No. 18-890

In The Supreme Court of the United States

DAVID D'ADDARIO, MARY LOU D'ADDARIO KENNEDY, GREGORY S. GARVEY, RED KNOT ACQUISITIONS, LLC, SILVER KNOT, LLC, NICHOLAS VITTI,

Petitioners,

v.

VIRGINIA A. D'ADDARIO, individually, and on behalf of the F. Francis D'Addario Testamentary Trust and the Virginia D'Addario Trust; and VIRGINIA A. D'ADDARIO, EXECUTRIX, as Executrix of the Probate Estate of Ann T. D'Addario, Deceased, and on behalf of the F. Francis D'Addario Testamentary Trust and the Ann T. D'Addario Marital Trust,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Upon the Defendants' Rule 12(b)(6) Motion to Dismiss Plaintiffs' RICO claims, the Second Circuit properly construed Plaintiffs' detailed factual allegations in Plaintiffs' favor, and ruled that Plaintiffs had adequately alleged (a) causation of Plaintiffs' claimed injuries under 18 U.S.C. §1964(c); and (b) that the co-Defendants who conspired with David D'Addario in his scheme to plunder, pillage and loot the assets of the Probate Estate of Virginia D'Addario's father provided knowing and active participation in the "operation or management" of David's wrongful schemes. Accordingly, the questions presented in the Petition are:

(1) Should the Court grant certiorari to consider whether Plaintiffs adequately alleged causation of Plaintiffs' claimed injuries under 18 U.S.C. §1964(c)?

(2) Should the Court grant certiorari to consider whether Plaintiffs adequately alleged that the co-Defendants who conspired with David D'Addario in his scheme to plunder, pillage and loot the assets of the Probate Estate of Virginia's father provided knowing and active participation in the "operation or management" of David's wrongful schemes?

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INTRODUCTION

In connection with the Defendants' Rule 12(b)(6) Motion to Dismiss Plaintiffs' RICO claims, the District Court properly ruled that Plaintiffs adequately alleged a sufficiently direct causal relationship between the Defendants' RICO violations and Plaintiffs' claimed injuries in accordance with *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992). *See D'Addario v. D'Addario*, 2017 WL 1086772 (D. Conn. Mar. 22, 2017) (reprinted at Pet. App. 68a-73a & 86a-87a), which ruling was then affirmed by the Second Circuit. *See D'Addario v. D'Addario*, 901 F.3d 80 (2d Cir. 2018) (reprinted at Pet. App. 31a-33a). Further, although the District Court did not have the opportunity to address the issue, the Second Circuit denied the Defendants' argument on appeal that Plaintiffs did not adequately allege the co-Defendants' knowing and active participation in the "operation or management" of Defendant David D'Addario's scheme to plunder, pillage and loot the assets of Virginia's father's probate estate, as set forth in *Reves v. Ernst & Young*, 507 U.S. 170 (1993).

As explained below, the Second Circuit's decision on RICO causation is in perfect harmony with *Holmes* and *Hemi Group, LLC v. City of New York*, 559 U.S. 1 (2010), with the claimed "Circuit split" on the RICO proximate cause issue nonexistent. Further, the Defendants have ignored the fact that Plaintiffs have the capacity to sue for and on behalf of the probate estate of Virginia's father to seek redress for the Defendants' RICO violations.

In addition, the Second Circuit's decision herein is not in conflict with the "operation or management" requirement set forth in *Reves*. Moreover, in that the Defendants did not contest the adequacy of the "operation or management" allegations against David D'Addario, at a minimum Plaintiffs will be able to assert co-conspirator liability claims against the co-conspirator Defendants named herein pursuant to 18 U.S.C. §1962(d).

Accordingly, the Defendants' Petition for a Writ of Certiorari should be denied.

STATEMENT OF THE CASE

When viewed through the proper Rule 12(b)(6) lens, the operative facts are the well-pled facts as set forth in the First Amended Complaint ("FAC") (D.N. 25[1]) (*see Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 642 n. 1 (2008)), as supplemented by Plaintiffs' Amended RICO Case Statement ("ARCS") (D.N. 36) (*see Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc*., 271 F.3d 374, 378 (2d Cir. 2001)), which the Court will find to be a distant universe from the "Factual Background" set forth in the Defendants' Petition. (Pet. pp. 4-6)

As far as the procedural posture of this case, for the two arguments that the Defendants assert in their

[1] References to "D.N. ___" are to the Docket Number of the filing in the District Court of Connecticut in No. 3:16cv99 (JBA).

