

No. 00-549

IN THE SUPREME COURT OF THE UNITED STATES

CEDRIC KUSHNER PROMOTIONS, LTD
Petitioner

v.

DON KING, DON KING PRODUCTIONS

Respondents.

BRIEF FOR THE RESPONDENTS

Filed February 26th, 2001

This is a replacement cover page for the above referenced brief filed at the
U.S. Supreme Court. Original cover could not be legibly photocopied

QUESTION PRESENTED

Did the United States Court of Appeals for the Second Circuit properly uphold the district court's dismissal of Petitioner's claim pursuant to 18 U.S.C. §§ 1962(c) and 1964(c) of the Racketeer Influenced and Corrupt Organizations Act based on its failure to allege an "enterprise" distinct from the "person" allegedly conducting its affairs, where the "enterprise" is a corporation and the "person" is an employee acting within the scope of his employment and on behalf of the corporation?

LIST OF PARTIES

The parties to the proceeding below were:

Cedric Kushner Promotions, Ltd. (hereinafter referred to as "Kushner"), Petitioner;

Don King, Respondent;

Don King Productions, Inc., Respondent; and

DKP Corporation, Respondent.

Respondents Don King Productions, Inc. and Respondent DKP Corporation, its predecessor in interest, will be referred to collectively hereinafter as "DKP."

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, Respondents and their undersigned attorneys certify that DKP Corporation and Don King Productions, Inc., are privately held corporations and have no corporate parents, affiliates and/or subsidiaries which are publicly held.

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STATEMENT OF THE CASE

The complexity and even the constitutionality of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), Pub. L. 91-452, Tit. IX, 84 Stat. 941, as amended, 18 U.S.C. §§ 1961-1968, have bedeviled this Court for decades. Often over vigorous dissent, *see, e.g., Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 479-523 (1985) (Marshall, J., dissenting), the Court has largely been constrained to tolerate the concededly abusive use of a criminal statute for civil litigation advantage.

This case raises yet another issue of significance to the administration of civil justice in the courts of the United States: – whether RICO reaches an ordinary commercial dispute where the "racketeer" is accused only of carrying on the regular affairs of a legitimate corporation in the normal course of his employment. The court below, consistent with earlier Second Circuit decisions, held that it did not. We respectfully submit that its judgment should be affirmed.

A. Petitioner's Allegations

Petitioner Kushner is a New York corporation which is in the business of promoting professional boxing bouts. (JA34 ¶ 10).¹ Kushner and Respondent DKP are rivals in the business of boxing promotion. (JA34 ¶ 11). Kushner's

¹ Citations in the form "Pet. Br. at ___" are to the Brief for Petitioner filed with the Court on January 25, 2001. Citations in the form "U.S. Br. at ___" are to the Brief for the United States as *Amicus Curiae* Supporting Petitioner filed January 25, 2001. Citations in the form "JA___" are to the Joint Appendix.

claims for relief arise out of two basic sets of purported facts.

In October 1995, Kushner allegedly signed an agreement with Hasim Rahman, a professional boxer, to act as Rahman's exclusive promoter. (JA35 ¶ 16). Among the bouts plaintiff arranged for Rahman was one against David Tua, scheduled for September 26, 1998. (JA 36 ¶ 20). That bout was canceled, however, after Rahman stated he had injured his hand. (JA40 ¶ 33). Kushner alleged that King, by reason of conduct in purported violation of state and federal criminal law, was responsible for the cancellation.

Louis DelValle is another boxer allegedly under an exclusive promotional agreement with Kushner. (JA40 ¶ 34). In June 1998, DelValle (and not Kushner) entered into a contract with DKP to fight Darrio Mattione, a boxer promoted by defendant DKP. (JA40 ¶¶ 34-35). The DelValle/Mattione fight, which was to be a part of the undercard of a heavyweight championship bout between Henry Akinwande and Evander Holyfield, was canceled when Akinwande withdrew from the championship bout against Holyfield and the promotion was necessarily cancelled. (JA41 ¶¶ 36-37).

Following the cancellation of the Akinwande/Holyfield event, Kushner allegedly arranged for another bout to take place between DelValle and Roy Jones, Jr. (JA41 ¶ 38). According to the complaint, defendant King, after the bout was announced, telephoned one Paul Munich, Director of Athletics at Madison Square Garden, and stated that DelValle would not be able to participate

in the bout against Roy Jones, Jr. because King had the right to promote DelValle's next bout, allegedly in violation of the federal wire fraud statute, 18 U.S.C. § 1343. (JA42 ¶ 38). Subsequently, however, King allegedly acknowledged he had no promotional rights concerning DelValle. (JA42 ¶ 39). There is no allegation the DelValle/Jones bout did not take place as scheduled.

Apparently motivated by RICO's treble-damage provisions, Kushner, rather than proceeding in state court, stitched together in its federal complaint a web of disparate allegations taken from a variety of legal proceedings involving DKP and its president, Respondent Don King. Of the seventy-five paragraphs and sub-paragraphs contained in the complaint's "Statement of Facts," a full two-thirds are allegations gleaned from such sources and have nothing whatsoever to do with Kushner.

Claiming these alleged facts constituted a pattern of racketeering activity, Kushner named King and DKP as defendants, and on the substantive RICO count, identified DKP as the purported RICO "enterprise" and King as the RICO "person" who conducted DKP's affairs through the alleged pattern of racketeering activity in violation of 18 U.S.C. § 1962(c).²

² 18 U.S.C. § 1962(c) provides:

[I]t 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 or racketeering activity or collection of unlawful debt.

B. The District Court's Decision

Granting Respondents' motion to dismiss, the district court first described the well-established rule that "[u]nder 18 U.S.C. § 1962(c), an enterprise and the persons conducting the affairs of the enterprise must be distinct." *Cedric Kushner Promotions, Ltd. v. King*, 98 Civ. 6859, 1999 WL 771366, *3 (S.D.N.Y. Sept. 28, 1999) (citing *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1063 (2d Cir. 1996), vacated on other grounds, 525 U.S. 128 (1998) (footnote omitted)). Quoting *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994), the court observed further that "where employees of a corporation associate together to commit a pattern of predicate acts in the course of their employment and on behalf of the corporation, the employees in association with the corporation do not form an enterprise distinct from the corporation." *Kushner*, 1999 WL 771366 at *3.

The district court held that, because Kushner's complaint named King as the RICO person and DKP as the RICO enterprise the "identity between the RICO person and enterprise r[an] afoul of *Riverwoods*." *Id.* The district court held further that permitting Kushner to drop DKP as a RICO defendant would do nothing to alter this analysis:

Recognizing this defect, plaintiff attempts to drive a qualitative wedge between DKP and King by offering to withdraw its RICO cause of action against DKP. Thus, plaintiff contends that it will have eliminated the distinctiveness problem if DKP is identified only as the RICO enterprise, and not as a RICO defendant.

