No. _____

In the
Supreme Court of the United States

STEVEN MENZIES,

Petitioner,

v.

SEYFARTH SHAW LLP, GRAHAM TAYLOR, NORTHERN TRUST CORPORATION, AND CHRISTIANA BANK & TRUST COMPANY,

Respondents.

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

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Seventh Circuit failed to apply this Court's mandated flexible approach to RICO's pattern of racketeering activity, by rigidly focusing solely on the particularity of the factual allegations regarding other victims of a fraudulent scheme.

2. Whether the pleading requirements of Federal Rule of Civil Procedure 9(b) require that the specific contents of allegedly privileged communications in a fraudulent scheme be pleaded with particularity to establish a RICO claim where the underlying predicate offenses are mail or wire fraud which do not require proof that the other defendants were actually deceived.

3. Whether a scheme's threat of continuity is evaluated at the time the racketeering activity occurred, or can subsequent, fortuitous events be considered to defeat the threat of continuity.

PARTIES TO THE PROCEEDING

Pursuant to United States Supreme Court Rule 14(1)(b), Petitioner Steven Menzies advises the Court that the caption of the case contains the names of all parties to this proceeding and, therefore, a separate list of parties is omitted.

CORPORATE DISCLOSURE STATEMENT

Pursuant to United States Supreme Court Rules 29.6 and 14(1)(b), Petitioner Steven Menzies is an individual with no corporate affiliation.

RELATED PROCEEDINGS

Menzies v. Seyfarth Shaw LLP, Graham Taylor, Northern Trust Corporation, and Christiana Bank & Trust Company, Case No. 15 C 3403, United States District Court for the Northern District of Illinois. Decision issued September 21, 2018.

Menzies v. Seyfarth Shaw LLP, Graham Taylor, Northern Trust Corporation, and Christiana Bank & Trust Company, Case No. 18-3232, United States Court of Appeals for the Seventh Circuit. Panel decision issued November 12, 2019. Order denying rehearing *en banc* issued December 12, 2019.

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The United States Court of Appeals for the Seventh Circuit panel opinion, *Menzies v. Seyfarth Shaw LLP*, 943 F.3d 328 (7th Cir. 2019), is reprinted in the Appendix to the Petition ("App.") at 1a–60a, and the Seventh Circuit order denying rehearing *en banc* is unreported and is reprinted at App. 166a–167a.

The Memorandum and Order of the district court issued on September 21, 2019 is unreported, but is available at *Menzies v. Seyfarth, Shaw LLP*, 15 C 3403, 2018 WL 4538726 (N.D. Ill. Sept. 21, 2018), and is reprinted at App. 61a–82a.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit panel entered its opinion on November 12, 2019. Petitioner timely filed a petition for rehearing *en banc* on November 26, 2019, which the Seventh Circuit denied on December 12, 2019. This Court has jurisdiction under 28 U.S.C. section 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. section 1962(c) (Racketeer Influenced and Corrupt Organizations Act ("RICO")) provides: "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. section 1962(d) (RICO conspiracy violation) provides: "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. section 1961(5) provides that a "'pattern of racketeering activity' requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity[.]"

18 U.S.C. section 1341 (mail fraud) provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, 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 occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or 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. section 1343 (wire fraud) provides:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major

> disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

INTRODUCTION

This case is about more than isolated or sporadic criminal activity. Steven Menzies' ("Menzies" or "Plaintiff") Second Amended Complaint ("SAC") details a complex tax fraud scheme that lasted for more than five years involving the development, marketing and implementation of tax shelter products intended to be, and in fact sold to multiple investors. Plaintiff alleged violations of 18 U.S.C. section 1962(c) and (d) with underlying predicate offenses of mail and wire fraud. In order to establish a claim for mail or wire fraud pursuant to 18 U.S.C. §§ 1341 or 1343, a plaintiff must show: a scheme to defraud; the intent to defraud; and the use of the mails or wire communications in furtherance of the scheme to defraud. *See Corley v. Rosewood Care Ctr., Inc. of Peoria*, 388 F.3d 990, 1005 (7th Cir. 2004).

The United States Court of Appeals for the Seventh Circuit in finding Plaintiff's allegations of a pattern insufficient, failed to give Plaintiff the benefit of reasonable inferences, overly restrictively requiring particularized allegations of the contents of legal opinion letters provided to other victims of the fraudulent scheme, and looking at the facts with the benefit of hindsight. Critically, this Court has held that

the elements of mail and wire fraud do not include any requirement that a plaintiff plead actual deception by alleging knowledge of other victims. *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 652 (2008); *Perlman v. Zell*, 938 F. Supp. 1327, 1346 (N.D. Ill. 1996), *aff'd*, 185 F.3d 850 (7th Cir. 1999) (whether defendants ultimately deceived plaintiff "is not a requirement for a charge of mail or wire fraud"). Thus, because Plaintiff did not need to prove that the other victims of the scheme were actually deceived, the fact that Menzies only alleged the general contents of opinion letters (which had been withheld on the basis of privilege) sent by Defendants as part of their fraudulent scheme is not material to whether he stated a claim for which relief can be granted.

The question presented here is whether the United States Court of Appeals for the Seventh Circuit failed to apply this Court's mandated flexible approach to RICO's pattern of racketeering activity. The Seventh Circuit took a position contrary to decisions of other courts of appeals in failing to provide Plaintiff with the benefit of reasonable inferences, and evaluating the scheme with the benefit of hindsight rather than at the time the racketeering activity occurred. This petition presents important questions of law, as the Seventh Circuit has adopted an erroneous restrictive view of the RICO pattern requirement which substantially weakens both civil and criminal RICO.

The Court should grant certiorari.

