No. 98-1480

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT A. BECK, II,
Petitioner

v.

RONALD M. PRUPIS, *ET AL*,
Respondent

BRIEF FOR RESPONDENTS LEONARD BELLEZA, WILLIAM PAULUS, JR., HARRY OLSTEIN , AND ERNEST J. SABATO

Filed September 17, 1999

COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether a person has standing to assert a civil RICO conspiracy claim under 18 U.S.C. §§ 1962(d) and 1964(c) where:

(i) he does not have viable substantive claims under 18 U.S.C. § 1962(a)-(c);

(ii) he was not injured by reason of "racketeering activity," as defined in 18 U.S.C. § 1961(1); and

(iii) the alleged overt act was the termination of his employment.

TABLE OF CONTENTS

Contents

Contents

TABLE OF CITED AUTHORITIES

Page

Cases:

COUNTERSTATEMENT OF THE CASE

This case arises from the termination of the employment of Robert A. Beck, II by Southeastern Insurance Group, Inc. (SIG), a Florida-based insurance holding company. Beck sued several of SIG's directors, asserting substantive RICO claims under 18 U.S.C. § 1962(a)-(c) and a RICO conspiracy claim under 18 U.S.C. § 1962(d). After discovery, the district court granted defendants' motion for summary judgment on all the RICO claims. The Eleventh Circuit affirmed. Beck petitioned for certiorari only with respect to the entry of summary judgment on the RICO conspiracy claim.

The circuits are divided as to whether a terminated "whistleblower" has standing to assert a RICO conspiracy claim when the alleged overt act was not itself "racketeering activity" under 18 U.S.C. § 1961(1). The Eleventh Circuit and four other circuits hold that there is no viable RICO conspiracy claim unless the alleged overt act was itself a RICO "predicate act."[1] Two circuits disagree, holding that a whistleblower has standing to assert a RICO conspiracy claim even if the overt act was merely the termination of employment.[2]

---

1. *See Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 48 (1st Cir. 1991); *Hecht v. Commerce Clearing House*, 897 F.2d 21, 25 (2d Cir. 1990); *Bowman v. Western Auto Supply Co.*, 985 F.2d 383, 388 (8th Cir.), *cert. denied*, 508 U.S. 957 (1993); *Reddy v. Litton Industries*, 912 F.2d 291, 295 (9th Cir. 1990), *cert. denied*, 502 U.S. 921 (1991); *Beck*, Pet. App. at 14-18. "Racketeering activity" is referred to in the decisions as "predicate offense" or "predicate act." *See, e.g., Atlas Pile Driving Co. v. Di Con Fin. Co.*, 886 F.2d 986, 990 (8th Cir. 1989).

2. *See Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1169 (3rd Cir. 1989) and *Schiffels v. Kemper Fin. Servs., Inc.*, 978 F.2d 344, 349 (7th Cir. 1992). In *Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143, 153 (5th Cir. 1997), *judgment vacated as moot*, (Cont'd)

A. Background.

From 1983, when it was founded, until January 1990, when it declared bankruptcy, SIG owned three insurance subsidiaries that wrote surety bonds for construction contractors. Respondents Leonard Bellezza, William Paulus, Jr., Harry Olstein and Ernest J. Sabato were four of SIG's directors.

In its early years, SIG was a small, thinly capitalized company that issued surety bonds of modest size. In August 1986, SIG raised $30 million of new capital through a private placement offering that enabled it to issue larger bonds, with the expectation of generating greater earnings. The long-term goal was to take SIG public — a strategy designed to allow SIG's original shareholders, including Beck, to sell their SIG stock as part of an initial public offering (IPO).

Beck served as SIG's president from 1983 to May 1988. Under his employment contract, Beck was responsible for developing and preparing SIG's budgets and financial forecasts, monitoring SIG's financial performance, and reporting SIG's financial condition to the Board of Directors and to the Florida Department of Insurance. J.A. 97, ¶ 3.1(a); R5-138-Exh. 4 at 86. Accordingly, Beck provided management reports to the Board and signed and filed quarterly financial reports with the Florida Department of Insurance, all of which showed SIG's insurance subsidiaries to be growing and profitable. *See generally* R5-138-Exh.C.

In May 1988, because of this reported success, and in preparation for a possible IPO, the Board hired Firemark

(Cont'd)
119 S. Ct. 442 (1998), the Fifth Circuit also aligned itself with the minority. However, because this Court vacated the judgment in that case, the Fifth Circuit's opinion has no "precedential effect." *See County of Los Angeles v. Davis*, 440 U.S. 625, 634 n.6 (1979).

Consultants, Inc. (Firemark), an independent insurance consultant, to conduct a due diligence investigation of SIG's operations and financial condition. The Board gave Firemark carte blanche authority to investigate and assess SIG's "operations, procedures, staff and management." J.A. 117.

Firemark conducted the investigation, reviewing financial data and interviewing 72 SIG employees from every department, level and job function. J.A. 117. On May 12, 1988, Firemark presented an oral report to SIG's Board, later memorialized in a written report. Contrary to the information previously given by Beck to the Board, Firemark reported that SIG was in organizational and financial disarray. It found serious deficiencies in all phases of SIG's operations, including a detrimental "cash-flow" underwriting policy that allowed high-risk bonds to be issued to generate premiums with little regard to potential claims. J.A. 118, 121.

Firemark also found a general lack of managerial ability or knowledge of the insurance and surety business at the highest levels; a lack of budgetary controls and underwriting guidelines; a lack of formal personnel guidelines and salary administration; inexperience at all levels of staff and management; the existence of "cliques, in-circles, camps and favoritism;" and grossly inadequate claims procedures. J.A. 117-21. Firemark concluded that SIG's Board had been seriously misled by management's past reports of profitability, stating:

> . . . SIG must frankly be considered a turnaround company. To refuse to acknowledge the number and gravity of problems, or to fail to understand the complexity and difficulty of establishing a profitable operation is shortsighted and dangerous. We are not faced with the task of restoring highly profitable

> results to an established company that has stumbled. Southeastern has yet to build an infrastructure, and in general has not established a solidly profitable business. Any profits reported in the past are highly suspect, considering previous management's clearly demonstrated propensity to delude itself and the Board.

J.A. 125-26.

Firemark made numerous recommendations, including the removal of SIG's entire senior management team — Beck (president), Ronald Prupis (CEO), Linda Burton (senior underwriting officer) and Carl Shible (executive vice president of underwriting) — for substandard managerial practices. *See* J.A. 122-23, 126. Obviously, Beck was not singled out. On May 13, 1988, in reliance on Firemark's oral recommendations, SIG's Board voted unanimously to terminate Beck, Prupis and Burton and to demote Shible. Respondents themselves then reported Firemark's findings and the termination of senior management to the Florida Department of Insurance and SIG's shareholders. *See* R5-138-Exh.E, ¶¶ 92-94, 106-151.

Beck's employment contract permitted SIG to terminate him for an "inability or substantial failure to perform the material duties" assigned to him. J.A. 104, ¶ 7.1(c). If Beck was "improperly terminated" — a phrase defined to mean "termination for any reason other than set forth" in the contract — he had the right to sell his SIG stock back to SIG at fair market value. J.A. 105, ¶ 7.2. According to Beck, one of the reasons SIG fired him was to avoid this stock repurchase obligation. J.A. 58, 70-72, 139, 147; Pet. at 3.

In his Complaint,[3] Beck asserted RICO claims against SIG's officers and directors, including Respondents (collectively, the SIG defendants). He claimed violations of each of RICO's substantive sections, 18 U.S.C. § 1962(a), (b) and (c), and of RICO's conspiracy section, 18 U.S.C. § 1962(d).

B. The Substantive RICO Claims.

In his brief, Beck misleadingly quotes what, "[b]ased upon the evidence, . . . the Eleventh Circuit found." Petitioner's Brief on the Merits (Pet. Br.) at 2. His quotation is from a part of the court's opinion describing allegedly illegal activities as if they were undisputed facts. Pet. App. 2-4. But neither the district court nor the Eleventh Circuit made any findings of fact; rather, both simply concluded that even if the facts were as alleged by Beck, he lacked RICO standing. Indeed, the Eleventh Circuit later noted that because the appeal was from a grant of summary judgment, it had "viewed all evidence in favor of the nonmoving party (i.e., Beck)." Pet. App. at 8.

In his Complaint and RICO case statement, Beck listed approximately 50 predicate acts supporting his claim of a pattern of racketeering activity, none of which were directed at him; they were directed solely at third parties. J.A. 76-83; J.A. 149-56. Specifically, Beck alleged numerous acts of extortion, "looting," mail fraud and wire fraud. J.A. 61-81, 95-96, 112-113, 138-43. The "extortion" was the charging of

---

3. Beck's RICO claims were initially asserted as a crossclaim in a shareholders derivative suit filed against him and other SIG officers and directors in the United States District Court for the District of New Jersey. J.A. 54. In March 1991, the federal district court in New Jersey severed Beck's crossclaim and transferred it to the Southern District of Florida pursuant to a forum-selection clause in his employment contract. *See* Pet. App. 2 n.1. For ease of reference, Beck's crossclaim is referred to in this brief as the "Complaint."

fees by a SIG subsidiary, Contractors Performance Corporation (CPC), to monitor the job performance of higher-risk contractors who purchased surety bonds, in order to fend off potential defaults. The "looting" was the execution of a reinsurance pooling agreement that allowed the insurance subsidiaries to pool claim payments, and also included the transfer of funds from the insurance subsidiaries to SIG to enable it to repay legitimate loans made by some of the defendants and First Fidelity Bank. J.A. 60-61, 139, 141, 144-145. The "mail and wire fraud" consisted of the SIG defendants' issuance of false financial statements to the insurance regulators and misleading financial projections to First Fidelity Bank to induce it to loan SIG $7.5 million. J.A. 60, 80, ¶¶ 108-09, 111; J.A. 149-56.[4]

Beck acknowledged below that he had no standing to assert a RICO claim based upon these alleged predicate acts directed at third parties. He alleged that he was injured indirectly, however, because defendants' alleged activities "resulted in the failure of SIG" and "caused the value of Beck's SIG stock to greatly depreciate." J.A. 162, ¶ 16; J.A. 148, ¶ 4.a.iv. He also alleged that he was "fraudulently induced" to purchase a SIG stock/debenture unit and to guarantee the $7.5 million First Fidelity loan. J.A. 72-73, 75-76, 148, 162.

