No. 13-873

IN THE
Supreme Court of the United States

US FOODS, INC.,

Petitioner,

v.

CATHOLIC HEALTHCARE WEST *et al.*, CASON, INC., AND FRANKIE'S FRANCHISE SYSTEMS INC., ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF DRI – THE VOICE OF THE DEFENSE BAR AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES – continued

TABLE OF AUTHORITIES – continued

TABLE OF AUTHORITIES – continued

STATUTES

TABLE OF AUTHORITIES – continued

INTEREST OF *AMICI CURIAE*[1]

Amicus curiae DRI – the Voice of the Defense Bar is an international organization that includes more than 23,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to address issues germane to defense attorneys, to promote the role of the defense lawyer, to improve the civil justice system, and to preserve the civil jury. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and – where national issues are involved – consistent. To promote these objectives, DRI participates as *amicus curiae* in critical cases raising issues of importance to its members, their clients, and the judicial system.

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amicus curiae* certifies that counsel of record for both petitioners and respondents have, after timely notification, consented to this filing in letters on file with the Clerk's office.

Executive Branch, and the courts, and the Chamber regularly files *amicus* briefs in cases of significance to the business community and for the judicial system.

This is just such a case, as the decision below threatens to promote rampant abuse of class action procedure. *Amici*'s members regularly defend against putative class actions in a variety of contexts, including where, as here, plaintiffs seek a classwide presumption of reliance to relieve themselves of their burden of proof. DRI and the Chamber each has participated as *amicus* at the petition and merits stage in *Halliburton Co. v. Erica P. John Fund, Inc.*, No. 13-317 (U.S. granted Nov. 15, 2013), and this case has similar importance for the countless additional contexts in which plaintiffs would seek to invoke such a presumption.

The stakes could not be more significant. As this Court has recognized, certification can create enormous hydraulic pressure to settle even the most meritless suits, as companies try to avoid betting their futures on a roll of the courthouse dice. Such pressure becomes even greater in the RICO context, where treble damages are at stake. Accordingly, DRI's members have a substantial interest in this Court reining in sprawling RICO class actions, like the one at hand, as well as resolving the well-entrenched circuit split on whether contract-expectancy damages are available in a RICO case.

INTRODUCTION

Disregarding this Court's precedents, the Second Circuit affirmed certification of an unprecedented nationwide class of 75,000 separate businesses from around the country who signed separate contracts following separate negotiations. In so doing, the court disregarded individualized issues of reliance

and damages, and transformed this breach of contract dispute into a monolithic RICO class action that exposes petitioner to exponential liability.

Amici agree that each of the issues presented in the petition is significant. *Amici* write separately, however, to discuss two of the issues, which have broad implications for class actions within the RICO context and beyond.

First, contrary to the general rule that cases requiring individual reliance are *not* suitable for class treatment, the Second Circuit certified the RICO class by allowing a presumption of reliance arising from the mere payment of an invoice. As a result, the Court relieved plaintiffs of their burden of proving actual reliance and effectively eliminated defenses that could have been raised as to individual plaintiffs' claim.

The use of a classwide presumption of reliance is a transformative issue in class action practice. It goes to the core of balancing expediency with the requirements of the Rules Enabling Act, the Due Process Clause, and fundamental fairness. In the securities context, of course, the presumption has a specific, though dubious, underpinning in the "efficient markets" theory, *see, e.g.*, *Erica P. John Fund, Inc. v. Halliburton Co.*, 718 F.3d 423, 429 (5th Cir. 2013), *cert. granted*, 82 U.S.L.W. 3295 (U.S. Nov. 15, 2013) (No. 13-317). Outside that limited context and in cases such as this one, the presumption is even less defensible. There is simply no reason to think that 75,000 disparate contracting parties, each with its own knowledge base and course of dealing, would have relied upon the same information. Moreover, plaintiffs' "invoice theory" could have the most far-reaching of consequences: If mere payment of a bill were treated as evidence of reliance, it would

be difficult to imagine a situation in which the theory *could not* be invoked.