STATEMENT OF THE CASE

A. Factual Background

Menzies is an insurance executive, having founded Applied Underwriters, Inc. ("AUI") with his business associate, Sidney Ferenc ("Ferenc"). (District Court Docket ("Dkt.") 165 ("SAC") ¶ 1). In November 2002, purported financial advisors at Defendant Northern Trust approached Menzies. (SAC ¶ 30). During preliminary communications, Menzies and Ferenc explained that they each held stock in AUI. (SAC ¶ 32). At that time, the AUI stock had a relatively low basis (original value for tax purposes) and there were investors and companies pursuing an interest in AUI. In the event that AUI stock was sold, or otherwise reflected as an income event, Menzies and Ferenc could potentially be liable for capital gains tax equal to the difference between the asset's cost basis and its purchase price. (SAC ¶¶ 1, 32, 43).

i. Menzies Participates in the Euram Oak Strategy – An Abusive Tax Shelter

Included among the so-called "financial services" that Defendant Northern Trust peddled to Menzies and Ferenc was the "Euram Oak Strategy." (SAC ¶¶ 16, 25). The strategy was a tax shelter product that Northern Trust, Christiana Bank & Trust Company ("Christiana"), Seyfarth Shaw LLP ("Seyfarth"), Graham Taylor ("Taylor") and Euram Bank ("Euram") (collectively, the "Enterprise") developed, marketed and implemented. (SAC ¶¶ 16–17, 20–25)

Neither Menzies nor Ferenc were sophisticated in tax planning. (SAC ¶ 46). Over the course of the next

several months, the Enterprise collectively represented to Menzies and Ferenc on numerous occasions that the Euram Oak Strategy was lawful and could be used to shelter income and thus taxes from a potential sale of the AUI stock. (SAC ¶¶ 43, 62, 76, 81, 88, 93, 98, 110, 111, 115, 148).

The transaction employed a grantor trust ("GRRT" or, for Menzies, the "Persephone Trust"), which provided the grantor with the power to reacquire the trust corpus by substituting other property of an equivalent value, by either (a) the grantor contributing options to the GRRT that were substantially offsetting over a relevant range of values, or (b) the grantor substituting appreciated assets for high-basis assets originally contributed to the GRRT. (SAC ¶ 16). The purported effect of the substitution was to create a tax basis in the contributed assets that bore no relationship to the taxpayer's economic investment in the asset, and thus sheltered the taxpayer's capital gains from sale reducing tax exposure. (SAC ¶ 16).

As it turns out, the Internal Revenue Service ("IRS") later designated the Euram Oak Strategy as a "transaction of interest" that has a potential for tax avoidance or evasion. *See* IRS Notice 2007-73. Contrary to the representations to Menzies and the other victims, the Euram Oak Strategy lacked economic substance, did not have a bona fide estate planning purpose and would never withstand IRS scrutiny. *Id.*

ii. Euram Bank Actively Developed, Marketed and Implemented its Fraudulent Tax Schemes, Including the Euram Oak Strategy

Once the Euram Oak Strategy had been created, it was easily replicated for multiple taxpayers, creating a clear and present threat of repetition and continued criminal activity. (SAC ¶¶ 157, 158, 210). Defendants were not providing individualized tax advice, but instead were engaged in a scheme to provide "tax products" aggressively marketed to multiple clients. (SAC ¶ 15). As evidence of Defendants' marketing efforts, Menzies attached a PowerPoint presentation to his Second Amended Complaint which describes the Euram Oak Strategy (SAC ¶¶ 21–22), and includes an eleven page "white paper" laying out the technical treatment of the strategy (SAC ¶ 41). Each of these documents includes a standard disclaimer demonstrating that the documents were intended for distribution to multiple potential investors. (SAC ¶¶ 22, 41).

Euram's activity in promoting tax shelter products was not limited to the Euram Oak Strategy. During the same time period, Euram also promoted and sold the Euram Rowan Strategy, POINT and the Split Option Trading Strategy. (SAC ¶ 18). Euram was identified as a regular off-shore participant in illegal tax shelters in the United States Senate Permanent Subcommittee on Investigations Report entitled "Tax Haven Abuses: the Enablers, the Tools and Secrecy". (SAC ¶ 27). The structured products group of Euram including individuals, John Staddon, Rajan Puri, Arfan Shaikh

and Tania Salim, were involved in the execution of the Euram Oak Strategy, the Euram Rowan Strategy and the Euram products identified in the Senate reports. (SAC ¶¶ 18, 28).

iii. The Enterprise Had Already Implemented the Euram Oak Strategy and Another Abusive Tax Shelter for Other Victims at the Time Menzies and Ferenc Were Approached

It turns out that prior to executing the Euram Oak Strategy for Menzies and Ferenc, the Enterprise had been involved in executing the same strategy for an Arizona investor. In Paragraphs 160–165 of the Second Amended Complaint, Plaintiff details that, as part of Defendants' fraudulent scheme, an Arizona investor also participated in the Euram Oak Strategy. Christiana was aware of the scheme because prior to Menzies and Ferenc, it served as the trustee for an Arizona investor. (SAC ¶¶ 50, 161). When Euram provided Christiana with a draft of the GRRT for Menzies and Ferenc, it advised Christiana that "all your attorney's points will be included" because the trust document was based on a similar trust document used for the Arizona investor. (SAC ¶ 50). Indeed, while Christiana was communicating with Euram regarding the Ferenc and Menzies transactions in October 2003, they were also discussing "two new trades involving the Oak structure." (SAC ¶ 89). In addition, even before executing the Euram Oak Strategy for Menzies, Ferenc and the Arizona investor, Plaintiff describes the details of a separate but related tax scheme known as the Euram Rowan Strategy that

Taylor, Seyfarth, Christiana, Euram and Pali implemented for a North Carolina investor. (SAC ¶¶ 166–80). The "Rowan Strategy" was named such by its promotors and was an entirely different tax planning strategy, although the IRS also determined it was abusive. (SAC ¶¶ 166–67).

iv. The Enterprise's Scheme to Defraud Menzies and Ferenc

Based in part on the reputation, integrity, and expertise of Northern Trust, and the explanation of the Euram Oak Strategy and its representations that the tax shelter was lawful and would provide the promised tax saving benefits, Menzies and Ferenc pursued further discussions. (SAC ¶ 47). Once Menzies and Ferenc showed interest in the Euram Oak Strategy, the Enterprise arranged a series of conference calls without Menzies or Ferenc, including on July 31, 2003 and August 7, 2003, to discuss the details on how the transactions would be structured to fraudulently attempt to avoid tax liability, including that Northern Trust was to receive a kickback of Euram's fee, which in turn, had been calculated as a percentage of tax savings. (SAC ¶¶ 48, 52, 56–57). Northern Trust was provided with details of pre- arranged steps associated with the strategy, and was requested by Euram to appoint a point person to coordinate the forty to fifty documents that were required to be executed as part of the scheme. (SAC ¶ 55).

