No. 24-273

IN THE

Supreme Court of the United States

SBFO OPERATOR NO. 3, LLC, ET AL.,
Petitioners,

v.

ONEX CORPORATION, ET AL,
Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Properly viewed, the petition for a writ of certiorari presents the following questions:

1. Did the Court of Appeals (and the district court) properly apply well established law in concluding that the challenged statements alleged as the basis for the supposed fraud in this case were all either true or inactionable puffery?

2. Did the Court of Appeals (and the district court) properly conclude that the dozens of releases and anti-reliance promises signed by the Petitioners for their own commercial advantage after they were on notice of the supposed falsity of the prior statements they now challenge bar both their state law tort claims and federal RICO claims?

3. Did the Court Appeals properly conclude that the district court was within its discretion to deny Petitioners leave to amend their complaint when Petitioners never made a motion for such relief, never offered a proposed amended pleading, and where the only proposed changes to the prior complaint would be to add references to the same facts the district court had already considered in granting the Respondents' motion for summary judgment and found to be insufficient as a matter of law to sustain the claim?

CORPORATE DISCLOSURE STATEMENT

Onex Corporation has no parent company but is controlled by OMIL Holdings Limited, and no publicly held corporation owns 10% or more of its stock. Onex Partners IV, LP is a privately-owned investment fund managed by its general partner, which is an affiliate of Onex Corporation, and no publicly held corporation owns 10% or more of its partnership interests.

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BRIEF IN OPPOSITION

Respondents Onex Corporation, Onex Partners IV, LP, Anthony Munk and Matthew Ross (together, "Onex") respectfully submit that the petition for a writ of certiorari should be denied.

COUNTER-STATEMENT OF THE CASE

This case does not raise any important or novel issues of federal law. Nor does it reflect any split between the Circuits in the interpretation of federal law. This case has always been, as Petitioners admitted to the Court of Appeals for the Eighth Circuit, "an individual commercial dispute" (Pet. 8th Cir. Br. i) focused on the meaning of certain clauses in private contracts and the effectiveness, under Missouri state law, of certain contractual releases and disclaimers of reliance.

Petitioners told the Eighth Circuit that "[t]he crux of this appeal … is whether, ***as a factual matter***, Plaintiffs were induced [to sign the disputed] Transaction Documents …." (Pet. 8th Cir. Br. 28 [emphasis added]). Consistent with that approach, they spent the first 20 pages of the argument section of their appellate brief engaged in a factual debate about what the evidence supposedly showed, and what significance to give those facts under a series of controlling ***state law*** decisions. (*Id.* at 33-52.) They devoted the next four pages to debating the district court's discovery rulings. (*Id.* at 52-56.)

Only now, after the Court of Appeals agreed with the district court that neither the undisputed

facts nor Missouri state law support the Petitioners' theories, do they try to present this case as creating a supposed conflict with the holdings of this Court or other Court of Appeals decisions. It does not.

The plaintiff entities are a series of related special purpose vehicles formed to own and operate Save-A-Lot branded grocery stores in economically distressed communities under license from Save-A-Lot. Run by a retired lawyer turned serial entrepreneur, and backed by an array of financial, tax, legal and other advisors (Pet. App. 2a-3a, 101 F.4th 551, 555 (8th Cir. 2024); Pet. App. 19a-20a), they conducted their own financial and operational diligence before deciding whether, when and where to open stores (Pet. App. 2a-3a, 10a, 101 F.4th at 555, 559) – all of which they did with someone else's money, including capital provided by state or local economic redevelopment entities. (8th Cir. Def. App. 349, 307-24.)

The Onex Respondents had nothing to do with this business strategy or Petitioners' decisions, which started years before Onex ever invested in Save-A-Lot's corporate parent entity. Each of the supposed misrepresentations that Petitioners sued about were made by Save-A-Lot, not by Onex (Pet. App. 49a-50a; Pet. 8th Cir. Br. 13-17, 65-66), and were made (including in contracts and on public-facing web sites) before Onex invested in Save-A-Lot. (Pet. App. 49a.)