Even if this Court permitted plaintiff to amend its pleading, the cosmetic adjustment proposed by plaintiff would not salvage its RICO claim. The complaint does not allege, and plaintiff has not suggested, that King acted outside the scope of his duties as an officer of DKP. Rather, the complaint makes it abundantly clear that the corporate acts of DKP were a reflection of the promotional and other business activities of King. Where the overlap between the named RICO person and the alleged corporate enterprise remains substantial, the prevailing case law from this circuit holds that the distinctiveness requirement is not met. See *Moy v. Terranova*, 1999 WL 118773, *4 (E.D.N.Y. Mar. 2, 1999) (87 Civ. 1578 (SJ)) (dismissal warranted where CEO and principal shareholder named as a RICO defendant was not distinct from the corporate "enterprise" he allegedly controlled); *CPF Premium Funding, Inc. v. Ferrarini*, 1997 WL 158361, *12 (S.D.N.Y. Apr. 3, 1997) (95 Civ. 4621 (CSH)) ("*Discon* leaves little room for doubt: when an individual defendant has acted in a corporation's behalf, he does not function as an entity distinct from that corporation, and should not be held liable under § 1962(c)"); *Protter v. Nathan's Famous Systems, Inc.*, 925 F. Supp. 947, 956 (E.D.N.Y. 1996). Accordingly, plaintiff's first claim for relief under 18 U.S.C. § 1962(c) is dismissed with prejudice.

Kushner, 1999 WL 771366 at *4.

C. The Second Circuit's Decision

The district court's decision was affirmed by the Court of Appeals for the Second Circuit in a decision

dated July 11, 2000. *Cedric Kushner Promotions, Ltd. v. King*, 219 F.3d 115 (2d Cir. 2000). The court held:

The complaint in the instant action identifies DKP as the RICO enterprise and King as the RICO person. Though the complaint names both King and DKP as RICO defendants, the parties on appeal agree that the RICO claims against DKP were dropped, leaving King as the sole RICO defendant. As it is undisputed that King was an employee acting within the scope of his authority at DKP, Kushner does not assert that King and DKP are distinct. Instead, Kushner argues that the distinctness requirement is inapplicable when only the RICO person, and not the RICO enterprise, is a defendant. We conclude that the District Court properly rejected this contention. Our decisions in *Riverwoods* and *Discon* preclude the imposition of liability under § 1962(c) unless the RICO person and RICO enterprise are distinct; these cases leave no room for creating exceptions to the distinctness requirement based on the identity of the defendant. Accordingly, we affirm the District Court's dismissal of Kushner's RICO claim against King pursuant to 18 U.S.C. § 1962(c), the only claim before us on this appeal.

Id. at 117 (footnote omitted).

SUMMARY OF ARGUMENT

1. In interpreting the appropriate application of § 1962(c), the courts of appeals have unanimously held that a RICO "person" must be distinct from the RICO "enterprise."

2. Recognizing this "distinctness" requirement, the court below refused to apply § 1962(c) to an employee acting "on behalf of" his corporate employer. While noting the "tension, if not conflict, with the decisions of other Courts of Appeals" (JA14 n.4), the court below, in line with prior decisions of the Second Circuit, held that employees of a corporation who "associate together to commit a pattern of predicate acts in the course of their employment *and on behalf of the corporation*" are not subject to liability under 18 U.S.C. § 1962(c) (emphasis added).

3. Petitioner and the United States overlook the crux of the Second Circuit's reasoning that the requisite "distinctness" between RICO "enterprise" and "RICO person" does not exist where the employee's alleged predicate acts are committed within the scope of his or her employment and on behalf of the corporation rather than outside the scope of employment and for the employee's own benefit.

4. The distinction drawn by the Second Circuit's position is consistent with the expressed legislative intent in enacting the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, a title which in itself evidences a purpose of increasing penalties for corporate wrongdoing when there is "infiltration" of a legitimate entity for the benefit of the "infiltrator," or where the corporation or other entity is "corrupt" and not otherwise legitimate.

5. Under the Second Circuit's analysis, the appropriate test for employee liability under § 1962(c) is

whether the employee's alleged predicate acts are conducted for the employee's benefit and on his or her individual behalf or, as the Second Circuit has stressed, "on behalf of the corporation." In the former instance, the requisite "distinctness" exists between the employee and the "enterprise" corporate employer. In the latter instance, "distinctness" does not exist.

6. The good sense of this conclusion is illustrated in the Brief for the United States in its expressed need to employ civil RICO lawsuits "to eliminate organized crime's influence and control over labor unions." (U.S. Br. at 23). The precise purpose of these civil RICO lawsuits is to root out corrupt union officials who have used the union, not to achieve union goals, but to feather their own pockets, or, put another way, not on behalf of the union but on their own personal behalf.

7. Petitioner argues for a "plain language" interpretation of § 1962(c). The United States implicitly concedes that a "plain language" interpretation of § 1962(c) is inappropriate and at odds with RICO's specific purpose and "distinctness" requirement. It urges adoption of Circuit Judge Posner's formulation that the defendant and the enterprise are "either formally . . . or practically . . . separable." (U.S. Br. at 7 (quoting *McCullough v. Suter*, 757 F.2d 142, 144 (7th Cir. 1985))). While it represents a legitimate attempt to harmonize the language of § 1962(c) with RICO's purpose, the *McCullough* standard is too elusive for consistent application and lacks the Second Circuit's bright line preservation of RICO's clear purpose.

ARGUMENT

1. The Legislative History of RICO

RICO was modeled on a 1969 bill proposed in Congress by Senators Hruska and McClellan. Michael Vitiello, *More Noise From the Tower of Babel: Making "Sense" Out of *Reves v. Ernst & Young**, 56 Ohio St. L.J. 1363, 1371 (1995). The legislation had two specific purposes: ridding organized crime of its influence over legitimate businesses, and combating the threat of the monolithic Mafia. See Gerald E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 Colum. L. Rev. 661, 677 (1987) ("The [RICO] bill proposed to remove the 'cancer' of organized crime penetration from the economy 'by direct attack, by forcible removal and prevention of return.'" (quoting 115 Cong. Rec. 9567 (1969))). Senator McClellan explained:

Mr. President, title IX [of the Organized Crime Control Act of 1970, which contains RICO's civil provisions,] is aimed at removing organized crime from our legitimate organizations. Experience has shown that it is insufficient to merely remove and imprison individual mob members. Title IX attacks the problem by providing a means of wholesale removal of organized crime from our organizations, prevention of their return, and, where possible, forfeiture of their ill-gotten gains.

116 Cong. Rec. 18939 (1970).

The intent of 18 U.S.C. § 1962, then, plainly was to prevent the infiltration of legitimate businesses and unions by organized crime. S. Rep. No. 91-617, at 159

(1969) ("Section 1962 establishes a threefold prohibition aimed at the infiltration of legitimate organizations."); H.R. Rep. 91-1549 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4007, 4033 (same). To further that purpose, subsections (a) and (b) of § 1962 proscribe acquiring an interest in a legitimate organization through criminal means; subsection (c) was intended to provide a remedy to dislodge the criminal, through economic and equitable relief, from such an organization after the infiltration has occurred. *Id.* at 79 ("Where an organization is acquired or run by defined racketeering methods, then the person involved can be legally separated from the organization, either by the criminal law approach of fine, imprisonment and forfeiture, or through a civil law approach of equitable relief broad enough to do all that is necessary to free the channels of commerce from all illicit activity.").

Consistent with the legislative intent behind 18 U.S.C. § 1962, RICO's treble-damage provision, 18 U.S.C. § 1964(c), was enacted to provide a civil remedy to individuals injured by organized crime, as this Court has explained:

In introducing the treble-damages provision to the House Judiciary Committee, Representative Steiger stressed that "those who have been wronged by organized crime should at least be given access to a legal remedy." *Hearings on S.30 and Related Proposals before Subcommittee No.5 of the House Committee on the Judiciary, 91st Cong., 2nd Sess., 520 (1970)*. . . . During the congressional debates on § 1964(c), Representative Steiger again emphasized the remedial purpose of the provision: "It is the intent of this body, I am certain, to see that innocent parties who are the

victims of organized crime have a right to proper redress It represents the one opportunity for those of us who have been seriously affected by organized crime activity to recover." 116 Cong. Rec. 35346-35347 (1970).

Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 241 (1987).

However, as Chief Justice Rehnquist has observed, RICO – at least its private remedy provisions – has broken from its legislative moorings, drifting into usage by the plaintiffs' bar in ways Congress never intended:

[T]here is no such thing as prosecutorial discretion to limit the use of civil RICO by plaintiffs' attorneys. Any good lawyer who can bring himself within the terms of the federal RICO provisions will sue in federal court because of the prospect of treble damages and attorney's fees which civil RICO holds out. So the question must be asked whether the kinds of frauds and swindles that have been held to come under civil RICO are really the sort of things that Congress intended to bring into the federal courts when it passed that statute in 1970. And, if not, should not this statute be at least modified?

The legislative history of the RICO Act strongly suggests that Congress never intended that civil RICO should be used, as it is today, in ordinary commercial disputes far divorced from the influences of organized crime.

William H. Rehnquist, *Remarks of the Chief Justice*, 21 St. Mary's L.J. 5, 10 (1989) (delivered at the Eleventh Seminar on the Administration of Justice sponsored by the Brookings Institute on April 7, 1989).

This Court, nonetheless, has often declined to limit this acknowledged subversion of RICO's true purpose, and the civil RICO plaintiff has been released of any burden to allege and prove a nexus of the pattern of racketeering acts to "organized crime" in the traditional sense, *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 249 (1989), and the statute may be invoked, in appropriate circumstances, against "respected and legitimate" corporate defendants. *Sedima*, 473 U.S. at 499. But, some rules have been fashioned, consistent with the statutory language, Congress' original intent, and the common law, to prevent RICO's abuse. See, e.g., *Beck v. Prupis*, 529 U.S. 561, 120 S.Ct. 1608, 1616 (2000) (limiting civil RICO conspiracy claims to those injured by tortious "racketeering activity" based on Congressional intent to incorporate common-law rule that conspiracy plaintiff must allege injury from act independently tortious in character).

2. Section 1962(c)

There is little legislative history dealing with the inclusion of subsection (c) when RICO was enacted. It is clear however that § 1962(c) was intended as a part of legislation designed to protect against the infiltration of organized crime into legitimate commerce. It is clear also that § 1962(c) was intended and designed to impose and limit RICO liability to the "person" who engages in "a pattern of racketeering."

This plain and accepted meaning of § 1962(c), conceded by both Petitioner and the United States as *amicus curiae*, has led all courts of appeals to conclude that the RICO "person" identified as the RICO defendant under

§ 1962(c) must be "distinct from the alleged RICO enterprise." See *Bessette v. Avco Fin. Serv., Inc.*, 230 F.3d 439, 448 (1st Cir. 2000); *Anatian v. Coutts Bank (Switzerland) Ltd.*, 193 F.3d 85, 88 (2d Cir. 1999) (affirming dismissal of § 1962(c) claims because "plaintiffs failed to allege an 'enterprise' sufficiently distinct from the RICO 'person'"), *cert. denied*, 528 U.S. 1188 (2000); *Old Time Enter., Inc. v. International Coffee Corp.*, 862 F.2d 1213, 1217 (5th Cir. 1989) ("The violator of section 1962(c) who commits the pattern of predicate acts must be distinct from the enterprise whose affairs are thereby conducted."). This "need for distinctness . . . reflects Congress' intention in § 1962(c) to target a specific variety of criminal activity, the exploitation and appropriation of legitimate businesses by corrupt individuals." *United States v. Goldin Indus., Inc.*, 219 F.3d 1268, 1270 (11th Cir.), *cert. denied*, 121 S.Ct. 573 (2000) (*en banc*) (internal quotation omitted). The rule is also supported by the language of § 1962(c) as the first circuit court to address the issue explained:

There is, however, the remaining problem, restricted to CSC, of whether Congress ever intended, in 18 U.S.C. § 1962, that the statute prohibit activities by a person where the activities are described as occurring with any enterprise when there was an identity between the person, on the one hand, and the enterprise, on the other. We conclude that "enterprise" was meant to refer to a being different from, not the same as or a part of, the person whose behavior the act was designed to prohibit, and, failing that, to punish. To be sure, the analogy between individuals and fictive persons such as corporations is not exact. Still, we would not take seriously, in the absence, at least, of very explicit

statutory language, an assertion that a defendant could conspire with his right arm, which held, aimed and fired the fatal weapon.

United States v. Computer Sciences Corp., 689 F.2d 1181, 1190 (4th Cir. 1982), *cert. denied*, 459 U.S. 1105 (1983), *overruled in part on other grounds*, *Busby v. Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990). *Accord Riverwoods*, 30 F.3d at 344 (distinctness requirement focuses § 1962(c) on the culpable party, and prevents the imposition of liability on passive instruments or victims of racketeering activity); *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 883 F.2d 132, 140 (D.C. Cir. 1989) (same), *rev'd in part on other grounds*, 913 F.2d 948 (D.C. Cir. 1990) (*en banc*), *cert. denied*, 501 U.S. 1222 (1991).

The United States agrees. (U.S. Br. at 6 (“The court of appeals correctly held that petitioner was required to name in its claim under 18 U.S.C. 1962(c) a ‘person’ who is distinct from the alleged RICO ‘enterprise.’ The courts of appeals have uniformly adopted that construction of Section 1962(c), and it is consistent with the text and structure of the law.”)).

The rule of distinctness thus harmonizes the statute with Congress’ intent to punish only the RICO “person” who, having gained access to the operation or management of a business entity, either victimizes the entity or uses it as an instrumentality to further his or her own personal objectives. The authors of a leading treatise have explained:

The logic of the majority position on section 1962(c) liability is compelling. Section 1962(c) makes it unlawful for any person employed by or associated with an enterprise to conduct that

enterprise through a pattern of racketeering activity. The statutory language clearly envisions a relationship between a “person” and an “enterprise” as an element of the offense. Only a person employed by or associated with an enterprise, not the enterprise itself, may violate section 1962(c). “The enterprise is mentioned in the section only as the instrument of the person doing the racketeering, and there is no suggestion that the enterprise also may be liable” Since a corporation cannot logically be “employed by or associated with” itself, imposing liability on the corporate enterprise would require the courts to disregard the limitations inherent in the statutory language. The majority position also finds support in RICO’s legislative history. If the primary purpose of RICO is to cope with the infiltration of legitimate businesses, “it is logical that Congress would have designed section 1962(c) so that it reached the criminal but protected the victimized enterprise from liability.”

David B. Smith & Terrance G. Reed, *Civil RICO* ¶ 3.07, at 3-80 – 3-81 (rev. ed. 2000) (footnotes omitted).

The rule of distinctness is now the law in every federal circuit. *See Goldin Indus.*, 219 F.3d at 1270 (collecting cases).

3. Distinctness Between A Corporation And Its Employees

The precise issue before this Court is whether and in what circumstances a corporate employee is sufficiently “distinct” from the corporate employer “enterprise” to qualify as a RICO “person” subject to RICO liability under § 1962(c).

The First and Second Circuits have held that a corporate employee is not "distinct" from the corporate employer for RICO purposes when acting within the scope of employment and on behalf of the corporation. *Kushner Promotions*, 219 F.3d at 117; *Bessette*, 230 F.3d at 448 ("[E]mployees acting solely in the interest of their employer, carrying on the regular affairs of the corporate enterprise, are not distinct from that enterprise."). In other words, as the Second Circuit noted in *Discon*, 93 F.3d at 1064, an employee and the "enterprise" are sufficiently distinct for imposition of § 1962(c) liability *only* where the racketeering activity was undertaken, not for the corporation's benefit, but rather for the benefit of the employee-racketeer.

