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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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
ARGUMENT	3
1. Reliance By *Someone* Is Required For A Civil RICO Claim Predicated On Mail Fraud, Even Though The Word "Reliance" Does Not Appear In RICO Or The Mail Fraud Statute	3
2. The Common-Law Meaning Rule Should Be Applied To Determine Whether Reliance By The Plaintiff Is Required For A Civil RICO Claim Predicated On Mail Fraud	5
3. Respondents' Reference To Irrelevant Provisions Of The Restatement And Isolated Judicial Decisions Cannot Overcome The Dominant Consensus Of Common-Law Jurisdictions That Reliance By The Plaintiff Is A Required Element Of A Fraud Claim	10
4. Respondents And Their Amici Concede That Common-Law Proximate Cause Principles Incorporated By RICO Require Reliance By Someone, And They Ignore Restatement Sections And Case Law Cited By Petitioners Showing That Common-Law Causation Principles Require Reliance By The Plaintiff For Fraud Claims	16

TABLE OF CONTENTS—Continued

Page

5. Respondents Improperly Act As If They Already Have Prevailed At Trial, And Much Of Their Argument Ranges Considerably Beyond The Allegations In The Complaint 19

CONCLUSION 25

TABLE OF AUTHORITIES

CASES Page

Abbatiello v. Monsanto Co., 522 F. Supp. 2d 524 (S.D.N.Y. 2007) 12
Angle v. Chicago, St. Paul, Minneapolis and Omaha Ry. Co., 151 U.S. 1 (1894) 11
Anza v. Ideal Steel Supply Corp., 547 U.S. 451 (2006)..... 2, 19
Barrett Assocs., Inc. v. Aronson, 190 N.E.2d 867 (Mass. 1963)..... 13
Beck v. Prupis, 529 U.S. 494 (2000)..... 7, 7-8, 10
Bicknese v. Sutula, 660 N.W.2d 289 (Wis. 2003)..... 14
Blake v. Levy, 464 A.2d 52 (Conn. 1983) 13
Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc., 425 S.E.2d 144 (W. Va. 1992)..... 14
Capiccioni v. Brennan Naperville, Inc., 791 N.E.2d 553 (Ill. App. Ct. 2003)..... 18
Cement & Concrete Workers Dist. Council Welfare Fund v. Lollo, 148 F.3d 194 (2d Cir. 1998)..... 12
Dobbin v. Pacific Coast Coal Co., 170 P.2d 642 (Wash. 1946) 14
Dowling v. Bangor Hous. Auth., 910 A.2d 376 (Me. 2006)..... 14
Durland v. United States, 161 U.S. 306 (1896)..... 15
Ed Miller & Sons, Inc. v. Earl, 502 N.W.2d 444 (Neb. 1993) 14
Ernst & Young, L.L.P. v. Pacific Mut. Life Ins. Co., 51 S.W.3d 573 (Tex. 2001) 14
Farmer v. Brennan, 511 U.S. 825 (1994)..... 8
Field v. Mans, 516 U.S. 59 (1995)..... 10, 11

TABLE OF AUTHORITIES—Continued

Page

Figueroa Ruiz v. Alegria, 896 F.2d 645 (1st Cir. 1990) 3
Francis v. Am. Bankers Life Assurance Co. of Florida, 861 A.2d 1040 (R.I. 2004) 14
Gibson v. ITT Hartford Ins. Co., 621 N.W.2d 388 (Iowa 2001) 14
Gold Kist Peanut Growers Ass'n. v. Waldman, 377 P.2d 807 (Okla. 1962) 14
Gomillion v. Forsythe, 62 S.E.2d 297 (S.C. 1950) 14
Gregory v. Brooks, 35 Conn. 437 (1868).. 12, 12-13
Guard-Life Corp. v. S. Parker Hardware Mfg. Corp., 406 N.E.2d 445 (N.Y. 1980)... 11
Hawaii's Thousand Friends v. Anderson, 768 P.2d 1293 (Haw. 1989) 14
Holmes v. Sec. Investor Prot. Corp., 503 U.S. 258 (1992) 17, 19
James v. Weisheit, 367 A.2d 482 (Md. 1977) 14
Keith v. Wilder, 86 S.E.2d 444 (N.C. 1955) .. 14
Kentucky Elec. Dev. Co.'s Receiver v. Head, 68 S.W.2d 1 (Ky. Ct. App. 1934) 14
Lamb v. S. Cheney & Son, 125 N.E. 817 (N.Y. 1920) 11
Leach v. Kelsch, 106 N.W.2d 358 (N.D. 1960) 14
Lightle v. State Real Estate Comm'n, 146 P.3d 980 (Alaska 2006) 13
Lubbe v. Barba, 540 P.2d 115 (Nev. 1975) .. 14
Madness, L.P. v. DiTocco Konstruction, Inc., 873 So. 2d 427 (Fla. Dist. Ct. App. 2004) 14

