No. 18-890

IN THE

Supreme Court of the United States

DAVID D'ADDARIO, MARY LOU D'ADDARIO KENNEDY, GREGORY S. GARVEY, RED KNOT ACQUISITIONS, LLC, SILVER KNOT, LLC, NICHOLAS VITTI,

Petitioners,

—v.—

VIRGINIA A. D'ADDARIO, individually, and on behalf of the F. Francis D'Addario Testamentary Trust and the Virginia D'Addario Trust; and VIRGINIA A. D'ADDARIO, EXECUTRIX, as Executrix of the Probate Estate of Ann. T. D'Addario, Deceased, and on behalf of the F. Francis D'Addario Testamentary Trust and the Ann T. D'Addario Marital Trust,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

I. The Decision Below On Proximate Causation Conflicts With The Precedent Of This Court And Other Circuit Courts.

Contrary to the Plaintiffs' assertions, the Second Circuit's decision on proximate causation is not in "harmony" with existing precedent, but instead represents a significant and unwarranted expansion of the civil RICO statute. The decision conflicts with this Court's decision in *Hemi Grp. LLC v. City of N.Y., N.Y.*, 559 U.S. 1 (2010), which made clear that in identifying a direct injury for the purposes of the RICO statute, a court should not look past the "first step." *Id*. at 10. The Second Circuit's decision also conflicts with the decisions of other circuit courts. If the Second Circuit's decision is permitted to stand, any disgruntled beneficiary of an estate or trust, simply by cobbling together two alleged predicate acts, will be able to circumvent local procedures and escalate a family probate dispute into a civil RICO action against an executor, with the attendant threat of reputational harm and treble damages.

In seeking to create the misimpression that the Second Circuit's decision does not create a circuit split, the Plaintiffs sidestep the core reasoning of the other circuit court decisions that are contrary to the Second Circuit's holding in this case. In those decisions, the other circuits squarely held

that when the alleged predicate acts harm the estate or trust as a whole, the injury to the beneficiary is indirect and, therefore, inadequate to support a RICO cause of action. For example, the Sixth Circuit in *Firestone v. Galbreath*, 976 F.2d 279 (6th Cir. 1992), held as follows:

> [The proximate cause] requirement forces the plaintiff to demonstrate a direct relation between the injury suffered and the alleged injurious conduct. Thus, the concept of direct injury refers to the relationship between the injury and the defendants' actions, not the plaintiffs' pocketbooks.
>
> For example, our court has held that a shareholder lacks standing to bring a suit where the alleged injury is diminution or destruction of the value of the stock due to acts aimed at a corporation. *Gaff v. FDIC,* 814 F.2d 311 (6th Cir.1987); *Warren v. Manufacturer's Nat'l Bank,* 759 F.2d 542 (6th Cir.1985). In these cases, the shareholder's injury is only indirect because the decrease in the value of the corporation precipitates the drop in the value of the stock. The corporation, on the other hand, suffers the direct injury in the decreased value of its corporate assets.
>
> The relationship between the Grandchildren's alleged injury and the injurious conduct here parallels that of the injured stockholders. The Grandchildren allege that by stealing from their grandmother during her lifetime, the defendants decreased the size of Dorothy Galbreath's

> estate, and consequently the size of their inheritance. This is only an indirect injury because any harm to the Grandchildren flows merely from the misfortunes allegedly visited upon Dorothy Galbreath by the defendants. *See Holmes,* 503 U.S. at ——, 112 S.Ct. at 1318. The estate suffered the direct harm; it, not the Family Trust, lost the property. Consequently, the Grandchildren lack standing to bring an individual RICO claim, and the district court correctly dismissed it.

976 F.2d at 285 (footnote omitted). The reasoning could not be clearer.

Similarly, in *Schrager v. Aldana*, 542 Fed. Appx. 101 (3rd Cir. 2013) (per curiam), the Third Circuit held:

> Applying the multi-factor analysis test of *Holmes* to the present case, we conclude that Schrager, as a beneficiary of the Estate, cannot maintain his claim based on § 1962. Schrager argues that Appellee conspired with her mother Lipton and family-friend Rosenblatt to defraud the Estate of Rosyln Schrager, through a pattern of racketeering activity, of over $1 million and thereby caused Schrager, a beneficiary of the Estate, to suffer a direct monetary injury. The direct victim of Appellee's conduct was the Estate, not Schrager. It was the Estate that lost value due to the fraudulent activities of Appellee and her co-conspirators and therefore the Estate is in a better position to bring a civil RICO

> claim. *See Firestone v. Galbreath,* 976 F.2d 279, 285 (6th Cir.1992) (holding that grandchildren, as beneficiaries of decedent's estate, lacked standing to bring a RICO claim because the estate suffered the direct harm). Consequently, Schrager lacks standing to bring an individual RICO claim.

