75 F.4th 86
United States Court of Appeals, Second Circuit.

Virginia A. D'ADDARIO, individually and on behalf of the F. Francis D'Addario Testamentary Trust and the Virginia D'Addario Trust; and Virginia A. D'Addario, Executrix, as Executrix of the Probate Estate of Ann T. D'Addario, Deceased, and on behalf of the F. Francis D'Addario Testamentary Trust and the Ann T. D'Addario Marital Trust, Plaintiff-Appellant,
Brent A. Platt, Trustee, as Trustee for the Virginia D'Addario Spray Trust #1, the Virginia D'Addario Spray Trust #2, and the Virginia D'Addario Accumulation Trust, Plaintiff,
v.
David D'ADDARIO, Mary Lou D'Addario Kennedy, Gregory S. Garvey, Red Knot Acquisitions, LLC, Silver Knot, LLC, and Nicholas Vitti, Defendants-Appellees.*

No. 21-2105
|
August Term 2022
|
Argued: December 8, 2022
|
Decided: July 24, 2023

Opinion

Judge Carney concurs in part and dissents in part in a separate opinion.

Menashi, Circuit Judge:

***88** Plaintiff-Appellant Virginia D'Addario appeals from a judgment of the United States District Court for the District of Connecticut granting the defendants' motion for judgment on the pleadings. *D'Addario v. D'Addario*, No. 16-CV-0099, 2021 WL 3400633 (D. Conn. Aug. 4, 2021).

Virginia brought claims, both individually and as the executrix of her mother's estate, under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*, against her brother, David D'Addario; her sister, Mary Lou D'Addario Kennedy; Gregory Garvey; Nicholas Vitti; Red Knot Acquisitions, LLC; and Silver Knot, LLC. She alleged that David orchestrated a long-running scheme to "plunder, pillage and loot the over $162,000,000 in assets of his deceased father's probate estate." App'x 40; Second Amended Complaint ("SAC") ¶ 1, *D'Addario v. D'Addario*, No. 16-CV-0099 (D. Conn. Oct. 15, 2019), ECF. No. 73. The district court concluded that Virginia's RICO claims were barred by the Private Securities Litigation Reform Act of 1995—also known as the "RICO Amendment"—which provides 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 [RICO]." 18 U.S.C. § 1964(c).

We conclude that Virginia's claims are not barred by the RICO Amendment. Accordingly, we reverse the judgment of the district court and remand for further proceedings.

BACKGROUND

In considering this appeal, we "accept all factual allegations in the complaint as true and draw all reasonable inferences in favor" of the plaintiff, Virginia. *Bank of N.Y. v. First Millennium, Inc.*, 607 F.3d 905, 922 (2d Cir. 2010) (internal quotation marks omitted).

I

Virginia's father, F. Francis D'Addario, controlled D'Addario Industries, a business enterprise with ventures in "environmental waste recycling and management, real estate, construction, building materials, professional sports, communications, and fuel oil." SAC ¶ 9. Francis died in an airplane crash in 1986 with a net worth of approximately $111 million. He was survived by his wife, Ann, and their five children, Virginia, Larry, Mary Lou, Lisa, and David.

Shortly after his death, Francis's will was filed for probate in the probate court of Trumbull, Connecticut. Francis had appointed his two sons, David and Larry—along with three non-family members—to be executors of his estate. His will provided that one half of his net assets would go into a marital trust for the benefit of his wife and the other half into five separate trusts for the benefit of his five children in equal shares. The will and other estate-planning documents provided that if any of the five children predeceased the others while the estate remained open, the deceased child's interests would return to the ***89** estate for pro rata distribution to the remaining siblings.

Over three decades after Francis's death, the estate remains open in probate court, and assets have not been

distributed to beneficiaries. According to Virginia, the assets have not been distributed because, since at least 1987, David has done "everything within his power to transfer the significant assets of the Estate for his personal financial benefit." SAC ¶ 20. Although he "owed fiduciary duties to [Virginia]" as an executor of the estate and as a trustee of various testamentary trusts, he "engaged in a continuing course of conduct" in breach of those duties in order to capture the assets of the estate for himself. SAC ¶ 102. Apart from transferring assets away from the estate, David has allegedly kept the estate open in order to deprive Virginia of her interest in the estate. He allegedly told Virginia, "I'm 15 years younger than you, I'll outlive you, and I can keep the Estate open until after you die." SAC ¶ 16.