TABLE OF AUTHORITIES—Continued

	Page
Manderville v. PCG & S Group, Inc., 146 Cal. App. 4th 1486 (Cal. Ct. App. 2007)...	13-14
Meader v. Francis Ford, Inc., 595 P.2d 480 (Or. 1979)	14
Michael v. Jones, 53 N.W.2d 342 (Mich. 1952).....	14
Mueller v. Zimmer, 124 P.3d 340 (Wyo. 2005).....	14
N.B. Garments (PVT) Ltd. v. Kids Int'l Corp., No. 03Civ8041, 2004 WL 444555 (S.D.N.Y. March 10, 2004).....	12
Nash v. Normandy State Bank, 201 S.W.2d 299 (Mo. 1947).....	14
Neder v. United States, 527 U.S. 1 (1999) ..	*passim*
Paiva v. Vanech Heights Constr. Co., 271 A.2d 69 (Conn. 1970)	13
Patten v. Alfa Mut. Ins. Co., 670 So. 2d 854 (Ala. 1995).....	13
Plimpton v. Friedberg, 166 A. 295 (N.J. 1933).....	13
Rice v. Manley, 66 N.Y. 82 (1876).....	11, 12
Safeco Ins. Co. v. Burr, 551 U.S. ___, 127 S. Ct. 2201 (2007).....	8
Salinas v. United States, 522 U.S. 52 (1997).....	7
Sandwich Chef of Texas, Inc. v. Reliance Nat'l Indem. Ins. Co., 319 F.3d 205 (5th Cir. 2003).....	23
Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393 (2003).....	6, 10
Schwartz v. Tanner, 576 P.2d 873 (Utah 1978).....	14
Speaker v. Cates Co., 879 S.W.2d 811 (Tenn. 1994)	14

TABLE OF AUTHORITIES—Continued

Page

Stephenson v. Capano Dev. Inc., 462 A.2d 1069 (Del. 1983) 14
Swanson v. Domning, 86 N.W.2d 716 (Minn. 1957) 14
Tankersley v. Barker, 651 S.E.2d 435 (Ga. Ct. App. 2007) 14
United States v. Stewart, 872 F.2d 957 (10th Cir. 1989) 6, 7
Wal-Mart Stores, Inc. v. Coughlin, --- S.W.3d ---, 2007 WL 1098162 (Ark. 2007) 13
Wilkie v. Robbins, 551 U.S. ___, 127 S. Ct. 2588 (2007) 6, 6-7
Zimmerman v. Loose, 425 P.2d 803 (Colo. 1967) 14

STATUTES

18 U.S.C. § 1341 (2002) 5
18 U.S.C. § 1951 (2005) 6
18 U.S.C. § 1962 (1988) 7, 8
18 U.S.C. § 1964 (1995) 8, 9, 16, 18

OTHER AUTHORITIES

W. Keeton, D. Dobbs, R. Keeton and P. Owen, *Prosser and Keeton on Law of Torts* (5th ed. 1984) 18
Restatement (Second) of Torts § 537 (1977) 18
Restatement (Second) of Torts § 548A (1977) 17, 18
Restatement (Second) of Torts § 623A (1977) 15
Restatement (Second) of Torts § 766B (1979) 15

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REPLY BRIEF FOR PETITIONERS

Respondents make three principal errors. First, they deny the significance of the common law in answering the question presented, even though (a) this Court has endorsed the common-law meaning rule, (b) the Court has applied the rule in both civil RICO cases and federal mail fraud cases, and (c) it is undisputed that neither the RICO statute nor the mail fraud statute defines "fraud" or "scheme to defraud." Second, having wrongly denied the relevance of the common law, respondents compound the problem by misstating what the common law of fraud is. Relying either on isolated cases that do not represent the governing law in their jurisdictions, or on cases that do not involve fraud at all (but rather other torts), respondents attempt to deny the overwhelming consensus of common-law jurisdictions that reliance by the plaintiff on an alleged mis-

representation is an element of a fraud claim. Third, in responding to petitioners' alternative argument based on the numerous cases that treat reliance as an aspect of proximate cause for fraud claims, respondents contend that the metes and bounds of proximate cause are, in all circumstances, fully encompassed within the three-part directness inquiry that this Court found dispositive in *Anza v. Ideal Steel Supply Co.*, 547 U.S. 451 (2006). Respondents thus wrongly seek to deny that the common-law concept of proximate cause can include a requirement of reliance by the plaintiff in cases alleging fraud.

Whether viewed as an element of a civil fraud claim or as a component of proximate cause in such cases, a plaintiff's reliance is a threshold requirement that a plaintiff must plead to state a valid civil RICO claim predicated on fraud. Respondents have not pled—and do not even try to argue that they could plead—that they relied on any alleged misrepresentation by petitioners. (This is hardly surprising, since respondents do not allege that they ever even received any such misrepresentation, by mail or otherwise.) Because respondents cannot allege any such reliance, the court of appeals should have affirmed the dismissal of their civil RICO claims based on fraud.

Requiring plaintiffs asserting RICO claims based on fraud to plead that they themselves relied on the defendant's alleged misrepresentations has the salutary effect of enabling federal courts to weed out, at an early stage, claims not properly filed under RICO. Given the special burdens imposed by civil RICO litigation, including not only burdens of cost and duration, but also the public opprobrium and damage to reputation visited on defendants who have

been labeled racketeers, an early screening device such as the reliance requirement permits federal courts to prevent garden-variety disputes between local competitors (such as this case) from being converted into federal racketeering actions.[1]

Although respondents and their *amici* revel in accusing petitioners of seeking to add to civil RICO fraud claims a requirement that is not present in the statute, in reality it is respondents and their supporters who are seeking to expand civil RICO claims to include numerous varieties of potentially tortious conduct that may be actionable but that are not addressed by the RICO statute and do not qualify as fraud against the plaintiff. Respondents already have asserted a state law claim for tortious interference with prospective economic advantage. If they are entitled to any relief at all, they can find it there, without twisting the RICO statute to reach any tort in which any defendant has made an allegedly false statement to anyone.

ARGUMENT

1. Reliance By *Someone* Is Required For A Civil RICO Claim Predicated On Mail Fraud, Even Though The Word "Reliance" Does Not Appear In RICO Or The Mail Fraud Statute.