Petition, both the District Court and the Second Circuit disagreed with the Defendants' Rule 12(b)(6) arguments on the adequacy of Plaintiffs' allegations in the FAC and the ARCS as to RICO causation, with the Second Circuit disagreeing with the Defendants' Rule 12(b)(6) arguments on appeal on the adequacy of Plaintiffs' allegations of the knowing and active participation of Defendant David D'Addario's co-conspirators in the "operation or management" of David's scheme to plunder, pillage and loot the assets of Virginia's father's probate estate, as outlined by this Court in *Reves*.

REASONS FOR DENYING THE WRIT

I. The Second Circuit's Decision On RICO Causation Is Consistent With This Court's Decisions In *Holmes* and *Hemi*, And Does Not Create A Circuit Split On The RICO Causation Issue

The Defendants argue that the Second Circuit's decision supposedly "departed from this Court's precedent" in *Holmes v. Securities Investor Protection Corp*., 503 U.S. 258 (1992) and *Hemi Group, LLC v. City of New York*, 559 U.S. 1 (2010) (Pet. pp. 2 & 13-14), and, in the process, supposedly "created a split with the Third, Fifth and Sixth Circuits", citing to *Firestone v. Galbreath*, 976 F.2d 279 (6th Cir. 1992) and the unpublished/non-precedential decisions in *Schrager v. Aldana*, 542 Fed. Appx. 101 (3d Cir. 2013) and *Sheshtawy v. Gray*, 697 Fed. Appx. 380 (5th Cir. 2017), *cert. denied*,

138 S.Ct. 1298 (2018). (Pet. pp. 2 & 20-22) The Defendants are wrong.

As explained by this Court in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 139-40 (2014), there is a fundamental difference between wrongful conduct that not only causes harm to an immediate victim, and, in the process, also causes harm to the intended victim (as is the situation here), and wrongful conduct that causes harm to an immediate victim, which only incidentally and remotely leads to a claim of losses by a third party (as was the situation in *Hemi*).

In *Lexmark*, the counterclaim defendant, Lexmark, manufactured and sold copiers and replacement toner cartridges, with the replacement cartridges embedded with a chip that prevented other cartridge refurbishers from refurbishing the spent Lexmark cartridge. The counterclaim plaintiff, Static Control Components, developed a chip that would bypass the Lexmark blocking chip, and thus allow other cartridge refurbishers to refurbish and resell Lexmark cartridges. Thereafter, Lexmark sent a letter to third party refurbishers, asserting that it was illegal to refurbish and resell Lexmark cartridges.

After Lexmark filed suit against Static for claimed copyright infringement, Static filed a counterclaim against Lexmark for its false claim that it was illegal to use Static's disarming chips to refurbish spent Lexmark cartridges. According to Lexmark's theory of

causation, Lexmark's false letter to the refurbishers caused Static to lose sales of its blocking chips.

In affirming the Sixth Circuit's reversal of the District Court's erroneous Rule 12(b)(6) dismissal of Static's counterclaim on the basis that Static's alleged injuries were too remote, this Court ruled that " '[w]here the injury alleged is so integral to an aspect of the [violation] alleged, there can be no question' that proximate cause is satisfied." *Lexmark*, 572 U.S. at 139, *quoting Blue Shield of Va. v. McCready*, 457 U.S. 465, 479 (1992). While this Court in *Lexmark* noted it that was the "general tendency" not to stretch proximate causation "beyond the first step" (*Lexmark*, 572 U.S. at 139, *quoting Holmes*, 503 U.S. at 271), this Court noted that

> the reason for that general tendency is that there ordinarily is a "discontinuity" between the injury to the direct victim and the injury to the indirect victim, so the latter is not surely attributable to the former (and thus also to the defendant's conduct), but might instead have resulted from "any number of [other] reasons."

Lexmark, 572 U.S. at 139-40, *quoting Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 458-59 (2006). "That [was] not the case [in *Lexmark*]", and is not the case here. *Lexmark*, 572 U.S. at 140.

