No. 07-210

In the Supreme Court of the United States

JOHN BRIDGE, *et al.*,
Petitioners,

v.

PHOENIX BOND & INDEMNITY CO., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Whether reliance is a required element of a RICO claim predicated on mail fraud and, if it is, whether that reliance must be by the plaintiff.

PARTIES TO THE PROCEEDING

Petitioners are John Bridge; Barrett Rochman; and Sabre Group, LLC. They were defendants in the district court and appellees in the court of appeals. Other parties in the court of appeals were Plaintiffs-Appellants Phoenix Bond & Indemnity Co. and BCS Services, Inc. and Defendants-Appellees Robert Jensen; Joseph Varan; Jeffrey Bridge; Francis Alexander; Jesse Rochman; Douglas Nash; Cronus Projects, LLC; Gregory Ellis; GJ Venture, LLC; L.C.C. Venture, LLC; Regal One, LLC; Jason Baumbach; Optimum Financial, Inc.; Carpus Investments, LLC; DRN II, Inc.; Jeshay, LLC; Mud Cats Real Estate, LLC; Georgetown Investors, LLC; Corinne Rochman; Christopher Rochman; BRB Investments, LLC; and CCJ Investments, LLC.

The court of appeals dismissed Plaintiff-Appellant Oak Park Investments, Inc. as a party.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

There are no amendments to the corporate disclosure statement submitted in the Petition for a Writ of Certiorari in this case.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

In the Supreme Court of the United States

No. 07-210

JOHN BRIDGE, *et al.*,
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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 477 F.3d 928. The opinion of the district court (Pet. App. 9a-21a) is unreported but can be found at 2005 WL 3527232.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 2007. On April 17, 2007, the court of appeals denied petitioners' request for rehearing and rehearing *en banc*. Pet. App. 22a-23a. On July 3, 2007, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including August 15, 2007. The petition was filed on

that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

> As used in this chapter—(1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud), section 1343 (relating to wire fraud) . . . .

18 U.S.C. § 1961 (1988).

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1962(c) (1988).

> It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1962(d) (1988).

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . .

18 U.S.C. § 1964(c) (1995).

> Whoever, having devised or intending to devise any scheme or artifice to defraud . . . for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. § 1341 (2002).

STATEMENT OF THE CASE

A. The Cook County Tax Sale

The annual Cook County tax sale is an auction administered by the Cook County Treasurer's Office as part of the Illinois real estate tax system. When property owners fail to pay their real estate taxes, Cook County acquires a tax lien on the property involved. Once a year, the Cook County Treasurer sells these tax liens to the public at the tax sale. The purchaser of each tax lien—called a "Tax Buyer"—must pay the delinquent tax plus any outstanding interest to the County. The property owner then can redeem the tax lien by paying the delinquent tax,

interest, and a predetermined penalty to the Tax Buyer. If the property owner fails to redeem the tax lien within two to three years, the Tax Buyer may commence a judicial proceeding to obtain title to the property. JA 16-17.

At the tax sale, bids are not made in cash amounts, and tax liens are not sold to the highest bidder. Instead, prospective Tax Buyers bid by stating the rate of the predetermined penalty that they will accept from property owners who wish to redeem tax liens. By law, the amount of this penalty can be no lower than 0% and no higher than 18% of the amount of the delinquent taxes. The bidding process is designed to enable property owners to redeem tax liens by paying the lowest possible penalty. Accordingly, the winning bidder at the tax sale is the one who bids the lowest penalty rate. When the bidding process results in one or more ties between prospective Tax Buyers (*i.e.* when two or more low bids for a lien are received at the same penalty rate), the Treasurer determines which of the low bidders will be awarded the affected liens. JA 17-18.[1]

To be eligible to participate in a tax sale, prospective Tax Buyers must register with the County Treasurer's office. The registration process requires submission of an application and a sworn affidavit

[1] A Tax Buyer who has purchased a tax lien also can pay real estate taxes that become due after the tax sale, which are called "subsequent taxes." Unlike delinquent taxes due at the time of the tax sale, the penalty rate for subsequent taxes is not set at auction. Rather, this penalty is set by statute at a rate of 12%. To redeem a tax lien when a Tax Buyer has paid subsequent taxes, a property owner must pay the Tax Buyer both the delinquent taxes plus the penalty set at auction and the subsequent taxes plus the statutory penalty. JA 18.

that, among other things, affirms the Tax Buyer's compliance with the Single Simultaneous Bidder Rule (the "SSB Rule").[2] The SSB Rule is not prescribed by statute but is an administrative rule established by the Treasurer. It generally prohibits related bidding entities from simultaneously participating in the bidding on any individual lien. As set forth in the "Acknowledgement of Single Simultaneous Bidder Rule" form distributed by the County Treasurer, the Rule

> provides that one tax buying entity (principal) may not have its/his/her/their actual or apparent agents, employees, or related entities, directly or indirectly register under multiple registrations for the intended or perceived purpose of having more than one person bidding at the tax sale at the same time for the intended or perceived purpose of increasing the principal's likelihood of obtaining a successful bid on a parcel.
>
> This rule does not prevent a single bidder from alternating the identity of the buyer for whom they are bidding at any given time, so long as related bidding entities, or entities perceived to be related, are not bidding at the same time.

JA 67 (emphasis in original).

The Acknowledgement form is signed by an authorized agent for the Tax Buyer. The Acknowledgement form further states that "[t]he determination of whether registered entities are related, so as to prevent the entities from bidding at the same time, is in the sole and exclusive discretion of the

[2] Plaintiffs do not allege that these applications were mailed to the County Treasurer.

Cook County Treasurer or her designated representatives." JA 67 (emphasis in original). By signing the Acknowledgement form, each Tax Buyer agrees that, "if the tax buying entity that [the Tax Buyer] represent[s] is challenged by the Cook County Treasurer with respect to having related, or allegedly related, entities simultaneously bidding at the Annual Sale, that all such disputes shall have as exclusive venue and jurisdiction in the Circuit Court of Cook County." *Id.*

In recent years, the Cook County tax sales have become very competitive. Since 2000, the typical winning bid submitted by Tax Buyers has been a penalty rate of 0%. As a result, Tax Buyers generally do not make a profit when property owners timely redeem tax liens. Rather, a profit ordinarily is realized only when one of two things occurs: the Tax Buyer pays subsequent taxes and collects the 12% statutory penalty from the property owner (*see* note 1); or the property owner fails to timely redeem a tax lien and the Tax Buyer obtains title to the property, which generally can be sold for an amount significantly greater than the amount paid for the tax lien. JA 18-19.

