No. 17-

IN THE

Supreme Court of the United States

U1IT4LESS, INC., D/B/A NYBIKERGEAR

Petitioner,

v.

FEDEX CORPORATION, FEDEX CORPORATE SERVICES, INC., FEDEX GROUND PACKAGE SYSTEM, 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

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QUESTIONS PRESENTED

1. Do the canons of statutory construction permit a court to re-cast the unambiguous language of 49 U.S.C. 13708(b) to allow the presentation of a fraudulent and misleading overcharge to a shipper so long as the total amount of that overcharge is accurately revealed on the face of the shipping invoice?

2. Are parties to an action bound to consistent truth before all courts or are they permitted to represent and testify to the same essential facts in diametrically opposed ways in order to suit the exigencies of the moment? May a corporation assert, in certain courts, a legal and practical separation between a holding company and all of its subsidiaries, while asserting precisely the opposite in other courts when that prior position would subject it to potential liability?

PARTIES TO THE PROCEEDING

1. U1IT4LESS Inc., DBA NYBIKERGEAR, petitioner on review, was the plaintiff-appellant below.

2. FedEx Corporation ("FedEx Corp."), FedEx Corporate Services, Inc. ("FedEx Services"), and FedEx Ground Package System, Inc. ("FedEx Ground"), respondents on review, were the defendants-appellees below.

RULE 29.6 DISCLOSURE STATEMENT

This petition is filed by U1IT4LESS Inc., DBA NYBIKERGEAR, a nongovernmental corporation that has no parent company, and no publicly held company owns 10% or more of its stock.

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U1IT4LESS Inc., DBA NYBIKERGEAR, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit's opinion is available at 871 F.3d 199 (September 18, 2017). Pet.App. 1a. The opinion of the district court granting respondents' motion for summary judgment on the grounds that FedEx Corp. and FedEx Services were not distinct from FedEx Ground for purposes of petitioner's RICO claims is reported at 157 F. Supp. 3d 341 (S.D.N.Y. January 27, 2016). Pet.App. 27a. The opinion of the district court granting in part and denying in part respondents' motion to dismiss, finding that while petitioner had failed to state a claim under 49 U.S.C. 13708(b), it had alleged sufficient distinctness under *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001), among the FedEx Ground enterprise, FedEx Corp. and FedEx Services entities for purposes of petitioner's RICO claims, is reported at 896 F. Supp. 2d 275 (S.D.N.Y. September 25, 2012). Pet.App. 51a.

JURISDICTION

The judgment of the Second Circuit was entered on September 18, 2017. Pet.App. 25a. This petition is timely under Rule 13(5) of the Rules of the Court, as petitioner's application for an extension of time in which to submit the petition until February 15, 2018, was granted by Justice Ginsburg on December 15, 2017. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1962(c)

(c) 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.

49 U.S.C § 13708(b)

(b) False or Misleading Information. No person may cause a motor carrier to present false or misleading information on a document about the actual rate, charge, or allowance to any party to the transaction.

49 U.S.C. § 14704(a)(2)

(a) In General.

…

(2) Damages for violations. A carrier or broker providing transportation or service subject to jurisdiction under chapter 135 is liable for damages sustained by a person as a result of an act or omission of that carrier or broker in violation of this part.

INTRODUCTION

This case presents two questions, one relating to the permissible bounds of statutory construction and the other

whether a frequent litigant may take contrary positions on the same issue in different courts to suit its needs of the moment.

The statutory question involves the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), 49 U.S.C. 13708(b), a simple statute which was designed by Congress to bar anyone from participating in the presentation of false or misleading information by motor carriers on invoices to their shippers. The statute has been held to be unambiguous by the only two circuit courts who have addressed the issue. While one circuit, the Sixth Circuit, followed the maxim that an unambiguous statute does not permit a court to engage in statutory construction analysis, the Second Circuit did just the opposite, claiming that notwithstanding the absence of ambiguity, it was "prudent" to do so. It is that ruling and its effect on Section 13708(b) for which review is sought in the petition.

The second question involves the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. 1962(c), and whether a corporation can be held to a single, objective truth, or if it is free to assert an alternate reality when it might avoid liability by doing so. The questionable practice of a litigant taking inconsistent positions before courts on the same issue when it behooves it, commonly called judicial estoppel or estoppel against inconsistent positions, goes to the core of permissible conduct and the practical effect of such conduct on our judicial system. On a motion for summary judgment, an additional concern is whether the decision as of which position is true is a question of fact for the trier fact, who is uniquely given the task of judging credibility.

For many years, respondents have affirmatively asserted in a variety of courts (and benefitted from that assertion by avoiding liability) that their individual corporate entities are just that, with separate legal status and governance. In the context of a RICO action, however, this prior position left respondents in this case vulnerable to liability, so they adroitly pivoted and put forth the exact opposite position in the courts below. Respondents were aware that this Court's binding precedent holds that "to establish liability under § 1962(c) one must allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Cedric Kushner Promotions, Ltd. v. King,* 533 U.S. 158, 161 (2001). In this unanimous decision, the Court further found that the distinctness principle was satisfied when the RICO "person" and "enterprise" are each "a legally different entity with different rights and responsibilities due to its different legal status. *And we can find nothing in the statute that requires more 'separateness' than that.*" *Id.* at 163 (emphasis added). Despite respondents having explicitly asserted that each of them was a separate legal entity, with different rights, responsibilities, and governance, in this case, respondents sought to disavow their prior position, and engraft additional hurdles for petitioners in the RICO context that this Court's jurisprudence does not require. Although respondents initially were unsuccessful with this strategy in the district court, ultimately the district court adopted respondents' new claim of corporate unity and the Second Circuit affirmed. Both were error under the precedents binding these courts, and reversal is necessary to vindicate both this jurisprudence and the continuing worth of an objective truth under judicial estoppel principles.

STATEMENT

1. Petitioner U1IT4Less, Inc., d/b/a NYBikerGear is an internet retailer of motorcycle gear that provides its products to its customers by shipping them throughout the United States and Canada. Pet.App. 2a.

2. Respondents, FedEx Corp., FedEx Services, and FedEx Ground are operated as three separately governed and functioning businesses. "As separately incorporated legal entities, FedEx [Corp.] and its subsidiaries FedEx Services and FedEx Ground are each 'distinct legal entities], with legal rights, obligations, powers, and privileges different from' each other, just like a corporate owner/employee and the corporation itself." Pet.App. 68a [citing *Cedric Kushner*, 533 U.S. at 163].

3. FedEx Corp. is a publicly traded holding company for various subsidiaries engaged in shipping-related businesses. Pet.App. 30a.

4. Respondent FedEx Services, a subsidiary of FedEx Corp., provides sales, marketing, and information technology support to other subsidiary companies of FedEx Corp, including FedEx Ground. Pet.App. 30a.

5. Respondent FedEx Ground offers small package shipping and delivery throughout the United States and Canada. Pet.App. 30a. In prior litigations, FedEx Corp. has represented to federal district courts the separate nature of the operation of subsidiaries, even subsidiaries that generally perform "shipping services," stating that such subsidiaries have distinct lines of business and operate in "entirely different functions," *e.g.,* "FedEx

Express has an entirely different function (package delivery via air) than FedEx Ground (package delivery via ground)." *Humphreys, et al. v. Federal Exp. Corp., et al.*, (No. 05-155) (W.D. Tex. Mar. 29, 2005).

6. FedEx Corp. does not exercise day-to-day control over FedEx Services or FedEx Ground, as each corporation has its own officers and board of directors, with little overlap between these officers and directors. Pet.App. 3a.

7. FedEx Ground has its principal place of business in Memphis, Tennessee, as does FedEx Services, while FedEx Ground's principal place of business is Moon Township, Pennsylvania. Pet.App. 4a.

8. As in *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 263 (2d Cir. 1995), FedEx Corp., FedEx Services, and FedEx Ground were three "active, operating businesses rather than [] stacks of stationery."

9. The complaint alleges that respondents had fraudulently marked up the weights of packages shipped by petitioner and overcharged it for Canadian customs that were to be paid by the recipients, but which respondents never attempted to collect from them, as they were required to do. By their actions, petitioner claimed that respondents violated the ICCTA, 49 U.S.C. 13708(b), and RICO, 18 U.S.C. 1962(c).

10. Petitioner alleged that FedEx Corp. and FedEx Services were separate RICO "persons," and FedEx Ground was the RICO "enterprise." As in *Securitron Magnalock*, the undisputed evidence establishes that

these three respondents each operated as separate and distinct corporate entities, with "entirely different" functions and control, albeit in related lines of business.

11. Petitioner's original complaint was served in March 2011, portions of which were dismissed for failing to state a claim, including petitioner's claims under ICCTA. Pet.App. 78a-83a. The United States District Court for the Southern District of New York dismissed the ICCTA claim on the pleadings because, it concluded, the ICCTA is not "directed at" the type of billing dispute at issue in this case. Pet.App. 82a. However, the district court declined to dismiss petitioner's RICO claims, holding that respondents' separate incorporation satisfied RICO's requirement that the "person" alleged to have violated its provisions be distinct from the alleged "enterprise. Pet. App. 68a-69a.

12. The remaining claims alleged RICO violations by RICO "persons," respondents FedEx Corp. and FedEx Services, and the RICO "enterprise," FedEx Ground. In February 2015, the district court granted partial summary judgment on some of the remaining claims, and then in January 2016, respondents' motion for summary judgment on the remaining RICO claims was granted by the district court following discovery. This time, the district court granted respondents' summary judgment motion and dismissed petitioner's substantive RICO claims because the court held that petitioner had failed to adduce evidence that FedEx Corp. and FedEx Services, the alleged RICO "persons," were sufficiently distinct from FedEx Ground, the alleged RICO "enterprise." This was error, in contravention of the precedent of this Court and the Second Circuit, as well as error when the district

court imputed an additional "facilitation" requirement – a requirement which was expressly disclaimed by the Second Circuit in its affirmance. Pet.App. 44a-48a; Pet. App. 24a.

13. The Second Circuit then compounded this error in adopting the district court's "distinctness" analysis and affirming the judgment of the district court. Pet.App. 3a.

REASONS FOR GRANTING THE PETITION

I. AN UNAMBIGUOUS STATUTE DOES NOT PERMIT ANY STATUTORY CONSTRUCTION ANALYSIS; A COURT IS REQUIRED TO APPLY SUCH A STATUTE AS WRITTEN, A CANON OF STATUTORY CONSTRUCTION WHICH THE SIXTH CIRCUIT RESPECTED, BUT THE SECOND CIRCUIT IGNORED, REWRITING SECTION 13708(b).

A. Standard of Review

The district court reached the applicability of 49 U.S.C. 13708(b) via a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). Pet.App. 6a. In this context, the complaint was to be construed in a light most favorable to petitioner, with all well-pleaded factual allegations taken as true and all reasonable inferences drawn in petitioner's favor, a standard applicable to the *de novo* review of the circuit court as well. *Austin v. Town of Farmington*, 826 F.3d 622, 626-7 (2d Cir. 2016), cert den ___ U.S. ___, 137 S.Ct. 398. A case on review by the Court on a motion to dismiss follows these same standards. See *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993).

B. The District Court's 49 U.S.C. 13708(b) Opinion

Though there were two decisions rendered by the district court prior to the appeal of this matter to the Second Circuit, only the earlier September 25, 2012, decision by Judge Seibel dealt with the applicability of 49 U.S.C. 13708(b). Pet.App. 51a. As the district court understood the pleadings, "Plaintiff's position appears to be that by charging Plaintiff for a package at a weight greater than the actual weight of the package, FedEx and FedEx Services 'persons' have caused 'carrier' FedEx Ground to present false information on a document (*e.g.*, the invoice) about the 'actual rate [or] charge.'" *Id.* at 79a. The district court's analysis was silent as to petitioner's allegations relating to the separate Canadian Customs scheme, which the district court had previously identified as consisting of respondents, rather than collecting Canadian customs fees from the recipient of the package as petitioner had directed, falsely "notify[ing] Plaintiff by U.S. mail that they were unable to collect the Canadian Customs, and electronically debiting Plaintiff's bank account for the same." *Id.* at 59a.

Nonetheless, with regard to both schemes, the district court found Section 13708(b) "to be ambiguous," [contrary to the subsequent holding of the Second Circuit as to Section 13708(b)] and concluded that "consideration of the statutory context and legislative history in interpreting this statute is appropriate." Pet.App. 79a. To those outside sources, the court also added that "the insight of the Surface Transportation Board ("STB") – the agency charged with administration of Section 13708(b) – merits at least some deference." *Id.* [citations omitted].

From this analytical admixture, the district court concluded that petitioner had failed to state a claim under Section 13708(b) for two reasons. The first, arising out of the district court's own factual determination, was that since the complaint alleged that FedEx Ground no longer did its own billing, this equated to there being no allegation that it could have "presented any information on a document, let along 'false or misleading information'." Pet.App. 82a. The second rationale, however, was the direct result of the court's determination that Section 13708(b) was ambiguous. The district court, bringing to bear its research on the statutory history, legislative intent and the "insight" of the STB, determined that Section 13708(b) was "not directed at activity alleged in connection with the upweighing and Canadian Customs schemes." *Id.* Instead, the court concluded, the statute was limited only to "invoices hiding off-bill discounts," a type of false or misleading information that plaintiff did not allege. *Id.*

In making this determination, the court abandoned the plain language of the statute for its own, more limited, interpretation, finding that "[w]hile the upweighing or Canadian Customs schemes might be said to involve invoices that *overcharged* Plaintiff, it cannot be said that these invoices misrepresented that a higher rate was charged when actually a lower rate was charged." Pet. App. 82a [italics in original]. In other words, since Section 13708(b) had its genesis in a regulatory atmosphere which once had banned off-bill *discounting*, the new statute was now barred from being applied to any "false or misleading information," despite its plain language, on a document which involved *overcharges*, since no one was being charged a lower or discounted rate. "In other words,

Section 13708(b) prohibits issuing a bill for amount *x* when the actual charge is *less than x*." Pet.App. 83a [italics in original]. According to the district court, this was the *only* permissible application of Section 13708(b).

C. The Circuit Court's 49 U.S.C. 13708(b) Opinion

The opinion of the Second Circuit with respect to Section 13708(b) wholeheartedly *rejected* the district court's finding of ambiguity. "[W]e are inclined," said the court, "to view the text of the ICCTA as unambiguous." Pet.App. 7a. In doing so, the circuit court invited comparison to a similar holding of the Sixth Circuit in *Solo v. United States*, 819 F.3d 788, 799 (6th Cir. 2016): "We disagree with the district court that the language of § 13708(b) is ambiguous and see no need to look to its sparse legislative history." *Id.* By doing so, the Second Circuit was able to latch onto petitioner's disclaimer that respondents had utilized any charges other than their published rate in computing the charges assessed against petitioner – fraudulent and misleading as they were alleged – for Section 13708(b), in the court's mind, "requires only that FedEx accurately document the charges that it actually assesses its customers." *Id.* [underlining in original].

The construct chosen by the circuit court leads to the conclusion that Section 13708(b) has no real purpose any longer, for, in the court's own words, "FedEx makes the compelling argument that the text requires only that the charge FedEx lists on a document match the charge FedEx assesses in fact." Pet.App. 7a. In other words, so long as the wrongful charge, however fraudulent or misleading, is laid out *in haec verba* on the invoice, Section 13078(b) is satisfied.

"In our view, the phrases 'false or misleading' and 'actual' require a comparison between documented charges and those assessed in fact, and the plain text therefore favors FedEx's position." *Id.* Said another way, Congress could have intended nothing greater when passing Section 13708(b) into law than to require that the theft, diversion or misapplication of funds be explicitly specified in an invoice, notwithstanding that the party preparing the invoice and receiving the funds upon its payment knew that the facts upon which it was based (and unknown to the recipient) were false or, at the very least, misleading. This is the very definition of "fraud," at least according to Merriam-Webster, *i.e.*, an "intentional perversion of truth in order to induce another to part with something of value[.]" Merriam-Webster Online Dictionary. 2018. http://www.merriam-webster.com/dictionary/fraud (15 Feb. 2018); see also FRAUD, Black's Law Dictionary (10th ed. 2014) ("A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment.").

"Actual," the circuit court said, meant "[e]xisting in fact; real" according to Black's Law Dictionary (10th ed. 2014) and the Oxford English Dictionary (3d ed. 2010), and the reality here was that respondents overcharged petitioner by the precise amount stated in the invoice. However, because petitioner did not know that those accurately-memorialized charges were for services never performed or were for services to cargo which had never been properly weighed, it can be permitted no remedy for this systematic overcharging scheme. Despite Congress' best intentions, such fraud was not only able to succeed, but according to the circuit court's interpretation, was outside the purview of Section 13708(b) even once discovered.

Still, the circuit court was uneasy for "the issue of textual ambiguity is close enough that, in prudence, we turn to the legislative history of the statute to confirm our reading of the text." Pet.App. 7a. That "prudent" deferral to Section 13708(b)'s legislative history, however, was not a mere "confirmation" of the statute's plain meaning, but an abandonment of the court's responsibility to apply statutes *as written* when they are unambiguous.

The Second Circuit correctly tracked the history of Section 13708(b)'s predecessor statute, designed to "'ban off-bill discounting,' 'a practice by which motor carriers provide discounts, credits or allowances to parties other than the freight bill payer, without notice to the payer.'" Pet.App. 7a. Congress would eventually end its ban of off-bill discounting in 1995; the ICC regulations which had enforced those requirements were rescinded; and "instead placed the disclosure and false information provisions in the statute [49 U.S.C. § 13708(a)-(b)] itself." Pet.App. 9a. The court carefully noted that while off-bill discounting was no longer barred, the statute still required that carriers "'disclose certain information *when they engage in the practice*.'" *Id.* at 9a-10a, quoting STB Decision, 1997 WL 106986, at *2 [emphasis added in original]. According to the circuit court, this legislative history and "in particular the persuasive policy statements and interpretive decisions issued by the STB and the ICC" reinforced its narrow reading of Section 13708(b)'s text. *Id.* at 10a. That reading, and the substance of the decision below, was that "Section 13708(b) prohibits a motor carrier from listing one amount on a bill when in reality it charges another[ ]" and nothing else. Pet.App. 10a. Because of that limited scope, "not all disputes about payments due for motor carrier transportation fall within the scope of

Section 13708," particularly petitioner's, for petitioner "does not allege that FedEx stated one charge on an invoice but actually assessed a different charge." *Id.* at 11a. In point of fact, FedEx dutifully stated the wrongful, inflated charged on its invoices, "a situation that falls squarely outside the scope of the statute." *Id.* The court found comfort in this interpretation of Section 13708(b) by rationalizing that if such a limited reading of Section 13708(b) were not so, "there would be many more than the twenty-five cases or so that have cited Section 13708(b) in the twenty-two years since the provision was enacted," to say nothing of the dearth of circuit court review of the section, as the 6th Circuit noted in *Solo*, 819 F.3d at 799 ["Neither we nor our sister circuits have yet examined the scope of § 13708."] Pet.App. 11a, Note 5. Arcane as section 13708(b) may be, the time for that examination has now arrived.

D. The Second Circuit Misinterpreted Section 13708(b)

So-called "canons of interpretation" can be useful when statutory language is ambiguous, but "such 'interpretive canon[s are] not a license for the judiciary to rewrite language enacted by the legislature'." *Corley v. United States*, 556 U.S. 303, 325 (2009) [*Alito, J., dissenting*], citing *United States v. Monsanto*, 491 U.S. 600, 611 (1989), quoting *United States v. Albertini*, 472 U.S. 675, 680 (1985). Both the Second and Sixth Circuits have now decided that Section 13708(b) is just such a statute – *unambiguous*. This should be the stopping point.