542 Fed. Appx. at 104 (footnote omitted).

In *Sheshtawy v. Gray*, 697 Fed. Appx. 380 (5th Cir. 2017) (per curiam), *cert. denied,* 138 S. Ct. 1298 (2018), the Eighth Circuit held:

> Plaintiffs' suggest that their injury comes in the form of financial losses to their property interests in their respective probate proceedings. However, the alleged injury to their share of the estate or trust is merely an expectancy interest that is too speculative and indirect to satisfy RICO standing. *See Gil Ramirez Grp., L.L.C. v. Hous. Indep. Sch. Dist.*, 786 F.3d 400, 409–410 (5th Cir. 2015); *In re Taxable Mun. Bond Sec. Litig.*, 51 F.3d at 522–23; *see also Firestone v. Galbreath*, 976 F.2d 279, 285 (6th Cir. 1992) (affirming the district court's dismissal of plaintiffs' RICO claims for lack of standing because the estate, not certain potential beneficiaries, suffered direct harm). Therefore, we affirm the district court's determination that Plaintiffs lack RICO standing . . . .

697 Fed. Appx. at 382.

The rule followed by the Third, Sixth and Eighth Circuits is consistent with numerous cases holding that shareholders in a corporation do not suffer a direct injury for the purposes of RICO when the harm is to the corporation as a whole. *See*, *e.g.*, *Willis v. Lipton*, 947 F.2d 998, 1000 (1st Cir. 1991); *Roeder v. Alpha Indus., Inc.*, 814 F.2d 22, 29 (1st Cir. 1987) (shareholder lacked standing to bring RICO action based on the payment of a bribe that injured corporation); *Manson v. Stacescu*, 11 F.3d 1127, 1131 (2d Cir. 1993) ("A shareholder generally does not have standing to bring an individual action under RICO to redress injuries to the corporation in which he owns stock."); *Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843, 849 (2d Cir. 1986) (shareholders in a bankrupt corporation lacked standing to bring a nonderivative RICO action against the corporation's principal creditor because "[t]he legal injury, if any, was to the firm. Any decrease in value of plaintiffs' shares merely reflects the decrease in the value of firm"); *NCNB Nat'l Bank v. Tiller*, 814 F.2d 931, 937 (4th Cir. 1987), *overruled on other grounds sub nom.*, *Busby v. Crown Supply, Inc.*, 896 F.2d 833, 840-41 (4th Cir. 1990); *Whalen v. Carter*, 954 F.2d 1087, 1091-92 (5th Cir. 1992); *Warren v. Manufacturers Nat'l Bank*, 759 F.2d 542, 544 (6th Cir. 1985); *Sears v. Likens*, 912 F.2d 889, 892 (7th Cir. 1990); *Sparling v. Hoffman Constr. Co.*, 864 F.2d 635, 640 (9th Cir. 1988); *Bivens Gardens Office Bldg. v. Barnett Banks of Florida, Inc.*, 140 F.3d 898, 906 (11th Cir. 1998).

Here, as in the corporation/shareholder cases, the direct injury is to the Estate as a whole and the alleged injury to Plaintiffs' anticipated inheritance is indisputably derivative and

indirect. *Hemi*, 559 U.S. at 10 (explaining that RICO standing does not extend beyond the "first step" and concluding that "[b]ecause the [plaintiff's] theory of causation requires us to move well beyond the first step, that theory cannot meet RICO's direct relationship requirement") (internal citations and quotations omitted).

Relying on *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), Plaintiffs attempt to avoid this established principle by arguing that David D'Addario's wrongful conduct was directed primarily at his sister, Virginia, not simply the Estate. However, *Lexmark* involved a claim for false advertising under the Lanham Act, not a claim under the RICO statute. As this Court has stated in the RICO context, the legal standard for proximate cause under RICO does not turn on intent or foreseeability, but rather on what entity (here the Estate) suffered harm directly from the alleged RICO violations. *Hemi*, 559 U.S. at 12 (rejecting argument that proximate cause requirement was satisfied because harms alleged were both foreseeable and intended because "[o]ur precedents make clear that in the RICO context, the focus is on the directness of the relationship between the conduct and the harm"). In addition, if Plaintiffs are allowed to proceed, this case would involve a clear risk of duplicative recovery (because the Estate is still open) and involve the complicated procedure of apportioning damages between the Estate and its various beneficiaries

and creditors. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 269 (1992).[1]

