

The Honourable Ronald B. Leighton

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
TACOMA DIVISION

PRESIDIO GROUP, LLC, et.al.,	)	CIVIL NO.: CV 08-5298-RBL
	)	
Plaintiffs,	)	RESPONSE MEMORANDUM OF LAW
	)	TO FRCP 12(e) MOTION FOR MORE
vs.	)	DEFINITE AND CERTAIN and FRCP
	)	12(f) MOTION TO STRIKE OF
GMAC MORTGAGE, LLC et.al.,	)	MARK SCHALLER
	)	
	)	NOTE ON MOTION CALENDAR:
	)	15 AUGUST 2008
Defendants.	)	

Plaintiffs Presidio Group LLC, a Washington limited liability company, Presidio Group LLC, d.b.a. Presidio Group International, LLC, a Washington unincorporated business entity, Presidio Group International, LLC, a Washington unincorporated business entity, Jameson Kealii Kauhi and Ramona Carmelle Kauhi, both individually and upon behalf of their community property marital estate hereby respond to the FRCP 12(e) motion for more definite and certain statement and the FRCP 12(f) motion to strike of defendant Mark Schaller as follows. Premised upon the foregoing arguments, the motions should be denied.

**I. FACTUAL BACKGROUND**

Plaintiffs instituted these proceedings pursuant to the federal Racketeer Influenced and Corrupt Organizations Act of 1970 [“RICO”][Title 18 U.S.C. §§ 1961 et.seq.] for damages arising from specifically alleged complained of activities committed by defendants. Those activities involved defendant Richard Cano, functioning in a corporate representative capacity as a senior

1 loan officer upon behalf of defendants GMAC Mortgage LLC and General Motors Acceptance  
2 Corporation, representing to plaintiffs, and similarly situated victims, that Cano allegedly had access  
3 to approximately £10,000,000 British Pounds Sterling located at an account with Lloyds Bank,  
4 London, United Kingdom, that would be disbursal to Cano, subject to Cano paying a \$187,000  
5 administrative expense fee to Lloyds.

6 Cano conducted his solicitation activities from the GMAC Mortgage, LLC, corporate  
7 offices in Vancouver, WA, employing his office, telephone, and Internet capabilities, representing  
8 to plaintiffs that in exchange for plaintiffs providing Cano substantial monetary funds to facilitate  
9 Cano's access to those monies, Cano, through an unidentified business entity he controlled, owned,  
10 managed, and operated, would provide plaintiffs with financial capital infusion for plaintiffs' diverse  
11 real estate activities. Cano and plaintiffs exchanged multiply numerous telephone calls and e mails  
12 over a substantial period of time during 2005 relative to these matters. In late December, 2005,  
13 plaintiffs wired in excess of \$82,000 from plaintiffs' bank account in Camas, WA, to the corporate  
14 bank account of Darmstad Clearing & Contracting, Ltd., situated in Greece. Plaintiffs reasonably  
15 believed that Darmstad was a business entity owned, controlled, managed, and operated by Cano,  
16 and had no reason to suspect or doubt otherwise. Cano provided plaintiffs with the corporate account  
17 wiring instructions and told plaintiffs to wire their monies to that account for his accessibility.

18 Cano's efforts to obtain the funds from Lloyds eventually proved futile. Throughout 2006  
19 plaintiffs increasingly registered questions and inquiries relative to why Cano was unable to perform  
20 as represented. Cano responded to plaintiffs that he was experiencing delays from Lloyds, and  
21 reassured plaintiffs that Cano would perform. Plaintiffs reasonably believed Cano's explanations  
22 but continued questioning Cano as to the reasons for non performance, and eventually suspected  
23 deficiencies with Cano's statements and questioning the alleged veracity and genuineness of Cano's  
24 representations.

