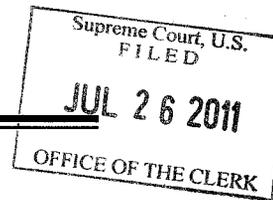


No. 10-1503



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IN THE  
**Supreme Court of the United States**

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JOHN C. REZNER,

*Petitioner,*

*v.*

UNICREDIT BANK AG AND  
UNICREDIT U.S. FINANCE LLC,

*Respondents.*

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

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**REPLY BRIEF**

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Petitioner John C. Rezner hereby replies to the Brief in Opposition of Respondents UniCredit Bank AG and UniCredit U.S. Finance LLC (hereinafter "HVB," consistent with respondents' names during the proceedings below).

### **I. Response To HVB's Statement Of The Case**

HVB's opening gambit is to tar Petitioner as the party who was actively trying to defraud the government, while simultaneously downplaying HVB's admitted role as a member of a criminal enterprise. There is nothing in the cited record to support HVB's characterization of the facts. This is unsurprising since HVB's defense that Petitioner was a knowing participant in HVB's fraud was so lacking in evidentiary support that summary judgment was granted against HVB by the district court.<sup>1</sup> It is also irrelevant to this Petition because the Ninth Circuit reversed the district court on an entirely different ground, finding that Petitioner's injury was "indirect."

Among its many RICO predicate acts, HVB, both directly and through its co-conspirators, committed mail and wire fraud by transmitting false and misleading representations and material omissions to Petitioner. Pet. App. 24a; 33a-34a; 42a. Petitioner presented undisputed evidence that he was unaware of these misrepresentations and omissions, and having consulted with numerous expert advisors who uniformly assured him of the transaction's legitimacy, paid substantial sums of money to HVB and

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1. Unlike HVB, Petitioner was never subject to any criminal investigation and, after paying his taxes in full, was never assessed with a penalty or any other fine by the government.

others for the CARDS financing transaction. In other words, Petitioner paid money directly to defendants who sold him a product that was not what it purported to be. The sale of that product to Petitioner, and the criminal acts undertaken in furtherance of that sale, was part of a scheme by HVB and its co-conspirators whose object was not only to defraud the government, but to make money for themselves by collecting fees from taxpayer investors like Petitioner.

HVB's trope that Petitioner's RICO claim is entirely dependent upon, and derivative of, HVB's admissions in the deferred prosecution agreement ("DPA") is simply fiction. Petitioner demonstrated his injury (fees) and the injury's relationship to HVB's criminal conduct through extensive discovery and undisputed evidence, including HVB's own conclusive admissions made under Federal Rule of Civil Procedure 36, binding Rule 30(b)(6) witness testimony, numerous depositions, and other undisputed evidence. All of that evidence shows that HVB committed criminal predicate acts directly resulting in Petitioner paying millions of dollars in fees, including approximately \$1.7 million directly to HVB. Pet. App. 42a-45a; 49a; *see also* Pet. App. 5a.

The Ninth Circuit denied Petitioner a day in court because it found his injury was "indirect;" it did not find or even suggest that he was complicit in HVB's fraud. Thus, even if HVB had sufficient evidence to create an issue of fact as to whether Petitioner was aware of HVB's fraud, that issue must be decided by a jury. Under the Ninth Circuit's analysis, Petitioner is denied even that opportunity. If a plaintiff like Petitioner has no remedy under RICO because the government was defrauded,

even though he paid millions of dollars directly to the defendants after being induced by their fraudulent RICO conduct and without knowledge of its illegality, no private plaintiff could possibly have standing. This evisceration of civil RICO is in direct conflict with other circuits and inconsistent with the statute's broad remedial purpose.