The court below in this case based its decision primarily upon two of its earlier decisions, *Riverwoods Chapqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339 (2d Cir. 1994), and *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055 (2d Cir. 1996), *vacated on other grounds*, 525 U.S. 128 (1998). *Riverwoods* concerned a RICO action brought against a defendant corporation and two of its employees (the latter were eventually dropped as defendants). According to the suit, the corporation conducted the affairs of an "enterprise," consisting of the corporation, its holding company, and several of its employees. Emphasizing the "distinctness" requirement of RICO, the Second Circuit declined to find the existence of an enterprise distinct from the defendant. The court reasoned that "[b]ecause a corporation can only function through its employees and agents, any act of the corporation can be viewed as an act of such an enterprise, and the enterprise is in reality no more than the defendant itself." *Riverwoods*, 30 F.3d at

344. As a result, "where employees of a corporation associate together to commit a pattern of predicate acts in the course of their employment and on behalf of the corporation, the employees in association with the corporation do not form an enterprise distinct from the corporation." *Id.* at 344.

In *Discon*, the plaintiff sought to allege a RICO enterprise consisting of a parent corporation and two of its subsidiaries. Each of these actors was also named as a defendant under § 1962(c). *Discon*, 93 F.3d at 1063. The Second Circuit found this situation analogous to that addressed in *Riverwoods*, and thus held that a RICO action could not lie. In the course of its discussion, the court stated that "in *Riverwoods*, the individual defendants were acting on behalf of the enterprise-corporation, and therefore, it would have been especially inappropriate to hold that they were distinct from the enterprise." *Id.* at 1064. The court stated that, in both *Discon* and *Riverwoods*:

[T]he individual defendants were acting within the scope of a single corporate structure, guided by a single corporate consciousness. It would be inconsistent for a RICO person, acting within the scope of its authority, to be subject to liability simply because it is separately incorporated, whereas otherwise it would not be held liable under *Riverwoods*.

Id. at 1064. The court in *Discon* acknowledged, however, that liability might be appropriate if "the defendants were acting outside the scope of their agency." *Id.* *Accord Bessette*, 230 F.3d at 449 ("[T]he failure to allege that AFS Management took actions independent of Textron is fatal to appellant's claims.").

4. Rules Of Construction, Common Law, And Section 1962(c)

While not expressly articulated in its various relevant decisions, including the decision from which Petitioner appeals, the Second Circuit's interpretation of § 1962(c) is supported by traditional rules governing the interpretation of statutes.

Judicial interpretation of statutory meaning necessarily implicates a consideration of relevant common law principles as they exist at the time of legislative enactment. See *Astoria Fed. Sav. and Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("Congress is understood to legislate against a background of common-law adjudicatory principles."); *United States v. Bailey*, 444 U.S. 394, 415 n.11 (1980) ("Congress . . . legislates against a background of Anglo-Saxon common law . . ."); *Pierson v. Ray*, 386 U.S. 547, 561 (1967) (Douglas, J., dissenting) ("Congress of course acts in the context of existing common-law rules, and in construing a statute a court considers the common law before the making of the Act." (internal quotation omitted)).

The Second Circuit's analysis of § 1962(c) is clearly the better interpretation of congressional intent when viewed, as it must be, within the context of bedrock common law principles.

First, the interpretation of § 1962(c) by the court below is based on the practical reality, as opposed to the legal fiction, that "a corporate entity, in effect, consists of the officers and employees who act in its name[.]" *Hitchcock v. Woodside Literary Agency*, 15 F. Supp.2d 246, 250

(E.D.N.Y. 1998), and "[a] corporation acts only through its officers, agents and employees." *Commissioner of Internal Revenue v. Consolidated Premium Iron Ores, Ltd.*, 265 F.2d 320, 322 (6th Cir. 1959); accord *Conklin Bros. Of Santa Rosa, Inc. v. United States*, 986 F.2d 315, 318 (9th Cir. 1993) ("A corporation acts only through its agents and employees . . ."); *Heckart v. Viking Exploration, Inc.*, 673 F.2d 309, 312 n.4 (10th Cir. 1982) (same); *Polycast Tech. Corp. v. Uniroyal, Inc.*, 129 F.R.D. 621, 626 (S.D.N.Y. 1990) (same). It is in harmony with "the general rule that the acts of the agent are the acts of the corporation." *Nelson Radio & Supply Co., Inc. v. Motorola*, 200 F.2d 911, 914 (5th Cir. 1952), cert. denied, 345 U.S. 925 (1953); accord *Dickerson v. Alachua County Comm'n*, 200 F.2d 761, 767 (11th Cir. 2000) ("[B]asic agency principles . . . 'attribute the acts of agents of a corporation to the corporation, so that all of their acts are considered to be those of a single legal actor.'" (quoting *Dussouy v. Gulf Coast Investment Corp.*, 660 F.2d 594, 603 (5th Cir. 1981))). The concept is ancient in the common law. See 1 William Blackstone, *Commentaries on the Laws of England* 456 (1st ed. 1765).

In sum, unlike a human "person," a corporation is only a creation of law. To hold that a corporation may be found legally distinct from its employees acting within the scope of their employment, and therefore considered "distinct" for RICO purposes, would emasculate the reality which the Second Circuit recognized. In life, a corporation and its employees are the same.³

³ Petitioner argues that simply because corporations are generally recognized as having an independent existence from their owners and employees (Pet. Br. at 15), the distinctness

Second, under the common law principle of *respondeat superior*, a corporation is liable for the conduct of its employees acting within the scope of their employment and on behalf of their corporate employer. Yet, Congress, in drafting § 1962(c), and contrary to the common law, deliberately exempted the corporate employer – the “enterprise” – from RICO liability. See *D & S Auto Parts, Inc. v. Schwartz*, 838 F.2d 964, 968 (7th Cir. 1988) (“Th[e] rule [of vicarious liability] . . . is not applicable to RICO, which does indicate Congressional intent to create an exception to the general rule of *respondeat superior*. . . .

requirement is satisfied and “the courts should look no further.” (*Id.* at 18). Such simple reasoning would eviscerate the rule of distinctness. As long ago explained by Chief Justice Marshall, “[a] corporation is an artificial being, invisible, intangible, and existing only in contemplation of law.” *Trustees of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819). In the words of Justice (then Judge) Cardozo, the corporate form is “enveloped in the mists of metaphor. Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.” *Berkey v. Third Ave. Ry. Co.*, 155 N.E. 58, 61 (N.Y. 1926). Thus, if recognition of the corporate form under state law would defeat the purpose of federal legislation, the former must give way. See *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 628-29 (1983) (“In discussing the legal status of *private* corporations, courts in the United States and abroad have recognized that an incorporated entity . . . is not to be regarded as legally separate from its owners in all circumstances.”); *Anderson v. Abbott*, 321 U.S. 349, 365 (1944) (declining to apply the law of state of incorporation of banking corporation to decide whether it had complied with the requirements of federal banking laws because “no State may endow its corporate creatures with the power to place themselves above the Congress of the United States and defeat the federal policy concerning national banks which Congress has announced.”). That is the case here.