A. The Second Circuit's Decision On RICO Causation Is In Perfect Harmony With This Court's Decisions In *Holmes* And *Hemi*

The Second Circuit's decision on RICO causation is in perfect harmony with this Court's decisions in *Holmes* and *Hemi*. Implicit in the Defendants' argument is the assertion that this Court in *Hemi sub silentio* abrogated the multi-factor analysis for RICO causation set forth in *Holmes*, and replaced it with a single factor test based solely on a strict direct injury requirement. Not so.

In accordance with this Court's decision in *Holmes*, the mere fact that the Defendants' wrongful conduct also caused harm to the Estate does not strip Plaintiffs of standing to pursue the Defendants for the injury that they caused to Plaintiffs' business or property. *See Lexmark*, 572 U.S. at 139-40; *Standardbred Owners Ass'n v. Roosevelt Raceway Assocs., L.P.*, 985 F.2d 102, 104-05 (2d Cir. 1993); *Ceribelli v. Elghanayan*, 990 F.2d 62, 63-64 (2d Cir. 1993); *GICC Capital Corp. v. Technology Fin. Group*, 30 F.3d 289, 293 (2d Cir. 1994). *See*, *also*, *King v. Wang*, 663 Fed. Appx. 12 (2d Cir. 2016). In accordance with the facts as alleged in the FAC (as supplemented by the ARCS[2]), Plaintiffs

[2] At the pleading stage, a RICO plaintiff " 'need only put forth allegations that raise a reasonable expectation that discovery will reveal evidence' of proximate causation." *In re Avandia Marketing*, 804 F.3d 633, 646 (3d Cir. 2015) (*quoting Fowler v. UPMC Shadyside*, 578 F.3d 203, 213 (3d Cir. 2009) (internal quotations omitted)). Indeed, "[a]t the motion to dismiss stage, 'standing allegations need not be crafted with precise detail, nor must the

will be able to show that they have "standing" (*i.e.*, RICO causation) to assert all of the RICO claims that they have alleged in this case.

In *Holmes*, this Court required the examination of three factors to determine whether an alleged RICO violation proximately caused injury to the plaintiff's business or property as set forth in §1964(c). These factors are: (1) the degree of directness of the injury; (2) the difficulty of apportioning damages among others affected by the alleged RICO violations; and (3) the possibility that other more directly injured victims could better vindicate the policies underlying RICO. 503 U.S. at 269-70. *See In re Avandia Marketing*, 804 F.3d at 642. Under the unique facts set forth in the FAC, as supplemented by the ARCS, this case does not present any of the three fundamental causation concerns expressed by this Court in *Holmes*. Rather, here (1) the injury is sufficiently direct (*see Lexmark*, 572 U.S. at 139-40; *Standardbred Owners Ass'n*, 985 F.2d at 104-05); (2) there is no risk of duplicative recovery; and (3) no one is better suited to sue David D'Addario for his deliberate, systematic and long-term looting of his father's Probate Estate than Virginia D'Addario.

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plaintiff prove his allegations of injury.'" *State of Connecticut Office of Protection and Advocacy v. Connecticut*, 706 F.Supp.2d 266, 278 (D. Conn. 2010) (*quoting Baur v. Veneman*, 352 F.3d 625, 631 (2d Cir. 2003)). Moreover, "[a]t the pleading stage, general factual allegations of injury . . . may suffice [to establish standing], for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), *quoting Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 889 (1990).

See Bridge v. Phoenix Bond & Indemnity Co., 553 U.S. 639, 658 (2008); *Standardbred Owners Ass'n*, 985 F.2d at 104-05.

Here, David D'Addario's wrongful conduct was directed primarily at his sister, Virginia, not simply at the Estate. (ARCS p. 47) Indeed, Plaintiffs specifically alleged that:

> [A]fter Virginia D'Addario executed the November 30, 1987 agreement, David D'Addario vowed that his sister, Virginia (who is 15 years his senior), would never receive another penny from the Estate. In fact, on a number of occasions, David told his sister, Virginia, that "I'm 15 years younger than you, I'll outlive you, and ***I can keep the Estate open until after you die.***"

(ARCS pp. 7-8; *see*, *also*, *id*. p. 42) Further, Plaintiffs alleged that:

> And at the end of [David D'Addario's] 29-year reign, not only is the Estate hopelessly insolvent, but David is left with a multi-million dollar personal net worth many times over, and with the personal satisfaction of knowing that he had lived up to his vow to make certain that his older sister, Virginia, would never receive another penny from the Estate.