Second, this Court needs to resolve the proper scope of damages in a civil RICO action predicated on a contract dispute, and decide whether contract-expectancy damages are available. As set forth in the petition, there is a clear circuit split on the issue, and the decision below deepens the split.

Immediate resolution of this question is necessary because decisions that permit expectancy damages in RICO contract disputes effectively federalize those contract disputes. And, given that RICO claims carry the threat of treble damages, the hydraulic pressure to settle those cases upon certification is magnified. By making it easier to certify sweeping RICO classes and expanding the damages plaintiffs can seek, the decision below provides overwhelming incentives to bring such actions and to extract nuisance settlements.

Accordingly, this Court should grant the petition.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD ACCEPT REVIEW TO ADDRESS THE AVAILABILITY OF A CLASSWIDE "PRESUMPTION" OR "INFERENCE" OF RELIANCE OUTSIDE THE SECURITIES CONTEXT.

This case raises fundamental questions about a plaintiffs' ability to establish reliance through generalized proof. As explained below, the Court allowed an "invoice theory" of presumed classwide reliance that relieved plaintiffs of their burden of proving individual reliance. Only this Court can correct this significant departure from its precedent.

A. The Second Circuit's Decision Allows The Class Action Procedure To Distort The Burden Of Proof And Availability Of Defenses.

1. A basic principle of Rule 23 jurisprudence is that the class-action procedure cannot be allowed to modify or abridge the substantive rights, burdens of proof, or available defenses for the underlying claim. That principle flows from the Rules Enabling Act, as well as the demands of fairness and due process. *See* 28 U.S.C. § 2072(b) (providing that Federal Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive right"); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality opinion) (class actions may proceed only where it "leaves the parties' legal rights and duties intact and the rules of decision unchanged"); *Amchem Prods. v. Windsor*, 521 U.S. 591, 615 (1997) (emphasizing that Rule 23 must be interpreted in light of the Rules Enabling Act and not sacrifice fairness).

It is thus critical that the "rigorous analysis" required by Rule 23 be rooted in the underlying elements of the claim, and that courts not be permitted to take shortcuts compromising defendants' rights or facilitating plaintiffs' claims. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). If a "shortcut [is] necessary" for the suit to proceed as a class action, that should be "a caution signal" against certification. *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 343 (4th Cir. 1998). And, if a class action would preclude a defendant from litigating its defenses, the class may not be certified. *See, e.g.*, *Wal-Mart*, 131 S. Ct. at 2561.

2. Consistent with the above principles, most courts refuse to certify Rule 23(b)(3) classes when

individual reliance is at issue. *See, e.g.*, *Sandwich Chef of Tex. v. Reliance Nat. Indem. Ins. Co.*, 319 F.3d 205, 219 (5th Cir. 2003) ("Individual findings of reliance necessary to establish RICO liability and damages preclude [certification]") (internal quotation marks and alternations omitted). As these courts recognize, the chain of causation in such cases largely depends on multiple steps that vary greatly from person to person and simply cannot be determined on a classwide basis. For instance, a finding of reliance turns on: (a) what representations the person received and was aware of; (b) what other knowledge the person had that would inform his interpretation of the representation or his decision to transact; and (c) whether the person entered into the transaction based on the alleged misrepresentation or for some other unrelated reason.