However, the difference between the Second and Sixth Circuits treatment of Section 13708(b) is that while the Sixth Circuit *withheld* the imposition of canons of

statutory interpretation and allowed Section 13708(b) to stand as unambiguously written, the Second Circuit *applied* those canons notwithstanding and judicially *re-wrote* the statute. This violated what the Court has referred to as its first canon of statutory construction: "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete'." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992), quoting *Rubin v. United States*, 449 U.S. 424, 430.

One would be hard-pressed to find a simpler or clearer statute than Section 13708(b). Under an introductory heading of "False or misleading information," it reads as follows: "No person may cause a motor carrier to present false or misleading information on a document about the actual rate, charge, or allowance to any party to the transaction." That statute is broad enough to reach not only rates, undoubtedly a vestige of its birth as a tariff-related statute, but includes charges of *all* kinds *without limitation.*

Further, it is a misreading of the statute to say that charges are lawful so long as they are textually accurate, even if they are "misleading." As the STB explained in 1997, the background of Section 13708(b) was as part of the Negotiated Rates Act of 1993's ("NRA") promotion of "truth-in-billing" and when re-formulated in the ICCTA Congress "placed specific truth-in-billing requirements in the statute itself." Policy Statement on the Transportation Industry Regulatory Reform Act of 1994, 2 S.T.B. 73, 1997 WL 106986, *1, 2 (STB, Feb. 25, 1997). The resulting Section 13708 did not only *retain* prior language, but *added to it.* "Specific disclosure provisions have now been expressly incorporated into the statute at 49 U.S.C.

13708; they are clear and unambiguous; and they do not require amplification by the Board. They are perfectly capable of being enforced in court by the parties to a given transaction[.]" *Id.* at *3. Echoing the Court's first canon of statutory interpretation, the STB added this caution: "To put it as plainly as we can, the plain language of 49 U.S.C. 13708 simply does not require regulations prohibiting off-bill discounting. Resort to legislative history, which is inappropriate in the face of such plain statutory language, is unavailing[.]" *Id.*

There is nothing in the language of Section 13708(b) which supports the reading that the Second Circuit has imputed to it, requiring that a person cause a motor carrier to "state[ ] one charge on an invoice but actually assess[ ] a different charge" in order to violate the statute. The statutory language makes the simple act of causing a motor carrier to *present* "false or misleading information" about charges a violation of the law. "Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park N'Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985), as cited in *Milner v. Department of Navy*, 562 U.S. 562, 569 (2011). "[C]anons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and time again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there [internal citations omitted]." *Connecticut Nat. Bank v. Germain*, 503 U.S. at 253-4.

This rather plain statute, found unambiguous by both the Second and Sixth Circuits, required nothing more than the words of the statute itself to decide whether its application to the case at bar was proper. Those words easily encompass the cause of action contained in petitioner's complaint, and it was only through an impermissible exercise of statutory re-construction that the Second Circuit erroneously excluded Petitioner's claims. The result is a statute that has been neutered by judicial interpretation; not "'construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant[.]'" *Hibbs v. Winn*, 542 U.S. 88, 101 (2004), quoting 2A N. Singer, Statutes and Statutory Construction § 46.06, pp. 181-186 (rev. 6th ed. 2000). "Truth-in-Billing" has been transmuted into "Truth-in-Stealing."

In the case at bar, there is even greater danger arising out of the Second Circuit's statutory construction analysis of an unambiguous statute in the context of a motion to dismiss under Federal Rule of Civil Procedure Rule 12(b)(6). In this context, the complaint was to be construed in a light most favorable to petitioner, with all well-pleaded factual allegations taken as true and all reasonable inferences drawn in petitioner's favor, to determine whether or not "defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The question for the Second Circuit, whose review was *de novo*, was not to be based on probability of success, but facial *plausibility*. *Bell Atl. Corp. v. Twombly*, 550 U.S.544, 556 (2007). If Section 13708(b) was unambiguous, as the circuit court held, then going beyond the language of the statute manufactured a doubt contrary to an inference of plausibility, which should have been drawn in favor of petitioner and the vitality of its action.

The decision below calls for this Court's resolution, as it draws into question the disparate manner in which two circuit courts have interpreted a single statute, a disparity which will only fuel further confusion as to whether the statute is ambiguous or not, as a matter of law. Decisions by other courts in other circuits which find Section 13708(b) ambiguous will result in wholesale re-writing of the statue and its applicability, confusing not only motor carriers and their customers, but district courts that must apply the law. The conflict between the circuits also extends to whether the first canon of statutory construction can be avoided by a court simply expressing its "prudent" desire to do so. An unchallenged finding that a statute is unambiguous should be just that: clear in its direction and application. This case, as it now stands, also presents the disturbing and critical question of whether Section 13078(b) now permits a motor carrier to steal from its customers, so long as it correctly states the amount it is wrongfully taking from them. The granting of this petition is necessary and justified.

II. THE SECOND CIRCUIT DEPARTED FROM BINDING SUPREME COURT PRECEDENT AND PRINCIPLES OF JUDICIAL ESTOPPEL WHEN IT HELD THAT RESPONDENTS WERE NOT SUFFICIENTLY "DISTINCT" FOR RICO PURPOSES.

The circuit court further erred in affirming the district court's granting of summary judgment to respondents on petitioner's RICO claims, resulting from a misapplication of the Court's binding precedent on the issue of "distinctness" and a violation of the principles of judicial estoppel.

A. Standard of Review

On a motion for summary judgment, the burden is on the movant to establish that "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(a). All evidence must be construed in the light most favorable to the non-moving party, and all reasonable inferences must be drawn in their favor. *In re Joint E. & S. Dist. Asbestos Litig.*, at 1134-35; *Kerzer v. Kingly Mfg.*, 156 F.3d 396, 400 (2d Cir. 1998), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Most important for present purposes, "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

B. The Question as to Respondents' Corporate Distinctness Posed a Genuine Dispute About a Material Fact That Should Have Precluded Summary Judgment Rather Than Having Been Determined by the Courts Below

The Second Circuit and the district court improperly disregarded the undisputed evidence that respondents operated as separate and distinct corporate entities [including multiple prior instances of respondents taking the opposite position in prior litigations], and erred in concluding that the corporations were not sufficiently distinct from the alleged RICO enterprise to support civil

RICO liability under § 1962(c) and the binding precedents applying that statute. But even apart from these erroneous conclusions, the fact that the district court itself had come down on different sides of the same question in view of the facts before it demonstrates that the dispute over respondents' corporate distinctness was truly "genuine" and "such that a reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248. The fact that the question of respondents' "distinctness" for RICO purposes also was determinative of whether respondents could be held liable to petitioners for overcharging them in the upweighting and Canadian Customs schemes further establishes the materiality of this dispute. It was therefore error for the Second Circuit to affirm the district court's improper grant of summary judgment to respondents in the face of such a genuine dispute of material fact.

It is of course true that "Rule 56(e)'s provision that a party opposing a properly supported motion for summary judgment "'may not rest upon the mere allegations or denials of his pleading but … must set forth specific facts showing that there is a genuine issue for trial.'" *Anderson*, 477 U.S. at 248. But, it is also "true that the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Anderson*, 477 U.S. at 248-49 [quoting *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968)].

In this case, sufficient evidence supporting respondents' corporate distinctness under this Court's binding precedent was provided not only by petitioners, and not only by the concessions by respondents themselves in *this* case,[1] but also by the affirmative arguments made by respondents in *other* judicial forums for at least a decade.

Petitioners have demonstrated, both in the district court and to the circuit court, that FedEx Corp., FedEx Services, and FedEx Ground are three "active, operating businesses rather than [three] stacks of stationery," as in *Securitron Magnalock*, 65 F.3d at 263. FedEx Corp. has its principal place of business in Memphis, Tennessee, as does FedEx Services, while FedEx Ground's principal place of business is Moon Township, Pennsylvania. Pet.App. 30a. FedEx Ground was originally "Roadway Package System" a subsidiary of Caliber Systems, Inc. that was acquired by FedEx Corp. in 1998 and rebranded as FedEx Ground. Pet.App. 30a-31a. Most critically, as recited by the district court,

> FedEx Corp. does not exercise day-to-day control over the operations of its subsidiaries, including FedEx Services and FedEx Ground. [ ] Each corporation has its own officers and board of directors; there is little overlap between these officers and directors. [ ]

1. In both the district court and circuit court, respondents have conceded that the FedEx companies each are legally distinct entities. However, respondents misrepresented and oversimplified petitioner's position as turning on the fact of legal incorporation alone, claiming that petitioners had mustered no evidence other than the fact of separate incorporation to support the claim of RICO distinctness. This is patently incorrect, as shown below.

> *Plaintiff has identified numerous instances of court proceedings in which FedEx and its representatives represented and testified to the legal separation between the holding company [FedEx Corp.] and all of its subsidiaries.* [ ] In one characteristic instance, a FedEx representative [Clement Edward Klank, III, Staff Vice President, Securities & Corporate Law] testified as follows when asked '[W]hat is the difference between the separate corporations and, say, looking at them as just separate divisions of one company?'
>
> > 'Well, legally because *they're a separate corporate entity,* they're their own legal entity. *They have their own management and they have their own Board of Directors* so *it is different than operating as a division* within the same company.'

Pet.App. 31a [emphasis added and internal citations omitted].

Petitioner has argued – and supported with undisputed proof – that the separate incorporation of the three FedEx companies, coupled with their different legal rights, responsibilities, functions, and control, means that respondent corporations are not only *legally* separate, but also are *factually* distinct, not "guided by a single corporate consciousness." *Cruz v. FXDirectDealer, LLC*, 720 F.3d 115,121 (2d Cir. 2013). As recognized by the court below itself, "Plaintiff has identified numerous instances of court proceedings in which FedEx and its representatives

represented and testified to the legal separation between the holding company and all of its subsidiaries." Pet.App. 31a.

Indeed, FedEx Corp. and various corporate subsidiaries have taken this legal position – that FedEx Corp. and its subsidiaries operate as entirely separate and distinct companies – repeatedly and consistently for over a decade in federal district courts across the nation. *See, e.g.*, *Humphreys, et al. v. Federal Exp. Corp., et al.*, (No. 05-155) (W.D. Tex. Dismissed Mar. 29, 2005), ECF No. 7 (Defendant Federal Express Corporation's Motion to Dismiss), at 2 ("FedEx Express is a distinct corporation from FedEx Ground and FedEx Home Delivery."); *Griffin, et al. v. FedEx Corp., et al.*, (No. 05C-2326) (N.D. Ill. May 20, 2005), ECF No. 10 (Defendant FedEx Corporation's Memorandum in Support of Motion to Dismiss), at 2 ("FedEx Express[ ] is also a distinct corporation from FedEx Corp. and FedEx Ground."); *Bare v. Federal Exp. Corp.*, 866 F.Supp.2d 600 (N.D. Ohio Jan. 23, 2012), ECF No. 37 (Memorandum in Support of Defendants' Motion for Summary Judgment), at ID 169 ("FedEx Express, FedEx Custom Critical, Inc., and their parent company, FedEx Corporation, are all separate and distinct corporate entities…. Each company has its own officers, managers, policies, procedures, and financial reporting."); *Hix v. FedEx Corp., et al.*, 2013 WL 820391 (W.D. Ark. Transferred April 30, 2012) (No. 3:12-cv-03050), ECF No. 8 (Memorandum in Support of Defendants' Motion to Dismiss), at 2 ("Defendants, FedEx Corporation, FedEx Freight, Inc., and FedEx Corporate Services, Inc. are not the same corporation, but are separate and distinct corporate entities.").

In view of this undisputed evidence and these affirmative claims of distinctness made by respondents themselves, the standards relevant to RICO's § 1962(c) in the Second Circuit and the logic of *Cedric Kushner Promotions* militate strongly in favor of a finding of sufficient distinctness among the respondent entities. Indeed, the district court ruling on respondents' motion to dismiss explicitly found that, "[a]s separately incorporated legal entities, FedEx and its subsidiaries FedEx Services and FedEx Ground are each 'distinct legal entit[ies], with legal rights, obligations, powers, and privileges different from' each other[.]" Pet.App. 68a. Analyzing this issue consistent with *Cedric Kushner*, the district court also found that in such circumstances, respondents "are sufficiently distinct for one to be named as a RICO person and the other as a RICO enterprise." *Id.* at 68a-69a.

Because each of the FedEx companies had different rights, responsibilities, functions, and control, the properly binding standard of this Court and the Second Circuit as to RICO "distinctness" pleading was satisfied, and it was error for the circuit court to rule otherwise. *Cedric Kushner,* 533 U.S. at 163; *City of New York v. Smokes-Spirits.com, Inc.*, 541 F.3d 425, 448 (2d Cir. 2008), citing *Cedric Kushner*; *Securitron Magnalock*, 65 F.3d at 263 (2d Cir. 1995).

At the barest minimum, given all of the above, petitioners had set forth sufficient evident of a genuine dispute of material fact that would "require a jury or judge to resolve the parties' differing versions of the truth at trial," *Anderson*, 477 U.S. at 248-49, and it was error for the courts below to have granted summary relief on respondents' behalf.

C. Separate and Apart from the Summary Judgment Standard, Principles of Judicial Estoppel Urge Reversal

The principle of judicial estoppel varies among circuits, but underlying the concept in every jurisdiction is an effort to combat "the sheer effrontery of advocates who, by playing 'fast and loose' with the courts, seem in the pursuit of wanton self-interest to trifle with the dignity of judicial truth-finding efforts." Wright, Miller & Cooper, 18B Fed. Prac. & Proc. Juris. § 4477 (2d ed.). Thus "[t]he concern is to avoid unfair results and unseemliness." *Id.* This Court also has identified a salutary purpose in stanching the use of intentional self-contradiction as a means of obtaining unfair advantage. *New Hampshire v. Maine*, ___ U.S. ___, 121 S.Ct. 1808, 1814-15 (2001) (citing Wright, Miller & Cooper). "Absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory." Wright, Miller & Cooper, 18B Fed. Prac. & Proc. Juris. § 4477.

As noted above, petitioner has identified numerous instances of court proceedings in which respondents represented to courts the legal separation between the holding company [FedEx Corp.] and all of its subsidiaries in an effort to avoid liability. To permit respondents now to fly in the face of their own decade-long assertions of independence because, in *this* case, they might *avoid* liability if the *opposite* were true, would "enable the party to gain an unfair advantage, or to impose an unfair disadvantage on its new adversary," petitioner here. Wright, Miller & Cooper, 18B Fed. Prac. & Proc. Juris. § 4477. In an era when respect for fact and truth

seem increasingly illusory, the need to prevent such gamesmanship in law is even more essential. Justice has always depended on ascertaining truth and, while there is no alchemy which can produce such a thing of value, we have come to rely on the trier of fact, be it judge or jury, to determine what is credible and what is not. Judicial estoppel, properly applied in this case, would have sent the question of what is true to that trier of fact, rather than allow this case to have been decided on paper, as a matter of law. This is an appropriate case to address such concerns. The petition should be granted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 15, 2018

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED SEPTEMBER 18, 2017

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 16-533-cv

U1IT4LESS, INC., D/B/A NYBIKERGEAR,

Plaintiff-Appellant,

v.

FEDEX CORPORATION, FEDEX CORPORATE SERVICES, INC., FEDEX GROUND PACKAGE SYSTEM, INC.,

Defendants-Appellees.

(Argued: March 7, 2017, Decided: September 18, 2017)

Before:

SACK and LOHIER, *Circuit Judges*,
and WOODS, *District Judge*.*

U1IT4Less, Inc., d/b/a NYBikerGear ("BikerGear"), appeals from a judgment dismissing its claims against

* Judge Gregory H. Woods, of the United States District Court for the Southern District of New York, sitting by designation.

FedEx Corporation, FedEx Corporate Services, Inc., and FedEx Ground Package System, Inc. (collectively, "FedEx"). BikerGear accused FedEx of fraudulently marking up the weights of packages shipped by BikerGear and wrongly charging BikerGear for Canadian customs. As relevant to this appeal, the United States District Court for the Southern District of New York (Seibel, J.) initially dismissed BikerGear's claim under 49 U.S.C. § 13708(b) for failure to state a claim. Following discovery, the District Court (Forrest, J.) granted summary judgment dismissing BikerGear's claims under the Racketeer Influenced and Corrupt Organizations Act ("RICO") on the ground that BikerGear had failed to satisfy RICO's "distinctness" requirement. We AFFIRM. Judge WOODS concurs in a separate opinion.

LOHIER, *Circuit Judge*:

U1IT4Less, Inc., d/b/a NYBikerGear ("BikerGear"), an internet retailer of motorcycle gear, accuses FedEx Corporation and its subsidiaries FedEx Corporate Services, Inc. and FedEx Ground Package System, Inc.[1] of fraudulently marking up the weights of packages shipped by BikerGear and overcharging BikerGear for Canadian customs. In doing so, BikerGear claims, FedEx violated the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), 49 U.S.C. § 13708(b), and the Racketeer Influenced and Corrupt Organizations

1. In this opinion we refer to FedEx Corporation as "FedEx Corp.," FedEx Corporate Services, Inc. as "FedEx Services," and FedEx Ground Package System, Inc. as "FedEx Ground." We refer collectively to the three companies as "FedEx."

Act ("RICO"), 18 U.S.C. § 1962(c). As relevant to this appeal, the United States District Court for the Southern District of New York (Seibel, J.) dismissed the ICCTA claim on the pleadings because, it concluded, the ICCTA is not "directed at" the type of billing dispute at issue in this case. *U1IT4Less, Inc. v. FedEx Corp.*, 896 F. Supp. 2d 275, 294 (S.D.N.Y. 2012). Following discovery, the District Court (Forrest, J.) granted FedEx's summary judgment motion and dismissed BikerGear's substantive RICO claims because BikerGear failed to adduce evidence that FedEx Corp. and FedEx Services, the alleged RICO "persons," are distinct from FedEx Ground, the alleged RICO "enterprise." We **AFFIRM**.[2]

Background

FedEx Corp. is the public holding company for all of FedEx's wholly-owned operating subsidiaries. FedEx Ground is FedEx's ground delivery service throughout the United States and Canada. FedEx Services provides sales, marketing, and information technology support to the other FedEx subsidiaries. FedEx Corp., which has fewer than 300 employees, does not exercise day-to-day control over FedEx Ground or FedEx Services. Each company operates mostly with its own directors and officers. FedEx

2. The District Court also granted summary judgment to FedEx on BikerGear's class action RICO claims because the shipping contracts contained class action waivers. *U1IT4Less, Inc. v. FedEx Corp.*, No. 11-cv-1713 (KBF), 2015 U.S. Dist. LEXIS 82933, 2015 WL 3916247 (S.D.N.Y. June 25, 2015). As we affirm the dismissal of BikerGear's individual RICO claims, we express no view on whether the District Court properly did so based on the class action waivers.

Corp. and FedEx Services are headquartered in Memphis, Tennessee, while FedEx Ground is headquartered in Moon Township, Pennsylvania.

Like thousands of other retail companies, BikerGear used FedEx Ground to ship products to its customers in the United States and Canada. The relevant pricing and shipping contracts were executed by BikerGear and FedEx Services, acting as an agent of FedEx Ground and FedEx Corp.