25 Plaintiffs allege that Mark Schaller, Cano's supervisory manager at the GMAC Mortgage  
26 corporate offices, facilitated and furthered Cano's activities. Schaller and Cano had previously been  
27 employed at a local financial institution years wherein Schaller was Cano's supervisor. Plaintiffs  
28 further allege that Schaller and GMAC Mortgage/GMAC had to be aware and knowledgeable of

1 Cano's prior activities when Cano was employed at Countrywide Home Loans, Inc., that resulted  
2 with Cano's termination. Cano engaged in certain fraudulent conduct during his employ at  
3 Countrywide, culminating with financial losses that is the subject of a pending state court  
4 proceeding, *Marilyn Ma Chau, v. Michael D. Kroon and Debra A. Kroon, Richard Cano, and*  
5 *Countrywide Home Loans, Inc.*, Superior Court of the State of Washington in and for the County  
6 of Clark, Case No.: 06-2-04841-9, filed 25 October 2006. Plaintiffs allege that Schaller and GMAC  
7 Mortgage/GMAC knew of Cano's prior fraudulent activities at the time of Cano's hiring, failed to  
8 investigate and discover those activities, and failed to remove Cano from his employ. Plaintiffs  
9 further allege that Schaller and GMAC Mortgage/GMAC conspired to conceal from detection  
10 Cano's fraudulent conduct. Plaintiff Ramona Kauhi physically appeared at Cano's office on 19 May  
11 2006 and engaged in a heightened interpersonal verbal altercation with Cano witnessed by both  
12 GMAC Mortgage/GMAC employees and clientele. This is one example of a direct confrontation  
13 between Cano and a disgruntled, angry victim that occurred at those corporate offices.

14 Plaintiffs allege that F. James Mayhew represented himself to plaintiffs as Cano's attorney,  
15 and further represented to plaintiffs that Mayhew had reviewed and evaluated Cano's documentary  
16 materials about the Lloyds Bank and Cano's legal right to obtain those funds, and confirmed such  
17 representations to plaintiffs. In 2006 when plaintiffs questioned Mayhew about whether Cano was  
18 in fact operating a scam, Mayhew, on 8 May 2006, e mailed to plaintiffs a particular e mail letter  
19 plaintiffs received from an entity that reflected the same particular information as Cano had  
20 represented and confirmed to plaintiffs, but under a different corporate entity name ["UTNI"], and  
21 that Cano could and would perform as promised. Plaintiffs subsequently discovered, on 21 June  
22 2006, that the UTNI letter Mayhew provided to plaintiffs was in fact an Internet scam, and  
23 informed Mayhew of that fact the same day. Mayhew not only refused to respond to plaintiffs'  
24 persistent inquiries of whether Cano was operating a scam, but immediately terminated further  
25 communication with plaintiffs. Plaintiffs allege that Mayhew conspired with Cano to conceal from  
26 detection the truth about Cano's activities.

27 Plaintiffs allege that Cano victimized others when Cano was employed not only at  
28 Countrywide and GMAC Mortgage/GMAC, but also Bank of America.. Those allegations are

1 materially relevant and required to plead and eventually establish proof of the RICO pattern of  
2 racketeering activity relatedness component of plaintiffs' RICO claims. The allegations are not  
3 immaterial or impertinent. See FAC ¶¶ 83-85.

4 Addressing the Cano FRCP 12(b)(1) motion and the contention of lack of subject matter  
5 jurisdiction, plaintiffs allege plaintiffs are permitted to initiate these proceedings before this  
6 Honourable Court. Though a proposed draft state court complaint was submitted by plaintiffs'  
7 former counsel, upon review, assessment, and evaluation of the underlying facts, including  
8 evidentiary facts, counsel concluded that the federal RICO claims would be more appropriate to be  
9 filed in federal court. Moreover, the fact that the bankruptcy court permitted plaintiffs to file a  
10 proceeding to recover damages arising from fraud should not necessarily confine or restrain  
11 plaintiffs' invocation of federal jurisdiction, including claims asserted by plaintiffs Presidio Group  
12 LLC and Presidio Group International LLC, which were not listed on Cano's bankruptcy mailing  
13 matrix. In fact, a federal securities fraud action is pending before this Honourable Court against  
14 Cano, GMAC, and Bank of America. *Kevin Giel v. Richard Cano, Bank of America, and General*  
15 *Motors Acceptance Corporation*, U.S.D.C. W.D. Wash., 3-2007-CV-05270 RBL advances multiple  
16 federal and state claims for relief. Giel was not listed on Cano's bankruptcy mailing matrix, either.  
17 Plaintiffs contend that this Honourable Court can properly exercise federal subject matter  
18 jurisdiction here.

