generally actionable under the securities laws—that is, whether
3 it is conduct that involved fraud in connection with the purchase or sale of securities. *MLSMK*,
4 651 F.3d at 278 (discussing legislative history and explaining that “Congress did not say that it
5 was removing ‘any *claim* that would have been actionable’”) (emphasis in original). The fact that
6 Plaintiff or the S.E.C. could not ultimately succeed on a securities claim against Defendants does
7 not in turn salvage their RICO claim, which is unquestionably premised upon “fraud made in
8 connection with the purchase and sale of securities” under even the most basic definition of
9 securities fraud. *Cf. id.* at 280. Ultimately, Perkumpulan’s proffered approach is contrary to the
10 purpose of the RICO Amendment, would expand rather than limit the use of securities fraud in
11 the RICO context, and has been persuasively rejected by another court faced with the same
12 argument. The Court thus finds Plaintiff’s distinction to be unpersuasive.

13 Because Perkumpulan cannot rely on the conduct of Defendants it has alleged to support
14 its RICO cause of action, it cannot state a valid claim under the statute. The Court does not
15 believe that allowing Plaintiff to file another amended complaint is necessary, since under any
16 internally consistent set of facts, the alleged scheme was one based upon securities fraud. *Swartz*,
17 476 F.3d at 761; *see Albrecht v. Lund*, 845 F.2d 193, 195 (9th Cir. 1988) (if “the allegation of
18 other facts consistent with the challenged pleading could not possibly cure the deficiency, then . .
19 . dismissal without leave to amend is proper.”) (internal quotation, citation omitted). Section 107
20 of the PSLRA thus requires that Plaintiff’s RICO claim be dismissed with prejudice.

21 **C. Plaintiff’s Remaining State Law Claims**

22 “Courts have an independent obligation to determine whether subject-matter jurisdiction
23 exists.” *Hertz Corp. v. Friend*, 559 U.S. 77, 95 (2010). Federal subject matter jurisdiction exists
24 only when a controversy involves diversity of citizenship between the parties or a question of
25 federal law. *See* 28 U.S.C. §§ 1331, 1332(a)(1)–(4). Plaintiff’s operative complaint premises the
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1 Court’s jurisdiction on its federal claim and the Court’s supplemental jurisdiction.¹¹ (Dkt. No.
2 381 at ¶ 2.1.) Because the Court no longer has any basis to exercise federal question jurisdiction,
3 the Court declines to exercise supplemental jurisdiction over Perkumpulan’s remaining state law
4 claims. *Ove v. Gwinn*, 264 F.3d 817, 826 (9th Cir. 2001) (“A court may decline to exercise
5 supplemental jurisdiction over related state-law claims once it has dismissed all claims over
6 which it has original jurisdiction.”). The Court accordingly dismisses Plaintiff’s remaining state-
7 law claims without prejudice.

8 **D. The Parties’ Motions for Sanctions**

9 **1. Jared Sherer’s and Perkumpulan’s Sanctions Motions (Dkt. Nos. 485,
10 499)**

11 In the course of discovery, Defendant Jared Sherer filed a motion for sanctions against
12 Perkumpulan and its counsel. According to Mr. Sherer, Plaintiff and its counsel violated the
13 automatic stay that arose when he re-opened his bankruptcy proceeding in the United States
14 Bankruptcy Court for the District of Utah by seeking discovery from him, notwithstanding his
15 active litigation of this matter. (Dkt. No. 499.) Plaintiff asserts in its response and its own motion
16 to compel and for sanctions (Dkt. No. 485) that Mr. Sherer’s contention is frivolous. As Plaintiff
17 explains, the Ninth Circuit has held that re-opening a previously closed Chapter 7 bankruptcy
18 proceeding does not re-instate the automatic stay that accompanies an initial filing. *In re Menk*,
19 241 B.R. 896, 914 (9th Cir. 1999) (“[T]o the extent that the automatic stay expired in
20 conjunction with closing, it does not automatically spring back into effect. If protection is
21 warranted after a case is reopened, then an injunction would need to be imposed.”) Additionally,
22 Plaintiff asserts that Mr. Sherer’s alleged conduct post-dates his bankruptcy discharge, rendering

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24 ¹¹ Even if Plaintiff attempted to base its lawsuit on the Court’s diversity jurisdiction, the Court would find
25 that jurisdiction was lacking. This is because Perkumpulan, as a foreign plaintiff, is suing foreign defendants. *See*
26 *Mutuelles Unies v. Kroll & Linstrom*, 957 F.2d 707, 712 (9th Cir. 1992) (“Diversity jurisdiction does not encompass
foreign plaintiffs suing foreign defendants.”); *Faysound, Ltd. v. United Coconut Chems., Inc.*, 878 F.2d 290, 294
(9th Cir. 1989) (no complete diversity where an alien plaintiff sues an alien defendant, even if there are citizen
defendants present).

