No. 12-667

IN THE
SUPREME COURT OF THE UNITED STATES

BIZZIE WALTERS *et al.*,

Petitioners,

v.

TODD MCMAHEN *et al.*,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondents object to the question presented in the Petition, which incorrectly states that the Fourth Circuit held below that "immigration violations cannot be the proximate cause of depressed wages." Pet. Br. i. As further explained in this Opposition, all that the Fourth Circuit held was that Petitioners failed to allege plausible facts establishing that they suffered an injury proximately caused by any RICO predicate act as required by this Court under the pleading standards set forth in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (collectively "*Twombly/Iqbal*"), and this Court's application of those standards to RICO injury requirements in *Hemi Group, LLC v. City of New York*, 130 S. Ct. 983, 989 (2010).

In as much as all of the supposedly conflicting circuit decisions referenced in the Petition were decided prior to *Twombly/Iqbal* under pleading standards that are no longer in effect, the question presented should be restated as follows:

Whether the decision of the Fourth Circuit, holding that Petitioners failed to allege plausible facts establishing that they suffered an injury proximately caused by any RICO predicate act, is worthy of review in the absence of any conflicting decision in another circuit applying this Court's *Twombly/Iqbal* pleading standards.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

OTHER AUTHORITY

INTRODUCTION

This case is the latest in a series of civil actions brought pursuant to RICO seeking to hold employers responsible for the perceived influx of undocumented aliens who are working in the United States.[1] Numerous courts have found that conclusory allegations of RICO violations, such as those set forth by Petitioners in their dismissed Amended Complaint, fail to state actionable claims.[2] The Fourth Circuit similarly and properly concluded that the allegations in this case failed to allege anything other than a speculative claim. Contrary to the Petition, there is no circuit split, no important federal question, nor any other compelling reason to warrant this Court's review. The Petition should therefore be denied.

As shown below, Petitioners misstate the holding of the Fourth Circuit. They assert that "the Fourth Circuit did not reject petitioner's [sic] claims on any grounds specific to this particular complaint" but rather determined that "RICO's proximate cause requirement eliminates the possibility of any wage depression suit premised on immigration violations" as a matter of law. Pet. Br. 16. Contrary to Petitioners' limited view of the Fourth Circuit's

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[1] *See*, *e.g.*, *Nichols* v. *Mahoney*, 608 F. Supp. 2d 526, 529 (S.D.N.Y. 2009) (commenting on the phenomenon in an opinion dismissing claims similar to those raised in this case).

[2] *See*, *e.g.*, *Nichols*, 608 F. Supp. 2d at 529; *American Dental Ass'n v. Cigna Corp.*, 605 F.3d 1283 (11th Cir. 2010); *Cruz* v. *Cinram Int'l, Inc.*, 574 F. Supp. 2d 1227 (N.D. Ala. 2008).

holding, the decision in this case was based upon specific pleading deficiencies unique to Petitioners' claim. The Fourth Circuit did not hold that a claim for immigration violations could never be pled. Rather, the Fourth Circuit held that Petitioners failed to do so in this case. *See*, *e.g.*, Pet. App. 18a-19a ("However, because the plaintiffs have not alleged facts establishing that they suffered an injury proximately caused by the hiring clerks' violation of the false attestation predicate, their claim also fails with regard to this predicate act."). The Fourth Circuit *did not* set forth a blanket prohibition on RICO immigration claims stemming from a properly pleaded complaint.

Also contrary to the Petition, there is no split of authority among the circuits as to this Court's current pleading standards for RICO claims. Petitioners attempt to demonstrate a split in authority based upon cases decided prior to the Court's decisions in *Twombly/Iqbal*, which resulted in a fundamental change in the federal pleading standard.[3] As the Fourth Circuit and other courts have noted, the cases relied upon by Petitioners are of little value in evaluating whether a plaintiff has alleged a plausible claim under the current, more stringent pleading requirements. *See*, *e.g.*, *Simpson*

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[3] *See*, *e.g.*, *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277 (11th Cir. 2006); *Trollinger* v. *Tyson Foods, Inc.*, 370 F.3d 602 (6th Cir. 2004); *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002); *Commercial Cleaning Servs., LLC v. Colin Serv. Sys., Inc.*, 271 F.3d 374 (2d Cir. 2001). All of the foregoing cases relied upon by Petitioners were decided under the now-obsolete pleading standard of *Conley v. Gibson*, 355 U.S. 41 (1957).