Moreover, even if circumstantial evidence, such as the mere fact of purchase following an alleged misrepresentation, were sufficient to meet plaintiffs' initial burden, the defendant should be allowed to raise such issues in defense of the claim. For example, in *In re St. Jude Medical, Inc.*, 522 F.3d 836 (8th Cir. 2008), the plaintiffs alleged state consumer fraud claims arising from representations about the efficacy of a heart valve, and the Eighth Circuit reversed class certification. The court correctly held that even if state precedent allowed reliance to be established by circumstantial, generalized proof, it could "not prohibit *St. Jude* from presenting direct evidence that an individual plaintiff … did not rely on representations from St. Jude." *Id.* at 840 (emphasis omitted). The court observed that a number of patients did not receive any material representations while two of the five named plaintiffs did not remember hearing anything about the unique

qualities of the valve. The court found such matters "highly relevant and probative" on the ultimate issue of whether the injury (the purchase) could be traced to the alleged misrepresentation. *Id.*

The Ninth Circuit's decision in *Poulos v. Caesars World, Inc.*, 379 F.3d 654 (9th Cir. 2004), is to similar effect. That case involved an alleged uniform misrepresentation and fraudulent concealment about how electronic gaming machines operated, and the court rejected Plaintiffs' arguments, which were variously framed as either a presumption of reliance or inference from circumstantial evidence. The court explained that, because there was "no single, logical explanation" for gambling or what players expected from the machines, plaintiffs could not rely on a circumstantial or "common sense" inference that all class members were misled. *Id.* at 667-68.

Numerous cases from other circuits are in accord. *See, e.g., Zimmerman v. Bell*, 800 F.2d 386, 390 (4th Cir. 1986) (securities fraud claims not amenable to class treatment where knowledge and availability of information varied); *Contos v. Wells Fargo Escrow Co.*, No. C08-838Z, 2010 WL 2679886, at *9 (W.D. Wash. July 1, 2010) (denying certification of state unfair practices claim alleging inflated escrow fees due to need to evaluate specific circumstances of transactions); *Dungan v. Acad. at Ivy Ridge*, 249 F.R.D. 413, 416-17 (N.D.N.Y. 2008) (reliance on alleged misrepresentation about school's accreditation would be defeated by evidence that students could enroll regardless of ability to issue credits or diplomas).

3. The courts below, however, charted their own path and elided these issues by adopting an "invoice theory" of presumed classwide reliance. Under this theory, the courts reasoned, each invoice contained

an "implicit" misrepresentation that the "cost" component of the price was derived from an independent, third-party invoice as opposed to a VASP controlled by defendant. Pet. App. 15a-16a, 19a. According to the court, the *only* way to rebut this presumption would be to show specific knowledge *of the allegedly fraudulent scheme*.

This theory is entirely meritless. Payment of an invoice is not evidence that all plaintiffs made payment for the same reasons or relied on any particular understanding about the cost-plus formula in doing so.

For example, some purchasers – like two of the named plaintiffs – may not have even read their contracts at the time of purchase and had no awareness or expectation that the price even had a "cost-component" to be calculated. Pet. 6; C.A. J.A. A1903, A1958-59, A1961. Those purchasers could not have relied on the cost-plus formula, any more than consumers can rely on advertising they never saw.

Moreover, purchasers were not locked into exclusive agreements with the defendant and could review published "order guides" to know the final invoice price *prior to deciding whether to place an order*. *See* Pet. 6. As a result, some class members likely purchased from defendant simply because it offered the best prices. Pet. 6, 23-24; C.A. J.A. A1905, A1924-25, A1952-53, A2420-21. Such purchasers would have been relying on the bottom-line prices *that they were quoted and invoiced*, and – similar to the gamers in *Poulos* – were not motivated by the internal workings of how the price was calculated or whether the VASPs were independent or not.

Still other purchasers may have paid despite being well aware that foodservice distributors set the "cost"

component themselves or through controlled entities. The district court recognized that "the plaintiffs' alleged knowledge of the VASP system is a strongly contested factual dispute," Pet. App. 58a, and the defendant also cited survey evidence of substantial, though varied, knowledge among customers about the practice, *see* C.A. J.A. A2445-46.[2] Regardless of whether any customer had full knowledge of defendant's VASP system (as the courts below required), the relative mix of knowledge and motivation would be at issue for determining causation in any individual trial and would differ from customer to customer.

