IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

H. GERARD HEIMBECKER Plaintiff,	: :	CIVIL ACTION
v.	:	NO. 01-6140
555 ASSOCIATES, et al., Defendants.	: :	

MEMORANDUM AND ORDER

LEGROME D. DAVIS, J. MARCH 26, 2003

Presently before the Court are the following four motions to dismiss: (1) a Motion to Dismiss, filed by Defendants 555 Associates, 555 Investors, L.P., Ronald Rubin, Faith et Fils, Inc., Faith Robbins, Dale Mulartrick, James Rementer, Gerald Arth, Esquire, and Fox, Rothschild, O'Brien & Frankel, L.L.P. on December 14, 2001 ("Motion to Dismiss by the 555 Defendants *et al.*"); (2) a Motion to Dismiss or for Summary Judgment, filed by Defendants Denis Dice, Esquire and Harvey, Pennington, Cabot, Griffith & Renneisen, Ltd. on December 14, 2001 ("Harvey Pennington Defendants' Motion to Dismiss"); (3) a Motion to Dismiss the Complaint, filed by Defendants CNA Insurance Company, Transportation Insurance Company, and Continental Casualty Company on December 14, 2001 ("CNA Defendants' Motion to Dismiss"); and (4) a Motion to Dismiss filed by Defendant Joseph T. F. Quinn on March 28, 2002 ("Quinn's Motion to Dismiss").[1] Also before the Court is the Motion to Preclude Plaintiff

[1] These four motions will be referred to together as "the four pending Motions to Dismiss."

from Commencing Further Actions, filed by Defendants CNA Insurance Company, Transportation Insurance Company, and Continental Casualty Company on December 14, 2001 ("Motion to Preclude").

In addition, H. Gerard Heimbecker ("Plaintiff") has filed a Motion for Recusal Pursuant to 28 U.S.C.A. § 144. The Motion for Recusal must be addressed and resolved first. Following this discussion, the Court will set forth the factual background and procedural history in this matter, and then proceed to address the four pending Motions to Dismiss and the Motion to Preclude.

I. SECOND MOTION FOR RECUSAL

On January 31, 2003, Plaintiff filed the instant Motion for Recusal pursuant to 28 U.S.C. § 144 ("Second Motion for Recusal"), which is currently pending. 28 U.S.C. § 144, entitled "Bias or prejudice of judge," provides:

> Whenever a party to any proceeding in a district court makes and files a *timely and sufficient* affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. *It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.*

28 U.S.C. § 144 (emphasis added). Having carefully considered the Second Motion for Recusal, the Court concludes that the Motion must be denied on the following grounds.

Initially, the Second Motion for Recusal must be denied based upon application of the "law of the case" doctrine. On May 24, 2002, one day after this matter was reassigned to this Court, Plaintiff filed a "Motion for the Recusal of The Honorable Legrome D. Davis Pursuant to 28 U.S.C.A. § 455" ("First Recusal Motion"). In the First Recusal Motion, Plaintiff argued that recusal was warranted based upon numerous factual allegations, including the following:

> 13. On May 23, 2002, . . . this case was randomly reassigned . . . to the Honorable Legrome D. Davis.
> 14. A review of the Resume of the Honorable Legrome D. Davis which is provided by the United States Department of Justice, Office of Legal Policy does not reveal a conflict.
> 15. A review of the Pennsylvania Manual does not reveal a conflict.
> 16. An article in The Legal Intelligencer, dated January 24, 2002, entitled "Six Nominated For Federal Bench Seats" by Shannon P. Duffy, states the Honorable Legrome D. Davis was an associate at the firm of Ballard Spahr Ingersoll and Andrews in 1987.
> 17. A 1999 White House Press Release states the Honorable Legrome D. Davis was an associate at Ballard, Spahr, Ingersoll and Andrews.
> 18. Ballard Spahr Ingersoll and Andrews represents the Defendants, CNA Financial, Inc., Transportation Insurance Company and Continental Casualty Insurance Company.

First Recusal Motion at 3. In an Order dated and filed on July 3, 2002, this Court denied Plaintiff's First Recusal Motion. Plaintiff then filed a Motion for Reconsideration, in which he included the following additional factual allegations: that I have had "long term, continuous and frequent contact" with Governor Edward Rendell,[2] who is a partner at Ballard Spahr Ingersoll & Andrews, L.L.P. ("Ballard Spahr"); that Governor Rendell had appointed me as Assistant District

[2] The Court will refer to Governor Rendell throughout this opinion by his current formal title, although at the various points in time referred to by Plaintiff, Governor Rendall held the positions of District Attorney or Mayor.

Attorney in 1978 and 1981, and had appointed me as Chairperson of the Task Force on Alternatives to Incarceration in 1992; that Louis Fryman, Chairman of Fox, Rothschild, O'Brien & Frankel, L.L.P. ("Fox Rothschild"), is a witness in the present litigation; that Fox Rothschild is a Defendant in the present litigation; that Mr. Fryman had suborned perjury and committed obstruction of justice during the First Montgomery County Action; and that between 1997 and 2001 I participated in the selection process before the Federal Judicial Nominating Commission of Pennsylvania, of which Mr. Fryman was a member in 1996 and 1997. See Plaintiff's Motion for Reconsideration at 4-5. In an Order dated and filed on July 22, 2002, the Court denied Plaintiff's Motion for Reconsideration.

Plaintiff then filed a Petition for Writ of Mandamus with the United States Court of Appeals for the Third Circuit, which Petition was denied by Judgment and Opinion dated November 29, 2002. In its Opinion, the Court of Appeals addressed all of the factual allegations which were contained in both the First Recusal Motion and the Motion for Reconsideration, as set forth above. See Judgment and Opinion of Third Circuit Court of Appeals, No. 02-3046, dated November 29, 2002. Plaintiff responded to the denial of his Petition by filing a Petition for Panel Rehearing, which was denied by an Order dated January 29, 2003.

Two days later, on January 31, 2003, Plaintiff filed the Second Motion for Recusal pursuant to 28 U.S.C. § 144. Plaintiff's affidavit accompanying the Motion sets forth numerous factual allegations, including the following:

> 3. On May 23, 2002, . . . this case was randomly reassigned . . . to the Honorable Legrome D. Davis.
> 4. A review of the Resume of the Honorable Legrome D. Davis, which he provided to the United States Department of Justice,

Office of Legal Policy, failed to reveal Judge Davis' employment with Ballard Spahr Ingersoll and Andrews.

5. A review of the Pennsylvania Manual did not reveal Judge Davis's employment with Ballard Spahr.

6. An article in The Legal Intelligencer, dated January 24, 2002, entitled "Six Nominated For Federal Bench Seats" by Shannon P. Duffy, stated Judge Davis was an associate at the firm of Ballard Spahr Ingersoll and Andrews in 1987.

7. A 1999 White House Press Release states the Honorable Legrome D. Davis was an associate at Ballard, Spahr, Ingersoll and Andrews.

8. Ballard Spahr Ingersoll and Andrews represents the Defendants, CNA Financial, Inc., Transportation Insurance Company and Continental Casualty Insurance Company.

. . . .

12. Further investigation into Judge Davis' "extremely attenuated" contacts with Ballard Spahr revealed the following:

    a. An individual associated with the law firm of Ballard Spahr Andrews and Ingersoll which Judge Davis has had long term, continuous and frequent contact [sic] is Edward G. Rendell, Esquire.

    b. Mr. Rendell is the governor of the Commonwealth of Pennsylvania . . . and a partner in the law firm of Ballard Spahr Andrews and Ingersoll.

    c. In 1978, then District Attorney Rendell appointed Judge Davis as Assistant District Attorney for the City of Philadelphia. In 1981, Mr. Rendell again appointed Judge Davis to the position of Assistant District Attorney. . . .

. . . .

13. I discovered an additional conflict

    a. In this case, Louis Fryman, Esquire, Chairman of Fox Rothschild O'Brien & Frankel, is a witness in the present litigation. . . .

    . . . .

d. In 1996 and 1997, Mr. Fryman was appointed by United States Senators Arlen Specter and Rick Santorum to the Federal Judicial Nominating Commission of Pennsylvania.

e. In 1997 through 2001, Judge Davis participated in the selection process before the same Federal Judicial Nominating Commission of Pennsylvania and was deemed recommended.