**II. The Ninth Circuit Held, In Direct Conflict With The Second and Seventh Circuits And Contrary To This Court's Established Precedents, That Petitioner Lacked Standing Under RICO Because The United States Government Was A Direct Victim Of The Defendant's Scheme.**

The Second and Seventh Circuits have both held that directly injured plaintiffs have standing to bring civil RICO claims, regardless of whether there is a more favored plaintiff. *RWB Services, LLC v. Hartford Computer Group, Inc.*, 539 F.3d 681, 688-89 (7th Cir. 2008); *Baisch v. Gallina*, 346 F.3d 366, 374 (2d Cir. 2003); *Commercial Cleaning Servs., L.L.C. v. Colin Service Sys., Inc.*, 271 F.3d 374, 383-84 (2d Cir. 2001). Putting the conflict into even starker contrast, the Second Circuit held that even if the RICO scheme is intended to and *did* defraud the government, private parties who suffer direct injuries still have standing to recover for the harm caused to them. *Baisch*, 346 F.3d at 374.

HVB argues that there is no conflict among the circuit courts (and that the Ninth Circuit decision's is unimportant and consistent with this Court's prior precedents) because the Ninth Circuit's holding was nothing more than a "fact-specific" application of this Court's prior holdings. HVB's analysis is wrong.

The most fundamental step of a “fact-specific” analysis of proximate causation is identifying the plaintiff’s injury. Without doing so, no further analysis of its “directness” is even possible. The Ninth Circuit did not identify Petitioner’s injury in its proximate cause analysis. The Ninth Circuit did not trace the causal chain between HVB’s conduct and Petitioner’s injury. The Ninth Circuit did not describe how the harm to Plaintiff was in any way “contingent” on harm to the United States. *Compare Rezner*, Pet. App. 6a (stating without analysis that “Rezner’s asserted injury indirectly resulted from HVB’s fraudulent activity against the United States”) with *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 271 (1992) (holding that plaintiffs’ injuries were indirect and contingent, because they claimed to have lost money [injury] not because they purchased stock whose price had been manipulated [RICO conduct], but rather because the broker-dealers who did purchase the stock became insolvent and could not pay their debts [contingency upon third-party injury]). Nor did the Ninth Circuit identify the direct cause of Petitioner’s injury as being an intervening act of a third party, or an intervening act by defendants that was separate and distinct from their criminal conduct. *Cf. Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 458 (2006) (“The cause of Ideal’s asserted harms, however, is a set of actions (offering lower prices) entirely distinct from the alleged RICO violation (defrauding the State).”); *Hemi Group, LLC v. City of New York*, 130 S.Ct. 983, 990 (2010) (“The City’s theory thus requires that the Court extend RICO liability to situations where the defendant’s fraud on the third party (the State) has made it easier for a *fourth* party (the taxpayer) to cause harm to the plaintiff (the City). Indeed, the fourth-party taxpayers here only caused harm to the City in the first

place if they decided not to pay taxes they were legally obligated to pay.”) (emphasis in original).<sup>2</sup>

Instead of performing a fact-specific analysis of the causal link between HVB’s conduct and Petitioner’s payment of fees to HVB, the Ninth Circuit relied solely on the fact that “a third-party, the United States, was directly injured by HVB’s fraudulent activity” to conclude that Petitioner’s injury was indirect. Pet. App. 15a-16a. But Petitioner’s injury was not the “lost tax revenue” suffered by the government as a result of HVB’s fraud. His injury consisted of fees paid to HVB and its co-conspirators for the CARDS transaction, based upon their false and misleading statements and material omissions. Those fees were paid and lost by Petitioner whether or not the government suffered any lost revenue (a loss which would not occur until later, when taxpayers claimed their deductions, and for which the government was fully compensated when Petitioner paid his taxes in full). Yet only the government’s injury was considered relevant to the proximate cause analysis, even though in its finding of facts, the Ninth Circuit acknowledged Petitioner’s payment of fees. Pet. App. 5a. Thus, although the Ninth Circuit did not use “magic words” to announce a new rule, it held that a private plaintiff who paid money directly to defendants based on false pretenses lacks standing based on nothing more than the fact that a third party (the government) was also directly injured.

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2. The parallels between the United States government’s injury in this case and the City of New York’s injury in *Hemi* are plain. The injury to both was lost tax revenue. In both cases, the loss of tax revenue is contingent upon taxpayers failing to pay taxes, rather than being directly caused by the misrepresentation of the defendants.