The defendants include David D'Addario; his sister, Mary Lou D'Addario Kennedy; his business partner and alleged co-conspirator Gregory S. Garvey; Red Knot Acquisitions, a Connecticut limited liability company owned by Garvey but alleged to be the alter ego of David; Silver Knot, a Delaware limited liability company formed by David and Garvey to engage in a scheme described below; and Nicholas Vitti, David's personal financial advisor and confidant.

In effectuating his alleged long-term plan to transfer estate assets for his personal benefit, David "designed and implemented a number of schemes." SAC ¶ 27. We describe each in turn.

A

First, we recount the "Red Knot Forbearance Agreement" scheme. SAC at 17. In 1986, the estate owed approximately $25 million to three banks—Connecticut National Bank, Connecticut Bank and Trust Company, and People's Bank (collectively, the "Bank Group")—on account of loans extended to F. Francis D'Addario. Four years later, the Bank Group claimed that the estate was in default on these loans and sought the sale of estate assets to satisfy the obligations. The estate and the Bank Group entered into an agreement pursuant to which additional funds were loaned to the estate and the estate's executors would sell assets to settle the loans.

In 1992, the Bank Group filed an application for removal of the executors in the probate court due to the estate's failure to dispose of assets in a timely fashion. The Bank Group alleged that David and Larry, as executors of the estate, had conflicts of interest that impeded the settlement of the estate to the detriment of its creditors. With the help of "skilled counsel," however, David delayed a disposition by the probate court for over five years. SAC ¶ 54.

By 1997, the amount owed to the Bank Group had grown to over $48 million. Because of its own "inner turmoil" and "substantial financial difficulties," the Bank Group offered to extinguish the loan obligations and liens in exchange for a one-time cash payment of $4.75 million. SAC ¶ 55. According to the complaint, David falsely claimed that the estate could not produce the required funds. Instead, David and Gregory Garvey created an entity called Red Knot Acquisitions, which purchased the Bank Group's secured loan position and entered into a forbearance agreement with the estate.

The forbearance agreement gave Red Knot a lien on virtually all the estate's assets. The agreement also provided that if David were ever removed as an executor, ***90** Red Knot would have "the immediate right to engage in collection efforts on the over $48,000,000 allegedly owed to Red Knot." SAC ¶ 60. The agreement contained a purchase option under which the estate could purchase the loan position at a variable price until January 7, 2003. In 2000, for example, the estate could have exercised the purchase option for approximately $800,000 and extinguished the debt owed to Red Knot. David did not exercise that option on behalf of the estate.

Allegedly, the true purpose of the forbearance agreement was to make it practically impossible to remove David as an executor. "Rather than operate as a mechanism for a legitimate secured creditor (purportedly, Red Knot) and a debtor (the Estate) to extend and work out a debtor's defaulted loan obligations, here the Red Knot Forbearance Agreement was used by David and Garvey as a mechanism for David to stay in control of the Estate for as long as he desired." SAC ¶ 65.

B

Second, we recount the "Silver Knot/Wise Metals" scheme. SAC at 28. In 1986, shortly before his death, F. Francis D'Addario had been negotiating an investment in an aluminum can recycling business known as New England Redemption. After Francis's death, David "usurped that business opportunity for his personal financial benefit" rather than continue the negotiations on behalf of the estate. SAC ¶ 80. David "offered free rent in the Estate's Bridgeport Brass Building [to New England Redemption] in exchange for a 25% ownership interest in the venture" for himself. SAC ¶ 80. Upon the sale of New

England Redemption in 1994, David "converted the profits ... for his personal financial benefit[ ] and refused to plow those profits back into the Estate." SAC ¶ 81.

In 1999, David used those proceeds—or possibly other estate assets—to form Silver Knot, LLC, which acquired a controlling interest in Wise Metals, a producer of aluminum cans.[1] In 2014, Constellium N.V., a Dutch aluminum company, acquired Wise Metals for $1.4 billion, including a cash payment to Silver Knot of $455 million. David again did not deliver the proceeds of that sale to the estate. Instead, he "converted those sale proceeds for his personal financial gain and for the benefit of his co-conspirator Defendants." SAC ¶ 84.