Second Motion for Recusal, Exhibit 13, Affidavit, at 1-3.

As is evident from a recitation of these factual allegations, the Second Motion for Recusal is based upon factual allegations that are substantially similar, if not identical, to those underlying the First Recusal Motion, thereby triggering application of the "law of the case" doctrine.

> The law of the case doctrine "limits relitigation of an issue once it has been decided" in an earlier stage of the same litigation. We apply the doctrine with the intent that it will promote finality, consistency, and judicial economy. Reconsideration of a previously decided issue may, however, be appropriate in certain circumstances, including when the record contains new evidence. This exception to the law of the case doctrine makes sense because when the record contains new evidence, "the question has not really been decided earlier and is posed for the first time." But this is so only if the new evidence differs materially from the evidence of record when the issue was first decided and if it provides less support for that decision. Accordingly, if the evidence at the two stages of litigation is "substantially similar," or if the evidence at the latter stage provides more support for the decision made earlier, the law of the case doctrine will apply.

Hamilton v. Leavy, 2003 WL 559392, at *9 (3d Cir. 2003) (citations omitted). The only factual allegations appearing in the affidavit accompanying the Second Motion for Recusal which do not appear in identical or substantially similar form in the First Recusal Motion are the allegations (1) that I represented in a sworn questionnaire submitted to the Committee on the Judiciary of the United States that I had at one time represented the Raymark Corporation, and (2) that Plaintiff

has been unable to confirm this fact.[3] Despite the addition of such factual allegations, the Court concludes that the Second Motion for Recusal is based upon factual allegations that are substantially similar to those underlying the First Recusal Motion, and that the Second Motion for Recusal must therefore be denied based upon the law of the case doctrine because these issues have previously been finally decided at an earlier stage in the litigation.

Even assuming *arguendo* that the law of the case doctrine does not warrant denial of the Second Motion for Recusal, the Motion must be denied because it is procedurally defective in three ways. First, in determining whether an affidavit is "sufficient" under 28 U.S.C. § 144, the Court must take the factual allegations as true and determine whether, as a matter of law, they support the conclusion that the judge in question has a personal bias or prejudice that would prevent or impede impartiality. See U.S. v. Vespe, 868 F.2d 1328, 1340 (3d Cir. 1989). Although the factual allegations must be taken as true, "[c]onclusory statements and opinions . . . need not be credited." Id. Here, disregarding the conclusory statements and opinions in Plaintiff's affidavit, and assuming for the purposes of discussion the truth of Plaintiff's factual averments, the affidavit alleges only that: I was formerly employed by the law firm of Ballard Spahr in 1987; that Ballard Spahr represents the CNA Defendants in the instant action; that the resume I provided to the U.S. Department of Justice, Office of Legal Policy did not list my former employment with Ballard Spahr; that Ballard Spahr "made significant financial

[3] The affidavit accompanying the Second Motion for Recusal also refers to a number of instances in which Plaintiff has been unable to obtain certain information from various sources. For example, Plaintiff complains that he has not received responses to letters he has written to the Chief Judge of the Third Circuit Court of Appeals asking the Chief Judge to provide information regarding my representation of the Raymark Corporation. The Court need not consider these references since they, in fact, do not constitute substantive allegations.

contributions" to my election campaign for the Court of Common Pleas; that I testified in a sworn questionnaire submitted to the Committee on the Judiciary of the United States Senate that, during my employment with Ballard Spahr, I had represented the Raymark Corporation; and that Plaintiff has been unable to independently confirm whether I ever represented the Raymark Corporation. Even taking these factual allegations as true, they do not establish a personal bias or prejudice that would prevent or impede the Court's ability to preside over this matter with impartiality. The Court therefore concludes that Plaintiff's affidavit is legally insufficient for purposes of 28 U.S.C. § 144.

Second, in order for an affidavit to be deemed "timely" under 28 U.S.C. § 144, the application for recusal must be made at the earliest moment after the movant obtains knowledge of the facts demonstrating the basis for disqualification. See U.S. v. Sykes, 7 F.3d 1331, 1339 (7th Cir. 1993); Apple v. Jewish Hosp. and Medical Center, 829 F.2d 326, 333 (2d Cir.1987). As to the factual allegations in the Second Motion for Recusal which were already raised by Plaintiff in the First Recusal Motion, such facts were known to Plaintiff at least by May 24, 2002, the date upon which he filed the First Recusal Motion. As to the only additional factual allegations (those pertaining to representation of the Raymark Corporation), such facts were known to Plaintiff at least by October 12, 2002, the date upon which he wrote a letter to the Court requesting information regarding such representation. See Letter to the Honorable Legrome D. Davis from H. Gerard Heimbecker dated October 12, 2002, attached as Exhibit 1 to the Second Motion for Recusal. However, the Second Motion for Recusal was not filed until February 3, 2003. Thus, Plaintiff's instant application for recusal was clearly not made at the earliest moment after he obtained knowledge of the alleged facts providing the basis for

disqualification, and the Court therefore concludes that Plaintiff's affidavit is not "timely" for purposes of 28 U.S.C. § 144.

The Second Motion for Recusal is also procedurally defective for a third reason, namely Plaintiff's failure to comply with the express statutory requirement that his affidavit be "accompanied by a certificate of counsel of record stating that it is made in good faith." 28 U.S.C. § 144. The certificate requirement serves the significant purpose of preventing abuse by protecting against obviously untruthful affidavits and unjustified attempts by a party to disqualify a judge. See, e.g., Morrison v. U.S., 432 F.2d 1227, 1229 (5th Cir. 1970), *cert. denied*, 401 U.S. 945 (1971). For this reason, the absence of a certificate of counsel is a sufficient basis upon which a motion for recusal pursuant to 28 U.S.C. § 144 may be denied. See id. Although Plaintiff is proceeding *pro se* and he therefore does not have a "counsel of record," other courts have held, and this Court agrees, that this procedural safeguard against abuse should apply equally to *pro se* litigants. See Robinson v. Gregory, 929 F.Supp. 334, 336-38 (S.D. Ind. 1996) (reasoning that the statutory language is clear in its requirement, that the requirement is an essential safeguard to protect against abuse of § 144, and that *pro se* litigants have other effective mechanisms available to protect them from biased judges such as 28 U.S.C. § 455); see also Mills v. City of New Orleans, 2002 WL 31478223, at *2-3 (E.D. La. 2002); Thompson v. Mattleman, Greenberg, Schmerelson, Weinroth & Miller, 1995 WL 318793, at *1 (E.D. Pa. 1995). The Court further notes that under the present circumstances, applying this procedural safeguard to Plaintiff and requiring him to obtain a certificate of counsel stating that the affidavit is made in good faith is particularly appropriate given that he has already unsuccessfully sought my recusal on substantially similar grounds pursuant to 28 U.S.C. § 455.

For the above-stated reasons, Plaintiff's Second Motion for Recusal will be denied.

II. FACTUAL BACKGROUND

A. The First Montgomery County Action

This case has its genesis in a decision made in 1994 to deny Plaintiff a renewal of his lease to operate a food concession shop in an office building located at 555 City Avenue in Bala Cynwyd, Pennsylvania ("555 Property"). See Commonwealth of Pennsylvania v. Dana Kleiman, Dale Mulartrick, and James Rementer, Superior Court of Pennsylvania, No. 1845 Philadelphia 1996, Memorandum Opinion filed February 11, 1997, attached as Exhibit A to the Motion to Dismiss by the 555 Defendants *et al.* When his lease was not renewed, Plaintiff filed private criminal complaints against three leasing agents and/or managers of the 555 Property (Dale Mulartrick ("Mulartrick") and James Rementer ("Rementer"), both of whom are defendants in the instant action, and Dana Kleiman) in the Montgomery County Court of Common Pleas ("First Montgomery County Action"), alleging that the defendants had violated the Real Estate Licensing and Registration Act, 63 Pa. C. S. A. § 455.101 *et seq.*, and had committed summary criminal offenses by engaging in the practice of real estate without a license. See id. After a trial before District Justice Henry J. Schireson, "not guilty" findings were entered as to the three defendants. See id. Apparently unsatisfied with the unfavorable outcome, Plaintiff then unsuccessfully employed a variety of procedural avenues in an effort to obtain an alternate result. Plaintiff first filed a notice of appeal to the Montgomery County Court of Common Pleas, which Court found the appeal frivolous and dismissed it with prejudice. See id. The Court also ordered Plaintiff and his attorney, Joseph T. F. Quinn (a defendant in the instant action) to pay the appellees' attorney's fees of $5,281.56. See id. Plaintiff then filed a motion to vacate the order

to pay attorney's fees, which was denied. Finally, Plaintiff filed a *pro se* notice of appeal to the Superior Court of Pennsylvania, which was quashed for lack of standing. See id.

