Case No.:_____

In The Supreme Court of the United States

JONATHAN ZUHOVITZKY and ESTHER ZUHOVITZKY,

Petitioners,

v.

UBS AG CHE 101.329.562, UBS AG CHE 412.669.376,UBS FINANCIAL SERVICES INC., UBS SECURITIES LLC, AND UBS ASSET MANAGEMENT (US) INC.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

MELISSA A. PERRY
COHEN, LABARBERA & LANDRIGAN LLP
99 Brookside Avenue
Chester, New York 10918
(845) 291-1900
(845) 291-8601 (fax)
mperry@cll-law.com

RONALD J. COHEN
Counsel of Record
COHEN, LABARBERA & LANDRIGAN LLP
99 Brookside Avenue
Chester, New York 10918
(845) 291-1900
(845) 291-8601 (fax)
rcohen@cll-law.com

Attorneys for Petitioners

APPELLATE INNOVATIONS
(914) 948-2240

Printed on Recycled Paper

21887

QUESTION PRESENTED

Under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1960-1968, in order for a cause of action to lie, the plaintiff must be able to establish both legal "but-for" causation as well as proximate or "by reason of" cause. Proximate cause is a flexible concept that labels generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts." *Holmes v Securities Investor Protection Corp*., 503 U.S. 258, 269 (1992). Proximate cause considers the permissible degree of attenuation between the claimed harm and the predicate act and requires "some direct relation between the injury asserted and the injurious conduct alleged". *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258 (1992). The standard for proximate cause under RICO "is generous enough to include the unintended though foreseeable consequences of RICO predicate acts, including, in some instances, harms that flow from, or are derivative, of each other. *Diaz v Gates*, 420 F.3d 897 (9th Cir. 2005).

The Question for the Court is:

Whether the Second Circuit's interpretation of "proximate cause" is unreasonable because it fails to honor the breadth of the RICO statute and ignores the Supreme Court's admonition that there is no bright line standard and proximate cause must be carefully considered under a flexible standard carefully considering the circumstances of each individual case.

LIST OF PARTIES

The Petitioners are Jonathan Zuhovitzky and Esther Zuhovitzky.

The Respondents are UBS AG Che 101.329.562, UBS AG Che 412.669.376, UBS Financial Services Inc., UBS Securities LLC, and UBS Asset Management (US) Inc.

STATEMENT OF RELATED PROCEEDINGS

Zuhovitzky v. UBS AG, No. 23-1184-cv, (2d Cir. May 13,2024) (*affirming motion to dismiss for defendants).*

Zuhovitzky v. UBS AG CHE 101.329.562, No. 21-cv-11124, (S.D.N.Y. July 18, 2023) (entering judgment for defendants).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES

Page

Cases:

Statutes, Rules, and Constitutional Provisions

Other Authorities

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Second Circuit is 133 A.F.T.R.2d 2024-1522; 2024 WL 2130838; not reported in the Federal Register.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on May 13, 2024. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Racketeer Influenced and Corrupt Organizations Act 18 U.S.C. 1961 et seq.

INTRODUCTION

This case addresses the question that has split circuit courts over what constitutes "proximate cause" under the RICO statute and what tests or standards the lower courts should use to determine if a Plaintiff has met that standard.

The Second Circuit affirmed the opinion of the District Court for the Southern District of New York holding that Petitioners failed to adequately plead proximate cause and therefore failed to state a claim under 18 U.S.C §1962(a), (b), and (d) (the Racketeer Influenced and Corrupt Organizations Act "RICO").

This is a civil action arising under the provisions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1962 et. seq. Plaintiff/Petitioners are a married couple, Jonathan and Esther Zuhovitzky. Jonathan Zuhovitzky is a citizen of Israel and a naturalized citizen of the United States. Esther Zuhovitzky is a citizen of Austria and Israel and has never been a resident or citizen of the United States. Defendants/Respondents are UBS AG CHE 101.329.561 and certain of its wholly owned subsidiaries, UBS AG CHE 412.669.376, UBS Securities LLC, UBS Financial Services, Inc. and UBS Asset Management (US) Inc. (hereinafter "UBS").

Petitioners have charged defendants with RICO violations stemming from actions taken by UBS which Petitioners assert are part of a long-

standing pattern of actions by UBS meeting the requirements of the RICO statutes. As part of the many actions taken by UBS in support of its RICO endeavor(s), UBS also engaged in actions directed specifically at Petitioners, causing Petitioners economic harm to their business or property.