After a Tax Buyer purchases a tax lien, a notice must be provided to the property owner (the last assessee of record, to be technically precise), informing the property owner that delinquent taxes, interest, and any penalty must be paid to the County (which in turn remits it to the Tax Buyer). The Tax Buyer must prepare this notice (the "22-5 Notice"; so named because of the section of the Illinois Property Tax Code that requires it, 35 ILCS 200/22-5) and provide it to the County, and the County sends it by certified mail to the property owner. JA 19. If the

property owner fails to redeem the tax lien and the Tax Buyer then files a Petition for Tax Deed to seek to obtain title to the property, a second notice must be provided to the property owner (the "22-10 Notice"). Like the 22-5 Notice, the 22-10 Notice must be prepared by the Tax Buyer and submitted to the County. The County Sheriff then serves the 22-10 Notice on the owners and occupants of the property and on any other interested parties. If any such persons cannot be served personally within the County, the Sheriff must serve the 22-10 Notice by certified mail. JA 19-20. Finally, an additional notice must be provided to the property owners and occupants during the prescribed notice—serving period, advising that the Tax Buyer has filed a judicial action to obtain title to the property and when the redemption period will expire (the "22-25 Notice"). Like the other notices, the 22-25 Notice must be prepared by the Tax Buyer and provided to the County. The County then sends the notice by certified mail to the owners and occupants of the property. JA 20. *See* 35 ILCS 200/22-15 through 200/22-25.

B. Proceedings In The District Court And The Court Of Appeals

On July 15, 2005, Phoenix Bond & Indemnity Co. and BCS Services, Inc. ("Plaintiffs") filed this action against petitioners and more than twenty other defendants in the United States District Court for the Northern District of Illinois. Pet. App. 9a. Plaintiffs, both of which were Tax Buyers in one or more Cook County tax sales, alleged that defendants, also Tax Buyers in one or more of those tax sales, had participated in the conduct of the affairs of an enterprise through a pattern of racketeering activity,

and had conspired to do so, in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c) and (d). JA 47-52. The "racketeering activity" that Plaintiffs alleged consisted of alleged mail fraud, in violation of 18 U.S.C. § 1341.

In particular, Plaintiffs alleged that defendants violated the SSB Rule by agreeing to transfer tax liens they purchased to a single entity. Plaintiffs did not explain why such an agreement, without more, allegedly would violate the SSB Rule. Although Plaintiffs did not identify any tax lien obtained by any defendant on which at least one Plaintiff and two or more defendants bid, Plaintiffs claimed that defendants improperly obtained more liens than they would have obtained if they had complied with the SSB Rule. JA 22-24.

Plaintiffs further alleged that defendants' putative scheme to obtain additional liens necessarily involved certain mailings, which allegedly established the predicate acts of mail fraud and thus formed the pattern of racketeering activity necessary for a RICO claim. These mailings were the routine 22-5, 22-10, and 22-25 Notices that were sent by the County to persons with an interest in the property. JA 41-47, 97-131. Plaintiffs did not allege that any of these mailings included any misrepresentations or that any of the mailings were directed to or received by Plaintiffs. Rather, the only misrepresentations alleged by Plaintiffs were defendants' affirmations to the Cook County Treasurer's Office as part of the Tax Buyer registration process regarding defendants' compliance with the SSB Rule. JA 23. Plaintiffs did not allege that any of these affirmations were

directed to or received by Plaintiffs, or that they were mailed to the County Treasurer.

On motions to dismiss filed by all defendants, the district court held that Plaintiffs lacked standing to bring their RICO claims. The court therefore dismissed those claims with prejudice. Pet. App. 20a. The court explained: "The plaintiffs were not the recipients of either the defendants' alleged misrepresentations that they were complying with the Single, Simultaneous Bidder Rule, nor were they sent the mailings that completed the purchase of the tax lien. The misrepresentations were made to the Treasurer and the mailings were sent to the property owners." *Id*. at 18a.[3]

The court of appeals reversed. As an initial matter, the court of appeals concluded that "[s]tanding is not a problem in this suit." Pet. App. 3a. Nevertheless, the court acknowledged that "[i]njury in fact is not sufficient under RICO" and that "the plaintiff also must establish that its injury was proximately caused by the defendants' scheme," citing this Court's decisions in *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006), and *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992). *Id*. at 4a. Proceeding to the proximate cause analysis, the court of appeals concluded that there is a split in the circuits regarding whether plaintiffs asserting a RICO claim based on mail fraud can recover even though they never received any false statements, or whether

[3] Plaintiffs also alleged a claim under state law for tortious interference with prospective economic advantage. The district court declined to exercise supplemental jurisdiction over Plaintiffs' state law claim of tortious interference with prospective economic advantage and dismissed that claim without prejudice. Pet. App. 20a.

"plaintiffs must show that they 'in fact relied upon [the defendant's] material misrepresentation'" (quoting *Vandenbroeck v. CommonPoint Mortgage Co.*, 210 F.3d 696, 701 (6th Cir. 2000)). Relying on the nature of the federal mail fraud crime, and citing the court's own previous decisions in *In re EDC, Inc.*, 930 F.2d 1275, 1279-80 (7th Cir. 1991), and *Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1257 (7th Cir. 1995), the court of appeals ruled that a plaintiff can assert a RICO claim based on mail fraud even if the defendant has made no misrepresentation to the plaintiff and even if the plaintiff did not rely on any misrepresentation by the defendant. The court therefore reversed the district court's dismissal and remanded for further proceedings. Pet. App. 7a-8a.

After denying a petition for rehearing, the court of appeals declined to stay its mandate pending disposition of a request for review in this Court. JA 9.

C. Subsequent Proceedings In The District Court

After remand, Plaintiffs twice amended their complaint, pleading additional facts about the alleged relationship among certain defendants, and naming five so-called third-party co-conspirators. The currently operative pleading, Plaintiffs' *Corrected* Second Amended Complaint, does not alter the key allegations in the original complaint regarding the representations made by defendants to the Cook County Treasurer or the notices prepared by defendants and then mailed to interested persons by Cook County.

Although the district court previously had informed Plaintiffs of other pleading deficiencies in the original

complaint that did not form the basis for the district court's dismissal (*see* Pet. App. 19a-20a), Plaintiffs did not rectify these problems on remand. In particular, Plaintiffs still did "not identify any properties on which the defendants simultaneously bid; and on which the plaintiff also bid and lost." *Id.* at 20a.

Defendants have moved to dismiss the *Corrected* Second Amended Complaint on several grounds, including that, as a condition of participating in the tax sales, all Tax Buyers agreed that only the County Treasurer can determine whether any Tax Buyer failed to comply with the SSB Rule and Plaintiffs have not alleged that they have asked the County Treasurer to make, nor has she made, any such determination regarding defendants. Defendants have argued further that Plaintiffs have not cured the pleading deficiencies identified by the district court, have not pled fraud with the necessary particularity under Fed. R. Civ. P. 9(b), and have not pled essential elements of their state law claim for tortious interference with prospective economic advantage. The motion to dismiss the *Corrected* Second Amended Complaint remains pending in the district court.

After this Court's grant of certiorari, the district court, in an order entered on February 1, 2008, stayed further proceedings pending this Court's decision.