‘Indeed, there is unlikely to be a situation, in the absence of an express statement, in which Congress more clearly indicates that *respondeat superior* is contrary to its intent.’ ” (quoting *Schofield v. First Commodity Corp. of Boston*, 793 F.2d 28, 32 (1st Cir. 1986)).⁴

⁴ Consistent with this conclusion, various courts of appeals have rejected claims of vicarious liability which would result in “enterprise” liability under § 1962(c). See, e.g., *Crowe v. Henry*, 43 F.3d 198, 206 n.19 (5th Cir. 1995) (enterprise may not be vicariously liable under 1962(c) when this would violate the person/enterprise distinction); *Gasoline Sales, Inc. v. Aero Oil Co.*, 39 F.3d 70, 73 (3d Cir. 1994); affirming Rule 12(b)(6) dismissal based on distinctness requirement holding that corporation/enterprise could not be vicariously liable for 1962(c) violations committed by its vice president); *Brady v. Dairy Fresh Prod. Co.*, 974 F.2d 1149, 1154 (9th Cir. 1992) (“*Respondeat superior* and agency liability is inappropriate when the person is the RICO enterprise.”); *Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 45 (1st Cir. 1991); *Landry v. Air Line Pilots Ass’n Int’l*, 901 F.2d 404, 425 n.70 (5th Cir.) (rejecting application of *respondeat superior* liability to 1962(c) claim where doing so would violate the person/enterprise distinctness requirement), *cert. denied*, 498 U.S. 895 (1990); *SK Hand Tool Corp. v. Dresser Indus., Inc.*, 852 F.2d 936, 941 (7th Cir. 1988), *cert. denied*, 492 U.S. 918 (1989); *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1306 (7th Cir. 1987) (stating that “Congress intended that ‘enterprises’ not be held vicariously liable as defendants” under RICO), *cert. denied*, 492 U.S. 917 (1989); *Petro-Tech, Inc. v. Western Co. of N. Am.*, 824 F.2d 1349, 1358-59 (3d Cir. 1987) (application of vicarious liability proper only where corporation is not also the enterprise); *Schofield v. First Comm. Corp. of Boston*, 793 F.2d 28, 32-33 (1st Cir. 1986); *B.F. Hirsch v. Enright Ref. Co., Inc.*, 751 F.2d 628, 633-34 (3d Cir. 1984); *Standard Chlorine of Delaware, Inc. v. Sinibaldi*, 821 F. Supp. 232, 250 (D. Del. 1992) (distinctness requirement ensures that a corporate defendant also named as the enterprise will not be vicariously liable for its employees’ actions); *Benet-Soto v. Chase Manhattan Bank, N.A.*, 791 F. Supp.

This departure from the common law can only be understood as reflecting Congress' intent, consistent with its purpose to punish and root out "infiltrators," to include as RICO "persons" under § 1962(c) only those employees who engage in conduct outside the scope of their employment, *i.e.*, on their own behalf and not on behalf of their corporate employer. Put another way, Congress, by exempting the corporate "enterprise" from liability, clearly limited liability under § 1962(c) to the situation where principles of *respondeat superior* are inapplicable under common law – *i.e.*, where the employee acts not for his employer's benefit, but for his own.

We respectfully submit that unless this Court were to conclude that Congress ignored these fundamental principles when it enacted RICO, § 1962(c) can only mean that Congress intended what the First and Second Circuits have concluded – that a corporation and its employees are "distinct" for RICO purposes only when the employee is acting outside the scope of employment and for his or her own benefit and not on behalf of the corporate employer.

The decision of the court below does not stand for the proposition, which Petitioner seems to advance, that a corporate employee may never be liable as RICO "person." As the Second Circuit in *Discon* noted, an employee

914, 922 (D. P.R. 1992); *Department of Econ. Devel. v. Arthur Andersen & Co.*, 683 F. Supp. 1463, 1481 n.19 (S.D.N.Y. 1988); *Connors v. Lexington Ins. Co.*, 666 F. Supp. 434, 453 (E.D.N.Y. 1987).

and his or her corporate employer "distinct" from one another, permitting § 1962(c) liability to attach to the employee, where the employee acts "outside the scope of their agency." *Discon*, 93 F.3d at 1064.

To summarize, DKP is a legitimate corporation engaged in the business of boxing promotion. King, the alleged RICO "person," is alleged to have taken part in racketeering activity in his corporate capacity to enrich DKP. (A8 ¶ 2; A31-32 ¶ 77). The purported racketeering acts of King are thus no different from those of DKP, the alleged "enterprise," on whose behalf and for whose benefit the actions were taken, as Kushner's complaint explicitly alleges. (*See* A8 ¶¶ 2, 3 (DKP only acted "through" King's own acts)). The Second Circuit's decision turns on Kushner's allegation that King was acting within the scope of his authority as an employee of DKP. The Second Circuit's distinction is therefore a pragmatic one: DKP and King are functionally indistinct under § 1962(c) because, acting in his capacity as DKP's president and for DKP's benefit, King *was* DKP.

A. Acts "Outside the Scope" of One's Employment

"Within the scope of employment" is a term of art meaning that the actions at issue " 'must be committed in connection with [the employee's] performance of some job-related activity.' " Philip A. Lacovara & David P. Nicoli, *Vicarious Criminal Liability of Organizations: RICO as an Example of a Flawed Principle in Practice*, 64 St. John's L. Rev. 725, 730 (1990) (quoting 1 Kathleen Brickey, *Corporate Criminal Liability* § 3:01, at 40 (1984)). At common law, it has long been established that to be acting within the

scope of one's employment, a party's actions must be motivated, at least in part, by a desire to benefit the employer. *See, e.g., Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 756 (1998) ("[C]onduct . . . [is] within the scope of employment when 'actuated, at least in part, by a purpose to serve the [employer],' even if it is forbidden by the employer." (quoting *Restatement (Second) of Agency* §§ 228(1)(c), 230, at 504, 511 (1957)); *Young v. Federal Deposit Ins. Corp.*, 103 F.3d 1180, 1190 (4th Cir.) ("[A]n act falls within the scope of employment only if the employee acted with the purpose of benefiting the employer. . . . If the employee acted for some independent purpose of his own, the conduct falls outside the scope of his employment."), *cert. denied*, 522 U.S. 928 (1997); *Mair v. C & O Railroad*, 851 F.2d 829, 834 (6th Cir. 1988) ("The test for determining whether an employee is acting within the scope of his employment is whether the purpose of the service rendered by the employee is to further the employer's business."); *D & S Auto Parts*, 838 F.2d at 967 ("An employer may be vicariously liable only for employee action taken within the scope of employment, that is, with intent to benefit the employer."); *Pal-estina v. Fernandez*, 701 F.2d 438, 440 (5th Cir. 1983) (actions of employee for his own personal pleasure were outside scope of his agency); *Copeland v. St. Louis-San Francisco Ry. Co.*, 291 F.2d 119, 121 (10th Cir. 1961) (act within scope of employment only if committed "in furtherance of the master's business."); *see generally*

Restatement (Second) of Agency § 228 comment a, at 504-05 (1958).⁵

Conversely, an act will fall outside the scope of one's employment when it is undertaken for purely personal reasons. *See, e.g., Bennett v. United States*, 102 F.3d 486, 489 (11th Cir. 1996) (conduct will be beyond the scope of employment "when an employee undertakes an act purely personal in nature"); *McNair v. Lend Lease Trucks, Inc.*, 95 F.3d 325, 328 (4th Cir. 1996) (*en banc*) ("An employee who deviates from his work to engage 'in some pursuit of his own' is not acting within the scope of his employment."); *Ware v. Royal Indem. Corp.*, 411 F.2d 1011, 1012 (10th Cir. 1969) (conduct will be held outside scope of agency if the agent was "'engaged in a mission of his own.'"), *cert. denied*, 396 U.S. 1058 (1970); *Novick v. Gouldsberry*, 173 F.2d 496, 500-01 (9th Cir. 1949) (conduct is outside scope of employment if it "was done with the sole intent of achieving an independent result.").