(*Id*. p. 11; *see*, *also*, *id*. p. 47) In addition, Plaintiffs alleged that their "injuries were reasonably foreseeable and anticipated as a natural consequence of the Defendants' wrongful conduct as set forth [in the ARCS]." (*Id*. p. 47) Under this Court's decisions in *Holmes* and

Bridge, Plaintiffs have adequately alleged causation of "injury to [their] business or property" for purposes of meeting the causation ("standing") requirement under §1964(c).

As concluded by the Second Court in *Standardbred Owners Ass'n*, and as is the situation here:

> A finding of causal relation under these circumstances comports with the demands of justice without at the same time opening the floodgates to administratively inconvenient or unmanageable litigation. . . . Construing the pertinent portions of the record in the light most favorable to the plaintiffs, as we are required to do, . . . we hold that the district court erred in concluding as it did that "plaintiffs lack standing to sue because the connection between the injury and the alleged RICO violation is 'too remote'. . . ."

985 F.2d at 104-05 (citations omitted). Indeed, here, like in *Bridge*, the Plaintiffs were the "primary and intended victims of the scheme to defraud", and their injury was a "foreseeable and natural consequence of [the] scheme." 553 U.S. at 650 & 658. *See*, *also*, *Lexmark*, 572 U.S. at 139-40. Upon a full and fair review of the facts set forth in the FAC (as supplemented by the ARCS), Plaintiffs have adequately alleged causation of "injury to [their] business or property" for purposes of meeting the causation requirement under RICO. *See* n. 2, *supra*.

In the District Court, the Defendants asserted that Plaintiffs lacked standing to pursue their RICO

claims because the Probate Estate, and not Plaintiffs, was the direct victim of the Defendants' long-term pattern of wrongful conduct, and therefore the Estate was "the [only] party with standing to bring a civil RICO claim." (Pet. App. 68a) In denying the Defendants' motion to dismiss based on causation, the District Court ruled that:

> Plaintiffs correctly note that "the mere fact that the Defendants' wrongful conduct also caused harm to the Estate does not strip Plaintiffs of standing to pursue the Defendants for the injury they caused to Plaintiffs' business or property."

(*Id.* at n. 8) After reviewing the detailed factual allegations of causation set forth in the FAC and the ARCS, the District Court found it "plausible"

> that Defendants' alleged RICO violations (maintaining control of the Estate in order "to plunder, pillage and loot" its assets) proximately caused Plaintiffs to incur expenses in Probate Court in an effort to collect on their interest. (Am. Compl. ¶ 121.) Construing Plaintiffs' interest in the Estate as an outstanding debt, albeit for an unknown amount at this time, and Defendants' conduct as efforts to frustrate collection of that debt, Plaintiffs may pursue RICO claims for damages incurred attempting to close the Estate and collect their promised inheritable beneficial interest.

(Pet. App. 87a)

In affirming the District Court's decision on RICO causation at the pleading stage, the Second Circuit ruled:

> Here, the causal relationship between Defendants' conduct and Virginia's collection expenses injury is easily identifiable: Defendants (chiefly David), through their violations of 18 U.S.C. §1962(b) and (c), are alleged to have destroyed the value of the Estate, in which Virginia, as a beneficiary, has an identifiable interest under Connecticut law. Virginia took steps and incurred related legal expenses to halt that wrongdoing. . . . These expenses were incurred in an attempt to protect both the Estate and Virginia's share of that Estate, and, for purposes of our causation inquiry here, the two are reasonably treated as indivisible.

(Pet. App. 31a-32a) The Second Circuit then concluded that

> Virginia's injuries are not so removed from Defendants' misdeeds as to place them outside the reach of the proximate causation chain as a matter of law. The expenses that she has incurred to stop the incursion are sufficiently proximate to the identified RICO violations [to] support a claim under section 1964(c).

(Pet. App. 33a)

In *Hemi*, the plaintiff, New York City, taxed the possession of cigarettes, but did not, itself, require out

of state sellers to submit customer information to the City. The defendant, Hemi (based out of New Mexico), sold cigarettes online directly to residents of New York City. Under Federal law (the "Jenkins Act"), out of state sellers of products were required to submit customer information to the states into which the products were sold. In New York, the State agreed to forward any such out of state sales information to the City.