19 The amended complaint is organized in a formulation wherein each party defendant is  
20 specifically identified as a RICO "person," [FAC ¶¶ 3-24, pp. 12-28], RICO §1962©)  
21 "enterprises" [FAC ¶¶ 101, pp. 110-116] are articulated in conformity with prevailing Ninth  
22 Circuit judicial authority, *Odom v. Microsoft Corp.*, 486 F.3d 541 (9<sup>th</sup> Cir. 2007)(en banc), and the  
23 RICO "artifice and scheme to defraud" [FAC ¶¶ 29-100, pp. 31-110], specifically articulates  
24 factual, including evidentiary factual representations, involving each defendant, referencing each  
25 defendants' conduct in connection therewith. The amended pleading sets forth each and every e mail,  
26 letter, and/or telephonic conversation exchanged between plaintiffs and Cano/GMAC  
27 Mortgage/GMAC. See FAC ¶ 42, pp. 41-79. Specifically pleaded factual paragraphs describing the  
28 activities of Darmstad and Mayhew are similarly set forth with especial details. The amended

1 complaint at FAC ¶¶ 102-104 , pp. 116-123, sets forth the RICO “pattern of racketeering activity”  
2 section setting forth those federal statutes that are statutorily identified as forms of “racketeering  
3 activity.” This particular section organizes for the defendants a reference for purposes of reading  
4 and comprehending the factual and evidentiary allegation paragraphs under the RICO “artifice and  
5 scheme to defraud” section, which specifically cites to those federal statutes as contravened by the  
6 defendants.

7 The “Multiple Claims For Relief,” FAC ¶¶ 107-456, pp. 125-462, advance alternative RICO  
8 liability claims for relief in addition to various Washington statutory and common law claims for  
9 relief. The defendants are specifically identified under the particular claim for relief advanced.  
10 Certain claims identify all defendants, while certain claims identify only certain defendants, and in  
11 each claim, the particular defendant is named, the conduct alleged, including the incorporation by  
12 reference paragraph specifically following each identified claim for relief, and the relief sought  
13 thereunder.

14 FRCP 8(e)(2) does not prohibit or exact upon plaintiffs a number of alternative claims for  
15 relief that can be asserted. The RICO claims include claims under RICO Sections 1962(a), (b), (c),  
16 and (d), and for contravention of primary, aiding and abetting, respondeat superior liability,  
17 conspiracy to contravene, conspiracy to conceal, aiding and abetting a RICO conspiracy, conspiracy  
18 to aid and abet a RICO contravention. The RICO enterprise allegations under §§ 1962(a), (b), and  
19 (c) are each distinctly different, and set forth specific allegations pertaining to each enterprisal  
20 configuration, a necessary and vitally important pleading requirement. Equitable RICO claims of  
21 relief are advanced against certain identified defendants only. Inasmuch as RICO is a complex  
22 federal criminal statute, alternative claim pleading, setting forth the requisite statutory elemental  
23 components under each particular claim, is preferable and superior, compared to a “catch all”  
24 pleading format asserting general, conclusory, vague allegations incapable of logical discernment.  
25 Similar claim pleading is evidenced under the state claims.