Over the course of several years, starting before Onex invested in Save-A-Lot, Petitioners opened a series of ten licensed grocery stores, and continued to open new stores even after the

performance of the earlier stores failed to live up to expectations. (Pet. App. 12a, 101 F.4th at 560.) With each store they opened, they signed a new series of agreements with Save-A-Lot that granted them a license to the brand for the store, provided them financial incentives, including cash, to open the store and stock the shelves, and otherwise set forth the terms that would govern their relationship. In connection with their analysis of specific proposed store locations, Save-A-Lot also provided some financial models and projections, which the Petitioners conceded they did not accept at face value, and not only diligenced but frequently haircut for purposes of their own internal financial modeling. (8th Cir. Def. App. 399.) It is undisputed that Onex provided none of the disputed information. (Pet. App. 49a.)

The multiple agreements between the Petitioners and Save-A-Lot contained repeated cautions about the risks of the enterprise on which the Petitioners were embarking, and the Petitioners repeatedly confirmed in those agreements – for site after site, year after year – that they had the knowledge, sophistication and experience to independently assess the business and financial risks involved; that they were not relying on any representations from Save-A-Lot or on any of the models and projections provided; and that they released Save-A-Lot as well as its officers, directors, employees and affiliates from any claims arising out of or related to the materials provided or the Petitioners' decisions to proceed with the stores at issue. (8th Cir. Pl. App. 098, 340-44.) As the Eighth Circuit noted, Petitioners "entered at least 54 broad

contractual releases and anti-reliance disclaimers barring their claims." (Pet. App. 4a, 101 F.4th at 556.)

Save-A-Lot as a corporate business did not fare well, and Onex ultimately lost its entire $660 million investment in the company. (Pet. App. 4a, 101 F.4th at 556.) Petitioners' stores did not perform well, either, and each of them eventually closed. (*Id.*) After Petitioners stopped hearing from their lenders and other creditors whose money they had used for the now-shuttered stores (8th Cir. Def. App. 350), Petitioners sued Onex – not Save-A-Lot – for a series of supposed state law misrepresentation torts and sought treble damages under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c)-(d), for the profits they wished they had made. The theory underlying all those claims was that Onex, after it invested in Save-A-Lot, supposedly should have noticed and forced Save-A-Lot to correct Save-A-Lot's earlier supposed misstatements to the Petitioners, and that Onex supposedly allowed Save-A-Lot to continue to include the same statements in its contracts with Petitioners and on its website that had been there since before Onex invested. (Pet. App. 50a.) Onex itself was not alleged to have made any actionable misrepresentations. (*Id.* 52a.)

Onex moved to dismiss the complaint on multiple grounds, including that (a) the claimed misrepresentations were each either true or inactionable puffery (vague generalities about Save-A-Lot's business); (b) to the extent Petitioners claim to have relied upon those statements, such a claim is barred by Missouri law, which precludes a claim of

reliance when the party has actually undertaken (as Petitioners conceded they did) independent due diligence; (c) to the extent Petitioners claim to have relied upon the statements, such a claim is also barred by their contractual disclaimers of reliance; and (d) the claims are further barred by Petitioners' repeated contractual waivers of claims and liability, including those signed after Petitioners were on notice of their potential claims because the performance of their stores, and the course of Save-A-Lot's performance (such as the disputed pricing of grocery inventory), failed to accord with what Petitioners claim they were promised.

Because the motion relied in part on Petitioners' contracts with Save-A-Lot, the district court decided to convert the motion to dismiss into one for summary judgment. (Pet. App. 33a-34a.) And when the Petitioners claimed the contractual waivers and disclaimers were unenforceable because they were supposedly procured by fraud, the district court allowed Petitioners to conduct limited discovery to try to substantiate their allegation of fraud in the inducement of those contracts. (Pet. App. 34a, 65a-68a.)

Following months of discovery, including defendants' production of over 5600 documents containing over 86,000 pages of material and 60 gigabytes of data, as well as two depositions (Pet. App. 59a, 65a), which the Petitioners acknowledged (8th Cir. Def. App. 287-8, 290) and the district court determined (Pet. App. 67a, 72a), provided a sufficient basis for them to oppose the motion, the district court denied a motion to allow further discovery. (Pet. App.

