UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GOVERNMENT OF BERMUDA, Plaintiff, v. LAHEY CLINIC, INC. (a.k.a. LAHEY HOSPITAL & MEDICAL CENTER, BURLINGTON), and LAHEY CLINIC HOSPITAL, INC., Defendants.	C.A. No. 1:17-cv-10242 ORAL ARGUMENT ON MOTION TO DISMISS SCHEDULED FOR 1/31/18

PLAINTIFF'S SUPPLEMENTAL RESPONSE IN OPPOSITION TO DEFENDANTS' NOTICE OF ADDITIONAL AUTHORITY

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Pursuant to the Court's January 8, 2018 Order [Dkt. 41], Plaintiff, the Government of Bermuda ("Bermuda"), respectfully submits this Supplemental Response in Opposition to Defendants Lahey Clinic, Inc. (a.k.a. Lahey Hospital & Medical Center, Burlington) and Lahey Clinic Hospital, Inc.'s (collectively "Lahey") Notice of Additional Authority in Support of Their Motion to Dismiss ("Notice"). *See* Notice [Dkt. 42].

PRELIMINARY STATEMENT

This case arises from Lahey's continuous and systematic illegal activities that caused substantial harm to Bermuda's business and property interests in the United States. For nearly two decades, Lahey, acting from its Burlington, Massachusetts-based headquarters, orchestrated a complex scheme that resulted in Bermuda's payment of tens of millions of dollars for services begotten by Lahey's bribery and corruption of the highest levels of Bermuda's government. Now, for the first time, eight months after briefing on its Motion to Dismiss closed, Lahey has attempted to introduce a new argument that it never raised in its extensive initial briefing – namely, that Bermuda's Complaint does not allege a "domestic" injury to its business or property. Lahey's new argument fares no better than the other ones it has raised because Bermuda's Complaint alleges numerous "domestic" injuries to its business and property in the U.S.[1]

Given its close proximity to this country, Bermuda necessarily does substantial business with the U.S. healthcare market and maintains a significant presence here, including, but not limited to, ongoing maintenance of a comprehensive U.S. network of Preferred Providers, claims adjudicators, and bank accounts from which it has paid Lahey alone over $40 million since 2006. As Bermuda alleges in the Complaint, Lahey conspired with Dr. Ewart Brown, a longstanding Member of Bermuda's Parliament and ultimately Premier, to undermine Bermuda's competitive

[1] A summary of the Complaint can be found at pages two through five of Bermuda's Opposition to Lahey's Motion to Dismiss [Dkt. 24], which Bermuda incorporates herein.

business interests, causing substantial "domestic" injury to Bermuda's business and property in the United States. For example, Bermuda alleges that Lahey's bribery of Dr. Brown caused Bermuda to award a multi-million dollar contract not to a highly-qualified and reputable U.S. medical institution, but instead to another U.S.-based healthcare management and consulting company that Dr. Brown knew would protect Lahey's interests. That contract was ultimately terminated after becoming mired in scandal due to high payments. Bermuda's property interests in the United States were also adversely impacted by Lahey's racketeering activity. As noted above, Bermuda paid Lahey tens of millions of dollars from and through its United States bank accounts. *See infra* Section II.A. "[W]hen a foreign plaintiff maintains tangible property in the United States, the misappropriation of that property constitutes a domestic injury." *Bascunan v. Elsaca*, 874 F.3d 806, 814 (2d Cir. 2017). Further, Bermuda also suffered a domestic injury insofar as its injuries were the result of working, traveling, and doing business with Lahey in the United States, and included, among other things, injuries suffered in the market for U.S. healthcare services. *See infra* Section II.B. Thus, even under *Bascunan*, the "additional authority" recently offered by Lahey, Bermuda has alleged clear "domestic" injuries. Lahey's last ditch attempt to exploit the Second Circuit's narrow holding in *Bascunan* therefore fails.

For the reasons below, as well as those stated in Bermuda's Opposition to Lahey's Motion to Dismiss [Dkt. 24] and its Opposition to Lahey's Notice ("Opposition to Notice") [Dkt. 40], both of which Bermuda incorporates herein, Lahey's Motion to Dismiss should be denied.