BikerGear alleges that FedEx engaged in two schemes. Under the first scheme (BikerGear calls it the "Upweighting Scheme"), FedEx Ground rated BikerGear's packages at weights higher than their actual weight, resulting in overcharges to BikerGear. Overall, BikerGear alleges that it was overcharged for roughly 150 of the 5,490 packages it shipped via FedEx Ground from July 2008 to August 2010. Under the second scheme (dubbed the "Canadian Customs Scheme"), FedEx Ground is alleged to have improperly charged BikerGear for Canadian customs at least 150 times. FedEx admits that a glitch in its shipping software, now fixed, caused some wrongful customs charges.

After learning of the improper charges, BikerGear (both individually and on behalf of a putative class of FedEx shipping customers) sued all three defendants for violating the ICCTA and New York State's General Business Law. It also asserted civil RICO and RICO conspiracy claims against FedEx Corp. and FedEx Services under 18 U.S.C. § 1962(c) and (d). FedEx moved to dismiss the claims under Rule 12(b)(6).

Judge Seibel dismissed the ICCTA claim because BikerGear failed to allege that FedEx stated one amount on its invoices but charged a different amount. For reasons not relevant to this appeal, Judge Seibel also dismissed BikerGear's RICO conspiracy and state law claims. *U1IT4Less*, 896 F. Supp. 2d at 291-95. Judge Seibel declined, however, to dismiss BikerGear's substantive RICO claims, holding that the defendants' separate incorporation, without more, satisfied RICO's requirement that the "person" alleged to violate 18 U.S.C. § 1962(c) be distinct from the alleged "enterprise." *Id.* at 287-88.

After discovery the case was reassigned to Judge Forrest, who granted summary judgment to FedEx and dismissed the remaining RICO claims. *U1IT4Less, Inc. v. FedEx Corp.*, 157 F. Supp. 3d 341 (S.D.N.Y. 2016). Contrary to Judge Seibel's earlier ruling on the motion to dismiss, Judge Forrest held that the mere fact of separate incorporation was not enough to satisfy the requirement that the RICO "person" and "enterprise" be distinct. *Id.* at 351-52. In addition, Judge Forrest concluded, BikerGear's RICO claims required a showing that the separate incorporation of FedEx Ground facilitated the racketeering enterprise allegedly run by FedEx Corp. and FedEx Services. *Id.* at 350-51. Because the evidence showed only that BikerGear "interacted with FedEx Ground and FedEx Services precisely as it would have had those sister subsidiaries in fact been divisions of a single FedEx corporation," Judge Forrest concluded that there was "no genuine question as to whether FedEx Corp. and FedEx Services are distinct from FedEx Ground for purposes of the RICO claims." *Id.* at 351-52.

This appeal followed.

Discussion

We first address Judge Seibel's Rule 12(b)(6) dismissal of BikerGear's claim under the ICCTA, followed by Judge Forrest's grant of summary judgment dismissing the RICO claims.

1. 49 U.S.C. § 13708

Billing and collection obligations of motor carriers are set forth in 49 U.S.C. § 13708. Section 13708(b), entitled "False or misleading information," provides as follows: "No person may cause a motor carrier to present false or misleading information on a document about the actual rate, charge, or allowance to any party to the transaction." 49 U.S.C. § 13708(b).

BikerGear claims that FedEx violated the statute by perpetrating the Upweighting Scheme and the Canadian Customs Scheme and by failing to apply certain discounts to which BikerGear was allegedly entitled under its shipping contracts with FedEx. But in the same breath BikerGear expressly *disclaims* that FedEx "used rates other than their published tariff rates in computing charges." Second Am. Class Action Compl. ("SAC") ¶ 145. BikerGear's disclaimer is dispositive of the inquiry before us: Section 13708(b) requires only that FedEx accurately document the charges that it *actually* assesses its customers.

In arriving at that conclusion, we are inclined to view the text of the ICCTA as unambiguous. *Cf. Solo v. United Parcel Serv. Co.*, 819 F.3d 788, 799 (6th Cir. 2016) ("We disagree with the district court that the language of § 13708(b) is ambiguous and see no need to look to its sparse legislative history."). As noted, Section 13708(b) prohibits presentation of "false or misleading information" about the "actual rate, charge, or allowance." FedEx makes the compelling argument that the text requires only that the charge FedEx lists on a document match the charge FedEx assesses in fact. On the other hand, BikerGear argues that the term "actual" refers not to the charges FedEx assessed in fact, but to the lesser amounts BikerGear claims it *should have* been charged had FedEx properly weighed the packages. In our view, the phrases "false or misleading" and "actual" require a comparison between documented charges and those assessed in fact, and the plain text therefore favors FedEx's position. *Cf. Actual, Black's Law Dictionary* (10th ed. 2014) ("Existing in fact; real."); *Actual, Oxford English Dictionary* (3d ed. 2010) ("Existing in fact, real; carried out, acted in reality.").

On balance, then, FedEx offers the more plausible textual interpretation of Section 13708(b) and its use of the term "actual." But the issue of textual ambiguity is close enough that, in prudence, we turn to the legislative history of the statute to confirm our reading of the text.

In 1993 Congress sought to ban "off-bill discounting," "a practice by which motor carriers provide discounts, credits or allowances to parties other than the freight

bill payer, without notice to the payer."[3] Regulations Implementing Section 7 of the Negotiated Rates Act of 1993 ("STB Decision"), 2 S.T.B. 73 (1997), 1997 WL 106986, at *1; *see also* H.R. Rep. No. 103-359, at 11 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 2534, 2538 (describing the "thrust" of "[t]he off-bill discounting provision"). It did so by enacting the predecessor statute to Section 13708, which required the Interstate Commerce Commission (ICC), the agency then tasked with administering the statute, to issue regulations to: (1) prohibit motor carriers "from providing a reduction in a rate set forth in its tariff or [shipping] contract" to any person other than the person "paying the motor carrier directly" for the shipping service; (2) require motor carriers to disclose the "actual rates, charges, or allowances" on documents presented to the final payer; and (3) prohibit a "person from causing a motor carrier to present false or misleading information on a document about the actual rate, charge, or allowance to any party to the transaction" *(i.e.*, the prohibition now contained in Section 13708(b)). Negotiated Rates Act of 1993, Pub. L. No. 103-180, § 7, 107 Stat. 2044, 2051-52 (codified at 49 U.S.C. § 10767), *repealed by* ICCTA, Pub. L. No. 104-88, § 102(a), 109 Stat. 803, 873-74 (1995). According to the Surface Transportation Board (STB), which succeeded the ICC and assumed the task of administering Section 13708, Congress mandated that the ICC regulations require motor carriers to

3. Typically, this occurs when shippers like BikerGear charge their customers based on the freight bill—providing the carriers' invoices as proof—but receive off-bill discounts from the carriers. The shippers pocket the savings, and the customers wind up paying more than the net freight charges.

accurately disclose "the *basis* for any rates, charges, or allowances." STB Decision, 2 S.T.B. 73, 1997 WL 106986, at *1 (emphasis added); *see also* Regulations Implementing Section 7 of the "Negotiated Rates Act of 1993" (Interpretive Decision), Ex Parte No. MC-180, 1994 WL 94482, at *1-2 (ICC Mar. 22, 1994) (interpreting prior statute to require disclosure of "actual" amount "paid by the party, or agent, responsible for payment" and the "allowances or adjustments" paid by the carrier to other parties for reasonable services).

In 1995 Congress repealed the requirement that the ICC issue regulations banning off-bill discounting, *see* ICCTA § 102(a), 109 Stat. at 873-74, and instead placed the disclosure and false information provisions in the statute itself, *see* 49 U.S.C. § 13708(a)-(b).[4] The STB explained that

4. Section 13708, entitled "Billing and collecting practices," provides in full as follows:

> **(a) Disclosure**.--A motor carrier subject to jurisdiction under subchapter I of chapter 135 shall disclose, when a document is presented or electronically transmitted for payment to the person responsible directly to the motor carrier for payment or agent of such responsible person, the actual rates, charges, or allowances for any transportation service and shall also disclose, at such time, whether and to whom any allowance or reduction in charges is made.
>
> **(b) False or misleading information**.--No person may cause a motor carrier to present false or misleading information on a document about the actual rate, charge, or allowance to any party to the transaction.

although the statute no longer bans off-bill discounting, it does "affirmatively require carriers to disclose certain information *when they engage in the practice*." STB Decision, 2 S.T.B. 73, 1997 WL 106986, at *2 (emphasis added); *see also* 2 S.T.B. 73, [WL] at *3 (explaining that Section 13708 "signal[s] a willingness to accept off-bill discounting, so long as it is clearly disclosed").

The legislative history—in particular the persuasive policy statements and interpretive decisions issued by the STB and the ICC—reinforces our reading of Section 13708's text. *See Austin v. Town of Farmington*, 826 F.3d 622, 629 n.7 (2d Cir. 2016). It shows that Congress intended to require disclosure of and prohibit false information about off-bill discounting or similar conduct, so that charges stated on disclosed documents match the charges the motor carrier assesses in fact. Cf. Policy Statement on the Trucking Indus. Regulatory Reform Act of 1994, 10 I.C.C.2d 251, 256, 1994 WL 580904, at *4 (Oct. 20, 1994) (explaining that off-bill discounting provision was "specifically directed at discrepancies between rates that are charged and rates that are set forth in tariffs"). In other words, Section 13708(b) prohibits a motor carrier from listing one amount on a bill when in reality it charges another.

(c) Allowances for services.--When the actual rate, charge, or allowance is dependent upon the performance of a service by a party to the transportation arrangement, such as tendering a volume of freight over a stated period of time, the motor carrier shall indicate in any document presented for payment to the person responsible directly to the motor carrier that a reduction, allowance, or other adjustment may apply.

But not all disputes about payments due for motor carrier transportation fall within the scope of Section 13708.[5] Here, although it disputes payment, BikerGear does not allege that FedEx stated one charge on an invoice but actually assessed a different charge. To the contrary, according to the complaint, FedEx's invoices accurately reflected previously stated rates and FedEx assessed the charges stated on its invoices—a situation that falls squarely outside the scope of the statute.[6] *See SAC* ¶¶ 145, 147 (alleging that FedEx represented to BikerGear's bank and credit card companies that BikerGear "owed the stated amount[s]" and that those stated amounts were transmitted to FedEx).

For these reasons, we affirm the District Court's dismissal of BikerGear's claim under 49 U.S.C. § 13708(b).[7]

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5. Otherwise, there would be many more than the twenty-five cases or so that have cited Section 13708 in the twenty-two years since the provision was enacted. *Cf. Solo*, 819 F.3d at 799 ("Neither we nor our sister circuits have yet examined the scope of § 13708.").

6. We decline to decide whether the statute extends only to the disclosure of off-bill *discounts*, as the District Court believed, 896 F. Supp. 2d at 294, and not to off-bill *surcharges*. *But see* Regulations Implementing Section 7, 1994 WL 94482, at *2 (interpreting pre-ICCTA statute to "govern[] any discounts, allowances, or adjustments that come out of the published tariff charge or contract rate shown on the freight bill," but not to "cover charges assessed in addition to those specified in the tariff or contract."). Here, BikerGear alleges neither off-bill discounts nor off-bill surcharges.

7. Because we hold that BikerGear has not alleged conduct covered by Section 13708(b), we express no view on whether a private right of action exists for violations of Section 13708, or whether

2. RICO

We now turn to BikerGear's effort to revive its RICO claims, which the District Court dismissed after granting summary judgment to FedEx on the ground that BikerGear failed to satisfy RICO's distinctness requirement under 18 U.S.C. § 1962(c).

Section 1962(c) makes it

> 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. § 1962(c). "[T]o establish liability under § 1962(c) one must allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001).[8] A corporate

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BikerGear sufficiently identified a "person" who "caused" a "motor carrier" to present false information. *See Solo*, 819 F.3d at 799-800 (discussing the distinction between the terms "person" and "motor carrier").

8. A RICO enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct," the existence of which is proven "by evidence of an ongoing organization,

entity can be sued as a RICO "person" or named as a RICO "enterprise," *see* 18 U.S.C. § 1961(3), (4), but the same entity cannot be *both* the RICO person and the enterprise, *Anatian v. Coutts Bank (Switzerland) Ltd.*, 193 F.3d 85, 89 (2d Cir. 1999) (citing *Bennett v. U.S. Tr. Co. of N.Y.*, 770 F.2d 308, 315 (2d Cir. 1985)). Though Congress initially enacted the RICO statute to target organized crime, the Supreme Court has since identified the statute's basic purposes as "both protect[ing] a legitimate 'enterprise' from those who would use unlawful acts to victimize it and also protect[ing] the public from those who would unlawfully use an 'enterprise' (whether legitimate or illegitimate) as a vehicle through which unlawful activity is committed." *Cedric Kushner*, 533 U.S. at 164 (quotation marks omitted).

BikerGear insists that the mere fact of separate legal incorporation satisfies the distinctness requirement under Section 1962(c). We disagree. As we have explained, "the plain language and purpose of the statute contemplate that a *person* violates the statute by conducting an *enterprise* through a pattern of criminality," so "a corporate person cannot violate the statute by corrupting itself." *Cruz v. FXDirectDealer, LLC*, 720 F.3d 115, 120 (2d Cir. 2013) (citing Bennett, 770 F.2d at 315). A corporation can act only through its employees, subsidiaries, or agents. So "if a corporate defendant can be liable for participating in an enterprise comprised only of its agents—even if those agents are separately incorporated legal entities—then

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formal or informal, and by evidence that the various associates function as a continuing unit." *United States v. Turkette*, 452 U.S. 576, 583, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981).

RICO liability will attach to any act of corporate wrongdoing and the statute's distinctness requirement will be rendered meaningless." *In re ClassicStar Mare Lease Litig.*, 727 F.3d 473, 492 (6th Cir. 2013) (citing *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994)). Accordingly, a plaintiff may not circumvent the distinctness requirement "by alleging a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant," *Riverwoods*, 30 F.3d at 344—that consists, in other words, of a corporate defendant "corrupting itself," *Cruz*, 720 F.3d at 120.

Our prior decisions reflect this common sense principle, rooted in the language of Section 1962(c). In *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, we held that a corporation was not distinct from an alleged enterprise consisting of the corporation and some of its own employees. 30 F.3d at 344-45. In *Discon, Inc. v. NYNEX Corp.*, we held that a parent corporation and its two wholly-owned subsidiaries were not distinct from an enterprise consisting of those three entities because each entity, like the corporation and its employees in *Riverwoods*, was "acting within the scope of a single corporate structure" and "guided by a single corporate consciousness." 93 F.3d 1055, 1064 (2d Cir. 1996), *vacated on other grounds*, 525 U.S. 128, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998). We reaffirmed *Discon* in *Cruz v. FXDirectDealer, LLC*, holding that a wholly-owned subsidiary was not distinct from an enterprise consisting of itself and its parent because the allegations showed

only that the two entities "operate[d] as part of a single, unified corporate structure." 720 F.3d at 121.

Of course, the principle we announced in *Discon* and *Cruz* has its limits and "does not foreclose the possibility of a corporate entity being held liable . . . where it associates with others to form an enterprise that is sufficiently distinct from itself." *Riverwoods*, 30 F.3d at 344. Where, for example, a natural person controls two active corporations that operate independently in different lines of business, receive independent benefits from the illegal acts of the enterprise, and affirmatively use their separate corporate status to further the illegal goals of the enterprise, we will regard each of the three entities as distinct from their coordinated enterprise under Section 1962(c). *See Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 263-64 (2d Cir. 1995).[9]

With these background principles in mind, and for the following reasons, we reject BikerGear's argument that FedEx Ground, the alleged RICO enterprise, is sufficiently distinct from the alleged RICO persons, FedEx Corp. and FedEx Services, solely by virtue of their separate

9. One academic survey of the differing circuit law on this issue explains that in our circuit, "where an association in fact enterprise is allegedly comprised of a subsidiary, with or without agents, controlled by a parent corporation," the existence of a single corporate consciousness can be disproven by showing that the alleged criminal activities are distinguishable from the subsidiary's ordinary business. See Laurence A. Steckman, *RICO Section 1962(c) Enterprises and the Present Status of the "Distinctness Requirement" in the Second, Third and Seventh Circuits*, 21 Touro L. Rev. 1083, 1096-97, 1270, 1281 (2006).

legal incorporation. First, BikerGear acknowledges the following facts suggesting FedEx's unified corporate structure: (i) FedEx Corp. is a holding company that operates exclusively through wholly-owned subsidiaries, (ii) FedEx's primary business is shipping, and (iii) FedEx Ground runs a domestic ground shipping operation exclusively on behalf of FedEx Corp. Appellant's Br. 13. Second, BikerGear presented no evidence showing that any FedEx entity operated outside of a unified corporate structure guided by a single corporate consciousness. *See Cruz*, 720 F.3d at 121. Nor did BikerGear present evidence that FedEx Corp.'s choice of corporate structure was in any way related to (let alone used to further) the racketeering activity alleged in the complaint.[10] *Compare* Discon, 93 F.3d at 1064, with *Securitron Magnalock*, 65 F.3d at 263-64; *see Cedric Kushner*, 533 U.S. at 164.

Viewing the record in the light most favorable to BikerGear, we hold that no reasonable juror could consider FedEx Corp.'s and FedEx Service's participation in FedEx Ground's affairs as anything other than participation in FedEx Corp.'s *own* ground shipping business. Even if BikerGear could prove a pattern of racketeering activity, it could show at most that FedEx "corrupt[ed] itself." *Cruz*, 720 F.3d at 120.

It is true, as BikerGear points out, that the three FedEx defendants have different board members and do not participate in each other's day-to-day operations.

10. For example, there is no record evidence that FedEx Ground's operations were infiltrated for racketeering activity. *See* Steckman, *supra* note 9, at 1096.

But at most this shows that the separate legal identity of each entity is genuine under state corporate law. Under *Discon* and *Cruz*, merely describing the governance and management structure of FedEx's corporate family is inadequate to satisfy RICO's distinctness requirement. BikerGear must also show that the corporate structure suggests a distinct corporate consciousness related to the alleged racketeering activity.

BikerGear invites us to distinguish *Discon* and *Cruz* by observing that the alleged RICO enterprises in those cases were associations-in-fact comprised of all the defendant corporations combined, while the alleged enterprise here is a discrete subsidiary. In our view, this difference is immaterial. Whether a corporate defendant is distinct from an association-in-fact enterprise turns on whether the enterprise is more than the defendant carrying out its ordinary business through a unified corporate structure unrelated to the racketeering activity—not on whether the plaintiff opts to sue all or only some members of the enterprise. *Compare Discon*, 93 F.3d at 1064, with *Securitron Magnalock*, 65 F.3d at 263-64.