1 any bankruptcy stay immaterial. *See Partners for Health and Home, L.P. v. Yang*, 488 B.R. 109,
2 119 (C.D. Cal. 2012) (“A bankruptcy discharge cannot discharge liabilities for acts that the
3 debtor committed or continued post-petition, or at least post-discharge.”). In light of the
4 foregoing, Perkumpulan requests that the Court compel Jared Sherer to respond to certain
5 discovery requests and pay for Plaintiff’s attorneys’ fees and costs associated with the motion to
6 compel. (Dkt. No. 485.)

7 The Court declines to sanction either party and declines to resolve the motion to compel
8 in light of the Court’s ruling herein on the Sherers’ motion to dismiss. As an initial matter, the
9 Court agrees with Plaintiff that Mr. Sherer’s bankruptcy re-opening has not worked to
10 automatically stay this action. Nor would the principal allegations against Mr. Sherer implicate
11 the stay even if the re-opening did renew the automatic stay, since they focus on conduct that
12 post-dates Mr. Sherer’s bankruptcy discharge. In light of these conclusions, the Court does not
13 believe that sanctions against Plaintiff or Plaintiff’s attorneys are warranted. But similarly, the
14 Court finds unnecessary sanctions against Mr. Jared Sherer. The Court has declined to resolve
15 the pending motion to compel in light of its ruling that Plaintiff’s complaint must be dismissed
16 for failure to state a claim. Absent a ruling that Mr. Sherer failed to comply with his discovery
17 obligations, the Court has no basis to award the fees incurred in filing the motion to compel
18 under Rule 37. If Plaintiff chooses to pursue its state law claims in state court, it may engage in
19 discovery in accordance with the rules thereof. Should Mr. Sherer fail to participate in good
20 faith, the presiding Judge may deal with his refusals accordingly. The motions for sanctions
21 (Dkt. Nos. 485, 499) are denied.

22 **2. Perkumpulan’s Motion for Sanctions Against Defendants Kenneth**
23 **McCabe, Michelle Sherer, and Donald Sherer (Dkt. No. 487)**

24 Perkumpulan also requests that the Court sanction Defendants Kenneth McCabe, Donald
25 Sherer, and Michelle Sherer pursuant to Rule 37(g)(2)(A) by striking their answers and motions
26 to dismiss and entering default against them. (Dkt. No. 494.) As Plaintiff points out, this Court
previously ordered Kenneth McCabe and the Sherers to respond to discovery requests that they

1 ignored and to show cause why they should not have to pay for the fees and costs Plaintiff
2 incurred in filing the motion to compel. (Dkt. No. 317.) Following that Order, Mr. McCabe
3 produced nothing. (Dkt. No. 487 at 3.) Instead, Plaintiff points out, Mr. McCabe continued to
4 insist that he had no e-mails or documents to produce and failed to respond to the Court's show
5 cause order. (*See id.*) The Sherers, then represented by counsel, did respond to the show cause
6 order. Counsel explained that it took him time to get up to speed on the case, that the motion to
7 compel could have been avoided, and that the Sherers provided the discovery responses at issue
8 as ordered by the Court. (Dkt. No. 323.)

9 Perkumpulan explains in the instant motion that Mr. McCabe has continued to stonewall
10 its discovery efforts. While the Sherers did produce some documents following the motion to
11 compel, Perkumpulan believes that the Sherers did not make a full production in good faith and
12 have failed to complete production of additional responsive documents. Perkumpulan also
13 highlights what it believes to be the Sherers' "ongoing pattern of misconduct," which include:
14 (1) the Sherers' failure to respond to Perkumpulan's discovery requests until faced with a motion
15 to compel; (2) the Sherers' failure to produce documents in response to the same; (3) the Sherers'
16 filing of procedurally improper motions to dismiss; (4) Donald Sherer's engaging in improper
17 representation of his son, Jared, when both parties are proceeding *pro se*; (5) the Sherers' making
18 of "hundreds of changes" to their deposition transcripts; (6) the Sherers' filing of an improper
19 surreply; and (7) the Sherers making a "bad faith attempt to remove Plaintiff's Alaska state-court
20 action" to the federal district court in Utah.