STATEMENT OF THE CASE

UBS Fraudulently Changed the Address of Esther Zuhovitzky's Account

Esther Zuhovitzky held an account with UBS in Zurich from the years 1988-2014. First Amended Complaint ("FAC") ¶11. In 2005, UBS, unilaterally, through its agent(s) purposefully, deceitfully, and for its own economic benefit, changed the address of Esther Zuhovitzky 's account from Zurich, Switzerland to an address in Israel which had no relation to Mrs. Zuhovitzky. FAC 21. After changing the address, UBS and its agents and directors created an exception document which allowed UBS to hold the account within its North-American Division" whereby UBS earned higher revenues from the account. FAC 21.

The actions taken by UBS against the interests of Petitioners are consistent with, and part and parcel to its global pattern of fraudulent actions for which UBS has been prosecuted for decades by government agencies from numerous nations. FAC 22. Over the past two decades, UBS has been prosecuted by the courts and administrative agencies of the United States for fraudulent and criminal behaviors including numerous RICO

offenses. FAC 18. In each case, UBS has agreed to the filing of criminal informations and admitted its criminal liability. UBS has managed to avoid full criminal prosecutions by admitting criminal behavior and agreeing to pay fines and penalties, which at this point amount to more than a BILLION dollars. FAC 18. The criminal acts acknowledged and admitted by UBS meet the requirements for criminal offenses under the RICO act, 18 U.S.C. 1961 et seq.

U.S Prosecution of UBS in the "John Doe Summons Case"

The actions taken by UBS against Petitioners were directly related to the larger offenses for which UBS was prosecuted by the United States regarding fraud against the United States and the Internal Revenue Service ("IRS"). On June 30, 2008 the United States filed a Petition in the District Court for the Southern District of Florida, to force UBS to hand over account information of a large (but undetermined) number of accounts belonging to unidentified U.S. persons. FAC 94.

On February 18, 2009, the Florida District Court approved a Deferred Prosecution Agreement (the "DPA") between UBS and the United States, in which UBS admitted that it had engaged in criminal activities in violation of U.S. law. FAC 95. The Swiss government became involved in the case, filing an *amicus* brief opposing the U.S. Court's actions on the grounds that the United States' efforts to obtain information about Swiss accounts 1) violated the Swiss/American Tax Treaty, 2) that

UBS would be in violation if it complied with a U.S. court order to release private bank information and 3) that an Order to compel enforcement would be inconsistent with international comity. FAC 96.

In order to settle the matter to the satisfaction of both governments, the United States and Swiss governments devised a Settlement Agreement which resulted in the Court issuing a Stipulation of Dismissal on August 19, 2009. FAC 98. A separate Settlement Agreement was signed between UBS and the IRS delineating the actions UBS' was required to engage in to meet its legal obligations under the agreements. It was solely up to UBS to identify the "unknown accounts" and select which accounts they would provide information about. FAC 99. The criteria and process by which UBS selected accounts was left entirely to the discretion of UBS. Prior to releasing information regarding any account, UBS was required to notify the holder of the account in order to provide that individual with the legally required opportunity to show that they did not meet the criteria for their account information to be released. FAC 100.

UBS Failed to Fulfill Its Legal Obligations Under the Agreements

As a prerequisite to the release of any account information, the administrative assistance proceedings agreed to by the U.S. and Swiss governments, under the auspices of the U.S./Swiss Tax Treaty guaranteed the notification of the bank clients by UBS in accordance with the settlement agreement. FAC 100 This notification served to

inform the bank client of their legal due process rights to contest the release of their account information *prior* to its release to the IRS. UBS was required to send this notification no later than 90 days after September 1, 2009. The provision of this notification letter was thus central to UBS' legal duty to bank clients in regard to the Settlement Agreement.

It was not until March 16, 2010, (well past the 90 day timeframe) that UBS attempted to send the required notice to Mrs. Zuhovitzky. FAC 145. UBS mailed the notice to the fraudulent, unrelated address which its agents had assigned to Esther Zuhovitzky 's account in 2005. FAC 149. The letter was not accepted at the address it was sent to and was promptly returned to UBS. FAC 102. Despite a decades long relationship, access to numerous accurate points of contact information including telephone, fax, and clear knowledge of the Petitioners' local address in Zurich, UBS made no further attempt to deliver this highly important legal document which would have provided Esther Zuhovitzky notice of the threat that her bank account information was to be turned over to a hostile taxing authority and of her legal rights and the process by which she could prevent such happening. FAC 102.