It now appears to be common ground that reliance by *someone* is essential for a civil RICO claim based on fraud. Respondents concede that a civil RICO

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[1] *See, e.g., Figueroa Ruiz v. Alegria*, 896 F.2d 645, 650 (1st Cir. 1990) ("The mere assertion of a RICO claim . . . has an almost inevitable stigmatizing effect on those named as defendants." Courts therefore "should strive to flush out" unwarranted RICO allegations "at an early stage of the litigation.").

claim predicated on mail fraud "generally will require proof that someone relied on the falsehoods." Resp. Br. 13; *see also id.* at 2, 17, 22, 24. Respondents repeatedly use the qualifier "generally," but they never explain why, and they never attempt to posit any situation in which a civil RICO action alleging fraud could be sustained without any reliance by anyone. The federal government is more direct: "In a civil RICO claim predicated on mail fraud, the plaintiff cannot logically establish causation without showing that *someone* relied on the misrepresentation in furtherance of the fraud." Gov. Br. 6-7 (emphasis in original).[2] The answer to the first part of the question on which the Court granted review, in other words, is an unqualified "yes," and that is so even though neither RICO nor the mail fraud statute uses the word "reliance."

The consensus that at least *some* reliance is required to bring a civil RICO claim based on fraud reflects the distinction between civil RICO claims predicated on fraud and criminal prosecutions based on similar underlying conduct. Respondents are simply wrong when they assert that as long as conduct is "indictable" as mail fraud, nothing more is required. To sustain a *criminal* conviction under the federal mail fraud statute, neither reliance nor damages are needed. *See, e.g., Neder v. United States*, 527 U.S. 1, 25 (1999). By contrast, in a civil RICO claim, the focus is not on the mail fraud statute alone (which provides no private right of action), but

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[2] *See also* Brief of the States of Connecticut, *et. al.* as *Amici Curiae* In Support Of Respondents at 5 (arguing only against requirement of "reliance by the plaintiff"); Brief of *Amicus Curiae,* International Association Of Insurance Receivers In Support Of Respondents ("Insurance Receivers Br.") at 3 (same).

on the interplay between RICO's civil damages provision and the predicate acts of racketeering activity alleged. Where those predicate acts involve fraud, the question is not *whether* reliance is needed but only *whose* reliance is required. For the answer to that question, the appropriate place to turn is the common law.

2. The Common-Law Meaning Rule Should Be Applied To Determine Whether Reliance By The Plaintiff Is Required For A Civil RICO Claim Predicated On Mail Fraud.

Because neither the text of RICO nor the text of the mail fraud statute, 18 U.S.C. § 1341, defines "fraud" or "scheme to defraud" or expressly addresses reliance, "there is a necessary second step." *Neder*, 527 U.S. at 21. As this Court has explained, "[i]t 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.'" *Id*. (emphasis added). Petitioners thus are not asking this Court to rewrite RICO, as respondents contend. Resp. Br. 23. Rather, petitioners ask only that the Court apply the same "well-established rule of construction" that the Court already has held should be applied when Congress uses terms with settled common-law meaning.

In *Neder*, this Court was asked to decide whether materiality is an element of a "scheme or artifice to defraud" under the federal mail fraud, wire fraud, and bank fraud statutes. Because the text of these three statutes does not define the phrase "scheme or artifice to defraud," the Court applied the common-

law meaning rule. Specifically, in defining the term "defraud," this Court referred to the "well-settled meaning" at common law of the term "fraud." 527 U.S. at 22. Concluding that "the common law could not have conceived of 'fraud' without proof of materiality[,]" *id.* at 22, the Court held that materiality of a falsehood is an element of all three of the federal fraud statutes. *Id.* at 25; *see also Wilkie v. Robbins*, 551 U.S. ___, 127 S. Ct. 2588, 2605-07 (2007) (applying common-law meaning rule and referring to common law of extortion while construing the Hobbs Act, 18 U.S.C. § 1951, to define predicate act under RICO); *Scheidler v. Nat'l Org. for Women*, 537 U.S. 393, 400 (2003) (same).

This Court also confirmed in *Neder* that "[t]he common-law requirements of 'justifiable reliance' and 'damages'" are not prerequisites for conviction under the federal criminal fraud statutes. 527 U.S. at 24-25. But this aspect of the Court's decision did not depend on interpretation of the statutory term "defraud." Rather, it was based on the fact that, as *criminal* provisions, the federal fraud statutes do not require a "completed fraud." *Id*. at 25. For this reason, the criminal statutes can be violated, and a criminal conviction can be sustained, even if no one has relied on a misrepresentation and even if no one has been injured as a result.[3]

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[3] In *United States v. Stewart*, 872 F. 2d 957 (10th Cir. 1989), which this Court relied upon in *Neder*, 527 U.S. at 25, the court explained why the mail fraud statute requires neither reliance nor damages:

> It is well established, however, that an offense under § 1341, unlike common law fraud, does not require the successful completion of the scheme to defraud. *It follows from this* that the government does not have to prove

Subsequently, in *Beck v. Prupis*, 529 U.S. 494 (2000), this Court considered whether a plaintiff who brings a civil action predicated on a violation of § 1962(d), which prohibits conspiracies to violate RICO, must allege that he was injured by an overt act that is itself either a racketeering act or otherwise unlawful. Even though this Court previously had defined what constitutes a violation of § 1962(d) based on the common law of criminal conspiracy, *see Salinas v. United States*, 522 U.S. 52, 63-65 (1997), it did not apply that definition in *Beck*. Rather, because *Beck* "d[id] 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[,]" this Court determined that the definition of the term "conspiracy" based on criminal law was not the appropriate reference. *Beck*, 529 U.S. at 501 n.6. As this Court explained:

> This case turns on the combined effect of two provisions of RICO that, read in conjunction, provide a civil cause of action for conspiracy. Section 1964(c) states that a cause of action is available to anyone "injured . . . by reason of a violation of section 1962." Section 1962(d) makes it unlawful for a person "to conspire to violate any of the provisions of subsection (a), (b) or (c) of this section." To determine what it means to be "injured . . . by reason of" a "conspir[acy]," we

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> actual reliance upon the defendant's misrepresentations nor do they have to prove that the victim suffered actual pecuniary losses from the scheme.