21 "If a party . . . fails to obey an order to provide or permit discovery," the Court may
22 impose sanctions, including the payment of expenses and attorneys' fees, "striking pleadings in
23 whole or in part," or "rendering a default judgment against the disobedient party." FED. R. CIV.
24 P. 37(c)(1). "Where the sanction results in default, the sanctioned party's violations must be due
25 to the willfulness, bad faith, or fault of the party." *Hester v. Vision Airlines*, 687 F.3d 1162, 1169
26 (9th Cir. 2012). The Ninth Circuit has explained that default judgment is a "harsh penalty" to be

1 imposed “only in extreme circumstances.” *Id.* (citation omitted). Accordingly, a court must
2 consider five factors before striking a pleading or declaring default as a sanction for discovery
3 violations: “(1) the public’s interest in expeditious resolution of litigation; (2) the court’s need to
4 manage its docket; (3) the risk of prejudice to the other party; (4) the public policy favoring the
5 disposition of cases on their merits; and (5) the availability of less drastic sanctions.” *Id.* (citation
6 omitted).

7 The Court is not satisfied that striking the pleadings and entering default against Mr.
8 McCabe and the Sherers is warranted. With regard to Mr. McCabe, the Court takes note that
9 while Mr. McCabe is steadfast in his assertion that he has no documents to produce—an
10 argument Plaintiff believes to be false—the parties did discuss the possibility of allowing
11 Plaintiff to search Mr. McCabe’s e-mails to prove his assertion but failed to reach agreement on
12 the matter. (Dkt. No. 494 at 3.) As Plaintiff admits, Mr. McCabe would not allow *Plaintiff* to
13 conduct the search, but did indicate his willingness to allow a lawyer or other third-party to
14 review his e-mails and attest that none of the requested communications were present. In its
15 reply, Plaintiff faults Mr. McCabe for “never commission[ing] such a search.” (*Id.*) But it is not
16 clear from the parties’ briefing whether Plaintiff itself ever sought to take Mr. McCabe up on this
17 offer. While the Court shares Plaintiff’s concern about Mr. McCabe’s lack of responsiveness,
18 these very facts belie its argument that default is the *only* appropriate sanction. Mr. McCabe has,
19 at a minimum, offered to cooperate with Plaintiff in some fashion so as to move the case along.
20 Permitting Plaintiff to take a default judgment against Mr. McCabe that could render him liable
21 for hundreds of millions of dollars is simply too strong a sanction for his failure to comply with
22 the Court’s previous order. Such an unreasonable sanction is made all the worse in light of the
23 Court’s ruling herein that Plaintiff has failed to state a claim for a RICO violation. Because Mr.
24 McCabe has not been subject to less drastic sanctions for his alleged conduct, because a
25 disposition of the case on the merits is preferable, and because a default would subject Mr.
26 McCabe to a disproportionately harsh sanction for the alleged conduct, the Court declines to

1 sanction Mr. McCabe by striking his pleadings and entering default against him. *See Hester*, 687
2 F.3d at 1169. Because the Court previously granted Plaintiff's motion to compel discovery
3 responses from Mr. McCabe and he failed to respond to the Court's order to show cause,
4 however, Mr. McCabe shall pay Plaintiff's reasonable attorneys' fees incurred in bringing that
5 motion to compel. (*See* Dkt. No. 317.) Plaintiff shall submit within fourteen (14) days proof of
6 its reasonable attorneys' fees for that motion.

7 The Court now turns to the Sherers' conduct. Unquestionably, they have failed to follow
8 local rules and their filings leave much to be desired. However, much of the conduct
9 Perkumpulan points to is *not* subject to Rule 37's authority for sanctions, which deals with a
10 party's failure to comply with a Court's discovery order. Some of the conduct does not even
11 involve this lawsuit, but instead refers to the Sherers litigation tactics in other matters. With
12 regard to the Sherers' discovery responses, which is the only conduct at issue here, their then-
13 counsel responded to the Order to Show Cause, explained the failure, and indicated that the
14 responses had been produced to Plaintiff. Now, in the instant motion, Plaintiff reiterates its belief
15 that the productions are not complete and requests that the Court sanction the Sherers by striking
16 their pending motions to dismiss and entering default against them. The Court declines to do so
17 upon consideration of the *Hester* factors. Namely, the Sherers undisputedly complied in part with
18 the Court's order to produce documents, though the parties remain in dispute as to whether that
19 production was complete. Even assuming that the production as not complete, however, the
20 Court notes that it has not yet required the Sherers to pay monetary fines, the default judgment
21 would be excessive given the award that Plaintiff seeks in this case, and as discussed above, the
22 Court has concluded that Plaintiff's complaint fails to state a claim as a matter of law. In light of
23 these factors, the Court cannot say that the Sherers' conduct, as frustrating, unprofessional, and
24 difficult it may be, warrants striking their motions to dismiss and subjecting them to a default
25 judgment.

