09-4302-cv(L)

09-4306-cv(CON), 09-4373-cv(CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

PARMALAT CAPITAL FINANCE LIMITED,

Plaintiff-Appellant,

DR. ENRICO BONDI, Extraordinary Commissioner of Parmalat Finanziaria S.p.A., Parmalat S.p.A., and other affiliated entities, in Extraordinary Administration under the laws of Italy,

Plaintiff-Counter-Defendant-Third-Party-Defendant-Appellant,

(Additional Caption On The Reverse)

On Appeal from the United States District Court for the Southern District of New York (Kaplan, J.)

FINAL BRIEF FOR APPELLEES GRANT THORNTON INTERNATIONAL, INC., GRANT THORNTON INTERNATIONAL LTD, AND GRANT THORNTON LLP

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Plaintiffs,

v.

BANK OF AMERICA CORPORATION, BANC OF AMERICA SECURITIES LIMITED, BANK OF AMERICA, N.A., BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, BANC OF AMERICA SECURITIES LLC, BANK OF AMERICA INTERNATIONAL, LTD., GRANT THORNTON INTERNATIONAL LTD,
Defendants-Appellees,

GRANT THORNTON INTERNATIONAL, GRANT THORNTON LLP,
Defendants-Third-Party-Plaintiffs-Counter-Claimants-Appellees,

DEUTSCHE BANK AG, MORGAN STANLEY & CO., INCORPORATED, BONLAT FINANCING CORPORATION, CALISTO TANZI, FAUSTO TONNA, COLONIALE S.P.A., CITIGROUP INC., BUCONERO, LLC, ZINNI & ASSOCIATES, P.C., DELOITTE TOUCHE TOHMATSU, DELOITTE & TOUCHE S.P.A., a Societa per Azioni under the laws of Italy, JAMES E. COPELAND JR., PARMALAT FINANZIARIA S.P.A., STEFANO TANZI, LUCIANO DEL SOLDATO, DOMENICO BARILI, FRANCESCO GIUFFREDI, GIOVANNI TANZI, DELOITTE & TOUCHE USA, LLP, DELOITTE & TOUCHE, L.L.P., CREDIT SUISSE FIRST BOSTON, CITIBANK, EUREKA SECURITISATION PLC, VIALATTEA LLC, PAVIA E ANSALDO, BANCA NAZIONALE DEL LAVORO S.P.A., CITIBANK, N.A., PROFESSOR MARIA MARTELLINI, BANCA INTESA S.P.A., DELOITTE & TOUCHE TOHMATSU AUDITORES INDEPENDENTES, CREDIT SUISSE INTERNATIONAL, CREDIT SUISSE SECURITIES (EUROPE) LIMITED, CREDIT SUISSE, CREDIT SUISSE GROUP, GRANT THORNTON S.P.A., a Societa per Azioni under the laws of Italy, now known as Italaudit, S.p.A.,
Defendants,

PARMALAT S.P.A.,
Defendant-Third-Party-Defendant.

CORPORATE DISCLOSURE STATEMENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND RULES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

This appeal involves a straightforward application of the state law doctrine of *in pari delicto*—the rule that "'a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing.'" *King v. First Capital Fin. Servs. Corp.*, 828 N.E.2d 1155, 1173 (Ill. 2005) (quoting Black's Law Dictionary). As the district court properly held, the parties asserting claims here—Parmalat Finanziaria S.p.A. and its affiliates under bankruptcy administration in Italy (collectively, "Parmalat")—undeniably participated in the wrongdoing underlying their lawsuit. Indeed, for more than a decade, Parmalat committed a spectacular fraud. Falsely presenting itself as a thriving, successful company, Parmalat bilked its investors and lenders out of *billions* in new capital. It used those ill-gotten gains to stay in business and expand its operations worldwide. The claims here are an attempt to force third parties to pay the company damages allegedly resulting from its own fraud. Applying well-established Illinois law, the district court properly threw those claims out of court.

This suit is one in a series filed by Italian bankruptcy administrator Enrico Bondi, standing in Parmalat's shoes and pursuing claims on its behalf. For years, Bondi has engaged in a massive litigation effort designed

to shift the blame for Parmalat's thirteen-year fraud to outside auditors, lawyers, and banks. Concluding that Parmalat's auditor in Italy was not likely to have sufficiently deep pockets, Bondi sued that Italian firm here in the United States, so he could also press claims against non-profit membership organization Grant Thornton International, Inc. ("GTI") and U.S. audit firm Grant Thornton LLP ("GT-US"). Neither GTI nor GT-US ever served as outside auditor to any Parmalat entity; the claims against them are purely vicarious, based on a web of far-fetched agency and "sub-agency" theories. Even before those questionable theories could be resolved at trial, however, the district court concluded that the claims could not proceed.

As the district court properly held, Parmalat was a full participant in the Parmalat fraud—the critical fact for *in pari delicto*. This was not a purely *personal* fraud by individuals working within the company; it was a *corporate* fraud, committed by the company and on its behalf. A corporation is presumed to be responsible for the acts of its agents within the scope of their authority. Illinois law recognizes only a narrow exception to that presumption: the "adverse interest" exception, which applies if the agent "entirely abandoned" the corporation's interests and undertook a scheme that served no corporate purpose whatsoever. Here, as Bondi has admitted,

Parmalat's most senior managers (acting within the scope of their authority) pursued a fraud that served at least two corporate purposes—keeping Parmalat in business and funding its expansion. Parmalat cannot now repudiate a fraud that enabled it to raise €14 billion, run two research centers, develop dozens of new products, expand from five to 30 countries, and increase its production value by 1100%, its workforce by 3000%, and its production facilities by 4600%. To the extent the insiders sought to benefit themselves by "looting" a portion of the fraud's proceeds (a fraction of the total, even if Bondi's inadmissible and mischaracterized "evidence" is fully credited), the fraud benefited them *alongside* the company, not at the company's expense.

Under these circumstances, no rational trier of fact could conclude that Parmalat's corporate interests were entirely abandoned. As the New Jersey Superior Court has held, based on the same facts, "[d]iscovery … has plainly demonstrated that the narrow application of [the adverse interest exception] has no currency. No rational trier of fact could reach a conclusion that over so many years, involving so many transactions, involving so many participants, [Parmalat's] culpable managers were doing nothing for the company." *Bondi v. Citigroup ("Citi")*, No. BER-L-10902-04. at 51 (N.J.

Super. Ct. Law Div., Apr. 15, 2008), *slip op. available at* 2008 WL 1772647, (order granting in part and denying in part defendant's motion for summary judgment) (appeal pending).

Having lost below on the adverse interest exception, Bondi now attempts to change the subject. He makes three separate arguments seeking new and categorical limitations on the doctrine of *in pari delicto* itself. To the extent this Court considers these arguments—two of which were never presented below—it will find them flatly inconsistent with Illinois law. Bondi's arguments based on Illinois' "audit interference" doctrine and its comparative negligence regime would require lifting legal principles from cases of negligence and applying them in a manner contrary to years of precedent in cases of fraud. And Bondi's request for a "policy" exception to *in pari delicto* fares no better. Illinois law precludes Bondi's suggestion that jurors should be allowed to decide whether to ignore this long-established legal principle based on policy arguments that supposedly "weigh against" applying it in a particular case. Br. 56. And in any event, Bondi's policy arguments make no sense at all, given the undisputed fact that these defendants were not involved in the Parmalat fraud.

Before this Court reaches any of these issues, however, it must first address Bondi's effort to upset six years' worth of federal court proceedings based on an alleged lack of jurisdiction. Bondi is in no position to object to having these claims litigated in federal court. It was Bondi who first invoked the power of the federal courts, filing his own Section 304 case in the Southern District of New York "in aid of" the foreign Parmalat bankruptcy proceeding. When Bondi filed the instant case in Illinois state court, it was properly removed as "related to" Bondi's own federal case—as well as to the Chapter 11 bankruptcy case initiated by a Parmalat subsidiary in the U.S. Since then, the district court has repeatedly been required to consider the impact of this case on the foreign bankruptcy proceeding and to enter Section 304-related orders designed to ensure the efficient resolution of U.S. claims and counterclaims that could impact the foreign bankruptcy estate. Throughout, the district court has shown the appropriate respect for the foreign bankruptcy *proceeding*, even if it was unwilling to defer to the forum-shopping choices of the foreign bankruptcy *trustee*.

Having acknowledged for years that principles of Illinois law govern all issues in this case, Bondi now asks this Court to ignore those principles. And, having spent a fortune in estate assets litigating this case in federal

court, Bondi now wants to spend even more, starting over in state court even though it was Parmalat itself that initiated the federal cases that underlie this Court's "related to" jurisdiction. These arguments should be rejected. GTI and GT-US respectfully ask that the judgment be affirmed.

JURISDICTIONAL STATEMENT

As detailed in Part I below, the district court properly exercised jurisdiction over this action because it falls within "related to" bankruptcy jurisdiction under 28 U.S.C. §1334(b).

For the reasons stated in Part VI of the brief by GTI and Grant Thornton International Ltd ("GTIL") in the accompanying appeal by Parmalat Capital Finance Limited (No. 09-4306-cv(CON)), this Court does not have jurisdiction to review the district court's non-final order dismissing Bondi's claims against GTIL.

COUNTERSTATEMENT OF ISSUES

I. Whether the district court properly exercised "related to" jurisdiction over this proceeding under 28 U.S.C. §1334(b) and declined to grant mandatory abstention under 28 U.S.C. §1334(c)(2).

II. Whether Parmalat's managers totally abandoned Parmalat's interests, and *in no way* acted on Parmalat's behalf, in perpetrating a thirteen-

year fraud that bilked more than €14 billion in capital from third parties—the vast bulk of which was used for corporate purposes, including a dramatic expansion of the company's footprint and production capabilities around the world.

III. Whether the district court committed manifest error in finding that Bondi's evidence of insider "looting"—which the court held would not be dispositive in any event—was neither a quantification of insider theft nor admissible, even at the summary judgment stage.

IV. Whether the Parmalat fraud—even if it could be described as "adverse" to Parmalat's corporate interests—must nevertheless be imputed because Parmalat was completely dominated by wrongdoers.

V. Whether Illinois' *in pari delicto* doctrine operates as a complete bar on all claims by a wrongdoing corporation—as opposed to as a damages-related rule for allocation of responsibility—or whether it allows for exceptions based on whether the claim happens to be for auditor malpractice or based on a case-by-case assessment of policy concerns.

VI. Whether the district court properly dismissed all claims against GTIL. *See* Part V of GTI and GTIL's brief in the accompanying appeal by Parmalat Capital Finance Limited (No. 09-4306-cv(CON)).

COUNTERSTATEMENT OF FACTS

Bondi's statement of facts is less than candid. The fraud at issue here was not "perpetrated by a small group of Parmalat's former managers/insiders." Br. 7. It was perpetrated by *dozens* of managers and directors—including Parmalat's CEO and controlling shareholder, along with every person who served as a Parmalat director between 1995 and 2003. *See infra* at 10. Nor does Bondi describe the full scope of the fraud. Indeed, to read his brief, one would never realize that the fraud entailed a decade-long effort to defraud third parties into providing *€14.353 billion* in new financing. As the New Jersey Superior Court recognized in Bondi's separate suit against Citigroup, "[t]he magnitude and extent of [Parmalat's fraud] … is stupefying." *Citi* at 7. Parmalat was not the *victim* of this massive fraud; it was the perpetrator and beneficiary.

A. *Parmalat's Origins And Massive Fraud*

Parmalat was founded in 1961 as a small dairy distributor in Parma, Italy. A2756(¶2), 2767(¶44). By 1990, it had become a diversified, multinational food company with production facilities in Italy, France, Germany, and Brazil. SPA18; A2767(¶47), 2785-87(¶175-79), 2793-95(¶189). According to Bondi, however, it had also become insolvent. A2769-70(¶51-55).

Parmalat's fortunes had turned during the 1980s, due in part to the Chernobyl disaster and a failed venture into the media sector. SPA18. A severe liquidity crisis ensued. From that point forward, Parmalat was undercapitalized, operating at a loss, and carrying a shareholder's deficit. *See id.*; CA181-82.