Finally, Plaintiffs implicitly acknowledge the weakness of their position by now arguing that Virginia may have the ability to sue on behalf of the Estate. However, Plaintiffs did not plead or pursue this theory below. Moreover, under well-settled Connecticut law, only duly-appointed executors (or administrators) have standing to assert claims on behalf of a probate estate. *See*, *e.g.*, *Silver v. Holtman*, 114 Conn. App. 438, 443 (2009) (executrix "is the only person who has standing to bring these claims [on behalf of the probate estate] because of her representative capacity"); *Geremia v. Geremia*, 159 Conn. App. 751, 781 (2015) (same; collecting authorities).[2]

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[1] Though Plaintiffs argue that it is unreasonable to expect that David D'Addario, as executor, would authorize the Estate to institute an action against himself, this contention cannot confer RICO standing. Under Connecticut law, Plaintiffs can seek to have the executors removed or have them surcharged. In fact, both Virginia D'Addario and a creditor of the estate filed motions to remove David D'Addario as executor, and in both instances, these motions were denied. *See* Amended Complaint ¶ 106; *Cadle Co. v. D'Addario*, 268 Conn. 441, 450 (2004). Despite many motions and appeals, there has been no finding, by any court, that David D'Addario has engaged in any wrongdoing in connection with his administration of the Estate.

[2] In addition, Virginia cannot sue on behalf of the Estate under the terms of her earlier settlement agreement with the Estate, which barred her from taking part in deliberations or decisions relating to the Estate or its property. Given this settlement, her prior unsuccessful effort to have the executors removed, and Connecticut law,

This Court should accept review to resolve the circuit split and avoid the confusion and risks created by the Second Circuit's overly-expansive reading of proximate causation under RICO. By accepting certiorari, the Court would have the opportunity to build on *Hemi* and create a clear, simple and enforceable rule so that family probate disputes are not escalated into civil RICO cases based on the allegations of one disgruntled beneficiary.

II. The Plaintiffs Fail To Meaningfully Dispute The Fact That The Second Circuit's Holding Cannot Be Harmonized With *Reves v. Ernst & Young*.

The Plaintiffs fail to offer any explanation as to how the Second Circuit's holding—that outside parties, who "assist" a member of a RICO enterprise in his operation or management of the enterprise or act as a "necessary tool" thereof, have themselves "participated in the operation or management of the enterprise" and can therefore be held liable under RICO—can be harmonized with this Court's holding in *Reves v. Ernst & Young*, 507 U.S. 170 (1993). Instead, the Plaintiffs simply state, with no analysis, that the Second Circuit did not so hold. (Pl. Opp. at 21). Confusingly, however, the only support for this bald assertion is the Plaintiffs' block quotation of the same portion of the Second Circuit's holding wherein the court states just that. (Pl. Opp. at 22).

Virginia cannot purport to act on behalf of the Estate without Probate Court approval.

The relevant portion of the holding below, quoted by both parties, is:

> The individual defendants (Mary Lou, Garvey, and Vitti) are alleged to have actively assisted David when he operated the Estate to effectuate his schemes, which directly affected his management of the Estate. Although the entity defendants (Silver Knot and Red Knot) were used simply to effectuate David's schemes, they also can be understood to have sufficiently assisted David in his conduct of the Estate's affairs simply by their formation and existence: they were necessary tools for the schemes' operation. Such assistance may fairly be considered "participation" in the operation or management of an enterprise, at least in the circumstances alleged here.

(App., at 48a). Under the Second Circuit's analysis of the alleged facts, the RICO enterprise was the Estate, and David D'Addario was a member of that enterprise. (App., at 46a, n.13). The Second Circuit reasoned that neither the individual defendants Mary Lou, Garvey, and Vitti, nor the entity defendants, Silver Knot and Red Knot, were members of the alleged enterprise. (App., at 46a). Thus, the Second Circuit clearly held that outside individuals, *i.e.* Mary Lou, Garvey, and Vitti, could be liable for participating in the operation or management of the enterprise itself, *i.e.* the Estate, simply because they assisted a single member of the enterprise, *i.e.* David D'Addario, in the operation of one of *his* alleged schemes which affected *his* management of the enterprise. (App., at 48a). As to

the outside entities, Silver Knot and Red Knot, the Second Circuit held that these defendants could be liable for participating in the operation or management of the enterprise simply by virtue of their existence, since they were "necessary tools," for a single member, *i.e.*, David D'Addario, to effectuate *his* purported "schemes." *Id*. The Plaintiffs offer no explanation as to how this holding is consistent with *Reves*, nor could they, as it is directly contrary.