Northern Trust played a critical role in recommending that Menzies and Ferenc use Christiana as the trustee and Seyfarth and Taylor for legal services, representing to both Menzies and Ferenc that

they were independent professional advisors, when in reality, they were participants in Defendants' nefarious scheme and had been involved in prior executions of the Euram Oak Strategy. (SAC ¶¶ 51, 58–60).

a. Christiana's Role as a Purported Independent Trustee

Euram contacted Christiana to act in the role as trustee for the proposed transactions for Menzies and Ferenc. (SAC ¶ 50). Neither Ferenc nor Menzies had any prior dealings with Christiana, who was located thousands of miles from their homes and business interests. (SAC ¶ 45). Indeed, although Menzies and Ferenc had each engaged Northern Trust as a financial advisor, Christiana was hand-picked by Euram as the trustee for the Euram Oak Strategy. (SAC ¶ 50). Christiana purportedly served as an independent trustee, but concedes that it "performed professional services at … Euram's direction." (Dkt. 178, p. 3).

Christiana was not acting as Menzies' fiduciary, or as an independent trustee, but instead was working at Euram's direction to conceal that the Euram Oak Strategy was no more than an abusive tax shelter designed to produce fees. Euram provided Christiana with a specific list of prearranged and fraudulent steps to be undertaken for Menzies' transaction. (SAC ¶ 65). The scheme required that Christiana participate in numerous steps of the transaction (often executing documents on both sides of the particular agreement). (SAC ¶¶ 79, 83, 87).

Menzies later determined that Christiana was concerned about its own liability for its role in the

scheme when on, or about, June 5, 2004, Euram contacted Christiana regarding the execution of the Euram Oak Strategy for Menzies and Ferenc regarding the possibility that the Euram Oak Strategy might be a reportable transaction to the IRS. (SAC ¶ 94). Christiana had its outside counsel review whether Christiana, as a material advisor, had an obligation to report to the IRS the 2003 Tax Shelter (and the similar transaction entered into by Ferenc). (SAC ¶ 94).

Christiana, despite its fiduciary duty to Menzies, failed to advise Menzies that it had sought counsel to consider whether Menzies had engaged in a reportable tax shelter transaction, notwithstanding that, Plaintiff alleges that on information and belief, Christiana charged the trust for the legal fees involved in pursuing such advice. (SAC ¶ 94).

b. The Participation of Taylor and Seyfarth in Drafting Bogus Legal Opinions Justifying the Transactions

On August 7, 2003, Northern Trust also recommended that Menzies engage Taylor (and Seyfarth) "because he was up to speed and would quickly get the documents ready to sign." (SAC ¶ 58). Taylor had been contacted by Euram regarding Menzies' and Ferenc's transactions before he was ever introduced to them. (SAC ¶ 53). This is not surprising because, based on his own testimony from a federal criminal trial, Taylor drafted hundreds of fraudulent opinion letters, over a span of more than ten years, and involving no less than eight different tax shelters: "Taylor knew what he was doing was wrong, but continued in his course of conduct because it was

profitable, it was intellectually stimulating and challenging; and because he was caught up in the fervor of the tax shelter world." (SAC ¶ 104).

In May 2003 Taylor had received a white paper related to the Euram Oak Strategy and prepared a summary of the steps necessary to obtain the required tax benefit. (SAC ¶ 104). Taylor was also provided with a draft legal opinion drafted by Proskauer Rose for the Euram Oak Strategy for his use in connection with the Menzies and Ferenc transaction. (SAC ¶ 39). Taylor's practice was to reuse the same form opinion letters, with any changes consisting of the personal details filled in for each specific client. (SAC ¶¶ 102, 109).

For Menzies and Ferenc, Taylor actually drafted the letter for Ferenc, only later copying it with the personal information changed for Menzies. (SAC ¶¶ 109, 110, 111, 115, 117, 123). In July 2004, even though Taylor was purportedly issuing an independent legal opinion, he sent a draft of the opinion letter to representatives of Pali and Euram, promotors of the tax shelter, for comments. (SAC ¶¶ 112–14). Taylor incorporated the Euram/Pali's comments into his purported independent opinion letter. (SAC ¶ 114).

By November 2005, Taylor had been indicted for tax fraud. (SAC ¶ 105). Seyfarth advised other clients of the criminal charges, but did not do so for Menzies. (SAC ¶ 106). In July 2006, before Menzies filed his tax returns reflecting the sale of AUI stock, he sought advice from Taylor regarding the Euram Oak Strategy. (SAC ¶ 134). Taylor did not advise Menzies that he had been indicted for tax fraud, but instead provided Menzies further false assurances that the structure

was lawful and that Menzies would receive the tax benefit as promised. (SAC ¶ 134). By the time that the IRS completed its audit of Mr. Menzies' taxes in 2012, Taylor had pled guilty to felony tax fraud, a fact the IRS found material in determining that it would assess penalties against Menzies. (SAC ¶ 142).

v. Menzies' Obligation to Pay Capital Gains Tax, Penalties and Interest After the IRS Audit Determines Euram Oak Strategy is Abusive

In early 2006, AUI agreed to sell its shares to Berkshire Hathaway Inc. ("BHI"). (SAC ¶ 130). BHI purchased the AUI stock from Menzies' Persephone Trust in May 2006. (SAC ¶ 131). Menzies filed his 2006 income tax in 2007, and as a result of, and relying on the advice he received from the Enterprise, he did not declare the AUI sale to BHI as a taxable event. (SAC ¶ 135). Christiana filed the tax return on behalf of Menzies' trust in 2007, and also failed to report the sale of the AUI stock. (SAC ¶ 136). However, in October 2009, the IRS notified Menzies of its intent to audit Menzies' 2006 tax returns. Menzies reasonably relied upon Defendants' representations, including the Seyfarth opinion letters, in explaining to the IRS why he did not report the sale of AUI stock. (SAC ¶ 138).

Not surprisingly the IRS was not persuaded by Defendants' scheme, and instead found that the purpose of the transaction was to inappropriately inflate Menzies' tax basis in his AUI stock. (SAC ¶ 144). The IRS did not believe that Taylor's opinion letter provided any form of defense, and threatened Menzies with large fines, severe penalties,

civil actions, and even potential criminal liability. (SAC ¶ 144). As a result, Menzies was forced to settle with the IRS, making a payment of $10,427,201.98 in capital gains tax, penalties and interest. (SAC ¶ 144). This action ensued shortly thereafter.