Stewart, 872 F. 2d at 960 (emphasis added) (internal citations omitted).

> turn to the well-established common law of civil conspiracy.

Id. at 500.

The ruling in *Beck* that the term "conspiracy" in § 1962(d) has different meanings in the criminal context and the civil context is consistent with this Court's standard approach to statutory interpretation. For example, just last term in *Safeco Insurance Co. v. Burr*, 551 U.S. ___, 127 S. Ct. 2201 (2007), this Court was asked to define the term "willfulness" in the civil liability provision of the Fair Credit Reporting Act. Before applying the common-law meaning rule, this Court first observed that "willfulness" has different meanings in civil common law and criminal common law. The Court concluded that the civil meaning should be applied when construing a civil liability statute. *Id*. at 2208-09 and n.9. *See also Farmer v. Brennan*, 511 U.S. 825, 836-37 (1994) (contrasting the different uses of the term "recklessness" in civil and criminal contexts).

Here, as in *Beck*, plaintiffs assert a civil cause of action for private injury by reason of a violation of RICO. And, as in *Beck*, the Court's task is to interpret RICO's civil action provision (§ 1964(c)) in conjunction with a criminal statute on which the claim is predicated (the mail fraud statute). Consequently, as in *Beck*, this Court should apply the common-law meaning rule and refer to the appropriate civil common law. In this instance, "[t]he obvious source in the common law for the combined meaning of these provisions is the law of civil [fraud]." *Beck*, 529 U.S. at 501 n.6.

Respondents attempt to distinguish *Beck* and thereby avoid application of the common-law

meaning rule by arguing that RICO does not define the term "conspiracy," but that it does define its predicate acts. Resp. Br. 23. This just begs the question of how the predicate acts themselves are defined, and when it turns out, as it does here, that the predicate act "definitions" themselves use undefined terms with well-established meanings at common law, the Court is led right back to the common-law meaning rule. And, since the purpose here is, as it was in *Beck*, to determine the proper scope of *civil* liability, it is appropriate to look to the common law of civil fraud to determine the prerequisites for a civil action like that filed by respondents.

Under § 1964(c), a plaintiff must plead and prove that he was "injured" "by reason of a violation" of RICO. Obviously, a person cannot be injured by reason of a fraud that is not completed. *See Stewart,* 872 F.2d at 960 (common-law fraud requires successful completion of scheme to defraud). Therefore, unlike a criminal prosecution under the mail fraud statute, a civil action under RICO predicated on mail fraud requires a completed fraud. It follows from this that, to determine the meaning of a civil action under § 1964(c) predicated on mail fraud, the Court should look to the common-law meaning of "fraud" to identify the elements of a completed fraud.

Finally with respect to the applicability of the common-law meaning rule, one of respondents' *amici* argues that the rule should not be applied here because the RICO statute "otherwise dictates." Insurance Receivers Br. 3. But nothing in RICO directs this Court to jettison the common-law meaning rule when interpreting statutory terms that have an established common-law meaning. If it did,

the Court would not have looked to the common law in cases like *Beck* and *Scheidler*. Nor have respondents or their *amici* identified any other reason to depart from this Court's precedent requiring application of the common-law meaning rule. Consequently, "a court must infer . . . that Congress mean[t] to incorporate the established meaning of these terms." *Neder*, 527 U.S. at 21.

3. Respondents' Reference To Irrelevant Provisions Of The Restatement And Isolated Judicial Decisions Cannot Overcome The Dominant Consensus Of Common-Law Jurisdictions That Reliance By The Plaintiff Is A Required Element Of A Fraud Claim.

Respondents and their *amici* do not dispute that, when this Court looks to the common law to interpret statutes, it 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." Pet. Br. 22 (quoting *Field v. Mans*, 516 U.S. 59, 71 n.9 (1995)). Nor do they dispute that this Court has stated that "the most widely accepted distillation of the common law of torts" is the *Restatement (Second) of Torts*. *Id.* (quoting *Field*, 516 U.S. at 70). Nevertheless, respondents and their *amici* rely primarily on a few isolated cases decided under New York law to support their contention that reliance by the plaintiff is not a required element of common-law fraud. They also rely on sections of the *Restatement (Second) of Torts* that pertain not to fraud, but to torts other than fraud. These isolated and irrelevant authorities are insufficient to refute petitioners' showing that "the dominant consensus of common-law jurisdictions" is that reliance by the plaintiff is a required element of common-law fraud.

Despite this Court's admonition in *Field v. Mans* that it does not look to "the law of any particular State," 516 U.S. at 71 n.9, respondents primarily rely upon *Rice v. Manley*, 66 N.Y. 82 (1876), and other New York case law to support their contention that reliance by the plaintiff is not a required element of common-law fraud. Resp. Br. 26-27; *see also* Gov. Br. 21-22. It is far from clear, however, that *Rice* even involves common-law fraud. And there is considerable doubt as to whether the New York cases cited by respondents accurately reflect even the current state of New York law, let alone the dominant consensus of common-law jurisdictions.