In its RICO suit, the City alleged that the defendant, the out of state seller of cigarettes, failed to mail sales information to the State, as the seller was required to do pursuant to Federal law, which the City contended constituted mail fraud. Based on these alleged mail fraud predicate acts, the City asserted that the defendant's RICO violations (breach of a duty owed to the State) caused the City to lose tax revenue. Not surprisingly, this Court in *Hemi* rejected the City's proximate cause analysis as "far too indirect", with the State, as the direct victim, with the capability and the incentive to sue for any claimed RICO violations by Hemi. 559 U.S. at 17-18.

While "the general tendency of the law . . . in regard to damages . . . is not to go beyond the first step" (*Hemi*, 559 U.S. at 10, citations omitted), the "first step" on RICO causation analysis is not a rigid direct injury requirement. *See*, *e.g.*, *Lexmark*, 572 U.S. at 139-40. Indeed, the RICO causation analysis as set forth in *Holmes*, and as applied in *Hemi*, involves a common sense application of the three factors set forth in *Holmes*.

In *Hemi*, this Court rejected the City's theory of causation not simply because it went "beyond the first step", but rather because it went "well beyond the first step. . . ." *Hemi*, 559 U.S. at 10. And this Court did not reject the City's causation theory simply because the City's claimed damages were "indirect", but rather because the claimed damages were "far too indirect." *Id*. Moreover, this Court in *Hemi* reconfirmed that "[o]ne consideration we have highlighted as relevant to the RICO 'direct relationship' requirement is whether better suited plaintiffs would have an incentive to sue." *Hemi*, 559 U.S. at 11-12, *citing Holmes*, 503 U.S. at 269-70. In other words, even after *Hemi*, the three factors for RICO causation analysis set forth in *Holmes* still need to be weighed and balanced in determining whether, based on the plaintiff's allegations, the RICO causation requirement can be met. The Second Circuit's decision herein is in perfect harmony with this Court's decisions in *Holmes* and *Hemi*.

B. The Claimed Circuit Split Is Nonexistent

The Defendants also claim that the Second Circuit's decision somehow creates a "Circuit conflict" with the Sixth Circuit's decision in *Firestone*, the non-precedential decision by the Third Circuit in *Schrager*, and the non-precedential decision by the Fifth Circuit in *Sheshtawy*. The Defendants, once again, are wrong.

In *Firestone*, the defendants (including Daniel Galbreath, the decedent's stepson, who was the executor of the decedent's probate estate) misappropriated

assets from the decedent during her lifetime, and thus the misappropriated assets did not pass into the probate estate, but rather the pre-death claim passed, upon the decedent's death, directly to the executor as a survivorship claim. Accordingly, the plaintiffs, as potential beneficiaries under a will that the decedent could have changed prior to her death, had no vested interest in the decedent's assets prior to her death, and thus suffered no tangible loss at the time the decedent's assets were misappropriated by the defendants. 976 F.2d at 284-85. Further, the defendant executor agreed to resign upon the plaintiffs' demand if they wanted the estate to pursue litigation for the alleged misappropriation of the decedent's assets. *Id*. at 282.

In affirming the District Court's dismissal of the plaintiffs' RICO claims, the Sixth Circuit in *Firestone* focused on the fact that the aim of the defendants' wrongful conduct was the decedent, rather than the decedent's grandchildren (the plaintiffs), and that the plaintiffs did not have a vested interest in the assets of the decedent that were misappropriated by the defendants prior to the decedent's death. *Id*. at 285. Here, on the other hand, the Defendants engaged in their pattern of wrongful conduct after the death of the senior Mr. D'Addario, and thus all of the predicate acts occurred after the time that Plaintiffs had secured a vested interest in the assets of the Estate. *See Gaynor v. Payne*, 261 Conn. 585, 592 (2002) ("[u]pon the decedent's death . . . , the [will beneficiaries'] rights of inheritance are vested [, and] those vested rights are

enforceable"). Further, David D'Addario's wrongful conduct was directed primarily at his sister, Virginia, not simply at the Estate. (ARCS pp. 7-8, 11, 42 & 47) As concluded by the District Court, here, in contrast to the facts of *Firestone*,

> Plaintiffs have vested, enforceable rights of inheritance. *See Gaynor v. Payne*, 261 Conn. 585, 592 (2002) ("[u]pon the decedent's death . . . the [will beneficiaries'] rights of inheritance are vested[, and] those vested rights are enforceable."). Thus, Plaintiffs' injury is significantly more direct than the plaintiffs' in *Firestone*, rendering that case inapposite.