Rather than disclosing its insolvency, Parmalat hid the truth, through false financial statements and a wide variety of other lies to creditors and investors. SPA18; A2770-83(¶56-105), 2797-2800(¶193-202), 2816-19(¶315-38). As the district court explained, by 1990, Parmalat "needed constant infusions of cash to cover its losses and service its massive debt. But cash could be obtained only so long as Parmalat appeared to be a sound investment." SPA18. Accordingly, Parmalat used a variety of artifices and transactions to create the false appearance of financial health. In this way, Parmalat obtained at least €14.353 billion in financing from unsuspecting investors. SPA18-19. It used these ill-gotten gains to cover its mounting losses and fund acquisitions and other investments around the world. SPA18-19, 38; A2773-74(¶70-71); A1105(¶204).

B. *Parmalat's Corrupt Managers*

Eighteen of Parmalat's most senior managers were "active participant[s]" in Parmalat's fraud. A2757-64(¶10-29). They included Parmalat's founder and CEO Calisto Tanzi—whose family at all relevant times held a controlling ownership interest in Parmalat (A2756(¶4), 2757-58(¶10), 2764(¶29))—and Parmalat's operating managers, general managers, and CFOs. A2757-64(¶10-31). Collectively, the culpable insiders were responsible for Parmalat's budgets, press releases, acquisitions, bond issuances, private placements, bank loans, internal accounting, and regulatory compliance. A2764-66(¶29-43).

Further, as Bondi has repeatedly admitted, *every person* who served as a director or statutory auditor of either Parmalat S.p.A. or Parmalat Finanziaria S.pA. (the publicly traded and parent Parmalat entities) from 1995 to 2003 was involved in the scheme. *See* CA151-58 (describing a fraud "of which everyone was aware"); CA433-41; A2907-08(¶740). In total, Bondi has implicated more than 50 former Parmalat officers, directors, and statutory auditors. *See*, *e.g.*, CA435-41; CA467-69; CA487-503; CA516-18; A2907-08(¶740).

C. *Parmalat's Fraud-Fueled Expansion*

Parmalat used the enormous amount of capital generated by the fraud to keep itself in business and fuel its expansion. A2767(¶45-46), 2787-95(¶179-91). From 1990 to 2003, Parmalat's production facilities increased from 3 to 130, its workforce grew from 1,217 to 36,356 employees, its product line grew to include 10,000 items, and its production value increased from €500 million to €5.7 billion. SPA18-19, 38; *see also* A2786-87(¶177), 2793-95(¶188-189); A1039, 1042; CA180. "Ultimately the scheme became unsustainable. Parmalat experienced a liquidity crisis, and the ensuing collapse was rapid." SPA20. But in the meantime, as Bondi has explained, Parmalat became "the number two brand franchise in the global food market." A1040-41.

One of the admitted purposes of Parmalat's fraud was to fund a massive acquisition campaign that began in the early 1990s and continued throughout the decade. A1105(¶204); A2773-74(¶70-71), 2787-95(¶180-89). From 1992 to 1994, Parmalat made acquisitions in Italy, Brazil, and the United States and entered the Russian and Hungarian markets. A2768(¶48), 2787-90(¶180-83). It conducted a second wave of acquisitions a few years later, making significant investments in Venezuela, Argentina,

Nicaragua, the United States, and Canada. A2791-93(¶84-87). In all, Parmalat spent approximately €4 billion on these acquisitions. SPA19.

Even today, after its collapse and bankruptcy, Parmalat has retained operations in 17 countries and a licensee presence in another nine. A1435. It owes each of these current operations to the acquisitions and investments fueled by the Parmalat fraud. *Compare* A2787(¶179) *with* A2767(¶46); *see also* A2768(¶48), 2787-95(¶180-89). Absent the acquisitions made possible by the fraud, Parmalat would not be the "truly international player in the dairy and fruit-based beverage Industry" that Bondi now claims it to be. A3508.

D. *GT-Italy's Alleged Role In Parmalat's Fraud*

Neither of the defendant-appellees ever served as outside auditor to any Parmalat entity. Bondi's claims against GTI and GT-US rest entirely on vicarious liability; he contends that these defendants should bear full responsibility for the work performed by a separate legal entity—the Italian firm formerly known as Grant Thornton S.p.A. ("GT-Italy"). SPA23.

GT-Italy served as Parmalat's principal outside auditor from 1995 to 1999, having engaged Parmalat as a client many years earlier, before it became a member firm of GTI and began using the "Grant Thornton" name.

CA871-74(¶61-78). In 1999, Deloitte & Touche S.p.A. took over as auditor of the consolidated financial statements for the publicly traded and parent Parmalat entities, while GT-Italy continued to audit certain Parmalat subsidiaries. CA874-77(¶79-86), 886(¶343). Throughout this period, Parmalat prepared false financial statements and took steps to cover up its deception. *See, e.g.*, CA886(¶345); A2772(¶62), 2774(¶73), 2816-19(¶315-38), A2907-08(¶740). Bondi accuses GT-Italy of providing false audit opinions, as well as advising Parmalat regarding the use of sham entities and sham transactions to hide losses and raise money. *See* CA296(¶358-63), 298(¶370-76), 300-02(¶383-98). It is undisputed that a large number of Parmalat insiders were directly involved in planning and carrying out these activities. A2770-73(¶56-63).

E. ***The Alleged Proof Of "Looting"***

Bondi's most aggressive estimate of "misappropriations" from Parmalat—what he claims is money looted or "stole[n]" by insiders—is just over €2 billion. Br. 8-9. Even if this claim could be taken at face value, that amount is less than 15% of the more than €14 billion in new capital gained by Parmalat through the fraud, much of which was spent on investments and acquisitions. SPA40 n.111.

Bondi's claims cannot, however, be taken at face value. His "misappropriations" evidence consists entirely of materials held by the district court to be inadmissible. Moreover, as the court properly held, this evidence does not show *looting for the benefit of insiders*—the only kind of "misappropriations" that would be relevant to the adverse interest exception. SPA40 n.111, 50. The author of one set of reports, for example—Franco Lagro, an Italian accountant retained by Bondi—conceded that his reports show nothing more than a lack of "adequate documentation" for certain expenditures; Lagro expressly refused to equate that conclusion with theft. CA532-33, 535.

F. ***The Summary Judgment Ruling***

In view of the undisputed facts summarized above, the district court granted summary judgment against Bondi based on *in pari delicto*.

First, as a threshold matter, the court held that Bondi is subject to all defenses that would have been available against Parmalat: "Dr. Bondi does not quarrel with the proposition that any defenses that would have been available in an action brought by Parmalat are available against him. He stands in Parmalat's shoes." SPA33.

Second, the court observed that "there is no dispute that Parmalat and PCFL officers engaged in a massive fraud that ended in the collapse of Parmalat. Nor do plaintiffs dispute that Parmalat's and PCFL's officers acted within the scope of their authority when they issued fraudulent financial statements, established new Parmalat entities, … made acquisitions, accessed the capital markets, and did many other things." SPA35.

Third, the court held that the fully developed record conclusively established the inapplicability of the adverse interest exception: "Even assuming that individual agents stole some of the money, Parmalat's officers and employees manifestly were engaged in conducting the work of Parmalat, growing and expanding the business, when they engaged in all of the activities alleged in the complaint save theft from Parmalat." SPA38-39. Thus, even "assuming extensive theft for purposes of analysis, … Plaintiffs simply cannot get around the fact that Parmalat, by means of the transactions complained of, raised and spent millions of euros for corporate purposes." SPA40. The court also rejected Bondi's argument that "squandering even a small portion of corporate assets would be sufficient to establish the adverse interest exception," correctly recognizing that there is "no defensible basis for including funds that were wasted or poorly used in any

evaluation of the extent to which insiders were acting in their *own* interests rather than serving *corporate* interests." SPA39, 40 n.111 (emphasis added).

Fourth, exercising its discretion, the court further held that Bondi's evidence of "looting" actually quantified no such thing and was inadmissible in any event. SPA46-56.

Finally, the court rejected Bondi's argument that *in pari delicto* operates as a bar on some claims but not others: as a matter of well-settled Illinois law, the defense "operates as an absolute bar to a claim based on equally wrongful acts of both parties." SPA56-59.

SUMMARY OF ARGUMENT

I. The district court properly exercised jurisdiction over this action as "related to" a case under Title 11. *See* 28 U.S.C. §1334(b). This case had at least a "conceivable effect" on not one but two Title 11 cases: the Section 304 case commenced by Bondi himself in aid of the administration of Parmalat's bankruptcy estate in Italy, and the Chapter 11 case filed by Parmalat's U.S. subsidiary, which stood to benefit from any recovery in this action. Further, the court did not err in declining to apply mandatory abstention, as Bondi failed to show that this action could be timely adjudi-

cated in state court, particularly in light of the potential interference by the related litigation then pending in federal court.

II. A corporation is responsible for its agents' acts within the scope of agency unless the interests of the agents and the corporation were entirely adverse—that is, unless the agents pursued a scheme for their own benefit at the corporation's expense, entirely abandoning the corporate interest and conferring no corporate benefit whatsoever. As the district court recognized, that is plainly not the situation here. Parmalat's managers perpetrated a fraud that allowed the insolvent company to raise more than €14 billion in financing, the vast bulk of which was used for corporate purposes. No rational trier of fact could conclude that such a fraud was perpetrated *in no part whatsoever* on behalf of the company.

III. While *in pari delicto* would operate as a complete bar even if Bondi could prove his theory that a portion of the fraud's proceeds (less than 15%) was "looted," the district court did not commit manifest error when it held that the various elements of evidence Bondi offered were inadmissible hearsay that would not show "looting" in any event.

IV. Even if it were possible to find that Parmalat was totally abandoned by its agents, the fraud must be imputed to Parmalat nonetheless

because its corrupt managers exercised complete control over its affairs. This case does not involve merely one or two corrupt directors perpetrating a fraud on their employer for their own personal benefit. Rather, dozens of high-ranking insiders—including *all* of Parmalat's directors during the relevant time—turned the company into an "engine of theft" against outsiders. *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449, 454 (7th Cir. 1982) (Illinois law). Parmalat was thoroughly rotten; there was no innocent corporate core. For this reason too, Parmalat stands *in pari delicto*.

V. As a matter of Illinois law, *in pari delicto* operates as a complete bar on all claims by a wrongdoing plaintiff. Illinois' audit interference doctrine is not to the contrary. It provides that an audit client's *negligence* may not be asserted by an auditor in a malpractice suit as part of a comparative negligence defense. That rule has nothing to do with the separate defense of *in pari delicto*, nor does it apply to a plaintiff's *intentional* (as opposed to merely negligent) wrongdoing.

Illinois law also precludes Bondi's demand for a new policy-based exception to *in pari delicto*, based on what he believes would best serve the policy aims of compensation and deterrence in this specific case. *In pari de-*

licto is a rule of law. Illinois law does not permit judges or juries to decline to apply it based on a case-by-case assessment of policy objectives.

To the extent that Bondi's policy arguments are based on his claim to represent Parmalat's innocent *creditors*, that argument is both waived and meritless. In resisting summary judgment, Bondi "[did] not quarrel with the proposition that any defenses that would have been available in an action brought by Parmalat are available against him." SPA33. Nor did Bondi ever present evidence that Italian law grants him broader powers than the many bankruptcy trustees who have been subjected to *in pari delicto*.

Finally, Bondi argues that *in pari delicto* is merely a basis for apportioning fault between parties, but this argument too was not raised below. And in any case, even after Illinois' shift to a comparative negligence regime for *negligence* cases, Illinois courts have continued to apply *in pari delicto* as a complete bar to recovery in cases where the plaintiff committed an intentional wrong. Accepting Bondi's argument would allow him to do exactly what the *in pari delicto* doctrine forbids: to enlist the courts in relieving Parmalat of the consequences of its own deliberate wrongdoing.