B. Procedural Background

i. District Court Proceedings

Menzies filed the action on April 17, 2015. (Dkt. 1). On June 10, 2015, Defendants Northern Trust, Christiana, Seyfarth and Taylor each moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). (Dkt. 29, 31, 35). On July 15, 2016, the district court entered a memorandum opinion and order granting in part and denying in part the motions to dismiss the RICO and RICO conspiracy causes of action. (*Menzies v. Seyfarth Shaw LLP*, 197 F. Supp. 3d 1076, 1118–19 (N.D. Ill. 2016)). The district court granted Menzies leave to file an amended complaint to address the alleged pleading deficiencies and lifted the stay of discovery to permit Menzies to conduct discovery. (*Id.* at 1119).

On December 23, 2016, Menzies filed an amended complaint. (Dkt. 101). On February 2, 2017, Defendants each moved to dismiss the amended complaint. (Dkt. 105, 108, 114). On May 16, 2017, the parties argued the motions before the court, and the court took Defendants' motions to dismiss under advisement. (Dkt. 136). On August 8, 2017, the court granted Menzies leave to file a second amended complaint, and denied each of the pending motions to dismiss without prejudice. (Dkt. 163). On August 8, 2017, Menzies filed his SAC. (Dkt. 165).

On September 5, 2017, Defendants each moved to dismiss the SAC. (Dkt. 169, 172, 175). On September 21, 2018, the court granted Defendants' motions to dismiss, and entered a final judgment in their favor. (App 82a). Plaintiff timely filed a notice of appeal on October 15, 2018. (Dkt. 233)

ii. The Seventh Circuit Panel Decision

a. Majority

In a 2-1 decision, the United States Court of Appeals for the Seventh Circuit Majority determined that Menzies did not adequately plead either open- or closed-ended continuity as required by RICO. The Majority and the Dissent agreed that Menzies pleaded the underlying tax shelter in sufficient detail to state a claim for RICO. (App. 25a, 45a). Likewise, the Panel was unanimous in finding that the allegations were sufficient with respect to Sidney Ferenc. (App. 25a, 45a). In evaluating whether there was a pattern of racketeering activity, the Majority and Dissent only reached different conclusions as to whether Menzies could establish closed- or open-ended continuity.

Although the factual allegations were sufficient to establish predicate acts of mail and wire fraud with respect to Menzies and Ferenc, the Majority improperly concluded that the allegations fell short with respect to the North Carolina and Arizona investors. (App. 23a). This conclusion was based only on the Majority's determination that "[w]hat Menzies needed to do … was allege at least some particulars about the precise communications with each investor." (App. 23a). Because Menzies did not allege the specific contents of

Defendants' communications with the North Carolina and Arizona investors, the Majority found that even though Menzies had alleged two victims with the particularity required by Rule 9(b), Menzies still did not establish closed-ended continuity. (App. 24a). After purporting to consider "the number and variety of predicate acts, the length of time over which they were committed, the number of victims, the presence of separate schemes, and the occurrence of distinct injuries," the Majority focused *only* on the fact that Menzies had not provided detailed factual allegations of the specific contents of opinion letters (which had been withheld on the basis of privilege), failed to provide Menzies with the benefit of reasonable inferences from the other allegations and improperly concluded that "his pleading was deficient [as to closed-ended continuity]." (App. 25a).

With respect to open-ended continuity, the Majority found that the scheme was reaching its "*natural* ending point" because of the following intervening events: Euram Bank divested from its subsidiary, Pali Capital; Taylor was indicted for tax fraud; one of Taylor's colleagues was forced to resign from Seyfarth; and Christiana and Euram Bank were conducting internal investigations regarding the possibility that the Euram Oak Strategy might be a reportable transaction. (App. 26a–27a) (emphasis added). The Majority then concluded (albeit incorrectly) that there were no factual allegations to support the conclusion that "following Taylor's arrest and indictment, there existed a threat of the defendants fraudulently marketing the tax shelter into the indefinite future." (App. 28a).

b. Dissent

Judge Hamilton, in dissent, found that Menzies "easily satisf[ied] [the] pleading requirements for a civil RICO claim, including the required 'pattern of racketeering activity.'" (App. 41a). In concluding that Menzies' allegations established closed- and open-ended continuity, Judge Hamilton explained that the Majority erred in several critical ways; specifically, the Majority "use[d] [ ] the distorting lens of hindsight," "demand[ed] far too much from a complaint that is already quite detailed, and [ ] fail[ed] to give plaintiff the benefit of plausible inferences from his complaint." (App. 35a). The Majority's restrictive approach to RICO's pattern element contradicts this Court's and the Seventh Circuit's emphasis on the need to apply a flexible approach in evaluating the pattern requirement. (App. 41a–45a).

With respect to open-ended continuity, Judge Hamilton took issue with the Majority "mak[ing] the basic error of giving the defendants the benefit of hindsight rather than considering the threat of continued fraud as it was happening." (App. 48a). Further, "[a]gainst [ ] substantial case law showing that courts do not rely on hindsight … to avoid recognizing a continued threat of crimes in … RICO cases, the majority offer[ed] no support for its reliance on hindsight." (App. 54a).

Judge Hamilton explained that employing hindsight improperly allows a threat-of-continuity determination to be grounded on intervening events (*e.g.*, Taylor's conviction). (App. 48a–49a). "Extensive RICO case law shows that … intervening event[s] [are] not relevant to

the threat of repetition." (App. 49a). In fact, Judge Blakey, the district judge who dismissed this case, instructed in another recent RICO case (*Inteliquent, Inc. v. Free Conferencing Corp.*, 2017 WL 1196957, at *10 (N.D. Ill. 2017)) that "a lack of a threat of continuity 'cannot be asserted merely by showing a fortuitous interruption of that activity such as by an arrest, indictment or guilty verdict.'" (App. 51a).

Perhaps most critically, Judge Hamilton warned that the Majority's error will unduly narrow RICO's application where "ongoing schemes are interrupted by arrests, indictments, convictions, or other events." (App. 49a). In particular, applying hindsight to analyze the threat of continuity "weakens criminal application of RICO where intervening events interrupt ongoing criminal schemes." (App. 51a).