26 Significantly advanced under the multiple RICO conspiracy claims is the invocation of  
27 *Pinkerton v. United States*, 328 U.S. 640 (1946), universally recognized as the *Pinkerton* Doctrine.  
28 *Pinkerton* has engendered intense debate relative to its application to civil RICO conspiracy

1 claim practice. Plaintiffs contend that the Doctrine applies here. By the nature of the motions  
2 presented, plaintiffs are unable to address the RICO conspiracy issue in significant analytical detail.

3 Plaintiffs duly note similar debate regarding the viability of *civil* RICO aiding and abetting  
4 liability. Plaintiffs contend that such civil liability should be recognized here. By the nature of the  
5 motions presented, plaintiffs are unable to address the RICO aiding and abetting issue in significant  
6 analytical detail.

7 The amended complaint specifically advances the underlying tenets of FRCP 8 and FRCP  
8 9(b). Though none of the pending motions address Rule 9(b), consideration of that specific  
9 particularity allegation requirement is significant in the context of reviewing these motions.

10 Plaintiffs conclude that the amended complaint sufficiently apprises each defendant of the  
11 conduct the defendants are alleged to have committed. The pleading includes evidentiary factual  
12 allegations as to each defendant for the express purpose of informing each defendant of that conduct  
13 so the defendant can formulate an answer. A FRCP 12(b)(6) motion would be appropriate to  
14 challenge the sufficiency of the pleading, rather than more definite and certain statement and strike  
15 motions, which federal courts consistently disfavour. For these reasons, plaintiffs oppose the  
16 motions and respectfully petition this Honourable Court to enter an order denying those motions.

## 17 II. LEGAL ARGUMENT

### 18 A. FRCP 12(e)

19 A Rule 12(e) motion is proper only where the complaint is so indefinite that the defendant  
20 cannot ascertain the nature of the claim being asserted. In such cases, a defendant cannot reasonably  
21 be expected to frame a proper response. *Cellars v. Pacific Coast Packaging, Inc.*, 189 FRD 575,  
22 578 (N.D. Cal. 1999). A more definite and certain statement motion attacks unintelligibility in a  
23 pleading, not simply mere lack of detail. Thus, the motions fails where the complaint is specific  
24 enough to apprise a defendant of the substance of the claim being asserted. *Bureerong v. Uvawas*,  
25 922 F.Supp. 1450, 1461 (C.D. Calif. 1996). Regarding RICO claims, courts have denied such  
26 motions. *Lehighton Area School District v. Gilbert*, 787 F.Supp. 429, 432 (M.D. Pa. 1992)(denied  
27 FRCP 12(e) motion because complaint sufficient to put defendant on notice of allegations against  
28 her and to allow her to frame an intelligent responsive pleading”); *Periodical Publishers’ Serv.*

1 **Bureau, Inc., v. Keys**, No. 90-3813 (E.D. La., Dec 11, 1990)(LEXIS, Genfed Library file)(denying  
2 FRCP 12(e) motion because RICO complaint sufficiently particularized and augmented by RICO  
3 Case Statement; defendant could gain more information through discovery).

4 Motions for more definite and certain statement are viewed with disfavour, and are rarely  
5 granted. *In re American International Airways, Inc.*, 66 BR 642, 645 (E.D. Pa. 1986). The  
6 technical requirements of pleading are minimized under the Federal Rules of Civil Procedure.  
7 Courts are therefore reluctant to spend time “fine tuning” the pleadings. Parties are expected to  
8 utilize discovery, not the pleadings, to learn the specifics of the claims being asserted. Also, courts  
9 realize that Rule 12(e) motions are sometimes brought for dilatory purposes. The motion must  
10 specify the defects complained of and the details allegedly required to eliminate the vagueness.  
11 A perusal of the motions merely states that the amended pleading is too lengthy and allegedly  
12 ambiguous. The motions fail to specifically identify what particular defect infects the pleading so  
13 that an answer cannot be filed. Accordingly, the motions should be denied.