v. *Sanderson Farms, Inc.*, No. 7:12-CV-28 (HL), 2012 U.S. Dist. LEXIS 130501, at *48-49 (M.D. Ga. Sept. 13, 2012) ("But overlooked or disregarded in all of Plaintiffs' briefs is that all of these cases were pre-*Twombly* and/or *Iqbal*. They were governed by a different, more lenient standard. Those cases simply have little precedential value.").[4]

Petitioners also fail to acknowledge that all of the prior circuit court decisions on which they rely were decided prior to this Court's clarification of the proximate cause requirements of RICO in *Hemi Group*, *LLC v. City of New York*, 130 S. Ct. 983 (2010), a case Petitioners do not even discuss. The Fourth Circuit expressly relied on this Court's holding in *Hemi Group* to conclude that RICO plaintiffs must establish that RICO predicate acts are the proximate cause of their injury, with a "direct relationship between the injury asserted and the predicate act alleged." Pet. App. 21a. Again, because there is no actual split in authority among the circuits on the proximate cause issue since this Court's decision in *Hemi Group*, this case is not appropriate for review.

Finally, the Fourth Circuit's opinion is plainly correct. Petitioners' Amended Complaint was woefully deficient in stating a claim of a RICO conspiracy and was based entirely on unsupported, conclusory allegations that do not rise beyond the level of speculation, as both the Fourth Circuit and

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[4] In *Simpson*, the plaintiffs relied upon the same string of cases Petitioners rely on here, as referenced above. Pet. Br. 10-16.

the District Court properly found. Numerous alternative grounds for the dismissal are also present that make the Petition a poor vehicle for review. The Petition should be denied on this ground as well.

STATEMENT OF THE CASE

Petitioners filed a one count conspiracy claim against Respondents for violation of Section 1964(d) of RICO, 18 U.S.C. § 1961 *et seq*. Specifically, Petitioners alleged that Respondents conspired to depress wages by knowingly employing illegal immigrants and by falsely attesting that these illegal immigrants presented genuine work authorizations and/or identification documents (referred to by Petitioners as the "Illegal Hiring Scheme"). The District Court dismissed Petitioners' case for failure to state a claim, and the Fourth Circuit affirmed.

A. Petitioners' Conclusory Claims Below.

Petitioners alleged in their Amended Complaint that the so-called "Corporate Co-Conspirators" conspired with the other named Respondents and the so-called "Facility Co-Conspirators" (all employees of Perdue) for the purpose of depressing wages by knowingly hiring large numbers of illegal immigrants and falsely attesting that such workers presented genuine work authorization documentation and/or identification documents. Pet. App. 57a-58a ¶¶ 45-46. Petitioners further alleged that this conduct established the "predicate acts" necessary to support a RICO claim.

Pet. App. 51a, 56a-57a ¶¶ 2, 3, 5, 43, 45-46. Significantly, unlike any of the cases relied on by Petitioners as supposedly creating a conflict, Petitioners did not allege a violation of 18 U.S.C. § 1962(c) (*conducting* or *managing* a RICO enterprise). Rather, the sole cause of action alleged below was that Respondents violated 18 U.S.C. § 1962(d) by *conspiring* to commit a Section 1962(c) offense. Pet. App. 64a ¶¶ 64-65.

The only Respondents who Petitioners alleged to have committed RICO "predicate acts" were human resource clerks (collectively, the "HR Clerk Defendants"). Pet. App. 60a-64a ¶¶ 53-62. Yet, none of the HR Clerk Defendants was alleged to have held a management-level position at Perdue. Pet. App. 53a-55a ¶¶ 14-16, 19-20, 24-26, 30-32, 35. Nor did Petitioners allege that the HR Clerk Defendants "conduct[ed] or participate[d], directly or indirectly, in the conduct of [Perdue's] affairs." Pet. App. 57a ¶ 45. Instead, Petitioners alleged, without any factual support, that the Illegal Hiring Scheme "emanates from the highest level of the Company down to the [HR Clerk Defendants] who interview job applicants at each of Perdue's facilities." Pet. App. 57a ¶ 45. Petitioners further alleged that Perdue's Vice President of Human Resources was responsible for Perdue's hiring policy, Pet. App. 60a ¶ 52, and that he, along with other named and other unnamed regional human resource directors, directed and approved the alleged Illegal Hiring Scheme. Pet. App. 57a, 60a ¶¶ 45, 52. Again, the complaint contained no plausible, non-conclusory facts in support of any of these conspiracy claims.