Turning to Menzies' detailed allegations, Judge Hamilton found the Majority erred by not engaging with the "extensive factual details alleged in the complaint that indicate a threat of repetition and support open-ended continuity", and by "fail[ing] to apply the proper standard of review, which gives the plaintiff the benefit of reasonable inferences from the allegations." (App. 54a–55a, 56a). Based on the "extensive details about how defendants carried out the fraud with Menzies and Ferenc", Judge Hamilton determined it was plausible that Defendants' schemes presented a threat of continuing activity. (App. 55a–56a).

The Majority failed to acknowledge the detailed allegations that "defendants themselves described [the] schemes as 'very similar' to and 'in essence identical' to

transactions with the Arizona investor." (App. 55a–56a). "The complaint also describes the similar 'Euram Rowan Strategy' with the North Carolina investor[ ] …." (App. 55a–56a). Further, Defendants used "fancy marketing materials" with disclaimers addressed to "investors" generally and required prospective clients to sign confidentiality agreements before explaining the tax shelter products. (App. 56a). On these facts, Judge Hamilton concluded that there was "ample support" for a threat of continuity, exclaiming, "[o]f course there was a threat of continued fraudulent episodes! As long as the defendants were getting away with the scam, why should they have stopped …?" (App. 56a). Defendants "had developed a profitable product … [that] assured defendants hundreds of thousands of dollars in fees every time it was used." (App. 56a). As Judge Hamilton explained, in the law "we ordinarily assume people are rational actors", meaning "we would expect defendants to continue with their profitable venture." (App. 56a).

Judge Hamilton also concluded that even with limitations place on Menzies' ability to conduct discovery, Menzies satisfied Rule 9(b)'s pleading standard and demonstrated closed-ended continuity. (App. 57a–60a). Judge Hamilton found that: (1) the Majority disregarded that in discovery Defendants evaded production of their fraudulent communications with the other investors by asserting attorney-client privilege,[1] and (2) "impose[d] an unfair and excessive

[1] Judge Hamilton noted that "[g]iven the IRS's rejection of these abusive tax shelters, there are ample reasons to think that the crime-fraud exception would apply to pierce the privilege …." (App. 57a).

pleading requirement [on Plaintiff] that goes beyond Rule 9(b) and any need for fair notice to defendants." (App. 57a). Thus, among other things, the Majority "unfairly reward[ed] defendants for their efforts to cover up their attempts to defraud other investors." (App. 60a).

Elaborating on the Majority's "unfair and excessive pleading requirement," Judge Hamilton stated that the Majority "discount[ed] the complaint's plausible allegations about the fraud aimed at the North Carolina and Arizona investors." (App. 57a). Indeed, contrary to the Majority's finding, Judge Hamilton concluded that Plaintiff's allegations satisfied Rule 9(b)'s heightened pleading standard by establishing the who, what when, where, and how of Defendants' fraud with the North Carolina and Arizona investors. (App. 59a). Moreover, Judge Hamilton explained that closed-ended continuity "should not fail simply because plaintiff has not yet seen [Defendants'] fraudulent opinion letters. … It's not difficult to infer what they said. If the letters had not asserted the fraudulent shelters were legal, there of course would have been no point in the transactions." (App. 59a). In fact, Judge Hamilton found "[t]he inference that the defendants' opinion letters say fraudulently that the tax shelters would be legal is not merely plausible but *compelling*." (App. 59a (emphasis added)).

On November 26, 2019, Menzies filed a petition for rehearing *en banc*. (App. 167a). The Seventh Circuit denied Menzies' petition for rehearing *en banc* on December 12, 2019. (App. 166a–67a).

REASONS FOR GRANTING THE WRIT

RICO imposes liability upon those who engage, or conspire to engage, in a pattern of racketeering activity through designated prohibited activities (referred to as predicate acts), including mail and wire fraud. 18 U.S.C. § 1961, *et seq*. Despite requiring a "pattern" of racketeering activity, RICO offers little guidance on what constitutes a pattern. *See* 18 U.S.C. § 1961(5) (a pattern "requires a least two acts of racketeering activity within a ten-year period"). This Court last addressed RICO's pattern element over three decades ago in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989), and it is thus time to update the pattern element. In *H.J.*, this Court mandated a flexible approach to applying RICO's pattern requirement and emphasized that a pattern requires "continuity plus relationship". *Id.* at 238, 239. Continuity is "both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241.

Despite the guidance provided in *H.J.*, uncertainty in applying the continuity prong has persisted, deepening circuit splits and undermining RICO's integrity. This ongoing uncertainty and expanding disagreement over the proper application of the continuity prong is reflected in the Seventh Circuit Panel's 2-1 decision in this case, which turned on the presence of continuity. While the dissent concluded that Plaintiff "easily satisfie[d] the 'pattern' requirement" by pleading a "strong case of open-ended continuity" and providing sufficient information,

despite discovery limitations, to establish closed-ended continuity (App. 47a, 57a–60a), the Majority disagreed. Disagreement over the continuity prong is not limited to this case, but is rampant and has created inconsistencies across the circuits. These inconsistencies are not trivial – they undermine the integrity of RICO. This Court's guidance is needed to prevent further erosion of RICO's effectiveness. Moreover, clarification by this Court will serve to advance the development of RICO.

I. This Court's Guidance is Needed to Clarify the Flexible Approach to the Continuity Analysis

A. The Flexible Approach to Determine Continuity Requires Consideration of More Than One Factor

This Court has stressed that a flexible approach should be used to determine the existence of a pattern, and consequently, continuity. *H.J.*, 492 U.S. at 239. "Congress intended to take a flexible approach, and envisaged that a pattern might be demonstrated by reference to a range of different ordering principles or relationships between predicates, within the expansive bounds set." *Id.* at 238–39. In this case, however, the Majority failed to follow this Court's mandate, and instead applied a restrictive approach to determine continuity.

While claiming to apply the approach laid out in *H.J.* to its continuity analysis, the Majority in fact applied a restrictive approach by focusing solely on one factor (the number of victims), rigidly applying purported pleading requirements, and ignoring the

facts and circumstances of this case. Given the complexity of the fraudulent scheme in this case, the duration of the execution, the nature and extent of the predicate acts alleged in the SAC, Menzies' allegations should have been sufficient under the guidance of *H.J.* and would have been found to state a claim under authority from the Sixth, Ninth and Eleventh Circuits. *Ouwinga v. Benistar 419 Plan Servs., Inc.*, 694 F.3d 783, 795–96 (6th Cir. 2012) (shelter marketed over period of five years); *Newmyer v. Philatelic Leasing, Ltd.*, 888 F.2d 385, 396–97 (6th Cir. 1989) (marketing of fraudulent tax shelter); *Durham v. Bus. Mgmt. Assocs.*, 847 F.2d 1505, 1512 (11th Cir. 1988) (pattern with two related schemes to market fraudulent tax shelters); *United Energy Owners Comm., Inc. v. U.S. Energy Mgmt. Sys., Inc.*, 837 F.2d 356, 360–61 (9th Cir. 1988) (reversing dismissal of RICO claim based on marketing of fraudulent tax shelter).