DISCUSSION

I. *RJR NABISCO, INC. V. EUROPEAN COMMUNITY*

In *Nabisco*, the European Community ("EC") and 26 of its member states sued RJR Nabisco, Inc. and related entities for their alleged participation in a global money-laundering

scheme. *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090, 2111 (2016) (hereinafter "*Nabisco*"). The Court attempted to resolve the following two issues: (1) whether RICO's substantive prohibitions in 18 U.S.C. § 1962 apply to conduct that occurs in foreign countries; and (2) whether RICO's private right of action in 18 U.S.C. §1964(c) applies to injuries that are suffered in foreign countries. *Id.* at 2099.

To answer the first question, the Court reviewed its prior decisions to determine whether the presumption against extraterritoriality had been rebutted. *Id.* at 2101-03. The Court noted that the first step in such an analysis is to determine "whether the statute gives a clear, affirmative indication that it applies extraterritorially." *Id.* at 2101. If the statute is not facially extraterritorial, the second step is to "determine whether the case involves a domestic application of the statute" by looking to the statute's "focus." *Id.* "If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad . . . ." *Id.* The Court did not reach the second step, however, because it found that the inclusion of predicate acts that facially apply extraterritorially in 18 U.S.C. § 1962 gave "clear, affirmative indication" that RICO's substantive provisions may apply to foreign conduct. *Id.* at 2102.

To answer the second question, the Court analyzed RICO's private cause of action, which provides that "[a]ny person injured in his business or property by reason of a violation of [RICO's predicate acts] may sue therefor in any appropriate United States district court" and recover damages. 18 U.S.C. § 1964(c). The Court found that RICO's private right of action "requires a civil RICO plaintiff to allege and prove a domestic injury to business or property." *Id.* at 2111. The Court neither analyzed nor defined "domestic" injury because the EC had stipulated to the dismissal of their claims for damages for domestic injuries. *Id.* Nor did the court examine how

the "focus" of RICO's private cause of action, which permits recovery for injuries to business or property "*by reason of*" a substantive RICO violation, informs the domestic injury analysis. *See* 18 U.S.C. § 1964(c) (emphasis added). As such, the Court provided little guidance for district courts to follow in analyzing whether injuries are "domestic" or "foreign. The Court nevertheless observed that "[t]he application of this rule in any given case will not always be self-evident, as disputes may arise as to whether a particular alleged injury is 'foreign' or 'domestic.'" *Id.* To avoid any suggestions to the contrary, the Court made plain that its ruling did "not mean that foreign plaintiffs may not sue under RICO." *Id.* at 2110 n.12.

As explained below, courts have taken varying approaches to analyzing "domestic" injuries in the wake of the Supreme Court's ruling in *Nabisco*. Under any of those approaches, Bermuda has alleged to have suffered numerous domestic injuries to its business and property.

II. BERMUDA HAS ALLEGED NUMEROUS DOMESTIC INJURIES TO ITS BUSINESS AND PROPERTY

Nabisco and *Bascunan* both make clear that there is no "one size fits all" approach to analyzing whether an injury is domestic or foreign; the inquiry necessarily depends on the particular facts of each case. *See Nabisco*, 136 S. Ct. at 2111 ("The application of [the domestic injury] rule in any given case will not always be self-evident"); *Bascunan*, 874 F.3d at 814 ("where a civil RICO plaintiff alleges separate schemes that harmed materially distinct interests to property or business, each harm – that is to say, each 'injury' – should be analyzed separately for purposes of this inquiry."). The facts of this case support Bermuda's numerous domestic injuries to its business interests and property in the United States. The Defendants are United States corporations, headquartered in the United States, who are alleged to have directed and managed a conspiracy from the United States that harmed Bermuda's property located in the United States

and its substantial business interests in the United States. Simply put, the hub of Lahey's racketeering activity, and also Bermuda's injuries, is the United States.

Bermuda's Complaint sets forth no fewer than four categories of domestic injuries to its business and property that it suffered as a result of Lahey's racketeering activity, each of which should be analyzed separately.[2] Those injuries are generally:

- injury to property in the United States resulting from Bermuda's payment of tens of millions of dollars from and through bank accounts in the United States to Lahey, in the United States, for services that Lahey corruptly obtained and carried out in the United States, (Compl. ¶¶ 107, 113);
- injury resulting from Bermuda's payment of millions of dollars for thousands of medically unnecessary diagnostic imaging tests read by Lahey in the United States, (*id*. ¶¶ 69, 70, 77, 94, 113);
- injury from an increase in diagnostic imaging fees caused by Lahey's corrupt activity in the United States, (*id*. ¶¶ 86, 90, 113); and
- injury, including competitive injury, related to Lahey's corruption of Bermuda's bidding for United States healthcare services, (*id*. ¶¶ 51-59, 63-64, 113).