SUMMARY OF ARGUMENT

I. Congress provided a private right of action for damages to "[a]ny person injured in his business or property by reason of" a violation of the RICO statute. 18 U.S.C. § 1964(c). In so doing, Congress explicitly required a civil RICO plaintiff to establish

that he suffered injury as a result of a RICO violation.

When basing a civil RICO claim on fraud, it is not sufficient for a plaintiff to show that some violation of a federal fraud statute has occurred. Rather, the plaintiff must show, like any other fraud plaintiff, that the plaintiff itself was defrauded. There is no indication that Congress, in authorizing a civil RICO action based on fraud, intended to permit such actions by persons who were not themselves defrauded. Congress imposed *additional* requirements of pleading and proof (*e.g.*, participation in the conduct of an enterprise, through a pattern of racketeering activity), but it did not authorize an action predicated on fraud without a showing that the plaintiff himself was defrauded.

In determining what a civil RICO plaintiff alleging fraud must show, the common law of fraud provides appropriate guidance. This Court has acknowledged that when Congress uses terms with a well-settled meaning at common law, it is presumed that the common-law meaning is incorporated into the statutory text. *Neder v. United States*, 527 U.S. 1, 21 (1999). The long-standing common-law principles of fraud require that a plaintiff may recover for fraud only if the plaintiff relied on a misrepresentation made to the plaintiff by the defendant. A plaintiff cannot have been defrauded unless he has relied on such a misrepresentation.

Here, Plaintiffs did not, and cannot, allege that they relied on any alleged misrepresentations. According to the allegations of the Complaint, only the County Treasurer, not Plaintiffs, received any misrepresentations, and only the County Treasurer, not Plaintiffs, could have relied on any such

misrepresentations. As a result, Plaintiffs' civil RICO claim fails. That does not mean that Plaintiffs may not be able to plead some other common-law tort. Indeed, Plaintiffs also alleged a state law claim for tortious interference with prospective economic advantage. But Plaintiffs cannot pursue a civil RICO claim based on fraud because no misrepresentations were made to them, they did not rely on any misrepresentations, they were not defrauded, and they did not suffer any injury as a result of a fraud perpetrated against them.

II. The proximate cause requirement inherent in the "by reason of" language of § 1964(c) also demands that a civil RICO plaintiff asserting a claim based on fraud establish his reliance on a misrepresentation by the defendant. This Court held in *Holmes* that the "by reason of" language, borrowed by Congress from the federal antitrust laws, necessarily incorporated a requirement that a civil RICO plaintiff establish a sufficient causal connection between his injury and the alleged RICO violation. In the context of a civil RICO claim predicated on fraud, that required causal link demands a showing that the plaintiff relied on an alleged misrepresentation made to the plaintiff by the defendant. Otherwise, the causal relationship between the alleged injury and the alleged fraud is too attenuated.

Applying the common-law meaning of proximate cause to this case, Plaintiffs are unable to meet the proximate cause requirement because they cannot plead or prove that they relied on any alleged misrepresentation. It is undisputed that Plaintiffs did not even receive any alleged misrepresentation, much less rely on one. Plaintiffs therefore cannot

satisfy the proximate cause requirement for a civil RICO claim based on fraud.

III. Without a reliance requirement for claims based on fraud, civil RICO will be expanded far beyond what Congress intended. Unlike the government, civil RICO plaintiffs do not exercise prosecutorial discretion when deciding to bring a case under Section 1964(c). Instead, the attraction of treble damages and attorneys' fees are a major incentive for civil plaintiffs to devise some way to bring their case under civil RICO. Without requiring plaintiffs to establish the traditional requirements of common-law fraud, there will be an expansion and over-federalization of fraud cases under civil RICO, even where such claims could not survive at common law in state court.

The courts of appeals have recognized the danger of permitting civil RICO cases based on fraud in the absence of a reliance requirement. The Fifth Circuit cautioned that without reliance, fraud could be applied to "garden variety products liability cases" through civil RICO, even when traditional state law would not permit such a fraud claim to survive. *Summit Props., Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 562 (5th Cir. 2000). Products liability cases are not the only ones that will be swept within the reach of civil RICO if plaintiffs are not required to establish reliance on alleged misrepresentations. Other courts of appeals have rejected the encroachment of civil RICO claims into cases involving, for example, warranties (*Appletree Square I, Ltd. P'ship v. W.R. Grace & Co.*, 29 F.3d 1283 (8th Cir. 1994)); stock purchases (*Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991)); and workers' compensation

(*Brown v. Cassens Transport Co.*, 492 F.3d 640 (6th Cir. 2007)).

Without a reliance requirement, many such cases will be brought improperly under civil RICO, even where the plaintiffs may have an adequate, alternative claim under state tort law. Particularly in these circumstances, there is no basis for permitting a plaintiff to pursue treble damages and attorneys' fees through a civil RICO claim based on fraud, when the common-law requirements of fraud cannot be satisfied.

ARGUMENT

The court of appeals erroneously held that a plaintiff who asserts a civil RICO claim predicated on mail fraud need not show that he relied on, or even that he ever received, any misrepresentation made by the defendant. In Section I, we show that the court of appeals' decision cannot be reconciled with this Court's precedent requiring that well-settled common-law principles be applied when construing the civil action provision of RICO. When a civil RICO claim is predicated on allegations of fraud, these common-law principles require the plaintiff to show that he relied on a misrepresentation made to him by the defendant. Congress made treble damages and attorneys' fees available for RICO plaintiffs who could establish injury to their business or property by reason of the conduct of an enterprise through a pattern of racketeering activity. But Congress never said, and did not intend, that by invoking RICO in a claim based on fraud, plaintiffs could avoid the reliance requirement that the common law has applied to fraud claims for more than a century.

Moreover, even if, as Plaintiffs contend, proximate cause is the only relevant limitation on civil RICO claims, proximate cause traditionally has incorporated a reliance element for claims based on fraud. As we show in Section II, therefore, the decision below conflicts with this Court's precedent holding that the "by reason of" requirement in RICO's civil action provision, 18 U.S.C. § 1964(c), incorporates common-law proximate cause principles. For civil RICO claims based on fraud, the proximate cause requirement cannot be met absent a plaintiff's reliance on a defendant's misrepresentation to the plaintiff. As we further show in Section III, public policy considerations strongly support the conclusion that civil RICO plaintiffs alleging fraud should not be able to prevail without showing that they relied on a defendant's alleged misrepresentation.

I. UNDER GOVERNING COMMON-LAW PRINCIPLES, A PLAINTIFF WHO ASSERTS A CIVIL RICO CLAIM PREDICATED ON MAIL FRAUD MUST ESTABLISH THAT HE RELIED ON A MISREPRESENTATION MADE TO HIM BY THE DEFENDANT.

A. The Applicable Statutes—The Mail Fraud Statute And § 1964(c) of RICO—Should Be Construed In Accordance With Well-Established Common-Law Principles.