The Majority's closed-ended continuity analysis centered on one factor: the number of victims. On this finding alone, the Majority determined that Menzies did not establish closed-ended continuity. (App. 24a–25a). Under the flexible approach espoused by *H.J.*, however, it is improper to find a lack of continuity based only on one factor. Indeed, courts, including the Seventh Circuit have even found continuity where only one victim was alleged, demonstrating that a flexible approach to the continuity analysis requires consideration of more than one factor. *See, e.g.*, *Gagan v. Am. Cablevision, Inc.*, 77 F.3d 951, 963 (7th Cir. 1996) (plaintiff established a pattern, even though claim was based on a single victim and a single scheme); *Liquid Air Corp. v. Rogers,*

834 F.2d 1297, 1304 (7th Cir. 1987) ("mere fact that the predicate acts relate to the same overall scheme or involve the same victim does not mean that the acts automatically fail to satisfy the pattern requirement" (citation and internal quotation marks omitted)); *Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio*, 900 F.2d 882, 886–87 (6th Cir. 1990) (noting it did not believe Congress intended to allow evasion of RICO simply because predicate acts were limited to one victim).

The Majority's rigid approach precludes from RICO's scope cases that successfully establish continuity under *H.J.* Further, the Majority's failure to use a flexible approach when evaluating whether the factual allegations establish continuity, creates intra-circuit and inter-circuit conflicts and, thus, shows that this Court's clarification on the continuity analysis is essential to protect RICO's integrity and advance the development of RICO.

B. The Elements of Common Law Fraud Cannot Be Conflated with Mail and Wire Fraud to Prevent Application of RICO

The Majority's determination that Menzies only pled two victims with particularity was based on flawed reasoning and further reflects the improper rigid approach applied in this case. The only thing the Majority found missing from Menzies' SAC was a description of the contents of the opinion letters.[2]

[2] Plaintiff received Seyfarth's legal opinions relating to the Euram Oak Strategy which Taylor had issued to each of Menzies and Ferenc. (SAC ¶¶ 1, 110, 111, 115, 118). These opinions are

(App. 22a–23a). Because Defendants withheld the documents on the basis of attorney/client privilege, Menzies was only able to make allegations on information and belief as to the contents of the letters. The Majority should have found these allegations sufficient.

The Majority concluded that Menzies' allegations were insufficient with regard to the North Carolina and Arizona investors, because, as the Majority ruled, the "combined demands of RICO's pattern element and Rule 9(b)'s particularity mandate" required that Menzies "spell out the specifics of any defendant's communication with [each] investor." (App. 21a, 22a). The Majority reasoned that without specific allegations of what each defendant "represented, misrepresented, or omitted" there was "no way to determine whether multiple predicate acts of mail or wire fraud occurred in a manner that satisfies RICO's pattern requirement." (App. 23a). Yet, under this Court's, the Seventh Circuit's and Eighth Circuit's precedents, mail and wire fraud do not require that there be any misrepresentation contained in any communication between defendants and the other victims. *Schmuck v. United States*, 489 U.S. 705, 714–15 (1989); *United States v. Sheneman*, 682 F.3d 623, 629–30 (7th Cir.

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virtually identical in language, save the differences in the names of the specific trust entities and the dollar amounts of the transactions. (SAC ¶ 123). Menzies identified numerous specific false statements contained in the Seyfarth opinion that he received. (SAC ¶ 124). Menzies has specifically alleged that Taylor's practice was to reuse the same form opinion letters, with any changes consisting of the personal details filled in for each specific client. (SAC ¶¶ 102, 109).

2012); *see also Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 992 (8th Cir. 1989). Instead, an act of mail fraud actually occurs when a person, "having devised or intending to devise any scheme or artifice to defraud," uses the mail "for the purpose of executing such scheme or artifice or attempting so to do...." 18 U.S.C. § 1341; *United States v. Briscoe*, 65 F.3d 576, 583 (7th Cir. 1995) (wire fraud).

While the scheme to defraud must be pleaded with particularity (which the Majority concedes Menzies accomplished (App. 21a–22a)), nothing in Rule 9(b) requires Menzies to specifically allege the contents of the opinion letters that purported to support transactions involving other victims. The issuance of the opinion letters is part of the scheme, but Menzies is not required to plead the particular contents of the opinion letters, as unlike a common law fraud, mail and wire fraud do not require specific fraudulent statements or omissions (or reliance). *See* 18 U.S.C. §§ 1341, 1343. This is particularly true when Defendants claimed privilege for the very opinion letters that the Majority decided were needed for Menzies to demonstrate continuity.

Despite Defendants evading production of the opinion letters used for the other investors, Menzies still alleged the "who, what, when, where, and how" with respect to these letters. Menzies alleged that in late 2002, Euram suggested that the North Carolina investor engage Taylor to provide a purported legal opinion in connection with the tax benefits promised from the Euram Rowan Strategy. (SAC ¶ 176). To that end, in or about October 2003, through the use of the

mails or via e-mail transmission, Taylor and Seyfarth provided the North Carolina investor with a legal opinion letter. (SAC ¶ 177). With respect to the Arizona investor, Menzies alleged that in or about March 2003, representatives of Euram and/or Pali, including Arfan Shaikh and Tania Sali, communicated with the Arizona investor regarding the Euram Oak Strategy. (SAC ¶ 160). Menzies alleged that in or about February 2004, through the use of the mails or e-mail transmission, Taylor and Seyfarth provided the Arizona investor with a legal opinion letter. (SAC ¶ 162). Later, on or about February 26, 2004, Seyfarth and Taylor sent via United States Mail or Federal Express an invoice for the tax advice related to the Arizona investor's execution of the Euram Oak Strategy (*i.e.*, the opinion letter). (SAC ¶ 164). These detailed allegations fully satisfy Rule 9(b)'s pleading requirement with respect to the opinion letters issued to the Arizona and North Carolina investors.