62a.) Notably, despite the court's previous admonition that "Rule 56(d) does not license a fishing expedition" (Pet. App. 65a), Petitioners' Rule 56(d) affidavit in response to the motion for summary judgment claimed first that because there was no smoking gun incriminating evidence produced in discovery, Onex must just be hiding it. (8th Cir. Def. App. 288.) Next, they claimed they needed discovery into the parties' relative sophistication and whether the Petitioners had any choice about signing the contracts (topics on which discovery, including deposition testimony, had already been taken, as on which their President has already testified that Petitioners were free to reject the deal). (8th Cir. Def. App. 292, 433.) Further, they said they wanted to take discovery of whether Save-A-Lot had ever been successfully sued by other licenses, and if so, what relief was obtained – a matter that was not only irrelevant to the motion but also constituted publicly available information that they could have researched. (Pet. App. 15a, 101 F.4th at 561.)

In a lengthy ruling, the district court painstakingly examined the undisputed evidence and determined that summary judgment was warranted, that Petitioners had ample discovery on the issues bearing upon that motion (such as their claim of fraudulent inducement), and that additional discovery would not change the conclusion. (Pet. App. 18a.)

The Eighth Circuit unanimously affirmed, agreeing that the statements were not actionable, and finding no merit to Petitioners' fraud in the inducement defense to the effectiveness of their

repeated releases and anti-reliance disclaimers, nor to their state law tort claims. It found the challenged statements on Save-A-Lot's website to be "fuzzy sales propaganda" on which nobody could reasonably rely as a matter of law (Pet. App. 9a, 101 F.4th at 558), and that there was no evidence from which a jury could find that the separate challenged statement about licensed store failure rates was untrue (Pet. App. 7a, 101 F.4th at 557-58).

The court further held that, as a matter of well settled Missouri law, Petitioners' "years-long independent investigation into Save-A-Lot," guided by "advisors, attorneys, and accountants," independently barred any claim of reliance on the supposed misstatements that Petitioners claimed had induced them into signing their multiple agreements. (Pet. App. 10a, 101 F.4th at 559.)

"As for the RICO claims," the Eighth Circuit held that "the conduct giving rise to … the alleged RICO conduct occurred before the [Petitioners] executed the releases, so the claims are barred." (Pet. App. 14a, 101 F.4th at 561.) And the court agreed with the district court that the requested additional discovery "would be largely duplicative and, in any case, futile," and thus the denial of further discovery was not an abuse of discretion. (Pet. App. 16a, 101 F.4th at 561.)

Petitioners' motion for rehearing, or rehearing en banc, was denied. (Pet. App. 69a.)

REASONS FOR DENYING THE PETITION

I. THE LOWER COURTS CORRECTLY DETERMINED THAT THERE WAS NO FRAUD

Both the district court and the Court of Appeals analyzed each of the statements the Petitioners claimed as a basis for their fraud claims and found that they had no merit. The statements were either true or represented classic puffery – far too vague and general to be actionable. (Pet. App. 7a-10a, 101 F.4th at 557-59; Pet. App. 59a.)

In trying unsuccessfully to avoid the contractual releases under a fraudulent inducement theory, Petitioners relied on the same statements by Save-A-Lot that underlay their affirmative state law fraud claims and formed the basis for the supposed indictable acts of mail and wire fraud constituting the predicate acts for their RICO claims. (Pet. App. 58a-60a.)

The Court of Appeals agreed with the district court that none of the challenged statements could support a fraud theory, and those determinations are not challenged here in the petition for certiorari. In other words, the record did not support – factually or legally – a claim sounding in fraud, whether denominated as common law fraud, wire fraud, RICO fraud or fraudulent inducement of contract as a defense to the enforcement of releases. By itself, that is an independent basis to deny the petition, since the issues Petitioners seek to raise now about the scope of the releases are entirely academic and unnecessary to

reach in the absence of a factual or legal basis for the supposed fraud.[1]

II. THERE IS NO CIRCUIT SPLIT REGARDING THE RELEASE OF RICO CLAIMS

The Petition seeks to manufacture a purported split in authority among the Circuits where none exists concerning the enforceability of releases of the type present here and the ability of a release to cover future violations. Contrary to the Petitioners' histrionic suggestion that the Court of Appeals "allow[ed] fraudsters to evade the RICO Act[] … with boilerplate release language … executed before the victim even knows of the fraud or that he has been injured" (Pet. 27), the decision did no such thing, and expressly noted that it does not even purport to "address the enforceability of a release that … immunizes future RICO conduct." (Pet. App. 15a, 101 F.4th at 561 n.5.)