C. The RICO Conspiracy Claim.

In his RICO conspiracy claim, Beck alleged that the SIG defendants conspired with Firemark to create false causes for his termination. J.A. 70, ¶¶ 51-52. The alleged conspiracy was designed to deprive Beck "of the money due and owing to him under his employment contract with SIG," which required

4. The remaining predicate acts were five telephone calls, allegedly related to a plan to mislead Beck into believing that the improper activity had been attributed to others, that it would be corrected and that he would not be terminated. J.A. 81-82, ¶¶ 119-23.

(at his option) the repurchase of his stock at fair market value if he was "improperly terminated." J.A. 72, ¶ 59; *see* J.A. 105, ¶ 7.2. Beck also claimed that the SIG defendants conspired to terminate him in retaliation for allegedly having blown the whistle on the allegedly illegal activities and because he refused to participate in those activities. J.A. 69-70, ¶¶ 49-54; Pet. at 3. He thus claimed that his termination was an overt act in furtherance of the alleged RICO conspiracy. J.A. 67-72, ¶¶ 43-60; J.A. 87, ¶ 144.

Although Beck alleged that SIG hired Firemark to fabricate criticisms of his performance to justify his termination for cause, the federal district court in New Jersey dismissed Beck's RICO claim against Firemark. It found no evidence of any conspiracy and nothing false about the Firemark report:

> It cannot be said that the [Firemark] Report itself is an objective manifestation of the [conspiracy] when Beck has failed to allege how the contents of the Report were false. Moreover, the questionable conduct described in the Report is attributed solely to neither Beck nor any other member of management. Additionally, *it is illogical for Beck to claim that the Report was false when it documents the same misconduct that Beck asserts occurred at SIG.*
>
> * * *
>
> Beck has nowhere provided any factual support for the allegation that the Report was false or that it blamed him exclusively for the misconduct at SIG. Although the Report does recommend Beck be terminated, it does not explicitly attribute any wrongdoing to Beck alone. If anything, the Report suggests that much of the management of SIG was

> to blame. The Report recommends termination or investigation of numerous officers or directors in addition to Beck.

R5-138-Exh.L at 44-45, 51 (emphasis added).

Beck did not appeal the dismissal of Firemark but nevertheless pressed his claims against the SIG defendants, whom he claims were Firemark's alleged co-conspirators.

D. Respondents' Summary Judgment Motion.

After the close of discovery, the SIG defendants moved for summary judgment. In opposing the motion, Beck submitted nine exhibits purportedly related to his claim that the SIG defendants conspired with Firemark to fabricate causes for his termination. *See* R5-163 at 17-18 (citing R5-161-Exhs. 12 & 16; R5-162-Exhs. 36, 39, 42-44, 47-48). Those exhibits showed, however, that Beck's conspiracy claim was factually baseless.

Five of the exhibits made no mention of Firemark at all; they merely consisted of hearsay statements of three SIG employees concerning rumors of Beck's possible termination and Ronald Prupis's (SIG's CEO) attempt to limit Beck's power. None of those five exhibits even remotely tended to prove that Respondents secretly hired Firemark to fabricate causes for Beck's termination.

Two of the remaining four exhibits consisted of multi-layered hearsay statements by former Firemark employees, to the effect that Firemark recommended Beck's termination because Joanne Morrissey (Firemark's president) wanted Beck's job. Quite apart from the incompetent nature of that evidence, even if it were true that Morrissey wanted Beck's job, there was no evidence that Respondents knew of her career ambitions. Nor did her alleged motive have anything to do with alleged RICO predicate acts or the claimed RICO conspiracy. The final

two exhibits consisted of deposition testimony of a SIG employee and of Michael Morrissey, another Firemark principal, whose testimony did not support Beck's claim of a conspiracy to fabricate reasons to justify Beck's termination.

The district court granted Respondents' summary judgment motion, holding that Beck lacked RICO standing to sue as a creditor, guarantor, shareholder and/or terminated whistleblower because his injuries were not proximately caused by the alleged misconduct. Pet. App. at 32-46.

E. The Eleventh Circuit Decision.

The Eleventh Circuit affirmed the summary judgment against Beck as to all of his RICO claims. As for his substantive claims under 18 U.S.C. § 1962(a)-(c), the court held that Beck lacked RICO standing because his alleged injuries were derivative of those suffered by SIG, and because there was no evidence that Beck relied upon any misstatements or that Respondents intended to deceive him. Pet. App. at 9-14.

As for Beck's conspiracy claim under § 1962(d), the court held that a terminated employee lacks standing to pursue a RICO conspiracy claim because his injury is not proximately caused by predicate acts of racketeering. Pet. App. at 14-18. The court reasoned that "RICO was enacted with an express target — racketeering activity — and only those injuries that are proximately caused by racketeering activity should be actionable under the statute." *Id.* at 15-16, *citing Holmes v. Securities Inv. Protection Corp.*, 503 U.S. 258, 265-69 (1992).

The court also explained that the minority view would eviscerate § 1962(a)-(c), because it would allow plaintiffs to circumvent the standing limitations of those subsections "simply by alleging a conspiracy." Pet. App. at 16-17. Finally, the court rejected Beck's argument that the majority view would render § 1962(d) superfluous, since under that view the conspiracy

provision still "allows persons who are responsible for an injury, but [who] did not actually participate in the injury-causing activity, to be held liable" as joint tortfeasors. Pet. App. at 16-17 & n.18.

F. Other Litigation Involving SIG.

During the pendency of this action, the direct victims of the predicate acts alleged by Beck sued the SIG defendants and others responsible for their losses. First, after SIG defaulted on the $7.5 million loan, First Fidelity sued Beck and the SIG defendants, all of whom had personally guaranteed the loan. First Fidelity obtained a $3.3 million judgment against the SIG defendants and Beck, all of which was paid by the SIG defendants. R5-138-Exhs.X&Y.

Second, SIG shareholders filed a RICO derivative action against Beck and the SIG defendants alleging the same pattern of racketeering activity alleged by Beck. R5-138-Exh.F, ¶¶ 73-75, 106-16. After SIG declared bankruptcy, its bankruptcy trustee took over the derivative action.

Third, the Florida and New Jersey departments of insurance, as receivers for SIG's insurance subsidiaries, sued the SIG defendants for damages resulting from various transfers of funds among SIG and its subsidiaries. R5-138-Exhs. M, O. The receivers alleged that the reinsurance pooling agreements among the insurance subsidiaries — which allowed them to pool the payment of claims — and the transfer of funds by the subsidiaries to SIG to enable it to repay legitimate loans, violated insurance regulations. These are the same transactions as Beck alleges constituted "looting." Pet. Br. at 9-10.

Fourth, SIG's bankruptcy trustee filed a legal malpractice suit on behalf of SIG against Lampf Lipkind Prupis & Petigrow

(Lampf Lipkind).[5] That suit alleged that Lampf Lipkind negligently advised SIG: to enter "workout" loans with defaulting contractors, resulting in the submission of misleading financial statements to the insurance regulators and others[6]; to withdraw funds from SIG's insurance subsidiaries and to use those funds to satisfy SIG's own loan obligations; and that the monitoring fees paid by contractors to CPC were permissible under insurance regulations. These are the same transactions included as predicate acts in Beck's pleadings. J.A. 60-62, 76-83, 138-41.

SUMMARY OF ARGUMENT

A terminated employee lacks standing to assert a RICO conspiracy claim because his injury was caused by an ordinary overt act (termination of employment), not by predicate acts of racketeering. RICO's conspiracy section, 18 U.S.C. § 1962(d), cannot be read in a vacuum. When read in the context of RICO's substantive provisions, 18 U.S.C. § 1962(a)-(c), and when considered in light of the statute's central purpose of punishing racketeering activity, the conspiracy section should be read to confer standing only upon persons who have been injured by an overt act that is itself a RICO predicate act. The predicate act requirement for conspiracy standing is consistent with this Court's decision in *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S.

5. Although that suit is outside the appellate record, it is a matter of public record. *See Jules Bagdan, in his capacity as Trustee in Bankruptcy of Southeastern Ins. Group, Inc. v. Lampf Lipkind Prupis Petigrow & LaBue, P.C.*, Case No. 93-6819 (S.D. Fla., Ft. Lauderdale Div.).