ARGUMENT

I. The District Court Properly Exercised Jurisdiction.

The federal courts have "original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. §1334(b). As detailed below, this action was "related to" not one but *two* "cases" under Title 11: Bondi's own Section 304 proceeding, and the Chapter 11 proceeding by Farmland Dairies LLC ("Farmland"), a U.S. Parmalat subsidiary. The court also properly held that abstention was unwarranted because Bondi failed to demonstrate that this action could be timely adjudicated in the Illinois courts.[1]

A. This action fell within "related to" jurisdiction.

1. A 304 proceeding is a "case" under Title 11.

Bondi's first jurisdictional objection—that a Section 304 proceeding is not a "case" for purposes of Section 1334(b)—ignores clear and unambiguous statutory language. Section 304, which falls within Title 11 of the U.S. Code, is headed "*Cases* ancillary to foreign proceedings," and it begins

[1] Parmalat Capital Finance Limited ("PCFL") joined Bondi's appeal of the jurisdictional and abstention issues by incorporating his arguments without further elaboration PCFL Br. 18-19. The appeal by PCFL (which filed its own Section 304 case) should be denied for the same reasons set forth here.

as follows: "(a) *A case* ancillary to a foreign proceeding is commenced by the filing with the bankruptcy court of a petition under this section by a foreign representative." 11 U.S.C. §304 (repealed 2005) (emphasis added).[2] Section 101(42) defines "petition" as a "petition filed under section 301, 302, 303, *or 304* of this title, as the case may be, *commencing a case* under this title." 11 U.S.C. §101(42) (emphasis added). The text of the Code is thus unambiguous. The question whether a 304 proceeding is a "case" should end there, without reference to legislative history. *See, e.g., Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) ("[W]hen the statute's language is plain, the sole function of the courts ... is to enforce it according to its terms.").

Bondi's argument to the contrary (Br. 22-23) is based on isolated and disconnected legislative history references and inapposite cases. The cited portions of the House and Senate reports do not address 304 proceedings at all. Instead, the cited material, located in each report's introduction, merely addresses the general chapter structure of what became Title 11. *See* H.R. Rep. No. 95-595 at 6 (1977); S. Rep. No. 95-989 at 3. Bondi's citation to Professor Nadelmann's statement is even further afield. It has nothing to do

[2] Though Section 304 was repealed, that provision and the related definitional provisions remain applicable to this case. *See* Pub. L. 109-8 (repeal for petitions filed after October 17, 2005).

with whether a 304 proceeding is a "case" within the meaning of Section 1334(b), but rather warns against giving too much power to a foreign trustee. *See Bankr. Act Revision: Hearings Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary on H.R. 31 and H.R. 32*, 94th Cong. 1449-50.

The only legislative history cited by Bondi that addresses Section 304 states that a 304 proceeding is not a "full bankruptcy case." Br. 23. That may be, but it is beside the point. The fact that such a proceeding is a "case" under Title 11—"full" or not—is sufficient. Section 1334(b) confers jurisdiction over "all civil proceedings … related to cases under title 11." 28 U.S.C. §1334(b). Nowhere does it refer to a "full bankruptcy case." *Id.*

Indeed, at oral argument on his motion to remand this case to state court, Bondi actually *admitted* that his 304 proceeding was a "case" under Title 11: "It is obviously a case, your Honor. In some sense it's clearly a case.... It's under Title 11 but it's not a full fledged case." A1219-20.

The authorities Bondi cites (Br. 21-22) do not and cannot support a reading of the statute that is so clearly contrary to its plain language. *See In re St. Theresa Props., Inc.*, 152 B.R. 852, 853 n.1 (Bankr. S.D.N.Y. 1993) (cited footnote concerns right of intervention); *Stouge v. Smoutha*, 136 B.R. 921, 929

(Bankr. S.D.N.Y. 1992), *dismissed*, 979 F.2d 845 (2d Cir. 1992) (decision concerns whether court had obtained exclusive *in rem* jurisdiction over debtor's assets through a 304 filing; cited reference is an unsupported aside concerning whether debtor's U.S. assets were under the court's exclusive authority); *In re Blackwell*, 267 B.R. 732, 737-39 & n.9 (Bankr. W.D. Tex. 2001) (rejecting subsidiary's reliance on parent's 304 proceeding for "related to" jurisdiction, where parent's bankruptcy was foreign and recovery by subsidiary would not benefit parent, as parent had not filed a claim against subsidiary). The statutory language is clear: Bondi's 304 proceeding is a "case" under Section 1334(b).

2. This action was "related to" at least one "case" under Title 11.

There can be no doubt that this civil recovery action was "related to" Bondi's 304 case. Indeed, as discussed below, the two matters have actually intersected at several points in time, as the defendants have had to seek relief in the 304 case in order to defend themselves here.

The conclusion that the two cases were "related" followed as well from the judicial gloss this Court and others have placed on the statute's "related to" language, holding that an action is "related to" any case under

Title 11 when the action's "outcome *might have any 'conceivable effect*' on the bankrupt estate" at issue. *In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 114 (2d Cir. 1992), *overruled on other grounds by Things Remembered, Inc. v. Petrarca*, 516 U.S. 124 (1995) (emphasis added). There are several reasons why this action could have had, and has indeed had, at least a "conceivable effect" on a case under Title 11.

First, it was always apparent that this action would have at least a "conceivable" effect on 304 case's "handling and administration." *In re Pacor, Inc.*, 743 F.2d 984, 994 (3d Cir. 1984) (impact on "handling and administration" is sufficient for "related to" jurisdiction). Indeed, GTI and GT-US were required to institute proceedings in the 304 case to alter the 304 injunction before they could take discovery in this case and pursue counterclaims. A1238-48. It was also necessary for GTI and GT-US to seek and obtain relief in the 304 case to enable them to pursue a third-party complaint against Bondi in the related securities class action, which encompassed claims parallel to the counterclaims here. A1901-11.

Bondi admits that a state-law action such as this one can be "related to" a 304 proceeding if it "operates effectively against the administration of that proceeding." Br. 26. Still, he contends that a *foreign* bankruptcy repre-

sentative's recovery action is different, because "only the *Italian* court administers Parmalat's foreign estate," and thus "there has never been a U.S. estate to administer." *Id.* at 26-27 (emphasis added).

This argument misses the point. In a 304 case, the estate administered *is* the foreign estate. Section 304 presupposes the existence of an estate being administered by the foreign debtor, and a 304 case enlists the U.S. courts in that administration, particularly with reference to the estate's U.S. assets. *See* 11 U.S.C. §304(a) (2005); *accord* 11 U.S.C. §101(23) (2005); *see also* 11 U.S.C. §304(b)(1)(B), (b)(2), (c), (c)(1), (c)(3), and (c)(4) (referring to "such estate"); *In re Koreag Controle et Revision S.A.*, 961 F.2d 341, 348-349 (2d Cir. 1992) (reference in Section 304 to "such estate" is to the foreign estate). Bondi himself conceded as much at oral argument before the district court: "There obviously is an estate. There obviously is an estate." A1227. Indeed, it was Bondi who enlisted the U.S. courts to aid the administration of that estate, by filing his 304 petition.

In any event, neither Section 1334(b) nor the Bankruptcy Code limits federal jurisdiction to actions "related to" a case administering a *U.S.* bankruptcy estate. All that is required is that the action relates to a "case" under

Title 11. As Judge Kaplan properly held, that requirement is satisfied here. SPA7-9.

Second, this action was and is "related to" Bondi's 304 case because Bondi's claims against GTI and GT-US are, themselves, assets of the Parmalat estate, which the 304 court is playing a role in administering. Bondi does not dispute that the outcome of these claims might have had "a conceivable effect" on the Parmalat estate by adding to its value. CA227-28(¶28-34). As Judge Kaplan explained, "[t]he parties do not dispute that the outcome of this action might have a conceivable effect on the Foreign Debtors' estates by adding to their assets." SPA6; *accord In re OCA, Inc.*, 551 F.3d 359, 367 (5th Cir. 2008) (adversary proceeding "obviously could have an affect [sic] on the bankruptcy estate because a judgment against [non-debtor] could increase the estate"); *In re Boston Reg'l Med. Ctr., Inc.*, 410 F.3d 100, 107 (1st Cir. 2005) ("[The liquidating entity's] success or lack of success in securing a share of the trust corpus will directly impact the amount of the liquidating dividend eventually paid to [the debtor's] creditors. That is a matter intimately connected with the efficacy of the bankruptcy proceeding."); *Kirschner ex rel. Refco Private Actions Trust v. Bennett*, No. 07 Civ. 8165(GEL), 2008 WL 1990669, at *6 (S.D.N.Y. May 7, 2008) (finding "related

to" jurisdiction because "the outcome of this action will, in at least one way, directly affect the assets available for distribution to Refco creditors").

Third, and independently, this action was also "related to" the 304 case because of the potential for counterclaims, which would also necessarily impact the Parmalat estate. GTI and GT-US brought counterclaims for spoliation and contribution, seeking to obtain assets of the Parmalat estate by setting off any recovery on such counterclaims against any recovery Bondi might have obtained from GTI and GT-US, leaving any excess for collection in Italy. A1238-48. That these counterclaims were ultimately dismissed is of no moment. The mere possibility of a claim against a bankrupt corporation has a "conceivable effect" on the estate and thus confers "related to" jurisdiction. *See In re Global Crossing, Ltd. Sec. Litig.*, 311 B.R. 345, 347 (S.D.N.Y. 2003); *see also In re TXNB Internal Case*, 483 F.3d 292, 298 (5th Cir. 2007); *In re N.Y. Int'l Hostel, Inc.*, 157 B.R. 748, 751 (Bankr. S.D.N.Y. 1993).

Bondi himself recognized the breadth of "related to" jurisdiction and the scope of the "any conceivable effect" test in an earlier appeal to this Court in the 304 case. There, he argued that the cost of defending contribution claims by GTI and GT-US would have a negative impact on Parmalat's

estate: "[A]n estate's assets are dissipated equally by costly litigation as by a creditor's seizure of a physical asset[,]" and "the estate's assets can be dissipated, and the trustee's attention distracted, just as much by defending against litigation as by a creditor seizing the estate's tangible assets[.]" Brief of Appellant Enrico Bondi in No. 07-0685-BK(L), at 15, 19 (filed 5/4/07); *see also id.* at 28.

Bondi nonetheless contends that neither his claims nor the counterclaims were "related to the preservation or recovery of any *U.S. property*," and it is preservation of *U.S. property* to which the civil action must relate. Br. 24-25 (emphasis added). In support, he cites *In re Marconi PLC*, 363 B.R. 361, 365 (S.D.N.Y. 2007), and *Bondi v. Citigroup*, No. 04-4373 (D.N.J. Nov. 17, 2004). Both decisions noted the absence of a U.S. estate in a 304 proceeding. Critically, however, neither decision cites any authority for the point that the property in issue in the "related" action must be the property of a U.S. estate. *See, e.g., Marconi*, 363 B.R. at 366. This action concerns the U.S. property of a *foreign* estate: it seeks to prosecute Parmalat's U.S. claims against GTI and GT-US and to resist counterclaims that could offset those claims, all the while incurring litigation expenses that would necessarily deplete those U.S. claims as well.

Fourth, and finally, even if a U.S. bankruptcy estate were required, the district court's exercise of jurisdiction should still be affirmed because this action was "related to" a Chapter 11 reorganization proceeding filed by Farmland, a U.S. subsidiary of Parmalat. GTI and GT-US removed this action and opposed remand on this basis as well (A969, 996, 1152, 1172, 1176, 1185; A1199, 1231), but in light of the district court's conclusion concerning the 304 case, the court did not reach that separate and independent basis for jurisdiction. SPA9 n.20.

In 2004, Farmland filed multi-million-euro claims against Parmalat in Italy. The court approved them and Farmland was included on Bondi's list of approved creditors. A1199 (attaching Parma court order). Accordingly, Farmland stood to benefit directly from any recovery in this action (CA172-77; A1766-69), and this action, in turn, would have had a direct effect on Farmland's Chapter 11 estate.

Indeed, Bondi conceded at oral argument in the district court that it was "*conceivable* that if [Bondi] is successful in [this action] and there is a recovery," Farmland would receive a benefit from those assets. A1216 (emphasis added). As discussed above, a "conceivable effect" is all this Court requires to satisfy Section 1334(b). *Cuyahoga Equip. Corp.*, 980 F.2d at

114. Bondi's concession that an effect on Farmland's Chapter 11 estate was "conceivable" is enough, by itself, to reject his arguments on appeal.

B. Abstention was not required because Bondi failed to establish that this lawsuit could be timely adjudicated in state court.

Section 1334(c)(2) requires a federal court to abstain from exercising jurisdiction over a "related to" action if, among other things, that action can be "timely adjudicated" in state court.[3] 28 U.S.C. §1334(c)(2). "A party is not entitled to mandatory abstention if it fails to prove any one of the statutory requirements." *In re Worldcom Inc. Sec. Litig.*, 293 B.R. 308, 331 (S.D.N.Y. 2003). The mandatory abstention provision of §1334(c)(2) should be "narrowly construed and the abstention should be exercised sparingly and cautiously." *In re Hillsborough Holdings Corp.*, 123 B.R. 1004, 1010 (Bankr. M.D. Fla. 1990), *aff'd*, 123 B.R. 1018 (M.D. Fla. 1990); *see also In re Taub*, 413 B.R. 69, 74 (Bankr. E.D.N.Y. 2009) ("Abstention is an 'extraordinary and narrow exception to' the federal court's duty to adjudicate a controversy properly before it.").