As shown *infra* in Section II.A, the injuries to Bermuda's property in the United States, including Lahey's depletion of tens of millions of dollars from Bermuda's U.S. bank accounts, fit squarely in the type of "domestic" injury recognized by the Second Circuit in *Bascunan* and several other courts. As shown *infra* in Section II.B, Bermuda also suffered at least four domestic injuries to its business in the United States, including injuries resulting from: (1) Bermuda's payment for services that Lahey corruptly obtained through bribery; (2) Bermuda's payment for medically

[2] Lahey's Notice grossly mischaracterizes Bermuda's injuries into two broad, misleading, and illogical categories – an alleged tangible injury in the "form of plaintiff's payments to Bermuda's insurers" and an alleged intangible injury "caused by the deprivation of the honest services of Dr. Brown." Notice at 3-4. Lahey's self-serving categorizations should be cast aside. Indeed, Lahey's reference to Bermuda's "payments to Bermuda insurers" is illogical. Bermuda is the insurer. Bermuda did not pay itself; it paid Lahey, in the United States, for services Bermuda has now learned were tainted by bribes. Compl. ¶ 113. The alleged "intangible" injury of the deprivation of Dr. Brown's honest services is equally misleading. Lahey's payment of millions of dollars to Dr. Brown resulted in the numerous tangible injuries to Bermuda's competitive business interests catalogued herein. *See infra* Section II.B.

unnecessary diagnostic imaging tests read by Lahey; (3) increases in the Standard Premium Rate attributable to an increase in diagnostic imaging fees caused by Lahey's conspiratorial conduct with the Brown Clinics; and (4) competitive losses caused by Lahey's corruption of Bermuda's U.S. bidding processes and relationships with U.S. market participants. Each of these injuries is "domestic" in nature under the growing body of case law interpreting *Nabisco's* holding.[3]

A. Lahey Injured Bermuda's Property in the United States.

"[A]n injury [to property] is domestic if the plaintiff's property was located in the United States when it was stolen or harmed." *Bascunan*, 874 F.3d at 820-21 (rejecting a domestic injury test based on the plaintiff's residency and finding foreign plaintiff suffered domestic injury to property located in United States); *Elsevier, Inc. v. Grossman*, 199 F. Supp. 3d 768, 786, 788-89 (S.D.N.Y. 2016), order clarified sub nom. *Elsevier Inc. v. Pierre Grossmann*, IBIS Corp., No. 12 CIV. 5121 (KPF), 2016 WL 7077037 (S.D.N.Y. Dec. 2, 2016) (holding an injury to property is domestic if the "plaintiff part[ed] with the property" on U.S. soil); *Cevdet Aksut Ogullari Koll. Sti v. Cavusoglu*, 245 F. Supp. 3d 650, 659 (D.N.J. 2017) ("[T]he situs of injury is where Plaintiff physically parted with the property in reliance of [defendant's] statements"); *see also Garcia v. Lion Mexico Consol., L.P.*, No. 5:15-CV-1116-DAE, 2016 WL 6157436, at *3 (W.D. Tex. Oct. 21, 2016) (recognizing that harm to property interests located in the United States constitutes a domestic injury and allowing plaintiffs to amend their complaint to allege such injuries); *Gusevs*

[3] As set forth herein, Bermuda has alleged that it sustained domestic injuries by reason of Lahey's pattern of racketeering activity, and therefore it has pled a violation of § 1962(b) and § 1962(c), and by extension a violation of § 1962(d). *See Nabisco*, 136 S. Ct. at 2103 (noting § 1962(b) and (c) each "prohibit the employment of a pattern of racketeering," and treating RICO's conspiracy section, § 1962(d), as coextensive with the underlying predicate for extraterritoriality purposes). Bermuda also has alleged that it sustained domestic injuries by reason of Lahey's use of income derived from its pattern of racketeering, and thus has pled a violation of 1962(a). *See* 18 U.S.C. § 1962(a) (prohibiting use of income derived from a pattern of racketeering); Compl. ¶¶ 68, 121-23.