In addition to being compelled by *Discon* and *Cruz*, our holding comports with the Supreme Court's decision in *Cedric Kushner*. There the Court held that the alleged natural RICO "person," the boxing promoter Don King, was distinct from Don King Productions, the alleged RICO corporate "enterprise," of which Don King was president, sole shareholder, and employee. 533 U.S. at 160, 163. King allegedly conducted the affairs of Don King Productions through a pattern of racketeering activities consisting

of fraud and other RICO predicate crimes. *Id.* at 160-61. In concluding that King and Don King Productions were distinct, however, the Supreme Court emphasized that its holding was limited to the circumstances in which "a corporate employee unlawfully conducts the affairs of the corporation of which he is the sole owner—whether he conducts those affairs within the scope, or beyond the scope, of corporate authority."[11] *Id.* at 166. As for both corporate employees and corporate entities, the Supreme Court suggested, Congress had in mind the "protect[ion of] the public from those who would run organizations in a manner detrimental to the public interest." *Id.* at 165 (quotation marks omitted). Indeed, the Court described our earlier decisions relating to the distinctness issue (for example, *Discon)* as "significantly different"—a strong signal that it was not addressing cases in which, as here, a corporate person conducts the affairs of an enterprise consisting only of corporate members of its wholly-owned corporate family. *Id.* at 164; *see also Ray v. Spirit Airlines,*

11. Elsewhere in its opinion, the Supreme Court strove repeatedly to limit and distinguish its holding. *See id.* at 163 (explaining that the purpose of incorporation is to create a legal entity distinct from "the natural individuals who created it, who own it, or whom it employs"); *id.* at 164 (noting that Second Circuit cases involving corporate entities "involved significantly different allegations compared with the instant case"); *id.* at 165 *("[I]n [the] present circumstances* the statute requires no more than the formal legal distinction between 'person' and 'enterprise' (namely, incorporation) that is present here." (emphasis added)); *id.* at 166 (noting that the Court's holding "says only that the corporation and its employees are not legally identical"); *id.* (holding "simply" that RICO "applies when a corporate employee unlawfully conducts the affairs of the corporation of which he is the sole owner").

Inc., 836 F.3d 1340, 1356 (11th Cir. 2016); *ClassicStar Mare*, 727 F.3d at 492. If, as BikerGear contends, the mere fact of separate incorporation alone were enough to satisfy the distinctness requirement in all RICO cases involving corporate entities as the alleged persons and enterprise, the Court in *Cedric Kushner* would not have distinguished decisions like *Discon*. And on the record in this case FedEx does not remotely resemble an organization being run "in a manner detrimental to the public interest." *Cedric Kushner*, 533 U.S. at 165.

Finally, we note that in analogous contexts the majority of our sister circuits appear to agree that the fact of separate incorporation alone fails to satisfy RICO's distinctness requirement. *See Bessette v. Avco Fin. Servs., Inc.*, 230 F.3d 439, 449 (1st Cir. 2000) ("Without further allegations, the mere identification of a subsidiary and a parent in a RICO claim fails the distinctiveness requirement"); *Gasoline Sales, Inc. v. Aero Oil Co.*, 39 F.3d 70, 73 (3d Cir. 1994); *NCNB Nat'l Bank of N.C. v. Tiller*, 814 F.2d 931, 936 (4th Cir. 1987), *overruled on other grounds by Busby v. Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990); *N. Cypress Med. Ctr. Operating Co. v. Cigna Healthcare*, 781 F.3d 182, 203 (5th Cir. 2015); *ClassicStar Mare*, 727 F.3d at 492; *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 934 (7th Cir. 2003); *Fogie v. THORN Americas, Inc.*, 190 F.3d 889, 898 (8th Cir. 1999); *George v. Urban Settlement Servs.*, 833 F.3d 1242, 1249 (10th Cir. 2016) (citing *Brannon v. Boatmen's First Nat. Bank of Okla.*, 153 F.3d 1144, 1149 (10th Cir. 1998)); *Ray*, 836 F.3d at 1356-57; cf. *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 883 F.2d

132, 141, 280 U.S. App. D.C. 60 (D.C. Cir. 1989) (collecting cases), *on reh'g in part*, 913 F.2d 948, 286 U.S. App. D.C. 182 (D.C. Cir. 1990). Some circuit courts have explained what "more" needs to be shown, consistent with *Cedric Kushner* and the purpose of the RICO statute itself. We see no need to do the same since, for all the above reasons, on this record, we conclude that BikerGear failed to satisfy RICO's distinctness requirement.[12]

Conclusion

To summarize: (1) Section 13708 of the ICCTA requires shipping documents to truthfully disclose the charges that a motor carrier in fact assesses, and prohibits a motor carrier from stating it will charge one amount when in reality it charges another; and (2) where, as here,

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12. The concurrence emphasizes that we do not here endorse the "facilitation" test that the District Court adopted and that some of our sister circuits have imposed. *See ClassicStar Mare*, 727 F.3d at 492 ("[C]orporate defendants are distinct from RICO enterprises when they are functionally separate, as when they perform different roles within the enterprise or use their separate legal incorporation to facilitate racketeering activity."); *Bucklew*, 329 F.3d at 934 (requiring plaintiffs to show that "the enterprise's decision to operate through subsidiaries rather than divisions somehow facilitated its unlawful activity"); *see also* David B. Smith & Terrance G. Reed, *Civil RICO* ¶ 3.07[2][a] (2017) (explaining that most circuits "hold that a subsidiary corporation cannot constitute the enterprise through which a defendant parent corporation conducts racketeering activity, at least in the absence of exceptional circumstances, such as a showing that the subsidiary was set up solely for the purpose of perpetrating a fraud"). But even if we adopted such a test, we agree with the District Court that BikerGear failed to satisfy it in this case. *See U1IT4Less*, 157 F. Supp. 3d at 350-52.

the RICO persons and the RICO enterprise are corporate parents and wholly-owned subsidiaries that "operate within a unified corporate structure" and are "guided by a single corporate consciousness," the mere fact of separate incorporation, without more, does not satisfy RICO's distinctness requirement under Section 1962(c).

We have considered BikerGear's remaining arguments and conclude that they are without merit. The judgment of the District Court is **AFFIRMED**.

Woods, *District Judge*, concurring in part and concurring in the judgment:

I concur in the judgment because I am persuaded that this conclusion is mandated by the Second Circuit's decision in *Cruz v. FXDirectDealer, LLC*, 720 F.3d 115 (2013). I write separately only because the decision to reaffirm the approach this Circuit took to the application of the "distinctness" principle in this context prior to *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001), was made four years ago by the panel in *Cruz*. Given that we are not working with a blank canvas—*Cruz* dictates the outcome here—I decline to paint in an analysis here to reconcile the court's decision in *Cruz* with *Cedric*.[1] As a result, I do not join in the discussion on pages 19 to 22 of this decision describing how the Supreme Court's ruling in *Cedric* supports this conclusion.

Cruz reaffirmed the principle that "corporations that are legally separate but 'operate within a unified corporate

1. As the opinion notes, our Circuit's approach in *Cruz*, which cabins the Supreme Court's decision in *Cedric* to its facts, is consistent with that taken by a number of other federal courts. Several commenters have remarked on this trend. *See, e.g.*, William B. Ortman, *Parents, Subsidiaries, and RICO Distinctiveness*, 73 U. Chi. L. Rev. 377, 398 (2006) (arguing that circuit courts have "ignored the Supreme Court's repeated directives against the use of purposive interpretation to extratextually cabin RICO liability"); Laurence A. Steckman, *RICO Section 1962(c) Enterprises and the Present Status of the "Distinctness Requirement" in the Second, Third and Seventh Circuits*, 21 Touro L. Rev. 1083, 1296 (2006) (observing that "Cedric . . . plainly stated that bare legal distinctness is all the 'distinctness' RICO requires. . . . The Second, Third and Seventh Circuits, plainly, remain committed to their pre-Cedric analytical paradigms.")

structure' and 'guided by a single corporate consciousness' cannot be both the 'enterprise' and the 'person' under § 1962(c)." *Cruz*, 720 F.3d at 121. In support, *Cruz* cited to the Second Circuit's 1996 decision in *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055 (2d Cir. 1996), *vacated on other grounds*, 525 U.S. 128, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998). In reaffirming the rule established in *Discon*, the opinion in *Cruz* did not analyze the impact of the Supreme Court's intervening decision in *Cedric* on the Circuit's approach to the "distinctness" principle. The analysis of *Cedric* presented in this case—limiting the Supreme Court's holding in *Cedric* to its facts, applicable only to distinctness analysis involving an individual owner and her wholly-owned corporation, and equating a separately organized subsidiary of a corporation to an "agent or employee" of a corporation—was not stated overtly in *Cruz*.

Nor did *Cruz* expressly grapple with the Second Circuit's first decision addressing the distinctness principle following *Cedric—City of New York v. Smokes-Spirits.com, Inc.*, 541 F.3d 425 (2d Cir. 2008). In *Smokes-Spirits*, the panel described the Supreme Court's holding in *Cedric* in a way that is at least arguably broader than the approach reaffirmed in *Cruz*. The *Smokes-Spirits* court wrote:

> In *Cedric Kushner*, the Supreme Court explained that the RICO "person" and alleged "enterprise" must be only legally, and not necessarily actually, distinct. . . . The City has alleged . . . that the enterprise is an innocent corporation, with its own legal basis for

> existing, and the persons are employees or officers of the organization unlawfully directing the enterprise's racketeering activities.

Id. at 448. In light of this language, I understand why Judge Seibel, writing before *Cruz* was handed down, reached her initial conclusion regarding the proper application of the distinctness principle after *Cedric. U1IT4less, Inc. v. FedEx Corp.*, 896 F. Supp. 2d 275, 288 (S.D.N.Y. 2012).

I emphasize too that in affirming the ruling below, we are not endorsing the test applied by Judge Forrest in her opinion, namely "whether the fact of separate incorporation facilitated the alleged unlawful activity." Judge Forrest derived the "facilitation" test from the Seventh Circuit's ruling in *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923 (2003). While *Bucklew* has been cited favorably by a number of courts evaluating this issue, the test has no foundation in the jurisprudence of the Second Circuit, and the application of existing circuit doctrine suffices to resolve this case.[2]

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2. While decided two years after *Cedric*, *Bucklew* does not mention the Supreme Court's decision in its analysis. Moreover, the single paragraph of analysis of this issue in *Bucklew* relies on cases involving the Sherman Act, principally *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984). *Bucklew*, 329 F.3d at 934. In *Cedric*, Mr. King argued that *Copperweld* supported a ruling in his favor. The Supreme Court rejected that argument, stating that its conclusion that legal separateness was all that was required by RICO was not "inconsistent with antitrust law's intracorporate conspiracy doctrine; that doctrine turns on specific antitrust objectives." *Cedric*, 533 U.S. at 166.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED SEPTEMBER 18, 2017

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 16-533

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 18th day of September, two thousand and seventeen.

Before: Robert D. Sack,
Raymond J. Lohier, Jr., *Circuit Judges*,
Gregory H. Woods, *District Judge.**

U1IT4LESS, INC., DBA NYBIKERGEAR,

Plaintiff-Appellant

v.

FEDEX CORPORATION, FEDEX CORPORATE SERVICES, INC., FEDEX GROUND PACKAGE SYSTEM, INC.,

Defendants-Appellees.

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*Judge Gregory H. Woods of the United States District Court for the Southern District of New York, sitting by designation.

Appendix B

JUDGMENT

The appeal in the above captioned case from a judgment of the United States District Court for the Southern District of New York was argued on the district court's record and the parties' briefs. Upon consideration thereof,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the judgment of the district court is AFFIRMED.

For The Court:
Catherine O'Hagan Wolfe,
Clerk of Court

APPENDIX C — OPINION & ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, FILED JANUARY 27, 2016

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

11-cv-1713 (KBF)

U1IT4LESS, INC., d/b/a/ NYBIKERGEAR,

Plaintiff,

-v-

FEDEX CORPORATION, FEDEX CORPORATE SERVICES, INC., AND FEDEX GROUND PACKAGE SYSTEM, INC.,

Defendants.

January 27, 2016, Decided
January 27, 2016, Filed

OPINION & ORDER

KATHERINE B. FORREST, District Judge:

Plaintiff U1IT4less, Inc. filed this suit against defendants FedEx Corporation ("FedEx Corp."), FedEx Corporate Services, Inc. ("FedEx Services"), and FedEx Ground Package System, Inc. ("FedEx Ground") on March 11, 2011. (ECF No. 1.) The gravamen of plaintiff's

complaint and its subsequent amendments (ECF Nos. 27, 41, & 134) is that defendants improperly calculated the weight of certain packages and improperly collected certain Canadian customs charges from shippers rather than recipients. (TAC[1] ¶¶ 1-3.) Plaintiff alleges that these actions constitute various violations of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1962(c)-(d), a federal statute regarding motor carriers' billing and collecting practices, 49 U.S.C. § 13708(b), and New York General Business Law § 349, which prohibits deceptive acts in commerce. (TAC ¶¶ 4, 43-159.)

Plaintiff's claims under state law and 49 U.S.C. § 13708 have been dismissed for failure to state a claim, as has its claim that defendants engaged in a RICO conspiracy. *See U1IT4less, Inc. v. FedEx Corp.*, 896 F. Supp. 2d 275 (S.D.N.Y. 2012). (ECF No. 55.) The Court also previously granted defendants' motion for partial summary judgment as to plaintiff's contractual class action waiver. (ECF No. 169.) Now before the Court is defendants' motion for summary judgment on the two remaining RICO counts. (ECF No. 181.)

The RICO statute imposes liability on persons that improperly use a distinct entity as a vehicle for misdeeds. It is not a statute that attaches federal criminal and civil liability to routine claims of fraud involving a parent and its subsidiary, or two sister corporations.

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1. The notation "TAC" refers to the Third Amended Complaint, filed December 22, 2014 and available at ECF No. 134.

The undisputed facts of this case demonstrate that the defendant corporations, a holding company and one of its subsidiaries, are not "distinct" from the alleged enterprise, another wholly owned subsidiary, for RICO purposes. If plaintiff's theory of RICO distinctness were accepted, it would transform every routine allegation of fraud involving a company that uses the routine holding company/subsidiary structure at issue here into a RICO claim. That is not and should not be the law.

For these and the reasons stated below, the motion is GRANTED.

I. FACTUAL BACKGROUND

A. The Events

Plaintiff is an internet retailer of motorcycle-related clothing and accessories. (Def.'s 56.1[2] ¶ 1.) Between July 2008 and August 2010, FedEx Ground determined a price for approximately 5,490 packages which it billed to plaintiff's FedEx account. (*Id.* ¶ 6.) Plaintiff alleges that approximately 150 of those packages were rated at a weight higher than their true weight, resulting in higher shipping prices. (*Id.* ¶ 7.) Between May 2009 and May 2010, Plaintiff shipped 395 packages to Canada using FedEx Ground. (*Id.* ¶¶ 40-41.) Plaintiff further alleges that, although it indicated on FedEx's software

2. The notation "Def.'s 56.1" refers to defendants' statement of material facts pursuant to Local Civil Rule 56.1. (ECF No. 184.) Unless otherwise noted, this opinion relies solely on statements of fact which plaintiff did not dispute in its response. (ECF No. 190.)

that recipients were responsible for Canadian customs, defendants nonetheless improperly charged plaintiff for such charges at least 150 times. (TAC ¶¶ 106, 112.)

B. FedEx Corporate Structure

Plaintiff's remaining claims allege, *inter alia*, a RICO enterprise stemming from the actions of three related corporations, FedEx Corp., FedEx Services, and FedEx Ground. Defendant FedEx Corp. is a publicly traded holding company for various subsidiaries engaged in shipping-related businesses. (Def.'s 56.1 ¶ 2.) Defendant FedEx Services is a wholly-owned subsidiary of FedEx Corp., and provides sales, marketing, and information technology support to its sister subsidiaries, including FedEx Ground. (*Id.* ¶ 3.) FedEx Ground is also a wholly-owned subsidiary of FedEx Corp., and it offers small package delivery throughout the United States and Canada. (*Id.* ¶ 4.)

FedEx Corp. has its principal place of business in Memphis, Tennessee. (Pl.'s 56.1[3] ¶ 46.) Memphis is also FedEx Services' principal place of business. (*Id.*) FedEx Ground's principal place of business is located outside Pittsburgh, in Moon Township, Pennsylvania. (*Id.* ¶ 45.) FedEx Ground was previously known as Roadway Package System ("RPS") and was a subsidiary of Caliber

3. The notation "Pl.'s 56.1" refers to plaintiff's counter-statement of material facts pursuant to Local Civil Rule 56.1. (ECF No. 190.) Unless otherwise noted, this opinion relies solely on statements of fact which defendants did not dispute in their response. (ECF No. 199.)

Systems, Inc. (TAC ¶ 30; ECF No. 140 ¶ 30.) FedEx Corp. acquired Caliber Systems, Inc. in 1998 and subsequently rebranded RPS as FedEx Ground. (TAC ¶ 30; ECF No. 140 ¶ 30.)

FedEx Corp. does not exercise day-to-day control over the operations of its subsidiaries, including FedEx Services and FedEx Ground. (Def.'s 56.1 ¶ 2.) Each corporation has its own officers and board of directors; there is little overlap between these officers and directors. (Pl.'s 56.1 ¶ 50.) Plaintiff has identified numerous instances of court proceedings in which FedEx and its representatives represented and testified to the legal separation between the holding company and all of its subsidiaries. (*Id.* ¶ 44.) In one characteristic instance, a FedEx representative testified as follows when asked "[W]hat is the difference between the separate corporations and, say, looking at them as just separate divisions of one company?"

> Well, legally because they're a separate corporate entity, they're their own legal entity. They have their own management and they have their own Board of Directors so it is different than operating as a division within the same company.

(*Id.*)

C. Litigation History

As stated above, plaintiff initiated this case on March 11, 2011. (ECF No. 1.) Defendants moved to dismiss the

complaint for failure to state a claim in September 2011. (ECF No. 42.) In September 2012, Judge Seibel, to whom the case was originally assigned, dismissed counts II, IV, and V. *U1IT4less, Inc. v. FedEx Corp.*, 896 F. Supp. 2d 275, 291-95 (S.D.N.Y. 2012). (ECF No. 55, at 21-28.)

Judge Seibel denied defendants' motion as to counts I and III against FedEx Corp. and FedEx Services, both of which allege RICO violations. *Id.* at 287-91. (ECF No. 55, at 13-21.) These counts assert the existence of a RICO enterprise, defined as "the FedEx Ground Enterprise consisting solely of FedEx Ground." (*Id.* ¶¶ 65, 117.) Plaintiff alleges that defendants "conduct[ed] and participate[d] in the affairs of the Enterprise through a pattern of racketeering activity." (*Id.* ¶¶ 67, 118.)

In their original motion to dismiss these counts, which Judge Seibel denied, defendants "argue[d] that Plaintiff's Section 1962(c) RICO claim fails as a matter of law because Plaintiff fails to allege (1) an adequately distinct enterprise ...; (2) the required 'pattern of racketeering activity,' ...; (3) plausible or particularly-pleaded predicate acts of mail and/or wire fraud ...; and (4) the required operation or control." *U1IT4less*, 896 F. Supp. 2d at 287. (ECF No. 55, at 13.) The Court rejected each of these arguments at that stage. The first of those alleged shortcomings, the asserted failure to plead distinctness, is most relevant to the instant motion.