When Petitioners signed the releases and non-reliance disclaimers for their later stores (including all those opened after Onex invested in Save-A-Lot), they were already on notice that the now-challenged statements previously made by Save-A-Lot about the success of licensed stores and about the wholesale

[1] The district court also rejected the RICO conspiracy claim on the independent basis that, as a matter of law, Onex cannot have conspired with its own personnel and subsidiary. (Pet. App. 54a.) The Eighth Circuit did not need to reach that point, but it remains an additional basis on which the suit was properly dismissed, obviating the need to address the issues Petitioners seek to raise by their petition for certiorari.

pricing of grocery inventory being sold to them were, in their view, untrue. (Pet. App. 3a, 12a, 101 F.4th at 556, 560; Pet. App. 49a.) That is why Petitioners concede that "some of the fraudulent representations were made" and "some of the conduct commenced" "before the releases were executed" (Pet. 27-28.) In the face of that knowledge, instead of cutting their losses, they made the calculated business decision to take more cash incentives from Save-A-Lot to open new stores, and in return to sign releases. (Pet. App. 12a, 101 F.4th at 560.)

Petitioners' suggestion that RICO gives them license to take new incentive payments from Save-A-Lot in return for releases that also covered Onex (as owner/affiliate) and then sue Onex for treble damages because Onex supposedly failed to correct earlier statements by Save-A-Lot that Petitioners already knew were supposedly untrue (Pet. App. 50a), and because Save-A-Lot continued to charge the same supposedly high wholesale grocery prices (Pet. 31) that Petitioners already knew they were paying,[2]

[2] Petitioners never offered any evidence of any particular grocery item that was supposedly overpriced, including what price they were charged or what the supposed "bona fide wholesale price" would have been. Both the district court and the Court of Appeals noted that Petitioners "cannot credibly claim to have been unaware that [Save-A-Lot] charged a mark-up," or that "wholesaler mark-ups are standard in the industry as part of the bona fide wholesale price." They also noted Petitioners had access to information about Save-A-Lot's "method for charging bona fide wholesale prices." (Pet. App. 10a, 101 F.4th at 559; Pet. App. 43a.) There was thus never a genuine issue of triable fact as to the supposed overcharge. And to the extent their claim of fraudulent inducement was predicated on the notion that Save-A-Lot never intended to perform its

seeks to turn the law on its head. Nothing in this Court's rulings or the decisions of the various Courts of Appeals that Petitioners cite reads RICO (or any other federal statute) in this way.

The Eighth Circuit's ruling here cited to the Seventh Circuit's decision in *MCM Partners, Inc. v. Andrews-Bartlett & Assocs., Inc.*, 161 F.3d 443 (7th Cir. 1998), which expressly noted that the release in that case "does not attempt to release claims for future violations," *id.* at 448, and was not applied "to bar future RICO claims," *id.* at 449. Rather, the challenged conduct in *MCM* involved "continued adherence to the April 1992 agreement" that was the subject of the release, and thus the claim was "clearly based" on conduct that had already occurred as of the release date and was barred by the release. *Id.* at 448. So too here, as the district court noted, the challenged conduct involved Save-A-Lot's supposed misrepresentation as to what prices it would charge. (Pet. App. 43a, 46a.) Continued adherence to a pre-existing misrepresentation about Save-A-Lot's pricing (Pet. 31) is based on the conduct released and not a new and independent fraud.

The Eleventh Circuit made the same point in *In re Blue Cross Blue Shield Antitrust Litig.*, 85 F.4th 1070 (11th Cir. 2023), where it described the release in *MCM* as involving "claims based on conduct central to the underlying litigation, even if they were ongoing after the effective date of the settlement agreement."

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contract, the district court also found that claim barred by Missouri state law as an improper attempt to turn a breach of contract claim into a tort claim. (Pet. App. 45a.)

Id. at 1088. The court noted that the release of antitrust claims in *Blue Cross*, like the release of RICO and antitrust claims in *MCM*, can properly encompass future matters "arising from the same conduct" that was already known and the subject of the release. *Id.* Notably, the Eleventh Circuit acknowledged but readily distinguished the footnote in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, (1985), on which Petitioners here rely (Pet. 29), because *Mitsubishi* involved a broad attempt to use choice of law and forum clauses to exempt a party from any application of the US antitrust laws "no matter what the antitrust claims were or when they accrued." *Blue Cross*, 85 F.4th at 1089.