B. The Alleged Predicate Acts.

Although the Amended Complaint repeatedly referenced an alleged Illegal Hiring Scheme, Petitioners only pled two RICO predicate acts, each of which implicated *only* the HR Clerk Defendants.

First, Petitioners alleged in conclusory fashion that the HR Clerk Defendants violated 8 U.S.C. § 1324(a)(3)(A)[5] by "personally hir[ing] hundreds of workers (and more than ten per year, each) with actual knowledge that the workers were unauthorized for employment, used identity documents that did not pertain to them, and had been brought into the country with the assistance of others on their illicit journey across the U.S.-Mexico border and in obtaining false identity documents once here." Pet. App. 61(a) ¶ 54. Petitioners did not identify any person allegedly hired in such a manner, nor did Petitioners describe the factual circumstances of any individual hire.

Second, Petitioners conclusorily alleged that the HR Clerk Defendants violated 8 U.S.C. § 1546(b)(1) through (3)[6] by making false

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[5] Section 1324(a)(3)(A) provides: "Any person who, during any 12-month period, knowingly hires for employment at least 10 individuals with actual knowledge that the individuals are aliens described in subparagraph (B) shall be fined under title 18, United States Code, or imprisoned for not more than 5 years, or both."

[6] Section 1546(b) provides:

(b) Whoever uses—

attestations on Forms I-9. Pet. App. 61a-64a ¶¶ 56-62. According to Petitioners, the HR Clerk Defendants knew that the work authorization documents provided to them were "fake/fraudulent," thereby violating Section 1546. Pet. App. 63a ¶ 58.

As to the Corporate Co-Conspirators, Petitioners alleged only in the most conclusory fashion that they knew and approved of the HR Clerk Defendants' alleged illegal hiring practices, and even more generally, that the Corporate Co-Conspirators directed the HR Clerk Defendants' "superiors . . . to conduct their facility hiring in this manner so as to ensure that hundreds of illegal immigrants are hired . . . ." Pet. App. 57a ¶ 45; *see also* Pet. App. 56a, 60a-61a ¶¶ 43, 52. Petitioners further alleged that the Corporate Co-Conspirators knew and approved of the HR Clerk Defendants' illegal hiring practices, and that they "direct[ed] all the HR personnel to conduct hiring in the manner described" in the Amended Complaint. Pet. App. 65a-95a ¶¶ 68-180. Again, the Amended Complaint was devoid of any factual averments to support these conclusory allegations.

> (1) an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor,
> (2) an identification document knowing (or having reason to know) that the document is false, or
> (3) a false attestation, for the purpose of satisfying a requirement of section 274A(b) of the Immigration and Nationality Act [8 U.S.C.S. § 1324a(b)], shall be fined under this title, imprisoned not more than 5 years, or both.

C. The Damage Allegations.

Petitioners summarily alleged, without any factual citation whatsoever, that the Illegal Hiring Scheme "saves Perdue millions of dollars in labor costs because illegal immigrants will work for extremely low wages, will typically not complain about workplace conditions and injuries, and because of their vulnerable situation, will accede to employer demands to work harder and longer hours than American citizens." Pet. App. 56a ¶ 43. Petitioners also summarily alleged that the Illegal Hiring Scheme "increases the profitability of Perdue and the amount of money each Defendant and the Co-Conspirators earn," and it "also enable[s] Defendants to earn higher compensation than they would otherwise earn if Perdue were not illegally lowering its labor costs through the [Illegal Hiring] Scheme." Pet. App. 57a ¶ 44. Petitioners, however, did not allege any facts to support these claims.