B. The Second Montgomery County Action

Thereafter, Mulartrick and Rementer sued Plaintiff along with his daughter Susan Heimbecker in the Court of Common Pleas alleging claims for malicious prosecution and civil conspiracy ("Second Montgomery County Action"). See Mulartrick v. Heimbecker, 1996 WL 1038816 (Pa. Com. Pl. 1996). After the Heimbeckers repeatedly violated court orders directing them to provide discovery, the trial court entered a default judgment against them. See id. Again unsatisfied with this unfavorable outcome, the Heimbeckers first filed a motion for reconsideration, as well as a motion to certify the matter for immediate appeal. See id. at *3. The Court of Common Pleas denied the motions, finding that the Heimbeckers had engaged in a "pattern of delay and obstruction," and had employed "tactical maneuvers intended to delay this case from moving forward." See id. at *3-5. The Court also found that the Heimbeckers' failure to appear at a hearing to address a motion for sanctions constituted "an affront to the dignity and authority of this court," and that the Heimbeckers' overall conduct demonstrated "a clear disregard for the authority of the Court as an institution for determining and enforcing rights." See id. The Heimbeckers then appealed to the Pennsylvania Superior Court, which Court denied the Heimbeckers' petition for review. See Dale R. Mulartrick and James Rementer v. H. Gerard Heimbecker and Susan Heimbecker, Court of Common Pleas of Montgomery County, No. 95-12208, Opinion dated December 27, 1997, attached as Exhibit C to the Motion to Dismiss by the 555 Defendants *et al.* ("Montgomery County Court of Common Pleas Opinion") at 3.

The case then proceeded toward an assessment of damages hearing. At this point the Heimbeckers' insurance carrier, CNA Insurance Company (a defendant in the instant action) negotiated a settlement with Mulartrick and Rementer. See id. at 3. Pursuant to the settlement, the Heimbeckers received a full release from liability in exchange for payment of $98,000 to be paid by CNA. See Dale R. Mulartrick and James Rementer v. H. Gerard Heimbecker and Susan Heimbecker, Superior Court of Pennsylvania, No. 3794 Philadelphia 1997, Memorandum Opinion filed September 16, 1998, attached as Exhibit D to the Motion to Dismiss by the 555 Defendants *et al.* ("First Superior Court Memorandum Opinion") at 2. Under the insurance policy, CNA was not required to obtain the Heimbeckers' consent to settle the case. See Montgomery County Court of Common Pleas Opinion at 14-15. Nevertheless, the Heimbeckers objected to the settlement. CNA thereafter intervened in the action and obtained the trial court's approval of the settlement. See id.

Apparently perceiving CNA's decision to settle the case without their approval as a profound injustice, the Heimbeckers then embarked upon what has proven to be something of a crusade. The Heimbeckers first appealed to the Superior Court of Pennsylvania, which Court affirmed the trial court. See First Superior Court Memorandum Opinion. The Superior Court held, *inter alia*: (1) that the trial court did not err in granting CNA's petition for intervention; (2) that the trial court properly approved the settlement; and (3) that the trial court did not err in entering default judgment against the Heimbeckers as a sanction for their failure to comply with discovery orders. See id. at 8. The Superior Court also addressed the Heimbeckers' approach toward the judicial process:

> Finally, we find it necessary to mention Appellants' disregard for the dignity of our judicial system. In both their initial and reply briefs, Appellants accuse Appellees, without evidentiary support, of such misdeeds as "engag[ing] in a pattern of criminal activity that includes corruption of a state commission, corruption of a judge, obstruction of justice, perjury and insurance fraud." They also assert that the "not guilty" verdict in the underlying criminal action was "fixed." Similar allegations of conspiracy and corruption are interspersed throughout Appellants' briefs. Our courts are not forums for parties to hurl unsupported assertions, rather, we rely upon evidence to substantiate claims and support rulings. However, Appellants offer only unfavorable results to support their vicious allegations. Lest Appellants fantasize that this Court is also conspiring against them, we note that we have invested more time than required upon their appeal by addressing claims that were waived and/or moot. Of course our decision is based upon information contained in the record, not unsupported allegations. If Appellants were members of the bar, we would certainly consider referring this matter to the disciplinary board.

See id. at 8-9.

C. The Philadelphia County Action

Next, the Heimbeckers filed an action in the Court of Common Pleas of Philadelphia County ("Philadelphia County Action"), including: claims against CNA[4] alleging breach of contract, negligence, and bad faith; a claim against attorney Denis Dice ("Dice") and his law firm, Harvey, Pennington, Cabot, Griffith & Renneisen, Ltd. ("Harvey Pennington") (who had represented the Heimbeckers during the assessment-of-damages-phase and settlement in the Second Montgomery County Action, and who are also defendants in the instant action) alleging professional negligence; and claims against Ballard, Spahr, Andrews & Ingersoll ("Ballard Spahr") and Joseph T. F. Quinn ("Quinn") (who are also defendants in the instant action), among

[4] CNA Insurance Company is apparently the parent company of Transportation Insurance Company and Continental Casualty Company. All three parties are defendants in the present action, and are referred to herein collectively as "CNA" or the "CNA Defendants."

others. See Susan M. Heimbecker and H. Gerard Heimbecker v. CNA Financial Corp. et al., Superior Court of Pennsylvania, No. 3592 EDA 1999, Memorandum Opinion filed October 10, 2000, attached as Exhibit E to the Motion to Dismiss by the 555 Defendants *et al.* ("Second Superior Court Memorandum Opinion") at 4-6. The trial court sustained preliminary injunctions and entered dismissal orders in favor of the defendants. See id. at 7. Susan Heimbecker, proceeding *pro se*, then appealed. The Superior Court affirmed the trial court's dismissal of the action. See id. at 2. Referencing its previous opinion, the Superior Court recounted its "dismay over the Heimbeckers' actions" and its "scathing rebuke of their 'disregard for the dignity of our judicial system.'" See id. at 4.

III. PROCEDURAL HISTORY

Apparently undeterred, Plaintiff initiated the instant action on July 10, 2001 by filing a Praecipe for a Writ of Summons in the Court of Common Pleas of Delaware County, Pennsylvania. Plaintiff named as defendants: Mulartrick and Rementer; attorney Gerald Arth ("Arth") and Fox Rothschild (who represented Mulartrick and Rementer in the malicious prosecution case); 555 Associates, 555 Investors, L.P., Faith et Fils, Inc., Ronald Rubin and Faith Robbins ("the 555 Defendants") (owners and operators of the 555 Property); Dice and Harvey Pennington; and CNA. Plaintiff filed a complaint on November 5, 2001, and this matter was removed to federal court on December 10, 2001.

On December 14, 2001, the following motions were filed: the Motion to Dismiss by the 555 Defendants *et al.*, the Harvey Pennington Defendants' Motion to Dismiss, and the CNA Defendants' Motion to Dismiss. Plaintiff then filed Objections to Notice of Removal, in response to which all Defendants except Quinn filed memoranda in opposition. Plaintiff filed a

Response to the three Motions to Dismiss, as well as an addendum to his response. On March 28, 2002 Quinn's Motion to Dismiss was filed, to which Plaintiff filed a response on April 11, 2002. On May 23, 2002, the case was reassigned to this Court, and on the following day Plaintiff filed the First Recusal Motion discussed above. The 555 Defendants filed an informal response to the First Recusal Motion, to which Plaintiff filed a reply. The CNA Defendants filed a formal response to the First Recusal Motion, to which Plaintiff filed a reply. On July 3, 2002, this Court denied Plaintiff's First Recusal Motion. Plaintiff filed a Motion for Reconsideration on July 22, 2002, which the Court denied on the same day.