There is no conflict between these decisions of the Seventh, Eighth and Eleventh Circuits and the decision of the Sixth Circuit in *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus.*, 648 F.3d 452 (6th Cir. 2011), as Petitioners erroneously contend (Pet. 30), because unlike here, *Watson* involved a claim that "did not exist" at the time the release was signed. *Id.* at 460. Although some of the alleged facts of the antitrust conspiracy in that case pre-dated the settlement, the later challenged refusal to deal occurred after the release was signed. *Id.* Thus, while the court noted that a release legitimately bars "suits for damages that might have been expected to result and were in fact caused by pre-release actions" (*id.*) – just as Petitioners here seek to sue about continuing disappointing store financial performance and the continuing alleged overcharges resulting from the supposedly fraudulent promises about wholesale pricing, all of which they were already aware of when

they continued to sign their releases – the fact pattern in *Watson* was different because the challenged refusal to deal was entirely distinct from the claims covered by the release. *Id.* Indeed, *Watson* expressly noted that it was not in conflict with the Seventh Circuit's *MCM* decision. *Id.* at 461.

Nor is there a conflict with the Second Circuit's decision in *Bingham v. Zolt*, 66 F.3d 553 (2d Cir. 1995) (a statute of limitations case), which carefully analyzed its own precedents and drew a distinction between further losses that "were not independent from [the] original injury," *id.* at 560, as in *Long Island Lighting Co. v. Imo Indus., Inc.*, 6 F.3d 876 (2d Cir. 1993) ("*LILCO*"), and *Glessner v. Kenny*, 952 F.2d 702 (2d Cir. 1991) – which is what Petitioners allege here from the continued charging of supposedly more than "BFWP [bona fide wholesale prices]" (Pet. 31) – as opposed to "multiple and independent injuries that occur over a broad span of time." *Bingham*, 66 F.3d at 560. In *Bingham*, the court found that the fraudulent activity involved "[a] variety of schemes … involving frequent misappropriations of discrete amounts of money from different sources." *Id.* at 561. Each was an independent injury, as opposed to just continuing losses from a prior injury, as in *LILCO* and here.

Petitioners' attempt to create a conflict between the Eighth Circuit's decision here and the Federal Circuit's decision in *Aspex Eyewear, Inc. v. Marchon Eyewear, Inc.*, 672 F.3d 1335 (Fed. Cir. 2012), is even weaker. *Aspex* was (in relevant part) a contract interpretation case, not a determination of

federal law.[3] The court was trying to determine whether a settlement and release of a patent infringement case covering the so-called "Old Design" also covered products reflecting a "New Design" that the defendant had introduced during the pendency of the case but that were not encompassed within the litigation. *Id.* at 1339. Starting from the proposition that "the parties to an action can determine for themselves what preclusive effect the settlement of the first action will have as to any potential subsequent actions" between them, *id.* at 1345, the court noted that the contractual release by its terms only covered the Old Design and products sold under the Old Design through the settlement date and not any New Design products sold after that date. *Id.* at 1346. As for the New Design product sold during the pendency of the case and prior to the release, the contract was silent, but the court found that since the focus of the settlement was Old Design products, and the New Design was not the subject of the litigation, it would not presume the release to cover those unspecified later products. *Id.* The *Aspex* decision was entirely contractual and simply has no bearing on the matters at issue before the Eighth Circuit in this case.[4]

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[3] Moreover, the language Petitioners cite from *Aspex* (Pet. 30) just quotes from Wright, Miller & Cooper's treatise on *Federal Practice and Procedure* concerning the res judicata effects of the conclusion of a lawsuit when similar conduct occurs after the case is resolved. It has nothing to so with the scope or enforceability of voluntary contractual releases, such as are at issue here.

[4] Petitioners' assertion that federal law controls the effect of the releases contained in their state law contracts with Save-A-Lot (Pet. 25-26) is wrong, and the case they cite for that

III. THE EIGHTH CIRCUIT'S DECISION DOES NOT IMPOSE A RELIANCE ELEMENT FOR RICO CLAIMS

Petitioners attempt to sow confusion when they argue that the Eighth Circuit extinguished their

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proposition – *Dice v. Akron, C. & Y. R. Co.*, 342 U.S. 359, 361 (1952) – says nothing of the sort. "There is no federal general common law," *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), and "matters left unaddressed" in a federal statutory scheme "are presumably left subject to the disposition provided by state law." *O'Melveny & Myers v. Fed. Deposit Ins. Corp.*, 512 U.S. 79, 85 (1994).