Most significantly, Petitioners did not allege any facts establishing the manner in which the alleged commission of the predicate acts by any of the Respondents proximately caused any direct injury to Petitioners or the putative class. Pet. App. 95a-96a ¶ 184. In particular, the Amended Complaint was devoid of any facts regarding: (1) the relevant markets for labor surrounding any particular Perdue facility; (2) the wages paid to Petitioners or other members of the putative class; (3) the market wage Petitioners or the putative class should have been paid; (4) any member of the putative class who was not hired because Respondents hired an illegal alien who worked for a

lower wage; (5) the amount that the employment of illegal aliens depressed Perdue's wages in any market, after accounting for other potential causes of wage stagnation or depression, such as the national or local economy; or (6) any other fact to support their conclusion that wages at any Perdue facility were depressed, as compared to the local market, by the illegal hiring or false attestation predicate acts alleged in the Amended Complaint.

D. The District Court's Opinion.

In the District Court, Respondents moved to dismiss Petitioners' Amended Complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. Following extensive briefing and argument, the District Court dismissed Petitioners' claims, with prejudice, finding the Amended Complaint to be riddled with shortcomings. Pet. App. 1a-22a.

First, the District Court concluded that Petitioners "present[ed] no more than conclusory allegations to suggest that the Defendants formed a conspiracy under 18 U.S.C. § 1962(d)." Pet. App. 33a. In particular, the District Court held that the allegations of a conspiratorial agreement were speculative, and Petitioners failed to allege "when or where the agreement took place, or the specific substance of any communications between management and HR staff regarding hiring policy." Pet. App. 33a-34a.

Second, the District Court found that Petitioners failed to plead adequately Respondents' agreement to join the conspiracy, relying on

United States v. *Pryba*, 900 F.2d 748, 760 (4th Cir. 1990) (requiring each defendant to agree to violate Section 1962(c)). Pet. App. 34a. The District Court concluded that Petitioners' failure to allege the personal agreement of each Respondent in the conspiracy was fatal to their claims and further noted that, as to eight of the Perdue facilities, Petitioners offered no factual averments supporting their allegations of predicate acts and/or conspiracy. Pet. App. 34a. Thus, the District Court concluded that Petitioners failed to advance "their allegations beyond a 'speculative level' as *Twombly* requires."

Third, the District Court concluded that Petitioners failed sufficiently to plead the commission of RICO predicate acts. As to Respondents' Section 1324(a)(3)(A) allegations, the District Court determined that the pleadings were insufficient, because they were nothing more than a mere "recitation of the statute," and the factual allegations were conclusions unsupported by any factual averments. Pet. App. 35a. The District Court noted that Petitioners did not identify a single worker specifically known to be an illegal alien but rather only alleged in "a conclusory fashion that Defendants at various facilities 'observe[] the largely illegal workforce and know[] that most of these people are not U.S. citizens.'" Pet. App. 35a. Additionally, the District Court stated that unlawful employment of aliens, alone, is *not* a RICO predicate act – "only the hiring of 'illegal aliens who are known to have been smuggled ("brought") into the United States' qualifies as a RICO predicate offense," and that Petitioners' allegations in this regard were deficient. Pet. App. 38a.

Similarly, as to Petitioners' Section 1546 allegations of false attestations, the District Court noted that the "HR staff's alleged knowledge stems from being 'directed by their superiors to accept . . . false documents and make these false attestations,' and from the alleged hiring practices themselves, which include 'hiring workers who are known to have previously been employed at Perdue under different identities' or 'hiring workers whose background information . . . is plainly invalid and/or inconsistent on its face.'" Pet. App. 36a. The District Court concluded that Petitioners failed to "provide any underlying facts supporting the statement that these practices are taking place." Pet. App. 36a-37a.

Fourth, the District Court found that Petitioners failed to plead any facts demonstrating an injury to "business or property" as required by Section 1964(c). The District Court specifically concluded that Petitioners failed to provide any allegations to support their theory of damages, and in failing to do so, they failed to "raise a right to relief above a speculative level." Pet. App. 37a-38a.

Fifth, the District Court found that Petitioners' reliance upon *Mohawk* was misplaced. Pet. App. 38a-39a. The District Court distinguished *Mohawk*, because it involved allegations against third parties who purportedly conspired with Mohawk employees to bring undocumented aliens across the border for employment purposes; whereas in this case, Petitioners did not allege a conspiracy involving third parties and alleged no requisite facts regarding the arrival of the purported illegal

workers in the United States. Pet. App. 38a-39a. The District Court also concluded that, because *Mohawk* was decided pre-*Iqbal*, its precedential value was limited. Pet. App. 39a.