First, the New York Court of Appeals has characterized *Rice* not as a fraud case, but as a wrongful interference with contract case. *See Guard-Life Corp. v. S. Parker Hardware Mfg. Corp.*, 406 N.E.2d 445, 451 (N.Y. 1980) (citing *Rice* in support of the proposition that "[w]here contracts terminable at will have been involved, we have upheld interference . . . when the alleged means employed by the one interfering were wrongful"); *Lamb v. S. Cheney & Son*, 125 N.E. 817, 818 (N.Y. 1920) (citing *Rice* as one of a number of cases establishing the rule that "if one maliciously interferes with a contract between two parties, and induces one of them to break that contract, to the injury of the other, the party injured can maintain an action against the wrongdoer."). And so too has this Court. *See Angle v. Chicago, St. Paul, Minneapolis and Omaha Ry. Co.*, 151 U.S. 1, 13 (1894) (citing *Rice* as one of many cases supporting the proposition that "[i]t has repeatedly been held that, if one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the

party injured can maintain an action against the wrongdoer.").

Second, if and to the extent that *Rice* arguably could be read to allow fraud claims absent reliance by the plaintiff, it is far from clear that the case accurately reflects New York law at the time RICO was adopted. As the Southern District of New York observed in a recent case cited by respondents, there are two distinct lines of authority that have addressed this issue under New York law: an older line of cases that holds that reliance by a third party is sufficient to sustain a cause of action for common-law fraud and a newer line of cases that holds that a claim for common-law fraud may not be based on third-party reliance. *N.B. Garments (PVT) Ltd. v. Kids Int'l Corp.*, No. 03 Civ. 8041, 2004 WL 444555 at *3 (S.D.N.Y. March 10, 2004) (following older line of cases). *Compare Cement & Concrete Workers Dist. Council Welfare Fund v. Lollo*, 148 F.3d 194, 196 (2d Cir. 1998) ("we hold that a plaintiff does not establish the reliance element of fraud for purposes of . . . New York Law by showing only that a third party relied on a defendant's false statements."); *Abbatiello v. Monsanto Co.*, 522 F. Supp. 2d 524, 534 (S.D.N.Y. 2007) ("New York law requires that the plaintiffs themselves be misled by the alleged misrepresentation or omission."). Thus, it is at best unclear whether even New York law would allow a fraud claim based on third-party reliance.

Respondents also cite *Gregory v. Brooks*, 35 Conn. 437 (1868). Resp. Br. 27. As the court's opinion makes plain, however, *Gregory* also was not a fraud case; rather, it was a case involving acts "done to one sustaining a *business relation* with the plaintiff, with a view of disturbing and breaking up that business

relation . . . ." *Id*. at 447 (emphasis in original); *see also Blake v. Levy*, 464 A.2d 52, 54 (Conn. 1983) (describing *Gregory* as a "case involving intentional interference with business relations."). In any event, at the time RICO was passed in 1970, reliance by the plaintiff unquestionably was a required element of a fraud claim under Connecticut law. *See Paiva v. Vanech Heights Constr. Co*., 271 A.2d 69, 71 (Conn. 1970) ("The essential elements of an action in fraud are . . . that [the false representation] was made to induce the other party to act on it; and that he did so act to his injury"). Respondents also cite cases from Massachusetts and New Jersey that were decided more than a hundred years ago. Resp. Br. 28 n.5. But again, at the time RICO was passed in 1970, reliance by the plaintiff was a required element of a fraud claim in each of these jurisdictions. *See Barrett Assocs., Inc. v. Aronson*, 190 N.E.2d 867, 868 (Mass. 1963) (fraud claim requires that "the plaintiff relied upon the representation as true and acted upon it to his damage"); *Plimpton v. Friedberg*, 166 A. 295, 296 (N.J. 1933) (fraud claim requires "that the plaintiff, believing such representation to be true, acted upon it and was thereby injured.").

Conspicuously absent from respondents' and their *amici's* briefs is any reference to the law of the remaining forty-six states. Petitioners have researched the law of these jurisdictions, and the overwhelming majority of them explicitly require a fraud plaintiff to plead and prove his or her own reliance on the defendant's misrepresentation.[4]

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[4] *See Patten v. Alfa Mut. Ins. Co.*, 670 So. 2d 854, 856 (Ala. 1995); *Lightle v. State Real Estate Comm'n*, 146 P.3d 980, 983 (Alaska 2006); *Wal-Mart Stores, Inc. v. Coughlin*, --- S.W.3d ---, 2007 WL 1098162 at *6 (Ark. 2007); *Manderville v. PCG & S*

Thus, contrary to respondents' assertion (Resp. Br. 30), the "abundant case law" demonstrates that, at the time RICO was enacted, the dominant consensus of common-law jurisdictions required reliance by the plaintiff as an element of a fraud claim.