(Pet. App. 71a)

The Second Circuit also noted that the decision in *Firestone* was not apposite to the facts of this case:

> The *Firestone* court found that beneficiaries of an estate had not suffered a "direct injury" cognizable under RICO from the defendants' alleged wrongdoing. *Id*. at 285. There, the testator's grandchildren, beneficiaries of her estate, brought various fraud and RICO claims against certain relatives and former associates of the testator, *id*. at 281-82, alleging that the defendants had "looted [the testator's] estate as she lay dying," diminishing their inheritances when she later died. *Id*. at 282. Here, in contrast, the alleged looting took place after Francis [Mr. D'Addario] died, when the Estate already existed and Virginia's interest in the Estate had vested, aligning her

> interest and that of the Estate temporally and conceptually. *See Gaynor*, 261 Conn. at 592.

(Pet. App. 32a-33a)

In *Schrager* (a non-precedential decision rendered pursuant to Third Circuit LAR 34.1(a)), the plaintiff alleged that the aim of the defendants' conspiratorial conduct was to defraud the probate estate of the decedent (*id*. at 102), and thus the defendants' wrongful conduct was not directed toward the plaintiff. Further, a "Public Administrator" had assumed control of the probate estate, who previously sued the defendants on behalf of the probate estate, with the state court awarding a monetary judgment for the benefit of the plaintiff in the RICO suit, as well as a monetary judgment against the RICO suit defendants in the amount of $3,427,692 for recovery of the funds that the defendants had fraudulently removed from the probate estate. *Id*. at 102-03 & 104 n. 4. The District Court in *Schrager* concluded that the plaintiff lacked standing because, under the facts as pled, the probate estate, with the Public Administrator having taken over control, was better suited to sue for the alleged injury. *Id*. at 103.

In affirming, the Third Circuit in *Schrager* noted that:

> Here, plaintiff has alleged a financial loss due to the diminution of the estate of which he is a beneficiary. *This loss can serve as the basis for standing* so long as the additional criterion

> of proximate causation [set forth in *Holmes*] is met.

Id. at 104 (emphasis added). After analyzing the "multi-factor analysis test" of *Holmes*, the Third Circuit concluded that "[t]he direct victim of [the defendants'] conduct was the Estate, not [plaintiff]", and that the probate estate, with the Public Administrator in control of the estate, "is in a better position to bring a civil RICO claim." *Id*. at 104.

Here, on the other hand, with three of the five Estate beneficiaries (David D'Addario, Mary Lou D'Addario and Larry D'Addario) benefiting from David D'Addario's fraudulent schemes, the primary aim of the conspiratorial conduct was directed at Virginia D'Addario, which also proximately caused harm to the fifth beneficiary, Virginia's mother, Ann T. D'Addario. Further, while co-executor Larry D'Addario does not wish to pursue an action against David D'Addario (FAC ¶94), it can hardly be expected that Chief Executor David D'Addario would authorize the Estate to institute an action against himself and his co-conspirators. *See Turkish v. Kasenetz*, 964 F.Supp. 689, 697 (E.D.N.Y. 1997) (estate beneficiary has standing to bring a RICO claim because the plaintiff named the estate's executors as participants in the alleged RICO enterprise); *Lawrence v. Cohn*, 932 F.Supp. 564, 572-73 (S.D.N.Y. 1996) (will beneficiaries have standing in securities fraud action where the executors participated in the fraud).

Simply, under the facts as alleged in the FAC, as supplemented by the ARCS, there is a sufficiently direct relationship between the Defendants' pattern of wrongful conduct and the Plaintiffs' injury; there is no difficulty in apportioning damages among other victims of the Defendants' wrongful conduct; and there is no other more directly injured victim who is willing to pursue the Defendants for the wrongful conduct as alleged in this suit. *See Standardbred Owners Ass'n*, 985 F.2d at 104-05; *Ceribelli*, 990 F.2d at 63-64; & *GICC Capital Corp*., 30 F.3d at 293. As concluded by the District Court:

> Applying the *Holmes* factors, the court [in *Schrager*] concluded that the direct victim of the defendant's conduct was the estate, not the plaintiff and that the estate was in a better position to sue for the alleged injury. This was especially true because a Public Administrator, who had already taken action to recover the defrauded funds, had assumed control of the estate. *Id*. at 103-04. In so ruling, the Third Circuit noted that "plaintiff has alleged a financial loss due to the diminution of the estate of which he is a beneficiary. *This loss can serve as the basis for standing* so long as the additional criterion of proximate causation [set forth in *Holmes*] is met." *Id.* at 104 (emphasis added). Therefore, while the Third Circuit panel concluded that the plaintiff beneficiary lacked standing, it did not preclude the possibility that under different facts a beneficiary to an estate might have standing to bring a civil RICO claim. Plaintiffs here

> have alleged that the executors of the Estate are fraudulently maintaining control over the Estate and thus there is no better party to bring the RICO suit.

(Pet. App. 70a-71a)

Finally, in *Sheshtawy* (a non-precedential decision rendered pursuant to Fifth Circuit Local Rule 47.5 (697 Fed. Appx. at 381 n. *)), the plaintiffs filed a RICO suit against certain Probate Court Judges, the Court Coordinator, plaintiffs' opposing parties in the underlying probate cases, and the opposing law firms and attorneys (*id*. n. 1), alleging that the defendants "conspired to 'take over' Harris County Probate Court No. 1 through their racketeering schemes to unlawfully enrich themselves at Plaintiffs' expense." *Id*. at 381-82.

In affirming the District Court's dismissal of the plaintiffs' RICO claims, the Fifth Circuit ruled that "Plaintiffs lack standing to pursue their RICO claims because they have failed to allege a direct, concrete, and particularized injury proximately caused by Defendants' conduct." *Id*. at 382. Although the plaintiffs in *Sheshtawy* contended that they sufficiently alleged a direct injury caused by the defendants' conduct, the Fifth Circuit concluded that the RICO complaint contained "little to no factual specificity as to injury or causation", and that the claimed injury "is too speculative and indirect to satisfy RICO standing." *Id*.

The decisions in *Firestone*, *Schrager* and *Sheshtawy* are distinguishable from the Second Circuit's

decision in this case, and there is no "Circuit split" as claimed by the Defendants which would justify the issuance of a Writ of Certiorari.

C. Plaintiffs Have The Capacity To Sue For And On Behalf Of The Probate Estate To Seek Redress For The Defendants' RICO Violations

In the District Court, the Defendants took the position that "[t]he alleged Predicate Acts would have caused injury to the business or property of the Estate. . . . Thus, the Estate . . . would have a RICO claim." (D.N. 44 p. 3) It is clear, however, that chief Executor David D'Addario would never authorize the Probate Estate to file this RICO suit against himself and his co-conspirators. Accordingly, Virginia D'Addario, as a beneficiary of her father's Estate, and as Executrix of the probate estate of her deceased mother, Ann T. D'Addario, has the capacity to sue under Connecticut law. *See Dickman v. Generis*, 48 Conn. Super. 380, 383-85, 845 A.2d 488, 490-91 (2004); *Geremia v. Geremia*, 159 Conn. App. 751, 784-86 (2015).

In a similar RICO probate fiduciary fraud case, *Glickstein v. Sun Bank*, 922 F.2d 666 (11th Cir. 1991), the Eleventh Circuit confirmed that pursuant to Rule 17(b)(3), the Court is to look to state law to determine the capacity of a beneficiary of a probate estate to bring suit. *Id*. at 670-71. *See*, *also*, *King v. Wang*, 663 Fed. Appx. 12 (2d Cir. 2016). Here, Connecticut law, as confirmed in *Dickman v. Generis*, provides that when the

executor of a probate estate is part of a scheme to defraud the probate estate, a beneficiary of the probate estate (such as Virginia D'Addario) has the capacity to bring suit for and on behalf of the probate estate. 48 Conn. Super. at 383-85, 845 A.2d at 490-91. While Plaintiffs believe that the allegations in this suit do not raise any of the three fundamental causation concerns delineated by this Court in *Holmes*, clearly, Virginia D'Addario, as a defrauded beneficiary, can proceed both individually and in her capacity as a beneficiary of her deceased father's Probate Estate for and on behalf of her deceased father's Probate Estate.