v. AS Citadele Banka, No. 216CV03793SVWFFM, 2016 WL 9086931, at *7 (C.D. Cal. Sept. 8, 2016) (determining whether plaintiffs' injuries were domestic or foreign by examining the location of wrongfully foreclosed properties). This common-sense approach recognizes that a "[p]laintiff has a property interest in his money," and when "he expend[s] his funds in the United States, [] the harms are actionable under § 1964(c)." *Castellanos v. Worldwide Distribution Sys. USA*, LLC, No. 2:14-CV-12609, 2017 WL 5499399, at *4 (E.D. Mich. Nov. 16, 2017).

Because Bermuda suffered injury to its property in the United States, its injury is "domestic," and therefore actionable under § 1964(c).[4] For example, the Complaint alleges that Bermuda suffered injury when it paid Lahey tens of millions of dollars for corrupt services from and through "bank accounts . . . ***in the United States***." Compl. ¶ 65 (emphasis added); *see also* Compl. ¶¶ 107(a), 113 (alleging that Bermuda suffered injury when it made payments to Lahey amounting to $40 million from United States bank accounts). Because Bermuda alleged that it "parted" with or "expended" its money in the United States—i.e., it withdrew funds located in United States bank accounts and paid Lahey in the United States—Bermuda suffered a domestic injury. *See Elsevier*, 2017 WL 5135992 at *4 (finding plaintiff suffered a domestic injury when it "relinquished control" of its property in the United States under false pretenses); *Castellanos*, 2017 WL 5499399 at *4 (finding a domestic injury where a defendant's wrongful conduct caused plaintiff to expend money in the United States).

Indeed, under the narrow holding of *Bascunan* – the only decision of any Circuit Court to

[4] Bermuda also alleges that its claims adjudicators in the United States authorized payments for Lahey's corrupt services. Compl. ¶¶ 65, 109. This too has been held to be a sufficient link to the United States to render an injury domestic. *See Elsevier Inc. v. Pierre Grossman, IBIS Corp.,* No. 12 CIV. 5121 (KFP), 2017 WL 5135992 at *4 (S.D.N.Y. Nov. 3, 2017) (finding plaintiff suffered a domestic injury when employees located in the United States authorized the shipment of property to defendant under false pretenses).

address RICO's domestic injury element after *Nabisco* – the depletion of Bermuda's United States bank accounts constitutes a definite domestic injury. *See Bascunan*, 874 F.3d at 820-21. There, the court considered injuries similar to those alleged in Bermuda's Complaint, including the misappropriation of funds held in United States bank accounts. *Id*. at 810. In finding that the plaintiff had pled a domestic injury, the court held that "at a minimum" an injury to property "is domestic if the plaintiff's property was located in the United States when it was stolen or harmed."[5] *Id*. at 814, 820-21. Thus, under *Bascunan's* holding, Bermuda's expenditure of funds located in United States bank accounts constitutes a clear domestic injury.[6]

A contrary conclusion would lead to – not avoid – the "international friction" that prompted the Supreme Court to import the domestic injury element into RICO's private cause of action. *See Nabisco*, 136 S.Ct. at 2017 (explaining the chief justification for the domestic injury requirement is the need to avoid the international friction that may result if the U.S. permits foreign citizens to unjustifiably bypass their home countries' less generous remedial schemes). Foreign persons, entities, and sovereigns "that own private property located within the United States," like Bermuda, "expect that our laws will protect them in the event of damage to that property."

[5] *Bascunan* also considered three other schemes and found domestic injury where bearer shares were misappropriated from a safe deposit box, and no resulting domestic injury in two other scenarios where the foreign defendant had no "preexisting connection" with the United States. *Bascunan*, 874 F.3d at 818-24. As discussed in Plaintiff's Opposition to Defendants' Motion for Leave to File Notice of Additional Authority, the other two schemes where the court found no domestic injury bear little resemblance to this case and do not speak to the character of Bermuda's injuries. *See* Opposition to Notice [Dkt 40] at 5-6 (distinguishing Bermuda's domestic injuries from the foreign injuries at issue in *Bascunan*). Likewise, Bermuda's preexisting connection with the United States was and is substantial, as demonstrated by the facts alleged throughout Bermuda's Complaint and repeated herein.