[3] This Court has determined that mandatory abstention *can* apply to removed cases. *Mt. McKinley Ins. Co. v. Corning, Inc.*, 399 F.3d 436, 446-47 (2d Cir. 2005). We respectfully disagree and hereby preserve this issue for further appeal, if necessary.

A proponent of mandatory abstention has the burden of proving that the action *can* be timely adjudicated in state court. *See, e.g., CCM Pathfinder Pompano Bay, LLC v. Compass Fin. Partners, LLC*, 396 B.R. 602, 606 (S.D.N.Y. 2008). The test is not how long it would take, based on general statistics, to adjudicate an average case, but whether *this* case can be timely adjudicated. *See In re Refco, Inc. Sec. Litig.*, 628 F. Supp. 2d 432, 446-47 (S.D.N.Y. 2008) (Lynch, J.). Here, the court properly found that Bondi "failed to show that this action can be 'timely adjudicated' in the state court" because this action was but one piece to a much larger puzzle involving the various bankruptcy proceedings and securities fraud actions, and the "litigation puzzle" would impede the progress of *this* action if it were remanded to state court. SPA10-12. The weighing of the timely adjudication factors is a matter of judicial discretion. *In re Georgou*, 157 B.R. 847, 851 (N.D. Ill. 1993); *see also Edge Petroleum Operating Co. v. GPR Holdings, LLC*, 483 F.3d 292, 299 (5th Cir. 2007). Bondi has fallen well short of demonstrating any abuse of discretion here.

Bondi is wrong in contending that the court should have ignored potential delays in adjudicating the action in state court simply because they arose from other, related actions pending in federal court. Judge Lynch

and Judge Cote have both rejected similar arguments, and there is nothing in the text of Section 1334(c)(2) precluding the consideration of such delays. *See Global Crossing*, 311 B.R. at 349; *WorldCom*, 293 B.R. at 331; *see also Refco*, 628 F. Supp. 2d at 446; *Kirschner*, 2008 WL 1990669, at *7 (May 7, 2008 S.D.N.Y.); *In re Adelphia Commc'ns Corp. Sec. & Deriv. Litig.*, No. 03 MDL 1529LMM, 2005 WL 1404798, at *2 (S.D.N.Y. June 14, 2005). According to Bondi, both *Global Crossing* and *WorldCom* are inapposite because they involved "mega" Chapter 11 cases and not a 304 proceeding. But the Parmalat bankruptcy proceeding (for whose benefit Bondi's 304 case was commenced) was no small affair, involving the reorganization of twenty-three Parmalat corporations. SPA2. And the size of the bankruptcies in *Global Crossing* and *WorldCom* was but one factor the Court considered, along with the interconnected nature of the complex securities actions and the complexity of the removed case. 311 B.R. at 348-49; 293 B.R. at 331. The district court here weighed the same factors. SPA11-12.

Bondi also complains that the district court erred by "improperly considering purported efficiencies that would be achieved by consolidating this action with a *securities* class action." Br. 32. But he ignores the fact that this consideration flowed from Bondi's own demand for both mandatory

(§1334(c)(2)) *and permissive* abstention (§1334(c)(1)), only the former of which is the subject of this appeal. Judge Kaplan separated his conclusions regarding these two independent grounds: his decision on *mandatory* abstention reflected his concern with the timely adjudication "of this case," whereas for permissive abstention, he appropriately considered broader judicial efficiency concerns, including "the importance of coordinating this proceeding with the international bankruptcy and the Securities Fraud Action." SPA12.

Moreover, to the extent the district court did consider the more global efficiences gained by litigating the matters together, it was not error. As Bondi concedes (Br. 31), courts have found that the timely adjudication test should be informed, not solely by the relative speed with which the state and federal court could be expected to proceed, but also by the needs of the related bankruptcy case. There is no meaningful difference between considering the impact on the related bankruptcy case, and considering whether adjudicating this action in Illinois would have complicated and slowed down "other [actions] pending in this Court." SPA12.

Finally, there is no merit to Bondi's argument that the needs of the related bankruptcy proceeding for a speedy resolution are entitled to less

weight in the Section 304 context. Br. 31-32. Bondi bases this argument on the fact that some courts have afforded less weight to the needs of a Chapter 7 debtor for speedy resolution than those of a Chapter 11 debtor, and a 304 case involves even less administration than a Chapter 7 case. *Id*. But the lesser weight afforded a Chapter 7 debtor's need for timely adjudication is not because of the amount of administration required; it relates instead to whether there is a reorganizing debtor. *See, e.g., World Solar Corp. v. Steinbaum (In re World Solar Corp.)*, 81 B.R. 603, 612 (Bankr. S.D.Cal. 1988). Bondi's 304 case is more analogous to a Chapter 11 proceeding in that respect, as Bondi himself explained in commencing it: "Italian Insolvency Law provides for a restructuring similar to that which could be accomplished through the chapter 11 process under the Bankruptcy Code." A814.

Given his expressed interest in ensuring that the Parmalat estate does not bear the cost of unnecessary litigation (*see supra* at 27-28), Bondi's attempt to upset six years' worth of litigation is ironic, to say the least. For the reasons discussed above, the district court did not err in exercising jurisdiction. Bondi's appeal on this basis should be rejected.

II. The Insiders' Wrongdoing Is Imputed To Parmalat, Which Stands *In Pari Delicto* as a Result.

In pari delicto stands for the proposition that no plaintiff may premise a suit on its own wrongdoing. *See, e.g.*, *King v. First Capital Fin. Servs. Corp.*, 828 N.E.2d 1155, 1173 (Ill. 2005). The doctrine focuses exclusively on the conduct of the plaintiff, barring the suit if "the plaintiff requires the aid of the illegal transaction to establish his case." *Devor v. Knauer*, 84 Ill. App. 184, 186 (1899) (internal quotation marks omitted). As Illinois cases recognize:

> If a plaintiff can not open his case without showing that he has broken the law, a court will not assist him. ... [T]he objection may often sound very ill in the mouth of a defendant, but it is not for his sake that the objection is allowed; .... The principle to be extracted from all the cases is that the law will not lend its support to a claim founded on its own violation.

Id. (internal quotation marks omitted).

This appeal, therefore, turns on whether Parmalat—the party pressing claims in this case—was itself a participant in the wrongdoing. Accordingly, the critical issue is whether the fraudulent scheme carried out by Parmalat's officers and directors is imputed to Parmalat as a matter of agency law. As Illinois courts have held, agency law and the rules of impu-

tation apply no differently when the issue happens to arise in the context of an auditor's *in pari delicto* defense:

> The imputation doctrine in accountant malpractice cases allows the wrongdoing of corporate officers to be attributed to the corporation to bar an action for damages if … the officers and directors of a corporation did in a knowing fashion all that the accountant is charged with; and … such actions by the corporation's top management amounted to fraud on behalf of the corporation.

First Nat'l Bank of Sullivan v. Brumleve & Dabbs, 539 N.E.2d 877, 881 (Ill. App. Ct. 1989).

In opposing the motion for summary judgment, Bondi argued that the officers' fraud may not be imputed because they were acting for the purpose of benefiting themselves through "loot[ing]." A2701-02. After the district court rejected that argument on several grounds—not only as a matter of law but also based on Bondi's failure to present any admissible evidence—Bondi changed his tune. He now contends that the fraud must also have been motivated by the insiders' interest in their continued employment, salaries, and good reputation—all personal benefits they acquired (he says) at the company's expense. Br. 50. Of course, Bondi does not cite a single case finding the adverse interest exception satisfied merely because a wrongdoing officer was motivated by a desire to continue receiv-

ing ordinary employment benefits like these—a motivation present in *every* case of corporate fraud.

More broadly, these arguments *all* fail to trigger the adverse interest exception. No rational trier of fact could conclude that the insiders' scheme was designed to benefit them personally in a manner entirely adverse to the corporation, conferring no corporate benefit whatsoever. To the contrary, the record is replete with evidence that Parmalat enjoyed real, substantial, and intended benefits during the course of the fraud, which generated billions upon billions of euros for its use in operations and expansion. The interests of the insiders and the corporation were never "adverse," and thus the adverse interest exception cannot apply.

A. Agency law presumes imputation for all acts committed and knowledge acquired within the scope of agency.

The analysis in this case must begin with the basic presumption that underlies all of agency law: a principal is presumptively charged with the acts of its agents within the scope of their authority. *Hartmann v. Prudential*, 9 F.3d 1207, 1210 (7th Cir. 1993) (Illinois law). Agency law presumes imputation even if the agent acted wrongfully or exhibited poor judgment. *Carlberg v. Spiegels House Furnishing Co.*, 178 Ill. App. 424, 426 (1913) (em-

ployer "is liable for the wanton and wilful acts of its agents in the line of their employment … while pursuing the business of the defendant") (citing *Keedy v. Howe*, 72 Ill. 133 (1874)); *e.g.*, *A.T. Kearney, Inc. v. INCA Int'l, Inc.*, 477 N.E.2d 1326, 133 (Ill. App. Ct. 1985) (knowingly accepting funds paid in breach of fiduciary duty); *City of Chicago v. Roppolo*, 447 N.E.2d 870 (Ill. App. Ct. 1983) (fraudulent concealment); *Pfeffer v. Farmers State Bank of Schaumburg*, 263 Ill. App. 360 (1931) (forgery by bank officer).

Bondi complains that the district court "spurned" a traditional agency law analysis "in favor of [a] 'corporate activities' analysis." Br. 47. In the corporate context, however, the question of imputation necessarily begins with scope of agency—or, in other words, with whether the corporate agents were engaging in "corporate activities." *See* SPA35-39. Accordingly, there is nothing surprising, new, or incorrect in the district court's statement that "[t]he preparation and certification of financial statements and advising Parmalat with respect to structuring financing vehicles and moving or keeping debt off consolidated balance sheets were corporate activities." SPA38. Because Parmalat's officers and directors were acting within their respective roles at the company, Parmalat is presumptively charged with their conduct and knowledge.

Indeed, it is undisputed that Parmalat's officers acted within the scope of their authority. As the district court explained, "there is no dispute that Parmalat … officers engaged in a massive fraud that ended in the collapse of Parmalat. Nor do plaintiffs dispute that Parmalat's … officers acted within the scope of their authority when they issued fraudulent financial statements, established new Parmalat entities, … made acquisitions, accessed the capital markets, and did many other things." SPA35. The imputation analysis is rarely simpler than where corporate officers perpetrate a fraud against third-parties through the corporation's financial statements: "The approval and oversight of [assumed fraudulent financial] statements is an ordinary function of management that is done on the company's behalf, which is typically enough to attribute management's actions to the company itself." *Baena v. KPMG LLP*, 453 F.3d 1, 7 (1st Cir. 2006) (citing Restatement (Second) of Agency §257). Accordingly, Illinois law *presumes* that the acts of the officers were, in fact, the acts of Parmalat itself.

B. To avoid imputation, the corporation must prove that the agent totally abandoned its interests, acting for the sole purpose of benefiting himself at the corporation's expense.

The rationale for imputation breaks down only in the extraordinary case where the agent *totally abandoned* the corporation's interests, "for it cannot be assumed that a faithless agent will confess the breach of the agent's duty to the principal." SPA36. To invoke this narrow "adverse interest" exception, the corporation must prove that the agent acted for the sole purpose of benefiting himself, providing no benefit to the company whatever. SPA37 n.103 (citing, *inter alia*, *Hartmann*, 9 F.3d at 1210 ("in general when an agent acts *entirely* on his own behalf ... the principal is not bound") (emphasis in original); 3 Fletcher Cyc. Corp. §819; Restatement (Second) of Agency §282(1)); *see also Grede v. McGladrey & Pullen LLP*, 421 B.R. 879, 886-87 (N.D. Ill. 2009) (Illinois law) (adverse interest exception applies "only when the wrongdoing 'can in no way ... be described as beneficial' to the company") (alterations in original).