Turning to the Restatement, respondents do not dispute that the sections that address common-law fraud all require reliance by the plaintiff. Instead, employing a linguistic sleight of hand, respondents

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Group, Inc., 146 Cal. App. 4th 1486, 1498 (Cal. Ct. App. 2007); *Zimmerman v. Loose*, 425 P.2d 803, 807 (Colo. 1967); *Stephenson v. Capano Dev. Inc.*, 462 A.2d 1069, 1074 (Del. 1983); *Madness, L.P. v. DiTocco Konstruction, Inc.*, 873 So. 2d 427, 429 (Fla. Dist. Ct. App. 2004); *Tankersley v. Barker*, 651 S.E.2d 435, 437 (Ga. Ct. App. 2007); *Hawaii's Thousand Friends v. Anderson*, 768 P.2d 1293, 1301 (Haw. 1989); *Gibson v. ITT Hartford Ins. Co.*, 621 N.W.2d 388, 400 (Iowa 2001); *Kentucky Elec. Dev. Co.'s Receiver v. Head*, 68 S.W.2d 1, 3 (Ky. Ct. App. 1934); *Dowling v. Bangor Hous. Auth.*, 910 A.2d 376, 382 (Me. 2006); *James v. Weisheit*, 367 A.2d 482, 484 (Md. 1977); *Michael v. Jones*, 53 N.W.2d 342, 343 (Mich. 1952); *Swanson v. Domning*, 86 N.W.2d 716, 720 (Minn. 1957); *Nash v. Normandy State Bank*, 201 S.W.2d 299, 303 (Mo. 1947); *Ed Miller & Sons, Inc. v. Earl*, 502 N.W.2d 444, 452-53 (Neb. 1993); *Lubbe v. Barba*, 540 P.2d 115, 117 (Nev. 1975); *Keith v. Wilder*, 86 S.E.2d 444, 446 (N.C. 1955); *Leach v. Kelsch*, 106 N.W.2d 358, 364 (N.D. 1960); *Gold Kist Peanut Growers Ass'n. v. Waldman*, 377 P.2d 807, 813 (Okla. 1962); *Meader v. Francis Ford, Inc.*, 595 P.2d 480, 482 (Or. 1979); *Francis v. Am. Bankers Life Assurance Co. of Florida*, 861 A.2d 1040, 1046 (R.I. 2004); *Gomillion v. Forsythe*, 62 S.E.2d 297, 302 (S.C. 1950); *Speaker v. Cates Co.*, 879 S.W.2d 811, 816 (Tenn. 1994); *Ernst & Young, L.L.P. v. Pacific Mut. Life Ins. Co.*, 51 S.W.3d 573, 577 (Tex. 2001); *Schwartz v. Tanner*, 576 P.2d 873, 875 (Utah 1978); *Dobbin v. Pacific Coast Coal Co.*, 170 P.2d 642, 648 (Wash. 1946); *Bicknese v. Sutula*, 660 N.W.2d 289, 294 (Wis. 2003); *Mueller v. Zimmer*, 124 P.3d 340, 349 (Wyo. 2005); *Bowling v. Ansted Chrysler-Plymouth-Dodge, Inc.*, 425 S.E.2d 144, 148 (W. Va. 1992).

assert that "frauds can occur in many ways, some of which involve falsehoods directed at third parties," and that "[s]ome of these frauds, in the classification of the Restatement, have acquired specialized labels as the law of torts has developed . . . ." Resp. Br. 30. Respondents then refer to "injurious falsehood" (citing *Restatement (Second) of Torts* § 623A (1977)) and to what they describe as "a tort where one 'intentionally and improperly interferes with another's prospective contractual relation'" (citing *Restatement (Second) of Torts* § 766B (1979)). *Id*. at 31; *see also* Gov. Br. 21 (asserting, without support, that mail fraud includes "not only common law fraud but also related torts . . . such as tortious interference"). But these so-called "related torts" are not common-law fraud. Rather, as the Restatement sections cited by respondents and their *amici* establish, they are separate and distinct torts with their own required elements. Moreover, this Court already has rejected respondents' argument that torts other than common-law fraud are encompassed by the mail fraud statute. *See Neder*, 527 U.S. at 24.

In *Neder*, the government argued, as respondents do here, that the mail fraud statute "sweep[s] more broadly than common-law fraud[,]" and that it is not limited "to conduct that would constitute 'fraud' at common law. . . ." *Id*. The government relied on *Durland v. United States*, 161 U.S. 306 (1896), where this Court had held that the mail fraud statute was not limited in scope to the common law definition of "false pretenses," which required a showing of a misrepresentation as to some *existing* fact and not a mere promise as to the future. *Neder*, 527 U.S. at 24. But while acknowledging that the mail fraud statute encompasses misrepresentations regarding the past, the present, *and* the future, and thus reaches conduct

that would not have constituted "false pretenses" at common law, this Court in *Neder* squarely rejected the government's argument "that the statute encompasses more than common-law fraud." *Id*. Nonetheless, the government and respondents repeat that rejected argument here. It should be rejected again.

Petitioners ask this Court to do no more than apply the common-law meaning rule and refer to the dominant consensus of common-law jurisdictions on the elements of fraud to resolve the statutory construction issue presented for review. Respondents, on the other hand, invite this Court to base its decision not on the common-law elements of fraud, but on the elements of other torts, such as injurious falsehood and interference with contractual relations. Respondents would, in effect, have this Court transform the "mail fraud" statute into a "mail tort" statute. It is respondents, therefore—not petitioners—who are asking this Court to rewrite a statute.[5]

4. Respondents And Their Amici Concede That Common-Law Proximate Cause Principles Incorporated By RICO Require Reliance By Someone, And They Ignore Restatement Sections And Case Law Cited By Petitioners Showing That Common-Law Causation Principles Require Reliance By The Plaintiff For Fraud Claims.

Respondents and their *amici* do not dispute that § 1964(c)'s "by reason of" language incorporates

[5] As mentioned previously, respondents already have asserted a claim for tortious interference in this very case. It therefore would be not only improper but also entirely unnecessary to expand the scope of civil RICO to cover tortious conduct other than fraud.

common-law principles of proximate causation. Indeed, the government acknowledges in its brief that "the Court looks to the common law to inform its interpretation of [§ 1964(c)] and has adopted common law principles of proximate causation in that endeavor." Gov. Br. 20 (citing *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992)). Respondents and their *amici* also concede that § 1964(c) therefore requires that someone must rely on the defendant's misrepresentation when a civil RICO claim is predicated on mail fraud. Resp. Br. 24 ("it generally will be impossible to establish even but-for causation without reliance by someone"); Gov. Br. 10 ("when the underlying RICO violation consists of acts of mail fraud, general causation principles logically require that *someone* . . . have relied on the misrepresentations.") (emphasis in original). The only issue is who must rely.