6. In some instances if a contractor defaulted on a job, resulting in a possible claim on the SIG surety bond, SIG would loan the contractor money to complete the job to avoid a default. It classified the loan (workout) as an asset (account receivable) on its financial statement rather than creating a liability or claim reserve for the default.

479 (1985), which recognized that a defendant who violates § 1962(c) is not liable for treble damages to everyone he might have injured by conduct other than predicate acts.

The majority approach gives meaning to each subsection of § 1962. The minority approach, on the other hand, effectively eviscerates § 1962(a)-(c) in a civil conspiracy case by permitting a plaintiff who lacks standing under those substantive provisions to obtain standing simply by alleging a conspiracy to commit those same substantive acts.

Beck's attempt to effect a wholesale transfer of criminal conspiracy concepts into civil RICO is inappropriate. Congress intended that in civil RICO suits, courts apply well-settled concepts of civil conspiracy law. Courts have long recognized that there is no cause of action for civil conspiracy as such, because it is the wrong resulting in damage, not the conspiracy, that constitutes the cause of action. The purpose of a "civil conspiracy" allegation is to serve as a procedural device to subject co-conspirators to "vicarious liability" if any one of them commits an actionable tort. Furthermore, in the civil context, the mere agreement to commit a tort is never itself actionable and, unlike in the criminal context, the overt act must be the very underlying tortious wrong that damaged the plaintiff and furnished the cause of action. Therefore, under RICO, a plaintiff does not have a civil conspiracy claim unless he was injured by reason of a violation of RICO's substantive racketeering provisions.

Principles of proximate causation, applied by this Court in *Holmes*, support the view that a terminated employee lacks standing to pursue a RICO conspiracy claim. The parties "proximately" injured by a RICO conspiracy are the direct victims of the racketeering activity performed pursuant to the conspiracy. Beck's loss of employment was a tangential by-

product, not a direct result, of the RICO conspiracy. The persons directly injured by the predicate acts not only had an incentive to sue but did so; they are the most effective enforcers of RICO.

The Court's antitrust precedents also support the view that standing to sue for a RICO conspiracy requires a plaintiff to show that his injury was proximately caused by a predicate act. To have standing to bring an antitrust action, a plaintiff must allege antitrust injury — i.e., "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). In antitrust law, the federal courts have almost unanimously held that an employee terminated in retaliation for refusing to participate in, or blowing the whistle on, an antitrust violation lacks standing to sue under § 4 of the Clayton Act, because they have not suffered an "antitrust injury" and because there are more direct victims of the antitrust violation who have incentive to sue. In a RICO case, it is similarly appropriate to compare the injury alleged with those injuries Congress sought to redress in making defendant's conduct unlawful and in providing a private remedy under § 1964(c). The only injuries "proximately caused" by a RICO conspiracy (whose goal is to commit racketeering activity) are those flowing from the predicate acts of racketeering that were Congress's target in enacting RICO.

Finally, concerns of federalism also support the requirement that a RICO conspiracy plaintiff be injured by an unlawful predicate act. Under the minority approach, a substantial body of state common law would be incorporated into RICO under a "conspiracy" umbrella, thus transforming RICO into a federal super-tort statute. RICO has a dangerous potential to engulf common law causes of action through an overly broad construction of the civil conspiracy doctrine. This danger approaches constitutional dimensions. To avoid a wholesale

federalization of state common law, RICO should be interpreted as requiring a conspiracy plaintiff to be injured by a substantive RICO violation.

ARGUMENT

I.

CONTRARY TO THE MINORITY VIEW, RICO'S PLAIN LANGUAGE DOES NOT CONFER STANDING UPON A TERMINATED EMPLOYEE TO SUE FOR A CONSPIRACY.

Beck's primary argument is that the "clear and unambiguous language" of § 1962(d) and § 1964(c) "algebraically" confers civil RICO standing upon any person "who has been injured by reason of a conspiracy to violate any of the provisions of subsections (a), (b), or (c)" of § 1962. Pet. Br. at 16. According to Beck, a person has standing to assert a RICO conspiracy claim even if his injury was caused by an ordinary overt act as opposed to a predicate act of racketeering. Pet. Br. at 16-21.

Beck's plain language argument, which reflects the minority view, is fundamentally flawed. First, that view is overly mechanistic and reads § 1962(d) in a vacuum, without reference to RICO's central purpose of punishing racketeering activity. Consequently, the minority view divorces RICO from its racketeering foundation and, if accepted, would eviscerate RICO's core substantive provisions in a civil action. *See infra* Point I.A. Second, Beck's argument depends upon the faulty assumption that concepts of *criminal* conspiracy law apply even though he seeks *civil* standing to sue for a federally created statutory tort. When the proper civil conspiracy principles are applied, Beck's plain-language argument collapses. *See infra* Point I.B.

A. The Minority View Would Eviscerate RICO's Substantive Provisions in a Civil Action.

Section 1964(c) authorizes a private suit for treble damages by "[a]ny person injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c). Section 1962, in turn, creates three substantive offenses, all dependent upon the commission of a "pattern of racketeering activity." 18 U.S.C. § 1962(a)-(c). Section 1962(a) prohibits the use of income derived from a pattern of racketeering activity to invest in an enterprise; section 1962(b) prohibits the acquisition of an interest in or control of an enterprise through a pattern of racketeering activity; and section 1962(c) prohibits a person from conducting the affairs of an enterprise through a pattern of racketeering activity. Section 1962(d) makes it unlawful "to conspire to violate" any of the substantive provisions.[7] The predicate acts of "racketeering" that undergird all of these offenses include various felonies "chargeable" under state law and various crimes "indictable" under federal law. 18 U.S.C. § 1961(1).

In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495-97 (1985), this Court rejected a rule that would have conferred standing only upon those who sustained a "racketeering injury" — an amorphous concept that required an injury caused indirectly by the entire pattern of racketeering activity.[8] Instead, the Court held that "the compensable injury [under § 1962(c)] necessarily is the harm caused by predicate acts, . . . *for the*

7. Here, the Eleventh Circuit held that Beck failed to present any evidence to support his claims under subsections (a) and (b). The court therefore "treat[ed] all of his substantive claims as 1962(c) claims." Pet. App. at 6 n.8.

8. *See Haroco, Inc. v. American Nat. Bank and Trust Co. of Chicago*, 747 F.2d 384, 387-99 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985).

essence of the violation is the commission of those acts in connection with the conduct of an enterprise." *Sedima*, 473 U.S. at 496-97 (emphasis added).[9]

The Court noted, however, that "[a] defendant who violates section 1962 is not liable for treble damages to everyone he might have injured by other conduct," i.e., by conduct other than predicate acts. *Id.* at 496-97. In the years after *Sedima*, the circuit courts have unanimously held that employment termination is the type of "other conduct" that is not compensable under RICO's *substantive* provisions. *See Bowman*, 985 F.2d at 385 (collecting cases).

The predicate act requirement for conspiracy claims is similarly consistent with the Court's repeated recognition that Congress's primary purpose in enacting RICO was to combat "long-term criminal activity." *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 248-49 (1989); *United States v. Turkette*, 452 U.S. 576, 588-91 (1981); *Russello v. United States*, 464 U.S. 16, 26-29 (1983). Central to that purpose was Congress's careful delineation of approximately 50 acts of "racketeering" that are the linchpin of a RICO violation, 18 U.S.C. §§ 1961(1) & 1962, and the requirement that defendants commit, or conspire to commit, a "pattern of racketeering activity," 18 U.S.C. § 1962. *See Sedima*, 473 U.S. at 481 ("RICO takes aim at 'racketeering activity' ").

By holding that a terminated employee lacks standing to sue for a RICO conspiracy because his injury is not proximately

9. Because the only substantive claim evaluated by the Eleventh Circuit was Beck's claim under § 1962(c), *see* note 7 *supra*, his § 1962(d) conspiracy claim can only be understood as alleging a conspiracy to violate § 1962(c). Accordingly, this appeal involves the appropriate standing requirements for a claim alleging a conspiracy to violate § 1962(c). There is no issue as to the appropriate standing requirements for a claim alleging a conspiracy to violate §§ 1962(a) (investment or use) or (b) (acquire or maintain).

caused by a predicate act, the courts in the majority attempt to effectuate this congressional purpose. They reason that *Sedima*'s predicate act injury requirement "applies equally well to RICO's conspiracy provisions," *Beck*, Pet. App. at 15, because "Congress did not deploy RICO as an instrument against all unlawful acts" but rather only against racketeering acts. *Hecht*, 897 F.2d at 25. They emphasize that because Congress "painstakingly" enumerated a list of predicate acts in 18 U.S.C. § 1961(1), to allow recovery of RICO damages for an injury caused by an act other than one of those predicate acts "would be tantamount to rewriting the statute." *Miranda*, 948 F.2d at 48; *accord Beck*, Pet. App. at 14-18; *Bowman*, 985 F.2d at 388; *Reddy*, 912 F.2d at 295.