Once again unsatisfied with the outcome, Plaintiff then filed a Petition for Writ of Mandamus with the United States Court of Appeals for the Third Circuit requesting the Court to compel me to disqualify myself, which Petition was denied by Judgment and Opinion dated November 29, 2002. Plaintiff then filed a Petition for Panel Rehearing, which was denied by the Court of Appeals in an Order dated January 29, 2003. Two days later, on January 31, 2003, Plaintiff filed the Second Motion for Recusal (addressed and resolved above).

On February 4, 2003, this Court entered an Order treating Plaintiff's Objections to Notice of Removal as a Motion to Remand, and the Court denied the Motion to Remand. The Court also entered an Order on that date directing the parties to appear for oral argument on the pending Second Motion for Recusal and the four pending Motions to Dismiss. On February 11, 2003, with the express consent of all parties including Plaintiff, the date for oral argument was rescheduled for March 5, 2003, to accommodate the schedules of the parties.[5] The 555

[5] Plaintiff expressly acknowledged that he was aware of the scheduled time and place for oral argument (March 5, 2003, 9:00 a.m. in Courtroom 12A) in his Motion to Stay this (continued...)

Defendants and the CNA Defendants then filed memoranda in opposition to the Second Motion for Recusal.

On February 15, 2003, Plaintiff filed a Motion to Stay, contending that the Court should stay oral argument on the four pending Motions to Dismiss and should first hear oral argument on, and resolve, the Second Motion for Recusal. The 555 Defendants and the CNA Defendants filed responses to the Motion to Stay, and on February 27, 2003, this Court entered an Order denying the Motion to Stay.[6] On February 3, 2003, Plaintiff filed a "Petition for Writ of Mandamus for the Denial of Motion to Stay" with the Third Circuit Court of Appeals, which is currently pending before that Court.

On March 5, 2003, this Court held oral argument at the appointed time and place. Despite having actual notice, Plaintiff failed to appear. Plaintiff did not notify the Court prior to oral argument that he would be unable to appear, and Plaintiff has not at any time following oral argument attempted to provide an explanation for his failure to appear. At the hearing, the CNA Defendants renewed their Motion to Preclude Plaintiff from Commencing Further Actions, and all other Defendants were granted permission to join in this Motion.

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[5](...continued)
Court's Order Dated February 4, 2003 and Undated Notice Docketed February 11, 2003, filed February 15, 2003 (Docket Entry No. 33).

[6] The Court's Order expressly set forth the Court's intention to address and resolve the Second Motion for Recusal first during oral argument. See Order dated and filed February 27, 2003 (Docket Entry No. 36).

IV. MOTIONS TO DISMISS

A. Legal Standard

The four pending Motions to Dismiss are based upon the contention that Plaintiff's Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6), which provides that a party may, by motion, raise as a defense the opposing party's "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Upon a Rule 12(b)(6) motion to dismiss, the Court must "accept as true all allegations in the complaint and all reasonable inferences that can be drawn therefrom, and view them in the light most favorable to the non-moving party." Rocks v. City of Philadelphia, 868 F.2d 644, 645 (3d Cir. 1989). In order to dismiss the complaint, it must appear beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Wisniewski v. Johns-Manville Corp., 759 F.2d 271, 273 (3d Cir. 1985).

In deciding a motion to dismiss, although a court must take well-pleaded facts as true, it need not credit a complaint's bald assertions or legal conclusions. In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1429-30 (3d Cir. 1997). As the Third Circuit Court of Appeals has recently explained:

> Liberal construction has its limits, for the pleading must at least set forth sufficient information for the court to determine whether some recognized legal theory exists on which relief could be accorded the pleader. . . . [C]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss. While facts must be accepted as alleged, this does not automatically extend to bald assertions, subjective characterizations, or legal conclusions.

General Motors Corp. v. New A.C. Chevrolet, Inc., 263 F.3d 296, 333 (3d Cir. 2001) (quoting 2 James Wm. Moore, Moore's Federal Practice § 12.34[1][b], at 12-61 to 12-63 (3d ed. 2001)).

B. Claims Against the CNA Defendants

Plaintiff's Complaint contains three counts against the CNA Defendants. Count 1, which sets forth a breach of contract claim against the CNA Defendants, alleges:

> 116. Defendants CNA breached the terms of the [comprehensive general liability insurance policy] by:
>
> (a) Failing to provide Plaintiff with a competent legal defense in the malicious prosecution case; and
>
> (b) Failing to investigate the facts and circumstances of the underlying malicious prosecution case . . . once the Plaintiff alleged the scheme to defraud; and
>
> (c) Settling the malicious prosecution case without notice to plaintiff and denying him the option to disclaim insurance coverage rather than accept the adverse legal consequences that flowed from the settlement; . . . .

Id. at 24-25. Count 2, which sets forth a claim for breach of the implied duty of good faith and fair dealing against the CNA Defendants, alleges that "Defendants CNA breached the terms of the [comprehensive general liability insurance policy] by breaching the implied duty of good faith and fair dealing by failing to investigate the underlying malicious prosecution case and settling the malicious prosecution case to protect its own interest rather than protecting the interests of the Plaintiff." Id. at 25. The third claim, Count 6 of the Complaint, alleges a violation of § 1962(d) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, against various Defendants, including the CNA Defendants.

CNA argues that all three of the claims against them are barred by application of the doctrine of res judicata (also referred to as claim preclusion). Specifically, CNA contends that

the claims brought by Plaintiff against CNA in the instant action are barred as a result of both the Second Montgomery County Action, and the Philadelphia County Action. The Court agrees.

Where it is alleged that a prior state court action serves as a bar to a claim in a subsequent federal court action based upon the doctrine of res judicata, the federal court must refer to the preclusion law of the state in which judgment was rendered. See, e.g., McNasby v. Crown Cork and Seal Co., Inc., 888 F.2d 270, 276 (3d Cir. 1989). Therefore, in deciding whether Plaintiff's claims against CNA are barred, the Court must apply Pennsylvania's res judicata law.

Pursuant to Pennsylvania law, "[t]he doctrine of res judicata holds that '[a] final valid judgment upon the merits by a court of competent jurisdiction bars any future suit between the same parties or their privies on the same cause of action.'" Dempsey v. Cessna Aircraft Co., 653 A.2d 679, 680-81 (Pa. Super. 1995) (citation omitted). "Proper application of the doctrine of res judicata requires the concurrence of four conditions: (1) identity of issues; (2) identity of causes of action; (3) identity of persons and parties to the action; and (4) identity of the quality or capacity of the parties suing or sued." Mintz v. Carlton House Partners, Ltd., 595 A.2d 1240, 1246 (Pa. Super. 1991). Moreover, the doctrine of res judicata bars relitigation not only of issues that were actually raised in the prior proceeding, but also issues that could have been but were not raised. See Balent v. City of Wilkes-Barre, 669 A.2d 309, 313 (Pa. 1995). It is also significant to note that "[t]he purpose of the doctrine of res judicata is 'to minimize the judicial energy devoted to individual cases, establish certainty and respect for court judgments, and protect the party relying on the prior adjudication from vexatious litigation.'" Mintz, 595 A.2d at 1245 (citation omitted). "Given this purpose, the doctrine of res judicata must be liberally construed and applied without technical restriction." Id.

Here, the applicability of the res judicata doctrine is clear: Plaintiff's claims against the CNA Defendants are barred because all of these issues either were actually raised in prior proceedings, or could have been but were not raised in prior proceedings. In its memorandum opinion in the Second Montgomery County Action, the Superior Court expressly held that the Heimbeckers' insurance policy with CNA gave CNA authority to settle the Action. See First Superior Court Memorandum Opinion. On appeal in the Philadelphia County Action (in which the Heimbeckers brought breach of contract, negligence, and bad faith claims against CNA), the Superior Court affirmed the trial court's dismissal of the breach of contract and bad faith claims against CNA based upon the same facts alleged in the instant action. See Second Superior Court Memorandum Opinion. The Superior Court noted that it had previously determined that the Heimbeckers' insurance policy with CNA gave CNA authority to settle the First Montgomery County Action, that there was no evidence of a breach of contract, and that the bad faith claim was not supported by evidence of any harm to the Heimbeckers. See id. at 9-11.