⁵ The cases cited concern whether the principal is vicariously liable for the torts of its agent. We note that the same rule applies, for similar reasons, where the issue is whether the agent's knowledge should be imputed to the principal. *See United States v. Route 2, Box 472, 136 Acres More or Less*, 60 F.3d 1523, 1527 (11th Cir. 1995) (acting within scope of employment "involves an intent to benefit the corporation."); *United States v. Barrett*, 51 F.3d 86, 89 (7th Cir. 1995) ("[C]ommon sense dictates that when an employee acts to the detriment of his employer and in violation of the law, his actions normally will be deemed to fall outside the scope of his employment and thus will not be imputed to his employer."); 3 William Meade Fletcher, *Fletcher Cyclopedia of the Law of Private Corporations* § 819, at 116-117 (rev. ed. 1994).

Union City Barge Line, Inc. v. Union Carbide Corp., 823 F.2d 129 (5th Cir. 1987), a Sherman Act case, provides an appropriate analogy to the issue at hand. There, plaintiff Union City, a company in the mid-stream refueling business, brought a claim under § 1 of the Sherman Act, 15 U.S.C. § 1, claiming the defendant Union Carbide had conspired with one of plaintiff's competitors, Channel, to destroy Union City's business. Union City alleged that Channel bribed a Union Carbide employee, one Carl Nutter, in order to obtain Union Carbide exclusive refueling business on the inland waterways of the Gulf Coast, to the exclusion of Union City. *Id.* at 131. Upholding the dismissal of Union City's claim, the Fifth Circuit explained that Nutter's conduct could not be attributed to Union Carbide, as it was solely motivated by self-interest:

Union City has impermissibly attempted to impute the culpable actions of Carl Nutter to his employer, Carbide, as a means of holding Carbide liable. *Respondeat superior*, in any incarnation, does not extend this far. The law in this circuit is well-established: an employer is not liable for an employee's criminal acts, committed outside her or his scope of employment, if those actions injure the employer. Given the undisputed criminal nature of Nutter's conduct, and the resulting economic harm it caused to Carbide, Carbide is clearly beyond the reach of antitrust liability.

....

It is undisputed that Nutter acted only in his behalf, never at the behest of, or with the slightest semblance of authority from Carbide. Indeed, his actions were in his own interest,

directly contrary to the interest of his employer, to whom he owed the duty of fidelity with honesty. Certainly, Channel was acting under no misapprehension whatsoever that Carbide had given Nutter the authority to accept kickbacks and bribes for himself, so that Carbide could pay too much money for its fuel. It is obvious that if Channel was willing to kick back Nutter one cent for every gallon of fuel Carbide paid to have redelivered, Carbide was paying Channel at least one cent too much.

....

As a matter of law, Carbide cannot be liable under the Sherman Act for its employee Nutter's wrongful actions.

Id. at 138-39 (citation and footnotes omitted).

Yet, consistent with the Second Circuit's analysis of § 1962(c), Nutter was plainly liable for his conduct and the right of any damaged person or entity, including his employer Union Carbide (which, under these facts, would unquestionably qualify as a RICO "enterprise"), to sue him under § 1962(c) is clear.

B. The Rule Of *Kushner Promotions* Is Not Difficult To Apply

The United States asks this Court to reverse the decision below because application of the Second Circuit's rule is allegedly "fraught with difficulty." (U.S. Br. at 21). That complaint is unjustified.

The "scope of employment" rule was applied in a RICO setting without difficulty in *CPF Premium Funding*,

Inc. v. Ferrarini, 95 Civ. 4621, 1997 WL 158361 (S.D.N.Y. April 3, 1997). There, the district court, pursuant to *Riverwoods* and *Discon*, held that § 1962(c) claims against corporate officers as RICO “persons” could proceed where their corporate employer, UFGI, was the alleged RICO “enterprise” if the plaintiff pleaded facts demonstrating that the defendant officers committed the predicate acts of racketeering to benefit themselves rather than UFGI. Before analyzing the complaint, the court held:

In determining what constitutes conduct outside the scope of one’s employment, I may look to the law of agency, which uses this concept in establishing an employer’s liability for the actions of its servant. In agency law, conduct not involving physical force is within the scope of employment if it is the kind of work the servant is employed to perform; it occurs within authorized time and space limits; and it is actuated, at least in part, by “a purpose to serve the master.” *Restatement (Second) of Agency* § 228[, at 504] (1958) . . . The fact that the acts attributed to the defendants are criminal does not place them outside the scope of defendants’ employment. *Id.* § 231[, at 510].

CPF Premium Funding, 1997 WL 158361 at *12 n.12.

Dismissing the complaint for failure to allege that the individual defendants were sufficiently distinct from UFGI, the court determined that the defendants were acting for UFGI’s benefit, not their own:

CPF contends that it has presented claims of “profiteering” by the RICO defendants . . . , thereby alleging actions taken outside the scope of their employment. It bases this assertion on a

statement in the complaint that these defendants used funds obtained from CPF for “other improper and unauthorized purposes” in addition to those benefiting UFGI. Complaint ¶ 46. But the plaintiffs’ attempt to squeeze a specific averment from this vague assertion will not suffice. The very paragraph which plaintiffs cite states that the UFG Group “entered such proceeds into the books of UFGI International as income” This leaves little room for the Court to construe the catch-all statement alluded to by the plaintiffs as a claim of profiteering.

Id. at *13.

Moreover, once understood, the Second Circuit’s interpretation and application of § 1962(c) poses no threat to what the United States concedes is the central purpose of RICO – effective criminal law enforcement against organized crime. The soundness of the Second Circuit’s analysis actually is illustrated by the argument of the United States that it needs to employ civil RICO lawsuits under § 1962(c) “to eliminate organized crime’s influence and control over labor unions.” (U.S. Br. at 23). Indeed, the precise purpose of these civil RICO lawsuits under § 1962(c) is to root out corrupt union officials who have used the union, not to achieve union goals, but to feather their own pockets, or, put another way, not on behalf of the union but on their own personal behalf.

Finally, we note that both Petitioner (Pet. Br. at 17) and the United States (U.S. Br. at 24-25) argue that the decision below means that criminals can escape liability under § 1962(c) merely by incorporating. That is incorrect. Where the corporate form is a sham, § 1962(c) clearly

would apply because individual actors can be held liable for using a sham corporate enterprise as a passive tool to extract money, or to achieve some other illegal purpose, through a pattern of racketeering activity. Cf. *Travis v. Gary Comty. Mental Health Ctr., Inc.*, 921 F.2d 108, 110 (7th Cir. 1991) (“[M]embers of the Ku Klux Klan could not avoid liability [for conspiring to violate civil rights under 42 U.S.C. § 1985] by incorporating, for they would still be trying to organize (through persuasion or terror) multiple centers of social or economic influence.”).⁶ Multiple participants can be held liable under an “association in fact” theory. *United States v. Turkette*, 452 U.S. 576, 583 (1981).

The argument is wholly spurious and surely illusory. There is as much chance of “mob” incorporation as there is of “mob” disappearance. But even were there any substance to this argument, the incorporation of organized crime would clearly serve RICO’s purposes because it would expose the “mob” corporation to audit, document subpoenas, and the Internal Revenue Service.

