No. 98-1480

In The

Supreme Court of the United States

ROBERT A. BECK, II,

Petitioner,

vs.

RONALD M. PRUPIS, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether an employee who is terminated for both blowing the whistle on and refusing to participate in a pattern of predicate acts of racketeering forbidden by the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*, may assert a civil RICO conspiracy claim, where he has been injured by an overt act in furtherance of the RICO conspiracy, which overt act is not, itself, a predicate act of racketeering.

PARTIES TO THE PROCEEDINGS

The parties to the proceedings before the District Court and Court of Appeals were:

Plaintiff Robert A. Beck, II, Petitioner here

Defendant Ronald M. Prupis, Respondent here

Defendant Leonard Bellezza, Respondent here

Defendant Ernest J. Sabato, Respondent here

Defendant William Paulus, Jr., Respondent here

Defendant Harry Olstein, Respondent here

Defendant Frederick C. Mezey, Respondent here

Defendant Joseph S. Littenberg, Respondent here

Defendant Byron L. Sparber, not a party here

Defendant Neil Prupis, not a party here

Defendant William Lipkind, not a party here

Defendant Firemark Consultants, Inc., not a party here

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 162 F.3d 1090, and is reprinted in the Appendix to Petitioner Robert A. Beck, II's ("Beck") Petition for Writ of Certiorari ("CP App."), p. 1.

The opinion of the United States District Court for the Southern District of Florida (Roettger, D.J.) is unreported, and is reprinted at CP App. 23.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on December 15, 1998. Petitioner filed his Writ of Certiorari on March 12, 1999, which this Court granted on June 7, 1999. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutory provisions at issue in this case are 18 U.S.C. §§ 1962(d) and 1964(c) of RICO, which are reprinted at CP App. 47.

STATEMENT OF THE CASE

1. Beck's Claim.

Beck brought this RICO action for damages he suffered to his business and property by reason of an overt

act committed by former officers and directors (the "Defendant Directors") of Southeast Insurance Group, Inc. ("SIG" or the "Enterprise"), in furtherance of their conspiracy to violate RICO. The Defendant Directors' racketeering activity consisted of extortion, mail fraud and wire fraud, including extortion of contractors (Beck's Crossclaim and Third Party Complaint (the "Verified Complaint") at ¶¶ 23-30) (Joint Appendix at ("JA") 61-63), falsification of financial statements (*Id.* at ¶¶ 18-19 and 22), looting of the Enterprise (*Id.* at ¶¶ 20-21, 33-35 and 37-41), fraudulent promises to indemnify (*Id.* at ¶ 32), set aside fraud (*Id.* at ¶ 31), and attempted options fraud (*Id.* at ¶ 36). Approximately 50 predicate acts are set forth in detail in the Verified Complaint, fulfilling RICO's pattern requirement (*Id.* at ¶¶ 79-128). When Beck refused to participate in and became a threat to the Defendant Directors' continued racketeering activities, he was discredited and terminated (*Id.* at ¶¶ 12-13 and 43-60).

2. The Eleventh Circuit's Findings Based Upon The Evidence Presented.

Based upon the evidence presented, which is discussed in further detail in Section 3, *infra*, the Eleventh Circuit found as follows:

> This case arises out of the relationship between . . . Beck, the plaintiff, and members of the board of directors of the Southeastern Insurance Group (SIG). SIG was a holding company founded in 1983. It owned three subsidiaries, all of which were in the business of writing surety

bonds for construction contractors. The defendants in this case were all directors of SIG at one time.

In 1987, some of the directors of SIG (including the defendants) began engaging in improper activity. For instance, they set up an entity called Construction Performance Corporation (CPC), which extracted substantial "fees" from otherwise non-creditworthy contractors in order to qualify them for SIG surety bonds, in violation of insurance regulations. The directors reneged on promises to indemnify certain contractors, and diverted corporate funds to their personal use. Finally, these directors knowingly classified certain SIG liabilities as assets on SIG's financial statements, causing the statements drastically to overestimate the corporation's value. These false financial statements were then given to regulators, shareholders, and creditors.

This misconduct eventually led to a lawsuit by the Florida Department of Insurance and a shareholders' derivative suit against SIG's officers and directors. In January 1990, as a result of the illegal activities of certain SIG directors and the consequent lawsuits, SIG filed for bankruptcy in the Southern District of Florida.

Meanwhile, in August 1983, SIG had hired Beck to serve as president and as a member of the board of directors. His employment contract, as revised in 1986, did not expire until 1991. The contract specified the grounds on which Beck's employment could justifiably be terminated, and stated that termination for any other reason would result in SIG being required to repurchase Beck's substantial stock holdings in

the company. The repurchase price would be the fair market value of the stock as determined by an investment bank.

For most of his tenure, Beck was unaware of the illegal activities of the other SIG officers and directors. When he became aware of this misconduct in early 1988, he attempted to correct them internally and informed insurance regulators about improprieties in SIG's financial statements. The other directors, afraid that Beck might expose their misdeeds, arranged for a consulting firm to write a report criticizing Beck's performance, thus providing the directors an excuse to terminate Beck's employment without having to repurchase Beck's stock. In May 1988, Beck was fired.

Beck v. Prupis, 162 F.3d 1090, 1093-1094 (11th Cir. 1998) (CP App. 2-4) (footnotes omitted).

3. The Underlying Evidence.

a. Background Facts.

SIG was a Florida-based insurance holding company. Until 1990, when it filed a petition for bankruptcy, SIG owned several insurance company subsidiaries, which were in the business of writing surety bonds for construction contractors (Verified Complaint at ¶ 7 (JA 57)). Pursuant to an employment agreement that, with amendments, was to expire in 1991, Beck served as SIG's president from its inception, in 1983, until he was wrongfully terminated in 1988 (*Id.* at ¶ 43 (JA 67)).

b. The Evidence of the Pattern of Racketeering Activity.[1]

i. Extortion of contractors.

Pursuant to their RICO conspiracy, the Defendant Directors extorted scores of contractors (R161-Ex15 at 34-35, 58-61, 180, 202-205; R161-Ex34 at 127-128; R161-Ex25 at 100-101, 336, 344; R161-Ex23 at 103).[2] Specifically, in early 1987, certain of the Defendant Directors created a separate corporation, Contractors Performance Corp. ("CPC"), to extort contractors applying for surety bonds from the SIG insurance subsidiaries (R161-Ex15 at 18-23; R161-Ex23 at 105-108; R161-Ex31 at 47-50; JA 61 at ¶ 23). The Defendant Directors forced the contractors to pay illegal fees (from 50% to 300% of the bond premium) to CPC to "qualify" for surety bonds, in addition to the surety bond premium the contractors were already paying to the SIG insurance subsidiaries (R161-Ex15 at 180;

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[1] Only some of the evidence of some of the Defendant Directors' racketeering conduct is highlighted in this section. For a more thorough discussion of the details of all of the racketeering conduct, see Beck's Statement of Material Facts in Opposition to the New Jersey Group's Motion for Summary Judgment (JA 234-260); Beck's Memorandum of Law in Opposition to the New Jersey Group's Motion for Summary Judgment (JA 261-284); the exhibits to both of these documents (Record 160-162); and Beck's Initial Brief filed in the Eleventh Circuit Court of Appeals (JA 303-371).