II. The Second Circuit's Decision Herein Is Not In Conflict With This Court's "Operation Or Management" Decision In *Reves*

According to the Defendants, the Second Circuit's decision herein "directly contradicted" this Court's holding in *Reves v. Ernst & Young*, 507 U.S. 170 (1993) when the Second Circuit supposedly "held" that "outside parties, who merely 'assist' a member of a RICO enterprise in his operation or management of the enterprise or act as a 'necessary tool' thereof, had themselves 'participated in the operation or management of the enterprise' ", and thereby supposedly created a conflict "with holdings from the Third, Seventh, and Eighth Circuits. . . ." (Pet. p. 2) Contrary to the Defendants' representation, the Second Circuit rendered no such holding.

After discussing the parameters of the "operation or management" test set forth by this Court in *Reves*, the Second Circuit ruled that "[t]he same analysis applies to the remaining defendants [*i.e.*, the co-Defendants who conspired with ringmaster David D'Addario] here." (Pet. App. 48a) As actually held by the Second Circuit:

> The individual defendants (Mary Lou, Garvey, and Vitti) are alleged to have *actively assisted* David when he operated the Estate to effectuate his schemes, which directly affected his management of the Estate. Although the entity defendants (Silver Knot and Red Knot) were used simply to effectuate David's schemes, they also can be understood to have *sufficiently assisted* David in his conduct of the Estate's affairs simply by their formation and existence: they were *necessary tools for the schemes' operation*. Such assistance may fairly be considered "participation" in the operation or management of an enterprise, *at least in the circumstances alleged here*.

(*Id*. (emphasis added))

The Second Circuit then noted that:

> Section 1962(c) prohibits *both* "conduct[ing]" an enterprise's affairs and "participat[ing]" in the conduct of an enterprise's affairs. . . . [W]e conclude that [Virginia's] allegations are sufficient to make out a claim that [David D'Addario's co-defendants] "participate[d]" in the conduct of the Estate's affairs under section 1962(c).

(Pet. App. 48a n. 14) Finally, the Second Circuit concluded by stating:

> We bear in mind that the "operation or management" test is "essentially one of fact." [*First Capital Asset Mgmt*.] at 176. Accordingly, at this early pleading stage in the suit, we conclude that Virginia's allegations suffice to support her claim that each Defendant participated in the operation or management of the Estate as enterprise, in violation of section 1962(c). Thus, Virginia has sufficiently stated a civil RICO claim against all Defendants arising out of their alleged violation of section 1962(c).

(Pet. App. 48a-49a)

A distortion of the Second Circuit's true holding on the adequacy of the Plaintiffs' allegations for Virginia's §1962(c) claims does not constitute a showing that the decision by the Second Circuit is in conflict with this Court's decision in *Reves*, or somehow creates an illusory conflict with the decisions by the Third, Seventh, and Eighth Circuits. Indeed, the allegations against the co-Defendants (David D'Addario's co-conspirators, named as Defendants herein) did not really involve any claims that they simply provided "services" that were usual and customary for the nature of the businesses in which they were otherwise engaged (such as legal services by a lawyer, or accounting services by an accountant). Rather, the allegations against the co-Defendants showed that they were knowing and active

participants in David D'Addario's overall fraudulent scheme.

Here, the facts set forth in the body of the FAC, as well as the facts set forth in the discussion of the Predicate Acts (*see* FAC pp. 47-56), detail: (a) the knowing and active participation of David D'Addario, Mary Lou D'Addario and Paul Berg in the Honeyspot Road Scheme, the Frenchtown Road Scheme, and the Estate Residential Real Estate Scheme; (b) the knowing and active participation of David D'Addario, Berg, Garvey and Red Knot in the Red Knot Forbearance Agreement Scheme; (c) the knowing and active participation of David D'Addario, Greg Garvey and Wise Metals in the Silver Knot/Wise Metals Scheme; and (d) the knowing and active participation of David D'Addario, Garvey and Red Knot in the Red Knot/David D'Addario Settlement Scheme. (D.N. 25 (FAC) pp. 47-56) The detailed factual allegations in the FAC, as supplemented by the ARCS, easily meet this Court's "operation or management" requirement as set forth in *Reves* for a §1962(c) claim.

And finally, in that the Defendants did not contest the adequacy of the "operation or management" allegations against kingpin David D'Addario, at a minimum, Plaintiffs will be able to assert co-conspirator liability claims against David's co-conspirator Defendants named herein pursuant to §1962(d).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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Respectfully submitted,

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