In the end, the real threat to justice is the sweeping application of § 1962(c) espoused by Petitioner and the United States, which would expose individuals to potential treble damage liability based on garden-variety fraud allegations simply because they are employed by a corporation which can then always be named as the RICO “enterprise.” Indeed, such exposure would discourage service by qualified individuals on boards of directors of both for-profit and eleemosynary corporations, which hardly

⁶ The similarity between the limits on individual liability under 42 U.S.C. § 1985 and those imposed by the Second Circuit in *Kushner Promotions* is explained *infra* at 31-33.

seems a wise policy decision. The better and only just solution is to limit § 1962(c)’s application to those situations where Congress intended it to apply.

C. The Rule Of *Kushner Promotions* Is Consistent With Other Relevant Areas Of The Law

The rule of *Kushner Promotions* is consistent with other areas of the law where individual liability is not imposed for corporate conduct, most notably the principles governing intracorporate conspiracies.

The intracorporate conspiracy doctrine provides:

It is basic in the law of conspiracy that you must have two persons or entities to have a conspiracy. A corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation.

Hull v. Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of Ed., 926 F.2d 505, 509 (6th Cir.) (quoting *Nelson Radio*, 200 F.2d at 914), *cert. denied sub nom. Hull v. Schuck*, 501 U.S. 1261 (1991).

The doctrine has been applied to prevent the imposition of civil liability on individual corporate employees pursuant to 42 U.S.C. § 1985, which forbids “two or more persons” from conspiring to violate a party’s civil rights, despite the fact that the statute, read literally, would apply. See *Benningfield v. City of Houston*, 157 F.3d 369, 378 (5th Cir. 1998), *cert. denied sub nom. Benningfield v. Nuchia*, 526 U.S. 1065 (1999); *Hartman v. Bd. of Trustees of Comty. Coll. Dist. No. 508, Cook County*, 4 F.3d 465, 469-71 (7th Cir. 1993); *Hull*, 926 F.2d at 509-510; *Robison v. Canterbury Vill.*,

Inc., 848 F.2d 424, 430-31 (3d Cir. 1988); *Buschi v. Kirven*, 775 F.2d 1240, 1252 (4th Cir. 1985); *Cross v. General Motors Corp.*, 721 F.2d 1152, 1156 (8th Cir. 1983); *Rice v. President & Fellows of Harvard Coll.*, 663 F.2d 336, 338 (1st Cir. 1981), *cert. denied*, 456 U.S. 928 (1982); *Girard v. 94th St. and Fifth Ave. Corp.*, 530 F.2d 66, 70-72 (2d Cir.), *cert. denied*, 425 U.S. 974 (1976). It has also been applied, as the United States observes (U.S. Br. at 19 n.10), to claims under § 1 of the Sherman Act. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984).

However, as under the Second Circuit's analysis of § 1962(c) liability in *Kushner Promotions*, liability under 42 U.S.C. § 1985 will be imposed on corporate employees and this merger of identity will dissolve where they act outside the scope of their employment "for their own personal purposes." *Benningfield*, 157 F.3d at 379; *accord Jackson v. City of Columbus*, 194 F.3d 737, 753 (6th Cir. 1999); *Wright v. Illinois Dep't of Children & Family Serv.*, 40 F.3d 1492, 1508 (7th Cir. 1994); *Girard*, 530 F.2d at 72 ("The plaintiff must also allege that [corporate officer defendants] acted other than in the normal course of their corporate duties." (internal quotation omitted)); *Jackson v. T & N Van Serv.*, Civ. A 99-1267, 2000 WL 562741, *5 (E. D. Pa. May 9, 2000) (doctrine did not apply because "[h]ere, plaintiff not only has alleged that the T & N defendants conspired with a third party, the defendant Union, but the individual defendants in this case can be viewed as having acted in a personal, as opposed to official, capacity and, thus, outside the scope of employment."); *Steptoe v. Savings of Am.*, 800 F. Supp. 1542, 1547-48 (N.D. Ohio 1992) ("[D]istrict courts in this Circuit have consistently

followed the general rule unless there was some allegation that the defendants were acting outside the scope of their employment.").

The argument advanced by Petitioner and the United States that the realities of the relationship between a corporation and its employees cannot be considered if to do so would restrict liability (Pet. Br. at 18; U.S. Br. at 22-23) is therefore untrue. If those realities are reflected in Congress' intent, as revealed in the language of the statute and its legislative history, then those realities should be respected, even if to do so would result in applying the statute less broadly than might otherwise be the case. As the Second Circuit recognized, that is the situation here.

Petitioner also relies heavily on the inclusion of corporations in the definition of "enterprise" in § 1961(4) to support its argument that, *a fortiori*, King and DKP are distinct. (Pet. Br. at 8, 11, 18). So does the United States. (U.S. Br. at 12, 18, 25 n.16). That, we respectfully submit, is too simplistic a premise upon which to base that conclusion. As this Court has explained in holding that corporate officers cannot conspire among themselves to violate 15 U.S.C. § 1, which declares that every "person" who conspires to restrain trade is guilty of a felony, literal language must give way to the principles behind the statute:

Nothing in the language of the Sherman Act is inconsistent with the view that corporations cannot conspire with their own officers. It is true that a "person" under the Act includes both an individual and a corporation. 15 U.S.C. § 7. But § 1 does not declare every combination

between two “persons” to be illegal. Instead it makes liable every “person” engaging in a combination or conspiracy “hereby declared to be illegal.” As we note, the principles governing § 1 liability plainly exclude from unlawful combinations or conspiracies the activities of a single firm.

Copperweld, 467 U.S. at 769-70 n.15.

The relevant inquiry, then, is whether principles governing RICO liability, as expressed in the whole statute, its legislative history, and in light of the common law compel the conclusion drawn by Petitioner. As explained above, they do not; instead, they compel the conclusion drawn by the Second Circuit.

5. Opposing Views

Petitioner and the United States rely in all material respects upon a “plain language” approach to the proper interpretation and intent of § 1962(c). While recognizing and, at least in the case of the United States, approving the “distinctness” requirement between RICO “person” and RICO “enterprise,” both contend this is satisfied because, simply put, a corporation is a corporation and a person is a person. Neither pay any attention to the immunity bestowed on the RICO “enterprise” under § 1962(c) and the implications thereof, or to the relevance of the law creating a unity of interest and liability in the principal/agent and corporation/employee relationship. Both also rely on those courts of appeals which disagree with the Second Circuit, each of which also ignored the factors to which we have pointed.

Petitioner relies principally upon the Third Circuit’s decision in *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258 (3d Cir. 1995). (Pet. Br. at 7, 9, 23, 24). Prior to

Jaguar Cars, the Third Circuit, like the Second Circuit, had held that a § 1962(c) claim “could not allege conduct on the part of corporate officers and directors acting through a legitimate corporate enterprise.” *Id.* at 263. For example, in *Glessner v. Kenny*, 952 F.2d 702 (3d Cir. 1991) the Third Circuit had endorsed the argument that, absent any allegation that the employee defendants were using or victimizing their corporate employer “enterprise” for their own benefit, no § 1964(c) treble-damage claim based on § 1962(c) was stated:

In *Brittingham[v. Mobil Corp.]*, 943 F.2d 297 (3d Cir. 1991)] we noted that “individual defendants in contrast to collective entities, are generally distinct from the enterprise through which they act.” 943 F.2d at 302. We therefore consider whether, in light of the pleadings before us, individual defendants who were officers and employees of the corporations can be the “persons” who were conducting a pattern of racketeering through the corporations as an enterprise. Although that is a viable theory under RICO, this is not the appropriate case in which it can be applied. As we explained in *Petro-Tech[, Inc. v. Western Co. of North Am.]*, 824 F.2d 1349 (3d Cir. 1987)], “section 1962(c) was intended to govern only those instances in which an ‘innocent’ or ‘passive’ corporation is victimized by the RICO ‘persons,’ and either drained of its own money or used as a passive tool to extract money from third parties. Such an interpretation avoids the absurd result that a corporation may always be pled to be the enterprise controlled by its employees or officers.