Indeed, under the minority view endorsed by Beck, the predicate act standing limitation imposed by § 1962(a)-(c) could be easily circumvented by "the artful pleader." *Bowman*, 985 F.2d at 388. Instead of bringing a wrongful discharge claim in state court, the plaintiff "could circumvent the predicate act requirement applicable to suits based on § 1962(a)-(c) simply by alleging a conspiracy to commit those same substantive acts." *Id.*; *accord Beck*, Pet. App. at 16-17.[10]

Thus, the minority view turns RICO on its head, with the conspiracy provision eviscerating the three substantive provisions that inform it. As this Court recognized long ago, "every section, provision, and clause of a statute shall be expounded by a reference to every other; and if possible, every

10. The minority view, of course, would not render § 1962(a)-(c) superfluous if the plaintiff was injured by a single defendant's RICO violation; such a plaintiff could sue only under § 1962(a)-(c) and would not be able to avoid the predicate act requirement. But such cases are rare. In the typical civil RICO case, the alleged pattern of racketeering activity is committed by more than one person.

clause and provision shall avail, and have the effect contemplated by the legislature. One portion of a statute should not be construed to annul or destroy what has been clearly granted by another." *Peck v. Jenness*, 48 U.S. (7 How.) 612, 623 (1849). Thus, the Court should be "hesitant to adopt" a statutory interpretation that would render § 1962(a)-(c) "superfluous." *See Kawaauhau v. Geiger*, 523 U.S. 57, 62 (1998).

Even if Beck's interpretation is suggested by a literal reading of RICO — a doubtful proposition in any event, *see infra* Point I.C. — that does not end the inquiry. It is a well-established canon of statutory construction that "absurd results" should be avoided, *United States v. Turkette*, 452 U.S. 576, 580 (1981); and if reliance on a statute's literal language would "defeat the plain purpose of the statute," a court should go beyond the literal language and follow the statute's purpose. *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983); *see also United States v. Ron Pair Enter., Inc.*, 489 U.S. 235, 242 (1989); *Commissioner v. Brown*, 380 U.S. 563, 571 (1965).

Indeed, in *Holmes v. Securities Inv. Protection Corp.*, 503 U.S. 258, 267 (1992), the Court eschewed a literal reading of § 1964(c), which appeared to require merely "but for" causation, in favor of a more informed reading, which dictated "proximate" causation. The Court did so because of "the very unlikelihood that Congress meant to allow all factually injured plaintiffs to recover." *Id.* at 266; *see also Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 59-60 (1911) (rejecting literal interpretation of § 1 of Sherman Act and holding that only "unreasonable" restraints of trade are prohibited).

Similarly, it is unlikely that Congress intended to foreclose substantive standing under § 1962(a)-(c) for injuries caused by ordinary acts while simultaneously conferring conspiracy

standing under § 1962(d) for injuries caused by those same ordinary acts. This is reason enough to reject Beck's purportedly "literal" interpretation of RICO.

Adoption of the minority view would expand standing beyond terminated whistleblowing employees to virtually anyone who threatens to report, or actually does report, allegedly illegal activities to law enforcement or other authorities — a result Congress did not likely intend. For example, if a non-employee learns of illegal conduct and threatens to or actually does disclose it, leading to a campaign of defamation to discredit him — with consequent harm to that person's business or ability to earn a living — the minority view's mechanistic interpretation of § 1962(d) would provide RICO standing for what should be a common law defamation suit. That would result in an overly broad application of the conspiracy provision.

B. The Majority View Does Not Render § 1962(d) Superfluous in a Civil Action.

Beck asserts that the majority's "predicate act" requirement renders § 1962(d) superfluous in a civil action because RICO plaintiffs can already sue under § 1962(a)-(c) for injuries caused by predicate acts. Pet. Br. at 19-21. He is wrong; under the majority view, § 1962(d) still serves an important, independent function. As is explained in detail below, the RICO conspiracy section serves as a procedural device to impose vicarious civil liability upon all co-conspirators for the predicate acts committed by the others.

Thus, unlike the minority approach, which would eviscerate RICO's core substantive provisions, the majority approach gives meaning and effect to each subsection of § 1962.[11]

11. *See Bailey v. United States*, 516 U.S. 137, 145 (1995) (interpretation of statutory phrases depends on their "placement and

(Cont'd)

C. Common Law Concepts of Civil Conspiracy, Which Congress Incorporated Into RICO, Preclude Standing Unless the Plaintiff's Injury Was Caused by an Unlawful Overt Act.

Beck purports to base his plain-language theory on "traditional concepts of conspiracy law." Pet. Br. at 21-26. But all of the "traditional concepts" upon which Beck relies are *criminal* ones, even though he seeks standing to pursue a *civil* RICO claim. This commingling of criminal and civil concepts produces a distorted interpretation of RICO, inconsistent with the well-settled principles of civil conspiracy that Congress intended the courts to apply in civil RICO suits.

1. Civil Concepts of Conspiracy Law Apply in a Civil RICO Action.

The term "conspiracy" is not defined in RICO. *See* 18 U.S.C. § 1961. At the time of RICO's enactment, however, that term had a settled common law meaning when applied in the civil context. "[W]here Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Neder v. United States*, __ U.S. __, 119 S. Ct. 1827, 1840 (1999) (citations omitted). Thus, when Congress used the term "conspiracy" in the context of a civil RICO claim, it presumably intended to incorporate the settled civil law meaning of that term. *See Kolstad v. American Dental Ass'n*, __ U.S.

(Cont'd)
purpose in the statutory scheme" and on their "context"); *see also United States v. Gordon*, 961 F.2d 426, 431 (3rd Cir. 1992) ("Courts should attempt to reconcile two seemingly conflicting statutory provisions whenever possible, instead of allowing one provision effectively to nullify the other provision").

__, 119 S. Ct. 2118, 2125, 2126-27 (1999) (applying common law principles in interpreting phrase "punitive damages" under Civil Rights Act of 1991); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 59-60 (1911) (applying common law understandings of phrase "restraint of trade" in interpreting section 1 of the Sherman Act).

Contrary to Beck's assertions (Pet. Br. at 24-26), the use of criminal conspiracy concepts in a civil RICO action is not required by *Salinas v. United States*, 522 U.S. 52 (1997). There, the Court interpreted the term "conspiracy" in the context of a *criminal* RICO case. In a civil RICO case, however, it only makes sense to apply civil conspiracy law. *See Beck*, Pet. App. 16-17 & n.18 (applying civil conspiracy law and distinguishing *Salinas* because it involved criminal RICO).[12]

There is nothing unusual about interpreting the RICO "conspiracy" language in distinct ways, depending upon the

12. Beck asserts that the lower courts have "repeatedly" applied *Salinas* in civil proceedings. Pet. Br. at 26. This assertion is incorrect and misleading. In fact, at least three courts, including the Eleventh Circuit below, have held that *Salinas* does not apply in determining civil RICO standing. *See Beck*, Pet. App. at 16-17 & n.18; *Kaplan v. Reed*, 28 F. Supp. 2d 1191, 1197-98 (D. Colo. 1998); *Schmidt v. Fleet Bank*, 16 F. Supp. 2d 340, 353 (S.D.N.Y. 1998). Moreover, in the cases Beck cites, the courts applied *Salinas* not on the civil conspiracy standing issue but on the issue of whether the plaintiff proved the "agreement" element of conspiracy, an issue that is approached in the same way under civil and criminal law. *See Goren v. New Vision Intern., Inc.*, 156 F.3d 721, 731-32 (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.*, 1999 WL 417848, *7 (N.D. Ill. June 18, 1999); *Florida Software Systems, Inc. v. Columbia/HCA Healthcare Corp.*, 46 F. Supp. 2d 1276, 1283-84 (M.D. Fla. 1999) (also discussing civil RICO standing in dictum); *Southern Intermodal Logistics v. D.J. Powers Co.*, 10 F. Supp. 2d 1337, 1360-61 (S.D. Ga. 1998).

nature of the action. Varied meanings are suggested by RICO's provision for criminal and civil liability for the same misconduct. 18 U.S.C. §§ 1962-1964; *see also Sedima*, 473 U.S. at 492 (noting RICO's dual purpose); *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 188 (1997) ("there are significant differences between civil and criminal RICO actions"). Indeed, the Court has applied different standards depending upon the civil or criminal nature of the RICO case. *See Sedima*, 473 U.S. at 490-91 (suggesting that "preponderance of the evidence" standard should apply in civil RICO actions, even though "beyond a reasonable doubt" standard applies in criminal RICO actions, and even though RICO's predicate acts are all "indictable" or "chargeable" crimes); *Agency Holding Corp. v. Malley-Duff Assocs., Inc.*, 483 U.S. 143, 155-56 (1987) (holding that civil RICO actions are subject to four-year limitation period, even though criminal RICO prosecutions are subject to five-year limitation period); *Klehr*, 522 U.S. at 187-88 (rejecting "last predicate act" rule for accrual of civil RICO statute of limitations, even though RICO's criminal statute of limitations runs from last predicate act); *see also United States v. Gypsum Co.*, 438 U.S. 422, 435 n.13 (1978).

It is immaterial that other RICO terms — such as "conduct," "enterprise" and "pattern of racketeering activity" — are given consistent meaning in both criminal and civil RICO actions. *See Reves v. Ernst & Young*, 507 U.S. 170, 177-83 (1993); *Turkette*, 452 U.S. at 580-81; *H.J., Inc.*, 492 U.S. at 236-43. Quite simply, none of those terms had any established meaning at common law, *see Agency Holding*, 483 U.S. at 149-50, and "enterprise" and "pattern of racketeering activity" are explicitly defined in RICO. 18 U.S.C. § 1961(4) and (5). Therefore, those terms are properly given the same meaning in criminal and civil RICO actions.

The term "conspiracy," on the other hand, is not defined in RICO and had two separate and drastically different meanings at common law. *See infra* at 23-27. Therefore, the only reasonable conclusion is that Congress intended the term "conspiracy" to be given its appropriate common law meaning depending on whether the action was criminal or civil.