Even assuming *arguendo* that mail and wire fraud required pleading the contents of the mailing and/or wire communication, Menzies' allegations satisfy this requirement. Importantly, on a Rule 12(b)(6) motion to dismiss, the allegations in Menzies' SAC must be accepted as true and Menzies must be given the benefit of favorable, reasonable inferences. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks and citation omitted). The Majority, however, failed to apply this standard in improperly requiring that Menzies "spell out the specifics" of the opinion letters. (App. 22a–23a).

From the allegations it can be reasonably inferred that the opinion letters sent to the other investors were substantially similar, if not identical, to the opinion letters issued to Menzies and Ferenc, which contained assertions as to the legality of the respective tax shelter products. (SAC ¶¶ 102, 109, 110, 123). Indeed, it would be unreasonable to infer otherwise. And, the Majority concluded that the allegations were sufficient with respect to the opinion letters issued to Ferenc and Menzies. (App. 21a–22a). Taylor reused the same basic opinion letter for each client investing in Defendants' tax shelter products. (SAC ¶¶ 102, 109). Taylor's practice of recycling opinion letters is reflected in his communication to another Seyfarth attorney, stating, "the Ferenc letter has just be[en] finished by Eda, *clone* for Menzies." (SAC ¶ 117 (emphasis added)). In addition, Defendants' recycling of other documentation used to execute their schemes is revealed in Defendants' communication describing documents used with Menzies and Ferenc as "very similar" and in "essence identical" to the documents used with the other investors. (SAC ¶¶ 50, 69, 78). On these factual allegations, it is more than reasonable to infer that the opinion letters issued to the North Carolina and Arizona investors were substantially similar, if not identical, to the opinion letters issued to Menzies and Ferenc which confirmed the legality of the tax shelters.

The Majority's overly restrictive application of Rule 9(b)'s heightened pleading standard required Menzies to plead details beyond the statutory requirements for the underlying offenses. This Court should grant Menzies' Writ to correct the imposition of common law fraud elements into claims of mail and wire fraud and

to prevent an overly restrictive application of Rule 9(b)'s heightened pleading standard.

II. Hindsight Cannot be Used to Determine Whether There is a Continuing Threat of Racketeering Activity

The Majority's use of hindsight in determining whether Defendants' scheme had a natural ending point or threat of continuing directly conflicts with the law in the Second, Fifth, Sixth, Seventh and D.C. Circuits, adding another layer of uncertainty to the continuity analysis. Further, the Majority's use of hindsight has significant implications on RICO's scope because it obstructs a victim's ability to successfully plead a violation of RICO when ongoing racketeering activity is interrupted by fortuitous events, such as arrests or convictions. To temper growing uncertainty and prevent an unwarranted contraction to RICO's scope, this Court's guidance is needed on the propriety of employing hindsight to assess the existence of a threat of continuing racketeering activity.

A. Use of Hindsight Further Fractures the Continuity Analysis

In this case, the Majority failed to assess whether Defendants' scheme had a threat of continuing *at the time* of the racketeering activity and, instead, made its determination based on hindsight. The Majority's improper use of hindsight allows racketeering activity to escape prosecution for RICO violations when ongoing predicate acts are interrupted by intervening events.

Menzies provided detailed factual allegations that established Defendants' scheme threatened to continue

and had no natural ending point. Defendants' abusive tax shelter products were not custom-designed for Menzies, but rather, were generic products with templates that could be (and were) quickly and easily replicated to defraud similarly situated taxpayers. (SAC ¶¶ 15, 20). Indeed, Defendants were incentivized to repeat the scheme indefinitely because each time it was repeated, Defendants reaped hundreds of thousands of dollars in professional fees. (SAC ¶ 20).

Defendants themselves described the transactions for their abusive tax shelter products carried out for different taxpayers as "very similar" or "in essence identical". (SAC ¶¶ 50, 82). When Arfan Shaikh of Euram Bank sent documents that were used to carry out the transactions for Defendants' abusive tax shelters, Mr. Shaikh advised Defendants that they "should be familiar" with the documents from other transactions. (SAC ¶¶ 69, 78). Further, the replicable nature of Defendants' tax shelter products is evidenced by Defendants' marketing materials, which contained a standard disclaimer addressed generally to "investors", thus showing that the tax shelters were not marketed to a specific individual, but instead were peddled to a broad group of "investors". (SAC ¶¶ 22, 41). Moreover, before providing details on their tax shelter products, Defendants required taxpayers to execute a confidentiality agreement. Defendants' use of confidentiality agreements demonstrates that Defendants wanted to prevent disclosure of details concerning their products so that they could continue to replicate the products with new taxpayers, and consequently, increase their profits. (App 39a–40a)

Defendants repeated their scheme with at least four taxpayers and had designed the scheme to be repeated indefinitely. Nevertheless, applying hindsight, the Majority found the scheme posed no threat of continuing because members of the enterprise were conducting investigations or arrested for their involvement in the scheme. (App. 26a–27a). The Majority reasoned that these fortuitous events indicated that the scheme was "running its course—reaching its 'natural ending point'…." (App. 27a).

The Majority's use of hindsight creates both intra-circuit and inter-circuit conflicts and, as a result, affects the consistent application of RICO in open-ended continuity cases. *See, e.g.*, *United States v. O'Connor*, 910 F.2d 1466, 1468 (7th Cir. 1990); *United States v. Aulicino*, 44 F.3d 1102, 1113–14 (2d Cir. 1995); *Abraham v. Singh*, 480 F.3d 351, 356 (5th Cir. 2007); *Heinrich v. Waiting Angels Adoption Servs., Inc.*, 668 F.3d 393, 410 (6th Cir. 2012); *United States v. Busacca*, 936 F.2d 232, 238 (6th Cir. 1991);*United States v. Richardson*, 167 F.3d 621, 626 (D.C. Cir. 1999).

For example, *Busacca* rejected the defendant's argument that the threat of continuity was defeated because the scheme could not continue following the defendant's conviction. 936 F.2d at 238. The Sixth Circuit stated that the "threat of continuity cannot be made solely from hindsight," and therefore, a "lack of a threat of continuity of racketeering activity cannot be asserted merely by showing a fortuitous interruption of that activity such as by an arrest, indictment or guilty

verdict." *Id.*; *see also Heinrich*, 668 F.3d at 410 (Fraudulent adoption scheme's threat of continuing was not defeated by the shutdown of defendants' business because at the time of the racketeering activity, and before the shutdown, there was no limit to the number of couples seeking to adopt, or the number of children that defendants could hold out as available (internal citation and quotation marks omitted)); *Blue Cross & Blue Shield of Michigan v. Kamin*, 876 F.2d 543, 545 (6th Cir. 1989) (open-ended continuity alleged because if defendant had not been caught, he would still be submitting fraudulent insurance claims).