At oral argument we questioned plaintiffs’ counsel on the theory in this case which would

permit us to view the individual defendants as using the corporations for their own benefit. Counsel responded that the individuals ultimately took Meenan private and used the gains for their own ends. This theory was also articulated in their Supplemental Letter. Assuming that there could be a viable section 1962(c) claim in which Meenan could be regarded as the victim enterprise, it is not the RICO claim alleged. The RICO case statement makes it abundantly clear that the plaintiffs' injuries for which suit was brought arose out of their failure to "obtain the safe, state-of-the-art units for which they paid." App. at 122.

The individual defendants were alleged to have participated in the fraudulent advertising as agents of the corporation. The RICO case statement alleges merely that "[a]ll of the defendants held positions as officers and principals of the corporate defendants, and received income as such. All of the defendants derived income from each and every sale of the 'blue flame' products. These sales were generated by defendants' multiple mail fraud violations which combined into a pattern of racketeering." App. at 132-33. This activity is indistinguishable from that alleged as to the corporations and is a far cry from the use by individuals of an innocent passive corporation contemplated by *Petro-Tech*. We conclude therefore that this is not the situation in which individual defendants, whether employees/officers or not, can be viewed as distinct from the corporations deemed the enterprise. It follows that dismissal of the section 1962(c) claim was not erroneous.

Glessner, 952 F.2d at 713-714 (footnote omitted). *Accord Gasoline Sales*, 39 F.3d at 73 ("Where the employees merely participate in the corporation's own fraud by acting as corporate agents, however, the employees may not be sued under section 1962(c).").⁷

In *Jaguar Cars*, the Third Circuit first acknowledged its prior decisions, consistent with those of the Second Circuit, that corporations "are artificially created legal persons that can only act through their officers and employees." *Jaguar Cars*, 46 F.3d at 265. It concluded however that those prior decisions could not survive this Court's decisions in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479 (1985), *National Org. for Women v. Scheidler*, 510 U.S. 249 (1994), and *Reves v. Ernst & Young*, 507 U.S. 170 (1993). It concluded that *Sedima*, by eliminating the "mob" as RICO's only target, inferentially eliminated "infiltration" as a consideration in interpreting § 1962(c); that *Scheidler* eliminated the need for a "victim" enterprise by observing that the enterprise is usually the "vehicle" of the racketeer, and that *Reves* purportedly held that employees were proper RICO "persons" even when acting within the scope of their employment and on

⁷ Although we believe *Glessner* was correctly decided, we recognize that, in addition to incurring liability for using their corporation as a passive tool to extract money from others, employee defendants would also be liable if their racketeering activities were motivated by something other than economic gain, e.g., to advance some personal political or ideological position. See *National Org. for Women v. Scheidler*, 510 U.S. 249, 262 (1994) (members of association-in-fact enterprise liable where racketeering activities motivated by desire to interfere with access to abortion facilities).

behalf of the corporate "enterprise." Based upon what it conceded was only "implicit" in *Reves*, the Third Circuit reversed its prior jurisprudence and held that employees acting on behalf of the "enterprise" were "distinct" from the "enterprise" and subject to RICO liability. *Jaguar Cars*, 46 F.3d at 267-68.

Petitioner's point seems to be that, at least to the Third Circuit, this Court, by its decisions in *Sedima*, *Scheidler*, and *Reves*, had left no room for the reasoning of *Glessner* and therefore no room for the position of the Second Circuit as reiterated by the court below in this case.

We disagree. *Sedima* decided two questions – whether a prior conviction was required under § 1962(c) and the meaning of "racketeering injury." *Scheidler* decided the need for "economic motive" as an element of liability under § 1962(c). *Reves* dealt with the liability of "outsiders" under § 1962(c). Quite aside from the precedential value of what clearly is *dicta* in those decisions, nothing said in those cases decided the issue now presented.

The Second Circuit's interpretation of § 1962(c) does not require that the defendant be a member of "organized crime" as commonly understood or limit its application to a "victim" corporate enterprise. And, to the extent *Reves* speaks of "insider" liability under § 1962(c), the decision does not address in what circumstances a corporate employee may properly be charged as a RICO "person" and surely does not mandate RICO liability in *all* circumstances.

6. The First And Second Circuits Properly Define The Scope Of Section 1962(c)

The Second Circuit, and the First, stand apart in their view of the appropriate interpretation and application of § 1962(c). Consistent with all other courts of appeals in requiring "distinctness" between the RICO "person" and the RICO "enterprise," both have refused to ignore the practical unity of employee and employer in favor of distinctions which are juridical and not real. The decisions of the First and Second Circuits are consistent with the exemption from liability which Congress, and all the courts of appeals, have awarded the corporate "enterprise" under § 1962(c). Both Circuits have recognized, at least implicitly, that the statutory "enterprise" immunity created by Congress limits the application of § 1962(c) to employees who, for their own benefit and without regard to corporate purpose, engage in predicate conduct constituting racketeering activity under RICO.

To impose liability because a corporation is distinct in a juridical sense rather than practically distinct from its employees is inconsistent with traditional principles of unity between employer and employee and the civil liability which derives therefrom, ignores the clear Congressional purpose in exempting the "enterprise" from § 1962(c) liability and runs counter to sound public policy which should deter the manipulation of common law claims in order to triple actual damage and, as in Petitioner's case, create federal jurisdiction where none otherwise exists.

The proper answer to claimants like Petitioner is that actions for single damages remain available in state court.

* * *

Petitioners "plain language" arguments should be rejected. In the words of Chief Judge Sloviter in *Glessner*, the decision of the Second Circuit "avoids the absurd result that a corporation may always be pled to be the enterprise controlled by its employees or officers." *Glessner*, 952 F.2d at 713. The decision also reflects a basic canon of statutory interpretation. "Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion . . ." *In re Chapman*, 166 U.S. 661, 667 (1897); accord *United States v. Bryan*, 339 U.S. 323, 338 (1950) (a statute should not be read literally if "the congressional purpose would be frustrated [thereby] . . .").

The words of this Court seem relevant when, in limiting liability for treble damages under § 4 of the Clayton Act, upon which the RICO statute was modeled,⁸ for violation § 7 of the Sherman Act, it explained:

A literal reading of the statute is broad enough to encompass every harm that can be attributed directly or indirectly to the consequences of an antitrust violation. Some of our prior cases have paraphrased the statute in an equally expansive way. But before we hold that the statute is as broad as its words suggest, we must consider whether Congress intended such an open-ended meaning.

⁸ See *Rotella v. Wood*, 528 U.S. 549, 557 (2000) ("[A]s we have previously noted, there is a clear legislative record of congressional reliance on the Clayton Act when RICO was under consideration . . .").

Associated Gen. Contractors of Calif., Inc. v. California State Council of Carpenters, 459 U.S. 519, 529-30 (1983).

◆

CONCLUSION

For the reasons set forth herein, the decision of the court below should be affirmed.

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