To be sure, *some* plaintiffs might have paid because they relied on their assumption that the "cost" component of the price was derived from an independent third-party. But making that determination for one plaintiff would not resolve the issue for other customers. Rather, adjudicating reliance depends on each plaintiff's individual facts and circumstances, and there is no reason to relieve plaintiffs of their burden of proof simply because they are litigating as class.

Yet, by holding that the defendant lacked any evidence to rebut this classwide presumption, the court effectively shifted the burden of proof and

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[2] In particular, 17 of 19 class members surveyed stated that they knew that distributors "set the 'cost' component for private label products under cost plus contracts from an invoice issued by itself or a company it controls." C.A. J.A. A2445. And 28 of 32 class members surveyed understood "that foodservice distributors, such as USF, had an internal profit or inside margin in the cost component of their private label sold on a cost-plus basis and use or have used 'value added service providers' or other middleman vendors for private label or national brands." *Id.*

precluded the Defendant from raising arguments that would be "highly relevant and probative" in any *individual* trial, *In re St. Jude Medical, Inc.*, 522 F.3d at 840 – including that plaintiffs and many class members were invoiced for *exactly the price they expected* when they ordered defendant's products based on the published price lists. Compounding its error, the court also pretermitted defendant's ability to obtain evidence pertinent to the reliance determination. At the very least, a defendant should be allowed to take discovery of each plaintiff claiming reliance to determine whether the plaintiff in fact individually relied. Even if *some* putative class members could show that they relied on a particular expectation, such proof would not resolve the claim for every class member.

B. Limiting The "Presumption Of Reliance" In Class Actions Is A Matter Of National Importance.

Presuming reliance based on nothing more than payment has vast significance, transcending RICO cases. For example, many states' "deceptive trade practice" laws require reliance. *See, e.g., Kuehn v. Stanley*, 91 P.3d 346, 351 (Ariz. Ct. App. 2004); *Jarrett v. Panasonic Corp. of N. Am.*, No. 4:12-cv-00739-SWW, 2013 U.S. Dist. LEXIS 97983, at *32 (E.D. Ark. June 21, 2013) ("[A]n ADTPA claim requires each class member to prove reliance on the allegedly fraudulent conduct and that such fraudulent conduct caused damage."); *Garcia v. Medved Chevrolet, Inc.*, 240 P.3d 371, 380 (Colo. App. 2009), *aff'd*, 263 P.3d 92 (Colo. 2011); *Stephenson v. Capano Dev., Inc.*, 462 A.2d 1069, 1074, 1077 (Del. 1983) (a showing of reliance required in actions seeking damages); *Captain & Co. v. Stenberg*, 505 N.E.2d 88, 98-99 (Ind. Ct. App. 1987); *Benedict v. Altria Grp.*

Inc., 241 F.R.D. 668, 679-80 (D. Kan. 2007); *Tucker v. Boulevard At Piper Glen LLC*, 564 S.E.2d 248, 251 (N.C. Ct. App. 2002) ("the plaintiff must show 'actual reliance' on the alleged misrepresentation in order to establish" proximate causation); *Amato v. Gen. Motors Corp.*, 463 N.E.2d 625, 628-29, (Ohio Ct. App. 1982) (indicating that reliance is an element of plaintiffs' consumer protection claim under Ohio Rev. Code Ann. §§ 1345.01 et seq.); *Feitler v. Animation Celection, Inc.*, 13 P.3d 1044, 1047 (Or. Ct. App. 2000) (for alleged misrepresentatives, "the causal 'as a result of' element requires proof of reliance-in-fact by the consumer"); *Weinberg v. Sun Co*, 777 A.2d 442, 446 (Pa. 2001) (consumer protection statute incorporates "traditional common law elements of reliance and causation"); *Nw. Pub. Serv. v. Union Carbide Corp.*, 236 F. Supp. 2d 966, 973-74 (D.S.D. 2002) (statute "require[s] proof of an intentional misrepresentation or concealment of a fact on which plaintiff relied and that caused an injury"); Tex. Bus. & Com. Code § 17.50(a)(1) (requiring act or practice to be a "producing cause" of damages and "relied on by a consumer to the consumer's detriment"); *Weiss v. Cassidy Dev. Corp.*, No. 206766, 2003 WL 22519650, at *2 (Va. Cir. Ct. Aug. 18, 2003) ("[a]llegations of misrepresentation of fact [under the VCPA] must include the elements of fraud," including "reliance by the party misled"); *White v. Wyeth*, 705 S.E.2d 828, 837 (W. Va. 2010) (plaintiff must prove reliance under the West Virginia consumer protections statute when affirmative misrepresentation is alleged).