[6] The *Bascunan* court kept its holding intentionally narrow, and therefore did not foreclose other means of demonstrating a domestic injury that were not before the court. *See Bascunan*, 874 F.3d at 814 (holding "at a minimum" that injury to physical property is "domestic"). Additional such means include, among other things, injuries incurred while doing business in the United States. *See infra* Section II.B.

Bascunan, 874 F.3d at 821. That modest expectation is entirely justified. Although Bermuda is a foreign sovereign, the funds in its United States bank accounts are "subject to all of the regulations imposed on private property by American state and federal law." *Id*. There is no reason, in the text of RICO or in the *Nabisco* decision, to "exclude private property of this kind from the remedial benefits conferred by RICO's private right of action." *Id*.

B. Lahey Injured Bermuda While Bermuda Was Doing Business in the United States.

An injury incurred while "working, traveling, or doing business in this country" also satisfies RICO's domestic injury element. *Tatung Co., Ltd. v. Shu Tze Hsu*, 217 F. Supp. 3d 1138, 1155 (C.D. Cal. 2016) (finding foreign corporation that "maintain[ed] a hub" in the United States suffered a domestic injury when it was harmed "in the course of doing business"); *Cevdet*, 245 F. Supp. 3d at 653 (recognizing that a plaintiff plausibly alleges a domestic injury when it "maintain[s] substantial business operations within the United States" and a defendant's wrongful conduct impacts those operations); *City of Almaty, Kazakhstan v. Ablyazov*, 226 F. Supp. 3d 272, 284 (S.D.N.Y. 2016), motion to certify appeal denied, No. 15-CV-5345 (AJN), 2017 WL 1424326 (S.D.N.Y. Apr. 20, 2017) (recognizing that "foreign corporations with business operations" in the United States should not be precluded from "bringing RICO actions to recover for injuries to those [operations]"); *Lan Li v. Walsh*, No. 16-81871-CIV, 2017 WL 3130388, at *10 (S.D. Fla. July 24, 2017) (recognizing that a complaint pleads a domestic injury if it alleges that plaintiffs were injured while "working, traveling or doing business in the United States"); *Glock v. Glock*, 247 F. Supp. 3d 1307, 1316 (N.D. Ga. 2017) (considering whether plaintiff was "working, traveling, or doing business in the United States when she was injured" to determine the location of plaintiff's injury); *see also Bascunan*, 974 F.3d at 819 (suggesting a domestic injury may arise if the injury resulted from a "preexisting connection between [plaintiff] and the United States."). Here, the Complaint

is replete with allegations of domestic injuries that Bermuda suffered while doing business in the United States.

As set forth in the Complaint, Bermuda is a small island with limited on-island healthcare services. Accordingly, Bermuda must shop, and does shop, for healthcare services in the U.S., its closest neighbor. For example, Bermuda transacts business directly with Lahey and other healthcare providers in the U.S., and it has created a substantial U.S.-based presence and framework for doing so. *See* Compl. ¶ 64 (discussing Bermuda's network of U.S.-based "Preferred Providers," which service "[h]undreds of Bermudians . . . each year"), ¶ 65, ¶ 109 (noting Bermuda has hired U.S.-based agents to negotiate rates and adjudicate and process claims, which it pays from Bermuda's U.S. bank accounts). Bermuda also seeks out and engages the U.S. market by, for example, requesting bids from U.S. providers for the provision and development of health services in Bermuda. *Id*. ¶¶ 50-60 (detailing Bermuda's solicitation of business from U.S. entities, including Kurron Shares of America, Inc., Johns Hopkins Hospital, and the Dana Farber Cancer Center, among other United States businesses), ¶ 61 (showing that Bermuda seeks out and appoints U.S. healthcare providers to act as Clinical Advisors at its state-run hospital), ¶ 109 (listing the various ways Bermuda "transact[s] business in Massachusetts," including by "work[ing] with Lahey on contracts that Lahey received from the Government"). Indeed, Bermuda's business operations in the United States are substantial. Bermuda has paid Lahey alone "over $40 million for services that Lahey provided in Massachusetts," (*id*. ¶ 3) and awarded to U.S. businesses numerous healthcare contracts worth millions.[7] *Id*. ¶¶ 51-59.