The RICO statute authorizes civil suits against persons who participate in the conduct of an enterprise through a pattern of "racketeering activity." "Racketeering activity," in turn, is defined in the statute to include more than one hundred predicate acts, one of which is any act "indictable under . . .

Title 18, United States Code . . . section 1341 (relating to mail fraud) . . . ." 18 U.S.C. § 1961(l).

In determining whether a plaintiff has adequately pled or proven a civil RICO claim, the first step is to determine whether a predicate act has been pled or proven. *See Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 400 (2003). Failure to adequately plead or prove a predicate act is fatal to a civil RICO claim. *Id.* at 411.

In *Scheidler*, the respondents brought civil RICO claims predicated on extortion in violation of federal and state laws, including the Hobbs Act, 18 U.S.C. § 1951. On appeal from a jury verdict finding that the petitioners violated the civil provisions of RICO and a judgment awarding damages and a permanent injunction, the Seventh Circuit affirmed in relevant part. This Court granted certiorari and reversed. The Court "first address[ed] the question whether petitioners' actions constituted extortion in violation of the Hobbs Act." 537 U.S. at 400. After "conclud[ing] that there was no basis upon which to find that [petitioners] committed extortion under the Hobbs Act," *id.* at 409, this Court next considered whether the petitioners' actions constituted extortion under any of the other laws at issue. *Id.* at 409-10. Concluding that they did not, this Court held that, "[b]ecause all of the predicate acts supporting the jury's finding of a RICO violation must be reversed, the judgment that petitioners violated RICO must also be reversed." *Id.* at 411. Thus, the failure to adequately plead a predicate act requires dismissal of a civil RICO claim.

Simply pleading a violation of the criminal mail fraud statute is not sufficient to establish a predicate act in a civil RICO case. As this Court explained in

Neder, *criminal* prosecutions under the mail fraud statute require proof of neither reliance nor damages because the mail fraud statute prohibits the "scheme to defraud, rather than the completed fraud." 527 U.S. at 25; *see also Pelletier v. Zweifel,* 921 F.2d at 1498 ("A scheme to defraud need not be carried out to constitute a violation of the mail and wire fraud statutes. These statutes punish unexecuted, as well as executed, schemes."); *United States v. Stewart,* 872 F.2d 957, 960 (10th Cir. 1989) ("It is well established . . . that an offense under § 1341 [the mail fraud statute] . . . does not require the successful completion of the scheme to defraud."). But such limited allegations and proof cannot satisfy a plaintiff's burden in a *civil* case: "Civilly of course the [mail fraud statute] would fail without proof of damage, but that has no application to criminal liability." *United States v. Rowe*, 56 F.2d 747, 749 (2d Cir. 1932) (L. Hand, J.), quoted in *Neder*, 527 U.S. at 25; *see also Summit Props.*, 214 F.3d at 559 ("the government can punish unsuccessful schemes to defraud because the underlying mail fraud violation does not require reliance, but a civil plaintiff 'faces an additional hurdle' and must show an injury caused 'by reason of' the violation.").

Consequently, the fact that reliance by the plaintiff is not a required element of a *criminal* violation of the mail fraud statute does not end the inquiry into whether reliance by the plaintiff is a required element of a *civil* RICO claim predicated on mail fraud. Rather, to determine whether reliance by the plaintiff is required in a *civil* RICO case predicated on mail fraud, a court must "first look to the text of the statutes at issue to discern whether they require [such] a showing . . . ." *Neder,* 527 U.S. at 20 (citing *United States v. Wells*, 519 U.S. 482 (1997)).

The statutes at issue here are the mail fraud statute, 18 U.S.C. § 1341, and the civil action provision of the RICO statute, 18 U.S.C. § 1964 (c). The word "reliance" does not appear in these statutory provisions, but that is not dispositive. As this Court has held:

> That does not end our inquiry, . . . because in interpreting statutory language there is a necessary second step. It is a well-established rule of construction that "[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, 527 U.S. at 21 (citation omitted); *see also Scheidler,* 537 U.S. at 402 ("Absent contrary direction from Congress, we begin our interpretation of statutory language with the general presumption that a statutory term has its common-law meaning.").

This Court has held that the "common-law meaning" rule must be applied when interpreting the mail fraud statute. In *Neder*, the issue was whether materiality is an element of a "scheme or artifice to defraud" under the federal mail fraud (18 U.S.C. § 1341), wire fraud (§ 1343), and bank fraud (§ 1344) statutes. 527 U.S. at 20. As a threshold matter, this Court concluded that, "based solely on a natural reading of the full text, materiality would not be an element of the fraud statutes." *Id.* at 21 (citation omitted). After reviewing relevant common-law authorities, however, this Court concluded that, at the time the mail fraud statute was enacted, "the well-settled meaning of 'fraud' required a misrepresentation or concealment of *material* fact." *Id.* at 22

(emphasis in original). On this basis, the Court reasoned that materiality should be required absent some persuasive evidence that Congress intended to exclude any materiality element:

> Thus, under the rule that Congress intends to incorporate the well-settled meaning of the common-law terms it uses, we cannot infer from the absence of an express reference to materiality that Congress intended to drop that element from the fraud statutes. On the contrary, we must *presume* that Congress intended to incorporate materiality "unless the statute otherwise dictates."

Id. at 23 (citation omitted) (emphasis in original). Following this reasoning, the Court held that materiality is an element of the federal mail fraud, wire fraud, and bank fraud statutes. *Id.* at 25.

This Court has also held that the common-law meaning rule must be applied when interpreting the RICO statute. In *Beck v. Prupis,* this Court ruled that a plaintiff may not bring a civil RICO conspiracy claim under § 1962(d) "for injuries caused by an overt act that is not an act of racketeering or otherwise unlawful under the statute." 529 U.S. 494, 507 (2000). In *Beck*, the plaintiff filed a civil RICO suit against his former employers for dismissing him because he alerted regulators that the employers were engaged in racketeering activities. *Id.* at 498. The plaintiff claimed that his injury was "proximately caused by an overt act—namely, the termination of his employment—done in furtherance of respondents' conspiracy, and that §1964(c) therefore provided a cause of action." *Id.* at 499. But the Court rejected this argument, relying on common-law principles of *civil* conspiracy. Specifically, the Court

stated that "[b]y the time of RICO's enactment in 1970, it was widely accepted that a plaintiff could bring suit for civil conspiracy only if he had been injured by an act that was itself tortious." *Id.* at 501. The Court rejected the plaintiff's argument that the interpretation of the elements for a civil RICO conspiracy claim should be based solely on criminal law principles:

> We have turned to the common law of criminal conspiracy to define what constitutes a violation of § 1962(d), a mere violation being all that is necessary for criminal liability. This case, however, does not present simply the question of what constitutes a violation of § 1962(d), but rather the *meaning of a civil cause of action for private injury* by reason of such a violation. In other words, our task is to interpret §§ 1964(c) and 1962(d) in conjunction, rather than § 1962(d) standing alone. The obvious source in the common law for the combined meaning of these provisions is the law of civil conspiracy.