The district court correctly rejected Bondi's argument that this analysis requires a court to "look primarily to the intent of the agents while ignoring or discounting evidence that the agents acted for the benefit of the

company." SPA44-45. The ultimate question, as Bondi agreed below, is "whether [Parmalat's] officers were conducting their own business or the corporation's." A2706 (citation omitted). That inquiry, by its terms, focuses on the nature and effect of the agents' acts. An act is not adverse to the principal simply because the agent is self-interested; adversity requires proof that the agent's benefit came at the principal's expense. *See Cenco*, 686 F.2d at 456 ("Fraud on behalf of a corporation is not the same thing as fraud against it."); *Sunseri v. Puccia*, 422 N.E.2d 925, 930 (Ill. App. Ct. 1981) (imputation of intentional tort not defeated merely because agent acted with "dual purpose" of serving principal's interest and his own); *Allard v. Arthur Andersen*, 924 F. Supp. 488, 495 (S.D.N.Y 1996) (cited in Br. 59) ("the 'adverse interest' exception does not apply 'when the agent acts both for himself and the principal, though his primary interest is inimical to the principal'"); 3 Fletcher Cyc. Corp. §819 ("where the officer is in fact acting for the corporation in a transaction, even though the officer may have an opposing personal interest, it will be presumed that the officer will communicate … the facts affecting the transaction "). As one court (applying Illinois law) recently recognized, "[t]he reason one must carefully examine what benefit accrued to the corporation is that corporate officers, even in

the most upright enterprises, can always be said, in some meaningful sense, to act for their own interests." *Grede*, 421 B.R. at 886.

C. No rational trier of fact could find that the insiders totally abandoned Parmalat's interests.

Under this standard, there can be no doubt that the adverse interest exception does not apply here. Parmalat received extensive benefits from the fraud, and these benefits are dispositive. *See Grede*, 421 B.R. at 886 ("[t]he exception is applicable when the corporate officers act entirely for their own interests and the actions do not benefit the corporation") (citing 3 Fletcher Cyc. Corp. §821). And even to the extent that the insiders' subjective motivations are relevant, their intent was not to benefit at the company's expense, but rather to benefit *together with* the company. In fact, Parmalat's managers testified that their intent was always to "rescue" Parmalat from its financial distress. CA411-12; CA418; CA426-27, 430-32; CA481-82; CA484-85.

In 1990, Parmalat was a relatively modest dairy operation; by 2003, it had become "the number two brand franchise in the global food market." A1040-41. In the interim was fraud. As the district court explained, Parmalat's managers covered Parmalat's losses, serviced its debt, and maintained

its attractiveness to investors by using false financial statements and sham subsidiaries to manufacture false revenue and bury operating losses, bad investments, and uncollectible debts. SPA18. Through these undisputedly "corporate activities," Parmalat's managers "assisted Parmalat in obtaining over €14 billion in capital, much of which Parmalat invested to expand its production facilities from three to 130, its workforce from 1,217 to 36,356 employees, its product line to 10,000 items, and its international presence from five countries to thirty." SPA38 (citation footnotes omitted). Much as Bondi might like to ignore these parts of the fraud, *none of this is disputed*. *See* SPA40 n.111 ("Plaintiffs do not dispute defendants' assertion that Parmalat fraudulently obtained €14 billion in financing, nor do they contend that any looting or squandering constituted more than a fraction of that amount.").

To meet the total abandonment standard, Bondi needs to prove that this fraud "can '*in no way* ... be described as beneficial to the company.'" *Grede*, 421 B.R. at 887 (alterations in original); *see also Hartmann*, 9 F.3d at 1210. He cannot come close to carrying that burden. In litigation between Bondi and Citigroup, the New Jersey Superior Court was presented with a record establishing the same material facts, and likewise concluded:

> The legions of vendors, customers, employees, and consumers of Parmalat were enjoying the fruits of [the] conduct of the insiders just as assuredly as the insiders may have been individually profiting from keeping the company afloat. The record does not bespeak a situation where a jury needs to sift through conflicting evidence to see if an abandonment of [Parmalat's] interests occurred. Clearly, it did not.

Citi at 51-52. This was a fraud *for* the company, not against it. *Accord Cenco*, 686 F.2d at 451 (fraud inflated inventory and stock price, enabling acquisitions and borrowing); *Grede*, 421 B.R. at 886 (fraud allowed company to attract clients, attract capital, reduce debt, and increase income); *Baena*, 453 F.3d at 7 (fraudulently overstated earnings facilitated stock sales and acquisitions).

Bondi dismisses the fruits of Parmalat's fraud as "illusory" (Br. 47), but the label does not fit. As an initial matter, the case of *In re CBI Holding Co.*, 529 F.3d 432 (2d Cir. 2008)—a decision on which Bondi relies for this point and others—applies the law of New York and thus does not control in this case.[4] But in any event, when *CBI* described certain corporate benefits in that case as "illusory," it had something very specific in mind: trading a corporation's debt for capital "may provide an illusory financial cu-

[4] Indeed, *CBI's* status as a statement of New York law is uncertain in light of this Court's certification of related issues to the New York Court of Appeals in *Kirschner v. KPMG LLP, et al.*, 590 F.3d 186 (2d Cir. 2009).

shion that lulls shareholders into postponing the decision to dissolve the corporation and thus *miss an opportunity to cut their losses*." Br. 49 (quoting *CBI*, 529 F.3d at 453) (emphasis added) (internal quotation marks omitted). That was not the case here. According to Bondi himself, when the fraud began, Parmalat was "terminally insolvent." A2723; *see also* A2769-70(¶51-55). Shareholders had no "opportunity to cut their losses" prior to the fraud; there was nothing left to lose. Led by its majority shareholder and CEO, Parmalat opted not to go into bankruptcy and cease to exist, but rather to grow into "the number two brand franchise in the global food market." A1040-41. The benefits here may have been unwise and dishonest, but they were quite real.

D. Bondi cannot prevail by recasting these corporate benefits as "squandering" or by focusing on "long-term harm" to Parmalat's creditors.

These corporate benefits establish conclusively that Parmalat's managers were acting at least in part on behalf of the company. Bondi cannot change that fact by focusing on "long-term harm," particularly given that such harm was inflicted on Parmalat's *creditors*, not the company itself.

First, framing his "long-term harm" argument, Bondi falsely contends that the district court too narrowly required a showing of overt loot-

ing (Br. 49-51), when in fact the court merely resolved the case as pleaded and argued *by Bondi*—centered on the allegation of insider looting. *E.g.*, A2701-02. On appeal, Bondi tries to avoid the issue of looting—no doubt because of the obvious problems with his evidence and the high hurdle posed by the manifest error standard of review. *See infra* Part III. In the court below, however, Bondi insisted that the *sole* purpose of the fraud was to facilitate insider looting. CA375-77(¶782-96). The court correctly found this characterization factually untenable.

In a related complaint against Bank of America, Bondi admitted that the fraud was undertaken to obtain financing for three purposes: to fund Parmalat's massive acquisition campaign, to enable insider looting, and to keep the company in business despite mounting losses. A1105(¶204). This admission resulted in dismissal of that complaint, given that a fraud undertaken for a corporate purposes is the very opposite of a "total abandonment." *See In re Parmalat*, 383 F. Supp. 2d 587, 597 (S.D.N.Y. 2005). Bondi's lawyers responded by scrubbing the admission from his amended pleading, but both Bondi and his aide later reaffirmed it in testimony. A2773-74(¶70-71). Bondi also made similar concessions in his Italian pleadings

(*e.g.*, CA441-42), and, as discussed above, discovery established conclusively that the fraud was perpetrated on Parmalat's behalf.

Bondi's brief does not address his repeated concessions that any "looting" was within the context of a broader fraud undertaken to conceal losses and grow the company. Nor does he seriously suggest that any "looting" can be isolated from the rest of the fraud as Bondi alleged it. In so holding, the court did not force Bondi to present his case only in terms of overt theft; it simply held that discovery had disproved the allegation that kept Bondi's case alive all these years—that "looting" was the sole purpose of the fraud.

Second, though Bondi tries to suggest otherwise (Br. 49-51), the court did, in fact, consider Bondi's "squandering" argument and found it wanting. The expenditures viewed by Bondi as problematic—what he now prefers to discuss in terms of "long-term harm" or Parmalat's change in "net equity"—are operating losses and funds spent to pay taxes, refinance debt, obtain new capital, and generally conceal the fraud rather than give up the ghost and send Parmalat into liquidation. Br. 9, 50-51. The district court correctly concluded that there is "no defensible basis for including funds that were wasted or poorly used in any evaluation of the extent to which

insiders were acting in their own interests rather than serving corporate interests, which is the concern of the adverse interest exception to the general rule of imputation. Regrettably, corporate officers and agents frequently make business decisions that turn out badly while acting with entire fidelity to their corporate employers." SPA40 n.111.

This is not error. Adversity cannot be established by the fact that the fraudulent scheme ended badly. In Illinois as elsewhere, "the adverse interest exception is not automatically triggered whenever misconduct contributes to a future financial harm. If it were, it would effectively eliminate the *in pari delicto* doctrine altogether, since unmasked frauds resulting in lawsuits rarely, if ever, benefit a company in the long run." *Grede*, 421 B.R. at 887 (internal quotation marks omitted); *see also Cenco*, 686 F.2d at 456 (that a corporation may not be a "net" beneficiary after the fraud is unmasked goes only to damages and does not trigger the adverse interest exception); *Rogers v. McDorman*, 521 F.3d 381, 394-95 (5th Cir. 2008) (same effect); *Nisselson v. Lernout*, 469 F.3d 143, 156 n.4 (1st Cir. 2006) ("subsequent implosion is of no moment"). The relevant issue is whether the company benefited *at the time*: "A fraud by top management to overstate earnings, and so facilitate stock sales or acquisitions, is not in the long-term interest

of the company" but "profits the company in the first instance and the company is still criminally and civilly liable." *Baena*, 453 F.3d at 7.

In fact, from the company's perspective, Bondi's "long-term harm" was not caused by the financial statement fraud at all. That fraud *raised* money; it did not spend it. *Cf. Bloor v. Carro et. al.*, 754 F.2d 57, 61-63 (2d Cir. 1985) (third-parties who allegedly assisted "a massive and continuing fraud" through which a company obtained "large amounts of money" held not responsible for resulting losses "when the proceeds of those transactions were allegedly funneled into unwise investments or diverted to the personal use of [corporate insiders]"); *Marion v. TDI, Inc.*, 591 F.3d 137, 150-51 (3d Cir. 2010) (similar); *In re CitX Corp.*, 448 F.3d 672, 677 (3d Cir. 2006).

Third, Bondi's "long-term harm" argument also misses the mark because it ignores the critical issue for the adverse interest exception—namely, whether the insiders' interests and the company's were "adverse." Here, through any frame of reference, the interests of Parmalat and its managers were aligned. In the shorter term, while the insiders were enjoying whatever benefits the fraud gave them personally, Parmalat was developing new products, undertaking new ventures, staying in business, and expanding around the world. And in the long term, the fraud ended badly

for the insiders and the company alike: Parmalat endured a bankruptcy proceeding and the insiders went to jail. Bondi gins up a false disconnect by juxtaposing happy fraudfeasing insiders between 1990 and 2002 with the disgraced company in 2003.

Finally, the "long-term harm" identified by Bondi was inflicted on Parmalat's *creditors*—not the company itself. Parmalat was insolvent by 1990 and had nothing left to lose. A2723; A2769-70(¶51-55). Its creditors and investors may have suffered because of the fraud, but Parmalat itself was able to stay in business, grow dramatically, pay its employees, and continue to improve and sell its products.