The fraudulent actions undertaken by UBS' agents in 2005 in furtherance of its ongoing illegal activities designed to further its illegal U.S. cross-border activities were the direct cause of Petitioners not receiving the legal notice which it was UBS'

obligation to provide under both the US/Swiss Settlement Agreement and the independent agreement between UBS and the IRS. UBS, in agreeing to become the arbiter of what accounts were to be released to the IRS, and in agreeing to provide notice to account holders prior to the release of any information, took upon itself a fiduciary duty to protect the interests of its clients, at least within the provisions of the requirements of the Agreements. FAC 105 UBS' knowing failure to comply with the requirements of the Agreements was done knowingly and illegally, in violation of Swiss Banking laws, Swiss criminal law, the US/Swiss Tax Convention and the specific agreements signed between the US/Swiss governments and UBS and the IRS. FAC 115.

Procedurally, once UBS had selected the accounts, it forwarded the information to the Swiss Federal Taxing Authority (SFTA). Unless the account holder mounted a challenge to the release of the account information, the SFTA did not review the account information for accuracy or appropriateness of release. If the accountholder made no request for reconsideration of the release of their account, the SFTA's role was simply to forward the account information to the IRS under the specifications of the treaty request between the US and Switzerland.

The IRS, upon receipt of the account information was under the impression that each account had been carefully, accurately, and appropriately screened by the selector- UBS, and

that each account provided met the selection criteria as delineated in the Agreement. The criteria for account selection are set out in the Annex of the Agreement Between the Swiss Confederation and the United States of America. The primary criteria for selection included a) U.S. domiciled clients for which a reasonable suspicion of "tax fraud or the like" can be demonstrated or b) US persons holding "offshore company accounts for which reasonable suspicion of "tax fraud or the like" can be demonstrated. The US government has stipulated (in a case before the U.S. Tax Court) that Esther Zuhovitzky was never a resident or citizen of the United States so she could not possibly meet criteria a). Esther Zuhovitzky never held any "offshore company accounts" and therefore could not possibly meet criteria b). Further, since Esther Zuhovitzky was never a U.S. person for tax purposes, she never had any duty to pay U.S income tax on her worldwide income and it was therefore a legal impossibility that she could have committed "tax fraud or the like" against the United States.

If UBS had met its legal duties and informed the Petitioners in a timely and dutiful manner, Petitioners would have been able to exercise their procedural rights prior to the release of the account information and thereby prevent the account information being shared with the IRS. FAC 171 Petitioners would have prevailed upon an appeal because it is uncontested that Esther Zuhovitzky was never a U.S. "person" within the meaning of the agreements, never owed income tax to the United States on her worldwide income, and therefore did

not meet the criteria set forth for the sharing of account information. It was UBS's own actions, the changing of the account address in order to keep the account within the U.S. cross-border business which led to Petitioners' harm.

UBS' Historical Actions Meet RICO Statutory Requirements

As evidenced by media reports and court filings around the globe, UBS has blithely continued to engage in fraudulent criminal activity over the past decades, in numerous countries and across jurisdictions in order to wrongfully profit from its illegal actions. The harm and damages suffered by Petitioners in this matter are but a small part and parcel of UBS' actions designed to support and continue its illegal activities. Both the United States and France have found UBS guilty of acting to defraud their governments by virtue of engaging in illegal cross-border business.

According to the criminal information filed as part of the John-Doe Summons case which begat this case, "it was part and an object of the conspiracy that defendant UBS and its co-conspirators would and did increase the profits of UBS by providing unlicensed and unregistered banking services and investment advice while in the United States and by mailings, email, and telephone calls to and from the United States. FAC 226. UBS consented to the filing of a criminal information which charged that "UBS did unlawfully, willfully, and knowingly, combine, conspire, confederate and agree to defraud the United States in violation of Title 18 U.S.C. §371

Conspiracy to Defraud the United States. FAC 228, 230. Thus, it can hardly be argued that UBS has not been involved in RICO activity. As a result of the filing of the above criminal information, the UBS board of directors, on February 11, 2009 agreed to pay $780 million dollars. FAC 231

In May 2011 the United States Securities and Exchange Commission (the "SEC") filed a complaint against Respondent UBS Financial Services alleging that it engaged in fraudulent bidding practices and made misrepresentations generating millions in ill-gotten gains and threatening the tax status of over $16.5 billion underlying securities. FAC 241-242 In that matter, UBS paid some $47 million dollars in fines and penalties to the SEC. FAC 243

In 2012, the United States filed a criminal information against UBS -Japan (another wholly owned subsidiary of UBS AG) charging them with unlawfully, willfully, and knowingly devising and intending to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations, and promises, and transmitting and causing to be transmitted by means of wire, radio, and television communications in interstate and foreign commerce, writings, signs, signals, pictures and sounds for the executing of such scheme and artifice. UBS admitted the behaviors charged and paid a fine of $100 million dollars. FAC 245-246.