[2] The district court clerk placed many of the exhibits filed, due to their volume, in expandable folders, without numbering the pages. Accordingly, citations to those exhibits will be as follows: "R(Record document number) – Ex(exhibit number) at (page number or paragraph)". For example, page 18 of Exhibit 15 to document 161 will be cited as R161-Ex15 at 18.

R161-Ex23 at 105-108; JA 61 at ¶ 23; R162-Ex50 at 3-4; R161-Ex18 at ¶ 4).

Contractors seeking bonds from the SIG insurance subsidiaries were threatened that, unless they agreed to pay these illegal fees to CPC, bonds would not be issued (R161-Ex15 at 194; R161-Ex32 at 86-87; JA 62 at ¶ 24; R162-Ex50 at 3-4). In most cases, the financial condition of these contractors prevented them from obtaining bonds elsewhere (R161-Ex23 at 83, 120-121). More than one hundred contractors applying for SIG surety bonds were forced to agree to pay these illegal fees to CPC (R161-Ex33).

One example of this illegal conduct involved JJW Construction, Inc. ("JJW"). JJW, an applicant for surety insurance at SIG's insurance subsidiary, was extorted to pay a $275,000 fee to CPC in exchange for the posting of a $500,000 letter of credit from one of the Defendant Directors, Leonard Bellezza ("Bellezza") (R161-Ex15 at 58-59; R161-Ex32 at 42-45, 75-76; R161-Ex34 at 126-130; R161-Ex25 at 84-86, 336 and 343; R161-Ex35; R161-Ex18 at ¶ 4; R161-Ex30 at 4; JA 62 at ¶¶ 24-25, JA 78-79 at ¶¶ 97-105). Another example involved Chief Structures, Inc. ("Chief") (for a more thorough discussion of the extortion of Chief, see Subsection ii, *infra*).

ii. Fraudulent financial statements.

As part of their conspiracy, the Defendant Directors falsified SIG's financial statements, resulting in a material overstatement of the value and net income of SIG and its subsidiaries. The Defendant Directors then used these

fraudulent financial statements to obtain a $7.5 million loan from First Fidelity Bank and as the basis of reports to SIG's regulators, creditors and shareholders (R162-Ex53 at 182-183; R162-Ex43 at 25-26, 153-157, 182; JA 138).

One example of the manner in which the Defendant Directors falsified SIG's financial statements involved Chief, a contractor who was issued bonds by one of SIG's insurance company subsidiaries ("SCI"). In sum, the Defendant Directors and others caused SIG to account for payments made as a result of claims against Chief as a "note receivable", an asset, instead of as a claims payment, which is an expense (R162-Ex51 at 5; R161-Ex30 at 5-6; R161-Ex20 at 6-7; R161-Ex22 at 5-6). SIG neither established nor reported loss reserves for future claims payments (R161-Ex17 at 215-218). This resulted in the fraudulent overstatement of SIG's financial condition by millions of dollars (R161-Ex30 at 5-6; R162-Ex51 at 5-6).

Specifically, in 1987, Chief notified SIG that it was experiencing financial difficulties and would be unable to meet its obligations under construction contracts for which SCI had provided bonds (R161-Ex19 at ¶¶ 6-8). Thereafter, Chief requested additional bonds (R161-Ex20 at 4). SCI determined that Chief would need to post collateral or produce an additional indemnitor to qualify for the new bonds (*Id.*). Bellezza agreed to sign a general indemnity agreement to enable new bonds to be issued to Chief, in exchange for a participation in Chief's profits (R161-Ex21 at 91-92; R161-Ex20 at 5). Because the profit participation fees could not be paid to Bellezza without violating insurance laws, SIG's affiliate, CPC, was used as

a front (R161-Ex23 at 100-118). Contrary to his representation, Bellezza never executed the general indemnity agreement (R161-Ex20 at 5).

Various members of the Defendant Directors drafted an agreement (the "Chief Agreement") and forced Chief to execute it (*Id.* at 4-5; R161-Ex17 at 102-103). This agreement provided: (1) Chief would form a new entity and 10% of the shares would be owned by CPC, which would elect one half of the Board of Directors of the new entity; (2) CPC would provide financial guarantees to SCI in order for SCI to issue the new bonds to Chief; (3) CPC would "arrange" for funds to be loaned to Chief, to complete projects bonded by SCI; (4) Bonds issued prior to the Chief Agreement would be classified as Group A bonds and new bonds issued after the Chief Agreement would be classified as Group B bonds; and (5) CPC would receive 50% of the profits on Group B bonds, but not less than $500,000 (R161-Ex24).

The Defendant Directors required the profit participation of CPC on construction projects bonded by SCI as a condition for issuing the surety bonds (R161-Ex15 at 89-90, 129, 137-140; R161-Ex23 at 87-90; R162-Ex50 at 2). The CPC fees were payable in addition to the premium payable to SCI (R161-Ex23 at 112, 117-118; R162-Ex50 at 3). These CPC fees constituted an illegal and excessive premium in direct violation of insurance laws (R161-Ex23 at 100-118; R162-Ex50 at 3-4). Chief was extorted into agreeing to pay these premiums to CPC (*see also* JA 148, 152-153, 156; JA 62 at ¶¶ 24, 25, JA 83 at ¶ 127). Furthermore, the arrangement of loans by CPC to Chief was a sham, with CPC fronting for the SIG insurance subsidiaries, which actually did advance funds to Chief (R162-Ex50 at 2-3). Such loans were, however, prohibited under Florida insurance law (R161-Ex25 at 246-249; R161-Ex26).

The Chief Agreement was executed at a time when there were claims and losses on the prior bonds to Chief (the Group A bonds) (R161-Ex17 at 78-84; R161-Ex15 at 90-93; R161-Ex24 at 1). This agreement therefore allowed the Defendant Directors to hide the losses, and actually to characterize them as an asset (JA 60 at ¶ 19).

The Defendant Directors concealed the claims on the Chief bonds in SIG's financial reports (R161-Ex18 at ¶ 3). In fact, the Claims Summaries that were disseminated (by mail) at the time (R161-Ex27 and Ex28; *see also* R161-Ex13 at 149) omitted any listing of the Chief bonds (R161-Ex18 at ¶ 3C; R161-Ex13 at 149). These misleading Claims Summaries were also used to reflect the loss expense and loss reserve in the September 30, 1987 financial statements of SIG and its insurance company subsidiaries (R161-Ex18 at ¶ 3).

The omission of the Chief claims was a material fact. The Chief claims eventually amounted to paid losses for SIG in excess of $6 million (R161-Ex29).

iii. Looting SIG.

Additionally, the Defendant Directors looted SIG and its subsidiaries (R160-Ex1 at ¶¶ 20-22; R162-Ex51 at 11-12; JA 138-139). For example, after Beck's termination, the Defendant Directors stole $2.5 million of policyholder surplus from SIG's subsidiaries and transferred it to Bellezza, Harry Olstein (another of the Defendant Directors), and others (R162-Ex50 at 5-7; R162-Ex51 at 9-12;

R162-Ex40 at 66-68). They also stole $3.5 million of policyholder surplus from SIG's subsidiaries and transferred it to First Fidelity Bank (R162-Ex50 at 5-7; R162-Ex51 at 3, 11-12). Substantial funds also were taken improperly from one of SIG's subsidiaries by the back-dating of a reinsurance pooling agreement (R162-Ex50 at 5; R162-Ex51 at 7-8). Surplus interest in the amount of $3.6 million was paid to SIG and used primarily to fund debenture-holder payments, the vast majority of which were made to the Defendant Directors, while this money should have been paid to other parties (R162-Ex51 at 8; R162-Ex52 at 27, 64; R162-Ex53 at 161-168; R160-Ex4; R160-Ex5; R160-Ex6).

iv. Fraudulent promises to indemnify.