C

Third, we recount the schemes that allegedly involved the wrongful disposition of the estate's real property. In 1986, the estate owned an undeveloped plot of land on "Honeyspot Road" in Stratford, Connecticut. SAC ¶ 29. David failed to pay taxes on the land—even though the estate had sufficient "liquid assets" to pay its taxes—resulting in a delinquency and a foreclosure sale. SAC ¶ 33. The property was sold to "close friends" of Mary Lou in 1996 and then sold back to an entity controlled by David in 1997 at below-market prices. SAC ¶ 34.

The estate also owned several residential properties in New York, California, Florida, and Vermont. For over a decade, David, Mary Lou, and Larry had "free and unfettered use" of the properties while the estate paid all the maintenance costs. SAC ¶ 76. In 1997, the New York and Vermont ***91** condominiums were deeded to David and the Vermont lot was deeded to Mary Lou without payment to the estate. In 1999, the California property was sold to a third party and David did not remit the proceeds from the sale to the estate.

Additionally, the estate owned a 50 percent interest in an undeveloped plot of land on "Frenchtown Road" in Trumbull, Connecticut. SAC ¶ 41. David knew that the town was interested in purchasing the property to build a new school. "In breach of his fiduciary duties, David did not take all reasonable steps necessary to accord the Estate the opportunity to acquire the [other] 50% interest" in the property. SAC ¶ 43. Instead, he purchased the remaining 50 percent interest through his own company for $450,000 and proceeded to sell the entire lot to the town for $6,000,000. Through the transaction, he earned $2.25 million in personal profit that should have reverted to the estate had he not usurped the business opportunity.

II

In January 2016, Virginia sued the defendants in the United States District Court for the District of Connecticut. She asserted RICO claims—under 18 U.S.C. §§ 1962(b), 1962(c), and 1962(d)—and Connecticut state law claims related to David's breach of his fiduciary duties. Her RICO claims were predicated on acts of mail fraud, wire fraud, money laundering, monetary transactions with unlawful proceeds, interstate racketeering, and interstate transport of misappropriated funds in connection with the fraudulent schemes discussed above.

The district court granted the defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), concluding that Virginia "fail[ed] to adequately plead substantive RICO violations, there is no diversity of parties, and the Court will not exercise supplemental jurisdiction over the state law claims." *D'Addario v. D'Addario*, No. 16-CV-0099, 2017 WL 1086772, at *1 (D. Conn. Mar. 22, 2017), *vacated and remanded*, 901 F.3d 80 (2d Cir. 2018).

On appeal, we vacated the district court's judgment and remanded for further proceedings. We concluded that Virginia had adequately pleaded a RICO claim under 18 U.S.C. § 1964(c) against all the defendants and adequately pleaded a RICO claim under 18 U.S.C. § 1962(b) against David, Garvey, and Red Knot. *D'Addario v. D'Addario*, 901 F.3d 80, 85-86 (2d Cir. 2018). While Virginia's claims based on her lost inheritance—and that of her mother's estate—were not ripe because the estate remained open and the amount of the lost inheritance was too speculative, her claim under RICO for legal expenses incurred in protecting her interest in the estate against David and other defendants was ripe. *Id.* at 95-96. We directed the district court to reconsider on remand whether to exercise supplemental jurisdiction over her remaining state law claims. *Id.* at 104-05.

On remand, the district court granted in part Virginia's motion for leave to file a second amended complaint and elected to exercise supplemental jurisdiction over her previously asserted state law claims. Ruling on Plaintiff's Motion for Leave to File Second Amended Complaint at

13-14, *D'Addario v. D'Addario*, No. 16-CV-0099 (D. Conn. Sept. 23, 2019), ECF No. 69. However, Virginia subsequently moved to stay consideration of all state law claims or for the district court to decline to exercise supplemental jurisdiction over those claims pending resolution of the state law claims in an existing state court suit. The district court granted Virginia's motion and declined to exercise supplemental jurisdiction, dismissing those counts related to Connecticut state law claims for breach of ***92** fiduciary duties, aiding and abetting breach of fiduciary duties, conspiracy to breach fiduciary duties, and unjust enrichment. Ruling on Plaintiff's Motion to Stay or Decline Supplemental Jurisdiction at 10, *D'Addario v. D'Addario*, No. 16-CV-0099 (D. Conn. Apr. 3, 2020), ECF No. 88.