Bondi's own cases (*see* Br. 47-49) prove the point. Each required proof that prolonging the corporation's life *harmed* the shareholders, whereas here, the fraud *helped* the then-current shareholders at the expense of creditors and investors. In *Holland v. Arthur Anderson & Co.*, 469 N.E.2d 419 (Ill. App. Ct. 1984), for example, the complaint alleged that an insurance company's failure to maintain adequate loss reserves led it to operate past the point of insolvency and ultimately collapse. *See id.* at 423, 426-27. But these courts had reason to conclude that, at the outset of a fraud, and despite the corporation's inability to pay its bills, the corporation was still

"worth something to the shareholders." *Fehribach v. Ernst & Young LLP*, 493 F.3d 905, 908 (7th Cir. 2007) (discussing *Schacht v. Brown*, 711 F.2d 1343 (7th Cir. 1983), a closely related case relied on by both *Holland* and Bondi); *also compare CBI*, 529 F.3d at 453 (fraud cost the company's owners an opportunity to sell their shares to a willing buyer for real value). In this case, on the other hand, "[the company's owners] had nothing more to lose"; "[t]he only possible losers" from the corporation's continued existence "were the corporation's creditors." *Fehribach*, 493 F.3d at 909. Moreover, though Bondi does not mention it, the *Holland* court later granted summary judgment against the plaintiff because—by hiding the company's insolvency and allowing it to borrow more—the fraud harmed the *creditors*, not the company. *Holland v. Arthur Andersen & Co.,* 571 N.E.2d 777, 782 (Ill. App. Ct. 1991); *see also In re Parmalat Sec. Litig.*, 501 F. Supp. 2d 560, 574-78 (S.D.N.Y. 2007) (an insolvent company has "nothing to lose simply by continuing to operate, even if that [means] the continued depletion of [its] assets") (discussing authorities in context of two Parmalat subsidiaries) *aff'd sub nom Pappas v. Bank of America Corp.*, 309 Fed. App. 536 (2009).

The operative question is whether the insiders' actions in hiding Parmalat's insolvency—including by fraudulently raising billions of euros

from third parties—failed to benefit the corporation in any way. To state the question is to answer it. For all the reasons discussed above, it is beyond dispute that the fraud served at least *some* corporate purpose: "while the theft from a company of even a pencil is an act solely for the benefit of the employee, the raising of capital for a corporation is part of the corporate business…. Plaintiffs simply cannot get around the fact that Parmalat, by means of the transactions complained of, raised and spent millions of euros for corporate purposes." SPA40. The adverse interest exception does not apply.

III. The District Court Did Not Commit Manifest Error In Rejecting Bondi's "Looting" Evidence.

As discussed above, the district court properly held that the insiders' wrongdoing is imputed to Parmalat and bars Bondi's suit even if Bondi were correct that a portion of the fraud's proceeds were "looted." But the court did not stop there. It also concluded that Bondi had failed to raise a genuine issue of fact with respect to insider "looting" in the first place. As the court correctly recognized—in rulings Bondi concedes are reviewed only for *manifest error* (Br. 19)—Bondi's evidence on this point was comprised entirely of inadmissible hearsay. Moreover, though Bondi ignores this fact,

the court also held that much of this evidence does not show "looting" in any event.

Bondi's suggestion that the court should not have concerned itself with matters of admissibility at the summary judgment stage (Br. 62) is flatly contrary to this Court's precedents. *Tamarin v. Adam Caterers, Inc.*, 13 F.3d 51, 53 (2d Cir. 1993) (citing cases). As this Court has recognized, "only admissible evidence need be considered by the trial court in ruling on a motion for summary judgment." *Raskin v. Wyatt Co.*, 125 F.3d 55, 66 (2d Cir. 1997). "[R]esol[ving] evidentiary questions on summary judgment conserves the resources of the parties, the court, and the jury." *Id*. That salutary purpose would be defeated if, as Bondi wrongly argues, a court were required to defer admissibility issues pending "a full trial record or an *in limine* proceeding." Br. 62; A2553 (order alerting the parties in advance that "[a]ny admissibility questions involving such evidence may be raised as part of the briefing of the summary judgment motion(s)").

A. ***The GdF report***

Bondi's primary evidence of alleged "misappropriations" is a report prepared by the Guardia di Finanza—the Italian financial police ("the GdF"). *See* A2897-98(¶654). As the district court held, however, this report

is not evidence of *looting by insiders*: it speaks only in terms of "diversions"—a category that "include[s] money paid to Parmalat subsidiaries to cover their debt." SPA47-48 (footnote omitted). Thus, even if this report were admissible, it "would not support plaintiffs' contention that corrupt insiders stole the €943 million or used it in some other way for their personal benefit and against the interests of the company." SPA48.

In any event, the court correctly refused to admit this report as a business record under Federal Rule of Evidence 803(6) because—as the officer in charge of the GdF's investigation explained—the report was *not* made in the GdF's "regular practice." SPA48. Bondi's only response is to point to a statement by one of this officer's subordinates—a statement not argued in Bondi's briefs to the district court—who stated that creating the report was "one of many duties of the [GdF]." Br. 62. But even if the GdF had a *duty* to create it, the report still was not a record regularly prepared, which is dispositive under Rule 803(6).

Further, and independently, the report is also inadmissible under Rule 803(6) because it is not trustworthy. As the district court recognized, "it is filled with conclusions based heavily on statements of former Parmalat insiders, all of whom had motives to conceal or minimize their own cul-

pability, shift responsibility to others, and be less than forthright with [GdF] investigators in other ways." SPA49 (footnote citing authorities omitted). Again, Bondi does not challenge this finding, which provided an independent basis for excluding the report.

B. ***Tonna's testimony at his Italian criminal trial***

Nor did the district court commit manifest error in declining to consider the testimony of former Parmalat CFO Fausto Tonna in Milan criminal proceedings. Bondi does not dispute the district court's holding that Tonna's statements are not admissible as prior testimony pursuant to Rule 804(b)(1), given that GTI and GT-US had no opportunity to cross-examine him. SPA55. Instead, Bondi asserts that the court committed manifest error in declining to find the testimony admissible as a statement against interest under Rule 803(b)(3). Br. 63-65. This is incorrect.

As the district court explained, Bondi failed to lay a foundation for this testimony, presenting no evidence that Tonna had personal knowledge about Tanzi's supposed €1 billion embezzlement. SPA54-55. In the interrogation in which Tonna reportedly said that his attempts to inculpate Tanzi were "based on [his] recollection" (Br. 64), Tonna also denied any first-hand involvement. CA60-61. And in his trial testimony itself, Tonna

based his account on a "reconstruction" of Parmalat's financial records (adding an additional level of hearsay)—a reconstruction he did not "precisely remember." CA428-29.

Independently, the court also did not manifestly err in concluding that Bondi had failed to establish that he "tried and failed to take Tonna's deposition or that he otherwise is unavailable." SPA55. Bondi never mentioned in his district court briefs that he had joined a Hague Convention notice to conduct Tonna's deposition. *Cf.* Br. 64. Further, the fact that Tonna invoked his right to remain silent at a 2006 deposition because of pending criminal proceedings did not mean that he would be unavailable for trial years later. On this basis as well, the court's refusal to consider Tonna's testimony provides no basis for relief on appeal.

C. *The Italian prosecutors' summaries*

The court also did not commit manifest error in declining to rely on unsworn interrogation summaries written by Italian prosecutors. Bondi argues that these are "no different from affidavits used every day in U.S. litigation" and that the court misunderstood the process by which these statements were taken. Br. 66-67. It is telling, however, that Bondi never

contradicts the crux of the court's ruling—that the statements purportedly summarized are *unsworn*. SPA51-53.

The documents in question are non-verbatim summaries of answers that certain Parmalat insiders supposedly gave during interrogations. The summaries were prepared by Italian prosecutors in anticipation of litigation. They do not include the questions asked, do not provide the full substance of the interrogation (for example, reducing a 4-hour session to 4 pages), bear illegible signatures, and show the insiders shifting blame to one another, rather than speaking against their own interests. *See, e.g.*, CA49 (Tanzi blames Tonna).

Even without these problems, moreover, these summaries were properly deemed inadmissible simply because the purportedly summarized statements were unsworn. SPA51-53. Bondi cannot get around this fundamental flaw. *See Cruden v. Bank of New York*, 957 F.2d 961, 972 (2d Cir. 1992) ("A genuine issue of fact requiring a trial cannot be raised by arguments or statements *unsupported by sworn statements* by persons with personal knowledge") (citing *Beyah v. Coughlin*, 789 F.2d 986, 989-90 (2d Cir. 1986)) (emphasis added); *United States v. Sasso*, 59 F.3d 341, 350-51 (2d Cir.

1995) (affirming refusal to rely on "unsworn investigative report" attributing a "conclusory" hearsay statement to a third party).

These problems would have required exclusion of these documents even if the blame-shifting stories supposedly repeated to interrogators had truly been statements against interest, which they are not. Fed. R. Evid. 804(b)(3). And further, these statements involve not one but *two* levels of hearsay. Bondi never identified a basis for admitting the summaries as proof of what the prosecutors heard in the interrogations. SPA52. For these reasons as well, the court did not manifestly err in declining to consider these documents.

D. ***The purported expert reports***

Finally, the district court correctly declined to consider reports from Italian accountants retained by Bondi—reports concluding that (1) €943 million was "misappropriated" from Parmalat, and (2) €1.118 billion funneled through a Parmalat financing vehicle in Uruguay, Wishaw Trading, was not used for "legitimate business purpose[s]." SPA49-51.

As an initial matter, these reports answer the wrong question. It makes no difference whether the transactions were adequately documented or whether they can be regarded as serving a "legitimate" purpose.

The question is whether they served a "*corporate* purpose." *In re Parmalat Sec. Litig.*, 412 F. Supp. 2d 392, 401 (S.D.N.Y. 2006) (emphasis added). The reports in question do not trace any funds to any insider's pocket. Indeed, Bondi does not challenge the court's conclusion that the €943 million figure was not a quantification of insider looting. *See* Br. 67-68. The reports define as "misappropriated" "any payment by Parmalat, either to an individual or another company, that *became uncollectible*." SPA50 (emphasis added). "They therefore equate bad debts with misappropriated or stolen funds. Accordingly, they do not support the suggestion that the €943 million was stolen or otherwise misappropriated in the ordinary sense of that word." *Id.*

Similarly, Bondi failed to raise an issue of fact as to the €1.118 billion from Wishaw Trading, which "represents transfers for which the experts could find 'no evidence supporting a legitimate business purpose.'" SPA51 (quoting Bondi's facts). The report's author Franco Lagro specifically refused to opine that this money had been stolen. Instead, he reported that for certain supposed expenditures, Wishaw did not have "adequate documentation." CA532-33, 535. But a claim that an "inadequately documented" transaction lacked a "legitimate business purpose" is not equiva-

lent to evidence that members of management totally abandoned the corporate interest for their own personal benefit.

Indeed, all Bondi could say about these transactions is that he has "no evidence" of their purpose. With that assertion, he could not possibly carry his burden of proof: "The fact that plaintiffs' experts could not account for these funds is evidence that Parmalat's bookkeeping was sloppy. While it is consistent with theft, it is consistent also with legitimate uses of the money for corporate purposes." SPA51.[5] And it is particularly absurd for Bondi to try to benefit from the lack of documentation in light of the extensive spoliation of documents by Parmalat personnel at the time of the collapse. CA294-95(¶350-51).

Bondi argues that the *jury* should have been allowed to determine whether the Wishaw transactions represented theft or bad documentation. Br. 68. But the author of the report himself refused to make that leap. CA532-33. The court did not "invade[] the jury's province" (Br. 68) in de-

[5] Indeed, discovery confirmed that the Lagro reports do not quantify looting. SPA51 & n.144. Much of the Wishaw expenditure, for example, was used to pay debts owed by Parmalat Participações. *See id.;* CA145-50; CA534.

clining to allow Bondi to ask a jury to reach a conclusion to which his own retained expert could not attest.

Finally, the court properly found the reports and testimony of Bondi's purported experts to be inadmissible on their face—regardless of whether they constituted evidence of "looting." SPA50. In a prior evidentiary ruling well before summary judgment, the court rejected these reports as utterly unreliable for several reasons—including the informational constraints under which their authors operated (only reviewing what Italian prosecutors chose to show them) and their failure to conduct broad, unbiased investigations. *See In re Parmalat Sec. Litig.*, No. 04 MD 1653(LAK), 2007 WL 1169217, at **1-2 (S.D.N.Y. Apr. 18, 2007). In the two years following those rulings, Bondi did nothing to correct those problems or submit proper expert evidence or reports under Rule 26—despite the court's explicit warnings to do so. *See* A2532. Given these circumstances, the court did not manifestly err in finding this evidence unreliable and inadmissible at the summary judgment stage.

IV. Even If The Fraud Had Been "Adverse," Parmalat Still Cannot Escape Imputation Because It Was Completely Dominated By Culpable Insiders.