Judge Seibel wrote that "[d]efendants, relying principally on *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055 (2d Cir. 1996), argue that the FedEx Ground Enterprise

(consisting solely of FedEx Ground) is not distinct from its parent FedEx [Corp.] or from its sister FedEx Services because all are 'businesses operating in a unified corporate structure.'" *Id.* (ECF No. 55, at 14 (quoting ECF No. 43, at 24.).) Judge Seibel rejected this argument in light of *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001). Judge Seibel quoted that case in noting that FedEx Corp., FedEx Services, and FedEx Ground "are each 'distinct legal entit[ies], with legal rights, obligations, powers, and privileges different from' each other." *U1IT4less*, 896 F. Supp. 2d at 288 (quoting *Cedric Kushner*, 533 U.S. at 163). (ECF No. 55, at 15.) She concluded from this that "[t]he logic of *Cedric Kushner* ... renders plausible the conclusion that the FedEx Ground Enterprise is distinct from FedEx [Corp.] and FedEx Services." *Id.* (ECF No. 55, at 15.) In a footnote, Judge Seibel remarked that plaintiff's complaint "alleges that FedEx Ground, originating as a separate company and with separate corporate headquarters, may not merely be part of FedEx's 'unified corporate structure,' and may not be the equivalent of a division operating within FedEx," which might provide an alternative basis for rejecting defendant's motion to dismiss. *Id.* at 288 n.10 (citations omitted) (quoting *Discon*, 93 F.3d at 1064). (ECF No. 55, at 15 n.10.) In another footnote, Judge Seibel questioned whether "*Discon* is still good law despite the logic of *Cedric Kushner*." *Id.* at 288 n.11. (ECF No. 55, at 15 n.11.)

In February 2015 the case was reassigned to the undersigned. In May 2015 defendants moved for partial summary judgment dismissing plaintiff's class claims on the ground that plaintiff had contractually waived its

ability to participate in a class action against defendants. (ECF No. 156.) The Court granted defendants' motion in June, (ECF No. 169) and denied plaintiff's motion for a certification of interlocutory appeal in July. (ECF Nos. 170, 171.) The Court also denied a motion to compel the production of documents plaintiff filed. (ECF Nos. 172, 175.) In its order denying that motion, the Court noted that

> [w]hile the RICO [claim] has not been dismissed, it is highly unlikely to survive once a motion to dismiss it (under 12(c) or 56) is made. According to longstanding Second Circuit precedent, a corporation cannot, through conduct of its ordinary business, constitute an enterprise. *See Cruz v. FXDirectDealer, LLC*, 720 F.3d 115, 120-121 (2d Cir. 2013); *Riverwoods v. Marine Midland Bank*, 30 F.3d 339, 344 (2d Cir. 1994).

(ECF No. 175, at 3.) Defendants filed the instant motion on October 16, and it became fully briefed on December 4. (ECF Nos. 181, 198.)

II. LEGAL PRINCIPLES

A. Summary Judgment Standard

Summary judgment may not be granted unless a movant shows, based on admissible record evidence, "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the burden of demonstrating "the absence of a genuine issue of material

fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). In reviewing a motion for summary judgment, the Court must "construe all evidence in the light most favorable to the nonmoving party, drawing all inferences and resolving all ambiguities in its favor." *Dickerson v. Napolitano*, 604 F.3d 732, 740 (2d Cir. 2010).

Once the moving party has asserted facts showing that the nonmoving party's claims cannot be sustained, the opposing party must set out specific facts showing a genuine issue of material fact for trial. *Price v. Cushman & Wakefield, Inc.*, 808 F. Supp. 2d 670, 685 (S.D.N.Y. 2011); *see also Wright v. Goord*, 554 F.3d 255, 266 (2d Cir. 2009). "[A] party may not rely on mere speculation or conjecture as to the true nature of the facts to overcome a motion for summary judgment," because "[m]ere conclusory allegations or denials . . . cannot by themselves create a genuine issue of material fact where none would otherwise exist." *Hicks v. Baines*, 593 F.3d 159, 166 (2d Cir. 2010) (citations omitted); *see also Price*, 808 F. Supp. 2d at 685 ("In seeking to show that there is a genuine issue of material fact for trial, the non-moving party cannot rely on mere allegations, denials, conjectures or conclusory statements, but must present affirmative and specific evidence showing that there is a genuine issue for trial.").

Only disputes relating to material facts—*i.e.*, "facts that might affect the outcome of the suit under the governing law"—will properly preclude the entry of summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *see*

also Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (stating that the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts"). The Court should not accept evidence presented by the nonmoving party that is so "blatantly contradicted by the record . . . that no reasonable jury could believe it." *Scott v. Harris*, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007); *see also Zellner v. Summerlin*, 494 F.3d 344, 371 (2d Cir. 2007) ("Incontrovertible evidence relied on by the moving party . . . should be credited by the court on [a summary judgment] motion if it so utterly discredits the opposing party's version that no reasonable juror could fail to believe the version advanced by the moving party.").

B. RICO Distinctness

Section 1962(c) of the RICO Act makes it "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. § 1962(c). The statute provides a private cause of action. *See* 18 U.S.C. § 1964(c). For RICO purposes, "'person' includes any individual or entity capable of holding a legal or beneficial interest in property," and "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(3)-(4).

"[T]o establish liability under § 1962(c) one must allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001).

III. ANALYSIS

This motion requires the Court to determine whether the alleged RICO persons, FedEx Corp. and FedEx Services, are sufficiently distinct from the alleged RICO enterprise, FedEx Ground, to support civil RICO liability.[4] For the reasons set forth below, the Court concludes that they are not.

Congress declared that its purpose in passing the RICO statute was "to seek the eradication of organized crime in the United States." *United States v. Turkette*, 452 U.S. 576, 589, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981) (quoting Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970)). Although "the major purpose of [the RICO Act] is to address the infiltration of legitimate business by organized crime," *id.* at 591, its legislative history "also refers to the need to protect the public from those who would run 'organization[s] in a manner detrimental to the public interest.'" *Cedric Kushner*, 533 U.S. at 165 (alteration in original) (quoting

4. Defendants have also advanced alternative arguments in support of summary judgment. (*See* ECF No. 182, at pp. 13-24.) Because the Court grants summary judgment on the "distinctness principle" issue, it does not consider these alternative bases.

S. Rep. No. 91-617, at 82 (1969)). RICO liability thus potentially sweeps much more broadly than the particular criminal underworld whose seeming impunity to state law enforcement efforts motivated the Act's passage. Nonetheless, the Second Circuit has cautioned courts to carefully scrutinize RICO claims "because of the relative ease with which a plaintiff may mold a RICO pattern from allegations that, upon closer scrutiny, do not support it." *Crawford v. Franklin Credit Mgmt. Corp.*, 758 F.3d 473, 489 (2d Cir. 2014) (quoting *Efron v. Embassy Suites (Puerto Rico), Inc.*, 223 F.3d 12, 20 (1st Cir. 2000)); *cf. C.A. Westel de Venez. v. American Tel. & Tel. Co.*, No. 90 Civ. 6665 (PKL), 1994 U.S. Dist. LEXIS 14481, 1994 WL 558026, at *7 (S.D.N.Y. Oct. 11, 1994) ("Plaintiff has attempted to plead a RICO violation in what is essentially a routine commercial dispute.").

Section 1962(c) of the RICO Act prohibits a person from unlawfully conducting the affairs of a separate, distinct enterprise. The statute's "distinctness principle" has been the subject of a number of decisions binding on the Court. However, the Court is not aware of any case precisely like this one, in which the alleged RICO persons are the corporate parent and sister subsidiary of the alleged RICO enterprise, a wholly-owned subsidiary. In order to determine what the distinctness requirement demands in this case, the Court must examine a number of binding decisions in light of the RICO statute's basic purposes, which the Supreme Court has identified as "both protect[ing] a legitimate 'enterprise' from those who would use unlawful acts to victimize it and also protect[ing] the public from those who would unlawfully use an 'enterprise' (whether legitimate or illegitimate) as a vehicle through

which unlawful activity is committed." *Id.* at 164 (internal quotation marks, alteration, and citations omitted).

In *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339 (2d Cir. 1994), the Second Circuit affirmed a district court's decision to enter a directed verdict for the defendants on a § 1962(c) claim. The plaintiff had alleged that the defendant bank was the RICO person and alleged "an association-in-fact enterprise known as the 'Restructuring Group,'" which consisted of the bank and two of its loan officers. *Id.* at 341. In light of the evidence "that the individual members of the Restructuring Group were employed by Marine Midland at the relevant times," and that "all of the actions taken by the Restructuring Group ... were undertaken on behalf of Marine Midland and were directly related to the bank's business," the Second Circuit held that RICO liability was unavailable. *Id.* at 344-45. "[T]he distinctness requirement may not be circumvented," the *Riverwoods* court warned, "by alleging a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant." *Id.* at 344.

The Second Circuit reached a similar conclusion in *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055 (1996), *vacated on other grounds*, 525 U.S. 128, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998). In *Discon* , the plaintiff, a corporation providing "removal services"[5] to phone companies,

5. "[R]emoval services include salvaging and disposing of obsolete telephone central office equipment." *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1057 (1996), *vacated on other grounds*, 525 U.S. 128, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998).

brought RICO claims against a holding company and two of its wholly owned subsidiaries, one of which was a local telephone service provider and the other of which provided procurement services for the holding company and a number of sister subsidiaries. *Id.* at 1057. The thrust of the complaint was that the procurement subsidiary purchased removal services for the local service provider subsidiary at inflated rates, cutting plaintiff out of the market. *Id.* at 1058. Plaintiff identified all three corporations (that is, the holding company and the two subsidiaries) as the RICO persons who conducted the affairs of an association-in-fact enterprise labeled "the 'NYNEX Group,' which consist[ed] of the three corporations." *Id.* at 1063. The Second Circuit concluded that *Riverwoods* controlled. Although the defendant corporations were "legally separate from each other and from the NYNEX Group," they nonetheless "were acting within the scope of a single corporate structure, guided by a single corporate consciousness." *Id.* at 1064. The *Discon* court held that under these circumstances, the requisite distinctness between RICO person and RICO enterprise was absent, precluding RICO liability.

Five years after *Discon*, a Second Circuit case on RICO distinctness advanced to the Supreme Court. In *Cedric Kushner Promotions, Ltd. v. King*, 219 F.3d 115 (2d Cir. 2000), *rev'd*, 533 U.S. 158, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001), the complaint asserted a RICO claim against boxing promoter Don King. *Id.* at 116. King was both the president and sole shareholder of a closely held corporation, DKP, and the allegations concerned actions he took within the scope of his employment. *Id.* at 116-17. The

complaint named King as the RICO person, while DKP was the alleged RICO enterprise. *Id.* at 117. The Second Circuit held that its "decisions in *Riverwoods* and *Discon* ... leave no room for creating exceptions to the distinctness requirement based on the identity of the defendant." *Id.* Thus, "[a]s it [was] undisputed that King was an employee acting within the scope of his authority at DKP," the RICO allegations failed the distinctness principle. *Id.*

A unanimous Supreme Court reversed. 533 U.S. at 166. It endorsed the distinctness principle as consistent with the language and purposes of the RICO statute, *id.* at 161-62, but rejected the Second Circuit's focus on whether King had been acting within the scope of his authority as an employee of the RICO enterprise corporation. *Id.* at 163. Instead, the Supreme Court noted that "[t]he corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status. And we can find nothing in the statute that requires more 'separateness' than that." *Id.*

The *Cedric Kushner* Court also distinguished that case from the precedent the Second Circuit had cited, *Riverwoods* and *Discon*. Noting that it did not intend to "consider the merits of these cases," the Court drew a distinction between the facts of the case before it and earlier Second Circuit precedent that "concerned a claim that a corporation was the 'person' and the corporation, together with all its employees and agents, were the 'enterprise.'" *Id.* at 164. Returning to the statute's text, the Court observed that "[i]t is less natural to speak of

a corporation as 'employed by' or 'associated with' this latter oddly constructed entity." *Id.*

The Second Circuit has applied *Cedric Kushner*'s refinement of the RICO distinctness principle twice. In *City of New York v. Smokes-Spirits.com, Inc.*, 541 F.3d 425 (2d Cir. 2008), *rev'd on other grounds*, 559 U.S. 1, 130 S. Ct. 983, 175 L. Ed. 2d 943 (2010), the Second Circuit reversed the district court's dismissal of the City's RICO claims. *Id.* at 438. The complaint alleged two forms of RICO enterprises: in one form, called "primary enterprises," "a defendant corporate entity is alleged to be a passive enterprise with its defendant officer(s) and/or director(s) acting as the RICO 'person[s],'" while in the other, called "association-in-fact enterprises," "the association consists of a defendant entity and a third party, and the RICO 'person[s]' consist of the defendant entity and, in general, the officers and/or directors of the entities comprising the enterprise." *Id.* at 435.

The Smokes-Spirits.com decision analyzed whether the primary enterprises were distinct for RICO purposes. According to the City's complaint, "the enterprise is an innocent corporation, with its own legal basis for existing, and the persons are employees or officers of the organization unlawfully directing the enterprise's racketeering activities." *Id.* at 448. The Second Circuit held that these allegations were "sufficient under the distinctness standards articulated in *Cedric Kushner*," which required "that the RICO 'person' and alleged 'enterprise' must be only legally, not necessarily actually, distinct." *Id.* (citing *Cedric Kushner*, 533 U.S. at 163). It thus allowed the City's civil RICO claims to proceed.

More recently, in *Cruz v. FXDirectDealer, LLC*, 720 F.3d 115 (2d Cir. 2013), the Second Circuit reaffirmed the continued vitality, for at least some purposes, of *Riverwoods* and *Discon*. In *Cruz*, the court affirmed the dismissal of a RICO claim that alleged that one wholly owned corporation was the RICO person who improperly conducted the affairs of an enterprise consisting of that corporation, its COO, its managing director, and its parent company.[6] *Id.* at 120-21. The decision quoted *Riverwoods* to explain that the COO and director were not distinct because "a RICO enterprise may [not] consist 'merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant.'" *Id.* at 121 (quoting *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994)). Left with an enterprise consisting only of the alleged RICO person and its parent company, the *Cruz* court found that this violated the distinctness requirement recognized in *Discon*, "that corporations that are legally separate but 'operate within a unified corporate structure' and 'guided by a single corporate consciousness' cannot be both the 'enterprise' and the "person" under § 1962(c)." *Id.* (quoting *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1064 (2d Cir. 1996), *vacated on other grounds*, 525 U.S. 128, 119 S. Ct. 493, 142 L. Ed. 2d 510 (1998)). In a footnote,

6. The complaint alleged that other entities also participated in the enterprise, but the Second Circuit found that those entities were not plausibly alleged to share a common purpose and thus excluded them separately before considering the distinctness of "the remaining members of the alleged enterprise—FXDD, Tradition, corporate counsel, and the chief operating officer." *Cruz v. FXDirectDealer, LLC*, 720 F.3d 115, 121 (2d Cir. 2013).

the Second Circuit noted that because the complaint only alleged an association-in-fact enterprise, the opinion did not "address whether the Supreme Court's decision in *Cedric Kushner* ... would permit a complaint naming [a subsidiary] as the 'person' and [its parent corporation] alone as the 'enterprise' to go forward." *Id.* at 121 n.3.

The hypothetical the *Cruz* decision raised closely resembles the allegations in the instant matter; rather than accusing a subsidiary of conducting the affairs of its parent company, the alleged enterprise, plaintiff alleges that a holding company, FedEx Corp., and one of its wholly owned subsidiaries, FedEx Services, are the RICO persons conducting the affairs of the alleged RICO enterprise, FedEx Ground, another wholly owned subsidiary. (TAC ¶¶ 44, 65, 104, 117.) The similarity between the facts of this case and the hypothetical the *Cruz* court explicitly identified as an open question refutes plaintiff and defendants' dueling insistence that controlling precedent clearly addresses the question before the Court.

Fortunately, several other Courts of Appeals have identified a RICO distinctness test that bridges the apparent gap between the Supreme Court's focus on legal identity in *Cedric Kushner* and the Second Circuit's reaffirmation of *Discon* in *Cruz.* In *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923 (7th Cir. 2003), the Seventh Circuit rejected a RICO claim on distinctness grounds. In that case, as in this one, "the enterprise alleged to have been conducted through a pattern of racketeering activity ... [was] a wholly owned subsidiary of the alleged racketeer." *Id.* at 934. Judge Posner, writing for the

court, explained that this separate incorporation did not constitute "sufficient distinctness to trigger RICO liability ... unless the enterprise's decision to operate through subsidiaries rather than divisions somehow facilitated its unlawful activity." *Id.* The Sixth Circuit has adopted the same test, holding that although "a parent corporation and its subsidiaries [typically] do not satisfy the distinctness requirement," they may incur RICO liability "when the parent corporation uses the separately incorporated nature of its subsidiaries to perpetrate a fraudulent scheme." *In re ClassicStar Mare Lease Litig.*, 727 F.3d 473, 493 (6th Cir. 2013).

A number of other post-*Cedric Kushner* decisions are consistent with this inquiry into whether the fact of separate incorporation facilitated the alleged unlawful activity. *See, e.g.*, *In re Countrywide Fin. Corp. Mortg. Mktg. & Sales Practices Litig.*, 601 F. Supp. 2d 1201, 1213-15 (S.D. Cal. 2009) (adopting the *Bucklew* test in absence of controlling Ninth Circuit precedent); *Chagby v. Target Corp.*, No. CV 08-4425-GHK (PJWx), 2009 U.S. Dist. LEXIS 130165, 2009 WL 398972, at *1 n.2 (C.D. Cal. Feb. 11, 2009) ("If, as alleged, Target Corp. and its subsidiaries are a RICO enterprise, then every corporation that has subsidiaries and commits fraud is an enterprise for RICO purposes. That is not the law."); *Buyers & Renters United To Save Harlem v. Pinnacle Grp. N.Y., Inc.*, 575 F. Supp. 2d 499, 510-11 (S.D.N.Y. 2008) (holding that distinctness analysis in cases involving subsidiaries turns on whether the corporations are in distinct lines of business, citing *Securitron Magnalock Corp. v. Schnablock*, 65 F.3d 256, 263-64 (2d Cir. 1995)); *Bates v. Nw. Human Servs., Inc.*, 466 F. Supp. 2d 69, 84 (D.D.C. 2006) (holding that, to

determine distinctness, "it is appropriate 'to look to the allegations in the complaint to determine whether the parent's activities are sufficiently distinct from those of [its subsidiaries] at the time that the alleged RICO violations occurred.'" (alteration in original) (quoting *Bessette v. Avco Fin. Servs., Inc.*, 230 F.3d 439, 449 (1st Cir. 2000))); *Z-TEL Communs., Inc. v. SBC Communs., Inc.*, 331 F. Supp. 2d 513, 561 (E.D. Tex. 2004) (applying *Bucklew*).

Limiting RICO liability in the parent-subsidiary context to circumstances in which separate incorporation facilitates the racketeering is also consistent with the text and purposes of the RICO statute. As noted above, the language of § 1962(c) clearly requires distinctness, and as the Sixth Circuit has held, "the statute's distinctness requirement will be rendered meaningless" "if a corporate defendant can be liable for participating in an enterprise comprised only of its agents—even if those agents are separately incorporated." *In re ClassicStar Mare Lease Litig.*, 727 F.3d 473, 492 (6th Cir. 2013). Moreover, neither of the dual purposes of the statute that the *Cedric Kushner* Court recognized, "protect[ing] a legitimate enterprise from those who would use unlawful acts to victimize it and also protect[ing] the public from those who would unlawfully use an enterprise (whether legitimate or illegitimate) as a vehicle through which unlawful activity is committed," apply to a situation in which an enterprise, although separately incorporated, operates with respect to the alleged racketeer and victim as if it were a division of its parent corporation.[7]

7. Careful analysis of the circumstances under which a parent corporation might face liability as a RICO person that conducted

Appendix C

The facts of this case indicate that there is no genuine question as to whether FedEx Ground's separate incorporation facilitated the alleged schemes; the "something more" is missing. Plaintiff emphasizes the fact that FedEx Ground originated as RPS and that its headquarters and high-level employees are located far from the Memphis headquarters of FedEx Corp. and FedEx Services. (ECF Nos. 189 & 190.) Plaintiff similarly collects a number of court filings in which FedEx Corp. and its various subsidiaries attest to their legal separation and distinctness from one another. (*See* Pl.'s 56.1 ¶ 44.) Neither of these facts indicate that the corporations at issue are distinct in the manner relevant to the RICO statute. There are many reasons a company may choose to make use of separate incorporation of its subsidiaries, and § 1962(c) does not stand for the proposition that every company that commits fraud after doing so violates the RICO Act. *See, e.g.*, *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 227 (7th Cir. 1997) (Posner, J.,) ("We have never heard it suggested that RICO was intended to encourage vertical integration.").