On September 4, 2020, the defendants filed a motion for judgment on the pleadings arguing that Virginia's RICO claims were barred by the RICO Amendment, which provides that "no person may rely upon conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of [RICO]." 18 U.S.C. § 1964(c); *see* Defendants' Motion for Judgment on the Pleadings, *D'Addario v. D'Addario*, No. 16-CV-0099 (D. Conn. Sept. 4, 2020), ECF No. 114. The district court granted the motion, concluding that the alleged fraudulent conduct described in the Red Knot and Silver Knot/Wise Metals schemes was actionable as securities fraud and therefore barred by the RICO Amendment. *D'Addario*, 2021 WL 3400633, at *6.

The district court explained that when a "scheme to defraud and the sale of securities coincide," such conduct is actionable as securities fraud and cannot form the basis of a RICO claim. *Id.* at *4 (quoting *SEC v. Zandford*, 535 U.S. 813, 822, 122 S.Ct. 1899, 153 L.Ed.2d 1 (2002)). The district court concluded that this case involved such conduct. Virginia alleged that David had granted a lien to Red Knot on the estate's assets—including securities—in exchange for a sham forbearance agreement that had the practical effect of making it impossible to remove him as executor. A pledge of securities is equivalent to a sale of securities for purposes of the securities fraud statutes. *See Rubin v. United States*, 449 U.S. 424, 425, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981) ("[A] pledge of stock to a bank as collateral for a loan is an 'offer or sale' of a security."). Because the granting of the lien on estate securities coincided with the scheme to defraud, the district court held that the RICO Amendment applied and barred Virginia's claims.

The district court also concluded that the Silver Knot/Wise Metals scheme coincided with securities transactions because Virginia alleged that David converted estate assets in breach of his fiduciary duties through the purchase and sale of securities in New England Redemption, Silver Knot, and Wise Metals. *D'Addario*, 2021 WL 3400633, at *5. Based on these two schemes, the district court concluded that Virginia's RICO claims were barred and granted judgment on the pleadings in favor of the defendants. The district court did not separately address the alleged wrongful dispositions of real property. Virginia timely appealed.

DISCUSSION

We review a district court's decision to grant a motion for judgment on the pleadings de novo. *Latner v. Mount Sinai Health Sys., Inc.*, 879 F.3d 52, 54 (2d Cir. 2018). We "accept all factual allegations in the complaint as true and draw all reasonable inferences in favor" of Virginia. *Bank of N.Y.*, 607 F.3d at 922 (internal quotation marks omitted).

I

RICO authorizes a cause of action against persons involved in a pattern of racketeering activity. *See* 18 U.S.C. § 1961(1) (defining "racketeering activity"). Section 1964(c) provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains." 18 U.S.C. § 1964(c). Section 1962 makes it unlawful to "acquire or maintain" ***93** an interest in or control of an enterprise through a pattern of racketeering activity, *id.* § 1962(b), to conduct or participate in the conduct of an enterprise through a pattern of racketeering activity, *id.* § 1962(c), and to conspire to do so, *id.* § 1962(d).

Congress amended the cause of action with the Private Securities Litigation Reform Act, Pub. L. No. 104-67, § 107, 109 Stat. 737 (1995). Before the amendment, a plaintiff could allege a civil RICO claim for securities fraud violations because "fraud in the sale of securities" is a predicate act of racketeering activity. 18 U.S.C. § 1961(1)(D); *see MLSMK Inv. Co. v. JP Morgan Chase*

& Co., 651 F.3d 268, 274 (2d Cir. 2011). The amendment eliminated securities fraud as a basis for a civil RICO claim—at least in the absence of a criminal conviction—by providing that "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962." 18 U.S.C. § 1964(c).[2]

The RICO Amendment aimed to avoid duplicative recoveries for securities fraud violations. "Because the securities laws generally provide adequate remedies for those injured by securities fraud, it is both [un]necessary and unfair to expose defendants in securities cases to the threat of treble damages and other extraordinary remedies provided by RICO." 141 Cong. Rec. H13, 691-08, at H13, 704 (daily ed. Nov. 28, 1995) (statement of SEC Chairman Arthur Levitt). The amendment sought to "prevent litigants from using artful pleading to boot-strap securities fraud cases into RICO cases, with their threat of treble damages." *MLSMK*, 651 F.3d at 274.