Even if Bondi could establish adversity, he would lose nonetheless under the "sole actor" rule. A corporation cannot invoke the adverse interest exception to avoid imputation where "those responsible for the scheme" had complete control over the corporation's affairs. *Nisselson*, 469 F.3d at 154-55; *see also First Nat'l Bank of Cicero v. Lewco Sec. Corp.*, 860 F.2d 1407, 1418 (7th Cir. 1988) (Illinois law) (rule applies when "the whole procedure … was entrusted by [the principal] to the initiation and execution of the agent" or where the agents were "in complete control of [the principal's] affairs") (alterations in original) (internal quotation marks omitted); *Mutual Investment Co. v. Wildman*, 182 Ill. App. 137, 144 (Ill. App. Ct. 1913); *In re Mediators, Inc.*, 105 F.3d 822, 827 (2d Cir. 1997). This rule is based on the notion that if agent and principal are effectively a single actor, "there is no one to whom [the agent must] impart his or her knowledge and no one from whom he or she may conceal it." 3 Fletcher Cyc. Corp. §827.10.

The sole actor rule—which the district court had no need to reach—provides an alternate ground for affirmance. Parmalat's board unanimously and repeatedly granted exclusive authority over Parmalat's business to

the company's founder and CEO, Calisto Tanzi. A2757(¶9). Tanzi's confederate Fausto Tonna—Parmalat's chief financial officer—retained absolute control over Parmalat's financial transactions. A2765(¶37). The two wielded their powers without supervision. CA442; CA141; CA160. As Bondi has explained, Parmalat's "corporate governance structure … put all management powers in [Tanzi's] hands." CA141.

Parmalat's complete abdication of power to Tanzi and Tonna, along with its utter failure to supervise them, is more than sufficient to trigger the sole actor rule. *Anderson v. Missouri State Life Ins. Co.*, 69 F.2d 794, 798 (6th Cir. 1934) ("When members of a board or committee representing a corporation surrender their powers to an individual … the dominant individual is the sole actor, and others are to be ignored as if they did not in fact, as they do not functionally, exist."). Having vested Tanzi and Tonna with absolute power, Parmalat cannot be heard to disavow their actions.

Further, Bondi has repeatedly admitted that *dozens* of Parmalat's insiders were complicit in its fraud. The culpable insiders controlled Parmalat's budgets, press releases, acquisitions, bond issuances, private placements, loans, accounting, and regulatory compliance. A2764-66(¶31-43). Indeed, Bondi himself has labeled *every* person who served as a director or

statutory auditor of Parmalat from 1995 to 2003 as corrupt and implicated in the fraud. *See supra* at 10. These admissions dictate that Parmalat be charged with even the ostensibly "adverse" conduct of its managers. *See In re Magnesium Corp. of America*, 399 B.R. 722, 768 (Bankr. S.D.N.Y. 2009) (dismissing trustee's claims because trustee had alleged that all the debtors' directors were "wrongdoers"); *In re Alphastar Ins. Group, Ltd.*, 383 B.R. 231, 273 (Bankr. S.D.N.Y. 2008) (same).

Unable to dispute these facts in the district court, Bondi was left to argue that it "would be illogical" to apply the sole actor rule to "a company of Parmalat's size." A2728. But there is no point at which a company becomes too large for traditional agency principles. Bondi conveniently ignored the many cases applying the sole actor rule to claims brought by large corporations.[6] A company's size is no defense where, as here, *every* director participated in the fraud. And while Bondi argued that Parmalat had a handful of "innocent insiders," it is undisputed that they had nothing to do with Parmalat's financial affairs. *See* A2783(¶106), 2801-10(¶204-

[6] *See*, *e.g.*, *Grassmueck*, 402 F.3d 833, 835, 840-41 (8th Cir. 2005); *Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand LLP*, 322 F.3d 147, 152, 165-66 (2d Cir. 2003); *In re Magnesium Corp. of America*, 399 B.R. 722, 767-69 (Bankr. S.D.N.Y. 2009); *In re Alphastar Ins. Group, Ltd.*, 383 B.R. 231, 242-43, 273 (Bankr. S.D.N.Y. 2008).

63), 2909(¶772-73); *see also Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co., Inc.*, 267 F.3d 340, 360 (3d. Cir. 2001) ("The possible existence of any innocent independent directors does not alter the fact that the [culpable insiders] controlled and dominated the Debtors.").

Bondi also argued that the sole actor rule cannot be invoked under Illinois law where the other party (here, GT-Italy) actually knew about the fraud. But Bondi has never presented any evidence that GT-Italy had the relevant knowledge. The question is not whether GT-Italy knew about the fraudulent financial statements. Rather, it is whether GT-Italy knew the insiders were "acting *adversely*" to Parmalat, in a scheme that benefited them at the company's expense. *Ash v. Georgia-Pacific Corp.*, 957 F.2d 432, 436 (7th Cir. 1992) (emphasis added). On summary judgment, Bondi produced no evidence that GT-Italy knew of any looting, or any other adversity for that matter.

In short, even if Bondi could show a "total abandonment" by the insiders, the sole actor rule precludes him from invoking the adverse interest exception. Thus he cannot avoid the presumption that the fraud is imputed to Parmalat and bars his claims. The judgment should be affirmed on this basis as well.

V. Once The Court Concludes That The Insiders' Fraud Is Imputed To Parmalat, Illinois Law Requires Application Of *In Pari Delicto* To Bar All Of Bondi's Claims.

Setting aside questions of adverse interest, Bondi proposes several reasons why a federal court should entertain at least part of his suit, even if Parmalat was, indeed, a full participant in the fraud. As discussed below, two of these arguments were not made in the district court, and all three are flatly inconsistent with Illinois law.

A. The "audit interference" doctrine does not foreclose or limit application of the *in pari delicto* defense.

Invoking an Illinois negligence rule—the "audit interference doctrine"—Bondi argues that the doctrine of *in pari delicto* should have a categorical exception for claims of auditor malpractice. Br. 36-44. It does not. Illinois courts have never hesitated to apply *in pari delicto* to bar claims of auditor malpractice. *E.g., First Nat'l Bank of Sullivan*, 539 N.E.2d at 881; *In re Sec. Investor Protection Corp. v. R.D. Kushnir & Co.*, 274 B.R. 768, 781 (Bankr. N.D. Ill. 2002) (Illinois law).

As the district court correctly recognized, the audit interference doctrine is a rule of comparative negligence; it "has nothing to do with the separate *in pari delicto* defense which, where it applies, operates as an absolute bar." SPA58. The audit interference doctrine provides that "the negli-

gence of an employer who hires an accountant to audit the business is a defense only when it has contributed to the accountant's failure to perform his contract and to report the truth." *Board of Trustees v. Coopers & Lybrand*, 803 N.E.2d 460, 464-465 (Ill. 2003) (rejecting argument that the audit interference doctrine did not survive the State's shift to comparative negligence), *quoted in* Br. 36; *see also Cereal Byproducts Co. v. Hall*, 132 N.E.2d 27 (Ill. App. Ct. 1956). By its terms, this doctrine distinguishes between types of corporate negligence—namely, negligence that affects an auditor's ability to conduct an audit, and negligence that does not—specifically for purposes of a comparative negligence analysis.

But comparative negligence and *in pari delicto* are not "functionally the same," as Bondi claims. Br. 39. Comparative negligence weighs one party's negligence against the other's in assessing damages, in order to protect the defendant from overcompensation. *See Ziarko v. Soo Line R.R.*, 641 N.E.2d 402, 407 (Ill. 1994). *In pari delicto*, on the other hand, is triggered by a plaintiff's *deliberate* wrongdoing and *completely bars* his claim, in order to protect the integrity of the judicial system itself. *Devor*, 84 Ill. App. at 186 (doctrine is animated by the concern that the law should not "lend its support to a claim founded on its own violation"); *Bateman Eichler, Hill Ri-*

chards, Inc. v. Berner, 472 U.S. 299, 306 (1985) ("courts should not lend their good offices to mediating disputes between wrongdoers"); *Olmstead v. United States*, 277 U.S. 438, 484 (1928) (Brandeis, J., dissenting) (courts deny aid "when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied ... in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination"). Thus, it is not surprising that courts applying Illinois law have treated the defenses of comparative negligence and *in pari delicto* as distinct. *See, e.g., Nat'l Council on Comp. Ins., Inc. v. Am. Int'l Group, Inc.*, No. 07 C 2898, 2009 WL 466802, at *5-6, *9-10 (N.D. Ill. Feb. 23, 2009); *Williams Elec. Games v. Barry*, No. 97 C 3743, 2001 WL 1104619, at *16-17 (N.D. Ill. Sept. 18, 2001).[7]

[7] The case of *National Accident Ins. Underwriters, Inc. v. Citibank*, 333 F. Supp. 2d 720 (N.D. Ill. 2004) (Br. 39) is not to the contrary. That decision struck *all* common law defenses as inapplicable under the relevant statute. *Id*. at 723-724. To be sure, the court described those six defenses as all based on the defendant's basic argument that "plaintiffs' negligence caused their loss." But that passing observation cannot be understood as a legal determination that a limit on one common law defense would necessarily operate as a limit on another.

No Illinois court has ever held that the audit interference doctrine limits an auditor's ability to rely on the plaintiff's intentional wrongdoing in invoking *in pari delicto*. The *Board of Trustees* case (the centerpiece of Bondi's argument) had nothing to do with *in pari delicto*, and it certainly does not establish a special exception limiting that defense in auditor cases. In *Board of Trustees*, the treasurer of a college board pursued investments not authorized by board resolutions. The board sued its auditor, alleging that the auditor's failure to identify the unauthorized investments breached its duty to conduct a proper audit. In response, the auditor asserted the defense of comparative *negligence* and sought to admit evidence of the board's own *negligence* in failing to supervise its treasurer. 803 N.E.2d at 463. The Illinois Supreme Court held that under Illinois's comparative negligence regime, "a client's poor business practices" were inadmissible if they did not affect the auditor's ability to conduct the audit. *Id.* at 466-68. Not only did the court "not intone the words 'imputation' or 'IPD'" (as Bondi admits, Br. 39), but there is no indication that the auditor ever raised these defenses or argued that the corporate plaintiff was guilty of an intentional wrong. Thus, *Board of Trustees* simply has nothing to do with this case.

As Bondi concedes, Illinois courts both before and after *Board of Trustees* have held that an auditor can invoke a plaintiff's intentional fraud to defeat malpractice claims, without requiring proof that the fraud "interfered" with the audit. Br. 42-43 (citing cases). In *Cenco*, the Seventh Circuit applied *in pari delicto* to bar claims for auditor malpractice, distinguishing an early Illinois audit interference doctrine case on the ground that it did not concern a "fraud" that "permeate[d] the top management" and that was committed on the company's behalf. 686 F.2d at 454 (discussing *Cereal Byproducts*, 8 Ill. App. 2d 331 (1956)). And more recently, in *Grede*, 421 B.R. at 884-889—decided years after *Board of Trustees*—the court held that *in pari delicto* barred claims against an auditor, including for malpractice, without requiring proof of audit interference.

Bondi relies on *Holland*, (Br. 41-42), but that case actually undermines his position. It stands for the proposition that if the officers and directors "did *in a knowing fashion*" all that the accountant is charged with, the fraud is imputed to the corporation and "bar[s] an action for damages," even "in accountant malpractice cases." *First Nat'l Bank of Sullivan*, 539 N.E.2d at 881 (citing *Holland*, 469 N.E.2d at 426). The court concluded that the trial court's dismissal on these grounds had been premature; it did not apply

any limitation on the rule of imputation based on whether there had been audit interference. *See Holland*, 469 N.E.2d at 427-28 (discussing audit interference doctrine as concerning audit client's "negligence" and concluding that the doctrine was "not … controlling in the case at bar"). *Holland* does not support—much less adopt—Bondi's proposal to allow wrongdoing plaintiffs to use the audit interference doctrine to prevent a court from considering their *intentional* misconduct for purposes of *in pari delicto*.

Similarly misplaced is Bondi's reliance on the Restatement (Third) of Agency. *See* Br. 37, 39, 42. The comment he cites is directed to the adverse interest exception and the concept of "apparent authority." Rest. (3d) Agency §5.04, cmt. c. These agency law provisions do not purport to set forth the substantive rules of tort liability for auditors or anyone else. To the contrary, immediately following the line quoted by Bondi, the comment refers the reader to §5.03, comment b, which explains that whether imputed knowledge "forecloses a claim for relief or a defense against liability" is "a matter of underlying substantive law." These comments thus say nothing about particular "substantive law" rules like the audit interference doctrine

and the doctrine of *in pari delicto*.[8]

In any case, the Restatement cannot trump clear principles of Illinois law. Without a decision from Illinois itself, Bondi has no basis for asserting that the rule he purports to draw from the Restatement applies "in a state like Illinois." Br. 37; *see In re Estate of Lieberman*, 909 N.E.2d 915, 922 (Ill. App. Ct. 2009) ("Restatements are not binding on Illinois courts unless adopted by our supreme court").