Finally, the District Court concluded that, even if Petitioners' claims were plausible, they were barred by the intracorporate conspiracy doctrine. Pet. App. 39a-43a. Following established Fourth Circuit precedent, the District Court held that, because the acts of corporate agents are attributable to the corporation itself, a corporation lacks the multiplicity of actors required to form a conspiracy. Pet. App. 39a-43a.

E. The Fourth Circuit's Opinion.

The Fourth Circuit expressly affirmed the District Court's dismissal of Petitioners' Amended Complaint, "because we conclude that the plaintiffs failed to plead sufficient facts to establish the elements of either RICO predicate act . . . ." Pet. App. 9a. In so holding, the Fourth Circuit explicitly relied upon the pleading standards set forth by this Court in *Twombly/Iqbal*. The Fourth Circuit determined that Petitioners were required properly to allege two distinct but related predicate acts in order to avoid dismissal. Pet. App. 10a. The Fourth Circuit held that, "in the present case, because the plaintiff[s] allege[d] only two predicate acts in support of their civil conspiracy claim, their failure to plead sufficient facts to establish the elements of *either* predicate act would require that the amended

complaint be dismissed." Pet. App. 10a (emphasis added).[7]

As to the first predicate act alleged by Petitioners – a purported violation of Section 1324(a)(3) (referred to by the Fourth Circuit as the "illegal hiring predicate") – the Fourth Circuit agreed with and affirmed the District Court's ultimate holding, namely, that Petitioners failed to allege sufficient facts to state a plausible claim that Respondents violated the illegal hiring predicate. Pet. App. 13a. Specifically, the Fourth Circuit found the "fatal deficiency of the illegal hiring predicate allegations is the failure to provide sufficient factual support concerning the unauthorized aliens' entry into the United States." Pet. App. 14a.[8]

As to the second predicate act asserted by Petitioners – a purported violation of Section 1546(b) (the fraudulent use and false attestation of documents referred to in the Fourth Circuit as the "false attestation predicate") – the Fourth Circuit concluded that, in accordance with this Court's precedent, Petitioners failed to allege "facts establishing that they suffered an injury proximately caused by the hiring clerks' violation of the false attestation predicate." Pet. App. 18a-19a. Further,

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[7] Petitioners do not seek review of this portion of the Fourth Circuit's opinion.

[8] Petitioners also do not seek review of this portion of the Fourth Circuit's opinion. The Fourth Circuit disagreed with a portion of the District Court's analysis relating to whether individual illegal hires had to be named, but this disagreement did not affect the ultimate holding of either court. *Id.*

relying upon this Court's precedent in *Hemi Group*, the Fourth Circuit held that the RICO predicate acts must not only be a "but for" cause of a plaintiff's injury, but the proximate cause of that injury as well. Pet. App. 20a. The Fourth Circuit went on to state:

> In the present case, however, it is not the violation of the false attestation predicate that has caused the harm suffered by the plaintiffs. Rather, the fraudulent use of identification documents and the false attestations placed on the I-9 forms are fundamentally crimes against the government of the United States, and such actions do not directly impact the plaintiffs' wage levels. Although false attestations made by the hiring clerks are one step in a chain of events that ultimately may have resulted in the employment of unauthorized aliens by Perdue, the plaintiffs have not demonstrated that the false attestations themselves have had a direct negative impact on the plaintiffs' wages, or on any other aspect of their compensation.

Pet. App. 20a-21a. Ultimately, the Fourth Circuit determined that "the false attestation violation cannot be a proximate cause of the plaintiffs' injury, because there is no direct

relationship between the injury asserted and the predicate act alleged." Pet. App. 21a (citing *Hemi Group*). Finding that Petitioners had not "alleged a plausible violation of either RICO predicate act," the Fourth Circuit concluded that, "as a matter of law, the plaintiffs have failed to establish a claim supporting their allegation under 18 U.S.C. § 1962(d) of a conspiracy to violate 18 U.S.C. § 1962(c)." Pet. App. 22a.[9]

Contrary to the Petition, nowhere in the Fourth Circuit's opinion did the court of appeals hold that "immigration violations cannot be the proximate cause of depressed wages." Pet. Br. i. The appeals court simply held that Petitioners "have not alleged a plausible violation of either RICO predicate act." Pet. App. 22a.