[7] In arguing for dismissal, Lahey has repeatedly ignored Bermuda's role as a public insurer and mischaracterized the extent of Bermuda's involvement in the insurance business by arguing Bermuda merely provides subsidies to private insurance companies. *See* Lahey's Memorandum in Support of Motion to Dismiss [Dkt. 17] at 10-11; Notice [Dkt. 42] at 3. The Complaint makes clear, however, that the Bermudian Government funds and manages three separate insurance plans.

Bermuda suffered at least four domestic injuries to its business while engaged in these substantial U.S.-based business operations. *First*, Bermuda suffered financial losses while doing business in the United States when it unknowingly paid Lahey directly over $40 million for services tainted by bribes. This injury is undoubtedly domestic. Lahey performed the corrupt services in the United States, and it even did so pursuant to contracts Bermuda negotiated in the United States. *Id*. ¶ 65 (noting "Bermuda negotiates agreements for covered services and established rates with [United States] providers"); *see also id.* ¶ 34 (noting "Lahey actively negotiated [its] agreements with Brown in and from Massachusetts," including from "Lahey's Burlington campus on March 31, 2008). Likewise, Bermuda, through its agents, adjudicated and processed the related claims in the United States and paid Lahey for the corrupt services out of United States bank accounts. *Id*. ¶ 65.

Second, Bermuda suffered a domestic injury each time a fraudulent claim was submitted for the thousands of MRI and CT scans that Lahey read in the United States for the Brown Clinics. As alleged in the Complaint, from its Burlington, Massachusetts-based headquarters, Lahey read and interpreted thousands of MRI and CT scans conducted at the co-conspirator Brown Clinics. *See id*. ¶¶ 70-71, 107. The scans were sent to Lahey via web transfer on a system that Lahey implemented and maintained in the U.S. *See id*. ¶ 71. Lahey then generated scanning reports that it exported to Bermuda. *Id*. These reports served to support the false claims that were ultimately

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Compl. ¶¶ 59, 78. In so doing, Bermuda suffered injury by unknowingly reimbursing Lahey for corrupt and fraudulent services. As explained below, because these injuries occurred while Bermuda was transacting "the business of insurance" in the United States, the injuries are domestic. *Compare Zoppo v. John Hancock Ins. Co.*, No. CIV. A. 95-2646C, 1996 WL 655742, at *4 (Mass. Super. Oct. 31, 1996) (defining "the business of insurance" as "profit driven business decisions about premiums, commissions, marketing, reserves and settlement policies and practices"), *with* Compl. ¶ 65 (alleging that Bermuda's U.S. agents, which specialize in cost containment, process and adjudicate claims from U.S. providers, negotiate agreements with U.S. providers for covered services, and establish rates with U.S. providers).

submitted by co-conspirators Dr. Brown and the Brown Clinics to Bermuda, which is the end-payor for certain publicly-funded health plans. Bermuda ultimately (and unknowingly) processed, adjudicated, and paid millions of dollars for these fraudulent U.S.-based services. Compl. ¶¶ 70-71, 77-80; *see also* ¶ 34 (describing Lahey's negotiation of its contracts with Dr. Brown from and in the United States).

Akishev v. Kapustin, which found a domestic injury, is directly analogous. No. CV 13-7152(NLH) (AMD), 2016 WL 7165714 (D.N.J. Dec. 8, 2016). There, the court determined that the foreign plaintiffs had suffered a domestic injury when they "traveled" to the United States via the internet and purchased cars falsely advertised on a U.S-based website that were never delivered or otherwise misrepresented. *Id*. at *7. The court explained that the "plaintiffs suffered their injuries the moment they clicked the computer mouse—on a United States-based website representing United States-based car dealerships—and ordered and paid for a car whose condition was materially misrepresented or did not even exist at all." *Id*. Similarly, here, Bermuda suffered a domestic injury the moment each medically unnecessary scan "traveled" to the United States via Lahey's web-based system for Lahey to read and interpret at its Burlington, Massachusetts headquarters. *See Akishev*, 2016 WL 7165714 at *8 (finding when "[t]he locus delecti of the crimes committed is the United States," it supports a finding of domestic injury).