The question presented in this case is whether claims arising from fraudulent conduct constituting a breach of fiduciary duties by the executor of an estate are barred by the RICO Amendment because the claims involve securities transactions. We conclude that for a claim to be barred, the fraud must be "*in* the purchase or sale of securities," which means that the actual purchase or sale of securities was fraudulent; it is not enough for securities to be an incidental feature of an overall scheme. 18 U.S.C. § 1964(c) (emphasis added). The Supreme Court has cautioned that securities fraud under section 10(b) of the Securities Exchange Act of 1934 "must not be construed so broadly as to convert every common-law fraud that happens to involve securities into a violation." *Zandford*, 535 U.S. at 820, 122 S.Ct. 1899. The RICO Amendment also must not be construed so broadly as to bar RICO claims based on common law frauds that happen to involve securities.

Other circuits have reached the same conclusion. In *Rezner v. Bayerische Hypo-Und Vereinsbank AG*, the Ninth Circuit held that a pledge of securities—as part of a tax scheme to generate the appearance of capital losses—was not fraud in the purchase or sale of securities for purposes of the RICO Amendment. 630 F.3d 866, 872 (9th Cir. 2010). While the defendant argued that the pledge of securities coincided with the fraud, the court concluded that the tax "fraud bore an insufficient connection to the securities" and that "securities were merely a happenstance cog in the scheme." *Id.*

In *Ouwinga v. Benistar 419 Plan Servs., Inc.*, the Sixth Circuit decided that claims arising from a tax fraud effectuated through the purchase of life insurance policies were not barred by the RICO Amendment ***94** because the securities transactions "were not integral to ... the fraudulent scheme as a whole." 694 F.3d 783, 791 (6th Cir. 2012). The Sixth Circuit favorably cited a district court decision from our circuit with a similar holding. According to that decision, even when an "alleged [tax] fraud could not have occurred without the sale of securities at the inflated basis ... it is inaccurate to suggest that the actual purchase and sale of securities were fraudulent." *Kottler v. Deutsche Bank AG*, 607 F. Supp. 2d 447, 458 n.9 (S.D.N.Y. 2009). Rather, "the alleged fraud here involved a tax scheme, with the securities transactions only incidental to any underlying fraud." *Id.*

Similarly, in *Menzies v. Seyfarth Shaw LLP*, the Seventh Circuit held that the RICO Amendment does not bar claims arising from a tax shelter fraud effectuated through a series of securities transactions. 943 F.3d 328, 333-36 (7th Cir. 2019). In that case, the "complaint focused not on the ... stock sale, but instead on its tax consequences." *Id.* at 335. To show fraud in the purchase or sale of securities, the court explained, the plaintiff must have "incurred his alleged losses as a more direct consequence of misrepresentations that closely touched the stock sale itself and not just its tax consequences." *Id.*

[5]We join these courts in holding that the RICO Amendment bars claims only when the alleged fraud is in the actual purchase or sale of securities, not when securities are incidental to the fraud.

A

Virginia alleged that David breached his fiduciary duty to the estate by arranging for his alter ego, Red Knot, to purchase the estate's debts in order to enhance his personal control over the estate. The transaction made Red Knot a secured creditor of the estate, with a lien on virtually all of the estate's assets. Those assets happened to include securities. Red Knot then entered into a forbearance agreement with the estate. But according to the complaint, the agreement was a sham because it provided that if David were ever removed as an executor, Red Knot would have "the immediate right to engage in collection efforts on the over $48,000,000 allegedly owed

to Red Knot." SAC ¶ 60. The agreement had the practical effect of making it impossible to remove David as an executor of the estate. *See* SAC ¶¶ 59-65.