[9] The Fourth Circuit found it unnecessary to address the intra-corporate conspiracy doctrine cited as an additional ground for dismissal by the District Court. Pet. App. 22a. The Fourth Circuit also did not address the District Court's finding that Petitioners had failed to plead sufficient allegations of the agreement necessary to find any RICO conspiracy. Finally, the Fourth Circuit found it unnecessary to address Respondents' contention below that Petitioners' Amended Complaint failed to meet the even more rigorous pleading standards of Rule 9(b) of the Federal Rules of Civil Procedure.

REASONS FOR DENYING THE PETITION

A. Contrary To The Petition, The Fourth Circuit's Decision Does Not Create A Split Of Authority In The Circuit Courts.

1. Petitioners inappropriately rely solely on cases decided prior to *Twombly/Iqbal*.

Petitioners' entire argument that there is a split in authority among the circuits is based upon comparing the Fourth Circuit's decision in this matter with pre-*Twombly/Iqbal* opinions from the Second, Sixth, Ninth, and Eleventh Circuits. Pet. Br. 10-16. There is no split, however, because all of the cases relied upon by Petitioners were decided under the former, more lenient pleading standard set forth in *Conley*. Under the *Conley* standard, the courts in the earlier decisions believed that dismissal of a civil RICO complaint for failure to state a claim was appropriate "only when it is clear that no relief could be granted under any set of facts that could be proved consistent with [plaintiff's] allegations." *Commercial Cleaning Servs.*, 271 F.3d at 380.[10]

Several of the appeals courts referenced above expressed serious reservations about allowing conclusory RICO complaints to avoid dismissal,

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[10] *See also Trollinger*, 370 F.3d at 615, 619 (holding that at the motion to dismiss stage, the court must "presume that these general factual allegations embrace the specific facts needed to prove the claim"); *Mendoza*, 301 F.3d at 1167, 1169 (same); *Mohawk*, 465 F.3d at 1288-1289 (same).

even under the *Conley* standard. Thus, in *Trollinger*, 370 F.3d at 619, the Sixth Circuit noted that the plaintiffs' claim contained a number of attenuated links in the chain of causation but felt constrained under *Conley* to assume plaintiffs would be able to prove them.[11] Similarly, the Ninth Circuit in *Mendoza* recognized many of the same concerns, but determined that, under the then-existing pleading standard, a complaint could be dismissed "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations," and "at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." 301 F.3d at 1167-68.

In *Twombly*, this Court expressly rejected the pleading standard on which the foregoing appeals court decisions were based, holding that the "no set of facts" test "is best forgotten as an incomplete, negative gloss on an accepted pleading standard." 550 U.S. at 563. This Court subsequently proscribed

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[11] The Sixth Circuit's initial reservations about allowing the *Trollinger* plaintiffs to proceed with their complaint proved to be well founded. After years of expensive discovery following the denial of the motion to dismiss Trollinger's complaint (filed by the same law firm that filed Petitioners' Amended Complaint), the complaint was found to have no merit and was dismissed on summary judgment. The District Court in the present case noted that the *Trollinger* result was "indicative of the lack of factual backing characterizing this particular strain of civil RICO cases based on alleged use of illegal immigrant labor." Pet. App. 38a (citing *Hall v. Thomas*, 753 F. Supp. 2d 1113 (N.D. Ala. 2010)).

the more stringent pleading requirement utilized by the District Court and Fourth Circuit in this matter:

> Factual allegations must be enough to raise a right to relief above the speculative level, see 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp 235-236 (3d ed. 2004) . . . ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action").

Id. at 555.[12] For a claim to survive a motion to dismiss post-*Twombly/Iqbal*, a complaint "must contain sufficient factual matter, accepted as true, to state a claim to relief that is *plausible on its face*." *Iqbal*, 556 U.S. at 678 (emphasis added). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Thus, this standard asks for "more than a sheer possibility that a defendant has acted unlawfully." *Id*. Accordingly, "[w]here a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.*

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[12] This Court has further made clear that its decision in *Twombly* expounded the pleading standards for all civil actions. *Iqbal*, 556 U.S. at 684.