2. Civil Conspiracy Is a Procedural Mechanism to Impute Liability Among Co-Conspirators, Not an Independent Substantive Cause of Action.

Under the minority view, RICO would provide an independent cause of action for civil "conspiracy" even when the underlying substantive claims are not actionable. In advocating this theory, Beck relies exclusively upon *criminal* concepts of conspiracy. He argues that: (1) "the gist of a conspiracy is the agreement itself"; (2) a conspiracy is punishable even if "no substantive crime [is] committed"; (3) the overt act in furtherance of the conspiracy did not, at common law, have to be unlawful; and (4) an overt act is not required in criminal RICO prosecutions. Pet. Br. at 23-25.

Beck attempts to effect a wholesale transfer of these criminal concepts into the civil RICO arena, arguing that the injury-causing overt act in a civil RICO case need not be an unlawful predicate act. Pet. Br. at 24. He even insists that there is no basis for any distinction between criminal and civil conspiracies, claiming that both "serve to impute liability" and that, like criminal conspiracies, "the gist of civil conspiracies is the agreement itself, as well, while adding the requirement of an injury." Pet. Br. at 25-26 (citations omitted). Beck's fusion of criminal and civil conspiracy concepts is inappropriate. A comparison of criminal and civil conspiracy law shows that, while Beck's "ordinary overt act" approach makes sense in the criminal context, it is antithetical to common law concepts of "civil conspiracy" that Congress incorporated into RICO.

First, whereas in criminal law the mere *agreement* to commit an unlawful act is the gist of the crime, *Braverman v. United States*, 317 U.S. 49, 53 (1942), in the civil context "[t]he gist of the action is not the conspiracy charged, but the tort working damage to the plaintiff." William Prosser, *The Law of Torts* § 46, at 293 (4th ed. 1971) (hereinafter *Prosser*). Indeed, as this Court stated more than a century ago, a civil conspiracy claim "cannot be sustained [merely] because there has been a conspiracy" but rather requires plaintiff to show that "the defendants have done some wrong, that is, have violated some right of [plaintiffs], and that damage has resulted." *Adler v. Fenton*, 65 U.S. (24 How.) 407, 410 (1860). Thus, it is typically stated that "there is no cause of action for conspiracy as such," because "it is the civil wrong resulting in damage, and not the conspiracy, which constitutes the cause of action."[13] The purpose of a "civil conspiracy" allegation is to serve as a procedural device for subjecting co-conspirators to "vicarious liability" if any one of them commits an actionable tort. *Prosser* § 46, at 291-92.[14] By 1970, when RICO was enacted, these principles were firmly embedded in the common law.

Second, whereas in criminal law the conspiracy and the underlying crime are two separate punishable offenses, *Callanan*

13. *Indianapolis Horse Patrol, Inc. v. Ward*, 217 N.E.2d 626, 628 (Ind. 1966); *Mox v. Woods*, 262 P. 302, 303 (Cal. 1927); *see also Becker v. Thompson*, 76 S.W.2d 357, 361 (Mo. 1934); *Brackett v. Griswold*, 20 N.E. 376 (N.Y. 1889); *Shope v. Boyer*, 150 S.E.2d 771, 774 (N.C. 1966).

14. *Accord* 4 *Restatement (Second) of Torts*, § 876(a) & comment b (1979); Thomas M. Cooley, *The Law of Torts*, Ch. V. at 125 (1880); *see Halberstam v. Welch*, 705 F.2d 472, 479 (D.C. Cir. 1983); *Beck*, Pet. App. at 16-17 n.18 ("In a civil context, . . . the purpose of a conspiracy claim is to impute liability — to make X jointly liable with D for what D did to P").

v. United States, 364 U.S. 587, 593 (1961), in the civil context the mere agreement to commit a tort is never itself actionable. "The mere common plan, design or even express agreement is not enough for liability in itself, and there must be acts of a tortious character in carrying it into execution." 4 *Restatement (Second) of Torts*, § 876 comment b, at 316 (1979).[15] As this Court has recognized, there can be no civil liability for conspiracy unless one of the conspirators commits an underlying tort. *Nalle v. Oyster*, 230 U.S. 165, 182-83 (1913) (because underlying libel claim was "not actionable, it follows plainly enough that a conspiracy to [commit libel] is not actionable").

Third, there is a fundamental difference between the function of the "overt act" in criminal and civil conspiracy law. "The function of the overt act in a conspiracy prosecution is simply to manifest 'that the conspiracy is at work,' " — i.e., to corroborate, through circumstantial evidence, the existence of the unlawful agreement. *Yates v. United States*, 354 U.S. 298, 333-34 (1957) (citations omitted); *Braverman*, 317 U.S. at 53.[16] As a result, the overt act need not "constitute the very crime that is the object of the conspiracy" and need not even be unlawful. *United States v. Rabinowich*, 238 U.S. 78, 86 (1915). Rather, it can be any ordinary act that tends to further the conspiracy. *See Yates*, 354 U.S. at 333-34 (stating that speech at public meeting could be considered overt act).

In the civil context, however, the overt act must be the very underlying tortious wrong that damaged the plaintiff and furnished the cause of action. *See Adler* 65 U.S. (24 How.) at 410 ("An act legal in itself, and violating no right, cannot be

15. *See also Cooley* Ch. V. at 125; *Prosser* § 46, at 293.

16. In criminal law, an overt act serves other procedural functions as well, relating to venue and accrual of the statute of limitations.

made actionable on account of" a conspiracy). If the "overt" act in a civil case does not constitute a substantive wrong, there is no cause of action for the conspiracy. *Nalle*, 230 U.S. at 182-83.[17]

Finally, the fact that an overt act need not be committed to sustain a *criminal* RICO conviction, *Salinas*, 522 U.S. at 63, is irrelevant. As all recognize — including the minority circuits — some overt act is necessary under civil RICO because otherwise there would be no "injury to business or property" as required by § 1964(c). *See, e.g.*, *Schiffels*, 978 F.2d at 348-49; *Medallion TV Enterprises v. SelecTV of Cal., Inc.*, 627 F. Supp. 1290, 1298 (C.D. Cal. 1986), *aff'd*, 833 F.2d 1360 (9th Cir. 1987), *cert. denied*, 492 U.S. 917 (1989); *see also Klehr*, 521 U.S. at 189.

Indeed, as in RICO, no overt act is required to sustain a criminal conviction under the antitrust laws. *See United States v. Saucony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940); *Nash v. United States*, 229 U.S. 373, 378 (1913). Yet a civil antitrust action requires an injury caused by reason of an *unlawful* overt act. It is not enough that two people conspire to restrain trade and that plaintiff be injured by some ordinary act; the injury must be caused by an act that constitutes the substantive violation of the antitrust laws. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971), *citing Suckow Borax Mines Consol., Inc. v. Borax Consol., Ltd.*, 185 F.2d 196, 207-08 (9th Cir. 1950).[18]

17. *See also Prosser* § 46, at 293; *Restatement* § 876(a) & comments b and c; *Cooley* Ch. V at 125-26.

18. In *Zenith*, this Court held that any overt act within the four-year limitations period that effectuates an antitrust injury pursuant to the conspiracy gives rise to an action for damages. 401 U.S. at 338-42. Conversely, overt acts that do not effectuate an antitrust injury do not (Cont'd)

In sum, Beck's attempt to synthesize criminal and civil conspiracy law fails completely. Any similarities between criminal and civil conspiracies are overshadowed by their fundamental differences.

3. Civil Concepts of Conspiracy Require That a Plaintiff's Injury Be Caused by an Underlying Substantive RICO Violation.

Beck argues that it would be a "radical change" to require "the actual commission of a predicate act, i.e., the underlying substantive crime, to establish civil liability for a RICO conspiracy." Pet. Br. at 25. On the contrary, as the Eleventh Circuit recognized, settled concepts of civil conspiracy law require that very result: "[A] civil conspiracy plaintiff must prove that someone in the conspiracy committed a tortious act

(Cont'd)
give rise to an action for damages. For instance, in *Suckow* — cited with approval in *Zenith* — the court concluded that defendant's purchase of certain business interests and procurement of releases did not constitute "illegal overt acts . . . to the damage of [plaintiffs]"; thus, such acts were not antitrust violations and did not constitute part of a "continuing violation" for statute of limitations purposes. *Suckow*, 185 F.2d at 207-09. Similarly, in *Kaiser Alum. & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1055-56 (5th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983), the court held that plaintiff's antitrust action was time-barred even though plaintiff had identified four overt acts occurring within the limitations period; although those acts "may have resulted in pecuniary injury" to plaintiff, "they [did] not, however, constitute acts injurious to plaintiff as antitrust damage."

In *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997), this Court rejected the "last predicate act rule" for accrual of RICO's four-year statute of limitations. The Court analogized to antitrust precedent in noting that "'each overt act *that is part of the violation and that injures the plaintiff*, . . . starts the statutory period running again.' " *Id.* at 189, *quoting* 2 Philip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 338b, at 145 (rev. ed. 1995) and *citing Zenith* (emphasis added).

that proximately caused his injury; the plaintiff can then hold other members of the conspiracy liable for that injury." *Beck*, Pet. App. at 16-17 & n.18.