Id. at 501 n.6 (emphasis added) (citation omitted).

Likewise, this case does not present simply the question of what constitutes a violation of the mail fraud statute sufficient to establish criminal liability, but rather the meaning of a civil cause of action under RICO for private injury by reason of such a violation. In other words, the task here is to interpret §1341 in conjunction with § 1964(c). Just as in *Beck*, "[t]he obvious source in the common law for the combined meaning of these provisions [was] the law of civil conspiracy," here the obvious source in the common law is the law of civil fraud. *Id.* The Court therefore should look to the well-settled common-law elements of fraud at the time RICO was enacted to

determine whether a showing of reliance is required for a civil RICO claim predicated on mail fraud.

When interpretation of a federal statute requires reference to common-law principles, this Court looks to "the general common law of torts, [*i.e.,*] the dominant consensus of common-law jurisdictions, rather than the law of any particular State." *Field v. Mans,* 516 U.S. 59, 71 n.9 (1995). In this regard, this Court has said that "the most widely accepted distillation of the common law of torts" is the Restatement (Second) of Torts. *Id.* at 70. The Court also has looked on occasion to various editions of Prosser's Law of Torts. *Id.* at 71-72; *see also Beck,* 529 U.S. at 501 (relying on Restatement (Second) of Torts (1977) and W. Prosser, Law of Torts (4th ed. 1971) to determine the common-law meaning of terms used in the RICO statute, which was enacted in 1970).

B. Under Well-Established Common-Law Principles, The Mail Fraud Statute And § 1964(c) Of RICO Should Be Construed To Require That A Plaintiff Who Asserts A Civil RICO Claim Predicated On Fraud Establish That He Relied On A Misrepresentation Made to Him By The Defendant.

When the federal mail fraud statute was enacted in 1872, "actionable 'fraud' had a well-settled meaning at common law." *Neder*, 527 U.S. at 22. By the time RICO was enacted in 1970, it was at least as well-settled that a civil plaintiff may recover for fraud "if, but only if, he relies on the misrepresentation in acting or refraining from action and his reliance is justifiable." Restatement (Second) of Torts, § 537 (1977); *see also* W. Keeton, D. Dobbs, R. Keeton and

P. Owen, *Prosser and Keeton on Law of Torts* § 108 (5th ed. 1984) ("*Prosser & Keeton*") ("Not only must there be reliance but the reliance must be justifiable under the circumstances."); *Capiccioni v. Brennan Naperville, Inc.*, 791 N.E.2d 553, 558 (Ill. App. Ct. 2003) ("The elements of common-law fraud [include] plaintiff's reliance upon the truth of the statement.").[4]

Only "the *recipient* of a fraudulent misrepresentation" may recover under common-law fraud. Restatement (Second) of Torts § 537; *see also Wright v. Peabody Coal Co.*, 8 N.E.2d 68, 70 (Ill. App. Ct. 1937) ("The essential elements of an action on the case for fraud and deceit are that the defendant made representations that were false; that they were known by the defendant to be false and made to deceive *the plaintiff*; that the plaintiff believed the representations; that the plaintiff reasonably relied on said representations, and acted thereon to his damage or injury.") (emphasis added)). Plaintiffs cannot satisfy the reliance requirement by claiming they relied on the "integrity of the allocation process used by the County," Opp. 29, a claim they never alleged in their complaint. Such a claim does not satisfy the requirement of common-law fraud that the plaintiff must be the recipient of the fraudulent misrepresentation. "The maker of a fraudulent misrepresentation in a business transaction is liable for

[4] Reliance on a misrepresentation is not justifiable where the plaintiff "knows that it is false or its falsity is obvious to him." Restatement (Second) of Torts § 541. At a minimum, therefore, Plaintiffs could not ever claim that they justifiably relied on any of the alleged misrepresentations by the defendants at any time after they filed their original complaint on July 15, 2005. Yet, in their *Corrected* Second Amended Complaint, Plaintiffs appear to be seeking to recover even with respect to tax sales that occurred after the original complaint was filed.

pecuniary loss caused to *its recipient* by his reliance upon the truth of the matter misrepresented." Restatement (First) of Torts § 546 (1938) (emphasis added). An expectation that others will generally comply with the law is not a representation made by anyone, nor can it be considered a representation that is made to the plaintiff. Plaintiffs did not and cannot allege that they received any misrepresentation and, therefore, they are unable to establish the requisite reliance on a misrepresentation to recover under common-law fraud.

For more than a century, courts have recognized reliance by the plaintiff to be a necessary element of a common-law fraud claim. "The essential constituents of [an action for fraud and deceit by means of false pretenses] are a false representation . . . which came to the knowledge of the *plaintiff* and *in reliance upon* which he, in good faith acted, and thus suffered the injury of which he complains. *The absence of any one of these particulars is fatal to a recovery*." *Brackett v. Griswold*, 112 N.Y. 454, 455 (N.Y. 1889) (emphasis added). Accordingly, reliance by the plaintiff on a misrepresentation by the defendant was a well-established element of a common-law fraud claim long before RICO was enacted. It follows under this Court's precedents that reliance by the plaintiff is also a necessary element of a civil RICO claim predicated on a violation of a federal fraud statute, such as the mail fraud provision in 18 U.S.C. § 1341.

II. RELIANCE BY THE PLAINTIFF ON THE DEFENDANT'S MISREPRESENTATION IS ALSO NECESSARY TO SATISFY THE PROXIMATE CAUSE REQUIREMENT OF A CIVIL RICO CLAIM PREDICATED ON MAIL FRAUD.

A. The "by reason of" Language Of § 1964(c) Requires A Civil RICO Plaintiff To Establish That His Injuries Were Proximately Caused by a RICO Violation.

RICO's civil action provision, 18 U.S.C. § 1964(c), provides a cause of action to a plaintiff injured in his business or property "by reason of" a violation of the RICO statute. In *Holmes*, this Court construed the words "by reason of" to impose the requirement that a plaintiff prove a proximate cause relationship between his claimed injury and a RICO violation. 503 U.S. at 265-68. The decision in *Holmes* was grounded on the fact that "Congress modeled § 1964(c) on the civil-action provision of the federal antitrust laws, § 4 of the Clayton Act, which reads in relevant part that 'any person who should be injured in his business or property *by reason of* anything forbidden in the antitrust laws may sue therefor. . . .'" *Id.* at 267 (citation omitted) (ellipsis in original) (emphasis added).