Similarly, the Second Circuit in *Aulicino* found a threat of continuity existed despite the racketeering activity (a series of kidnappings to extract ransoms) ending after a leader of the enterprise was murdered and several other leaders were arrested. 44 F.3d at 1112–14. The enterprise's abandonment of its activities did not eliminate the *threat* of continuity because at the time of the racketeering activity, "there was no reason the ring could not attempt to kidnap additional individuals any time the ring members wanted more money." *Id.* at 1113–14. The Fifth Circuit, D.C. Circuit and Seventh Circuit have similarly found that it is improper to use hindsight to determine that fortuitous events defeat the threat of continuity. *See Richardson*, 167 F.3d at 626 ("The fortuitous interruption of racketeering activity such as by an arrest does not grant defendants a free pass to evade RICO charges." (internal alterations, citation and quotation marks omitted)); *Abraham*, 480 F.3d at 356 (no reason to believe defendants' scheme "would not have continued indefinitely had the Plaintiffs not filed this lawsuit");

O'Connor, 910 F.2d at 1468 (even though racketeering activity ended with defendant's arrest, evidence was sufficient to establish a pattern because defendant had committed himself to an "enduring series" of racketeering activity).

Incorporated into the "threat of continuity" analysis, is the assessment of whether a scheme had a natural ending point. Here too, the Majority disregarded precedent and used hindsight to conclude that several intervening events (*e.g.*, Taylor's arrest and conviction) indicated the scheme had a "natural" ending point. (App. 26a–27a). Even if true, these facts do not establish that this tax shelter scheme had a natural ending point. Even after Taylor's arrest and conviction the scheme could have continued unabated with attorneys from Seyfarth, or otherwise.

Contrary to the Majority's conclusion, the Seventh Circuit has instructed that a scheme has a natural ending point when it is created to achieve a "clear and terminable goal." *See Roger Whitmore's Auto. Servs., Inc. v. Lake Cty., Illinois*, 424 F.3d 659, 674 (7th Cir. 2005) ("schemes with a clear and terminable goal have a natural ending point" (citation and internal quotation marks omitted)); *see also Vicom, Inc. v. Harbridge Merch. Servs., Inc.*, 20 F.3d 771, 782 (7th Cir. 1994) (same). For example, *Empress Casino Joliet Corp. v. Balmoral Racing Club, Inc.*, involved a planned bribery where racetrack owners agreed to contribute to then-Governor Blagojevich's campaign in exchange for signing a bill imposing a tax on casinos to the benefit of the racetrack owners. 831 F.3d 815, 820–21 (7th Cir. 2016). The Seventh Circuit held that the bribe had a

natural ending point because "[o]nce the bill was signed, the scheme was at its natural end point." *Id.* at 830.

Likewise, in *Roger Whitmore's Automotive Services*, the Seventh Circuit concluded that a scheme to raise funds for an undersheriff's campaign had a natural end point: the election date. 424 F.3d at 674; *see also Vicom,* 20 F.3d at 783 ("natural ending point" with company's sale); *Uni*Quality, Inc. v. Infotronx, Inc.*, 974 F.2d 918, 919–20 (7th Cir. 1992) ("natural end point: the completion of the [project]").

Further, in *O'Connor*, the defendant, a police officer, took bribes in exchange for providing information and protection for undercover federal agents posing as dealers of stolen auto parts. 910 F.2d at 1468. The Seventh Circuit found that although the scheme ended after the defendant was arrested, the facts could support finding continuity because the scheme was designed to continue indefinitely. *Id.* In other words, continuity could be established because the scheme did not have a clear and terminable goal, it was intended to continue in perpetuity.

The Majority's application of the "natural end point" analysis to the facts here is not only inconsistent with the law of other circuits, but ignores this Court's emphasis that courts should take a "natural and commonsense approach to RICO's pattern element …." *H.J.*, 492 U.S. at 237. The Majority, ignoring specific factual allegations that showed the scheme was easily replicable and designed to continue indefinitely, concluded that Defendants' scheme posed no threat of continuing and had a *natural* ending point because a

member of the enterprise was eventually arrested years later (and continued to practice law until he pled guilty). Commonsense and precedent do not support the Majority's conclusion. An arrest and investigation are not natural, built-in end points, these events are interruptions, similar to the arrest in *O'Connor* where the Seventh Circuit determined the allegations supported a finding of open-ended continuity.

The Majority's failure to comply with its own circuit's precedent and the precedents of the Second, Fifth, Sixth and D.C. Circuits, cannot stand, nor can its disregard of this Court's emphasis on a natural and commonsense approach to RICO's pattern element. The Majority's contravention of binding precedent and the intra- and inter-circuit conflicts it creates by applying hindsight to its open-ended continuity analysis adds another layer of uncertainty to the continuity analysis, thus affecting the integrity of RICO and requiring this Court's intervention.

B. The Use of Hindsight Limits RICO's Scope by Preventing RICO Claims Where a Racketeering Enterprise Is Caught Committing Criminal Activities

As Judge Hamilton discusses in dissent, (App. 49a), using hindsight, as the Majority does, to analyze the threat of continuity unduly limits the application of RICO where the scheme is interrupted by intervening events, such as arrest. *See Richardson*, 167 F.3d at 626; *Busacca*, 936 F.2d at 238. Such a precedent would allow an enterprise to avoid RICO claims simply because the enterprise or one of its members was caught committing criminal activities. The law should

not put victims at a disadvantage by requiring the threat be successful, see *United States v. Koen*, 982 F.2d 1101, 1106 (7th Cir. 1992); *United States v. Bucey*, 876 F.2d 1297, 1311 (7th Cir. 1989), nor should it allow defendants to benefit from being arrested, indicted or convicted for conducting racketeering activity or other criminal conduct. The Majority's analysis of the threat of continuity has a substantial effect on RICO's application, and thus, is a question of exceptional importance warranting this Court's review.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

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Date: March 10, 2020