No. 19-901

IN THE

Supreme Court of the United States

DEVON DRIVE LIONVILLE, LP, *et al.*,
Petitioners,

v.

PARKE BANK, *et al.*,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

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Civil RICO cases come in all shapes and sizes, each with a unique and potentially challenging question of proximate cause. This Court has made it clear that there are no hard-and-fast, black-letter rules of law governing proximate cause, meaning there is often no simple answer to these challenging questions.

But the problem is that judges come in all shapes and sizes, too, each steadfast in their resolve that the question is not remotely challenging and that the answer is crystal clear. This results in the answer being dependent upon which circuit decides the case and/or the composition of a given panel. And because civil RICO conspiracies often span multiple circuits, it results in forum shopping.

This is not how our federal system is supposed to work and this Court's purpose is to provide the guiding principles by which proximate cause is to be gauged when the victim of mail or wire fraud is not in the first step of the causal chain.

A. Why This Case and Why Now?

It has been a decade since this Court wrote on proximate cause in a civil RICO case. *Hemi Group, LLC v. City of New York*, 559 U.S. 1 (2010). That 4-1-3 plurality opinion suggested a significant divide within the Court on the reach of proximate cause. But the decision in *Hemi* came shortly after the unanimous decision in *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008), in which the Court held that first-party reliance is not an essential element in a RICO case and that proximate cause extends beyond the first step in the causal chain.

Since *Hemi* and *Bridge*, the circuits have written extensively on if and when a party beyond the first step can recover under RICO. As explained in the Petition, the circuits have developed four distinct analytical frameworks to define the reach of proximate causation. Those decisions have left the district courts and practitioners with a cacophony by which to try to reconcile what the law is on this question and how the question should be answered.

What is lacking is a set of defining guidelines by which courts can determine when and under what circumstances a party beyond the first step—*i.e.*, someone other than the direct recipient of the mail or wire fraud—can recover under RICO. Although Petitioners believe that those guiding principles can be drawn from this Court's opinions, *see* Pet. at 13-14, the circuits have scrambled them such that a plaintiff

in one circuit can recover under certain circumstances whereas that same plaintiff would be barred from recovery in a different circuit. *Compare* Pet. for a Writ of Cert. in *Devon Drive*, *with* Pet. for a Writ of Cert. in *Takeda Pharmaceutical*, *infra*.

The facts of this case make it the right case for the Court to set out those guidelines:

- Although Petitioners were not the direct recipients of the mail and wire fraud, the FDIC and other federal regulators were;
- The Respondents did that to protect themselves from the potential regulatory and criminal repercussions of their criminal enterprise; and
- The FDIC and other regulators were therefore unable to protect Petitioners from what the Respondents were doing because they were unaware of it due to the mail and wire fraud.

On its face, this seems like a clear-cut case for when proximate cause should be deemed to exist under *Bridge*, but not to the Third Circuit. *See Devon Drive Lionville v. Parke Bank*, 791 F. App'x 301 (3d Cir. 2019). Petitioner's claims were dismissed under Rule 12(b)(6), meaning the case comes strictly on the allegations in the pleadings and it is not encumbered by a tangled web of discovery. This is the right case for review.

Now is also the right time because the discord among the circuits is not harmonizing with time. To the contrary, the circuits continue to deepen in their resolve, with different panels within the circuits often arriving at different conclusions. And as explained below, the Court has before it another petition with the same question presented. The time is right.

B. *Takeda Pharmaceutical Co. v. Painters & Allied Trades District Council 82 Health Care Fund*, No. 19-1069 (U.S.)

On pages 27-30 of their petition, Petitioners discuss a split in the circuits on the question of proximate cause in pharmaceutical cases, as outlined by the Ninth Circuit in *Painters & Allied Trades District Council 82 Health Care Fund v. Takeda Pharmaceutical Co.*, 943 F.3d 1243 (9th Cir. 2019). Since the filing of Petitioners' petition, Takeda Pharmaceutical and Eli Lilly and Company have petitioned for a writ of certiorari in that case. No. 19-1069 (U.S.). The first issue presented in that petition likewise involves the scope of proximate cause.

Certiorari has also been sought, and denied, in many of the other cases discussed in Petitioners' petition.[1] The result is a tangled web of decisions within the circuits on the scope of proximate cause under RICO, particularly when the victim is not the direct recipient of the fraud. The divide on this issue is not going to resolve itself with time and is only going to become more convoluted and scrambled.

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[1] *See Knit With v. Knitting Fever, Inc.*, 136 S. Ct. 1662 (2016); *D'Addario v. D'Addario*, 139 S. Ct. 1331 (2019); *Biggs v. Eaglewood Mortg., LLC*, 560 U.S. 939 (2010); *Feldman v. Am. Dawn, Inc.*, 138 S. Ct. 322 (2017); *Heartwood 88, LLC v. BCS Servs., Inc.*, 565 U.S. 883 (2011); *Khalil v. BCCI Holdings (Luxembourg) S.A.*, 531 U.S. 958 (2000); *River Birch, Inc. v. Waste Mgmt. of La., LLC*, 140 S. Ct. 628 (2019); *S.G.E. Mgmt., LLC v. Torres*, 138 S. Ct. 76 (2017); *Cassens Transp. Co. v. Brown*, 558 U.S. 1085 (2009); *Pfizer, Inc. v. Kaiser Found. Health Plan, Inc.*, 571 U.S. 1094 (2013); *GlaxoSmithKline, LLC v. Allied Servs. Div. Welfare Fund*, 136 S. Ct. 2409 (2016); *Sergeants Benevolent Ass'n Health & Welfare Fund v. Eli Lilly & Co.*, 564 U.S. 1046 (2011); *cf. Bank of Am. Corp. v. Miami, FL*, No. 19-675, 2020 WL 981781 (U.S. Mar. 2, 2020) (certiorari granted, judgment vacated as moot in light of *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950)).

Furthermore, the Third Circuit's decision in *Devon Drive* falls into the "narrow construction" category on this issue whereas the Ninth Circuit's decision in *Takeda Pharmaceutical* falls into the "broad construction" category. As a result, the Court has before it petitions on both sides of the equation.

C. Again, Why This Case?

Why should this Court issue a writ of certiorari in *Devon Drive* instead of *Takeda Pharmaceutical*? The answer is that writs should be issued in both cases and they should be decided together as companion cases.

But of the two fact scenarios, there are far more general civil RICO cases throughout the country than there are pharmaceutical cases, meaning a decision in this case will have a far greater impact than a decision in *Takeda*. Indeed, a decision in *Devon Drive* would have direct application to the pharmaceutical cases because the alleged fraud in those cases is to the FDA and prescribing physicians, not the consumers. Those cases, like *Devon Drive*, involve plaintiffs who are not the direct recipients of the fraud and are therefore not in the first step of the causal chain.

Much has been written on the scope of proximate cause over the decades. *See, e.g.*, *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (N.Y. 1928). As Respondents wrote on proximate cause, "'[t]here is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion.'" Resp't's Br. at 16 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41 at 263 (5th ed. 1984)).

The time is right for this Court to intercede and this is the right case for it to provide direction.

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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