Because Beck lacked standing to pursue his substantive RICO claims under § 1962(a)-(c), he should not have standing to pursue a RICO conspiracy claim under § 1962(d) based on the same conduct and the same alleged injuries. In the parlance of the common law, the act that injured Beck — termination of employment — is not unlawful under substantive RICO and thus lacks the "tortious" quality that a civil conspiracy claim demands as a condition of recovery. To provide Beck with standing to assert a conspiracy claim when he lacks standing to assert a substantive claim would be tantamount to creating an independent tort of conspiracy, which the courts have long rejected. *See, e.g.*, *Adler*, 65 U.S. (24 How.) at 410; *Nalle*, 230 U.S. at 182-83.

One might argue that because Beck's termination was allegedly "wrongful" in the contemporary sense of the word, it constituted an underlying tort sufficient to sustain a conspiracy claim. This argument does not withstand analysis. Beck is not suing for any ordinary civil conspiracy, for which he could recover for an ordinary common law tort; he is seeking standing *under RICO* to recover for a federally created *statutory* tort, for an injury purportedly flowing from a conspiracy *to violate RICO's substantive provisions*. Therefore, the underlying wrongful act that creates a RICO conspiracy claim must be unlawful in the *statutory* sense.

Indeed, in contexts other than employment termination, the circuit courts have held that if the substantive RICO claims are deficient, dismissal of a RICO conspiracy claim necessarily follows. Thus, if the plaintiff lacks standing to assert substantive

RICO claims, he also lacks standing to assert a RICO conspiracy claim.[19]

In sum, because Beck cannot prove that he was injured by a substantive RICO offense prohibited by § 1962(a)-(c), he should not have conspiracy standing under § 1962(d) even though he was allegedly injured by a common law tort committed during the course of the alleged RICO conspiracy. The "unlawful" overt act that creates a cause of action for a RICO conspiracy must be a *statutory* unlawful act — i.e., a predicate act of racketeering listed in § 1961(1).

II.

A PERSON WHOSE INJURY WAS NOT CAUSED BY A PREDICATE ACT DOES NOT SATISFY THE PROXIMATE CAUSE STANDARDS IDENTIFIED IN *HOLMES*.

Principles of proximate causation support the view that a terminated employee lacks standing to pursue a RICO conspiracy claim. The parties "proximately" injured by a RICO

---

19. *See Danielson v. Burnside-Ott Aviation*, 941 F.2d 1220, 1232 (D.C. Cir. 1991) (holding that because plaintiff lacked standing to assert substantive claims under § 1962(a)-(c), he also lacked standing to assert conspiracy claim under § 1962(d)); *Grider v. Texas Oil & Gas Corp.*, 868 F.2d 1147, 1150-51 (10th Cir.), *cert. denied*, 493 U.S. 820 (1989) (holding that because plaintiff lacked standing to assert substantive claim under § 1962(a), he also lacked standing to assert a conspiracy claim under § 1962(d)); *see also Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1191 (3rd Cir. 1993); *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1064 (2d Cir. 1996), *vacated on other grounds*, 525 U.S. 128 (1998); *Religious Tech. Center v. Wollersheim*, 971 F.2d 364, 367 n.8 (9th Cir. 1992); *Edwards v. First Nat. Bank of Bartlesville*, 872 F.2d 347, 352 (10th Cir. 1989).

conspiracy are the direct victims of the racketeering activity performed pursuant to the conspiracy. Beck's loss of employment was a tangential by-product, not a direct result, of the RICO conspiracy.

A. As a Terminated Employee, Beck Is Merely an Indirect Victim of the RICO Violation And Is Not the Most Efficient Enforcer of the Statute.

Section 1964(c) was modeled on section 4 of the Clayton Act, which confers civil standing upon "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15; *see Holmes*, 503 U.S. at 267; *Sedima*, 473 U.S. at 489-90 & n.8. Because of the "close similarity" in "purpose and structure" of RICO and the Clayton Act, *Agency Holding*, 483 U.S. at 150-52, their civil standing requirements should be interpreted consistently. *See Holmes*, 503 U.S. at 268.

As is the case under section 4 of the Clayton Act, § 1964(c) requires a plaintiff to show that the defendants' RICO violation was both a "but for" cause and a "proximate" cause of his injury. *Holmes*, 503 U.S. at 265-69. As this Court has noted, "proximate cause" is not a static concept but rather is a generic "label" for the set of "judicial tools used to limit a person's responsibility for the consequences of that person's own acts." *Id.* at 268. "At bottom, the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.' " *Id.* at 268 (citation omitted).

In the context of both RICO and antitrust, the tendency in regard to damages "is not to go beyond the first step." *Holmes*, 503 U.S. at 271; *Associated Gen. Contractors of Cal. v. California State Council of Carpenters*, 459 U.S. 519, 534 (1983). Thus, the proximate cause rule demands "some direct

relation between the injury asserted and the injurious conduct alleged" and precludes recovery by a plaintiff who complains of harm "flowing merely from the misfortunes visited upon a third person by the defendant's acts." *Holmes*, 503 U.S. at 268.

Drawing upon its antitrust precedents, this Court in *Holmes* held that an indirectly injured plaintiff lacked standing to sue under RICO because "the link [was] too remote" between the alleged racketeering activity and the harm sustained by plaintiff. *Holmes*, 503 U.S. at 271. The Court identified three principles to aid in determining whether a plaintiff has RICO standing: (a) the less direct an injury, the more difficult it is to ascertain the amount of plaintiff's damages attributable to the violation as distinct from other independent factors (factual causation); (b) claims of indirectly injured persons would force courts to adopt complicated rules apportioning damages among various plaintiffs to eliminate the risk of multiple recoveries; and (c) to avoid the need to grapple with these potentially complex problems, a court should inquire whether there are more directly injured victims who can be counted upon to vindicate the law as private attorneys general without the problems attendant to suits by plaintiffs more remotely injured. *Holmes*, 503 U.S. at 268.[20]

Here, Beck's alleged RICO injury was indirect. The RICO "conspiracy" was an alleged agreement to violate RICO's substantive provisions by committing mail fraud, wire fraud

---

20. Even though the plaintiff in *Holmes* was in the linear chain of causation because his injuries resulted from the commission of the predicate acts, this Court nevertheless held that it was too far down that chain to allow standing, i.e., it was difficult to determine if its injuries resulted from the RICO acts or from other factors. *Holmes*, 503 U.S. at 272. Beck's injuries are even more remote and are not even in the linear chain of harm resulting from the predicate acts.

and extortion. Thus, the "direct" victims of the conspiracy were the contractors who paid improper monitoring fees; First Fidelity, which was induced to loan SIG $7.5 million; and SIG and its insurance subsidiaries, whose treasuries were supposedly looted. Beck was not an object of this conspiracy, and his loss of employment stemmed not from mail fraud, wire fraud or extortion but from SIG's collateral decision to fire him. Therefore, his injury is a mere "byproduct" of the alleged RICO conspiracy.[21]

If saddled with all of the baggage of a RICO claim, a trial of Beck's wrongful discharge case would not be "administratively . . . convenient," *see Holmes*, 503 U.S. at 268, especially because the direct victims are better able to vindicate RICO's purpose. Beck would have to prove all the elements of a RICO claim, including the existence of an enterprise, the existence of a conspiracy and a pattern of racketeering activity — an endeavor that would require the district court to supervise extensive, protracted discovery concerning the SIG defendants' business practices and motives spanning several years. On top of that, there would be a sharp factual dispute as to the reason for Beck's termination. Was it caused by the SIG defendants' desire to deprive him of the stock repurchase provided by his employment contract? By their desire to remove SIG's entire management team for poor performance, as recommended by Firemark? Or by their desire to punish him for blowing the whistle?

A much simpler and more administratively convenient cause of action, capable of yielding the same actual damages — plus the possibility of punitive damages — would be a state

21. *See Fallis v. Pendleton Woolen Mills, Inc.*, 866 F.2d 209, 211 (6th Cir. 1989) (holding that terminated whistleblower lacked antitrust standing); *accord In re Industrial Gas Antitrust Litig. (Bichan v. Chemetron Corp.)*, 681 F.2d 514, 520 (7th Cir. 1982) (same).

court suit for wrongful discharge.[22] In such a suit, the terminated employee would not have to prove the characteristics of the "enterprise" or the existence of a conspiracy or a pattern of racketeering activity, and the extent and scope of the discovery and trial would be correspondingly simpler. The plaintiff would merely have to prove that he was fired in retaliation for complaining about a single criminal act, rather than about a pattern of racketeering activity connected with a RICO "conspiracy" and "enterprise."[23]

In a RICO suit, there is no reason why a federal court and jury should have to grapple with factual disputes regarding an employer's motivation in terminating an employee, given "the fact that those directly injured . . . [can] be counted on to bring suit for the law's vindication" without the attendant factual disputes. *See Holmes*, 503 U.S. at 269, 273. Indeed, the direct victims of the SIG defendants' alleged RICO violation had incentive to sue and, with the exception of the contractors, did sue. SIG's bankruptcy trustee filed a RICO suit against the SIG defendants based upon the same conduct alleged in Beck's complaint. (*cf. Holmes*, 503 U.S. at 272, where this Court noted that the insolvency trustee for the broker dealers had filed suit).

22. The overwhelming majority of states have recognized either a common law or a statutory cause of action for wrongful discharge. *See Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 106 nn.2-4 (Colo. 1992) (collecting common law holdings of other state courts); 9A Labor Relations Reporter — Individual Employment Rights Manual (BNA) at 505:28, 540-592 (1999) (collecting state whistleblower statutes). Indeed, Beck sued SIG and the SIG defendants in state court asserting a variety of claims and seeking damages flowing from his termination. R-5-138-Exh.E.