In addressing CNA's res judicata argument, Plaintiff appears to acknowledge (and the Court so finds) that the element of identity of issues, and the element of identity of the quality or capacity of the parties suing or sued, are satisfied with regard to all of the claims against CNA, and that the element of identity of the cause of action is satisfied as to all of the claims against CNA except the RICO claim. See Plaintiff's Response to Motions to Dismiss, filed on December 31, 2001 ("Pl.'s Response 12/31/01"), at 32. As to the identify of the cause of action element with regard to the RICO claim, Plaintiff's entire argument is set forth in a single sentence: "At no time has a RICO action arising from the allegation set forth in the complaint been brought against Defendant CNA." Id. Plaintiff appears to misunderstand the scope of the

res judicata doctrine. As noted above, the preclusion that results from the doctrine of res judicata applies equally to issues that could have been but were not raised in the prior action. Balent, 669 A.2d at 313. It is clear that the Heimbeckers could have, but did not, raise a RICO claim against the CNA Defendants in the Philadelphia County Action. See McCarter v. Mitcham, 883 F.2d 196, 200 (3d Cir. 1989) (holding that although Pennsylvania courts would most likely not apply claim preclusion where the original court lacked subject matter jurisdiction, the federal civil RICO statute does not confer exclusive federal jurisdiction, but rather concurrent state and federal jurisdiction). The identity of cause of action element is therefore satisfied with respect to the RICO claim.

As to the element of identity of persons and parties to the action, Plaintiff argues that res judicata does not apply because he was not a party to the Philadelphia County Action.[7] In fact, Plaintiff, his daughter Susan Heimbecker, and Triple Nickel (the Heimbeckers' sandwich shop) initially filed the writ of summons in the Philadelphia County Action. See Second Superior Court Memorandum Opinion at 2, n.1. However, on October 26, 1998, Plaintiff filed a praecipe to discontinue the action as to himself and Triple Nickel. See id. Thus, the ultimate judgment in

[7] Plaintiff's argument ignores the fact that he was a party in the Second Montgomery County Action, and that the Superior Court in that Action held that the Heimbeckers' insurance policy with CNA gave CNA authority to settle the Action. See First Superior Court Memorandum Opinion. Thus, even if there were no identify of parties between the instant action and the Philadelphia County Action, the Second Montgomery County Action would bar Plaintiff's instant claims against CNA for breach of contract and breach of the implied duty of good faith and fair dealing pursuant to the doctrine of collateral estoppel. Menna v. St. Agnes Medical Center, 690 A.2d 299, 302 (Pa. Super. 1997) ("Collateral estoppel, now more commonly referred to as issue preclusion, is a doctrine that works to prevent an issue that has already been fully and fairly litigated from being raised again in a subsequent suit.").

that case was technically entered only as to Susan Heimbecker.[8] The question, then, is whether Plaintiff is in privity with his daughter for purposes of the doctrine of res judicata.

"The doctrine of res judicata applies to and is binding, not only on actual parties to the litigation, but also to those who are in privity with them. A final valid judgment upon the merits by a court of competent jurisdiction bars any future suit between the same parties or their privies on the same cause of action." Stevenson v. Silverman, 208 A.2d 786, 788 (Pa. 1965). Privity exists between two individuals where there is "such an identification of interest of one person with another as to represent the same legal right." Ammon v. McCloskey, 655 A.2d 549, 554 (Pa. Super. 1995), *appeal denied*, 670 A.2d 139 (Pa. 1995); see also Day v. Volkswagenwerk Aktiengesellschaft, 464 A.2d 1313, 1317-18 (Pa. Super. 1983) ("[p]rivity connotes those so connected in law with a party to the judgment as to have such an identity of interest that the party to the judgment represented the same legal right"). The Pennsylvania Supreme Court has stated:

> The doctrine of res judicata is based on public policy and seeks to prevent an individual from being vexed twice for the same cause. . . . "The rule should not be defeated by minor differences of form, parties, or allegations, when these are contrived only to obscure the real purpose, – a second trial on the same cause between the same parties. The thing which the court will consider is whether the ultimate and controlling issues have been decided in a prior proceeding in which the present parties actually had an opportunity to appear and assert their rights. If this be the fact, then the matter ought not to be litigated again, nor should the parties, by a shuffling of plaintiffs on the record, or by change in the character of the relief sought, be permitted to nullify the rule."

Stevenson, 208 A.2d at 788 (citation omitted).

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[8] Susan Heimbecker received her law degree from Widener University School of Law in 1997. See Second Superior Court Memorandum Opinion at 6 n.6.

The facts here compel the conclusion that Plaintiff is in privity with his daughter. The Heimbeckers were together sued in the Second Montgomery County Action for malicious prosecution and civil conspiracy. The Heimbeckers were both insureds under the CNA insurance policy in question, and together they appealed to the Superior Court the trial court's approval of CNA's settlement with the plaintiffs in the Second Montgomery County Action. Each has subsequently challenged CNA's conduct in settling that action in a separate lawsuit (Susan Heimbecker in the Philadelphia County Action and Plaintiff in the instant action), and Plaintiff was originally a plaintiff in the Philadelphia County Action, although he subsequently removed himself from that action. Were this Court to permit Plaintiff to now proceed in the instant action against CNA, alleging claims which either have already been fully litigated by his daughter, or could have been but were not raised by his daughter, in prior proceedings regarding the very same factual allegations, the result would be a second trial on the same cause between essentially the same parties resulting from a mere "shuffling of plaintiffs on the record."

In summary, for the reasons set forth above, the Court concludes that the doctrine of res judicata bars Plaintiff's three claims against the CNA Defendants. As a result, the CNA Defendants' Motion to Dismiss will be granted, resulting in the dismissal of Counts 1 and 2, and Count 6 to the extent that it is asserted against the CNA Defendants.

C. RICO Claims

Plaintiff's Complaint contains four counts alleging RICO violations. RICO imposes criminal and civil liability upon those who engage in certain prohibited activities. H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 232 (1989). A private cause of action arises under § 1964(c), which states, in pertinent part, that "[a]ny person injured in his business or

property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the costs of the suit, including a reasonable attorney's fee." 18 U.S.C. § 1964(c). Section 1962, in turn, provides four avenues by which liability may be assessed, set forth in subdivisions (a) through (d) of that section. See 18 U.S.C. § 1962.

Count 3 of Plaintiff's Complaint alleges a violation of § 1962(a) against Arth, Fox Rothschild, Dice, Harvey Pennington, Mulartrick, Rementer, and the 555 Defendants. Count 4 of the Complaint alleges a violation of § 1962(b) against the same Defendants excluding Harvey Pennington. Count 5 alleges a violation of § 1962(c) against Arth, Dice, Mulartrick, Rementer, Robbins and Rubin. Count 6 alleges a violation of § 1962(d) against the same Defendants as in Count 3.

1. Statute of Limitations

A four-year limitations period applies to civil RICO actions, which period begins to run when a plaintiff knew or should have known of his injury. Agency Holding Corp. v. Malley-Duff Assocs., 483 U.S. 143, 156 (1987); Forbes v. Eagleson, 228 F.3d 471, 484 (3d Cir. 2000). Defendants argue that all four of Plaintiff's RICO counts are barred by the statute of limitations because all of the injuries complained of in these counts occurred more than four years prior to July 10, 2001, the date when Plaintiff instituted the instant action. See Motion to Dismiss by the 555 Defendants *et al.*, at 8-9. Specifically, Defendants argue that these claims accrued, at the very latest, when CNA entered into a settlement agreement in the Second Montgomery County Action, and they further contend that the settlement occurred on May 20, 1997. See id. Plaintiff expressly agrees that "the cause of action accrued with the settlement of

the malicious prosecution action by CNA." Pl.'s Response 12/31/01, at 30. However, Plaintiff argues that the settlement did not occur until August 5, 1997, at which time "the general release was signed and CNA issued checks to the Defendants, Mulartrick and Rementer and their attorneys, the Fox Firm." Id. at 30-31.