The Ninth Circuit is therefore in direct conflict with the Second and Seventh Circuit Courts of Appeal, and its holding is inconsistent with the prior decisions of this Court. As discussed in the Petition, such a rule would have a significant impact on RICO standing, and effectively immunize (at a minimum) a broad class of defendants that have defrauded the government from civil RICO liability. One would have to be very naive to believe that other defendants will not cite the Ninth Circuit opinion for the proposition that private plaintiffs cannot show proximate causation under RICO where the government has been defrauded.<sup>3</sup>

**III. This Court's Decision In *Hemi* Did Not Overrule Either *Baisch v. Gallina* Or *RWB Services, LLC v. Hartford Computer Group, Inc.***

HVB's claim that this Court's opinion in *Hemi* overruled *Baisch* and *RWB Services* is incorrect. The plurality opinion in *Hemi* rejected the proposition that foreseeability is sufficient to establish proximate causation. *Hemi*, 130 S.Ct. at 991. Instead, "in the RICO context, the focus is on the directness of the relationship between the conduct and the harm." *Id.* Justice Ginsburg concurred in the judgment, but declined to "subscrib[e] to the broader

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3. Indeed, at least one has already done so: see Memorandum in Support of Motion to Dismiss Consolidated Class Action RICO Complaint at 15, *In Re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, 2011 WL 1599406 (E.D.La. Feb 28, 2011) (No. 2179) ("Other courts have similarly concluded that civil RICO claims by private parties based on fraud against the government fail for lack of proximate causation. *Rezner v. Bayerische Hypo-Und Vereinsbank AG*, 630 F.3d 866, 873-74 (9th Cir. 2010).")

range of the Court's proximate cause analysis." *Id.* at 995. Seizing on the fact both the Second and Seventh Circuit opinions include the word "foreseeable," HVB claims that those decisions are no longer good law.

*Hemi* has no impact on either case. A more careful reading of both *Baisch* and *RWB* demonstrates that each properly analyzed the question of whether the alleged injury was "direct." Neither found proximate causation based on mere foreseeability. Furthermore, the injuries in both cases would be considered "direct" under any formulation by or precedent of this Court, including *Hemi*.<sup>4</sup>

In *Baisch*, the Second Circuit was explicit that foreseeability is not the test for whether an injury is sufficiently "direct": rather, it is an additional requirement that must also be met to show proximate causation under Second Circuit precedents. *Baisch*, 346 F.3d at 373-74. Thus, if anything, the Second Circuit in *Baisch* applied a *stricter* standard for proximate causation than any of this Court's precedents, including *Hemi*. *Baisch* gave money to the defendants based on misrepresentations they made to him. *Baisch*, 346 F.3d at 369-70. The Second Circuit

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4. Certainly HVB cannot be claiming that *Hemi* narrowed RICO proximate causation to the point where there can only be a single directly injured victim of RICO conduct. Indeed, the opinion points out that the causal chain presented in that case was far more attenuated than those rejected in *Holmes* and *Anza*. *Hemi*, 103 S.Ct. at 989-90. The relevant holding by both the Second and Seventh Circuit Courts of Appeal — that there can be multiple direct victims of a defendant's RICO conduct — would be unaffected by *Hemi*, even if the Second and Seventh Circuits had applied the wrong test for proximate causation.

held that was a direct injury, regardless of whether the scheme was intended to or did defraud the government. *Id.* at 373-74. Thus, under facts that are indistinguishable from those presented to the Ninth Circuit in this case, the Second Circuit found that a private plaintiff may be directly injured by RICO conduct that also defrauded the government.

Similarly, while the Seventh Circuit made a prefatory statement that a “direct” injury was “akin” to a foreseeable one, it did not use foreseeability as the test for proximate causation. Rather, it stated that “[i]n examining whether a RICO violation proximately caused the plaintiff’s injury, ‘the central question ... is whether the alleged violation led directly to the plaintiff’s injuries.’” *RWB Services, LLC v. Hartford Computer Group, Inc.*, 539 F.3d 681, 688 (7th Cir. 2008) (quoting *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 461 (2006)). In *RWB*, the defendants stole cameras from the plaintiff, RWB Services, in order to defraud Wal-Mart. *RWB* 539 F.3d at 688. In other words, like HVB, the defendants took something of value from the plaintiff through criminal conduct that defrauded a third party. The Seventh Circuit held that the presence of a “better” plaintiff (Wal-Mart) did not deprive RWB of standing to pursue a remedy under RICO for the unique injury it suffered as a direct result of the defendants’ conduct. *Id.* at 688-89 (“the defendants robbed Peter to defraud Paul; the former is as foreseeable a plaintiff as the latter *with as direct an injury*”) (emphasis added).