#### 14 **B. FRCP 12(f)**

15 Despite the functions they serve, motions to strike are regarded with disfavour because often  
16 used as delaying tactics, and because of the limited importance of pleadings in federal practice. For  
17 that reason, the motion should be denied. *Bureerong v. Uvawas*, 922 F.Supp. 1450, 1478 (C.D.  
18 Calif. 1996). Strike motions premised upon redundant, immaterial, impertinent or scandalous matter  
19 are rarely granted. Where there is any doubt as to the relevance of the challenged allegations, courts  
20 err on the side of permitting the allegations to stand, particularly where the moving party shows no  
21 prejudice therefrom. *Dah Chong Hong, Ltd., v. Silk Greenhouse Flowers, Inc.*, 719 F.Supp. 1072,  
22 1073 (M.D. Fla. 1989). “Redundant” has been defined a including allegations that are wholly foreign  
23 to the issues involved or the needless repetition of allegations. *Gilbert v. Eli Lilly Co., Inc.*, 56 FRD  
24 116, 120, fn.4 (D. P.R. 1972) . “Immaterial” means the matter has no bearing on the controversy  
25 before the court. If there is any doubt as to whether the allegations might be an issue in the action,  
26 the motion should be denied. *Fantasy, Inc., v. Fogerty*, 984 F.2d 1524, 1527 (9<sup>th</sup> Cir. 1993).  
27 “Impertinent” has been defined to include allegations that are not responsive or relevant to issues  
28 involved in the action and which could not be admitted into evidence in the action. *Fantasy, Inc.,*

1 *v. Fogerty*, 984 F.2d 1524, 1527 (9<sup>th</sup> Cir. 1993). “Scandalous” has been defined as allegations that  
 2 cast a “cruelly” derogatory light on a party or other person. *Skadegaard v. Ferrell*, 578 F.Supp.  
 3 1209, 1221 (D. N.J. 1984).

4 The amended complaint does not contain allegations that are “irrelevant,” “redundant,”  
 5 “immaterial,” “impertinent,” or “scandalous.” To the contrary, the allegations are especially  
 6 pertinent, material, relevant, and necessary to advance plaintiffs’ claims. Addressing a strike motion  
 7 filed in a federal RICO case, the United States District Court for the Central District of California  
 8 denied the motion where the defendants sought to have the court strike certain factual allegations  
 9 from a complaint about defendants’ wrongful conduct that formed the basis of a separate action  
 10 pending in another court. The court determined the allegations were materially relevant to the  
 11 pending action. *See Lentz v. Woolley*, [1989 Transfer Binder] Fed Sec L. Rep (CCH) ¶94,498, at  
 12 p. 93,183 (C.D. Calif. 12 June 1989); *Southmark Prime Plus, L.P. v. Falzone*, 768 F.Supp. 487,  
 13 492 (D. Del. 1991)(strike motion denied; allegations of organized crime association found central  
 14 to plaintiffs’ RICO claims, and were not unreasonably derogatory or offensive); *National Council*  
 15 *of Young Israel v. Wolf*, 963 F.Supp. 276 (S.D.N.Y. 1997)(strike motion denied as to allegations  
 16 of RICO claim of one defendant as convicted felon and reference to embezzlement charges and  
 17 contempt adjudication as to another); *In re Catanella and E.F. Hutton & Co.*, 583 F. Supp. 1388  
 18 (E.D. Pa. 1984)(strike motion denied to RICO complaint including allegation of a defendant as  
 19 “recidivist” and referred to prior criminal conviction for federal and state securities law  
 20 contraventions, finding allegations not impertinent or scandalous, but, rather highly relevant). Id be