The Defendant Directors also made fraudulent statements about indemnifying SIG's insurance company subsidiaries so that bonds could be written to contractors in which the Defendant Directors had some interest. *See, e.g.*, R162-Ex54 at 2, R161-Ex20 at 2-3, and R161-Ex34 at 98-115 (relating to Aldrich Construction Co.); Subsection ii, *supra* (relating to Chief).

c. Beck's Termination in Furtherance of the RICO Conspiracy.

In furtherance of their racketeering conspiracy, the Defendant Directors purposely kept Beck out of the information loop at SIG (R162-Ex36 at 26-36, 39, 104-106, 129-130; R161-Ex16 at 32-35; R162-Ex37 at 24, 36-37; R162-Ex38 at 7-10). In fact, SIG employees were specifically

instructed to withhold essential information from Beck (*Id.*; R162-Ex39 at 23-25).

Nevertheless, in the Spring of 1988, Beck began to discover some of the illegal conduct. He prevented the theft of more than $2 million from one of SIG's subsidiaries (R162-Ex40 at 66; R161-Ex12 at 172-173) (as more fully detailed in section 3(b)(iii), *supra*, after Beck's termination, the Defendant Directors committed this theft). In addition, Beck contacted SIG's regulators and advised them that he had learned that the company's financial statements may have been overstated (R162-Ex41 at 6-7, 19; R161-Ex13 at 154-158).

Seeing Beck as a threat to their continued criminal conduct, the Defendant Directors embarked on a scheme to create false causes to terminate and discredit Beck (R162-Ex36 at 26-36, 39, 104-106, 129-130; R162-Ex39 at 23-25, 42-46; R162-Ex42 at 15-16, 71-74; R162-Ex43 at 80-85; R161-Ex12 at 171-173). Through a series of secret meetings from which Beck was excluded, the Defendant Directors hatched their conspiracy and retained Firemark Consultants, Inc. ("Firemark"), a consulting company (JA 137). Firemark's chairman confessed that Firemark fabricated things about Beck and recommended his termination because the president of Firemark wanted Beck's job (R162-Ex44 at 17-18). Firemark also fabricated documents to substantiate its recommendation to terminate Beck (*Id.*; R162-Ex47 at 42-43). On May 13, 1988, the Defendant Directors did, in fact, terminate Beck (JA 67-72). As part of Firemark's reward for its participation, the Defendant Directors gave Firemark's president Beck's job (R161-Ex16 at 80-81; R162-Ex48 at 372-373).

4. The Decisions Below.

Beck's claims were originally brought as cross-claims while he was a defendant in a shareholder derivative suit against SIG and its directors in the United States District Court for the District of New Jersey. *Beck*, 162 F.3d at 1093 n.1 (CP App. 2). Beck's cross-claims were subsequently severed and transferred to the Southern District of Florida. *Id.*; *see also* R1.

The United States District Court for the Southern District of Florida granted the Defendant Directors' Motion for Summary Judgment, holding that, assuming all evidence in Beck's favor to be true, as a matter of law, Beck lacked standing to assert a claim for a RICO conspiracy for either being "discharged in retaliation for reporting a RICO mail fraud scheme, or for refusing to participate in the scheme," citing the Eleventh Circuit cases of *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987), and *O'Malley v. O'Neill*, 887 F.2d 1557 (11th Cir. 1989), *cert. denied*, 496 U.S. 926, 110 S.Ct. 2620, 110 L.Ed.2d 641 (1990) (CP App. 42). *Morast* has since been disapproved of by this Court on other grounds. *Haddle v. Garrison*, ___ U.S. ___, ___, 119 S.Ct. 489, 491-492, 142 L.Ed.2d 502 (1998). The district court also relied on *Cullom v. Hibernia Nat'l Bank*, 859 F.2d 1211 (5th Cir. 1988), which the Fifth Circuit has since limited to cases involving violations of RICO's substantive provisions (*see Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143, 152-153 (5th Cir. 1997)), and *Willis v. Lipton*, 947 F.2d 998 (1st Cir. 1991), in granting the Motion for Summary Judgment on this claim (CP App. 42).

While noting that Beck had set forth evidence of illegal conduct, the Eleventh Circuit held as follows:

> This case hinges on the following question: Must a plaintiff bringing a civil RICO conspiracy claim prove that the overt act (in furtherance of the conspiracy) by which he was injured was an "act of racketeering"? We answer the question in the affirmative, and therefore affirm the district court's grant of summary judgment.

Beck, 162 F.3d at 1093 (CP App. 2). In so holding, the Eleventh Circuit expressly noted a conflict between the circuits on this issue, pointing to decisions from the Seventh, Third and Fifth Circuits that disagreed with its holding, and cases from the Eighth, First, Ninth and Second that agreed. *Id.* at 1098-1099 (CP App. 14-16). The Eleventh Circuit also declined to apply principles from this Court's recent holding in *Salinas v. United States*, 522 U.S. 52, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997), to a civil RICO action. *Beck*, 162 F.3d at 1099 n.18 (CP App. 16-17).

SUMMARY OF ARGUMENT

The Defendant Directors terminated Beck for his refusal to participate in, and his blowing the whistle on, their racketeering conduct. Beck's injuries thus were caused by an overt act committed in furtherance of the Defendant Directors' conspiracy to violate the substantive provisions of RICO. As such, Beck was injured by reason of a violation of a section of § 1962, specifically § 1962(d), which prohibits RICO conspiracies.

Under the plain and unambiguous language of § 1964(c), this is all that is required to confer upon Beck a right to sue under RICO. There is simply no requirement contained anywhere in the statute that the overt act committed in furtherance of the RICO conspiracy that injures a person's business or property also be a predicate act of racketeering. As there is no ambiguity, this plain meaning controls. In fact, writing a predicate act injury requirement into this section of the statute would render § 1962(d) superfluous to § 1962(c) in the civil context, because, if a predicate act of racketeering itself causes the plaintiff's injury, then the plaintiff may bring a civil suit for the violation of § 1962(c).

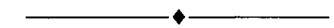
Additionally, under traditional concepts of conspiracy law, which are incorporated into the RICO statute, no predicate act or substantive crime whatsoever need be committed to establish the conspiracy. The overt act need not even be unlawful, so long as it furthers the conspiracy. Congress intended RICO conspiracy law to be broader than traditional conspiracy law: to establish a RICO conspiracy, no overt act is even necessary. Congress did not so expand traditional conspiracy law and, at the same time, work the radical change of requiring the commission of a predicate act in order to establish civil liability for a RICO conspiracy.

Under *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992), proximate causation provides the necessary limiting rationale so that not every injury that occurs by virtue of an overt act committed in furtherance of a conspiracy to violate RICO is actionable under RICO. The chain of causation is limited to direct injuries proximately caused

by the violation of § 1962 (not by the predicate acts themselves). Beck was directly injured by the Defendant Directors' conspiracy. His damages are unique, discreet and easily ascertainable. Beck, fired by the Defendant Directors to perpetuate their conspiracy, is within the zone of interests RICO is meant to protect.