23. *See Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739, 751 (9th Cir. 1984), *cert. dism'd*, 469 U.S. 1200 (1985) (Kennedy, J., dissenting) ("In its zeal to compensate Ostrofe for his injury, the majority has given Ostrofe the wrong cause of action. He should be seeking remedies for wrongful discharge, not treble damages for a violation of the antitrust laws").

First Fidelity filed an action based on SIG's failure to repay a portion of the $7.5 million loan. SIG's trustee filed an action against SIG's former attorneys alleging legal malpractice that caused SIG to engage in the predicate acts. And both the Florida and New Jersey insurance departments filed actions on behalf of SIG's subsidiaries against the SIG defendants for the same alleged looting set forth in Beck's complaint. Although these latter suits were not brought under RICO, they still "vindicate the law's 'general interest in deterring injurious conduct.' " *Callahan v. A.E.V., Inc.*, 182 F.3d 237, 266-67 (3d Cir. 1999) (Becker, J.) *quoting Holmes*, 503 U.S. at 269.

Finally, as with antitrust law, the most "efficient enforcers" of RICO are not whistleblowers but rather the direct victims of the RICO conspiracy. *See In re Industrial Gas Antitrust Litig. (Bichan v. Chemetron Corp.)*, 681 F.2d 514, 520 (7th Cir. 1982), *cert. denied*, 460 U.S. 1016 (1983), *citing Illinois Brick Co. v. State of Illinois*, 431 U.S. 720, 734-35 (1977). If an indirectly injured plaintiff were permitted to sue under RICO, the defendants would be subjected to multiple treble damage awards — those in favor of the direct victim(s) of the racketeering activity and those in favor of persons injured by ordinary overt acts. Such multiple awards "reduce the immediate victim's award, thereby reducing their incentive to enforce [the RICO statute]." *See* Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 364d at 231 (rev. ed. 1995) (hereinafter *Areeda*).[24]

24. *See also Willis v. Lipton*, 947 F.2d 998, 1002 (1st Cir. 1991) (allowing RICO suit by derivatively injured employee would deplete funds available to pay direct victims of defendant's fraudulent RICO activity); *Adams v. Pan Am. World Airways, Inc.*, 828 F.2d 24, 30-31 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 934 (1988) (indirectly injured employees lacked antitrust standing in part because of risk of "multiple liability" against defendant's "single quantity of wealth"); *Gregory Marketing Corp. v. Wakefern Food Corp.*, 787 F.2d 92, 97-98 (3rd Cir. 1986), *cert. denied*, 479 U.S. 821 (1986) (similar).

By allowing parties other than those directly injured by predicate acts to obtain treble damages, the minority approach would undermine RICO's remedial purposes through overdeterrence. As this Court has stated, "RICO's remedial purposes would more probably be hobbled than helped by . . . [a]llowing suits by those injured only indirectly." *Holmes*, 503 U.S. at 274. Suits by tangentially injured parties such as Beck "would open the door to massive and complex damages litigation, which would not only burden the courts, but would also undermine the effectiveness of treble damages suits." *See id.* RICO's deterrent purpose is best served by "concentrating the entire right to recover in the hands of the directly injured party." *Carter v. Berger*, 777 F.2d 1173, 1176 (7th Cir. 1985) (Easterbrook, J.), *citing Illinois Brick*, 431 U.S. at 735-37; *see also Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 188 (1994) (Although aiding and abetting claim under SEC Rule 10b-5 "makes the civil remedy more far-reaching, . . . it does not follow that the objectives of the statute are better served. Secondary liability for aiders and abettors exacts costs that may disserve the goals of fair dealing and efficiency in the securities markets").

B. The Majority Approach Is Supported by Antitrust Standing Principles.

This Court's antitrust precedents support the view that standing to sue for a RICO conspiracy requires a plaintiff to show that his injury was proximately caused by a predicate act.

One element of the antitrust standing calculus is the requirement that the plaintiff show an "antitrust injury," namely, an "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). An antitrust court analyzes "the relationship of the injury alleged with those forms of injury

about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy" under the Clayton Act. *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 478 (1982). Because antitrust law is primarily concerned with competition, a recoverable antitrust injury is one that results from an "anticompetitive aspect" of defendant's conduct. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334, 339 (1990); *Brunswick Corp.*, 429 U.S. at 487-89; *Associated Gen. Contractors*, 459 U.S. at 538. "This test forces antitrust courts to connect the alleged injury to the purposes of the antitrust laws." *Areeda* ¶ 362a, at 210.

In a RICO case, it is similarly appropriate to compare the "injury alleged" with those injuries Congress sought to redress "in making defendant's conduct unlawful and in providing a private remedy" under § 1964(c). *See Blue Shield*, 457 U.S. at 478. As shown in Point I, Congress was concerned with punishing racketeering activity and with remedying injuries flowing from that activity. Therefore, the only injuries "proximately caused" by a RICO conspiracy (whose goal is to commit racketeering activity) are those flowing from predicate acts of racketeering. *Cf. Holmes*, 503 U.S. at 286-90 (Scalia, J., concurring in the judgment). Anyone who suffers an injury flowing from other ordinary acts committed during the course of the conspiracy "stand[s] at too remote a distance to recover." *Holmes*, 503 U.S. at 268-69.[25]

25. Although this Court has stated that the "antitrust injury" concept has no analogue in RICO, *Holmes*, 503 U.S. at 269 n.15 (citing *Sedima*), the Court was merely referring to *Sedima*'s rejection of the amorphous "racketeering" or "competitive" injury requirements for RICO standing that some courts had borrowed from the Clayton Act. *See, e.g., Haroco*, 747 F.2d at 391-98. Here, Respondents do not seek to resurrect the "racketeering" or "competitive" injury requirements; they merely seek to apply the predicate act rule — which is derived from RICO's text — in conspiracy cases.

In antitrust law, the federal courts have grappled with a standing issue nearly identical to the one presented here: whether an employee terminated in retaliation for refusing to participate in, or blowing the whistle on, an antitrust violation has standing to sue under § 4 of the Clayton Act. With one notable but limited exception, the courts agree that such plaintiffs lack antitrust standing because they have not suffered an "antitrust injury" and because there are more direct victims of the antitrust violation who have incentive to sue.[26]

Only the Ninth Circuit would grant antitrust standing to terminated employees. *See Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378 (9th Cir. 1982) ("*Ostrofe I*"), *cert. granted and judgment vacated*, 460 U.S. 1007 (1983), *adhered to*, 740 F.2d 739 (9th Cir. 1984) ("*Ostrofe II*"), *cert. dism'd*, 469 U.S. 1200 (1985). However, since that decision, the Ninth Circuit has strictly limited antitrust standing to cases in which a "dismissed employee is an 'essential participant' in an antitrust scheme, the dismissal is a 'necessary means' to accomplish the scheme, and the employee has the greatest incentive to challenge the antitrust violation." *Vinci v. Waste Management, Inc.*, 80 F.3d 1372, 1376-77 (9th Cir. 1996), *cert. denied*, 520 U.S. 1119 (1997). The court stated that *Ostrofe* was a "limited exception to the general rule that a terminated employee lacks antitrust standing." *Id.* at 1376-77.

26. *See In re Industrial Gas Antitrust Litig. (Bichan v. Chemetron Corp.)*, 681 F.2d 514, 517-19 (7th Cir. 1982), *cert. denied*, 460 U.S. 1016 (1983); *Gregory Marketing Corp. v. Wakefern Food Corp.*, 787 F.2d 92, 95-97 (3rd Cir. 1986), *cert. denied*, 479 U.S. 821 (1986); *Feeney v. Chamberlain Mfg. Corp.*, 831 F.2d 93, 96 (5th Cir. 1987); *Fallis v. Pendleton Woolen Mills, Inc.*, 866 F.2d 209, 211 (6th Cir. 1989); *Winther v. DEC Intern., Inc.*, 625 F. Supp. 100, 102-03 (D. Colo. 1985); *Thomason v. Mitsubishi Elec. Sales America, Inc.*, 701 F. Supp. 1563, 1569-70 (N.D. Ga. 1988).

The reasons for denying antitrust standing to a terminated employee are soundly based on the types of injuries the antitrust laws were intended to prevent. As noted by then-Judge Kennedy in a stinging dissent in *Ostrofe II*, a terminated employee simply does not suffer an antitrust injury — i.e., he "does not allege an injury related to an antitrust violation," and "the measure of damages does not reflect or respond to the breakdown in competition caused by the antitrust violation." *Ostrofe II*, 740 F.2d at 750 (Kennedy, J., dissenting); *accord* Areeda ¶ 377d5, at 316-17 (employees lack standing because they do not suffer injury that flows from reduced competition in product market).

Just as an employee lacks standing to claim that his termination was proximately caused by a price-fixing conspiracy aimed at a product market, an employee should lack standing to claim that his termination was proximately caused by a RICO conspiracy aimed at third parties. While in some sense both the antitrust employee and the RICO employee are *factually* injured by reason of the conspiracy, they are not "proximately" injured in a way that the respective statutes were intended to prevent. *See Ostrofe II*, 740 F.2d at 751 (Kennedy, J., dissenting) ("Antitrust enforcement becomes divorced from antitrust policy when treble damages bear no relation to the anticompetitive effects of the illegal conduct"); *Bichan*, 681 F.2d at 519 (adopting Judge Kennedy's dissent).