The fact of legal separation between FedEx Corp., FedEx Services, and FedEx Ground is wholly unrelated to the alleged improper acts in this case. There is no allegation in the complaint, nor any suggestion in the parties' subsequent submissions, that FedEx Ground's

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the affairs of its wholly owned subsidiary is also consistent with the Supreme Court's holding that such corporations are not legally capable of conspiring with one another for other purposes. *See Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 773-74, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984) (antitrust).

separate incorporation played any role in either the Upweighing claim or the Canadian Customs claim. This is not a case in which, for example, a parent corporation portrayed the separately incorporated entity as an unrelated corporation in furtherance of the unlawful scheme. *See In re ClassicStar*, 727 F.3d at 493-94 ("NELC's separate corporate existence and purported independence were key aspects of the fraudulent scheme.") Instead, plaintiff interacted with FedEx Ground and FedEx Services precisely as it would have had those sister subsidiaries in fact been divisions of a single FedEx corporation. Therefore, there is no genuine question as to whether FedEx Corp. and FedEx Services are distinct from FedEx Ground for purposes of the RICO claims in the instant action. They are not, and for that reason RICO liability does not attach.

IV. CONCLUSION

For the reasons stated above, defendants' motion for summary judgment is GRANTED. The Clerk of Court is directed to terminate the motion at Docket No. 181 and to terminate this action.

SO ORDERED.

Dated: New York, New York
January 27, 2016

/s/ Katherine B. Forrest
KATHERINE B. FORREST
United States District Judge

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK, FILED JANUARY 27, 2016

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

11 CIVIL 1713 (KBF)

U1IT4LESS, INC., D/B/A NYBIKERGEAR,

Plaintiff,

-against-

FEDEX CORPORATION, FEDEX CORPORATE SERVICES, INC., AND FEDEX GROUND PACKAGE SYSTEM, INC.,

Defendants.

Defendants having moved for summary judgment (Doc. #181), and the matter having come before the Honorable Katherine B. Forrest, United States District Judge, and the Court, on January 27, 2016, having rendered its Opinion & Order (Doc. #205) granting Defendants' motion for summary judgment and directing the Clerk of Court to terminate the motion at Docket No. 181 and to terminate this action, it is,

ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion & Order

dated January 27, 2016, Defendants' motion for summary judgment is granted; accordingly, the case is closed.

Dated: New York, New York
January 27, 2016

RUBY J. KRAJICK
Clerk of Court

BY:
/s/ K. Mango
Deputy Clerk

APPENDIX E — OPINION OF THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK, FILED SEPTEMBER 25, 2012

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

11-CV-7163 (CS)

U1IT4LESS, INC. D/B/A NYBIKEGEAR,

Plaintiff,

-against-

FEDEX CORPORATION, FEDEX CORPORATE SERVICES, INC., AND FEDEX GROUND PACKAGE SYSTEM, INC.,

Defendants.

September 25, 2012, Decided;
September 25, 2012, Filed

OPINION AND ORDER

Seibel, J.

Before the Court is Defendants' Motion to Dismiss Plaintiff's Second Amended Complaint pursuant to Rules 9(b) and 12(b)(6), (Doc. 42). For the following reasons, Defendants' Motion is GRANTED IN PART and DENIED IN PART.

Appendix E

I. Background

For purposes of Defendants' Motion, I accept as true the facts (but not the conclusions) as stated in the Second Amended Complaint ("SAC"). Plaintiff is an internet retailer that sells motorcycle gear such as helmets, boots, goggles, chaps, jackets, and vests, shipping within the United States and internationally. (SAC ¶ 21.) Defendant FedEx Ground Package System, Inc. ("FedEx Ground"), a Delaware corporation with its principal place of business in Moon Township, Pennsylvania, ships and delivers small packages by motor carrier in the United States and Canada. (*Id.* ¶ 28.) Defendant FedEx Corporation ("FedEx"), a Delaware Corporation with its principal place of business in Memphis, Tennessee, is the parent corporation of FedEx Ground. (*Id.* ¶ 26.) Until FedEx acquired and rebranded it, FedEx Ground was Roadway Package System, a subsidiary of Caliber Systems, Inc. with its principal place of business in Pittsburgh, Pennsylvania. (*Id.* ¶ 31.) FedEx Ground is one of only two companies that provide fast and reliable small package delivery services both nationwide and internationally. (*Id.* ¶ 32.) FedEx funds, controls, and oversees FedEx automation software and the information technology involved in weighing, measuring, rating, pricing, billing, and paying for FedEx Ground's services. (*Id.* ¶ 26.) FedEx is also the parent company of Defendant FedEx Corporate Services, Inc. ("FedEx Services"), a Delaware corporation with its principal place of business in Memphis, Tennessee. (*Id.* ¶¶ 26-27.) FedEx Services manages, supports, and provides customer service for the information technology used in connection with scanning, data collection, sorting,

weighing, measuring, rating, and billing for FedEx Ground. (*Id.* ¶ 27.)

FedEx Ground neither handles its own billing nor provides online or software driven shipping solutions; these functions are performed by FedEx Services and overseen by FedEx. (*Id.* ¶ 34.) FedEx automation software and website access to fedex.com are licensed to customers of FedEx Ground so that they can both electronically transmit shipment details (such as package weight and dimensions) to Defendants and receive shipment information (such as status, history, and account summaries) from Defendants. (*Id.* ¶¶ 34-35.) Following a pick-up by a FedEx Ground truck, packages are forwarded to FedEx Ground's nearest hub or automated satellite for sorting and processing. (*Id.* ¶ 36.) As a package works its way through the hub or satellite, information technology managed and supported by FedEx Services automatically calculates the package's weight and physical dimensions and routes it based on information encoded on the shipping label. (*Id.* ¶ 38.)[1] Charges, surcharges, and fees for packages shipped by FedEx Ground are computed

1. The SAC implies that FedEx does not control or oversee this stage of FedEx Services's operations. (*Compare* SAC ¶ 38 (not specifically alleging FedEx control or oversight of automatic weight and dimension calculation), *with id.* ¶ 41 (specifically alleging FedEx control and oversight of automatic package routing).) This is somewhat inconsistent with the allegation that "FedEx has funded and overseen and FedEx Services has managed and supported the alteration and operation of such information technology in connection with weighing, computing and transmitting charges, and collecting payment for packages transported by FedEx Ground." (*See id.* ¶ 68.B.)

based on a number of factors, including package weight. (*Id.* ¶ 42.) For packages smaller than three cubic feet, the package weight is the actual weight; for larger packages, it is the greater of the actual weight or dimensional weight (length times width times height). (*Id.* ¶ 43.)

A. The "Upweighting" Scheme Allegations

Plaintiff was a customer of FedEx Ground from about July 2008 until August 2010. (*Id.* ¶ 22.) Plaintiff licensed FedEx automation software so that Plaintiff could transmit details of each of its shipments to Defendants, print shipping labels, and schedule pick-ups with FedEx Ground. (*Id.* ¶ 23.) Plaintiff also purchased a scale (to weigh packages) from a FedEx authorized vendor. (*Id.* ¶ 24,) Nearly all of the packages Plaintiff shipped via FedEx Ground were smaller than three cubic feet and therefore were rated based upon their actual weight. (*Id.*; *see id.* ¶ 60.)

Plaintiff shipped hundreds of packages weekly via FedEx Ground. (*Id.* ¶ 51.) Over the period from March 2009 to May 2010, Plaintiff was charged for a shipment weight that was greater than the actual package weight at least 150 times. (*See id.* ¶¶ 57-58, 74; *see also* Plaintiff's First Amended RICO Statement ("RICO Stmt."), (Doc. 31), Ex. A.)[2] Internet postings dating from 2007 onward

2. The SAC incorporates by reference the RICO Stmt. (SAC ¶ 74.) Exhibit A of the RICO Stmt, lists the date, tracking number, actual weight, and "upweight" of approximately 150 of Plaintiff's packages shipped over a period of about fourteen months. (RICO Stmt. Ex. A.) The dates of invoices and bank debit notifications for a number of shipments are listed in Exhibit B. (*Id.* Ex. B.)

indicate that others experienced the same pattern of upweighting. (*Id.* ¶¶ 49, 78.) According to the SAC, such upweighting is the result of "a continuing scheme or artifice to defraud" Plaintiff and others, (*id.* ¶ 46), in furtherance of which Defendants FedEx and FedEx Services perpetrated, among other things, the following: "commandeering, designing or altering the design of, [or] managing and supporting information technology that can cause package weight... to be fixed at a fictive higher weight than its actual weight," (*id.* ¶ 47.A); "seeking and receiving payment... for artificially inflated charges attributable to upweighting," (*id.* ¶ 47.D); and "perpetuating, facilitating and concealing upweighting . . . and attempting to unfairly shield themselves from liability by creating and implementing a labyrinthine and corrupt BRE [billing and revenue enhancement] Model... which incorporates a 'caveat emptor' billing process with little or no quality control, a byzantine online and email-based invoicing system... that obscures billing discrepancies, and . . . includes draconian billing adjustment terms and conditions, and other unfair and deceptive structures, terms and tools designed to disadvantage customers in their transactions with defendants," (*id.* ¶ 47.E). For example, Defendants' billing system disaggregates charges for a single shipment into many different statements, "with no single invoice itemizing and totaling all the charges included in each transaction," making it difficult for shippers to piece together the total charge for a single shipment. (*Id.* ¶ 47.E.i.) Plaintiff alleges that the upweighting it experienced cannot be unintentional because its upweighted packages were not confined to a specific facility or zone, and others experienced the same upweighting. (*Id.* ¶ 49.)

Appendix E

Plaintiff first became aware of an upweighted shipment when two employees of FedEx Services visited Plaintiff on September 15, 2010. (*Id.* ¶ 55.) Plaintiff later identified 150 specific examples of upweighting. (*Id.* ¶ 57.) Plaintiff apparently informed a representative of FedEx Services of these upweighted transactions. (*See id.* ¶ 61.) In response, FedEx Services, in correspondence dated November 15, 2010, acknowledged that such upweighting occurred in hundreds of instances, and agreed to re-rate roughly 200 shipments. (*Id.* ¶ 62.)[3] On January 7, 2011, Plaintiff received a check for $134.45 issued by FedEx referencing a single invoice number. (*Id.* ¶ 64.)

Plaintiff alleges that FedEx and FedEx Services have conducted and participated in the affairs of the FedEx Ground Enterprise (consisting solely of FedEx Ground, (*id.* ¶ 66)) through a pattern of racketeering activity in

3. Defendants included an apparent copy of the email correspondence as Exhibit 1 to its Reply in Support of Defendants' Motion to Dismiss ("Ds' Reply Mem."), (Doc. 49), and dispute the SAC's characterization of it as an admission of upweighting, (*id.* at 13-14). If Defendants intended to dispute allegations in the SAC based on documentary evidence — which would have been permissible here because the November 15, 2010 email is relied upon in the SAC, *see, e.g., Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002); *Weiss v. Inc. Vill. of Sag Harbor*, 762 F. Supp. 2d 560, 567 (E.D.N. Y. 2011) — the document should have been submitted with Defendants' opening brief. *Cf. Playboy Enters., Inc. v. Dumas*, 960 F. Supp. 710, 720 n.7 (S.D.N.Y, 1997) ("Arguments made for the first time in a reply brief need not be considered by the court,") (collecting cases). In any event, the email plainly contains a statement that about 200 packages would be re-rated downward, and whether it contains an acknowledgement of upweighting is immaterial to the disposition of the instant Motion.

violation of Section 1962(c) of the Racketeer Influenced and Corrupt Organizations ("RICO") Act. (*Id.* ¶ 68.) According to the SAC: FedEx heads a hierarchical decision-making structure led by its information technology management team — headed by Robert B. Carter, an officer of both FedEx and FedEx Services — which oversees the relevant activities of FedEx Services, (*id.* ¶ 68.A); FedEx has commandeered control of and funded and overseen the alteration and operation of certain information technology — managed and supported by FedEx Services — in connection with weighing, computing, and transmitting charges, and collecting payment for packages transported by FedEx Ground, (*id.* ¶ 68.B); FedEx and FedEx Services have used electronic transmissions to exchange data relating to customer charges, (*id.* ¶ 68.D); and FedEx Services has used the United States mails and electronic transmissions to assess charges and obtain payment for packages transported by FedEx Ground, (*id.* ¶ 68.E). Plaintiff alleges that FedEx and FedEx Services have violated 18 U.S.C. §§ 1341 and 1343 "in what likely involved millions of separate instances, [by making] use of U.S, mails and interstate wire facilities in the form of, among others, emails, credit card transmissions and electronic funds transfers." (*Id.* ¶ 71.) Plaintiff further alleges that FedEx, FedEx Services, and FedEx Ground violated 49 U.S.C. § 13708(b) ("Section 13708(b)") by communicating documents containing inflated charges attributable to upweighting. (*Id.* ¶ 146.) Plaintiff also alleges that FedEx and FedEx Services have violated Section 349 of New York General Business Law ("Section 349") by perpetrating the upweighting in New York. (*Id.* ¶¶ 150, 154.)

B. Conspiracy Allegations

United Parcel Service, Inc. ("UPS") is not a party to this litigation. UPS and FedEx Ground are the two leading small package ground delivery companies. (*Id.* ¶ 32.) Plaintiff alleges that UPS has implemented a billing revenue enhancement model similar to FedEx's, (*id.* ¶ 87), and that UPS has changed the dimensions of packages qualifying for dimensional weighting in an upward direction, (*id.* ¶ 88). UPS and FedEx announced a mutual corporate policy to prevent customers from using third-party consultants to negotiate contracts, audit invoices, and process claims on behalf of shippers who use FedEx Ground and UPS. (*See id.* ¶¶ 90-91.) Plaintiff alleges that such mutual policy served the purpose of concealing, maintaining, and perpetuating FedEx's and UPS's upweighting schemes, (*id.* ¶ 92), which could not be maintained in the policy's absence, (*id.* ¶ 93), and thus amounts to a conspiracy to violate Section 1962(c) in violation of Section 1962(d) of the RICO Act, (*see id.* ¶ 94).

C. The "Canadian Customs" Scheme Allegations

Under FedEx's standard agreements, the shipper pays Canadian customs or duties, taxes, and related charges ("Canadian Customs") on shipments from the United States to Canada, unless the shipper informs FedEx that the package recipient is to pay such charges. (*Id.* ¶ 106.) Although Plaintiff designated on each package it shipped to Canada that the recipient would pay, Plaintiff was repeatedly charged for Canadian Customs. (*Id.* ¶ 107.) Despite either making no attempt to collect Canadian

Customs from package recipients or actually collecting from them, Defendants nevertheless notified Plaintiff by U.S. mail that they were unable to collect the Canadian Customs, and electronically debited Plaintiffs bank account for the same. (*Id.* ¶ 108.)

Plaintiff notified FedEx Services of these overcharges on or about September 28, 2009, (*id.* ¶ 110), and FedEx Services represented by correspondence dated October 8, 2009 that such charges were erroneous and due to a FedEx software problem which had been corrected, (*id.* ¶¶ 111-12). Nevertheless, Plaintiff continued to be improperly charged — at least 150 times — for Canadian Customs, (*Id.* ¶ 113.) According to Plaintiff, such charges are the result of a "continuing scheme to defraud United States shippers who designated the Canadian recipient of packages shipped by FedEx Ground as payer of [Canadian Customs]." (*Id.* ¶ 115.) In furtherance of this scheme, Plaintiff alleges that FedEx and FedEx Services have issued notifications that they were unable to collect Canadian Customs, despite not attempting to collect or actually collecting the same, (*id.* ¶ 116.A), and "developed and implemented the corrupt and labyrinthine BRE Model" alleged in connection with the upweighting scheme, (*id.* ¶ 116.B).

Plaintiff alleges that FedEx and FedEx Services have conducted and participated in the affairs of the FedEx Ground Enterprise (consisting solely of FedEx Ground, (*id.* ¶ 118)) through a pattern of racketeering activity in violation of Section 1962(c) of the RICO Act. (*Id.* ¶ 119.) According to Plaintiff, FedEx and FedEx Services

transmitted by U.S. mail and wire false statements contained in correspondence, billing statements, or notices of inability to collect, in violation of 18 U.S.C. §§ 1341 and 1343, (*id.* ¶ 122-23), and such transmissions contained knowing and intentional misrepresentations about Canadian Customs charges, (*id.* ¶ 124). Plaintiff further alleges that FedEx, FedEx Services, and FedEx Ground violated Section 13708(b) by communicating documents containing improperly-assessed Canadian Customs charges. (*Id.* ¶ 146.) Plaintiff also alleges that FedEx and FedEx Services have violated Section 349 by fraudulently assessing the Canadian Customs charges in New York, (*Id.* ¶¶ 150, 154.)

D. The "Missing Discount" Scheme Allegations

Under a FedEx Pricing Agreement,[4] Plaintiff is entitled to certain discounts when it or others ship packages by FedEx Ground under its FedEx-assigned billing number. (*Id.* ¶ 139.) Since at least as early as 2009, Defendants failed to apply or improperly applied such discounts. (*Id.* ¶ 140.) Plaintiff alleges that FedEx, FedEx Services, and FedEx Ground violated Section 13708(b) by communicating documents containing charges that did not reflect the promised discounts. (*Id.* ¶ 146.) Plaintiff also alleges that FedEx Ground, as party to the FedEx Pricing Agreement, was and is under a duty to ensure

4. The SAC is ambiguous as to whether there is only one such agreement, (*see* SAC ¶ 146), or more than one, (*see id.* ¶ 139). Defendants' brief is similarly ambiguous. (*See* Memorandum in Support of Defendants' Motion to Dismiss ("Ds' Mem."), (Doc. 43), 9 n.6.)

that discounts are properly applied to charges assessed for its services. (*Id.*)

E. Procedural Posture

Plaintiff commenced this action by filing a Complaint on March 11, 2011, (Doc. 1), and subsequently filed an Amended Complaint on May 27, 2011, (Doc. 27), and the SAC on August 29, 2011, (Doc. 41). Plaintiff brings claims against FedEx and FedEx Services for substantive RICO in violation of 18 U.S.C. § 1962(c) (Counts I and III), RICO conspiracy in violation of 18 U.S.C § 1962(d) (Count II), and violation of Section 349 (Count V). Plaintiff brings a claim against all Defendants for violation of Section 13708(b) (Count IV).