Currently, the French government in involved in ongoing prosecution where it has found

UBS guilty of unlawful client solicitation and aggravated laundering of the proceeds of tax fraud. At question at this time is only the amount of the fine/penalty to be levied against UBS.

The specific actions taken by UBS that harmed Petitioners were part and parcel of UBS' ongoing and pervasive efforts to further their RICO endeavors. The fraudulent and illegal actions taken by UBS against Petitioners and their account are the direct cause of Petitioners being denied their due process rights and the ensuing harms.

Once the IRS received the documentation from Mrs. Zuhovitzky 's account they opened an extensive audit focused solely on the purported failure to report income from the UBS account of Esther Zuhovitzky. FAC 176. During the income tax audit, the IRS also chose to pursue an adjacent assessment of a civil penalty against Jonathan Zuhovitzky for not including information about his wife's UBS account on his annual FBAR filings. Throughout the audit IRS staff acted in a particularly aggressive manner and refused to disclose to Petitioners what circumstances initiated the audit. The IRS operated on the assumption that UBS had correctly done its due diligence in selecting accounts and therefore acted under the assumption that the Petitioners met the criteria set forth in the Annex to the Agreement of being a) a U.S. person and b) suspected of significant tax fraud. The IRS did not engage in any independent assessment of whether the selection of accounts were appropriate. The IRS likely assumed that if an account holder felt

their account did not meet the criteria, the account holder would have taken advantage of the appeal procedures provided for in the Agreements.

The IRS Proceedings

The IRS income tax audit resulted in the issuance of a Notice of Deficiency in which the IRS demanded taxes, penalties and interest of nearly seven million dollars. The Petitioners took the matter to the United States Tax Court where it was held that there was no issue of either criminal or civil tax fraud. The IRS determined that it had no grounds to prove civil fraud and Petitioners agreed to settle with the IRS for a small amount with no penalties.

The IRS also sought to impose a willful FBAR penalty against Mr. Zuhovitzky for over five million dollars for failing to include information about his wife's account on his annual FBAR reports. With the addition of administrative penalties and interest the proposed FBAR penalty eventually reached an unconscionable $9.7 million dollars. Mr. Zuhovitzky sought relief by filing suit in the District Court for the Southern District of New York and successfully had the entire penalty negated.

UBS' actions caused Petitioners to have to engage in long and costly legal and court battles in order to avoid enormous tax and penalty assessments, to clear their names of the stigma of having wrongfully been labeled "tax frauds" and to clear themselves from legal entanglements with the U.S. government. Under U.S. tax law, Esther

Zuhovitzky, a non-U.S. person had no legal duty to pay income taxes to the United States on her world-wide income- including any income from the UBS account. Therefore- without the wrongful actions of UBS, the IRS would have had no cause, indeed no legal standing, to initiate investigations. The completely unfounded allegations of tax fraud and dishonesty, coupled with being placed under a criminal tax investigation, irreparably tainted Mr. Zuhovitzky 's professional reputation causing him financial harm from lost revenue. The costs of the actions that Petitioners were forced to take to protect their interests have exceeded some $700,000 to date. The costs of the loss of business opportunities to Mr. Zuhovitzky's professional reputation as well as the financial losses engendered by the excessive demands on his time to marshal the legal and accounting resources needed to fight these battles has accrued to an estimated loss of $1,500,000.00. FAC 263

The Federal Court Proceedings

The Second Circuit upheld the district court's determination that the Zuhovitzky 's failed to plead proximate cause adequately and therefore failed to state a claim. The Court found that intervening causes broke the causal chain between UBS' alleged conduct and the harms suffered by the Zuhovitzkys. The court found that the proximate cause of the harms was the IRS rather than UBS. Zuhovitzky v. UBS AG, 2024 WL 2130838 *1.