III.

THE MINORITY'S "ORDINARY OVERT ACT" APPROACH IMPROPERLY FEDERALIZES STATE COMMON LAW.

Concerns of federalism also support the requirement that a RICO plaintiff be injured by an unlawful predicate act. Under the minority approach, a substantial body of state common law would be incorporated into RICO under a "conspiracy"

umbrella, thus transforming RICO into a federal super-tort statute. Although Congress did anticipate *some* federalization of state fraud law, primarily through mail, wire and securities fraud predicates,[27] Congress did not intend to effect a wholesale federalization of state common law.[28] These concerns bear special significance here because the employer-employee relationship has traditionally been within the province of state law.

In an analogous context, this Court declined to construe the civil rights conspiracy statute in a way that would federalize state tort law. 42 U.S.C. § 1985(3). Recognizing the danger that § 1985(3) might be used against ordinary criminal assaults, the Court limited it, in accordance with Congress's core concern, to conspiracies having "some racial, or perhaps otherwise class-based animus." *Griffin v. Breckenridge*, 403 U.S. 88, 101-02 (1971). "The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose — by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation" stressed by the statute's sponsors. *Id.* at 102.

This Court reiterated these concerns more recently in holding that § 1985(3) does not provide a federal cause of action against persons obstructing access to abortion clinics. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 268 (1993). The Court refused to interpret the term "class" so broadly as to allow "innumerable tort plaintiffs . . . to assert causes of action under § 1985(3) by simply defining the aggrieved class as those seeking to engage in the activity the defendant has interfered

27. *See Sedima*, 473 U.S. at 500; *Bennett v. Berg*, 685 F.2d 1053, 1064 (8th Cir. 1982), *cert. denied*, 464 U.S. 1008 (1983).

28. *Willis v. Lipton*, 947 F.2d 998, 1001 (1st Cir. 1991); *Miranda*, 948 F.2d at 49 (RICO "cannot be used as a surrogate for local law").

with." *Id.* at 269. Such a "definitional ploy would convert the statute into the 'general federal tort law' it was the very purpose of the [discriminatory] animus requirement to avoid." *Id.* Furthermore, the expansion of § 1985(3) was unnecessary because "[t]respassing on private property" during an abortion protest "may be prosecuted criminally under state law and may also be the basis for state civil damages." *Id.* at 286.

As with § 1985(3), RICO has a dangerous potential to engulf common law causes of action — such as wrongful discharge,[29] breach of contract or defamation — through an overly broad construction of the civil conspiracy doctrine. This danger approaches constitutional dimensions. As Justice Kennedy has observed, "essential considerations of federalism are at stake here. The federal balance is a fragile one, and a false step in interpreting § 1985(3) risks making a whole catalog of state crimes a concurrent violation of a single congressional statute." *Bray*, 506 U.S. at 287 (Kennedy, J., concurring); *cf. Gregory v. Ashcroft*, 501 U.S. 452, 460-67 (1991) (absent "plain statement" of congressional intent "to alter the usual constitutional balance between the States and the Federal Government," federal court must adopt construction of statute that maintains existing balance).

Likewise, the risk of federalizing state common law through RICO's conspiracy provision demands that some rational limit be placed on civil RICO conspiracy claims. The predicate act requirement, which has its foundation in RICO's text and purpose, represents the appropriate limit. *See Griffin*, 403 U.S. at 102 (the only way to prevent encroachment on state law is "by giving full effect to the congressional purpose").

29. *See* n.22, *supra.*

IV.

RICO'S LEGISLATIVE HISTORY AND REMEDIAL PURPOSES DO NOT SUPPORT THE MINORITY VIEW.

Beck concedes that "[t]here is no legislative history directly regarding the specific issue presented by [his] Petition, § 1964(c)'s civil remedies for conspiracies to violate RICO." Pet. Br. at 37 n.3. Therefore, Beck's legislative-history argument (Pet. Br. at 32-41) is of no moment because, as recognized in *Sedima*, Congress's intent is best determined by the statutory language it chooses. "Congressional silence, no matter how 'clanging,' cannot override the words of the statute." *Sedima*, 473 U.S. at 494 n.13. If Congress had wanted to provide RICO whistleblowers with standing for their retaliatory loss of employment injury, it could have done so, as it has done in several other statutes.[30]

Recognizing the absence of any legislative history capable of helping his case, Beck falls back on more generalized statements of RICO's "remedial purposes," its intent to "provide vigorous incentives for plaintiffs to pursue RICO claims," and its intent to "strengthen the evidence-gathering process." Pet. Br. at 34-38. This Court recognized these goals in *Holmes* but nevertheless limited RICO standing to those persons whose injuries are proximately caused by the illegal conduct. For the reasons set forth in Point II of this brief, fulfillment of these goals is not thwarted by limiting RICO standing to the preferred attorneys general — the direct victims of the illegal conduct.[31]

30. *See, e.g.*, 42 U.S.C. § 6971 (RCRA); 42 U.S.C. § 9610 (CERCLA); 31 U.S.C. § 3730(h) (False Claims Act); 12 U.S.C. § 1831j (Federal Deposit Insurance Act); 42 U.S.C. § 5851 (Energy Reorganization Act); 33 U.S.C. § 1367 (Clean Water Act); 49 U.S.C. § 31105 (Surface Transportation Assistance Act); 5 U.S.C. § 1213 (Federal Whistleblower Protection Act).

31. Moreover, RICO's liberal construction clause does not require rejection of the predicate act rule for conspiracy claims. As (Cont'd)

V.

THE ALLEGED RETALIATORY DISCHARGE WAS NOT AN OVERT ACT IN FURTHERANCE OF THE ALLEGED RICO CONSPIRACY AND THUS PROVIDES NO BASIS FOR RICO CONSPIRACY STANDING.

Beck asserts that after he contacted SIG's insurance regulators advising them that its financial statements were overstated, false causes were created to justify his termination. Pet. Br. at 11. He was terminated allegedly in retaliation for his whistleblowing.

But a retaliatory motive could not be "in furtherance of" the RICO conspiracy because the allegedly illegal acts had already been disclosed. Even courts in the minority agree that a retaliatory discharge is not "in furtherance of" a RICO conspiracy if the termination occurs after the employee has already exposed the fraudulent scheme and the termination is simply to punish him for blowing the whistle.[32] Here, because Beck had already exposed the alleged RICO conspiracy to the Florida insurance regulators,[33] his subsequent

(Cont'd)
this Court has observed, that clause "is not an invitation to apply RICO to new purposes that Congress never intended." *Reves*, 507 U.S. at 183. Here, the minority view would extend RICO to just such a purpose — deterring common law torts and remedying injuries caused by ordinary acts.

32. *See Schiffels*, 978 F.2d at 350-51, 353 (RICO conspiracy claim was deficient because plaintiff's allegations indicated "only that she was fired in retaliation for attempting to disclose the fraudulent scheme, not to further it or prevent its disclosure").

33. Under Florida law, the insurance regulators were obligated to investigate allegations of wrongdoing and had broad investigative powers. Fla. Stat. §§ 624.307 & 624.321; *Florida Dep't of Ins. and Treasurer v. Bankers Ins. Co.*, 694 So. 2d 70, 71-74 (Fla. App. 1997).

termination cannot be considered "in furtherance of" that conspiracy.[34]

Moreover, prior to Beck's termination, the SIG defendants' own actions resulted in the exposure of the wrongdoing at SIG. It was the SIG defendants who hired Firemark to audit SIG's operations, and it was Firemark whose investigation revealed the conduct that Beck alleges comprised much of the RICO violation. Since the SIG defendants themselves helped to expose the wrongdoing, their subsequent termination of Beck could not have been "in furtherance of" the conspiracy; the cat was already out of the bag.

34. *See also United States v. Steele*, 685 F.2d 793, 801 (3rd Cir.), *cert. denied*, 459 U.S. 908 (1982) (acts occurring after criminal bribery scheme was revealed to Governor of Puerto Rico were not committed "in furtherance of" the conspiracy); *cf. United States v. Maze*, 414 U.S. 395, 401-03 (1974) (under mail fraud statute, there was insufficient connection between mailings and execution of respondent's scheme where mailings "increased the probability that respondent would be detected and apprehended"). Moreover, even after the termination, nothing prevented Beck from further exposing the alleged fraud by continuing his conversations with the insurance regulators or, in his capacity as a substantial SIG shareholder, calling a shareholders' meeting and demanding an investigation. *See Casper v. Paine Webber Group, Inc.*, 787 F. Supp. 1480, 1500 (D.N.J. 1992) (plaintiff's termination was not in furtherance of RICO conspiracy because it "would not prevent her from disclosing the alleged illegalities, but rather invites [her] to disclose the alleged unlawful schemes").

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit should be affirmed.

Respectfully submitted,

MICHAEL M. ROSENBAUM
Counsel of Record
DONALD P. JACOBS
RICHARD M. DEAGAZIO
BUDD LARNER GROSS ROSENBAUM
GREENBERG & SADE, P.C.
Attorneys for Respondents
Leonard Bellezza, William Paulus, Jr., Harry Olstein and
Ernest J. Sabato
150 John F. Kennedy Parkway
Short Hills, New Jersey 07078
(973) 379-4800