### 21 C. FRCP 8

22 The FRCP 8 contentions about the amended complaint are without merit. FRCP 8(e)(2)  
 23 specifically recognizes, and encourages, that a complaint may contain two or more statements of a  
 24 claim for relief “alternatively or hypothetically, either in one count . . . or in separate counts.”  
 25 *McCalden v. California Library Ass’n*, 955 F.2d 1214, 1219 (9<sup>th</sup> Cir. 1990); *see Ayers v. United*  
 26 *States*, 277 F.3d 821, 829 (6<sup>th</sup> Cir. 2002)(“alternative pleadings are not disfavoured”). Moreover,  
 27 a party may set forth as many separate claims under FRCP 8(e)(2)] “as he has regardless of  
 28 consistency and whether based on legal, equitable or maritime grounds...” provided that all such

1 claims are made in compliance with Rule 11. *Independent Enterprises Inc., v. Pittsburgh Water &*  
2 *Sewer Authority*, 103 F.3d 1165, 1175 (3<sup>rd</sup> Cir. 1997). Indeed, plaintiffs may plead two or more  
3 inconsistent statements of a claim, even within the same count. *Henry v. Daytop Village, Inc.*, 42  
4 F.3d 89, 95 (2<sup>nd</sup> Cir. 1994)(neither claim may be construed as an admission to bar alternative or  
5 inconsistent claims). A party asserting several theories of recovery based upon the same set of  
6 circumstances may set forth each theory in one claim or in separate claims under FRCP 8(e)(2). *See*  
7 *American Intl Adjustment Co., v. Galvin*, 86 F.3d 1455, 1460 (7<sup>th</sup> Cir. 1996)(FRCP 8(e)(2)  
8 “abolished the doctrine of election of remedies in federal court”).

9 In fraud cases involving multiple defendants, the complaint should set forth the role of each  
10 defendant in the fraud. Each defendant is entitled to be informed of the specific acts or omissions  
11 which it must defend. *Neubronner v. Milken*, 6 F.3d 666, 671 (9<sup>th</sup> Cir. 1993). However, a plaintiff  
12 may allege that certain defendants acted in concert or pursuant to a conspiracy. If the complaint  
13 adequately identifies a particular defendant with a category of defendants allegedly responsible for  
14 some continuing course of conduct, allegations that “defendants” committed described acts cover  
15 each member of the group. *In re Equity Funding Corp. of America Sec. Litig.*, 416 F.Supp. 161,  
16 181 (C.D. Calif. 1976).

17 The amended pleading suffices for FRCP 8(a) purposes. Pleadings are construed liberally  
18 in favour of the pleader, and in challenging the sufficiency of a complaint, all of the material  
19 allegations are taken as true. *Gilligan v. Jamco Develop. Corp.*, 108 F.3d 246, 249 (9<sup>th</sup> Cir.  
20 1997)(Rule 8 contains “a powerful presumption against rejecting pleadings for failure to state a  
21 claim”). Addressing RICO claim pleading, some courts have recognized that because Rule 8 must  
22 be read in harmony with Rule 9(b)’s pleading requirements, a civil RICO complaint properly can be  
23 “neither particularly short nor particularly plain.” *Stephenson v. Deutsche Bank*, 282 F.Supp.2d  
24 1032, 1075 (D. Minn. 2003). A well pled RICO claim in a complaint therefore must find the  
25 appropriate balance between Rule 8(a)’s demand for brevity and Rule 9(b)’s command for  
26 particularity. *See Trustees of Plumbers & Pipefitters Nat’l Pension Fund v. Transworld*  
27 *Mechanical, Inc.*, 886 F.Supp. 1134, 1142 (S.D.N.Y. 1995).