Unable to avoid the Illinois cases that preclude his proposed auditor-specific exception to *in pari delicto*, Bondi relies on a case from New Jersey. Br. 40 (citing *NCP Litigation Trust v. KPMG LLP*, 901 A.2d 871 (N.J. 2006)). In fact, *NCP* neither mentions nor analyzes the audit interference doctrine. But more importantly, there is no support for *NCP* in the law of Illinois.

Even within New Jersey, *NCP* has been recognized as a controversial, outlier decision that violates fundamental agency principles. Justice La-

[8] The illustration itself provides no more help to Bondi's position. It does not purport to state a rule of auditor liability in tort, but rather to illustrate the agency rule that a principal may not invoke the adverse interest exception against a third-party who relied in good faith on the adverse agent's apparent authority. *See* §5.04 (*where agent acts adversely*, "[n]evertheless, notice is imputed (a) when necessary to protect the rights of a third party who dealt with the principal in good faith"). A third party's good faith is of no consequence when, as in this case, the adverse interest exception does not apply in the first place.

Vecchia, dissenting, wrote that there was no justification for "a carve-out [for auditor negligence] from the application of the strict rule of the imputation defense." 901 A.2d at 890-91. Justice Rivera-Soto, also dissenting, wrote that *NCP*'s "new iteration of the imputation defense" meant that the traditional rule requiring companies to "bear responsibility for their statements and actions"—a central function of agency law—"no longer exists" in New Jersey. *Id*. at 894, 897. As one commenter put it, *NCP*'s creation of an auditor exception to imputation allows companies to "immunize" themselves from their own wrongdoing and renders "all of agency law unworkable and meaningless." Samuel C. Wasserman, Note, *Can the Trustee Recover?*, 77 Fordham L. Rev. 365, 395 n.262 (2008). Indeed, New Jersey is the *only* State that categorically exempts corporate principals from ordinary imputation rules whenever auditors are involved.[9]

B. There is no policy question for the jury to resolve.

Bondi also argues for an exception to *in pari delicto* based on policy concerns, asserting that "[r]easonable jurors could find" that "tort law's policies of compensation and deterrence ... weigh against" applying the

[9] Bondi also cites *Thabault v. Chait*, 541 F.3d 512, 529 (3d Cir. 2008), but that case was controlled by New Jersey law and *NCP*.

doctrine here. Br. 55-58. This position is contrary to Illinois law, and it was waived in any event.

Illinois courts do not assess "tort law's policies of compensation and deterrence" (Br. 55) on a case-by-case basis, nor do they vest juries with the discretion to ignore long-established legal doctrines. The Seventh Circuit's discussion of policy issues nearly thirty years ago is not to the contrary. In *Cenco*, the Seventh Circuit was engaged in "an attempt to divine how Illinois courts would decide" the issues of imputation and *in pari delicto*. *Schacht*, 711 F.2d at 1347 (citing *Cenco*, 868 F.2d at 455). And *Schacht* mirrored that undertaking as a matter of federal law. *See id.* (explaining that *Cenco* did not govern the RICO claim at bar, and the court "therefore write[s] on a clean slate and may bring to bear federal policies"). Today, however, Illinois law on these issues is perfectly clear. Legal principles of imputation and *in pari delicto* operate "to bar an action for damages" where (1) "the officers and directors of a corporation did in a knowing fashion all that the accountant is charged with"; and (2) "such actions by the corporation's top management amounted to fraud on behalf of the corporation." *First Nat'l Bank of Sullivan*, 539 N.E.2d at 881; *Holland*, 469 N.E.2d at 426.

Bondi cites no decision that empowers any court to decline to apply these clear principles based on a case-specific policy assessment.

Even if these policy considerations were legally pertinent, they cut strongly in favor of GTI and GT-US. No wrongdoing defendant is walking away here. Bondi has already obtained a default judgment against GT-Italy, the audit firm alleged to have aided in the Parmalat fraud. And it is simply absurd to suggest that applying the settled rule of *in pari delicto* in this case "would leave auditors free to participate knowingly in even the most egregious client fraud." Br. 17. As Bondi well knows, the defendants here—GTI and GT-US—did not "participate knowingly" in the Parmalat fraud at all; they are sued here solely for vicarious liability. *Id.* Nor would applying *in pari delicto* here grant anyone total "immunity." The issue here is simply whether the wrongdoing corporation can be the *plaintiff*.

As for deterrence, Bondi's argument is a bait-and-switch. Bondi begins with the proposition that "courts examine whether the company's *shareholders* were better situated than the auditor to monitor the insiders; if not, this weighs against applying IPD." Br. 57-58 (emphasis added). But Bondi's actual argument depends on the notion of monitoring by *creditors*, not shareholders. "Here," Bondi argues, "although Parmalat had some

large institutional *creditors*, none conducted its own independent audit." *Id.* at 58 (emphasis added). The switch is crucial for Bondi, given that more than 50% of Parmalat's shares were at all times controlled by Parmalat's corrupt CEO, Calisto Tanzi. As for the smaller shareholders, their interests were always represented by a board of directors, which must itself be faulted for failing to hire honest managers. *Cenco*, 686 F.2d at 455-56. Here, in fact, by Bondi's own admission, Parmalat's directors and statutory auditors were all participants in the fraud. *See supra* at 10. On this point, then, *Cenco* does not support Bondi's argument; it destroys it. 686 F.2d at 456 (concluding that "the scale of the fraud—the number and high rank of the managers involved … makes the failure of oversight by Cenco's shareholders and board of directors harder to condone").

It makes no difference that some innocent creditors might have benefited from a judgment here. That is always the case in successful bankruptcy trustee litigation, and yet *in pari delicto* is routinely employed to bar claims by bankruptcy trustees following the disclosure of corporate fraud. *See, e.g.*, *Gray v. Evercore Restructuring L.L.C.*, 544 F.3d 320 (1st Cir. 2008); *Rogers v. McDorman*, 521 F.3d 381 (5th Cir. 2008); *Nisselson v. Lernout*, 469 F.3d 143 (1st Cir. 2006); *Baena v. KPMG LLP*, 453 F.3d 1 (1st Cir. 2006);

Grassmueck v. Am. Shorthorn Ass'n, 402 F.3d 833 (8th Cir. 2005). As recognized in *Grede* (cited at Br. 57), there is a "a clear consensus" that bankruptcy trustees are *not* immune to the *in pari delicto* defense. 421 B.R. at 885. "None of this is surprising," the *Grede* court explained, because "[t]he essential principle of bankruptcy law is that the trustee stands in the exact place of the debtor." *Id.* Notably, the court went on to reject the same policy argument that Bondi is attempting to assert here, finding no cases that "recognize[] an exception based on the general concepts of equity interposed by the trustee here." *Id*. at 888.

Moreover, Bondi is wrong when he contends that "only 'entirely innocent' creditors" stand to benefit from any recovery. Br. 56 n.19. Bondi is now CEO of a new Parmalat, which has emerged from bankruptcy. According to Bondi and his amici, the proceeds of this lawsuit would "go directly to the new company." Br. of Amicus Guido Alpa at 9. Any recovery would thus inure not only to "innocent" injured creditors who received new Parmalat shares in the bankruptcy, but also to speculators who bought new Parmalat stock on the market—and who were never injured by the fraud at all.

In a last-ditch attempt to squeeze his claims through the limitations of Illinois law, Bondi attempts to liken himself to the Director of Insurance of Illinois, who acts as a statutory liquidator. Br. 56-58. But this argument is based on narrow cases allowing certain statutory receivers to recover corporate assets in situations involving fraudulent conveyances. *See Schacht*, 711 F.2d at 1346-47 n.3; *see also Scholes v. Lehmann*, 56 F.3d 750, 754-55 (7th Cir. 1995) (Illinois law) (cited at Br. 57); *Knauer v. Jonathan Roberts Fin. Group*, 348 F.3d 230, 235-37 (7th Cir. 2003) (explaining in detail that this was the situation in *Scholes*). No such circumstances are present here.

In any event, Bondi has waived any argument that he shares the insurance liquidator's unique statutory "mandate to recover on behalf of other innocent parties." Br. 57. At the time of summary judgment, Bondi "[did] not quarrel with the proposition that any defenses that would have been available in an action brought by Parmalat are available against him." SPA33. It is simply not true that Bondi "preserved the argument" that the innocence of parties "who stand to recover from this action is an important factor to be taken into account in IPD analysis." Br. 57 n.21. Defendants' summary judgment brief directly argued that Bondi stands in Parmalat's shoes (A2641), and Bondi did not contest the issue. Indeed, he expressly

declined to join in policy arguments made by another plaintiff (PCFL) with whom he filed a joint brief. *See* A2740 n.42; *see also* SPA33 (recognizing that, while Bondi conceded that he stood in Parmalat's shoes, "PCFL takes a different position…").

Further, in the district court, Bondi failed to present any evidence that Italian law gives him more or different powers than a U.S. bankruptcy trustee, which stands in the shoes of the debtor and is fully subject to the *in pari delicto* defense. The district court admonished Bondi at the pleading stage that "in the absence of proof to the contrary," he would be treated like any other bankruptcy trustee, and that "[h]is vague allusions to potentially differing law are not entitled to any weight." *See In re Parmalat Sec. Litig.*, 377 F. Supp. 2d 390, 420-421 (S.D.N.Y. 2005). Yet at no time did Bondi even attempt to prove the special status he now claims for himself. He cannot do so now, either directly or through amici. *Ruff v. St. Paul Mercury Ins. Co.*, 393 F.2d 500, 502 (2d Cir. 1968) (a party may not raise issue of foreign law for the first time on appeal); *Riverkeeper, Inc. v. Collins*, 359 F.3d 156, 163 n.8 (2d Cir. 2004) (amici may not expand scope of party's appeal).

Finally, to the extent that Bondi is now attempting to argue that Italian law gives him broader rights, he has already lost that issue. In the *Citi*

litigation, the New Jersey Superior Court specifically resolved the narrow issue of whether Bondi stood as Parmalat under Italian law:

> [N]othing in the [Italian] insolvency legislation, the insolvency final settlement (Concordato), or other aspects of Italian law persuades me that Bondi is anything more than a trustee of Parmalat, subject to successor liability, and vulnerable to [the] defense of imputation. Italian law … does not cloak Bondi with status-shifting powers that enable him, chameleon-like, to be all things to all people (creditors, debtors, and stakeholders) and escape potential defenses by facilely changing roles.

Citi at 26. Bondi had his day in court on this issue and lost. He has no right to seek another.

C. Bondi's apportionment argument is waived and has no merit.

Alternatively, Bondi argues that *in pari delicto* should be merely a basis for apportioning fault between parties. Br. 58-60. His brief in the court below, however, made no mention of apportioning fault and cited the primary authority on which he now relies—the New Jersey decision in *NCP*—only once, in a footnote regarding the estoppel effect of the *Citi* decision. *See* A2719 n.24. This too, then, is an entirely new argument, and this Court should not consider it on appeal.

In any event, the argument is wrong. Bondi proposes to ask a jury to apportion fault between the wrongdoing company and others accused of

wrongdoing. But that is precisely what *in pari delicto* forbids: the whole point of the rule is that "courts should not lend their good offices to mediating disputes among wrongdoers." *Bateman Eichler*, 472 U.S. at 306. This has long been, and remains today, the law in Illinois. *E.g.*, *Harris v. Hatfield*, 71 Ill. 298, 300-01 (1874); *Vine Street Clinic v. Healthlink, Inc.*, 856 N.E.2d 422, 436 (Ill. 2006).

Bondi does not cite a single Illinois case finding *in pari delicto* to be something less than a complete bar to recovery. No Illinois authority holds that Illinois' decades-old change from contributory to comparative negligence abolished *in pari delicto* as a complete defense, and the many decisions applying the doctrine prove otherwise. Regardless of how the law may have developed in New Jersey (Br. 59 (citing *NCP*)), Illinois cases since the early 1980s have dismissed entire claims based on *in pari delicto*, without concern about the change to comparative negligence. *See supra* at 66-70 (citing cases). This Court should do no differently.

CONCLUSION

For all these reasons, the judgment should be affirmed.

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Respectfully submitted,

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