Last, the intent of the RICO statute, public policy and legislative history all support this result. RICO is to be liberally construed to effectuate its remedial purpose. Congress drafted RICO in such a way so as to encourage private attorneys general to bring civil actions to assist in the fight against organized crime (which is not the sole limit of RICO's focus). Allowing persons such as Beck the right to sue would further these remedial purposes. This is especially true given the important function that whistleblowers serve in today's society, strengthening the evidence gathering process and providing an important tool in the fight against crime, both of which are expressed goals of RICO, as stated by Congress.

In sum, the question that the Eleventh Circuit determined this case hinged upon – "Must a plaintiff bringing a civil RICO conspiracy claim prove that the overt act (in furtherance of the conspiracy) by which he was injured was an 'act of racketeering'?" – should be answered in the negative and this case should be reversed and remanded for further proceedings.



ARGUMENT

I. THE RICO STATUTE CLEARLY AND UNAMBIGUOUSLY PROVIDES A RIGHT TO SUE TO A PERSON INJURED BY REASON OF AN OVERT ACT, WHICH IS NOT ALSO A PREDICATE ACT, COMMITTED IN FURTHERANCE OF A RICO CONSPIRACY.

The civil remedies provision of RICO provides that a person may sue thereunder if he has been injured "by reason of a violation of section 1962." 18 U.S.C. § 1964(c). Section 1962 contains four subsections. The first three, subsections (a) through (c), are RICO's substantive sections. The fourth, subsection (d), provides: "It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section." Thus, § 1964(c) algebraically provides that a person who has been injured by reason of a conspiracy to violate any of the provisions of subsections (a), (b), or (c) may sue therefor.

A person injured by an overt act committed in furtherance of a conspiracy to violate RICO's substantive sections has been injured by reason of a violation of § 1962(d). Under the clear and unambiguous language of the RICO statute, no more is necessary. There is no additional requirement contained anywhere in the statute that the injury-causing overt act also be a predicate act of racketeering listed in § 1961(1). As stated by the Seventh Circuit, "Congress could have written RICO to state that only those injured by reason of predicate acts committed as part of a RICO violation could sue. It did not, and for courts to read § 1964(c) as if that is what Congress wrote would be tantamount to rewriting the statute." *Schiffels v.*

Kemper Financial Services, Inc., 978 F.2d 344, 350 (7th Cir. 1992) (citations omitted). The Fifth Circuit's interpretation of the RICO statute similarly stays true to the language chosen by Congress:

> . . . we refuse to place "a limitation on RICO standing that RICO itself does not impose." *Schiffels*, 978 F.2d at 346. Since § 1962(d) does not require that a predicate racketeering act actually be committed, it follows that the act causing a § 1964(c) claimant's injury need not be a predicate act of racketeering. A person injured by an overt act in furtherance of a RICO conspiracy has been injured by reason of the conspiracy, and thus has § 1964(c) standing. *See Id.* at 349.

Khurana, 130 F.3d at 153.

It is fundamental that, where there is no ambiguity in the language of a statute, the plain meaning controls:

> Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and "the statutory scheme is coherent and consistent." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290 (1989); *see also Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254, 112 S.Ct. 1146, 1149-1150, 117 L.Ed.2d 391 (1992).

Robinson v. Shell Oil Co., 519 U.S. 337, 340, 117 S.Ct. 843, 846, 136 L.Ed.2d 808 (1997); *see also United States v. Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246 (1981) ("In determining the scope of a statute, we look first to its language. If the statutory language is

unambiguous, in the absence of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.' ") (citing *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980)). This Court has applied this rule to the RICO statute on numerous occasions. *See, e.g., Salinas*, 522 U.S. at 58, 118 S.Ct. at 474 (citing, *inter alia, Ardestani v. INS*, 502 U.S. 129, 135, 112 S.Ct. 515, 519-520, 116 L.Ed.2d 496 (1991)); *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 260-261, 114 S.Ct. 798, 805-806, 127 L.Ed.2d 99 (1994); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 493-500, 105 S.Ct. 3275, 3283-3287, 87 L.Ed.2d 346 (1985); *Russello v. United States*, 464 U.S. 16, 20, 104 S.Ct. 296, 299, 78 L.Ed.2d 17 (1983); *Turkette*, 452 U.S. at 580-581, 101 S.Ct. at 2527-2528. In *Sedima*, the Court rejected a "racketeering injury" requirement, as contrary to the plain language of the RICO statute. *Sedima*, 473 U.S. at 495, 105 S.Ct. at 3284 ("There is no room in the statutory language for an additional, amorphous 'racketeering injury' requirement."). The Court held that the insertion of a requirement not otherwise present in the statute was " . . . a form of statutory amendment [not] appropriately undertaken by the courts." *Id.*, 473 U.S. at 500, 105 S.Ct. at 3287; *see also National Organization for Women*, 510 U.S. at 260-261, 114 S.Ct. at 805-806 (rejecting "economic motive" requirement for a civil RICO claim based upon a violation of § 1962(c), as being contrary to the language of the statute); *Turkette*, 452 U.S. at 580-581, 101 S.Ct. at 2527 (rejecting requirement that an enterprise be "legitimate," as being contrary to the language of the statute). Similarly, the clear and unambiguous statutory language chosen by

Congress contains no predicate act injury requirement for civil liability for a conspiracy to violate RICO.

It is also fundamental that a statute's provisions should not be construed so as to render aspects of the statute superfluous. *See, e.g., Kawaauhau v. Geiger*, 523 U.S. 57, 62, 118 S.Ct. 974, 977, 140 L.Ed.2d 90 (1998) (" . . . we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.") (citing *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 837, 108 S.Ct. 2182, 2189, 100 L.Ed.2d 836 (1988)); *United States v. Menasche*, 348 U.S. 528, 538-539, 75 S.Ct. 513, 520, 99 L.Ed. 615 (1955) ("The cardinal principle of statutory construction is to save and not to destroy. It is our duty to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section . . . .") (citations omitted). Construing the RICO statute to require that the injury-causing overt act committed in furtherance of a conspiracy also be a predicate act of racketeering, in fact, would render § 1962(d) superfluous to § 1962(c) in the civil context. A person directly injured by reason of a predicate act of racketeering may bring a civil suit for a violation of § 1962(c). *See, e.g., Sedima*, 473 U.S. at 496-498, 105 S.Ct. at 3285-3286; *Holmes*, 503 U.S. at 269-270, 112 S.Ct. at 1318. An identical requirement for a suit brought for a violation of § 1962(d) " . . . would ignore § 1964(c)'s provision for civil liability for, *inter alia*, a violation of § 1962(d) that proximately injures a person's property or business." *Khurana*, 130 F.3d at 153. "[I]t would be anomalous to allow plaintiffs to recover for harm suffered from investment in [§ 1962(a)], or control [§ 1962(b)] or conduct of [§ 1962(c)], a pattern of racketeering, yet preclude

recovery for conspiracy to commit these violations simply because the overt act that furthers the conspiracy does not itself qualify as racketeering." *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1170 (3d Cir. 1989).

The circuit courts that have written into the RICO statute a requirement that the overt act causing the injury also be a predicate act have utilized reasoning, which, while purporting to be based upon the statutory language, actually ignores the clear language of the statute. *See, e.g., Bowman v. Western Auto Supply Co.*, 985 F.2d 383, 388 (8th Cir.) ("Imposing the predicate act requirement on civil claims based on violations of § 1962(d) narrows the focus of those suits to the specific racketeering activity that lies at the heart of the RICO statute."), *cert. denied*, 508 U.S. 957, 113 S.Ct. 2459, 124 L.Ed.2d 674 (1993); *Beck*, 162 F.3d at 1098-1099 (CP App. 15-16) (same); *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 48 (1st Cir. 1991) (same); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990) (same).