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1 **E. Perkumpulan’s Motion to Seal (Dkt. No. 526)**

2 Finally, Perkumpulan requests that the Court seal exhibits K, P, Q, and Z, which it filed
3 in opposition to Defendant Dwight Williams’ motion for summary judgment and in support of its
4 own motion for partial summary judgment. (Dkt. No. 526.) The documents at issue were marked
5 “Confidential” or “Highly Confidential” by Regal Financial Bank, a former Defendant in this
6 matter. The Court has not considered any of these documents in the instant ruling given the
7 analysis herein. No party or interested person has opposed or responded the motion.

8 The Court denies the motion to seal. (Dkt. No. 526.) A party filing documents subject to a
9 stipulated protective order *must* file them under seal, but need not provide a “specific statement
10 of the applicable legal standard and the reasons for keeping a document under seal.” Local Rules
11 W.D. Wash. CR 5(g)(3). Instead, the party or interested person must who designated the
12 document confidential must satisfy the rule above and provide evidentiary support from
13 declarations where necessary. *Id.* Here, Perkumpulan filed a motion to seal certain documents
14 that former-Defendant Regal Financial Bank marked “Confidential” or “Highly Confidential.”
15 However, it provided no explanation as to why the Court should keep the documents sealed, and
16 no party or other interested person (such as Regal Financial Bank) responded as required under
17 the Local Rules. Under the governing rules, the Court has no basis to seal the documents and will
18 not, *sua sponte*, engage in document review on behalf of the parties—especially when the Court
19 has not relied upon the documents at issue in reaching a dispositive ruling in this case.

20 Because the Court denies the motion to seal, the documents at issue will be unsealed in
21 seven (7) days absent a request that the materials be withdrawn from the record rather than
22 unsealed. *See* Local Rules W.D. Wash. CR 5(g)(6).

23 **III. CONCLUSION**

24 For the foregoing reasons, the Court rules as follows:

25 1) The motion to dismiss filed by Defendant Jared Sherer and joined by Michelle and
26 Donald Sherer is GRANTED (Dkt. No. 388) and Plaintiff’s RICO claim is DISMISSED with

1 prejudice;

2 2) The Court declines to exercise its supplement jurisdiction over Plaintiff's state law
3 claims and accordingly DENIES as moot the parties' motions relating to those claims (Dkt. Nos.
4 377, 404, 432, 441, 509, 516);

5 3) The Court GRANTS the Sherers' motions to file over-length papers (Dkt. Nos. 429,
6 431) and Michelle Sherer's motion to withdraw (Dkt. No. 440), and STRIKES Michelle Sherer's
7 initial motion to dismiss (Dkt. No. 430);

8 4) The Court DENIES as moot the parties' non-dispositive discovery, service of process,
9 and default-related motions in light of the dismissal of Plaintiff's complaint (Dkt. Nos. 426, 427,
10 457, 477, 506, 538, 544, 546);

11 5) The Court DENIES Perkumpulan's and Jared Sherer's motions for sanctions (Dkt.
12 Nos. 485, 487, 499) except as explained herein with regard to Defendant Kenneth McCabe;

13 6) The Court DENIES Perkumpulan's motion to seal (Dkt. No. 526).

14 DATED this 14th day of March 2014.

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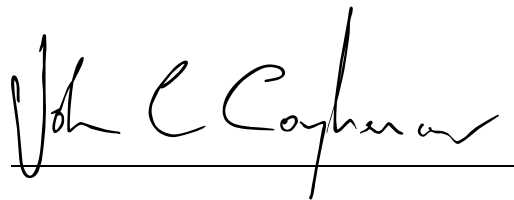
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John C. Coughenour
UNITED STATES DISTRICT JUDGE