Holmes principally relied on this Court's earlier decision in *Associated General Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 579 (1983), where the Court explained that Congress had enacted § 4 in 1914 by borrowing language from § 7 of the Sherman Act, which was enacted twenty-four years earlier. *Holmes*, 503 U.S. at 267. Because the lower federal courts already had read § 7 to incorporate common

law principles of proximate causation before § 4 was passed, the *Associated General Contractors* Court concluded "that Congressional use of the § 7 language in § 4 presumably carried the intention to adopt the 'judicial gloss that avoided a simple literal interpretation.'" *Id.* at 268 (quoting *Associated Gen. Contractors*, 459 U.S. at 534). In *Holmes*, this Court concluded that "[this] reasoning applies just as readily to § 1964(c)." *Id.* As the Court explained:

> We may fairly credit the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4. It used the same words, and we can only assume it intended them to have the same meaning that courts had already given them.

Id. (citations omitted). The Court therefore held that plaintiffs must establish proximate cause to recover under civil RICO. *Id.*

B. Established Common-Law Principles Govern Whether Or Not A Civil RICO Plaintiff Is Able To Establish Proximate Cause.

Although *Holmes* decided that § 1964(c)'s "by reason of" language imposes a proximate cause requirement on civil RICO claims, this Court did not establish any rigid framework for determining whether the proximate cause requirement is satisfied. This is because, as the Court observed, "'the infinite variety of claims that may arise make it virtually impossible to announce a black-letter rule that will dictate the result in every case.'" *Holmes*, 503 U.S. at 274 n.20 (quoting *Associated Gen. Con-*

tractors, 459 U.S. at 536). The Court did, however, provide the following general guidelines for addressing this issue: "Here we use 'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. At bottom, the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'" *Holmes*, 503 U.S. at 268 (quoting *Prosser and Keeton* § 41, at 264). Consequently, as this Court further explained, general common-law proximate cause principles must be consulted to determine whether the proximate cause requirement is satisfied. *Id.* at 268-69 (citing 1 J. Sutherland, *Law of Damages* 55-56 (1882)).

The directive of *Holmes* that general common-law principles be consulted to determine whether a civil RICO plaintiff can establish proximate cause is buttressed by this Court's decision in *Beck*. In *Beck*, this Court considered whether a Section 1964(c) plaintiff asserting an injury based on a violation of the conspiracy provision in Section 1962(d) has a cause of action when the overt act alleged to have proximately caused the injury is not itself a racketeering act. In holding that the plaintiff did not have a cause of action, the Court "turn[ed] to the well-established common law of civil conspiracy," *id.* at 500, explaining that the law of civil conspiracy was "[t]he obvious source in the common law" for guidance in interpreting the relevant provisions of RICO. *Id.* at 501 n.6. Relying on these common-law principles, the Court concluded:

> As at common law, a civil conspiracy plaintiff cannot bring suit under RICO based on injury caused by *any* act in furtherance of a conspiracy that might have caused the plaintiff injury.

> Rather, consistency with the common law requires that a RICO conspiracy plaintiff allege injury from an act that is analogous to an "ac[t] of a tortious character," *see* 4 Restatement (Second) of Torts § 876, Comment *b*, meaning an act that is independently wrongful under RICO.

Id. at 505-06 (emphasis in original).

Here, the common-law dealing with causation is the "obvious source" to consult for guidance in determining whether proximate cause requires, in the context of a RICO claim based on mail fraud, a showing that the plaintiff relied on the defendant's misrepresentation. Under well-settled common-law principles, proximate cause is established for fraud claims only where the plaintiff can demonstrate that he relied on the misrepresentation: "A fraudulent misrepresentation is a legal cause of a pecuniary loss resulting from action or inaction *in reliance upon it* if, but only if, the loss might reasonably be expected to result from the reliance." Restatement (Second) of Torts § 548A (emphasis added). Put another way, the causation element of common-law fraud is "a matter of the recipient's reliance in fact upon the misrepresentation in taking some action or in refraining from it." *Id.* at Comment *a*. It necessarily follows that a plaintiff asserting a civil RICO claim predicated on mail fraud cannot satisfy the proximate cause requirement unless he can establish that his injuries resulted from his reliance on the defendant's fraudulent misrepresentation. Indeed, as we show below, the majority of federal courts of appeals to consider this issue have so held.

C. A Majority Of The Courts Of Appeals That Have Considered The Issue Have Held That Reliance By The Plaintiff On A Misrepresentation By The Defendant Is A Required Element Of A Civil RICO Claim Predicated On Mail Fraud.

In *Summit Properties*, the Fifth Circuit affirmed the dismissal of the plaintiffs' civil RICO claims predicated on mail and wire fraud because the plaintiffs were unable to establish their reliance on the alleged misrepresentations of the defendants. 214 F.3d at 562. The plaintiffs in *Summit Properties* alleged that the defendants, manufacturers and marketers of polybutylene plumbing systems, engaged in a conspiracy to defraud by directing a fraudulent marketing plan at building code approval officials, members of the building industry, and others. It was undisputed, however, that none of the plaintiffs had detrimentally relied on the allegedly false representations that served as the basis for their RICO claims. *Id.* at 558. In deciding the case, the Fifth Circuit first observed that: "[m]ost other circuits . . . require a showing of detrimental reliance by the plaintiff, which is consistent with *Holmes*' admonition that federal courts employ traditional notions of proximate cause when assessing the nexus between a plaintiff's injuries and the underlying RICO violation." *Id.* at 560 (citations omitted). The Fifth Circuit then held that requiring a plaintiff to establish his reliance on the misrepresentation is consistent with *Holmes*'s requirement of proximate cause for civil RICO cases predicated on mail fraud. *Id.*

In *Chisolm v. Transouth Financial Corp.*, 95 F.3d 331 (4th Cir. 1996), the Fourth Circuit vacated the district court's dismissal of the plaintiffs' RICO claims for failure to allege reliance and remanded the case with instructions to allow the plaintiffs an opportunity to amend their complaint. *Id.* at 338. In their original complaint, the plaintiffs alleged that the defendants had engaged in a fraudulent vehicle repossession scheme that involved the mailing of notices to the plaintiffs that misrepresented the nature of the vehicle repossession proceedings that were underway. But the plaintiffs did not allege that they had relied on these mailings. *Id.* While remanding the case to permit the plaintiffs to amend their complaint to allege reliance if they could, the court admonished that "in civil RICO fraud actions . . . where fraud is alleged as a proximate cause of the injury, the fraud must be a 'classic' one. In other words, the plaintiff must have justifiably relied, to his detriment, on the defendant's material misrepresentation." *Id.* at 337.[5]

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[5] The Seventh Circuit in this case misread an earlier Fourth Circuit case, *Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc.*, 18 F.3d 260 (4th Cir. 1994). In its opinion, the Seventh Circuit, citing *Mid Atlantic*, concluded that "the direct *victim* may recover through RICO whether or not it is the direct *recipient* of the false statements." Pet. App. 7a. In *Mid Atlantic*, however, the Fourth Circuit plainly stated that "while . . . it is not necessary to establish detrimental reliance by the victim in order to make out a violation of the federal mail fraud statute, such reliance *is* necessary to establish injury to business or property 'by reason of' a predicate act of mail fraud within the meaning of § 1964(c)" and directed the district court to resolve "the reliance issue" on remand. *Mid Atlantic*, 18 F.3d at 264 (emphasis added) (quoting *Brandenburg v. Seidel*, 859 F.2d 1179, 1188 n.10 (4th Cir. 1988)). Thus, *Mid Atlantic* supports the reliance requirement advocated here by petitioners.