In opposing petitioners' position that common-law principles of proximate causation require reliance by the plaintiff for a fraud claim, respondents assert that "there is nothing in the Restatement that suggests that frauds can be perpetrated *only* against the recipient of a misstatement." Resp. Br. 30 (emphasis in original). But in support of this assertion, respondents rely on sections of the Restatement that address torts other than fraud while ignoring sections that address fraud. *Id.* at 30-31 (discussing Restatement sections addressing injurious falsehood and intentional interference with contract relations). Among the Restatement sections not addressed by respondents or their *amici* is § 548A, entitled "Legal Causation of Pecuniary Loss," which is discussed in petitioners' opening brief. Pet. Br. 28. Particularly instructive is Comment *a* to this section, which states, in pertinent part, that: "Causation, in rela-

tion to losses incurred by reason of a misrepresentation, is a matter of the recipient's reliance in fact upon the misrepresentation in taking some action or in refraining from it." Respondents simply ignore this statement and others like it.[6]

Respondents and their *amici* also rely on the isolated and inconclusive New York case law discussed above to support their contention that common-law causation principles do not require reliance by the plaintiff for a fraud claim. Resp. Br. 26-29; Gov. Br. 21-22. At the same time, they completely ignore the case law from the Fourth, Fifth, Sixth, Eighth, and Eleventh Circuits discussed in petitioners' opening brief that holds that common-law proximate cause principles incorporated through § 1964(c)'s "by reason of" language require reliance by the plaintiff for a civil RICO claim predicated on mail fraud. Pet. Br. 29-35. This prevailing case law is consistent with the Restatement sections cited by petitioners.

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[6] While ignoring § 548A of the Restatement, respondents take petitioners to task for purportedly omitting what they describe as "the critical portion of" § 537. Resp. Br. 30. Respondents assert that the omitted language shows that the requirement of reliance by the plaintiff applies only when the plaintiff is the recipient of the misrepresentation. *Id.* But respondents neglect to address the additional authority cited by petitioners immediately after the quotation from § 537. That authority shows that the reliance-by-the-plaintiff requirement is generally applicable to *all* fraud claims. Pet. Br. 22-23 (citing W. Keeton, et al., *Prosser and Keeton on Law of Torts* §108 (5th ed. 1984) and *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.")).

The federal government argues that it is "implausible that Congress intended to incorporate common law requirements (such as reliance by the plaintiff), tailored to each individual tortious act, as part of the statute's general proximate cause standard." Gov. Br. 21. But this argument is doubly flawed. First, it overlooks that respondents and their *amici* have conceded that reliance by someone must be shown to satisfy *Holmes'* proximate cause requirement when a civil RICO claim is predicated on mail fraud, and that even a third-party reliance requirement would apply only to claims predicated on the federal fraud statutes. And second, as the government acknowledges in its brief, the proximate-cause test under § 1964(c) necessarily will vary depending on which of the more than a hundred RICO predicate acts forms the basis for a civil RICO claim. Gov. Br. 13 (citing *Holmes*, 503 U.S. at 288 (Scalia, J., concurring)).

5. Respondents Improperly Act As If They Already Have Prevailed At Trial, And Much Of Their Argument Ranges Considerably Beyond The Allegations In The Complaint.

Having argued wrongly that the proximate cause element of a civil RICO claim consists entirely of the three-part directness inquiry described in *Holmes* and *Anza*, respondents and their *amici* then devote substantial energy to arguing that the "directness" requirement is satisfied here, even as they contend at the same time that the issue is not properly before the Court. Resp. Br. 33-39; Gov. Br. 24-27. The problems with respondents' argument are symptomatic of several significant flaws in respondents' case, which we address briefly here lest it be said that petitioners have conceded the points.

The district court decided this case on a motion to dismiss. Consequently, only the facts alleged in the complaint were properly before the court of appeals and are now before this Court. None of those facts have been proven. As to the alleged connection between petitioners' alleged misrepresentations and respondents' alleged injury, the complaint contains only a single relevant allegation. It states that, when more than one potential Tax Buyer bids a 0% penalty rate, "the auctioneer will allocate the liens *on a rotational basis* . . . ." JA 18 (emphasis added). The complaint does not describe what this alleged "rotational basis" is or how it allegedly operates. The court of appeals, however, perhaps in an excess of self-confidence, injected into the case an element of mathematical certainty that is missing from the complaint itself.

> The County's solution to the problem of multiple bids at 0% is allocation by lot. If X bids 0% on ten parcels, and each parcel attracts five bids at that penalty rate, then the County awards X two of the ten parcels. Winners share according to the ratio of their bids to the identical bids.

Pet. App. 2a. The complaint makes no mention of "allocation by lot." In suggesting that one can predict with mathematical precision how many and which liens would have been awarded to any given bidder if the SSB Rule had been followed, the court of appeals' opinion and respondents' brief in this Court elaborate significantly and inappropriately on the allegations in the complaint.