The alleged fraud was the use of an alter ego to purchase the estate's debts so that David could wield personal influence over the estate and the creation of the sham forbearance agreement that made David unremovable as an executor. That the estate owned securities was an incidental fact. Because the securities were merely "incidental to any underlying fraud," *Kottler*, 607 F. Supp. 2d at 458 n.9, there was no fraud "in the purchase or sale of securities," 18 U.S.C. § 1964(c).

B

[7]Virginia also alleged a scheme in which David converted estate assets to his personal use. Since at least 1987, David has allegedly acted to "plunder, pillage and loot" the estate, SAC ¶ 28, and has done "everything within his power to transfer the significant assets of the Estate for his personal financial benefit," SAC ¶ 20. He did so by using estate assets to acquire interests in two aluminum processing companies, New England Redemption and Wise Metals, and then by converting proceeds from the sale of those interests.

In particular, the complaint alleged that David misappropriated a business opportunity that his father had been negotiating. Rather than continue negotiations on behalf ***95** of the estate, David "usurped that business opportunity for his personal financial benefit." SAC ¶ 80. This allegation does not describe fraud "in the purchase or sale of securities." 18 U.S.C. § 1964(c).

David proceeded to use an estate asset—rentable space in the estate's Bridgeport Brass Building—to acquire a 25 percent ownership interest in the New England Redemption venture. Eight years later, he "converted the profits from the sale of [the venture] for his personal financial benefit, and refused to plow those profits back into the Estate." SAC ¶ 81.

David continued the conversion scheme through the formation of Silver Knot and the purchase and sale of Wise Metals. Again, David allegedly used "assets, proceeds and business opportunities" of the estate to capitalize Silver Knot, which would acquire a controlling interest in Wise Metals. SAC ¶ 83. After the sale of Wise Metals, David again did not deliver the proceeds of that sale to the estate but "converted those sale proceeds for his personal financial gain and for the benefit of his co-conspirator Defendants." SAC ¶ 84.

While securities transactions occurred with the purchase and sale of interests in New England Redemption and Wise Metals, securities were incidental to the multi-year conversion scheme. Virginia does not allege that David made misrepresentations about the value of securities or that he was not authorized to transact in securities on behalf of the estate. The alleged fraud was the misappropriation and conversion of estate assets in violation of fiduciary duties to the estate. That is not fraud "in the purchase or sale of securities." 18 U.S.C. § 1964(c).[3]

II

The district court concluded that Virginia's RICO claims were barred because the alleged misconduct described in the Red Knot and Silver Knot/Wise Metals schemes was actionable as securities fraud under *SEC v. Zandford*. In *Zandford*, the Supreme Court concluded that a stockbroker's conduct—selling client securities held in a brokerage account and converting the proceeds to his own personal use—constituted fraud "in connection with" the purchase or sale of securities under section 10(b) of the Securities Exchange Act. Even though the stockbroker was authorized to engage in securities transactions on behalf ***96** of the client, the sales were "properly viewed as a course of business that operated as a fraud or deceit on [the] stockbroker's customer." *Zandford*, 535 U.S. at 821, 122 S.Ct. 1899 (internal quotation marks omitted). In such circumstances, "[i]t is enough that the scheme to defraud and the sale of securities coincide." *Id.* at 822, 122 S.Ct. 1899.

But the holding in *Zandford* "does not transform every breach of fiduciary duty into a federal securities violation." *Id.* at 825 n.4, 122 S.Ct. 1899. The Court cautioned that section 10(b) "must not be construed so broadly as to convert every common-law fraud that happens to involve securities into a violation." *Id.* at 820, 122 S.Ct. 1899. For example, a case in which "a thief simply invested the proceeds of a routine conversion in the stock market" would not involve securities fraud. *Id.* For the fraud to "coincide" with a securities transaction, a claim must "necessarily allege," "necessarily involve," or necessarily "rest on" the purchase or sale of securities. *Romano v. Kazacos*, 609

F.3d 512, 522 (2d Cir. 2010) (quoting *Dabit v. Merrill Lynch, Fenner & Smith, Inc.*, 395 F.3d 25, 48, 50 (2d Cir. 2005)).