In *Appletree Square I*, the Eighth Circuit affirmed the district court's order granting the defendants summary judgment on, *inter alia*, the plaintiffs' RICO claim predicated on mail and wire fraud. 29 F.3d at 1286-87. One of the plaintiffs alleged that it purchased a building from a third party and that it subsequently learned that the building had been constructed with an asbestos-containing fireproofing product manufactured by the defendants. The plaintiff alleged that the defendants had promoted use of the asbestos-containing product through a series of misstatements and misrepresentations. *Id.* The plaintiff did not allege, however, that any of the misstatements or misrepresentations had been directed towards it or that it had relied on any of the alleged misrepresentations in purchasing the building. *Id.* at 1287. In support of its decision affirming summary judgment for the defendants on the RICO claim, the court stated as follows: "Because [the plaintiff] has not produced any evidence to show it detrimentally relied on any of the alleged misrepresentations in its purchase of the building, it has failed to establish the existence of a genuine issue of material fact as to whether the alleged misrepresentations proximately caused its claimed injuries . . . ." *Id.*

In *Pelletier*, the Eleventh Circuit affirmed the district court's order granting summary judgment for the defendants on, *inter alia*, the plaintiff's civil RICO claim predicated on mail and wire fraud. 921 F.2d at 1498-1510. The plaintiff alleged that the defendants had fraudulently induced him to purchase stock in a company by misrepresenting facts about the worth of the company. The court concluded, however, that the record evidence established that the plaintiff had made his determination about the

worth of the company based solely on information he had obtained from other sources, and that the plaintiff had not relied upon the defendants' alleged misrepresentations. *Id.* at 1509-10. In support of its decision affirming summary judgment for the defendants, the court stated: "[A] plaintiff has standing to sue under section 1964(c) only if his injury flowed directly from the commission of the predicate acts. This means that, when the alleged predicate act is mail or wire fraud, the plaintiff must have been a target of the scheme to defraud and must have relied to his detriment on misrepresentations made in furtherance of that scheme." *Id.* at 1499-1500 (citation omitted); *see also Sikes v. Teleline, Inc.*, 281 F.3d 1350 (11th Cir. 2002).

In *Brown v. Cassens Transport Co.*, the Sixth Circuit affirmed the dismissal of, *inter alia*, the plaintiff's civil RICO claim predicated on mail and wire fraud. 492 F.3d at 647. The plaintiffs—current and former employees of one of the defendants—alleged that the defendants—the employer, a claims adjuster, and a doctor—had engaged in a scheme that involved securing fraudulent medical opinions to unlawfully deny the plaintiffs' claims for workers' compensation benefits. The plaintiffs further alleged that the defendants sent fraudulent mail and wire communications among themselves and to the plaintiffs as part of this alleged scheme. *Id.* at 642. The plaintiffs did not allege, however, that they had relied on any of the mailings or wire communications. *Id.* at 643. In support of its decision affirming dismissal of the civil RICO claims, the court stated that "the well-established precedent of this circuit requires that a civil RICO plaintiff alleging mail or wire fraud plead reliance, that is, that a defendant made fraudulent representations to the plaintiff on

which the plaintiff relied." *Id.*; *see also Vandenbroeck*, 210 F.3d 696.

Thus, five circuits–the Fourth, Fifth, Sixth, Eighth and Eleventh—have held that reliance by the plaintiff is necessary to satisfy the proximate cause requirement for a civil RICO claim predicated on mail fraud.

The Fifth Circuit has recognized a "narrow exception to the requirement that the plaintiff prove direct reliance on the defendant's fraudulent predicate act." *Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 223 (5th Cir. 2003). But this narrow target exception applies only "when the plaintiff can demonstrate injury as a *direct and contemporaneous* result of fraud committed against a third party." *Id.* (emphasis added). In *Sandwich Chef*, the Fifth Circuit held that its narrow target exception did not apply where insurance companies allegedly provided false information about their rates to a regulator, bills were then sent based on the allegedly falsified rates, and the plaintiffs then paid the allegedly falsified rates. As the court explained, "because it would always be necessary for the regulator to be deceived *and* for the policy holder to pay an unlawfully inflated premium . . . [t]he regulator's reliance on the fraudulent act would not alone be enough to result in a direct and contemporaneous injury to a policyholder that satisfies RICO's proximate cause requirement." *Id.* at 224 (emphasis in original).

Similarly here, Plaintiffs allege that false representations were made by petitioners and other defendants to the County Treasurer at the time that they submitted their registration applications for the County tax sales. As in *Sandwich Chef*, however,

Plaintiffs' alleged injury could not have occurred contemporaneously with the alleged misrepresentations by petitioners and other defendants; rather, their alleged injury could have occurred only at some later time after Plaintiffs elected to participate in the tax sales, bid on tax liens at the lowest penalty rate, and discovered (although Plaintiffs do not allege) that two or more related defendants bid on those same tax liens at that same lowest penalty rate. Thus, under *Sandwich Chef*, the County Treasurer's alleged reliance on petitioners' and other defendants' alleged misrepresentations could not alone have been enough to result in the "direct and contemporaneous injury" to Plaintiffs that is required to bring their claims within the Fifth Circuit's narrow target exception. Rather, it would always be necessary for the County Treasurer to be deceived *and* for the Plaintiffs to participate in a tax sale and to bid the lowest penalty rate on tax liens on which two or more petitioners or other related defendants had also bid the same rate. Consequently, the Fifth Circuit would require reliance by Plaintiffs to establish proximate cause in this case.

The conclusion that reliance by the plaintiff is necessary to satisfy the proximate cause requirement of a civil RICO claim predicated on mail fraud draws support from this Court's recent decision in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.,* 552 U.S. ___, 128 S. Ct. 761 (2008), which addressed reliance by the plaintiff in the analogous context of a private securities fraud action under Section 10(b) of the Securities Exchange Act of 1934, 17 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 CFR §240.10b-5 (2007). In *Stoneridge*, investors in a cable TV company sued several defendants, including two companies that supplied digital cable converter boxes

to the cable operator. The investor plaintiffs alleged, among other things, that the cable box suppliers entered into sham transactions and backdated agreements with the cable operator and that they either knew about or recklessly disregarded the cable operator's intention to use these transactions to misrepresent its revenues and pump-up its stock prices. The district court dismissed the claims against the cable box suppliers for failure to state a claim on which relief could be granted, and the Eighth Circuit affirmed. This Court granted certiorari to consider whether an injured investor may sue under Section 10(b) to recover from a party that neither makes a public misstatement nor violates any duty to disclose but arguably does participate in a scheme to defraud. *Stoneridge*, 128 S. Ct. at 767-78.