Defendants move to dismiss the SAC on the following grounds: (1) as to all claims, a License Agreement and E-Agreement require Plaintiff to have sued in the Western District of Tennessee within one year of any claim arising against Defendants, and Plaintiff has not done so, (*see* D's Mem. 20-21); (2) as to all RICO claims (Counts I, II, and III), Plaintiff has failed to plead (a) that FedEx Ground is a RICO "enterprise" distinct from RICO "persons" FedEx and FedEx Services, (b) facts showing the required relatedness or continuity of RICO "predicate acts," (c) facts plausibly or particularly demonstrating that Defendants committed the RICO predicate acts, and (d) facts plausibly demonstrating that FedEx or FedEx Services participated in the operation or management of the alleged RICO enterprise, (*see id.* at 24-33); (3) as to the RICO conspiracy claim (Count II), Plaintiff has failed to

adequately plead a conspiracy, (*see id.* at 33-39); (4) as to the Section 13708(b) claim (Count IV), there is no private right of action, and Plaintiff has not alleged a violation of Section 13708(b), (*see id.* at 39-44); and (5) as to the state-law claim (Count V), it is preempted and Plaintiff has failed to state a plausible claim, (*see id.* at 44-48).

II. Legal Standards

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)), "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (alteration, citations, and internal quotation marks omitted). While Federal Rule of Civil Procedure 8 "marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era,... it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." *Iqbal*, 556 U.S. at 678-79.

In considering whether a complaint states a claim upon which relief can be granted, the court may "begin

by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth," and then determine whether the remaining well-pleaded factual allegations, accepted as true, "plausibly give rise to an entitlement to relief." *Id.* at 679. Deciding whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged — but it has not 'show[n]' — 'that the pleader is entitled to relief.'" *Id.* (second alteration in original) (quoting Fed. R. Civ. P. 8(a)(2)).

III. Discussion

A. Defenses Based on Contract

When deciding a motion to dismiss, ordinarily the court's "review is limited to the facts as asserted within the four corners of the complaint, the documents attached to the complaint as exhibits, and any documents incorporated in the complaint by reference." *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 191 (2d Cir. 2007); *accord Faulkner v. Beer*, 463 F.3d 130, 134 (2d Cir. 2006). But the court can also consider documents where the complaint relies heavily on their terms and effect — that is, documents "integral" to the complaint. *See Chambers*, 282 F.3d at 153. Such reliance "is a necessary prerequisite to the court's consideration of the document on a dismissal motion; mere notice or possession is not enough." *Id.* Furthermore, "even if a document is 'integral'

to the complaint, it must be clear on the record that no dispute exists regarding the authenticity or accuracy of the document." *Faulkner*, 463 F.3d at 134.

Defendants argue that the SAC "implicates" the Service Guide,[5] License Agreement,[6] and E-Agreement[7] on its face, (Ds' Mem. 9), and that Plaintiff alleges facts "regarding, and thus, 'with respect to,' Plaintiff's use of FedEx software under the License Agreement and E-Agreement," (*id.* at 20-21). In arguing for dismissal based on the License Agreement and E-Agreement, Defendants rely on provisions of both that require claims arising with respect to the use of certain FedEx software to be brought in the Western District of Tennessee within one year. (*Id.* at 15-16.) Even assuming that the Service Guide, License Agreement, and E-Agreement are "integral" to the complaint, I find that they nevertheless do not govern the conduct of which Plaintiff complains.

With respect to both the License Agreement and the E-Agreement, Plaintiff has not alleged any wrongdoing relating to the operation of the software covered by these agreements; Plaintiff instead alleges that the wrongdoing

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5. "Service Guide" refers to the 2010 FedEx Service Guide, attached as Exhibit 2 of the Affirmation of P. Daniel Riederer in Support of Defendants' Motion to Dismiss ("Riederer Aff."), (Doc. 44).

6. "License Agreement" refers to the FedEx Ship Manager Software End-User License Agreement. (Riederer Aff. Ex. 3.)

7. "E-Agreement" refers to the FedEx Automation E-Agreement. (Riederer Aff. Ex. 4.)

occurred on Defendants' end, after Plaintiff had used the software to properly input package weights and transmit shipping information to Defendants. (SAC ¶¶ 47.A-B, 116.) It is at that point that Defendants are alleged to have upweighted packages, improperly charged Canadian Customs, and/or improperly failed to apply discounts. Because Plaintiff's claims do not arise out of Plaintiff's use of Defendants' licensed software, the clauses of the License Agreement and E-Agreement requiring that suits regarding that software be brought in the Western District of Tennessee within one year do not apply.[8]

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8. it is unclear whether Defendants actually argue that provisions of the Service Guide constitute an independent basis for dismissal. (*See* Ds' Mem. 11-15.) Defendants note that the Service Guide contains provisions requiring that "[Requests for invoice adjustment due to an overcharge . . . be made to [FedEx] Ground within 180 days" and "any civil claim for overcharges . . . be made within 18 months." (*Id.* at 13 (alterations and internal quotation marks omitted).) Defendants assert that Plaintiff "fails to plead the complete history of pre-suit adjudication of its inflated charge assertions for even a single package." (*Id.* at 14.) But then Defendants go on to conclude that that failure "has rendered it impossible to assess the plausibility of Plaintiffs allegation that certain charges should have been corrected by [FedEx] Ground because they were inflated. In view of this impossibility, Plaintiff's allegations of overcharges are certainly not 'facially plausible.'" (*Id.* at 14-15.) This argument misses the mark. The plausibility of Plaintiff's allegations is based on the factual content of the SAC as a whole. The SAC plausibly pleads that Plaintiff complained of overcharges to Defendants, and that Defendants did not correct them. (SAC ¶¶ 53-64; 110-13.) A detailed pleading of the "complete history of pre-suit adjudication for even a single package" is not required to reach this conclusion. Whether FedEx Ground knew of and failed to correct any particular overcharge has little, if any, bearing on the plausibility of the larger allegations that FedEx and FedEx

B. Civil RICO

The civil RICO statute makes it 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...." 18 U.S.C. § 1962(c). Defendants argue that Plaintiff's Section 1962(c) RICO claim fails as a matter of law because Plaintiff fails to allege (1) an adequately distinct enterprise, (Ds' Mem. 23-27); (2) the required "pattern of racketeering activity," (*id.* at 27-28); (3) plausible or particularly-pleaded predicate acts of mail and/or wire fraud, (*id.* at 28-32); and (4) the required operation or control, (*id.* at 32-33). I address each of these in turn.

1. Distinctness

"[T]o establish liability under § 1962(c), one must allege and prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Cedric*

Services engaged in a course of fraudulent conduct involving regular overcharges. This is a suit concerning an alleged fraudulent and widespread course of conduct, affecting numerous shipments over an extended period of time. The claim does not rise and fall on any single overcharge or group of overcharges not being corrected. Thus, to the extent that Defendants argue that "failure to plead a complete pre-suit adjudication for even a single package" constitutes a basis for dismissal of the suit, I disagree. Even if some transactions are outside the limits set forth in the Service Guide, the claims are still plausible to the extent described below.

Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161, 121 S. Ct. 2087, 150 L. Ed. 2d 198 (2001); *see City of N.Y. v. Smokes-Spirits.com, Inc.*, 541 F.3d 425, 447 (2d Cir. 2008) ("[T]he distinctness doctrine requires a plaintiff to demonstrate that the RICO person is legally separate from the RICO enterprise. . . ."), *rev'd on other grounds sub nom. Hemi Group, LLC v. City of N.Y., N.Y.*, 559 U.S. 1, 130 S. Ct. 983, 175 L. Ed. 2d 943 (2010).

Defendants, relying principally on *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055 (2d Cir. 1996), argue that the FedEx Ground Enterprise (consisting solely of FedEx Ground) is not distinct from its parent FedEx or from its sister FedEx Services because all are "businesses operating in a 'unified corporate structure.'" (Ds' Mem. 24-25.) Defendants cite a number of cases from within this district, many relying on *Discon*, as holding that RICO distinctiveness is not satisfied when the RICO "person" and "enterprise" are "companies in the same corporate family carrying out their regular business." (*Id.* at 25-26.) Plaintiff argues that the Supreme Court in *Cedric Kushner* "sharply limited" *Discon*, and that RICO distinctness is satisfied by the formal corporate distinctness here. (*See* P's Mem. 22-24).[9]

Cedric Kushner held that "[t]he corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status."

9. "P's Mem." refers to Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss. (Doc. 47.)

Cedric Kushner, 533 U.S. at 163. In so holding, the Court relied both on the legal effect of incorporation, *see id.* ("[I]ncorporation's basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the natural individuals who created it, who own it, or whom it employs."), and on the statutory definition of RICO "person" and RICO "enterprise," *see id.* ("person" includes "individual"; "enterprise" includes "corporation").

The Court's logic applies here, where a parent corporation and its subsidiary are alleged to be the RICO "person," and a separately incorporated subsidiary is alleged to be the RICO "enterprise." (SAC ¶¶ 45, 65-66.) As separately incorporated legal entities, FedEx and its subsidiaries FedEx Services and FedEx Ground are each "distinct legal entities], with legal rights, obligations, powers, and privileges different from" each other, just like a corporate owner/employee and the corporation itself. *See Cedric Kushner*, 533 U.S. at 163. And, the RICO statute contemplates corporations being both "person" and "enterprise." *See* 18 U.S.C. § 1961(3) ("person" includes "any . . . entity capable of holding a legal or beneficial interest in property"); *id.* § 1961(4) ("enterprise" includes a "corporation"); *cf. Cedric Kushner*, 533 U.S. at 163 (analyzing the statutory definitions of "person" and "enterprise" to support distinctness conclusion). The logic of *Cedric Kushner* thus renders plausible the conclusion that the FedEx Ground Enterprise is distinct from FedEx and FedEx Services.[10] *See Bates v. Nw. Human*

10. Further, although I need not definitively decide the issue, the SAC plausibly alleges that FedEx Ground, originating as a

Servs., Inc., 466 F. Supp. 2d 69, 82 (D.D.C. 2006) (the "fundamental principle articulated in *Kushner*" is "that so long as two entities 'are not legally identical,' they are sufficiently distinct for one to be named as a RICO person and the other as a RICO enterprise") (quoting *Cedric Kushner*, 533 U.S. at 166).[11]

2. Pattern of Racketeering Activity - Relatedness and Continuity

a. Legal Standard

A "pattern of racketeering activity" is defined as at least two predicate acts of racketeering within ten years of one another. *See* 18 U.S.C. § 1961(5). A "pattern"

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separate company and with separate corporate headquarters, may not merely be part of FedEx's "unified corporate structure," *Discon*, 93 F.3d at 1064, and may not be the equivalent of a division operating within FedEx, *see Panix Promotions, Ltd. v. Lewis*, No. 01-CV-2709, 2002 U.S. Dist. LEXIS 784, 2002 WL 72932, at *6 (S.D.N.Y. Jan. 17, 2002) (citing *Discon*, 93 F.3d at 1063-64), Thus, even if *Discon* retained some vitality, the claim might still survive at this stage.

11. *Cedric Kushner* specifically distinguished and declined to address *Discon. See Cedric Kushner*, 533 U.S. at 163. But even if *Discon* is still good law despite the logic of *Cedric Kushner*, it differs from this case in that *Discon* addressed an "enterprise" alleged to consist of a parent and two of its subsidiary corporations, where each of the three constituent corporations was alleged to be the RICO "person," *Discon*, 93 F.3d at 1057, and held that this arrangement did not satisfy the RICO distinctness requirement, *id.* at 1064. *Discon* simply did not address the situation here, where there is no overlap between the entities constituting the "person" and the entities constituting the "enterprise."

requires (1) "relatedness" among the predicate acts, and (2) acts that "themselves amount to, or . . . otherwise constitute a threat of, *continuing* racketeering activity." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 240, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989) (emphasis in original). Relatedness means "acts that have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* (internal quotation marks omitted); *see Cosmos Forms Ltd. v. Guardian Life Ins. Co.*, 113 F.3d 308, 310 (2d Cir. 1997) ("A relationship to show the existence of a pattern is indicated by temporal proximity of the acts, by common goal, methodology, and their repetition."). Regarding the continuity requirement, a "plaintiff in a RICO action must allege either an open-ended pattern of racketeering activity (i.e., past criminal conduct coupled with a threat of future criminal conduct) or a closed-ended pattern of racketeering activity (i.e., past criminal conduct extending over a substantial period of time)." *First Capital Asset Mgmt, Inc. v. Satinwood, Inc.*, 385 F.3d 159, 180 (2d Cir. 2004) (internal quotation marks omitted). "To satisfy open-ended continuity the plaintiff need not show that the predicates extended over a substantial period of time but must show that there was a threat of continuing criminal activity beyond the period during which the predicate acts were performed." *Cofacrèdit, S.A. v. Windsor Plumbing Supply Co.*, 187 F.3d 229, 242 (2d Cir. 1999). In the Second Circuit, two years of activity is usually required to establish a "substantial period of time" in the context of closed-ended continuity, *see First Capital Asset Mgmt.*, 385 F.3d at 181; *Cofacrèdit*, 187 F.3d at 242 (collecting

cases), although a shorter period may also suffice in "rare" circumstances, *see Spool v. World Child Int'l Adoption Agency*, 520 F.3d 178, 184 (2d Cir. 2008).

b. Relatedness

I find that Plaintiff has plausibly alleged relatedness of the predicate acts, as Plaintiff has clearly alleged at least that the acts are "interrelated by distinguishing characteristics and are not isolated events." *See H.J. Inc.*, 492 U.S. at 240. Plaintiff has alleged approximately 150 specifically-identified instances of upweighting, (SAC ¶ 49), and approximately 150 specifically-identified instances of Canadian Customs overcharges, (*id.* ¶ 113). The numerous acts of both upweighting and Canadian Customs overcharges all share distinguishing characteristics and are clearly not isolated events. *See H.J. Inc.*, 492 U.S. at 240. Furthermore, Plaintiff has alleged a detailed "labyrinthine and corrupt BRE Model" through which Defendants "perpetuat[e], facilitate[e], and conceal[] upweighting" and Canadian Customs overcharges, (SAC ¶¶ 47.E, 116), clearly a common method of commission, *see HJ. Inc.*, 492 U.S. at 240. Plaintiff has also alleged a purpose common to all instances of upweighting - namely to "earn[] hundreds of millions of dollars of illicit profits from the assessment of improper overcharges." (SAC ¶ 47.E.viii.) Profit presumably also motivates the Canadian Customs scheme. (*See id.* ¶ 131 (alleging "millions of dollars in improper overcharges based upon [Canadian Customs]"),) This suffices to allege relatedness. *See Cosmos Forms*, 113 F.3d at 310 (finding relatedness in repetitious fraudulent inflation of invoices over a fifteen-month period of time).

c. Open-Ended Continuity

I find that Plaintiff has plausibly alleged open-ended continuity. This case is analogous to *Cosmos Forms*, in which the Second Circuit held that seventy fraudulently inflated invoices submitted over fifteen months to one customer satisfied the tests for both relatedness and open-ended continuity. *See id.* Here, Plaintiff alleges numerous instances of upweighting and Canadian Customs overcharges, over approximately the same period of time as in *Cosmos Forms*. Furthermore, Plaintiff has adequately alleged a threat of continuing criminal activity. After Plaintiff complained of Canadian Customs overcharges in September 2009, and despite receiving a response on October 8, 2009 that this was due to a FedEx software problem that had been corrected, (SAC ¶¶ 110-12), Plaintiff continued to be improperly charged for Canadian Customs, (*id.* ¶ 113; RICO Stmt. Ex. B). Similarly, Defendants are alleged to have been on notice since at least 2007 of upweighting overcharges, and nevertheless continued to upweight. (SAC ¶ 49, 78.)[12] These allegations plausibly imply the requisite threat of continued overcharges.

d. Closed-Ended Continuity

I also find that Plaintiff has adequately pleaded closed-ended continuity with respect to the upweighting scheme,

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12. Whether the Internet postings dating from 2007 are true or not, their existence — unlikely to have been missed by Defendants — constitutes notice of the alleged practice to which Plaintiff was actually subjected (assuming the truth of the facts in the SAC) two years later.

because Plaintiff has plausibly alleged upweighting for more than two years within the period from 2007 to 2010. Plaintiff alleges the date and the nature of numerous particular instances of upweighting - including the date of the shipment, its tracking number, the original weight, and the shipment weight for which it was charged — spanning nearly seventeen months. (*See id.* ¶¶ 57-58; RICO Stmt. Ex. A).[13] In addition to these specific allegations, Plaintiff has alleged that "[a]s early as 2007, individuals posted reports of upweighting to online discussion forums," (SAC ¶ 178), and that "[p]ostings by consumers on numerous Internet websites [from 2007 on] indicate that many consumers have experienced the same pattern of upweighting by defendants as plaintiff has experienced," (*id.* ¶ 49).[14] Thus, between the numerous specifically-alleged predicate acts and the generally-alleged Internet reports, I find that Plaintiff has plausibly alleged closed-ended continuity with respect to the upweighting scheme.

3. Particularity of Predicate Acts

"A complaint alleging mail and wire fraud must show (1) the existence of a scheme to defraud, (2) defendant's

13. Although Plaintiff argues that it has specifically-alleged predicate acts over fourteen months, (*see* P's Mem. 27), it appears to the Court that the particularly-alleged instances of upweighting date from January 7, 2009 to June 1, 2010, a nearly seventeen-month period, (*see* SAC ¶ 57; RICO Stmt. Ex. B). Obviously, this only strengthens the plausibility of closed-ended continuity with respect to the upweighting scheme.

14. Internet postings would obviously be hearsay if relied on for their truth on summary judgment or at trial, but in the context of the instant motion and in the circumstances of this case, the postings contribute to the plausibility of closed-ended continuity.

knowing or intentional participation in the scheme, and (3) the use of interstate mails or transmission facilities in furtherance of the scheme." *S.Q.K.F.C., Inc. v. Bell Atl. TriCon Leasing Corp.*, 84 F.3d 629, 633 (2d Cir. 1996). Furthermore, for a civil RICO claim such as this one, where the alleged predicate acts are frauds, a plaintiff must plead these acts with particularity under Federal Rule of Civil Procedure 9(b). *Moore v. PaineWebber, Inc.*, 189 F.3d 165, 173 (2d Cir. 1999). "[T]he complaint [must] specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiff[] contend[s] the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements," as well as "allege facts that give rise to a strong inference of fraudulent intent." *Id.* (internal quotation marks omitted); *accord Spool*, 520 F.3d at 185.

I find that Plaintiff has plausibly alleged the predicate acts of mail and/or wire fraud with sufficient particularity. Plaintiff has specified numerous instances of fraudulent upweighting and improper assessment of Canadian Customs charges, specifying their date and nature. (*See* RICO Stmt. Exs. A, B.) Having set forth details of Defendants' BRE Model — *e.g.*, the disaggregation of charges that obfuscates the overcharges, (*see* SAC ¶¶ 47, 116) — and how FedEx and FedEx Services participated in billing Plaintiff and others for inflated weights and improper Canadian Customs charges, (*see id.* ¶¶ 26-27, 34-43, 47,116), Plaintiff has also plausibly alleged the existence of a scheme to defraud. Plaintiff has also specified numerous shipments allegedly giving rise to

fraudulent billings, and described the particular mailed or wired communications to which such shipments would give rise, thus satisfying the particularity requirement at this stage. Furthermore, Plaintiff has plausibly alleged facts giving rise to a strong inference of intent. Defendants had both motive (profit) and opportunity (control of billing technology) to perpetrate the alleged frauds, (*see id.* ¶ 47), and, because the upweightings were not confined to a specific facility or zone, (*id.* ¶ 49), they do not appear to be mere administrative errors. In short, Plaintiff has provided enough detail regarding the predicate acts to withstand the Motion to Dismiss.