Other state statutes require proof of causation. Ala. Code § 8-19-10(a) (unlawful conduct must "cause[] monetary damage to a consumer"); Alaska Stat. § 45.50.531(a) ("ascertainable loss" must be incurred "as a result of" violation of statute); Fla. Stat.

§ 501.211(2) (must show a "loss as a result" of violation of statute to recover damages); Idaho Code Ann. §48-608(1) ("ascertainable loss" must be incurred "as a result of" of unlawful act); *Oliveira v. Amoco Oil Co.*, 776 N.E.2d 151, 160 (Ill. 2002) (citing Ill. Comp. Stat. 505/10a(a)); *Woods v. Walgreen Co.*, No. 3:01CV-646-S, 2003 WL 1239364, at *3 (W.D. Ky. Mar. 17, 2003); La. Rev. Stat. Ann. § 51:1409(A) (loss must have occurred "as a result of the use or employment by another person of an unfair or deceptive method, act or practice"); Md. Code Ann., Com. Law § 13-408(a) (action for damages requires injury or loss "as the result" of proscribed practice); *Fraser Eng'g Co. v. Desmond*, 524 N.E.2d 110, 113 (Mass. App. Ct. 1988); Mich. Comp. Laws § 445.911(2), (3) (loss must be "as a result of a violation" of the Act); *Grp. Health Plan, Inc. v. Philip Morris, Inc.*, 621 N.W.2d 2, 13 (Minn. 2001); Miss. Code Ann. § 75-24-15(a) ("ascertainable loss" must be "a result of" unlawful acts); Mo. Rev. Stat. § 407.025(1) (same); Neb. Rev. Stat. Ann. § 59-1609 ("Any person who is injured" by a violation of the act may bring claim); Nev. Rev. Stat. § 41.600(1) (A claim may be brought by or on behalf of "any person who is a victim of consumer fraud."); N.H. Rev. Stat. Ann. § 358-A:10-a (allows any person injured to bring a claim and to bring a class action "if the unlawful act or practice has caused similar injury to numerous other persons"); *Cox v. Sears Roebuck & Co.*, 647 A. 2d 454, 464 (N.J. 1994) ("The 'causation' provision of N.J.S.A. 56:8-19 requires plaintiff to prove that the unlawful consumer fraud caused his loss."); N.M. Stat. Ann. § 57-12-10(B) (Any person who suffers a loss of money or property "as a result of" unlawful acts may bring an action.); *Stutman v. Chem. Bank*, 731 N.E.2d 608, 611-12 (N.Y. 2000) (stating that statute requires a showing of causation but not