The Ninth Circuit reached the exact opposite result. It held that Petitioner, from whom HVB took money on false pretenses as part of its RICO conduct, lacked standing solely because the United States was also

defrauded and was a “better” plaintiff. The conflict is real.

#### **IV. The Proximate Causation Issue Was Not Properly Before The Ninth Circuit And Was Waived By HVB.**

HVB’s assurances that there were no procedural irregularities in the Ninth Circuit ring hollow. The record indisputably proves that HVB waived the proximate causation issue that was ultimately decided, and that this issue was not properly before the Ninth Circuit. HVB cites to the Ninth Circuit’s statement that the issue was before it, but does not dispute that it never argued in its appellate briefs that Petitioner’s injury was indirect. HVB does not dispute that it explicitly waived the issue in its Reply Brief to the Ninth Circuit. HVB does not dispute that Petitioner was given no notice or opportunity to brief the issue before the Ninth Circuit. In sum, the arguments actually before the Ninth Circuit were different from what the Ninth Circuit said they were. HVB knows this, yet represents in its Opposition that the issue was properly raised and decided.

To justify the Ninth Circuit’s actions, HVB equates what the Ninth Circuit did in this case to what this Court did in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2720 (2010) and *FEC v. Beaumont*, 539 U.S. 146, 163 (2003). Rather than supporting the Ninth Circuit’s *sua sponte* ruling on a waived issue, both cases instead demonstrate that the procedure below so far departed from the ordinary course of judicial proceedings as to warrant the intervention of this Court. Specifically, both cases involved *cross-motions* for summary judgment. *Holder*, 103 S.Ct. at 2714 (noting that all parties moved for summary judgment); *Humanitarian Law Project*

*v. Gonzales*, 380 F.Supp.2d 1134, 1136 (C.D. Cal. 2005) (district court opinion in *Holder* case stating that the Department of State brought motion to dismiss and cross-motion for summary judgment); *Beaumont v. Federal Election Com'n*, 137 F.Supp.2d 648, 649-50 (E.D.N.C. 2000) (district court in *FEC* noting that cross-motions were filed).

Thus, in stark contrast to this case, judgment could properly be entered in favor of *either* party. Here, *Petitioner* was the one who had filed a motion for summary judgment and received judgment in his favor. Yet after ruling *sua sponte* on an issue that had been explicitly waived by HVB, the Ninth Circuit effectively entered summary judgment in HVB's favor. Pet. App. 63a-65a.

Finally, HVB's attempt to distinguish *Fountain v. Filson*, 336 U.S. 681 (1949) only underscores the fact that the Ninth Circuit departed from the norms of judicial proceedings even more than did the Circuit Court in *Fountain*. HVB argues that the procedure was defective in *Fountain* because the circuit court examined evidence, concluded that the non-moving party was entitled to judgment, and remanded to the district court with instructions to enter judgment. Here, the Ninth Circuit, as acknowledged by HVB, did not even attempt to examine the record to determine the facts supporting what HVB has characterized as a "fact-dependent" decision.

HVB's own words also belie its suggestion that the Ninth Circuit simply remanded for application of law to facts by the district court, and the Ninth Circuit's reasoning happened to result in dismissal. After the Ninth Circuit ruled, HVB moved to dismiss on the grounds that

“the Ninth Circuit held that, as a matter of law, Rezner cannot establish that HVB’s fraud was the proximate cause of his asserted injury” and that dismissal was required by the “rule of mandate.” The District Court agreed with HVB that the Ninth Circuit decision mandated dismissal without any further analysis of existing facts or those that could be potentially developed. Pet. App. 63a-65a.

The decision below was reached through fundamentally flawed and unfair proceedings. Review by this Court should therefore be granted for the additional purpose of protecting the integrity of the judicial process.

### CONCLUSION

Petitioner respectfully requests that the Court grant his petition for a writ of certiorari.

Respectfully Submitted,

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