Initially, the Court notes that Plaintiff has failed to offer any evidence regarding the date upon which the release was signed and the settlement checks were issued. More importantly, however, according to Plaintiff's own factual allegations, the parties in the Second Montogomery County Action entered into the settlement agreement, and Plaintiff knew or should have known of any injury arising therefrom, prior to June 10, 2001. In his Complaint, Plaintiff alleges:

> 91. On or about May 20, 1997, Defendant Dice telephoned Ms. Heimbecker and advised her that Kahn and Makadon of the Ballard Firm had unilaterally settled the malicious prosecution case on behalf of the Heimbeckers for the sum of $98,000.00 to be paid by Defendants CNA.
> 92. At no time prior to May 20, 1997, did Kahn, Makadon, the Ballard Firm, or Defendants Dice, Harvey Firm or CNA consult with the Heimbeckers to determine whether they might prefer to disclaim insurance coverage rather than have the malicious prosecution case settled within policy limits.
> 93. At no time prior to May 20, 1997, did Kahn, Makadon, the Ballard Firm, or Defendants Dice, the Harvey Firm or CNA inform the Heimbeckers that settlement negotiations between Defendants Arth, the Fox Firm, on behalf of Defendants Mulartrick and Rementer, were in progress.
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> . . . .
>
> 95. By letter dated May 22, 1997, Plaintiff protested to Defendants CNA the consummation of any settlement of the malicious prosecution case. Additionally, the Heimbeckers threatened a professional negligence and bad faith action against Defendants Dice and CNA if the settlement was not withdrawn.

> 96. By letter dated May 24, 1997, Defendants CNA responded in substance that it would not change its position on the matter and would proceed with the settlement.

Plaintiff's Complaint ("Pl.'s Complaint") at 19-20. According to the "injury discovery" rule set forth in Forbes, the running of the statute of limitations is triggered by a plaintiff's actual or constructive knowledge of the injury, and Plaintiff's allegations establish that he knew of the settlement agreement and of any alleged harm resulting therefrom in May, 1997 (and thus prior to July 10, 1997). Therefore his RICO claims in the instant action filed on July 10, 2001 are barred by the statute of limitations.

2. Standing

Even if the RICO claims were not barred by the statute of limitations, Plaintiff would nonetheless lack standing to pursue the RICO claims. As noted above, § 1964(c) authorizes "[a]ny person injured *in his business or property* by reason of a violation of section 1962 of this chapter" to bring a private RICO action. 18 U.S.C. § 1964(c) (emphasis added). It is well-established that "the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 496 (1985); see Maio v. Aetna, Inc., 221 F.3d 472, 483 (3d Cir. 2000). This threshold requirement limits civil RICO standing to persons injured in their business or property, with the intention that RICO not be expanded to provide a federal cause of action to every tort plaintiff. Maio, 221 F.3d at 483. "Thus, 'a showing of injury requires proof of a concrete financial loss and not mere injury to a valuable intangible property interest.'" Id. (citation omitted); see also Genty v. Resolution Trust Corp., 937 F.2d 899, 918-19 (3d Cir. 1991)

(holding that RICO plaintiffs may recover damages for harm to business and property only, not physical and emotional injuries).

In Counts 3 through 5, Plaintiff fails to allege any particular harm or injury. See Pl.'s Complaint at 26-27. In Count 6, Plaintiff alleges that his injuries include "expenses related to the costs of litigation; . . . severe emotional distress resulting in the aggravation of pre-existing medical conditions; . . . [and] damage to his property[,] reputation and financial well being." Id. at 32. Plaintiff's allegations of emotional distress and damage to reputation are clearly insufficient to establish standing. Plaintiff's remaining allegations are notably vague and conclusory. In his Response, Plaintiff again provides only a vague reference to injuries to "his business interests, his property rights in his insurance policy, his right to access the courts and state agencies without a corrupting influence." Pl.'s Response 12/31/2001 at 30. Such bald assertions, subjective characterizations, and legal conclusions are insufficient for purposes of a motion to dismiss. See General Motors Corp. Inc., 263 F.3d at 333. Because Plaintiff has failed to allege a concrete injury to his business or property, he lacks standing to proceed on his RICO claims.

3. Pattern of Racketeering Activity

Even if the RICO claims were not barred by the statute of limitations, and even if the allegations in the Complaint were sufficient to establish standing for the RICO claims, all of the RICO claims would nonetheless fail. As to Counts 3 through 5, in order to state a RICO claim under subdivisions (a), (b) or (c) of § 1962, a plaintiff must plead, among other things, a "pattern of racketeering activity." A "pattern of racketeering activity" requires at least two "predicate acts" of racketeering activity. See 18 U.S.C. § 1961(5). "Racketeering activity" is, in turn,

defined by incorporating specifically enumerated state and federal offenses including mail fraud (18 U.S.C. § 1341), wire fraud (18 U.S.C. § 1343), and interstate transportation of stolen property (18 U.S.C. §§ 2314, 2315). See 18 U.S.C. § 1961(1). Here, in Counts 3 through 5, the Complaint alleges that Defendants engaged in a pattern of racketeering activity when they "utilized the United States mails and the wires in violation of 18 U.S.C. 1341 and 1343." Pl.'s Complaint at 27, 29, 30.

When the alleged predicate acts are acts of fraud, Fed. R. Civ. P. 9(b) "requires plaintiffs to plead with particularity the 'circumstances' of the alleged fraud in order to place the defendants on notice of the precise misconduct with which they are charged, and to safeguard defendants against spurious charges of immoral and fraudulent behavior." Seville Indus. Machinery Corp. v. Southmost Machinery Corp., 742 F.2d 786, 791 (3d Cir. 1984). Thus, allegations of predicate acts of fraud must be injected with precision and "some measure of substantiation." Id. The allegations here do not satisfy this standard. The Complaint merely alleges in vague and conclusory fashion that the Defendants "either individually or through their agents, utilized the United States mails and the wires in violation of 18 U.S.C. 1341 and 1343," and that "[t]hese mailings and use of the wires, constitute a 'pattern of racketeering' as defined in 18 U.S.C. § 1961(1) and (5)." Pl.'s Complaint at 27, 29, 30.

Moreover, Count 6 of the Complaint, which alleges a violation of § 1962(d), curiously states only that the Defendants "conspired to violate 18 U.S.C. § 1962(d)." Such an allegation does not state a claim under § 1962(d), which makes it "unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." 18 U.S.C. § 1962(d).

In summary, the RICO claims (Counts 3 through 6) will be dismissed based upon three distinct grounds: (1) they are barred by the statute of limitations; (2) Plaintiff lacks standing to bring these claims; and (3) the claims pursuant to § 1962(a) through (c) fail to establish a "pattern of racketeering activity," and the claim pursuant to § 1962(d) fails to state a claim upon which relief can be granted.

D. Breach of Contract Claim

Count 7 of the Complaint states a claim for breach of contract against Dice, Harvey Pennington, and Quinn. See Pl.'s Complaint at 32. It alleges that these Defendants "breached their various contractual obligations to the Plaintiff," and that, as a result , Plaintiff has "incurred expenses related to the costs of litigation, has been legally foreclosed from pursuing claims against Defendants Mulartrick and Rementer for wrongful use of civil proceedings and related harms," has suffered emotional distress, and has sustained damage to his reputation and financial well-being. Pl.'s Complaint at 32-33.

As to Defendant Quinn, the Complaint alleges: that Quinn represented Plaintiff during the early stages of the Second Montgomery County Action; that Quinn failed to properly and timely address discovery requests and court orders; that Plaintiff discovered these alleged failures on or about May 8, 1996; and that these alleged failures resulted in a default judgment being entered against the Heimbeckers on July 2, 1996. See Pl.'s Complaint at 9-14. As to Defendants Dice and Harvey Pennington, the Complaint alleges: that these Defendants were retained by CNA to represent the Heimbeckers in the Second Montgomery County Action on July 31, 1996; that these Defendants shortly thereafter filed a motion for reconsideration of the court's default judgment order, or in the alternative a request to certify the matter for appeal, without

immediately notifying Plaintiff; that the denial of this motion and request was due "[i]n large measure" to the Defendants' "failure to follow appropriate procedure and the filing of what the court perceived to be a frivolous interlocutory appeal"; that Dice failed to properly keep Plaintiff informed regarding the status of the litigation and rejected Plaintiff's suggestion that he file a petition to open the default judgment; that these Defendants were tangentially involved in the ultimate settlement of the action, which was directly undertaken by Ballard Spahr on behalf of CNA and the Heimbeckers; that the settlement was entered into, and that Plaintiff was aware of and objected to the settlement, prior to June 10, 1997 (although the court in the Second Montgomery County Action did not formally approve the settlement until July 28, 1997, and payment to Mulartrick and Rementer under the settlement was not made until August 5, 1997). See Pl.'s Complaint at 14-23.