reliance); *Wilson v. Blue Ridge Elec. Membership Corp.*, 578 S.E.2d 692, 694 (N.C. Ct. App. 2003) (stating that proximate causation is an element under the statute); *Patterson v. Beall*, 19 P.3d 839, 846-67 (Okla. 2000) ("[Okla. Stat. tit. 15, §761.1(A)] requires plaintiff to prove that his or her damages were caused by the defendant's unlawful practice."); R.I. Gen. Laws § 6-13.1-5.2(a) (ascertainable loss must be "as a result of the use or employment … of a method, act or practice declared unlawful"); S.C. Code Ann. § 39-5-140(a) (same); Tenn. Code Ann. ¶ 47-18-109(a)(1) (same); Utah Code Ann. § 13-11-19(2) (same); *Pickett v. Holland Am. Line-Westours, Inc.*, 35 P.3d 351, 360 (Wash. 2001) ("An actionable private claim under Washington's CPA requires '[a] causal link ... between the unfair or deceptive acts and the injury suffered by plaintiff.") (alteration and omission in original); Wis. Stat. § 100.18(11)(b)(2) (pecuniary loss must be "because of a violation" of the statute); Wyo. Stat. Ann. § 40-12-108(a) (consumers must suffer damages "as a result of" the unlawful deceptive trade practice).

Class actions under these various state statutes frequently are tried in federal court under the jurisdiction provided by the Class Action Fairness Act. 28 U.S.C. § 1332(d). If causation and reliance can be inferred based upon mere payment of an invoice *without requiring reliance on the specific, underlying representation*, then causation and reliance will be presumed in virtually all cases brought by consumers or anyone else alleging deceptive trade practices.

Such a rule cannot be allowed to stand. As this Court has recognized, even at the pleading stage, causation plays a critical role in ensuring that a "largely groundless claim" is not pursued simply for the "*in terrorem* increment of the settlement value."

Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 347 (2005) (internal quotation marks omitted). Certifying a class by relaxing a causation or reliance requirement is even more dangerous, given that "[c]ertification of a large class may so increase the defendant's potential liability . . . that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978); *see also Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980) (observing that "[a] district court's ruling on the certification issue is often the most significant decision rendered in . . . class-action proceedings").

Indeed, courts across jurisdictions have observed the "enormous," "irresistible," or "hydraulic" pressure to settle following certification, simply to avoid the risk of ruinous liability, however remote. *See, e.g.*, *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 310 (3d Cir. 2009) (observing "potential for unwarranted settlement pressure"); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293 (1st Cir. 2000) (noting that class certification may raise "the stakes of the litigation so substantially that the defendant likely will feel irresistible pressure to settle"); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 756 (5th Cir. 1996) (calling it "judicial blackmail" that class certification creates an "insurmountable pressure" to settle to avoid risk of "all-or-nothing verdict," even if unlikely). Numerous studies and surveys have likewise shown that cases overwhelmingly settle following class certification. *See, e.g.*, Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, ClassWide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1875 (2006); Barbara J. Rothstein & Thomas E. Willging, Fed. Judicial Ctr.,

Managing Class Action Litigation: A Pocket Guide for Judges 6 (2005).

Accordingly, engaging in inferences or presumptions that relieve plaintiffs of their burden on a critical element of a classwide claim is destined to invite abusive strike lawsuits. This Court should accept immediate review to provide guidance on this important issue.

II. THE COURT SHOULD ACCEPT REVIEW TO ADDRESS THE SCOPE OF RICO DAMAGES.

This Court's intervention is all the more necessary because the threat of abusive class actions is magnified in the RICO context, in which treble damages are at stake. And, here, the Second Circuit accentuated the problem even more by permitting the class to seek contract-expectation damages, deepening an existing inter-circuit split.

RICO allows for treble damages and attorneys' fees to "[a]ny person injured in his business or property by reason of" repeated racketeering activities. 18 U.S.C. § 1964(c). Courts of appeals have long recognized the "'restrictive significance'" of this narrow injury requirement. *Steele v. Hosp. Corp. of Am.*, 36 F.3d 69, 70 (9th Cir. 1994) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)). But they have nonetheless diverged in applying it where RICO claims relate to, or arise out of, contractual dealings.

The Fifth, Sixth, Eighth, and Ninth Circuits have held that expectation damages are never compensable under RICO because they do not fit the definition of injury to "business or property." Those courts limit RICO damages to "a concrete financial loss, and not mere injury to a valuable intangible property interest," such as a contractual expectation.