The court mistakenly accepted Respondent's rationale that the IRS chose to audit and pursue

Jonathan Zuhovitzky because it believed that he had failed to disclose a foreign account in violation of 31 C.F.R. §1010.350(a) (the FBAR). This conclusion is simply not in concordance with the facts or the law of the case.

The SFTA and the IRS Did Not Constitute Intervening Causes

As is delineated in the facts above, the UBS account of Esther Zuhovitzky was chosen, at the sole discretion of UBS, at the time when UBS was under pressure to satisfy the obligations to produce accounts of U.S. persons under the conditions of the U.S/Swiss and UBS/IRS agreements. The selection of accounts was 100% the responsibility of UBS. The selection of accounts was to be strictly based on based on the conditions clearly laid out in the "Annex: Criteria for Granting Assistance Pursuant to the Treaty Request" included as part of the Agreement Between the Swiss Confederation and the United States of America.

The criterion for selection of accounts bore absolutely no relation to whether or not FBAR reports had been filed. Indeed, because the Agreement was based on the tax treaty between the U.S. and Switzerland it is doubtful that any criteria involving the FBAR could have been included as the FBAR is controlled by U.S. 31 C.F.R. §1010.350 which is not part of the Internal Revenue Code. The IRS, in opening an audit on the Zuhovitzkys' tax status relied entirely on UBS' assertion that the account met the criteria as set forth in the Annex of the Settlement Agreement- primarily that Mrs.

Zuhovitzky was a US domiciled account holder of UBS for which a reasonable suspicion of "tax fraud or the like" could be demonstrated.

The court also mistakenly identified the Swiss Federal Tax Authority ("SFTA") as another possible intervening cause of harm because it was the SFTA that actually sent the documentation to the IRS. The SFTA made no independent determinations as to the appropriateness of the selection of Mrs. Zuhovitzky's account. The role of the SFTA was to provide an appeals forum where account holders could exercise their legal right to challenge the release of their account information. UBS had a legal obligation placed upon it to notify customers that there was a potential that their account information could be released to the U.S. authorities.

UBS first sent the account information to the SFTA under the conditions agreed to between the US and Switzerland. This process was designed to avoid violating Swiss law and the US/Swiss Tax Treaty. The SFTA did not conduct a separate investigation to ensure that the account met the criteria of the Annex to the Agreement. If the SFTA did not receive an appeal for reconsideration from the account holder, the SFTA automatically forwarded the account information to the IRS. Had the SFTA held an independent review and determined that Mrs. Zuhovitzky's account met the criteria of the Annex, it may have posed an independent, intervening cause of harm. Where it simply held the account information until after the

time for appeal had past and then forwarded the information to the IRS, the SFTA functioned only as a mail-station to satisfy the agreement between the United States and Swiss governments and not as an intervening cause of harm.

REASON FOR GRANTING THE PETITION

1. There is Disagreement Between the Circuit Courts as to What Constitutes "Proximate Cause" for RICO Purposes with Some Circuits Ignoring Supreme Court Guidance on the Broadness and Flexibility of RICO Standards.

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§1960-1968, was originally signed into law by Richard Nixon in 1970 as a measure for dealing with organized crime. Over the past few decades Rico has been expanded and applied to other situations. RICO has been used in a variety of circumstances from ponzi schemes to failure to pay state sales tax and lends itself well to claims involving bank failures, investment scams, and reports of banking and mortgage fraud. However the lower courts continue to be conservative in applying RICO even as the Supreme Court continues to emphasize the statute's breadth.

As Justice White, writing for the majority of the Supreme Court said , "RICO is to be read broadly". *Sedima, SPRL. V. Imrex Co Inc.,* 473 U.S. 479,497, 105 S.Ct. 3275, 3285, (1985). "This is the lesson not only of Congress' self-consciously expansive language and overall approach, but also

of its express admonition that RICO is to "be liberally construed to effectuate its remedial purposes." *Id at 497-98*, 105 S.Ct 3275, citing *United States v. Turkette*, 452 U.S. 576,586-87 (1981) and quoting Pub. L. 91-452, §904(a), 84 Stat. 947

Proximate cause considers, among other things, the permissible degree of attenuation between the claimed harm and the predicate act and requires "some direct relation between the injury asserted and the injurious conduct alleged." *Holmes v. Securities Investor Protection Corporation,* 503 U.S.258 at 268, 112 SCt 1311 (1992). Still proximate cause "is generous enough to include the unintended, though foreseeable consequences of RICO predicate acts," including, in some instances harms that flow from, or are derivative of, each other. *Diaz v. Gates,* 420 F.3d 897, 901 (9th Cir. 2005).