28 A significant pleading affecting civil RICO claim practice and procedure is the effect of the

1 2007 decision of the United States Supreme Court in *Bell Atlantic Corp . v. Twombly*, \_\_\_ U.S.  
2 \_\_\_\_. 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) wherein the Court clarified that FRCP 8's pleading  
3 requirements impose a burden of pleading facts upon a plaintiff alleging a conspiracy. In *Twombly*,  
4 an antitrust class action complaint broadly alleged a conspiracy to fix telephone service charges to  
5 monopolize telecommunications markets based largely upon allegations of parallel business conduct  
6 coupled with “merely legal conclusions” about an alleged conspiratorial agreement. Expressly  
7 overruling the landmark pleading sufficiency standard articulated in *Conley v. Gibson*, 355 U.S. 41,  
8 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), the Supreme Court in *Twombly* held that Rule 8  
9 requires a plaintiff to allege sufficient plausible facts to justify an “entitlement to relief.” 127 S. Ct.  
10 at 1966. In other words, a plaintiff must plead “enough facts to state a claim to relief above the  
11 speculative level.” 127 S. Ct. at 1974. The *Twombly* opinion will attract considerable judicial  
12 attention and adjustment as to the proper gatekeeping role of courts at the pleading stage, especially  
13 in conspiracy cases.

14 A significant number of RICO claims advanced are RICO conspiracy claims. Those claims  
15 are invoked under the *Pinkerton* Doctrine. From a pleading standpoint, plaintiffs deem it required  
16 to elucidate upon the applicability of *Pinkerton*. Understanding the *Pinkerton* Doctrine requires  
17 a factual review. Walter and Daniel Pinkerton, two brothers, were indicted for both substantive and  
18 conspiratorial offenses arising from evading federal liquor taxes. The Supreme Court reviewed the  
19 case because the jury had been instructed that it could convict the Pinkertons of all substantive  
20 offenses committed to further their conspiracy.

21 Upholding the instructions and sustaining the convictions, Justice Douglas concluded that  
22 the brothers were affiliated within a conspiracy when the offenses were committed. Justice  
23 Douglas’s cogent analysis is both compelling and persuasive. Concluding that a conspiracy is  
24 essentially tantamount to a “partnership in crime,” Justice Douglas espoused the *Pinkerton*  
25 Doctrine. That Doctrine recognizes that because members of a conspiracy are “partners in crime,”  
26 they are liable for acts taken by their co-conspirators in furtherance of their joint criminal purposes:

27 Justice Douglas based this doctrine on two sources – a rule of proximate causation and a rule  
28 of complicity among co-conspirators. In dissent, Justice Rutledge contended that the  
majority’s use of the rule of complicity among co-conspirators abrogated the historic

1 principle that in criminal law guilt is personal, not vicarious.” But even before *Pinkerton*,  
2 participation in a conspiracy could establish liability for crimes committed by other  
3 conspirators; this was simply a means of proving complicity, and Justice Douglas derived  
4 his *Pinkerton* holding from this rule of complicity among co-conspirators. The major  
5 difference between the two doctrines is that under *Pinkerton*, membership in a conspiracy  
6 gives rise to a presumption of aiding crimes committed to further the goals of that  
7 conspiracy, while under the older rule membership was evidence of complicity but did not  
8 give rise to a presumption.

9 Brenner, *Civil Complicity: Using the Pinkerton Doctrine to Impose Vicarious Liability in Civil*  
10 *RICO Actions*, 81 Kentucky Law Journal 369, 385 (1992-93).

11 *Pinkerton*, therefore, can thus be characterized as a rule of conspiracy law recognizing  
12 affiliative liability. The act of mutually agreeing to the commission of offenses is considered to have  
13 an independent causal significance that justifies holding one who agrees to a conspiracy liable for  
14 its intended results. This observation is especially compelling when considering application of  
15 *Pinkerton* to civil RICO conspiracy pleading:

16 This act [affiliating with another for a criminal purpose] satisfies the criteria for imposing  
17 accountability under the traditional criminal law standard of personal liability: affiliating  
18 with another for criminal purposes is a voluntary act committed with a culpable mental state,  
19 or *mens rea*, that causes a prohibited social harm. (footnote omitted). In either of its guises,  
20 as *Pinkerton* liability or as complicitious liability, this act is clearly more culpable than the  
21 act that suffices for imposition of vicarious liability in civil law. . . . The only element of  
22 criminal liability that is attenuated under *Pinkerton* is causation, which receives the same  
23 treatment accorded it under the kindred doctrine of accomplice liability. Liability can attach  
24 under either form of affiliative liability without showing that the affiliative act actually  
25 caused commission of certain crimes. (footnote omitted). And because the affiliative act is  
26 a wrong in itself, liability can attach even though the target crime was not accomplished.