This argument, however, ignores the plain, unambiguous meaning of the language selected by Congress and seeks to elevate over that language a perceived notion of the intent of Congress. Especially given the language used by Congress and the clear expressions of the true intent of the legislature, this is inappropriate. *See Sedima*, 473 U.S. at 494, 105 S.Ct. at 3284 (statement that " . . . plaintiff must seek redress for an injury caused by conduct that RICO was designed to deter is unhelpfully tautological.").

> . . . [C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.

Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-254, 112 S.Ct. 1146, 1149, 117 L.Ed.2d 391 (1992) (citations omitted); *see also Salinas*, 522 U.S. at 56, 118 S.Ct. at 473; *Robinson*, 519 U.S. at 340-341, 117 S.Ct. at 846; *National Organization for Women*, 510 U.S. at 260-261, 114 S.Ct. at 805-806; *Turkette*, 452 U.S. at 593, 101 S.Ct. at 2534 (language of the RICO statute is the "most reliable evidence of [Congress'] intent . . . ."); *Khurana*, 130 F.3d at 153 (" . . . the provision for conspiracy violations was part and parcel of Congress's intent and plan and cannot be ignored.") (citing *Sedima*, 473 U.S. at 499, 105 S.Ct. at 3286).

II. REQUIRING PREDICATE ACT INJURY IS CONTRARY TO TRADITIONAL CONSPIRACY PRINCIPLES, WHICH ARE INCORPORATED BY CONGRESS INTO THE RICO STATUTE'S CONSPIRACY PROVISIONS.

A. Traditional Conspiracy Concepts Are Incorporated Into RICO's Conspiracy Provisions.

In the absence of a clear dictate to the contrary, when Congress legislates on a subject for which well-established legal principles exist, the settled principles are presumed to be "imported" into the statute. *See, e.g.,*

Kolstad v. American Dental Assoc., ___ U.S. ___, ___, 119 S.Ct. 2118, ___, ___ L.Ed.2d ___, 1999 WL 407481, *7 (1999) ("We assume that Congress, in legislating on punitive awards, imported common law principles governing this form of relief."); *Murphy Brothers, Inc. v. Michetti Pipe Stringing, Inc.*, ___ U.S. ___, ___, 119 S.Ct. 1322, 1327-1329, 143 L.Ed.2d 448 (1999) (presuming that traditional understandings regarding removal were not changed by Congress when it enacted 28 U.S.C. § 1446(b)); *United States v. Wells*, 519 U.S. 482, 491, 117 S.Ct. 921, 927, 137 L.Ed.2d 107 (1997) ("We do, of course, presume that Congress incorporates the common-law meaning of the terms it uses if those terms have accumulated settled meaning under the common law and the statute does not otherwise dictate.") (citations omitted); *Astoria Federal Savings & Loan Assoc. v. Solimino*, 501 U.S. 104, 108-110, 111 S.Ct. 2166, 2169-2171, 115 L.Ed.2d 96 (1991) (" . . . Congress is understood to legislate against a background of common-law adjudicatory principles.") (citations omitted). "Congress is, after all, not a body of laymen unfamiliar with the commonplaces of our law." *Callanan v. United States*, 364 U.S. 587, 594, 81 S.Ct. 321, 325, 5 L.Ed.2d 312 (1961) (citations omitted).

In *Salinas*, this Court applied this principle to conspiracies under § 1962(d):

> In interpreting the provisions of § 1962(d), we adhere to a general rule: When Congress uses well-settled terminology of criminal law, its words are presumed to have their ordinary meaning and definition. *See Morissette v. United States*, 342 U.S. 246, 263, 72 S.Ct. 240, 249-250, 96 L.Ed. 288 (1952). The relevant statutory phrase in § 1962(d) is "to conspire." We presume that Congress intended to use the term in its conventional sense, and certain well-established principles follow.

Salinas, 522 U.S. at 63, 118 S.Ct. at 476-477. Traditional conspiracy concepts should be applicable to the instant matter, as well.

B. Rejection of the Predicate Act Injury Requirement Is Warranted by Traditional Concepts of Conspiracy Law.

The gist of a conspiracy is the agreement itself. *United States v. Broce*, 488 U.S. 563, 570-571, 109 S.Ct. 757, 763, 102 L.Ed.2d 927 (1989) (citing *Braverman v. United States*, 317 U.S. 49, 53, 63 S.Ct. 99, 101, 87 L.Ed. 23 (1942)). "It has been long and consistently recognized by the Court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses." *Callanan*, 364 U.S. at 593, 81 S.Ct. at 325 (citations omitted). " . . . [A] conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. The conspiracy, however fully formed, may fail of its object, however earnestly pursued; the contemplated crime may never be consummated; yet the conspiracy is none the less punishable." *United States v. Rabinowich*, 238 U.S. 78, 85, 35 S.Ct. 682, 683-684, 59 L.Ed. 1211 (1915) (citations omitted). Once an overt act in furtherance of the conspiracy is committed, the conspiracy imputes liability to all conspirators. *Pinkerton v. United States*, 328 U.S. 640, 646-647, 66 S.Ct. 1180, 1183-1184, 90 L.Ed. 1489 (1946) (citations omitted). In fact, a person " . . . may be liable for conspiracy even though he was incapable of committing the substantive offense." *Salinas*,

522 U.S. at 64, 118 S.Ct. at 477 (citing *Rabinowich*, 238 U.S. at 86, 35 S.Ct. at 684). Moreover, the overt act, itself, need not be criminal or even unlawful, as long as it furthers the conspiracy. *See, e.g., Iannelli v. United States*, 420 U.S. 770, 785 n.17, 95 S.Ct. 1284, 1294 n.17, 43 L.Ed.2d 616 (1975) ("Indeed, the [overt] act can be innocent in nature, provided it furthers the purpose of the conspiracy.") (citations omitted); *Rabinowich*, 238 U.S. at 86, 35 S.Ct. at 684 (the overt act " . . . need not be of itself a criminal act; still less need it constitute the very crime that is the object of the conspiracy.") (citations omitted). "We have consistently held that the common law understanding of conspiracy does not make the doing of any act other than the act of conspiring a condition of liability." *United States v. Shabani*, 513 U.S. 10, 13-14, 115 S.Ct. 382, 384, 130 L.Ed.2d 225 (1994) (citations omitted).

Under traditional conspiracy law, no substantive crime need be committed whatsoever to establish liability. Thus, these traditional concepts further support the plain meaning of the language chosen by Congress in the RICO statute, that a person should have the right to sue for an injury caused by an overt act, even where there are no predicate acts of racketeering committed.