After interpreting the court of appeals' decision as holding that any deceptive statement or act by the cable box suppliers was not actionable "because it did not have the requisite proximate relation to the investors' harm," this Court stated that "[t]hat conclusion is consistent with our own determination that [the box suppliers'] acts or statements were not *relied upon* by the investors and that, as a result, liability cannot be imposed upon [them]." 128 S. Ct. at 769 (emphasis added). Similarly here, a plaintiff who asserts a civil RICO claim predicated on mail fraud cannot show the requisite proximate relation between his harm and the defendant's conduct where the defendant's statements were not relied upon by the plaintiff.

D. Plaintiffs Are Unable To Satisfy Civil RICO's Proximate Cause Requirement Because It Is Undisputed That They Did Not Rely On The Misrepresentations Allegedly Made By Petitioners or Other Defendants To The County Treasurer.

Plaintiffs do not allege that they relied on the misrepresentations that petitioners and other defendants allegedly made to the County Treasurer regarding their compliance with the SSB Rule. Nor do Plaintiffs allege that they either acted or refrained from acting in reliance on these alleged misrepresentations, or that they even knew about them at any relevant time. Nor do they allege that any of the mailings at issue in this case contained a misrepresentation or that any Plaintiff ever received, let alone relied on, any of these mailings.

A peculiar aspect of this case is that the alleged misrepresentations on which the civil RICO claims are based were not mailed to anyone. Although the court of appeals speculated in its opinion that perhaps the mails had been employed "to send affidavits" (Pet. App. 3a), Plaintiffs have not alleged that any affidavits were mailed to the County Treasurer by petitioners or any other defendants. Rather, the only mailings alleged by Plaintiffs are the routine post-auction notices sent by the County to property owners, and those notices are not even alleged to have contained any misrepresentations. As a result, this is a civil RICO action based on mail fraud, but the case involves no fraudulent mailings.

Nevertheless, even if the defendants' registration and acknowledgement forms attesting to compliance with the SSB rule had been mailed to the County

Treasurer, the result here would be the same. The alleged misrepresentations still would not have been sent to or received by the plaintiffs. And the alleged misrepresentations still would not have been relied upon by the plaintiffs.

Given the absence of any allegation of reliance by Plaintiffs on the alleged misrepresentations on which their claims are based, they cannot satisfy the proximate cause requirement of their civil RICO claims predicated on mail fraud.

III. RELIANCE BY THE PLAINTIFF IS A NECESSARY AND APPROPRIATE LIMITATION ON THE SCOPE OF CIVIL RICO CLAIMS PREDICATED ON MAIL FRAUD.

A. Civil RICO Plaintiffs Are Unchecked By Prosecutorial Discretion And The Common-Sense Liability Limitation Of Reliance By The Plaintiff Is, Therefore, Appropriate In Civil RICO Claims Predicated on Fraud.

This Court has noted that § 1964 was not intended to expand federal jurisdiction into traditionally state law claims without limitation. Rather, "private attorney general provisions such as § 1964(c) are in part designed to fill prosecutorial gaps." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 493 (1985). The predicate acts of the RICO statute, however, potentially cover a broad range of conduct, especially the mail and wire fraud statutes. Indeed, as then-Chief Justice Rehnquist noted, "[w]ith the growth of long distance communication and technology, mail fraud and wire fraud—which applies to all telephone

calls—have a much wider sweep now than they did when the statutes were enacted." Hon. William H. Rehnquist, *Remarks of the Chief Justice*, 21 St. Mary's L.J. 5, 10 (1989).

In the criminal context, the breadth of the mail and wire fraud statutes "exists against a backdrop of prosecutorial discretion . . . which, if sensitively exercised, operates as a check to the improvident exertion of federal power." *Schreiber Dist. Co. v. Serv-well Furniture Co.*, 806 F.2d 1393, 1402 (9th Cir. 1986) (Kennedy, J. concurring). But, as then-Chief Justice Rehnquist observed, "there is no such thing as prosecutorial discretion to limit the use of civil RICO by plaintiffs' attorneys. Any good lawyer who can bring himself within the terms of the federal civil RICO provisions will sue in federal court because of the prospect of treble damages and attorney's fees which civil RICO holds out." *Remarks of the Chief Justice,* 21 St. Mary's L.J. at 10; *see also Schreiber,* 806 F.2d at 1402 (Kennedy, J., concurring) ("A company eager to weaken an offending competitor obeys no constraints when it strikes with the sword of [RICO]."). These concerns voiced by present and former members of this Court militate strongly in favor of the requirement that a civil RICO plaintiff who asserts claims predicated on mail or wire fraud be required to establish that he relied on the alleged misrepresentation of the defendant.

B. A Reliance Requirement Ensures A Direct Relationship Between The Injury And The Alleged Fraud, Preventing The Over-Federalization Of Traditional State Law Claims.

A requirement of reliance serves as a "commonsense liability limitation," helping to prevent plaintiffs from wielding the threat of treble damages and attorneys' fees in federal court in support of meritless claims. *Summit Props.*, 214 F.3d at 562. As this Court recently observed in the analogous context of the federal securities laws, the potential for abuse is significant because "extensive discovery and the potential for uncertainty and disruption in a lawsuit allow plaintiffs with weak claims to extort settlements from innocent companies." *Stoneridge*, 128 S. Ct. at 772. Although *Stoneridge* addressed the "essential element" of reliance under the federal securities laws, the Court's description of the role a reliance element plays in fraud cases is equally applicable to civil RICO claims. The core purpose of reliance is to "ensure[] that, for liability to arise, the 'requisite causal connection between a defendant's misrepresentation and a plaintiff's injury' exists as a predicate for liability." *Id*. at 769 (citation omitted). This was the very reason a proximate cause requirement was recognized by this Court in *Holmes* and that a reliance requirement is necessary for civil RICO claims predicated on fraud.

In *Summit Properties,* the Fifth Circuit warned that "[t]o hold [that reliance is not required] would allow the threat of treble damages and attorney fees to infiltrate garden variety products liability cases whenever marketing promotions touted the merits of

the products, even if no plaintiff relied on those representations." 214 F.3d at 562. As the Fifth Circuit observed, it is highly unlikely that Congress intended "such a federalization and escalation of the states' laws of product liability [or other common law claims]." *Id.* Indeed, without a requirement of reliance by the plaintiff, civil RICO would not only over-federalize traditional state law claims, it would also expand the reach of RICO into claims that would not even satisfy traditional state law requirements for fraud.

CONCLUSION

The judgment of the court of appeals should be reversed, and the case should be remanded with instructions to dismiss Plaintiffs' civil RICO claims.

Respectfully submitted,

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