27 Brenner, *Of Complicity and Enterprise Criminality: Applying Pinkerton Liability to RICO Actions*,  
28 56 MO. L. Review 931, 963-964 (1991).

29 Affiliative liability, is, therefore, judicially recognized and appropriately applicable to  
30 ascribe *Pinkerton* liability to RICO co-conspirators whose offense is consummating the illegal  
31 agreement to contravene RICO substantive provisions. Plaintiffs are receptive to this Honourable  
32 Court entering an appropriate RICO Case Statement Order to facilitate assistance relative to the  
33 allegations of the amended complaint inasmuch as the FRCP 9(b) specific particularity component  
34 can be fully developed and amplified upon as well as addressing the incremental constituent  
35 components of RICO claim pleading and practice. Accordingly, the motions should be denied.

#### 36 **D. FRCP 12(b)(1)**

37 The motions that address the FRCP 12(b)(1) subject matter jurisdiction contention are

1 without merit. Plaintiffs should not be restricted to prosecuting those efforts in a state court.  
 2 Practically speaking, the *Cano* bankruptcy case is now closed, and from an administrative  
 3 perspective, reopening that case to pursue adversary proceedings would be burdensome and costly.  
 4 On 31 August 2007, the bankruptcy court in *In re: Richard Cano and Claire E. Cano*, Case No.:  
 5 06-42615-PBS, entered an order granting motions for relief from stay to enable plaintiffs to pursue  
 6 appropriate litigation against Richard Cano for recovery of monetary damages and equitable relief.  
 7 Plaintiffs had previously filed an adversary proceeding against Cano in *Kauhi v. Cano*, Adv. Proc.  
 8 No.: 07- 04006-PBS, for the purpose of obtaining a non-dischargeability judgment based upon fraud,  
 9 conversation, breach of fiduciary duty, and related claims for relief. Moreover, *Kevin Giel v. Richard*  
 10 *Cano, Bank of America, and General Motors Acceptance Corporation*, U.S.D.C. W.D. Wash.,  
 11 3-2007-CV-05270 RBL is pending before this Honourable Court. Giel was not listed as a creditor  
 12 by Cano, just as Presidio Group, LLC, and Presidio Group International, LLC, were not listed.  
 13 Therefore, these particular actions should be allowed to continue. Accordingly, the motion should  
 14 be denied.

### 15 III. CONCLUSION

16 Based upon the foregoing, the *seriatim* motions should be denied. The amended complaint  
 17 sufficiently alleges facts in multiple claim fashion to inform each defendant of the alleged  
 18 wrongdoing to answer. Plaintiffs are willing to submit a RICO Case Statement to supplement the  
 19 amended complaint in the event this Honourable Court deems necessary by entry of an appropriate  
 20 RICO Case Statement Order.

21 Dated: 25 June 2008.

Respectfully submitted,

22 By: /s/Dean Browning Webb

23 DEAN BROWNING WEBB, WSBA # 10735

24 ATTORNEYS AND COUNSELORS AT LAW FOR  
 25 PLAINTIFFS:

26 PRESIDIO GROUP LLC, a Washington limited liability  
 27 company; PRESIDIO GROUP LLC d.b.a. PRESIDIO  
 28 GROUP INTERNATIONAL, LLC, a Washington  
 unincorporated business entity; PRESIDIO GROUP  
 INTERNATIONAL, LLC, a Washington unincorporated  
 business entity; JAMESON KEALII KAUHI and  
 RAMONA CARMELLE KAUHI, both individually and  
 upon behalf of their community property marital estate