The *Zandford* Court emphasized the "threat to investor confidence in the securities industry" that results from stockbrokers misappropriating client assets from discretionary brokerage accounts:

> Not only does such a fraud prevent investors from trusting that their brokers are executing transactions for their benefit, but it undermines the value of a discretionary account like that held by the [victims]. The benefit of a discretionary account is that it enables individuals, like the [victims], who lack the time, capacity, or know-how to supervise investment decisions, to delegate authority to a broker who will make decisions in their best interests without prior approval. If such individuals cannot rely on a broker to exercise that discretion for their benefit, then the account loses its added value.

Zandford, 535 U.S. at 822-23, 122 S.Ct. 1899. The stockbroker's fiduciary duty to his client was to execute securities transactions in the client's best interest. For that reason, the securities transactions were a necessary feature of the fraud.

By contrast, an executor of a decedent's estate bears responsibility for the estate's administration. The executor is generally responsible for gathering estate assets, paying expenses and claims, filing tax returns, making distributions under the terms of the decedent's will, and maintaining records concerning management of the estate. The executor owes a duty of loyalty to beneficiaries and must avoid self-dealing. "No principle is more equitable or better settled in the law than that a trustee shall make no personal profit from the funds entrusted to his care beyond a reasonable compensation for his services." *Candee v. Skinner*, 40 Conn. 464, 468 (1873).

The Red Knot and Silver Knot/Wise Metals schemes involve alleged fraudulent conduct in breach of an executor's duty of loyalty to an estate. David purportedly engaged in self-dealing by purchasing the estate's debt in order to enhance his personal control over the estate. He made personal profits through the misappropriation of estate assets. These fraudulent schemes only incidentally involved securities, unlike a securities broker who sells client securities in breach of his duty to execute securities transactions in the best interests of the client.[4]

***97 CONCLUSION**

For the reasons stated above, we conclude that the alleged conduct was not fraud "in the purchase or sale of securities" and that Virginia's claims are not barred by the RICO Amendment. 18 U.S.C § 1964(c). We reverse the judgment of the district court and remand for further proceedings.

Minority opinion(s) omitted.

Footnotes

* The Clerk of Court is directed to amend the caption as set forth above.

1 The district court said that David formed Silver Knot and acquired the interest in Wise Metals "using the proceeds from the New England Redemption sale." *D'Addario*, 2021 WL 3400633, at *2. But the complaint describes the source of the funds only as "assets, proceeds and business opportunities of the Estate." SAC ¶ 83.

2 *See generally* Eliza Clark Riffe, Note, *Actionability and Ambiguity: RICO After the Private Securities Litigation Reform*

Act, 2012 U. Chi. Legal F. 463, 469-70 (2012).

[3] The partial dissent argues that "[u]nlike the Red Knot forbearance scheme, the securities transactions underlying the alleged Silver Knot/Wise Metals scheme were fraudulent in and of themselves." *Post* at 99. We disagree. Of the Red Knot scheme, the partial dissent explains that "although the scheme involved a pledge by the Estate of collateral that included securities," a securities transaction, "nothing about the Estate's pledge of securities was fraudulent":

> Virginia does not allege, for example, that David made any misrepresentations about the value of the securities pledged or that those securities could not lawfully be pledged as collateral. What made the Red Knot scheme fraudulent was instead that David was on both sides of the forbearance agreement and that he allegedly did not make a good faith effort to repay the Estate's debt.

Id. at 98. A similar argument applies to the Silver Knot/Wise Metals scheme. The complaint does not allege that David misrepresented the value of the securities or that the securities could not lawfully be purchased and sold. Instead, the Silver Knot/Wise Metals scheme was fraudulent because David did not act in good faith as executor but instead converted the estate's assets for his and the other defendants' benefit. In describing the fraud this way, we do not seek to describe the scheme at a "high level without referencing securities." *Id.* at 105. Rather, we recognize that an executor's breach of fiduciary duties to an estate is distinct from a fraudulent purchase or sale of securities.

[4] Because we conclude that the RICO Amendment does not bar Virginia's claims even as to the Red Knot and Silver Knot/Wise Metals schemes, we need not separately address the district court's decision to issue a judgment on the pleadings as to the real property schemes that did not involve securities.