C. This Court's Opinion in *Salinas* Supports This Result.

In *Salinas*, this Court made clear that the RICO conspiracy statute is actually "more comprehensive than the general conspiracy offense in § 371." *Salinas*, 522 U.S. at 63, 118 S.Ct. at 476. For § 1962(d), "[t]here is no requirement of some overt act or specific act . . . unlike the

general conspiracy provision applicable to federal crimes, which requires that at least one of the conspirators have committed an 'act to effect the object of the conspiracy.' " *Id.*

By its definition, a predicate act committed in furtherance of a RICO conspiracy would also qualify as an overt act. In *Salinas*, this Court confirmed that Congress "broadened conspiracy coverage by omitting the requirement of an overt act." *Id.*, 522 U.S. at 64, 118 S.Ct. at 477. Just as Congress " . . . did not, at the same time, work the radical change of requiring the Government to prove each conspirator agreed that he would be the one to commit two predicate acts," *Id.*, Congress also certainly did not work the radical change of requiring the actual commission of a predicate act, i.e., the underlying substantive crime, to establish civil liability for a RICO conspiracy.

In the present case, the Eleventh Circuit attempted to distinguish *Salinas* by drawing a distinction between criminal and civil conspiracies. The court stated that criminal conspiracies target agreements to engage in criminal activity, while civil conspiracies simply serve to impute liability. *Beck*, 162 F.3d at 1099 n.18 (CP App. 16-17). There is no basis for such a distinction, however, especially in the RICO context.

Criminal conspiracies, like civil conspiracies, serve to impute liability. *See Salinas*, 522 U.S. at 64, 118 S.Ct. at 477 (citing *Pinkerton*, 328 U.S. at 646, 66 S.Ct. at 1184 ("And so long as the partnership in crime continues, the partners act for each other in carrying it forward.")). Furthermore, the gist of civil conspiracies is the agreement itself, as

well, while adding the requirement of an injury. As the Seventh Circuit reasoned:

> It is true that an agreement to violate RICO, standing alone, cannot harm anybody. Some act in furtherance of that agreement (an "overt act," in legal parlance) is necessary. However, since RICO conspiracy does not require the actual commission of a predicate act, it follows that the act causing plaintiff's injury need not be a predicate act of racketeering.

Schiffels, 978 F.2d at 348-349; *see also Khurana*, 130 F.3d at 153. Moreover, as more fully discussed in Section IV(A), *infra*, the civil remedies provisions of RICO, which include civil remedies for conspiracies, are remedial in nature, and serve as another tool in the fight against organized criminal activity. In fact, *Salinas* has not been so restrictively read by lower courts, which have repeatedly applied it to civil proceedings. *See, e.g., Goren v. New Vision Internat'l, Inc.*, 156 F.3d 721, 730-731 (7th Cir. 1998); *BCCI Holdings (Luxembourg), S. A. v. Khalil*, ___ F.Supp.2d ___, ___, 1999 WL 432560, *36 (D.D.C. June 23, 1999); *Nystrom v. Associated Plastic Fabricators, Inc.*, ___ F.Supp.2d ___, ___, 1999 WL 417848, *7 (N.D. Ill. June 18, 1999); *Florida Software Systems, Inc. v. Columbia/HCA Healthcare Corp.*, ___ F.Supp.2d ___, ___, 1999 WL 254374, *5 (M.D. Fla. April 19, 1999); *Southern Intermodal Logistics, Inc. v. D.J. Powers Co.*, 10 F.Supp.2d 1337, 1361 n.45 (S.D. Ga. 1998) ("this Court will apply *Salinas* to this [civil] action.").

III. RICO'S PROXIMATE CAUSE REQUIREMENT, ARTICULATED BY THIS COURT IN *HOLMES*, IS THE APPROPRIATE LIMITING FACTOR, AND, UNDER SUCH AN ANALYSIS, BECK'S INJURIES ARE PROXIMATELY CAUSED BY THE DEFENDANT DIRECTORS' CONSPIRACY TO VIOLATE RICO.

Of course, not every injury flowing from every overt act should confer upon the victim a right to sue under RICO. An example of how this could be taken to an extreme was articulated by the Seventh Circuit:

> A more graphic example would be where a group of people conspire to operate an arson-for-hire enterprise. While driving to buy gasoline with which to start fires, one of the conspirators collides with and seriously damages another automobile. Although the damage to the automobile is injury to property "by reason of" an act to further the RICO conspiracy, it would be absurd to suggest that the owner of the damaged automobile could sue under RICO; other than "but for" causation, the damage has nothing to do with RICO.

Schiffels, 978 F.2d at 350. The appropriate manner to limit the chain of causation, however, is not for courts to write into the RICO statute a predicate act injury requirement that does not otherwise exist. Rather, it is to conduct the appropriate proximate cause analysis as articulated by this Court in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992). *See, e.g., Mendelovitz v. Vosicky*, 40 F.3d 182 (7th Cir. 1994).

In *Holmes*, the Court held that the language "by reason of" contained in § 1964(c) required that a defendant's

violation of § 1962 be the proximate cause of the plaintiff's injuries, not merely the "but for" cause. *Id.*, 503 U.S. 265-266, 268; 112 S.Ct. at 1316-1318. In so holding, this Court noted that the concept of "proximate cause" is not capable of precise definition, but does require "some direct relation between the injury asserted and the injurious conduct alleged." *Id.*, 503 U.S. at 268, 112 S.Ct. at 1318.

> Here we use "proximate cause" to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's acts. At bottom, the notion of proximate cause reflects "ideas of what justice demands, or of what is administratively possible and convenient." W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 41, p. 264 (5th ed. 1984). . . . Thus, a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover. *See, e.g.*, 1 J. Sutherland, *Law of Damages* 55-56 (1982).

Id.; *see also Blue Shield of Virginia v. McCready*, 457 U.S. 465, 477 n.13, 102 S.Ct. 2540, 2547 n.13, 73 L.Ed.2d 149 (1982).

The Court further explained that "directness of relationship" was a central element of the proximate cause analysis for at least three reasons:

> First, the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent factors. Second, quite apart from problems of proving factual causation, recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries. And, finally, the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely.

Holmes, 503 U.S. at 269-270; 112 S.Ct. at 1318-1319 (citing *Associate General Contractors of Cal. v. Carpenters*, 459 U.S. 519, 541-544, 103 S.Ct. 897, 910-912, 74 L.Ed.2d 723 (1983), remaining citations omitted).

In *Holmes*, the plaintiff's ("SIPC") injuries were not direct, and thus failed to meet the proximate cause requirement. There, the defendants, through a stock manipulation scheme, injured broker dealers. As a result, the broker dealers could not pay claims made by their customers. The resulting insolvency of the broker dealers (an intervening act) triggered SIPC's statutory duty to reimburse the ultimately injured customers. As "[t]he general tendency of the law, in regard to damages at least, is not to go beyond the first step," *Id.*, 503 U.S. at 271-272, 112 S.Ct. at 1319-1320 (citations omitted), SIPC's injuries were not proximately caused by the defendants' RICO violations and, accordingly, SIPC had no right to sue under RICO.

Beck's injuries, however, were directly and proximately caused by the Defendant Directors' conspiracy to violate RICO. The injuries, in fact, occurred in "the first step." The Defendant Directors terminated Beck as an

overt act in furtherance of their conspiracy, causing an immediate, direct, foreseeable and cognizable injury.