Chaset v. Fleer/Skybox Int'l, LP, 300 F.3d 1083, 1087 (9th Cir. 2002); s*ee also Jackson v. Sedgwick Claims Mgmt. Servs., Inc.*, 731 F.3d 556, 566 (6th Cir. 2013) (en banc) (holding that "racketeering activity leading to a loss or diminution of benefits the plaintiff expects to receive under a workers' compensation scheme does not constitute an injury to 'business or property' under RICO"); *Regions Bank v. J.R. Oil Co.*, 387 F.3d 721, 730 (8th Cir. 2004); *Price v. Pinnacle Brands, Inc.,* 138 F.3d 602, 607 (5th Cir. 1998) (per curiam).

In direct conflict with these decisions, the Seventh Circuit has allowed expectancy damages, at least when the racketeering activity came after, and was designed to thwart, an undisputed contractual right and expectancy. *See Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1310 (7th Cir. 1987) (awarding rental income as damages where defendants falsified return receipts in order to steal the product).[3]

Until the decision below, the Second Circuit appeared to be aligned with the courts holding that expectation damages are unavailable in RICO cases. In a prior decision, the Second Circuit held that expectancy damages are "generally unavailable in RICO suits," *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 228 (2d Cir. 2008), because it is all but impossible to "explain[] how a party's expectation can constitute business or property." *Id.* (internal quotation marks omitted). In the decision below, however, the court limited its prior rule to fraud-in-the-inducement cases and held that when plaintiffs allege that fraud occurred *after* the expectancy arose, they state a valid claim under RICO. Pet. App. 25a-

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[3] *See also* Pet. 15 (citing *Wishnefsky v. Carroll*, 44 F. App'x 581, 582 (3d Cir. 2002); *Scivally v. Graney*, No. 93-2075, 1994 WL 140413, at *3 (1st Cir. Apr. 15, 1994) (per curiam)).

26a. Thus, the court cast its lot with the Seventh Circuit. Indeed, the Second Circuit went a step further in finding that RICO damages could be based on *a disputed* contractual expectancy that is the subject of a concurrently litigated breach of contract claim.[4]

Because this case involves a sprawling class action with serious *in terrorem* effects, this Court's immediate resolution of the split is necessary. The ultimate question is whether RICO should be a vehicle for federalizing breach of contract law and providing treble damages for a willful breach. Even in a non-class action, this basic question about the intersection of RICO and state contract law would warrant this Court's intervention. But when the stakes are multiplied by 75,000, timely review is all the more paramount.

Were this case to be litigated to final judgment—or, more likely, until a settlement is reached—tens of thousands of class members would receive an enormous, undeserved, and utterly unprecedented windfall. Contracting parties who did not rely on the alleged fraud, and who may even have paid the lowest prices on the highly competitive market, would receive treble damages based on an expectation they never had. Because of the "intrusion of the draconian civil RICO remedies," *Young v. W. Coast Indus. Relations Ass'n*, 763 F. Supp. 64, 71 (D. Del. 1991),

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[4] It is also worth noting that many of the plaintiffs here seek an expectation interest that arose only because of the alleged RICO violation itself, and thus the alleged racketeering actually *created* their expectancy in prices. *See* Pet. 16-17. In that respect as well, the Second Circuit appears to have pushed beyond the boundaries previously set by other courts. But, regardless, the decision below underscores that there is a well-entrenched split that will not go away on its own.

aff'd, 961 F.2d 1570 (3d Cir. 1992), vigilant policing of the statute's borders is needed. *See Mathon v. Marine Midland Bank, N.A.*, 875 F. Supp. 986, 1001 (E.D.N.Y. 1995) ("[A]lleged RICO violations must be reviewed with appreciation of the extreme sanctions it provides, so that actions traditionally brought in state courts do not gain access to treble damages and attorneys fees in federal court simply because they are cast in terms of RICO violations.").

CONCLUSION

For these reasons, and those stated by petitioners, the Court should grant the petition.

Respectfully submitted,

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