Moreover, the simple illustration offered by the court of appeals disregards the enormous complexity and indeterminateness that inevitably would be involved in attempting to reconstruct the auction

bidding process after the fact, based on changed assumptions regarding who should have been permitted to bid. Respondents themselves have alleged that at least 195 potential Tax Buyers registered to participate in the 2005 annual tax sale. JA 20-21. The number of registered bidders actually bidding on each lien fluctuates greatly throughout the auction. Different sets of bidders compete for different liens, and different combinations of bidders may tie at a 0% penalty rate for different liens. Respondents' blithe assertions about the alleged "directness" of their injury and the ease of determining damages (*see, e.g.*, Resp. Br. 35) are seriously misguided. In fact, the process would be incredibly difficult, if not impossible.[7]

Also problematic is how to determine the value of any lien that allegedly should have been awarded to respondents. For some time, the typical penalty rate bid on many liens has been 0%. JA 18. As a consequence, a lien can generate a profit for a Tax Buyer only when subsequent taxes are paid and the

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[7] Perhaps not surprisingly, respondents' complaint is devoid of any allegations about how the County Treasurer's auctions actually work. The auctions are conducted live and in person, using an "open outcry" auction system. The process is very rapid. More than a hundred liens can be auctioned in an hour. There can be a large number of bidders (sometimes as many as a hundred) for a given lien. No record is kept of the bidders on each lien. When bidders tie at a 0% penalty bid for a particular lien, the auctioneer simply awards the lien to one of the tied bidders. The auctioneer exercises considerable discretion in doing so. The auctioneer may turn or look from time to time to different portions of the auction room, or he may award a lien to the first bidder that he hears shout out a 0% penalty rate after the parcel number has been announced. Petitioners are not aware of any other conceivable factual basis for the allegation that liens are awarded "on a rotational basis."

property owner pays a penalty on those taxes, or when the Tax Buyer is able to obtain a deed for the property after the property owner fails to pay delinquent taxes and penalties for two to three years after the tax sale and the property can then be sold for more than the amount that the Tax Buyer has paid the County. Pet. Br. 6; JA 18-19. But there is no way to determine *ab initio* whether a tax buyer will pay subsequent taxes on a lien, whether or when a property owner will redeem a tax lien, or at what amount of profit, if any, a property will be sold if a deed is obtained by the Tax Buyer.

Respondents also assert that there is no risk that petitioners could be subjected to multiple overlapping damages awards because "[t]he only issue here is how the tax liens will be allocated among identical bidders . . . ." Resp. Br. 56. But as just discussed, nothing in the complaint alleges precisely how liens are awarded when there are multiple lowest-penalty-rate bidders. Moreover, respondents fail to explain how it would be determined that any particular Tax Buyer would receive any particular tax lien—a fact that would need to be known to determine the value of the liens that allegedly should have been obtained by respondents. Nothing in the complaint suggests, let alone establishes, that it would be possible to identify which specific lien would have been allocated to which specific Tax Buyer at any of the tax sales absent the alleged wrongdoing of petitioners.

Nor are respondents necessarily correct in their claim that they are the only "immediate victims" of petitioners' alleged wrongful conduct because the County—the only recipient of the alleged misrepresentations—suffered no damages. Resp. Br. 37. It is far from clear that the County would suffer no harm from the alleged wrongful conduct. For

example, if it became known that the auctions were being conducted in an unfair manner as respondents allege, this presumably would deter potential tax buyers from participating. Reduced participation, in turn, would reduce the demand for tax liens. At some point, this would be expected to result in the County's inability to sell all of its tax liens, injuring the County in an amount equal to the unpaid taxes due under the unsold liens. The County therefore, as the direct recipient of petitioners' alleged misrepresentations, has a significant incentive to bring an action to enforce the SSB Rule, and, as petitioners observed in their opening brief (Pet. Br. 5-6), the Treasurer has expressly reserved to herself the "sole and exclusive discretion" to determine whether registered bidders are "related" within the meaning of the rule.

Even if this Court were to adopt a so-called "target exception" to the reliance-by-the-plaintiff rule to allow claims by direct victims who did not receive or rely on an alleged misrepresentation, such an exception would not help respondents. Because RICO's proximate cause requirement mandates a direct relation between the injury asserted and the injurious conduct alleged, the "target exception" applies only "when the plaintiff can demonstrate injury *as a direct and contemporaneous result* of fraud committed against a third party." *Sandwich Chef of Tex., Inc. v. Reliance Nat'l Indem. Ins. Co.*, 319 F.3d 205, 223 (5th Cir. 2003) (emphasis added). Respondents plainly could not satisfy this requirement.

Indeed, even assuming that petitioners engaged in the wrongful conduct alleged in the complaint, at least the following additional things would have to occur before respondents could suffer any injury:

1. Petitioners would have to participate in a tax auction in which respondents also participated.

2. At least two petitioners and one or both respondents would have to simultaneously bid the same lowest penalty rate on the same liens.[8]

3. A petitioner would have to obtain a lien that, absent petitioners' alleged wrongful conduct, would have been obtained by respondents and not by petitioners or some other Tax Buyer.

4. The property owner of the property to which that particular tax lien relates would have to fail to redeem the tax lien before either (a) petitioners paid subsequent taxes or (b) two to three years passed and petitioners obtained a tax deed for the property.

5. The property owner would have to pay the subsequent taxes and the associated penalty, or the property would have to be sold at a profit after paying all delinquent taxes and interest.

None of this alleged injury would be "direct and contemporaneous," and respondents therefore could not benefit from any "target exception" to the reliance-by-the-plaintiff rule.

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[8] In a footnote (Resp. Br. 12 n.3), respondents challenge petitioners' observation that respondents still have not identified any specific lien on which two or more named defendants and at least one plaintiff bid a 0% penalty rate and the lien was awarded to one of the defendants. Not surprisingly, the footnote contains no supporting citation.

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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