Dice held that federal, rather than state, law controlled the validity of releases under the Federal Employers Liability Act (FELA), 342 U.S. at 361, but the statutory scheme at issue in that case expressly provided in section 5 of the FELA that efforts by a common carrier to insulate itself from liability are void. 45 U.S.C. § 55. *Dice* therefore falls within the *O'Melveny & Myers* exception because the federal statute had spoken directly to the contested issue.

To the extent that Petitioners also point to *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1481 (6th Cir. 1989), as support for the notion that federal common law should control the validity of the releases, *Street* predates this Court's subsequent holding to the contrary in *O'Melveny & Myers*, and thus the validity of *Street* on that issue is somewhat in doubt. In any event, *Street* merely applied the Restatement of Contracts, 886 F.2d at 1481, and there is no reason to believe that such a benchmark would lead to any different result under federal law than was true under Missouri law.

Equally important, in the lower courts, Petitioners took the opposite position from what they urge here, and argued in both the district court and the Court of Appeals that the validity of the releases should be determined under ***Missouri state law***. *See* 8th Cir. Pl. App. 366 ("Controlling Missouri law" governs whether releases cover the challenged conduct here); *id.* at 4 (arguing Missouri case law); Pet. 8th Cir Br. 2, 28 (same).

claims based on "the common law notion of justifiable reliance" even though, under *Bridge v. Phx. Bond Indem. Co.*, 553 U.S. 639 (2008), "no showing of reliance is required to establish that a person has violated [RICO]." (Pet. 21 (*quoting Bridge*, 553 U.S. at 649)). They are conflating two distinct issues.

In response to Onex's affirmative defense that all the asserted claims – state law and RICO – were covered by the releases, Petitioners asserted a fraudulent inducement defense to the enforcement of the releases. The question of whether Petitioners were fraudulently induced to sign the releases was an issue of state law, and the Eighth Circuit properly applied the Missouri state law fraudulent inducement framework, which Petitioners agreed at the time was applicable and which includes a reliance element, to assess the viability of that defense.

While the RICO claim arose from some of the same underlying supposed misstatements giving rise to the fraudulent inducement defense – such as whether Save-A-Lot was a "hard discount" grocer, and whether its sold inventory to its licensees at "bona fide wholesale prices" – nowhere in the Eighth Circuit's opinion did it impose any reliance requirement to establish a viable RICO claim. Rather, as the Eighth Circuit explained, Onex made a prima facie showing that it was entitled to judgment because "[u]nder Missouri law, [courts] presume that executed releases – like the ones discharging the [Petitioners'] claims here – are valid and enforceable." (Pet. App. 5a, 101 F.4th at 557). Since Petitioners were unable to make a showing of fraudulent inducement, the Court never proceeded to any further

analysis of Petitioners' RICO claim because it was unnecessary. *Id.*

When the Eighth Circuit held that as to four of the claimed representations, the "right-to-rely" element under fraudulent inducement was dispositive, and Petitioners had no right to rely on any of the website or bona fide wholesale prices representations as a matter of law given that Petitioners had performed their own independent investigation prior to entering into the contracts (Pet. App. 9a-10a, 101 F.4th at 559), the Court was ruling on (and rejecting) the rejoinder that the releases ought not to be enforceable. It was not defining the elements of a RICO claim.

Nor is the Second Circuit's decision in *Turkish v. Kasenetz*, 27 F.3d 23 (2d Cir. 1994), on which Petitioners rely (Pet. 20), at odds with the Eighth Circuit's decision here. *Turkish* involved RICO claims, but it was not a reliance case and did not involve a release. Rather, the defendants in *Turkish* sought to shield themselves from a RICO claim by pointing to a contractual limitation of liability in an agreement between the parties. The Second Circuit reached the unremarkable conclusion that, as a matter of public policy, a party may not use a contractual limitation of liability or exculpation clause to shield itself *prospectively* from liability for intentional misconduct such as fraud. 27 F.3d at 28. And it reached that conclusion not because of RICO but because of the state law governing contractual limitations of liability. *Id.* (citing Massachusetts and New York state court decisions). *Turkish* is simply irrelevant to the issue presented here.