It is of no consequence that Bermuda paid Dr. Brown for these unnecessary services, who in turn paid Lahey. The Complaint alleges that Lahey directed, controlled, and engaged in a conspiracy to submit medically unnecessary claims to the Bermudian Government. Compl. ¶¶ 167-73. When Lahey's coconspirators, Brown and the Brown Clinics, submitted the false claims and accepted the reimbursements, they did so as agents of Lahey. *See Ocasio v. United States*, 136 S. Ct. 1423, 1430 (2016) ("[W]hen people enter into a conspiracy to accomplish an unlawful

end, each and every member becomes an agent for the other conspirators in carrying out the conspiracy."). Paying the Brown Clinics was akin to paying Lahey directly. *See U.S. v. Hurley,* 63 F.3d 1, 22–23 (1st Cir. 1995) (finding co-conspirators vicariously liable for a $136 million RICO forfeiture); *see also State Farm Mut. Auto. Ins. Co. v. Kalika,* No. 04–CV–4631, 2007 WL 4326920, at *9 (E.D.N.Y. Dec. 7, 2007) (finding "ample authority" to hold one defendant jointly and severally liable "for the total cost of the medically unnecessary procedures submitted to State Farm by all of the defendants involved in the conspiracy").[8]

Nor is this case similar to the scheme the *Bascunan* court rejected in which the foreign defendant's only contact with the U.S. was to launder money through U.S. accounts after it had been misappropriated. *See* Notice at 3 (invoking *Bascunan*, 874 F.3d at 818). Here, Lahey directed a fraudulent scheme from the U.S., performed necessary and critical components of that scheme in the U.S., and worked with its coconspirators to induce Bermuda to make payments that were shared with and retained by Lahey in the U.S. Bermuda has come to the forum where it was "induced by fraud to send its money and where those ill-gotten proceeds were realized and retained" by Lahey. *Akishev*, 2016 WL 7165714 at *8 (finding a domestic injury where foreign plaintiffs were defrauded into sending funds to the United States).[9]

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[8] The agreements between Brown and Lahey themselves were governed by U.S. law. *See* Dkt. No. 17-1. So too were several contracts between Bermuda and Lahey. *See* Compl. ¶¶ 61, 66 (describing contracts between Lahey and Bermuda's state-run hospital that were governed by U.S. law). It would be anomalous for Lahey and its co-conspirators to be able to avail themselves of the courts of this country but not the entity directly harmed by their conspiracy.

[9] The injuries arising from Lahey's fraudulent scanning scheme are also injuries to Bermuda's property because, in purpose and effect, Lahey's fraud caused Bermuda to expend funds in the United States. To find that under such circumstances Bermuda did not suffer a domestic injury *to property* only because Bermuda first paid the Brown Clinics in Bermuda, who in turn paid Lahey, would be absurd. The practical effect of a defendant's fraud must be considered so as to avoid the "counterintuitive" results and "strange gaps" in RICO's coverage that the Supreme Court cautioned courts to avoid. *Nabisco*, 136 S. Ct. at 3094, 2104 (instructing courts on how to properly interpret the language of the RICO statute).

Third, and for the same reasons, Bermuda suffered a domestic injury resulting from its payment of increased reimbursement rates. As alleged in the Complaint, between Fiscal Years 2007 and 2016, the Standard Premium Rate "more than doubled." Compl. ¶ 86. During this time, "Lahey ha[d] read every MRI scan performed at BHCS and every CT scan performed at BDC (which collectively number in the thousands)," and received "a substantial percentage of Brown's reimbursement for each scan." Compl. ¶¶ 69, 90. "[A]ny increase in the fees insurers paid Brown for imaging services resulted in increased remuneration for the Brown Clinics, Brown, and Lahey." *Id*. ¶ 90. By inducing the Government to increase reimbursement rates, and indeed causing that increase by perpetuating the fraudulent scanning scheme, Lahey caused Bermuda to suffer injury in the U.S.—where Bermuda effectively paid extra for Lahey's U.S. scanning services and where Lahey realized and retained the ill-gotten proceeds of its fraud.