4. Operation or Management

To state a claim under Section 1962(c), Plaintiff must also allege that the Defendants "participate[d] in the operation or management of the enterprise itself." *Reves v. Ernst & Young*, 507 U.S. 170, 185, 113 S. Ct. 1163, 122 L. Ed. 2d 525 (1993). The "operation or management" test is a relatively low bar at the pleading stage, *see First Capital Asset Mgmt.*, 385 F.3d at 176, and requires only that the defendants take "*some* part in directing the enterprise's affairs," *Reves*, 507 U.S. at 179 (emphasis in original).

Plaintiff alleges that FedEx Ground does not handle its own billing, and that "FedEx oversees and FedEx Services performs these functions for FedEx Ground." (SAC ¶ 34.) This allegation alone suffices to hurdle the low bar of the "operation or management" test, as the crux of the conduct that allegedly violated Section 1962(c) was the billing. But Plaintiff goes further, providing detailed

allegations regarding the control and oversight of the information technology used to perpetrate the upweighting and Canadian Customs schemes, and the establishment of the BRE Model which furthered the schemes by preventing customers from identifying the fraudulent charges. (*See, e.g., id.* ¶¶ 47, 68, 116.) Accordingly, I find that Plaintiff has adequately alleged FedEx's and FedEx Services's "operation or management" of the FedEx Ground enterprise.

For all of the foregoing reasons, I find that Plaintiff has plausibly alleged that FedEx and FedEx Services violated Section 1962(c) with respect to both the upweighting and Canadian Customs schemes. Accordingly, the Motion to Dismiss as to Counts I and III is denied.

C. RICO Conspiracy

Section 1962(d) of the RICO Act makes it "unlawful for any person to conspire to violate any of the provisions of subsection... (c) of this section." 18 U.S.C. § 1962(d). To allege a conspiracy under Section 1962(d), Plaintiff must plausibly allege facts that imply an "agreement . . . to commit at least two predicate acts." *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21,25 (2d Cir. 1990); *accord Gov't Employees Ins. Co. v. Hollis Med. Care, P.C.*, No. 10-CV-4341, 2011 U.S. Dist. LEXIS 130721, 2011 WL 5507426, at * 10 (E.D.N. Y. Nov. 9, 2011). Although the heightened requirements of Rule 9(b) do not apply to allegations of agreement, *see Hecht*, 897 F.2d at 26 n.4, Plaintiff must nevertheless provide at least some factual basis that would support an inference of conscious

agreement, *id.*; *In re Terrorist Attacks on September 11, 2001*, 740 F. Supp. 2d 494, 515 (S.D.N.Y. 2010).

Plaintiff alleges no specific instance of upweighting by UPS, provides no facts regarding the same, and alleges only that "UPS has changed the dimensions of packages qualifying for dimensional weighting in an upward direction causing those packages to be deemed to 'weigh' more." (SAC ¶ 88.) In the absence of any facts supporting this conclusory allegation, I do not find it plausible. Furthermore, I do not find Plaintiff's scant allegations of agreement to commit a RICO violation plausible. Plaintiff alleges lock-step pricing increases and a mutual corporate policy to exclude third-party consultants among FedEx and UPS, (*id.* ¶¶ 89, 91), and further alleges that these "agreements" are designed to "conceal[], maintain[], and perpetuat[e]" the upweighting scheme, (*id.* ¶¶ 92-93). But the connection between the factual allegations (lock-step pricing and mutual corporate policy) and the conclusion (designed to maintain the scheme) is absent, and does not plausibly support an allegation of conspiracy under Section 1962(d). Further, Plaintiff does not allege any harm from FedEx Ground's pricing *per se*, nor does it allege that it used or wished to use a consultant. In short, even if the allegations regarding UPS's conduct and intent were not conclusory, the allegations that UPS and Defendants acted in concert j to enable the upweighting scheme, or that Plaintiff was harmed thereby, are wholly conclusory.

For the foregoing reasons, the Motion to Dismiss Count II is granted.

D. Violations of 49 U.S.C. § 13708(b)

Section 13708(b) states that "[n]o person may cause a motor carrier to present false or misleading information on a document about the actual rate, charge, or allowance to any party to the transaction." 49 U.S.C. § 13708(b). Plaintiff alleges that FedEx and FedEx Services violated Section 13708(b) in perpetrating both the upweighting and Canadian Customs schemes, (SAC ¶ 146), and by failing to apply or properly apply applicable discounts to which Plaintiff was allegedly entitled under a FedEx Pricing Agreement, (*id.* ¶ 139-40, 146).[15] Plaintiff further alleges that FedEx Ground violated Section 13708(b) because it is a party to the "FedEx Pricing Agreement, the party for whom FedEx and FedEx Services performed billing services and the party that shipped the packages," and is thus "under a duty to ensure that discounts are properly applied to charges assessed for [its] services." (*Id.* ¶ 146.) Plaintiff admits that Section 13708(b) itself does not authorize a private cause of action, but argues that 49 U.S.C. § 14704(a)(2) does. (P's Mem. 36; *see* SAC ¶ 138). Section 14704(a)(2) provides, in relevant part, that "[a] carrier ... providing transportation or service subject to jurisdiction under chapter 135 is liable for damages sustained by a person as a result of an act or omission of that carrier... in violation of this part."

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15. Defendants note in their brief that the Pricing Agreement is protected by a "robust confidentiality clause," and have offered to provide the Court with a copy for *in camera* review. (Ds' Mem. 9 n.6.) Defendants do not argue, however, that the Pricing Agreement itself constitutes a basis for dismissal. Accordingly, I need not see the content of the Agreement to dispose of this Motion.

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Defendants argue that (1) Section 14704(a)(2) does not authorize a private cause of action at all, (Ds' Mem. 39-41), (2) even if it does, it cannot be used in tandem with Section 13708(b), (*id.* at 41-42), and (3) Plaintiff has not stated a claim under Section 13708(b), (*id.* at 42-44). Because I agree that Plaintiff has not stated a claim under Section 13708(b), for the reasons discussed below, I need not address whether Section 14704(a)(2) creates a private cause of action that can be used to remedy violations of Section 13708(b).

The SAC is less than clear as to how exactly Defendants' alleged conduct violated Section 13708(b), and Plaintiff's brief adds nothing, merely quoting the statutory language, (*see* P's Mem. 39-40). With respect to the upweighting and Canadian Customs allegations, Plaintiff's position appears to be that, by charging Plaintiff for a package at a weight greater than the actual weight of the package, FedEx and FedEx Services "persons" have caused "carrier" FedEx Ground to present false information on a document (*e.g.*, the invoice) about the "actual rate [or] charge."

I find the "actual rate [or] charge" language in Section 13708(b) to be ambiguous. Accordingly, consideration of the statutory context and legislative history in interpreting this statute is appropriate. *See Estate of Pew v. Cardarelli*, 527 F.3d 25, 30 (2d Cir. 2008). Furthermore, the insight of the Surface Transportation Board ("STB") — the agency charged with administration of this statute, *see* 49 U.S.C. § 13501; *Project Hope v. M/V IBN SINA*, 250 F.3d 67, 74 (2d Cir. 2001) — merits at least some deference. *See United*

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States v. Mead Corp., 533 U.S. 218, 234-35, 121 S. Ct. 2164, 150 L. Ed. 2d 292 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134,139-40, 65 S. Ct. 161, 89 L. Ed. 124 (1944). Section 7 of the Negotiated Rates Act of 1993 amended the predecessor of Section 13708 to state:

> (a) REGULATIONS LIMITING REDUCED RATES. — Not later than 120 days after the date of the enactment of this section, the Commission shall issue regulations that prohibit a motor carrier subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title from providing a reduction in a rate set forth in its tariff or contract for the provision of transportation of property to any person other than (1) the person paying the motor carrier directly for the transportation service according to the bill of lading, receipt, or contract, or (2) an agent of the person paying for the transportation.
>
> (b) DISCLOSURE OF ACTUAL RATES, CHARGES, AND ALLOWANCES. — The regulations of the Commission issued pursuant to this section shall require a motor carrier to disclose, when a document is presented or transmitted electronically for payment to the person responsible directly to the motor carrier for payment or agent of such responsible person, the actual rates, charges, or allowances for the transportation service and shall prohibit any person from causing a motor carrier to present

> false or misleading information on a document about the actual rate, charge, or allowance to any party to the transaction. Where the actual rate, charge, or allowance is dependent upon the performance of a service by a party to the transportation arrangement, such as tendering a volume of freight over a stated period of time, the motor carrier shall indicate in any document presented for payment to the person responsible directly to the motor carrier for the payment that a reduction, allowance, or other adjustment may apply.

Negotiated Rates Act of 1993, Pub. L. No. 103-180, § 7, 107 Stat. 2044,, *repealed by* ICC Termination Act of 1995, § 102(a), Pub. L. No. 104-88, 109 Stat. 803, 804. Section 7(a) mandated regulations prohibiting "off-bill discounting" — that is "a practice by which motor carriers provide discounts, credits or allowances to parties other than the freight bill payer, without notice to the payer." *See Regulations Implementing Section 7 of the Negotiated Rates Act of 1993*, Ex Parte No. MC-180 (Sub-No. 3), 2 S.T.B. 73, 1997 WL 106986, at *1 (Feb. 25, 1997). Section 7(b) — the nearly-verbatim predecessor to Section 13708 — mandated "truth-in-billing" regulations, *i.e.*, regulations requiring disclosure of the "actual rate, charge or allowances for the transportation service[s]." *See* 1997 STB LEXIS 52, [WL] at *1 & n.6. The ICC Termination Act of 1995 (which created the STB) repealed the Section 7(a) mandate to issue off-bill discount regulations, and placed the Section 7(b) truth-in-billing requirements directly into Section 13708. *See* §§ 102(a), 103, 109 Stat,

at 804, 873; *Regulations Implementing Section 7 of the Negotiated Rates Act of 1993*, 1997 STB LEXIS 52, 1997 WL 106986, at *2 ("Now, the statute no longer requires that we maintain regulations prohibiting the practice of granting off-bill discounts; it does, however, affirmatively require carriers to disclose certain information when they engage in the practice."); 1997 STB LEXIS 52, [WL] at *4 ("Off-bill discounting is not prohibited by statute, while truth-in-billing provisions are expressly embodied in the statute,"). Thus, the statutory context and legislative history of Section 13708, bolstered by the STB's insight, make clear that Section 13708 requires disclosure of (and prohibits false or misleading information associated with) off-bill discounts and the like. I thus interpret Section 13708(b) to proscribe presentation of a document (such as an invoice) indicating that a customer was charged a certain amount, when in fact the carrier *actually* charged that customer a lesser amount. *See* 1997 STB LEXIS 52, [WL] at *1-2.

Under this interpretation, Plaintiff has not stated a claim under Section 13708(b). First, "FedEx Ground no longer does its own billing," (SAC ¶ 34), and thus is not alleged to have presented any information on a document, let alone "false or misleading information." Second, the statute is not directed at activity alleged in connection with the upweighting and Canadian Customs schemes. The statute prohibits invoices hiding off-bill discounts; Plaintiff does not allege that Defendants did that. While the upweighting or Canadian Customs schemes might be said to involve invoices that *overcharged* Plaintiff, it cannot be said that these invoices misrepresented that a higher rate was charged when actually a lower rate was charged.

With respect to the "missing discounts," Plaintiff alleges it was entitled to receive certain discounts, (*id.* ¶ 139), and that "defendants failed to apply or improperly applied the discounts to which plaintiff was entitled," (*id.* ¶ 140). This is not the hiding of off-bill discounts to which Section 13708(b) is directed; Defendants are not alleged to have actually granted a discount that did not appear on a bill. Instead, Plaintiff alleges it was entitled to discounts it did not receive. Section 13708(b) simply does not apply to this activity.

In other words, Section 13708(b) prohibits issuing a bill for amount x when the actual charge is less than x. Here, Defendants are alleged to have actually charged x when by contract Plaintiff should have been charged less than x. Defendants' conduct did not misrepresent the "actual rate [or] charge" within the meaning of Section 13708(b), and thus the Motion to Dismiss Count IV is granted.

E. N.Y. General Business Law § 349

To state a claim under Section 349, "a plaintiff must allege: (1) the act or practice was consumer-oriented; (2) the act or practice was misleading in a material respect; and (3) the plaintiff was injured as a result." *Spagnola v. Chubb Corp.*, 574 F.3d 64, 74 (2d Cir. 2009); *see Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25-26, 647 N.E.2d 741, 623 N.Y.S.2d 529 (1995). "Consumer-oriented" does not mean that "the defendant committed the complained-of acts repeatedly — either to the same plaintiff or to other

consumers - but instead . . . that the acts or practices have a broader impact on consumers at large." *Oswego*, 85 N.Y.2d at 25. Courts have repeatedly held that a Section 349 consumer "is one who purchase[s] goods and services for *personal, family or household use." Exxonmobil Inter-Am., Inc. v. Advanced Info. Eng'g Servs,, Inc*., 328 F. Supp. 2d 443, 448 (S.D.N.Y. 2004) (alteration in original) (emphasis added) (internal quotation marks omitted); *see Cruz v. NYNEX Info. Res*., 263 A.D.2d 285, 703 N.Y.S.2d 103, 106 (1st Dep't 2000) ("In New York law, the term 'consumer' is consistently associated with an individual or natural person who purchases goods, services or property primarily for 'personal, family or household purposes.'"). Thus, New York courts have generally found that that "when activity complained of involves the sale of commodities to business entities only, such that it does not directly impact consumers, section 349 is inapplicable." *Shema Kolainu-Hear Our Voices v. ProviderSoft, LLC*, 832 F. Supp. 2d 194, 204 (E.D.N.Y. 2010) (collecting cases); *see Exxonmobil*, 328 F. Supp. 2d at 449 ("Contracts to provide commodities that are available only to businesses do not fall within the parameters of § 349.").

Plaintiff has not plausibly alleged that Defendants' conduct in connection with the upweighting and Canadian Customs schemes is consumer-oriented — *i.e*., that it affects customers purchasing shipping services for personal, family, or household purposes, Plaintiff itself is an online retailer that shipped hundreds of packages weekly via FedEx Ground. (SAC ¶¶ 21, 51.) As a business, Plaintiff licensed FedEx's automation software to process its shipments (including to print shipping labels and

schedule pick-ups), and purchased a FedEx-authorized scale for weighing its packages. (*Id.* ¶¶ 23-24.) These are not the hallmarks of an individual consumer using FedEx Ground shipping services for personal, family, or household purposes. Furthermore, it appears that the alleged upweighting and Canadian Customs schemes — which rely on a "labyrinthine and corrupt BRE Model" that, among other things, "disaggregates charges" and makes it difficult to identify inflated charges — would be effective only against high-volume shippers, *i.e.*, commercial customers. In Plaintiffs own words, the alleged schemes "rel[y] upon and exploit[] the fact that *customers who move large numbers of packages daily* generally have neither the time nor the resources to cost-effectively reconstruct the undifferentiated mass of disaggregated charges in order to verify whether the total charge for the shipment of any single package is accurate or contains overcharges concealed in the labyrinth of data." (*Id.* ¶ 47.E.iii (emphasis added).) An individual consumer — one shipping for personal, family, or household purposes — is not one "who moves large numbers of packages daily," and is thus not one for whom identifying an overcharge is difficult or impossible.[16] Indeed, Plaintiff has not plausibly alleged that any individual consumer is affected by the upweighting or Canadian Customs schemes. Accordingly, the Motion to Dismiss Count V is granted.

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16. For example, a consumer dropping off packages at a FedEx store presumably watches the packages being weighed and receives a bill on the spot, and would therefore not be subject to the "labyrinthine" invoice scheme allegedly designed to obscure upweighting.

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IV. Leave to Amend

Leave to amend a complaint should be freely given "when justice so requires." Fed. R. Civ. P. 15(a)(2). It is within the sound discretion of the district court to grant or deny leave to amend. *McCarthy*, 482 F.3d at 200. "Leave to amend, though liberally granted, may properly be denied for: 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.'" *Ruotolo v. City of N.Y.*, 514 F.3d 184, 191 (2d Cir. 2008) (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)). Amendment is futile when the claim as amended cannot "withstand a motion to dismiss pursuant to Rule 12(b)(6)," and "[i]n deciding whether an amendment is futile, the court uses the same standard as those governing the adequacy of a filed pleading." *MacEntee v. IBM*, 783 F. Supp. 2d 434, 446 (S.D.N.Y. 2011) (internal quotation marks omitted), *aff'd*, 471 F. App'x 49 (2d Cir. 2012) (summary order). Where the problem with a claim "is substantive . . . better pleading will not cure it," and "[r]epleading would thus be futile." *Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000).

At a pre-motion conference held on July 29, 2011, Defendant sought leave to file a motion to dismiss. Based on the issues raised at that conference and the associated letters requesting the conference, I gave Plaintiff a second chance to amend its pleadings, and stated that there would be no further leave to amend. Plaintiff's

failure to fix some deficiencies in its previous pleadings alone is sufficient ground to deny leave to amend *sua sponte*. *See In re Eaton Vance Mut. Funds Fee Litig.*, 380 F. Supp. 2d 222, 242 (S.D.N.Y. 2005) (denying leave to amend because "the plaintiffs have had two opportunities to cure the defects in their complaints, including a procedure through which the plaintiffs were provided notice of defects in the Consolidated Amended Complaint by the defendants and given a chance to amend their Consolidated Amended Complaint," and "plaintiffs have not submitted a proposed amended complaint that would cure these pleading defects"), *aff'd sub nom. Bellikoff v. Eaton Vance Corp.*, 481 F.3d 110, 118 (2d Cir. 2007) ("[P]laintiffs were not entitled to an advisory opinion from the Court informing them of the deficiencies in the complaint and then an opportunity to cure those deficiencies.") (internal quotation marks omitted); *see also Ruotolo*, 514 F.3d at 191 (affirming denial of leave to amend "given the previous opportunities to amend"). Further, Plaintiff has not requested leave to file a Third Amended Complaint or otherwise suggested that it is in possession of facts that could cure the pleading deficiencies. Accordingly, I decline to grant Plaintiff leave to amend *sua sponte* with respect to the dismissed claims. *See, e.g., Gallop v. Cheney*, 642 F.3d 364, 369 (2d Cir. 2011) (no error in failing to grant leave to amend where it was not sought); *Walton v. Morgan Stanley & Co.*, 623 F.2d 796, 799 n.7 (2d Cir. 1980) ("[A]ppellants never sought leave to amend their complaint either in the district court or as an alternative form of relief in this court after [appellee] raised the issue of the sufficiency of appellants' complaint. Accordingly, we see no reason to grant such leave *sua sponte*").

V. Conclusion

For the reasons above, Defendants' Motion to Dismiss as to Counts II, IV, and V is GRANTED. Defendants' Motion to Dismiss as to Counts I and III is DENIED. The Clerk of the Court is respectfully directed to terminate the pending motion, (Doc. 42). The parties are directed to appear for a conference on **October 26, 2012** at 10:15 a.m.

SO ORDERED.

Dated: September 25, 2012
White Plains, New York

/s/ Cathy Seibel
CATHY SEIBEL, U.S.D.J.