Plaintiff acknowledges that Count 7 is intended to state a cause of action for legal malpractice based in assumpsit. See Plaintiff's Response, April 11, 2002 ("Pl.'s Response 4/11/2002") at 31. Legal malpractice claims in Pennsylvania can sound in trespass (*i.e.*, negligence) or assumpsit (*i.e.*, contract). See Williams v. Sturm, 110 F.Supp.2d 353, 357 (E.D. Pa. 2000).

> [A]n assumpsit claim based on breach of the attorney-client agreement . . . is a contract claim and the attorney's liability in this regard will be based on terms of that contract. Thus, if an attorney agrees to provide his or her best efforts and fails to do so an action will accrue. Of course an attorney who agrees for a fee to represent a client is by implication agreeing to provide that client with professional services consistent with those expected of the profession at large.

Bailey v. Tucker, 621 A.2d 108, 115 (Pa. 1993).

1. Statute of Limitations

The Court concludes that this breach of contract claim is barred by the statute of limitations based upon the same reasoning set forth above in addressing the RICO claims. Under Pennsylvania law, it appears that a four-year statute of limitations period applies to claims for legal malpractice sounding in assumpsit. See Garcia v. Community Legal Services Corp., 524 A.2d 980, 982 (Pa. Super. 1987), *appeal denied*, 538 A.2d 876 (Pa. 1988). According to the "injury discovery" rule set forth in Forbes, the running of the statute of limitations is triggered by a plaintiff's actual or constructive knowledge of the injury, and the factual allegations in the Complaint establish that Plaintiff knew of the harm of which he complains more than four years prior to filing the instant action on July 10, 2001.

2. Damages

The Court also finds that Plaintiff's legal malpractice claim against Quinn, Dice, and Harvey Pennington fails because Plaintiff has not alleged any actual and identifiable loss, which is an essential element to such a claim.

> Clearly, "when it is alleged that an attorney has breached his professional obligations to his client, an essential element of the cause of action, whether the action be denominated in assumpsit or trespass, is proof of actual loss." "The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm – not yet realized – does not suffice to create a cause of action for negligence . . . ." "The test of whether damages are remote or speculative has nothing to do with the difficulty in calculating the amount, but deals with the more basic question of whether there are identifiable damages . . . . Thus, damages are speculative only if the uncertainty concerns the fact of damages rather than the amount."

Rizzo v. Haines, 555 A.2d 58, 68 (Pa. 1989) (citations omitted). As noted, Plaintiff alleges that he has "incurred expenses related to the costs of litigation, has been legally foreclosed from

pursuing claims against Defendants Mulartrick and Rementer for wrongful use of civil proceedings and related harms," has suffered emotional distress, and has sustained damage to his reputation and financial well-being. Pl.'s Complaint at 32-33. The Court finds that Plaintiff has alleged only remote, speculative and unidentifiable damages, and that these alleged damages are therefore insufficient to support Plaintiff's legal malpractice claim. Moreover, the ultimate result of the Second Montgomery County Action, in which Defendants Quinn, Dice and Harvey Pennington at various times represented Plaintiff, was a settlement payment of $98,000 to the plaintiffs in that action *paid in full by CNA*. Thus, Plaintiff suffered no actual, identifiable damages as a direct result of the legal representation provided by these Defendants.

E. Punitive Damages

Count 8 states a bare claim for punitive damages unrelated to any particular cause of action. See Pl.'s Complaint at 33. However, an independent cause of action does not exist for punitive damages, as punitive damages are simply a form of relief. Because the Court will dismiss Counts 1 through 7, the Court will also dismiss the punitive damages claim set forth in Count 8.

V. MOTION TO PRECLUDE PLAINTIFF FROM COMMENCING FURTHER ACTIONS

As noted at the outset, the CNA Defendants' Motion to Dismiss also includes a Motion to Preclude Plaintiff from Commencing Further Actions ("Motion to Preclude") requesting that the Court "enter an order prohibiting [Plaintiff] from filing additional actions against CNA based on the underlying events without first seeking and obtaining leave of Court." CNA Defendants'

Motion to Dismiss at 13. Also as noted, at oral argument the Court granted the motions of all other Defendants in the action to join in the CNA Defendants' Motion to Preclude.

The type of injunction sought by Defendants in this case is most frequently entered pursuant to the All Writs Act, 28 U.S.C. § 1651. See Gagliardi v. McWilliams, 834 F.2d 81, 83 (3d Cir. 1987). Generally, where a litigant files numerous complaints raising claims that are identical or similar to claims that have already been adjudicated, a district court has authority under the "broad scope of the All Writs Act" to issue an order restricting the litigant from filing additional meritless cases seeking to relitigate the same claims. In re Oliver, 682 F.2d 443, 445 (3d Cir. 1982). This type of injunction serves "[t]he interests of repose, finality of judgments, protection of defendants from unwarranted harassment, and concern for maintaining order in the court's dockets." Id. "In appropriate circumstances, courts have gone beyond prohibitions against relitigation and enjoined persons from filing any further claims of any sort without the permission of the court." Id. Some courts have imposed an injunction requiring the litigant "not only to obtain the district court's leave before filing further claims, but also to certify, on penalty of contempt, that his claim had not previously been litigated in federal court." Id.

However, this kind of proscriptive injunctive relief entered against a litigious plaintiff is "an extreme remedy," which "should be used only in exigent circumstances," and which "should 'remain very much the exception to the general rule of free access to the courts.'" Id. (citation omitted). Moreover, "'the use of such measures against a *pro se* plaintiff should be approached with particular caution.'" Id. (citation omitted). "Access to the courts is a fundamental tenet of our judicial system; legitimate claims should receive a full and fair hearing no matter how litigious the plaintiff may be." Id. at 446. For this reason, although it is clear in this Circuit "that

a pattern of groundless and vexatious litigation will justify an order prohibiting further filings without permission of the court," the litigant in question must first be afforded notice and an opportunity to respond. Chipps v. U.S.D.C. for the M.D. of Pa., 882 F.2d 72, 73 (3d Cir. 1989). In addition, "the scope of the injunctive order must be narrowly tailored to fit the particular circumstances of the case before the District Court." Brow v. Farrelly, 994 F.2d 1027, 1038 (3d Cir. 1993).

A number of factors weigh in favor of entering an injunction of this nature against Plaintiff. Perhaps most significantly, Plaintiff has demonstrated a persistent and profound lack of respect for the judicial system. In the Second Montgomery County Action, the Court of Common Pleas found that the Heimbeckers had engaged in a "pattern of delay and obstruction," and had employed "tactical maneuvers intended to delay this case from moving forward." See Mulartrick, 1996 WL 1038816, at *3-5. The Court also found that the Heimbeckers' failure to appear at a hearing to address a motion for sanctions constituted "an affront to the dignity and authority of this court," and that the Heimbeckers' overall conduct demonstrated "a clear disregard for the authority of the Court as an institution for determining and enforcing rights." See id. In that same action, the Superior Court of Pennsylvania criticized the Heimbeckers' "disregard for the dignity of our judicial system," and admonished the Heimbeckers by remarking that "[i]f Appellants were members of the bar, we would certainly consider referring this matter to the disciplinary board." See First Superior Court Memorandum Opinion at 8-9.

Despite such pronounced reprimands, Plaintiff is apparently unwilling or unable to curb his irreverent behavior. As one example among many in the instant matter, despite having actual

notice of the scheduled time and place for oral argument,[9] Plaintiff simply failed to appear. All Defendants and their attorneys appeared, and the Court waited nearly an hour before proceeding without Plaintiff. Plaintiff did not notify the Court beforehand of any impediment to his attending, nor has he subsequently offered any explanation for his failure to attend.[10] Such conduct is quite simply a disdainful abuse of the judicial process.[11] Plaintiff has affirmatively sought out the Court's assistance in remedying what he perceives to be an injustice, but he apparently fails to recognize that once he has invoked the Court's involvement, he must abide by the Court's processes, procedures, and rulings. Plaintiff's willingness to respect this Court may not be conditioned upon this Court's acquiescence to his wishes.

In addition to this lack of respect for the judicial process, Plaintiff has also demonstrated a penchant for perceiving unconnected and innocuous facts and events through a highly conspiratorial lens, resulting in factual allegations which are often offensive and which frequently border on the absurd. As discussed in Section II.B. of this opinion, the Superior Court in the Second Montgomery County Action commented sharply on the Heimbeckers' propensity for making unsubstantiated allegations. See First Superior Court Memorandum Opinion at 8-9.