In short, there is no conflict between the Eighth Circuit's ruling in this case and either the prior decisions of this Court or the decisions of other Courts of Appeals.

IV. LEAVE TO AMEND WAS PROPERLY DENIED AND DOES NOT WARRANT REVIEW

The Eighth Circuit has been clear for decades, both in its decisions and in the local rules of its district courts, that "to preserve the right to amend the complaint, a party must submit the proposed amendment along with its motion." *Clayton v. White Hall Sch. Dist.*, 778 F.2d 457, 460 (8th Cir. 1985); *see also* E.D. Mo. Local Rule 4.07 ("A proposed amendment to a pleading or amended pleading itself must be submitted at the time any motion for leave to amend any pleading is filed.").

In this case, Petitioners neither submitted a formal motion seeking leave to amend, nor offered a proposed amended complaint. Instead, they requested leave to amend in a footnote contained in a 35 page brief and argued that the district court should grant leave to amend because Petitioners "could add all of the facts presented in their [statement of facts]" submitted in opposition to the motion for summary judgment. (8th Cir. Pl. App. 372.)

Because Petitioners failed to comply with established case law and the district court's local rule, the district court was well within its discretion to deny leave to amend, as the Eighth Circuit found.

(Pet. App. 16a-17a, 101 F.4th at 562.) "Parties should not be allowed to amend their complaint without showing how the complaint could be amended to save the meritless claim." *Wisdom v. First Midwest Bank*, 167 F.3d 402, 409 (8th Cir. 1999); *see Dudek v. Prudential Securities, Inc.*, 295 F.3d 875, 880 (8th Cir. 2002) (finding no abuse of discretion when plaintiff failed to submit proposed amended pleading and failed to describe substance of amended claims).

Petitioners' attempt now to relitigate that point by fabricating a supposed division of opinion among the Circuits is unavailing. Even the cases they cite from other Circuits as supposed evidence of a split in interpretation are clear that the plaintiff seeking leave to amend must "set forth with particularity the grounds for the amendment." *Thomas v. Chevron U.S.A., Inc.*, 832 F.3d 586, 590 (5th Cir. 2016) (cited at Pet. 34). *Accord Estate of Lagano v. Bergen Cnty. Prosecutor's Office*, 769 F.3d 850, 861 (3d Cir. 2014) (cited at Pet. 35).

Petitioners failed this test. This was not a case where the district court had only a complaint to review; the request was made in connection with a motion for summary judgment following discovery, with a voluminous documentary record before the court. Petitioners had argued from 283 exhibits that were before the district court in connection with that motion (Pet. App. 34a), and which the court painstakingly considered. The most Petitioners said about their proposed (but never written) amended complaint is that it would repeat those very same facts that the court already considered. (8th Cir. Pl. Br. 58.) Thus, for the same reason the district court

concluded that further discovery would be futile (Pet. App. 59a), rehashing in an amended complaint the very same facts the court had already considered and found to be insufficient to support the Petitioners' claims would similarly have been futile.

"Futility is a valid basis for denying leave to amend," *Liscomb v. Boyce*, 954 F.3d 1151, 1156 (8th Cir. 2020), and Petitioners' own cited cases echo that point. Even now, the Petitioners do not identify anything new or different that they would plead that was not already considered by the court. Indeed, they offer merely that their complaint could have been amended to add "RICO claims based on the BFWP [bona fide wholesale price] facts already alleged in [P]etitioners' complaint." (Pet. 37.) But those facts were already on the table and the district court found, and the Eighth Circuit agreed, that they could not salvage Petitioners' lawsuit. That is the definition of futility.[5]

[5] Throughout their brief, Petitioners repeatedly contend that they were "stripped" (Pet. 1) or "deprived" of "their Constitutional right to a jury trial" (Pet. 22) because the Eighth Circuit affirmed the district court's decision to grant summary judgment in favor of Onex. By definition, however, any claim that cannot withstand a motion to dismiss or motion for summary judgment is not entitled to proceed to trial. Holding Petitioners to their pleading and evidentiary burdens under the Federal Rules of Civil Procedure did not deprive them of a constitutional right.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari to the Eighth Circuit should be denied.

Respectfully submitted,

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