As noted above, other courts considering similar conclusory allegations under RICO have found that the Rule 12(b)(6) holdings of *Trollinger*, *Mendoza*, *Mohawk*, and *Commercial Cleaning Services* today have "limited" precedential value, "because they precede *Twombly"* and *Iqbal. See Nichols*, 608 F. Supp. 2d at 536; *Simpson*, 2012 U.S. Dist. LEXIS 130501, at *48-49. The supposed circuit split relied on by Petitioners, therefore, is illusory and does not provide a basis for granting certiorari in this case.

2. The cases relied on by Petitioners were also decided pre-*Hemi Group*.

As an additional reason why the Fourth Circuit decision has not created a circuit split, all of the cases relied on by Petitioners were decided years before this Court's decision in *Hemi Group*. That case, in turn, clarified the holdings of this Court in *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 268 (1992), and *Anza v. Ideal Steel Supply Corporation*, 547 U.S. 451, 453 (2006), on the issue of proximate cause pleading requirements in RICO complaints in a post-*Twombly/Iqbal* pleading context. The Fourth Circuit in the present case expressly relied on *Hemi Group*, which was of course not available for consideration by any of the older cases on which Petitioners rely.

In *Hemi Group*, the City of New York alleged that it had suffered a RICO injury as a result of the defendants' failure to file Jenkins Act reports identifying its interstate sale of cigarettes. The City

claimed that the defendants' failure to file the reports caused damage to its business and property through the loss of tax revenue. Expanding on the holdings of *Holmes* and *Anza*, this Court concluded that the City's "causal theory cannot satisfy RICO's direct relationship requirement." 130 S. Ct. at 989. In so holding, this Court reaffirmed the requirement set forth in *Holmes*, that a plaintiff must establish that a RICO predicate offense "not only was a 'but for' cause of his injury, but was the proximate cause as well." *Id.* The Court further stated that "the compensable injury flowing from a [RICO] violation . . . 'necessarily is the harm caused by [the] predicate acts.'" *Id.* at 991 (quoting *Anza*, 547 U.S. at 457). Thus, where there is no causal link between the alleged predicate acts on the one hand and the alleged injuries on the other hand, a RICO claim cannot lie. *Id.* at 988-93.

In combination with the *Twombly/Iqbal* decisions previously discussed, the Fourth Circuit's reliance on *Hemi Group* even more compellingly serves to distinguish the circuit court cases on which Petitioners rely for their claim that a circuit split exists. In reality, no court of appeals since *Twombly/Iqbal*, and certainly none since *Hemi Group*, has found any conclusory complaint remotely similar to Petitioners' complaint to state an actionable claim for proximately caused injury under RICO. For this reason as well, no conflict in the circuits exists, and the Petition should be denied.[13]

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[13] Additionally, each of the cases relied upon by Petitioners alleged causes of action only pursuant to 18 U.S.C. § 1962(c)

B. Contrary To The Petition, The Fourth Circuit's Ruling Was Plainly Correct.

The Fourth Circuit properly judged the conclusory allegations of Petitioners' Amended Complaint to be deficient under *Twombly/Iqbal* and *Hemi Group*. With respect to the Section 1546 false attestation claim, the sole basis for the Petition, the Fourth Circuit properly determined that, because Petitioners had not alleged facts establishing that they "suffered an injury proximately caused by the hiring clerks' violation of the false attestation predicate, their claim failed with regard to this predicate act." Pet. App. 18a-21a.

Citing *Hemi Group*, *Twombly*, and *Iqbal*, the Fourth Circuit properly found that Petitioners simply did not allege facts sufficient to support their summary conclusions about damages. Pet. App. 20a ("Notably, however, the wage depression alleged by the plaintiff is not directly linked to any violation of the false attestation predicate"). Thus, while the Fourth Circuit recognized that Petitioners had pled a *theory* of damages, it concluded that Petitioners did