The underlying purposes of the direct injury/proximate cause requirement demonstrate that the requirement has been satisfied in the present case. First, the precise amount of Beck's damages attributable to this violation are easily ascertainable – the value of his lost employment. Second, there is no need for any analysis, let alone a complicated one, for apportioning the damages caused to Beck, as opposed to others, by the RICO violation. Beck's damages are discreet and measurable. In fact, Beck is the only person who has suffered these direct injuries by virtue of the overt act of his termination. Last, Beck, and whistleblowers generally, are the first wave of potential deterrents of racketeering conduct. *See* Section IV(B), *infra* (discussion of value of whistleblowers in combating organized crime). While others may ultimately assert RICO claims based upon injuries from the predicate acts of racketeering themselves (here, state regulatory bodies and the shareholders of SIG ultimately initiated actions based, in part, upon Beck's uncovering the Defendant Directors' conspiracy), private attorneys general able and motivated to initiate action at the initial stages of a conspiracy may deter predicate acts, preventing the consequent injuries.

Further, Beck, fired by the Defendant Directors to perpetuate their conspiracy, is within the "zone of interests" RICO is meant to protect. *Holmes*, 503 U.S. at 287, 112 S.Ct. at 1328 (Scalia, J., concurring).

> [In a case such as this one], an employee is fired to prevent the employee from causing the conspiracy to unravel by disclosing the scheme.

> Unlike in *Holmes*, the employee has been directly injured by the defendant's RICO violation. Just as important, the act causing the injury has been committed to further the conspiracy and is directly related to the conspiracy's goals. This brings the injured employee well within the zone of interests RICO is meant to protect.

Schiffels, 978 F.2d at 351.

The Eleventh Circuit below attempted to support its holding with *Holmes*:

> In the context of RICO's substantive provisions, the Supreme Court has held that a plaintiff's injuries must have been proximately caused by acts of racketeering. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 265-269, 112 S.Ct. 1311, 1316-1318, 117 L.Ed.2d 532 (1992). We believe that this reasoning applies equally well to RICO's conspiracy provisions.

Beck, 162 F.3d at 1098 (CP App. 15); *see also Bowman*, 985 F.2d at 387-388 (same). This, however, misapplies *Holmes*. In *Holmes*, the Court held that a person injured in his business or property may sue under § 1964(c) for a violation of § 1962, as long as his injury was proximately caused *by that violation of § 1962*, not by the predicate acts themselves. *See also Sedima*, 473 U.S. at 496, 105 S.Ct. at 3285 (" . . . 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*." (emphasis added)). In the present case, the subsection of § 1962 involved is subsection (d), prohibiting RICO conspiracies. To satisfy the mandates of *Holmes*,

then, the injury suffered by Beck must have been proximately caused by the Defendant Directors' RICO conspiracy, not by any predicate acts. *See, e.g., id.; BCCI Holdings (Luxembourg), S.A. v. Khalil*, ___ F.Supp.2d ___, ___, 1999 WL 432560, *40 (D.D.C. June 23, 1999) ("Applying § 1964(c)'s causation element to a § 1962(d) violation requires that the conspiracy, rather than the substantive RICO violation or the predicate acts, be the proximate cause of plaintiffs' injuries.").

IV. THE INTENT OF THE RICO STATUTE, PUBLIC POLICY AND LEGISLATIVE HISTORY ALL SUPPORT A WHISTLEBLOWER'S RIGHT TO SUE WHEN TERMINATED AS AN OVERT ACT IN FURTHERANCE OF A RICO CONSPIRACY.

A. RICO Is to Be Liberally Construed to Effectuate its Remedial Purpose.

As this Court stated in *Sedima*:

> RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach, *see United States v. Turkette*, 452 U.S. 576, 586-587, 101 S.Ct. 2524, 2530-2531, 69 L.Ed.2d 246 (1981), but also of its express admonition that RICO is to "be liberally construed to effectuate its remedial purposes," Pub.L. 91-452, § 904(a), 84 Stat. 947.

Sedima, 473 U.S. at 497-498, 105 S.Ct. at 3285-3286. This remedial purpose was discussed in *United States v. Turkette*:

> The statement of findings that prefaces the Organized Crime Control Act of 1970 reveals the

pervasiveness of the problem that Congress was addressing by this enactment:

> "The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Government

> are unnecessarily limited in scope and impact." 84 Stat. 922-923.
>
> In light of the above findings, it was the declared purpose of Congress "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." *Id.*, at 923. The various Titles of the Act provide the tools through which this goal is to be accomplished.

Turkette, 452 U.S. at 588-589, 101 S.Ct. at 2531-2532 (footnotes omitted).

"RICO's drafters likewise sought to provide vigorous incentives for plaintiffs to pursue RICO claims that would advance society's fight against organized crime." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 241-242, 107 S.Ct. 2332, 2345, 96 L.Ed.2d 185 (1987) (citing *Sedima*, 473 U.S. at 498, 105 S.Ct. at 3286). "While few of the legislative statements about novel remedies and attacking crime on all fronts . . . were made with direct reference to § 1964(c), it is in this spirit that all of the Act's provisions should be read." *Sedima*, 473 U.S. at 498, 105 S.Ct. at 3286 (citations omitted); *see also Shearson/American Express*, 482 U.S. at 240, 107 S.Ct. at 2345 ("The legislative history of § 1964(c) reveals the same emphasis on the remedial role of the treble-damages provision."). Congress intended to encourage private litigants to promote the policies underlying RICO with the "carrots" of treble damages and a provision awarding attorneys' fees only to a successful plaintiff (and not to a successful

defendant). *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 150-151, 107 S.Ct. 2759, 2764, 97 L.Ed.2d 121 (1987); *Northeast Women's Center v. McMonagle*, 889 F.2d 466, 474 (3d Cir. 1989).

Conspiracies are themselves a distinct evil that must be targeted:

> [C]ollective criminal agreement – partnership in crime – presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.

Callanan, 364 U.S. at 593-594, 81 S.Ct. at 325; *see also United States v. Feola*, 420 U.S. 671, 693-694, 95 S.Ct. 1255, 1268, 43 L.Ed.2d 541 (1975) (discussing two independent values served by conspiracy law: "protection of society from the dangers of concerted criminal activity," and the fact that "the likelihood of commission of an act is sufficiently great" so as to justify intervention).

> For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators for further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, requiring more time for its discovery, and adding to the importance of punishing it when discovered.

Pinkerton, 328 U.S. at 644, 66 S.Ct. at 1182 (citing *Rabinowich*, 238 U.S. at 88, 35 S.Ct. at 685).

Last, while organized crime was the prime target of Congress in enacting the RICO statute, the statute it designed went further. "The occasion for Congress' action was the perceived need to combat organized crime. But Congress for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime." *National Organization for Women*, 510 U.S. at 260, 114 S.Ct. at 806 (citing *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 248, 109 S.Ct. 2893, 2905, 106 L.Ed.2d 195 (1989)).

B. RICO's Remedial Purpose Would Be Furthered by Whistleblowers Having a Right to Sue Thereunder for an Injury Caused by an Overt Act Committed in Furtherance of a RICO Conspiracy.

In addition to being called for by the clear language of the RICO statute, providing whistleblowers with a right to sue under RICO for the injuries sustained by them by reason of the overt act of their termination, committed in furtherance of the RICO conspiracy, also furthers RICO's remedial purpose.[3] There can be no doubt that whistleblowers serve an important function in today's society, strengthening the evidence-gathering process and providing a critical tool in the fight against crime. Public policy favors rewards, not punishment, for refusing to participate in, or blowing the whistle on racketeering activity. Whistleblowers may expose an otherwise unknown pattern of racketeering to the appropriate authorities, ultimately preventing predicate acts from occurring. In fact, even the Eleventh Circuit, in *Beck*, acknowledged that a " 'whistle blower' claim such as

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[3] There is no legislative history directly regarding the specific issue presented by this Petition, § 1964(c)'s civil remedies for conspiracies to violate RICO. *See, e.g.*, House Rep. No. 91-1549, *U.S. Code Cong. and Admin. News* 1970, pp. 4007, 4033 (stating only that " . . . subsection (d) makes conspiracy to violate (a), (b), or (c) equally subject to the sanctions of sections 1963 and 1964, below."). Furthermore, despite the incorporation of antitrust principles into other sections of RICO, there is no analogous antitrust provision on the issue presented here. This is especially true because, under the antitrust laws, there is not a distinct provision forbidding conspiracies. *See* 15 U.S.C. § 1.