In order for a cause of action to lie in RICO litigation, the plaintiff must be able to establish that the subject damages are caused directly "by reason of" the activities that RICO was designed to address. The question is "Whether the conduct has been so significant and important a cause that the defendant should be held responsible". *Brandenburg v Seidel,* 859 F.2d 1179 (4th Cir. 1988). However, the statutory language does not require that, for an injury to be to business or property, the business or property interest have been the "direct target" of the predicate act. The statute is broad, but that is the statute we have. *Diaz c. Gates,* 420 F.3d 897, 901 (9th Cir. 2005).

The Supreme Court has stated, "In analyzing RICO we use "proximate cause" to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. At bottom the notion of proximate cause reflects "ideas of what justice demands". *Holmes v. Securities Investor Protections Corp.,* 503 U.S. 258 (1992). If factors other than defendant's fraud are an intervening direct cause of plaintiff's injury, that same injury cannot be said to have occurred by reason of the defendant's actions. *First Nationwide Bank v. Gelft Funding Corp*., 27 F.3d 763, 770 (2d Cir. 1994).

It can be difficult to predict when intervening independent factors render a chain of causation too tenuous. *BCS Services, Inc. v Heartwood 88, LLC* 637 F.3d 750 (7th Cir. 2011) was the second appeal resulting from the circumstances alleged in *Phoenix Bond & Indemnity Co. v. Bridge*, 553 U.S. 639 (2007). Both appeals arose out of auctions held in Cook County, Illinois, pursuant to which the county sold its tax liens. The county had imposed a "single-bidder rule", which required each bidder to affirm that no other related bidders were participating in the auction. The plaintiffs alleged that the single bidder rule was regularly violated by many auction participants who sent multiple bidders to auctions. The defendants alleged that there were multiple potential causes of the plaintiff's failure to obtain more liens. For example, plaintiffs may not have obtained legitimate competition from third-party bidders, the auctioneers' subjective perception of which bidder raised their hand first, the failure of

the plaintiffs to keep pace with the auction, and the plaintiff's relative seating position at the auction. The Seventh Circuit held that such circumstances did not destroy the chain of causation between the defendants' violation of the single bidder rule and the plaintiff's loss of liens.

The Seventh Circuit disagreed with the defendants' arguments that the plaintiff must prove there were no intervening causes and held that the plaintiff does not have to "offer evidence which positively excludes every other possible cause…" Once a plaintiff presents evidence that he suffered the sort of injury that would be the expected consequence of the defendant's wrongful conduct, he has done enough to withstand summary judgment on the ground of absence of causation. *BCS Services, Inc. v Heartwood 88, LLC* 637 F.3d 750, 757-58 (7th Cir. 2011).

The issue in *RWB Services* involved used cameras that were misappropriated by the defendants and then resold to Wal-Mart as new cameras. Plaintiffs held a security interest in the used cameras which should have been returned to them. While the lower court reasoned that RWB was not the direct victim of Defendant's scheme and that Plaintiffs had failed to show either factual "but-for" or proximate causation, the Seventh Circuit disagreed. The lower court reasoned that RWB Services was not the "direct victim of Defendants' alleged scheme" and that Wal-Mart or its customers would be better plaintiffs because the alleged scheme was primarily to defraud them.

The first question to be answered is whether plaintiff's injury would have occurred "but-for" the violation of section 1962. *RWB Services LLC v. Hartford Computer Group, Inc.* 539 F.3d 681, 686 (7th Cir. 2008), citing *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268, 112 S.Ct. 1311 (1992); *Sedima, S.P.R.L. v Imrex Co. Inc.*, 473 U.S. 479, 495 (1985) ("if the defendant engages in a pattern of racketeering activity in a manner forbidden by these provisions, and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim."). It is clear, and unchallenged that the Zuhovitzkys have appropriately pled "but-for" causation.

The second question to be answered is whether Petitioners harm was "proximately caused" by UBS' actions. There is no hard line definition or test for proximate cause within the RICO context. As the Supreme Court has stated, "Proximate cause is a flexible concept that labels generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts." *Holmes v Securities Investor Protection Corp.*, 503 U.S. 258, 269 (1992). "Saying that the injury to the plaintiff is "direct" is akin to saying that the victim was reasonably foreseeable, the traditional principle for hemming in tort liability. *RWB Services LLC v. Hartford Computer Group, Inc.* 539 F.3d 681, 688 (7th Cir. 2008)

In examining whether a RICO violation proximately caused the plaintiff's injury, "the central question…is whether the alleged violation

led directly to the plaintiff's injuries". *Anza v Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006).