In a misleading attempt to tie the Second Circuit's reasoning to the holding in *Reves v. Ernst & Young*, the Plaintiffs claim that "[a]fter discussing the parameters of the 'operation and management' test set forth by this Court in *Reves*, the Second Circuit ruled that '[t]he same analysis applies to the remaining defendants . . . .'" (Pl. Opp. at 22). What the Plaintiffs attempt to obfuscate is that the "same analysis" the Second Circuit was applying was *not*, as the Plaintiffs' claim, this Court's analysis in *Reves*, but rather was the Second Circuit's own flawed analysis in *First Capital Asset Management, Inc. v. Satinwood, Inc.*, 385 F.3d 159, 179 (2d Cir. 2004). (App., at 47a-48a). As discussed in detail in Defendants' Petition, in *First Capital*, the Second Circuit erroneously reasoned, in dicta, that liability under the "operation or management test" was analogous to liability for aiding and abetting. *First Capital*, 385 F.3d at 179 (citing 18 U.S.C. § 2, the aiding and abetting statute, as an analogous authority supporting its application of the operation or management test). In *Reves*, however, this Court rejected that same premise, and held that participation in the operation or management of the conduct of an enterprise's

affairs has a "narrower" meaning than the meaning of "aid and abet." *Reves*, 507 U.S. at 178-79. Similarly, every other Circuit to address the issue has held that, under *Reves*, simply assisting the enterprise is not sufficient to establish liability under §1962(c*). See, e.g.*, *Univ. of Maryland at Baltimore v. Peat, Marwick, Main & Co.*, 996 F.2d 1534, 1539 (3d Cir. 1993); *United States v. Swan*, 250 F.3d 495, 499 (7th Cir. 2001); *Crichton v. Golden Rule Ins. Co.*, 576 F.3d 392, 399 (7th Cir. 2009); *Dahlgren v. First Nat. Bank of Holdrege*, 533 F.3d 681, 690 (8th Cir. 2008).

The Plaintiffs also attempt to support the Second Circuit's holding below by arguing that the "operation or management" test is satisfied simply based on the allegations of the Defendants' "knowing and active participation" in the various "Predicate Acts." (Pl. Opp. at 24). This argument only further highlights the flaws in the Plaintiffs' position and the Second Circuit's ruling. Again, this same argument was expressly rejected by this Court in *Reves*. In *Reves*, this Court held that "'to participate . . . in the conduct of . . . affairs' must be narrower than 'to participate in affairs' or Congress' repetition of the word 'conduct' would serve no purpose." *Reves*, 507 U.S. at 179. Rather than simply participating in the affairs, *Reves* requires that a defendant have "some part in directing those affairs." *Id.*

The underlying facts in *Reves* further emphasize the point. The accounting firm in *Reves* participated in the underlying predicate acts -- in fact, they were convicted of underlying counts of securities fraud. *Reves*, 507 U.S. at 176. Nevertheless, this Court held that such participation in the affairs of the enterprise did

not amount to participation in the *conduct* of the enterprise's affairs, as necessary to establish liability under §1962(c). *Id*. at 178-79.

Thus, as the Plaintiffs themselves argue, under the Second Circuit's holding below, mere participation in the enterprise affairs, *i.e.* the predicate acts, would be sufficient to establish participation in the operation or management of the enterprise's affairs. (Pl. Br. at 24). That holding is directly contrary to the binding precedent of this Court set forth in *Reves v. Ernst & Young*, as well as the holdings of the Third, Seventh, and Eighth Circuits. Accordingly, the Plaintiffs' argument in opposition only further underscores the need for this Court to grant review and align the law in the Second Circuit with this Court's binding precedent and resolve the circuit split created by the Second Circuit's holding below.[3] *See* Supreme Court R. 10(a) and (c).

[3] In a tacit acknowledgment of the weakness of their argument in opposition, the Plaintiffs claim that whether the Second Circuit's holding as to the operation and management test was erroneous is irrelevant because the Plaintiffs have alleged co-conspirator liability under 18 U.S.C. §1962(d). (Pl. Br. at 24) This Court need not consider the flaws of that single-sentence argument, as the substantive adequacy of the Plaintiffs' §1962(d) claims was never addressed by the District Court, or the Second Circuit.

CONCLUSION

For the foregoing reasons, as well as those contained in the Petition for Certiorari, the petition should be granted.

Dated: February 22, 2019

Respectfully submitted,

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