Finally, Bermuda suffered injury in the United States as a result of Lahey's successful efforts to corrupt and undermine Bermuda's competitive bidding of public healthcare projects. *See Sedima, S.P.R.L.* v. *Imrex Co., Inc.*, 473 U.S. 479, 497 n.15 (1985) (noting recoverable damages under 1962(c) include competitive injuries). As discussed above, Bermuda does not have the on-island resources necessary to meet all of its healthcare needs and thus turns to and engages the U.S. market by requesting bids and assistance from U.S. companies for healthcare contracts related to the development and provision of health services on and off the island. *See* Compl. ¶¶ 50-63 (showing that Bermuda sought bids from or otherwise engaged U.S. healthcare providers, including Lahey, for projects related to an Urgent Care Center, a long-term healthcare strategy for the island, management of Bermuda's state-run hospital and services to be provided at the hospital, including Clinical Advisor services, and a public insurance plan); *see also Alcorn Cnty., Miss. v. U.S. Interstate Supplies, Inc.*, 731 F.2d 1160, 1169 (5th Cir. 1984), abrogated by *United States v.*

Cooper, 135 F.3d 960 (5th Cir. 1998) (holding governmental bodies have cognizable claims under RICO when bribery causes them to make purchases at inflated prices).

The point of competitive bidding is obviously to obtain the best services for the best price. Bermuda alleges in the Complaint, however, that Lahey bribed Dr. Brown to manipulate bidding processes involving U.S. bidders, and to ensure that "Lahey's interests [would] be protected." Compl. ¶¶ 51-58 (alleging Lahey bribed Brown in order to fix the bidding for a $13.5 million contract to develop a long-term healthcare strategy for the island that was terminated years later because it had "been mired in scandal due to high payments to health consultants"), ¶ 59 (alleging Lahey bribed Brown to ensure that "Lahey was favored over other potential U.S. healthcare providers, including John Hopkins, for lucrative contracts relating" to a public health insurance plan), ¶¶ 63-64 (alleging Lahey received preferential treatment over other U.S. healthcare providers for contracts related to overseas care); *see also* Brown Agreement [Dkt. 17-1] at 1 (requiring Dr. Brown to "identify . . . opportunities to increase [Lahey's] market share for the provision of health care services . . . that will offer Lahey the greatest potential for return on its investment."). Because Lahey "obtain[ed] an improper advantage" in the U.S. market at the expense of Bermuda's relationship with hospitals and healthcare organizations in the U.S., Bermuda has suffered a domestic injury. *See Union Commercial Servs. Ltd., v. FCA Int'l Operations LLC,* No. 16-cv-10925, 2016 WL 6650399 at *5 (E.D. Mich. Nov. 10, 2016) (recognizing that plaintiff suffers a domestic injury where a defendant "obtain[s] an improper advantage" in the U.S. market at the plaintiff's expense); *see also Elsevier*, 199 F. Supp. 3d at 789 (considering whether the racketeering activity "had some effect on Plaintiffs' relationships with actual or prospective U.S. customers").

Indeed, "[i]t is ludicrous to think that a foreign individual could not sue under civil RICO for financial injuries incurred while they are working, traveling, or doing business in this country as the result of an American RICO operation." *Tatung*, 217 F. Supp. 3d at 1155 (finding a domestic injury where defendant's fraudulent activity thwarted the rights of a foreign corporation operating in the United States). Lahey "specifically directed [its] conduct" at the U.S. market "with the aim of thwarting [Bermuda's] right[]" to participate and compete in that market free of bribery. *Id*. at 1156; *Akishev*, 2016 WL 7165714, at *8 (denying motion to dismiss and finding that "[n]othing in 18 U.S.C. § 1964(c) suggests Congress intended to exclude a scenario" where a fraudulent scheme operated from the U.S. targets a foreign plaintiff). Bermuda's injuries are therefore domestic.

CONCLUSION

For the foregoing reasons, and those set forth in Bermuda's Opposition to Lahey's Motion to Dismiss [Dkt. 24] and its Opposition to Lahey's Notice [Dkt. 40], Bermuda has alleged numerous domestic injuries to its business and property. The Court should deny Lahey's Motion to Dismiss.

Dated: January 22, 2018

Respectfully submitted,

GOVERNMENT OF BERMUDA

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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing and paper copies will be sent via overnight mail to non-registered participants on January 22, 2018.

/s/ Michael J. McMahon