Beck's could perhaps have a deterrent effect on racketeering . . . ." *Beck*, 162 F.3d at 1099 (CP App. 16).

The following example illustrates how the applicable policies are advanced where a civil action pursuant to § 1964(c) exists for an employee who is terminated as an overt act in furtherance of a RICO conspiracy:

> Suppose several racketeers were to decide to take over a construction company. Suppose they said, "Let's agree to operate this company in violation of the law. Let's rig bids, bribe officials, intimidate and threaten competitors not to bid on jobs and let's travel in interstate commerce to accomplish all of this. And, oh yes, let's fire all of the honest employees in the company, so we won't have any opposition in accomplishing our scheme.
>
> . . . The Court believes that Congress intended to afford the discharged employees a civil remedy in such a situation and that the Supreme Court following *Sedima* would so interpret the RICO statute.

Williams v. Hall, 683 F.Supp. 639, 644 (E.D. Ky. 1988), *criticized, Kramer v. Bachan Aerospace Corp.*, 912 F.2d 151 (6th Cir. 1990). Any other result would " . . . assure employers that when troublesome employees threaten to disclose the commission of RICO violations, those employees can be threatened with termination to keep such violations hidden from public view . . . , ensur[ing] that fewer instances of fraud will be uncovered and that Congress's intent in enacting the RICO statute will be frustrated." *Bowman*, 985 F.2d at 389 (Heany, J., dissenting).

C. A Concern That This Result Would Allow a Flood of New Lawsuits by Artful Pleaders Does Not Justify Rewriting the Statute.

At the heart of some of the decisions holding that an actionable overt act committed in furtherance of a RICO conspiracy must also be a predicate act is the concern that, absent such a requirement, a flood of new lawsuits will be brought by "artful pleaders." *See, e.g., Beck*, 162 F.3d at 1099 (" . . . requiring proof of direct injury by racketeering activity for section 1962(a)-(c), but not for section 1962(d), would . . . allow plaintiffs to circumvent the requirements of the first three subsections simply by alleging a conspiracy."); *Bowman*, 985 F.2d at 388 ("While this might appear to collapse a civil RICO suit based on a § 1962(d) conspiracy into those suits based on substantive RICO violations as delineated in § 1962(a)-(c), any other result would render this decision merely a guide to the artful pleader."). Such a concern, however, does not justify rewriting the RICO statute to incorporate a requirement that does not exist.

Congress determines what actions are available to private litigants. An argument that the statutory language chosen by Congress opens an avenue for a plaintiff to bring a claim " . . . is not a legal argument at all; it addresses a policy issue that Congress has already resolved." *Cannon v. University of Chicago*, 441 U.S. 677, 709, 99 S.Ct. 1946, 1964, 60 L.Ed.2d 560 (1979).

This "floodgates" argument has been raised and rejected by this Court in connection with civil RICO on numerous occasions. In *Sedima*, this Court noted that "[u]nderlying the Court of Appeals' holding [requiring a

"racketeering injury"] was its distress at the 'extraordinary, if not outrageous,' uses to which civil RICO has been put." *Sedima*, 473 U.S. at 499, 105 S.Ct. at 3286 (citation omitted). The Court rejected the imposition of a racketeering injury requirement, deferring to the requirements Congress chose to place in the statute, as drafted. *Id.*, 473 U.S. at 499-500, 105 S.Ct. at 3286-3287 ("Yet this defect – if defect it is – is inherent in the statute as written, and its correction must lie with Congress. It is not for the judiciary to eliminate the private action in situations where Congress has provided it . . . ."). Similarly, in *National Organization of Women*, the Court of Appeals introduced the requirement of an economic motive for an action based upon § 1962(c), in part to limit the breadth of the use of that section. *Id.*, 510 U.S. at 258, 114 S.Ct. at 804. This Court again rejected this requirement, finding that the statute was "unambiguous," and that "Congress ha[d] not, either in the definitional section or in the operative language, required that an 'enterprise' in § 1962(c) have an economic motive." *Id.*, 510 U.S. at 261, 114 S.Ct. at 805-806; *see also Turkette*, 452 U.S. at 580-581, 101 S.Ct. at 2527 (rejecting lower court's requirement that "enterprise" be confined to "legitimate" enterprises).

Moreover, the concerns about widening the floodgates of RICO litigation raised in cases such as *Bowman* and *Beck* have not been borne out empirically in the 1990's. From 1990 through 1998 (using a calendar year ending September 30), the number of *total civil cases* filed in the United States District Courts has generally increased: from 219,051 (1990), 210,890 (1991), 230,509 (1992), 229,850 (1993), 236,391 (1994), 248,335 (1995),

269,132 (1996), 272,027 (1997), to 256,787 (1998). Administrative Office of the United States Courts, L. Mecham, *Judicial Business of the United States Courts* [Reports from 1994, 1995, 1996, 1997 and 1998], Table C-2A (U.S. District Courts – Civil Cases Commenced by Nature of Suit). During that same period, however, the number of *civil RICO cases* filed has actually dropped: from 1,138 (1990), 972 (1991), 897 (1992), 903 (1993), 828 (1994), 900 (1995), 849 (1996), 840 (1997), to 785 (1998). *Id.* These statistics include cases filed pursuant to the split in authority on the question presented by this Petition. Certainly, following the language of the RICO statute in the instant case will not have an impact on these figures. Regardless, as discussed in Section III, *supra*, such suits by whistleblowers would be limited by the appropriate proximate cause analysis mandated by *Holmes*, and, as discussed in Section IV(B), *supra*, these suits would further the remedial purpose of the RICO statute.

CONCLUSION

Beck suffered unique, ascertainable and direct damages when he was terminated as an overt act in furtherance of an ongoing conspiracy to violate RICO's substantive provisions (that continued for almost two years after he was terminated). Beck's injuries were thus proximately caused by the Defendant Directors' violations of § 1962(d).

At the outset of its decision below, the Eleventh Circuit stated that this case "hinged" on the question of whether " . . . a plaintiff bringing a civil RICO conspiracy

claim [must] prove that the overt act (in furtherance of the conspiracy) by which he was injured was an 'act of racketeering'?" *Beck*, 162 F.3d at 1093 (CP App. 2). As more fully set forth in the foregoing sections, this question should be answered in the negative – a plaintiff bringing a civil RICO conspiracy claim need only show that he directly suffered injuries proximately caused by an overt act committed in furtherance of the conspiracy, regardless of whether that overt act was also a predicate act of racketeering. Beck has made that showing and, therefore, should have a right to sue under § 1964(c) for his injuries that were proximately caused by the Defendant Directors' violations of § 1962(d). Accordingly, for the foregoing reasons, the judgments entered below should be reversed and the case should be remanded for further proceedings, including trial.

Respectfully submitted,

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