For its own benefit and to protect its own illegal actions, UBS' wrongfully provided Esther Zuhovitzky's account information to the IRS. Esther Zuhovitzky was never a U.S. person under the rules of U.S. tax law. This fact has been conceded to by the U.S. government in the matter heard before the U.S. Tax Court. UBS' compounded the harm it caused Petitioners when it fraudulently and illegally changed the address to Esther Zuhovitzky's account thereby creating the circumstances where she was not informed of the potential for her account information to be released and was denied her legal right to prevent that release by appeal. Without UBS' actions, taken to further their own RICO scheme, there was no legal reason for the IRS to have become involved in Esther Zuhovitzky's banking affairs.

Proximate cause arguments do not rule out the possibility of multiple victims with different injuries. *RWB Services, LLC v. Hartford Computer Group, Inc.* 539 F 3d.681, 688 (7th Cir. 2008) "the existence of multiple victims with different injuries does not foreclose a finding of proximate cause…").

In *RWB* the district court reasoned that because Wal-Mart was the victim of the fraud, which formed the greater part of the "violation", it was a distinctly better plaintiff than RWB Services. The injury that RWB Services suffered, the court surmised, was simply a bump in the road on the path to defraud Wal-mart. But the Seventh Circuit

held that RWB Services was a direct victim of the alleged scheme, even if Wal-Mart was one as well. "The existence of multiple victims with different injuries does not foreclose a finding of proximate cause; in fact one of the hallmarks of a RICO violation is "the occurrence of distinct injuries" affecting several victims." *RWB* 539 F.3d at 688; *See Morgan v. Bank of Waukegan*, 804 F2d. 970, 975 (7th Cir 1986) (discussing "the number of victims, the presence of separate schemes and the occurrence of distinct injuries"). The Seventh Circuit held that it was not dispositive that the scheme envisioned defrauding Wal-Mart as well, who could potentially have brought an independent RICO claim. The court determined that the existence of a "better" plaintiff will not otherwise be grounds for denying a claim to a plaintiff directly injured by one predicate act in the hopes that a different one will emerge. *RWB Services at 689*

In the case here under consideration, the entire matter arose out of the United States prosecution of UBS, to which UBS accepted criminal responsibility for defrauding the United States, including by use of the mail or wires (clearly meeting RICO standards). Thus, the United States and the IRS has already prosecuted UBS for its injuries caused by the same RICO activities and were handsomely rewarded with the payment of a $780 million dollar fine. That should not provide grounds for denying the Petitioners claims for the direct harms caused to them by UBS' related activities.

In a case reminiscent of *BCS Services, Inc. v Heartwood* and *Phoenix Bond & Indemnity Co. v. Bridge*, the Second Circuit has recently issued an opinion that broadens the proximate cause element of claims brought under RICO. *Alix v. McKinsey & Co.*, 23 F.4th 196, 2nd Cir. 2022. Alix involved a claim by Alix Partners against McKinsey & Co., Alix's dominant competitor in the high -end corporate bankruptcy advising market. *Alix v. McKinsey & Co.* 25 F.4th 196 (2022). Although McKinsey is the dominant player in the market, Alix historically received 24% of the cases not assigned to McKinsey. Alix alleged that McKinsey violated RICO and improperly received bankruptcy engagements by (1) submitting false applications to the US Bankruptcy Court that omitted conflicts of interest that would have led to McKinsey's disqualification and 2) engaging in a "pay-to-play" scheme in which McKinsey introduced its clients to bankruptcy attorneys in exchange for lucrative referrals of bankruptcy assignments from the attorneys. Alix claimed that these illegal activities by McKinsey deprived it of bankruptcy court engagements that it otherwise would have obtained absent McKinsey's actions.

The district court granted McKinsey's motion to dismiss, finding that Alix failed to sufficiently plead the proximate cause element of RICO. *Alix v. McKinsey & Co. Inc.,* 404 F.Supp 3d 827 (2019). The district court held that there " were independent intervening decision of the U.S. Bankruptcy Trustee and the Bankruptcy Court regarding the retention of consultants that rendered the causal connection

between McKinsey's actions and Alix's failure to win more bankruptcy assignments "too remote, contingent, and indirect" to sustain a RICO claim." *Alix v. McKinsey*, 404 F.Supp 3d at 838. In other words, the court found that the direct cause of Alix's injury arose from independent decisions of the various debtors' trustees not to hire Alix, rather than McKinsey's alleged misconduct.