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[9] Plaintiff's actual notice of the scheduled time and place for oral argument is evidenced in the Letter to the Honorable Legrome D. Davis from H. Gerard Heimbecker dated February 26, 2003 (Docket Entry No. 38). In addition, the date and time of oral argument had initially been rescheduled by this Court's Clerk with Plaintiff's explicit approval by phone.

[10] Plaintiff's irreverence can also be discerned from the tone of his February 26, 2003 letter. See Letter to the Honorable Legrome D. Davis from H. Gerard Heimbecker dated February 26, 2003 (Docket Entry No. 38) at 3-4.

[11] It is noted that Plaintiff similarly failed to appear at a hearing to address a motion for sanctions in the Second Montgomery County Action. See Mulartrick, 1996 WL 1038816, at *3-5.

Similarly, in the instant action, Plaintiff has made numerous preposterous allegations without the slightest trace of evidentiary support, including: that the Chairman of Ballard Spahr or employees of Ballard Spahr may have made misrepresentations to the Department of Justice and the Federal Bureau of Investigation so serious as to constitute criminal conduct; and that some sort of vast conspiracy exists which involves the Governor of Pennsylvania, the law firm of Ballard Spahr, the Chairman of Fox Rothschild, the University of Pennsylvania, two United States Senators, the Federal Judicial Nominating Commission of Pennsylvania, and this Court. See Pl.'s Second Motion for Recusal at 3-4. Clearly, it is not unreasonable to recognize the possibility that, in response to this Memorandum and Order dismissing Plaintiff's Complaint, Plaintiff may simply proceed to file another action in this or some other Court based upon utterly unsubstantiated allegations.

However, as noted, the type of prospective injunctive relief sought by Defendants is truly "an extreme remedy" that "should be used only in exigent circumstances," and "'the use of such measures against a *pro se* plaintiff should be approached with particular caution.'" In re Oliver, 682 F.2d at 445 (citation omitted). Moreover, despite the objectively irreverent and offensive conduct Plaintiff has consistently exhibited, Plaintiff has not yet proven himself to be the kind of "serial filer" (in terms of the number of actions filed) against whom such injunctive relief is most frequently granted.

For example, in Oliver, the plaintiff had filed fifty-one law suits, all of which were without sufficient merit to warrant even a hearing. Id. at 444-46. The Third Circuit Court of Appeals found that these circumstances warranted the district court's enjoining the clerk from accepting further cases from the plaintiff without permission of the court (although the Court

vacated and remanded to provide the litigant with an opportunity to oppose the district court's order). Id. In Abdul-Akbar v. Watson, 901 F.2d 329 (3d Cir. 1990), a prisoner had filed forty claims under 42 U.S.C. § 1983 and three claims under 28 U.S.C. § 2254 in seven years. Id. at 331. The Court of Appeals found that "an injunction directed to repetitious or otherwise frivolous claims might be appropriate" (although the Court vacated the district court's injunction and remanded to allow the district court to "revisit the injunction issues" in light of particular considerations not expressly addressed by the district court). Id. at 335. In Matter of Packer Ave. Associates, 884 F.2d 745 (3d Cir. 1989), the appellant had filed or attempted to file at least twenty-seven frivolous *pro se* petitions attempting to collaterally attack issues decided in a bankruptcy case. Id. at 746. The Court of Appeals held that the appellant's conduct warranted a proscriptive injunction, although the Court modified the district court's injunction in order to "strike[] a good balance between the right of the litigant to access to the courts, the right of parties to previous litigation to enjoy the repose of *res judicata*, and the right of taxpayers not to have a frivolous litigant become an unwarranted drain on their resources." Id. at 748. And in Chipps v. U.S.D.C. for the M.D. of Pa., 882 F.2d 72, 73 (3d Cir. 1989), the plaintiff had filed four suits in the District Court for the Middle District of Pennsylvania concerning the same dispute regarding repayment of a student loan. Id. at 73. The Court of Appeals held the plaintiff's "series of lawsuits, assessed in light of his announced plans to file still more suits, fully supported the District Court's conclusion that some restriction on [the plaintiff's] litigating opportunities was required" (although the Court remanded for entry of a modified order limiting the scope of the injunction). Id.

Here, the instant action is, in fact, the only suit that Plaintiff has filed against these Defendants in this Court related to these particular factual allegations.[12] Although Plaintiff has filed, in addition to this action, one criminal and one civil action in state court pertaining to the same factual allegations, the Court is not fully convinced that these facts presently rise to the level of "*a pattern* of groundless and vexatious litigation." Chipps, 882 F.2d at 73 (emphasis added). Thus, because Plaintiff has not filed "numerous complaints" in this Court "raising claims that are identical or similar to claims that have already been adjudicated," the Court will deny Defendants' request for an injunction prohibiting Plaintiff from filing future actions without permission of the Court. Oliver, 682 F.2d at 445.

Despite reaching this conclusion, the Court expressly recognizes the closeness of this question. What Plaintiff presently lacks with respect to the quantity of filings is nearly compensated for by Plaintiff's profound disrespect for the judicial process and his willingness to file actions, motions, and appeals that are so clearly without merit. However, considering the extraordinary nature of the injunctive relief requested, and the fundamental importance of free access to the federal courts, the Court concludes that the overarching policy of judicial restraint compels the denial of Defendants' Motion to Preclude.

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[12] Plaintiff has filed one other action in this Court, against different defendants, which is tangentially related to the instant action. That action was filed against Former Deputy Attorney General for the Commonwealth of Pennsylvania, Kirk Wiedemer, and Deputy Chief Counsel for the Bureau of Professional and Occupation Affairs ("BPOA"), Ruth Dunnewold, alleging that these individuals had improperly handled complaints filed by Plaintiff with the Attorney General and the BPOA, respectively. See E.D. Pa. Docket No. 02-cv-00601. The complaints in question had been filed against individuals including Rementer, Mulartrick, Robbins, and Rubin, and they stemmed from the decision in 1994 to deny Plaintiff a renewal of his lease to operate his food concession shop at the 555 Property. In that action, the District Court granted the defendants' motion to dismiss, and the Court of Appeals for the Third Circuit affirmed on appeal. See 3d Cir. Docket No. 02-2131.

An Order in accordance with the Memorandum follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

H. GERARD HEIMBECKER Plaintiff,	: :	CIVIL ACTION
v.	:	NO. 01-6140
555 ASSOCIATES, et al., Defendants.	: :	

ORDER

AND NOW, this day of March, 2003, it is hereby ORDERED as follows:

1. The Motion for Recusal Pursuant to 28 U.S.C.A. § 144, filed by Plaintiff H. Gerard Heimbecker on January 31, 2003 (**Docket Entry No. 28**) is DENIED.

2. The Motion to Dismiss, filed by Defendants 555 Associates, 555 Investors, L.P., Ronald Rubin, Faith et Fils, Inc., Faith Robbins, Dale Mulartrick, James Rementer, Gerald Arth, Esquire, and Fox, Rothschild, O'Brien & Frankel, LLP on December 14, 2001 **(Docket Entry No. 3**) is GRANTED.

3. The Motion to Dismiss or for Summary Judgment, filed by Defendants Denis Dice, Esquire and Harvey, Pennington, Cabot, Griffith & Renneisen, Ltd. on December 14, 2001 (**Docket Entry No. 4**) is GRANTED.

4. The Motion to Dismiss filed by Defendant Joseph T.F. Quinn on March 28, 2002 (**Docket Entry No. 16**) is GRANTED.

5. The Motion to Dismiss the Complaint, filed by Defendants CNA Insurance Company, Transportation Insurance Company, and Continental Casualty Company on December 14, 2001 (**Docket Entry No. 6**) is GRANTED.

6. The Motion to Preclude Plaintiff from Commencing Further Actions, filed by Defendants CNA Insurance Company, Transportation Insurance Company, and Continental Casualty Company on December 14, 2001 (**also Docket Entry No. 6**) is DENIED.

As a result of this Order, all claims in the instant action have been dismissed in their entirety, and all pending motions have been resolved. The Clerk of Court is therefore directed to close this matter for statistical purposes.

BY THE COURT:

Legrome D. Davis