The Second Circuit reversed and remanded the matter, acknowledging that the body of case law surrounding proximate cause in RICO actions is "less than pellucid" and that proximate cause is a flexible concept that is generally not amenable to bright-line rules. *Alix v. McKinsey & Co., Inc.* 23 F.4th 196, 206, (2nd Cir. 2022) citing *Bridge,* 553 U.S. at 654,659. "Although the existence of an intervening decision-maker may in some cases tend to show that an injury was not sufficiently direct to satisfy the proximate cause requirement… it is not in and of itself dispositive." *Id, citing Bridge*, 553 U.S. at 659. In *Neurontin Marketing* the court rejected the defendant's proximate cause defense based on intervening third-parties, saying that it "undercut the core proximate causation principle of allowing compensation for those who were directly injured, whose injury is plainly foreseeable and was in fact foreseen, and who were the intended victim of a defendant's wrongful conduct." *Neurontin Marketing and Sales Pract. Litig.*, 712 F.2d 21, 38 (1st Cir. 2013). The court also held that "a tort plaintiff need not prove a series of negatives; he doesn't have to offer evidence which positively excludes every other possible cause." *Id.*; see also

Wallace v. Midwest Financial & Mortgage Serv. Inc., 714 F.3d 414, 422 (6th Cir. 2013) ("the application of traditional proximate cause considerations supports a minimal finding where plaintiff has raised a genuine issue of material fact regarding causation where plaintiff's allegations of harm caused by defendants are not so indirect, unforeseeable, or illogical that the defendants must prevail as a matter of law.") At the motion to dismiss stage, a plaintiff need only plausibly allege that defendants' actions proximately caused their harm. *Alix v. McKinsey & Co. Inc.* 23 F4th 196, 209 (2nd Cir. 2022). The Second Circuit's decision in *Alix* underscores the flexible nature of proximate cause in a RICO case, and it encourages a case-specific analysis of even the most creative causation arguments.

Recent decisions in the Ninth (*Painters and Allied Trade District Council 82 Health Care Fund v. Takeda Pharmaceuticals Co.*, 943 F.3d 1243, 1259 (9th Cir. 2019), First, (*In re Neurontin Marketing & Sales Practices Litigation*, 712 F.3d 21 (1st Cir. 2013) and Third Circuits (*In re Avandia Marketing, Sales Practices & Product Liability Litigation*, 804 F.3d 633, 634 (3rd Cir. 2015). have caused a split with decisions in the Seventh (*Sidney Hillman Health Center v. Abbot Laboratories*, 873 F.3d 574 (7th Cir. 2017) and Second Circuits (*UFCW Local 1776 v. Eli Lilly & Co.* 620 F.3d 121 (2nd Cir, 2010). on the issue of proximate cause under RICO.

The analysis turns primarily on the three Supreme Court decisions of *Anza v. Ideal Steel Supply Corp.*, 547 US 451 (2006), *Hemi Group LLC*

v. City of New York, 559 U.S. 1 (2010) and *Bridge v. Phoenix Bond & Indemnity Co*. 553 U.S. 639 (2008).

There are significant disagreements between the Circuits regarding the correct determination of proximate cause in the RICO setting and what constitutes an intervening factor that serves to severe the "proximate cause". The lower Courts have shown a tendency to ignore the Supreme Court's repeated warnings that RICO is to be read broadly and that determination of "proximate cause" is not subject to any bright line rules and must be flexibly undertaken with the specifics of each case in mind.

CONCLUSION

This Petition for a writ of certiorari should be granted.

Respectfully Submitted
/s/Ronald J. Cohen
RONALD J. COHEN
Counsel of Record
COHEN, LABARBERA & LANDRIGAN LLP
99 Brookside Avenue
Chester, New York 10918
(845) 291-1900
(845) 291-8601 (fax)
rcohen@cll-law.com

MELISSA A. PERRY
COHEN, LABARBERA & LANDRIGAN LLP
99 Brookside Avenue
Chester, New York 10918
(845) 291-1900
(845) 291-8601 (fax)
mperry@cll-law.com

Attorneys for Petitioners
Jonathan and Esther Zuhovitzky

September 10, 2024