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(conducting or managing a RICO enterprise). *See Trollinger*, 370 F.3d at 606; *Mendoza*, 301 F.3d at 1168; *Mohawk*, 465 F.3d at 1282-83; *Commercial Cleaning Servs.*, 271 F.3d at 378-79. In contrast, the sole cause of action alleged by Petitioners in their Amended Complaint is that Respondents violated Section 1962(d) by *conspiring* to commit a Section 1962(c) offense. Pet. App. 64a ¶¶ 64-65. Again, Petitioners cannot cite to any immigration-related RICO conspiracy case in which another circuit has found conclusory allegations such as those in Petitioners' Amended Complaint to state an actionable claim, as there is no such conflicting case.

not allege facts to support the conclusion that the damages were proximately caused by the alleged false attestations. This holding is entirely consistent with the decisions of this Court on the proper pleading of proximate causation for RICO injury claims, as set forth above.[14]

Thus, the standard of causation applied by the Fourth Circuit is in full accordance with this Court's well established precedent applied to RICO claims. The Fourth Circuit recognized that Petitioners "were required to allege facts establishing that a violation of the false attestation predicate proximately caused the plaintiffs' injury." Pet. App. 19a (citing *Anza,* 547 U.S. at 453; *Holmes*, 503 U.S. at 268). *See also Hemi Group*, 130 S. Ct. at 991 ("[T]he compensable injury flowing from a [RICO] violation . . . necessarily is the harm caused by [the] predicate acts."). Pet. App.19a.

In concluding that Petitioners' Amended Complaint was fatally deficient, the Fourth Circuit stated:

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[14] Petitioners assert that, because RICO specifically provides that a violation of Section 1546 is a RICO predicate act, Congress' intent is somehow undermined by the decision of the Fourth Circuit. Pet. Br. 22. Petitioners ignore the distinction between RICO's criminal and civil provisions, however. It is well settled that RICO permits a private litigant to seek damages only when the alleged injury is *directly caused by a defendant's commission of a predicate act*. *See Hemi Group* (and cases cited therein). Nothing in RICO states that all predicate acts are actionable as a matter of right in a civil suit in the absence of properly pleaded damages.

> The injury alleged in the amended complaint is the depression of wages suffered by the plaintiffs as the result of Perdue's employment of unauthorized aliens. ***Notably, however, the wage depression alleged by the plaintiffs is not directly linked to any violation of the false attestation predicate.***

Pet. App. 20a (emphasis added).[15]

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[15] Even before *Twombly/Iqbal* and *Hemi Group*, the Seventh Circuit likewise questioned the correctness of the plaintiffs' theory of proximate causation in a case with similarly conclusory allegations. *See Baker v. IBP, Inc.*, 357 F.3d 685, 691-92 (7th Cir.) ("An increased supply of labor logically affects, not just the wages at IBP's Joslin plant, but wages throughout the region (if not the country). Workers can change employers (leaving IBP for higher pay elsewhere), and this process should cause equilibration throughout the labor market. Yet plaintiffs' theory is not that too many aliens depress wages around Joslin; it is that IBP pays lower wages than some competitors, and that effect would be very hard to attribute to particular violations of 8 U.S.C. § 1324(a)(3)(A). Suppose that plaintiffs believed that IBP has violated the Fair Labor Standards Act by failing to calculate other workers' overtime premium; could plaintiffs obtain damages from IBP even though it had paid them all that the FLSA requires?"), *cert. denied*, 543 U.S. 956 (2004).

C. The Petition Is A Poor Vehicle For Review Of The Issue Raised Therein, Because There Are Numerous Alternative Grounds For Affirmance Of The Dismissal Of Petitioners' Amended Complaint.

Even if a true conflict existed with regard to the issues raised in the Petition, there are many alternative grounds for affirmance of the dismissal of Petitioners' Amended Complaint. Therefore, little purpose would be served by granting the Petition, in as much as the result would most likely be an "advisory opinion."

First, as noted above, Petitioners failed to request review of the Fourth Circuit's holding that Petitioners were obligated to state actionable claims as to both of the predicate acts alleged in their Amended Complaint.[16] Nor did Petitioners request review of the Fourth Circuit's finding that Petitioners' allegations of the first predicate act (the Illegal Hiring Scheme) independently failed to state an actionable claim. Pet. App. 14a. As a result, even if the Petition's narrow review question were granted, the Amended Complaint would have to be dismissed under the non-appealed portions of the Fourth Circuit's holding.

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[16] "[I]n the present case, because the plaintiff[s] allege[d] only two predicate acts in support of their civil conspiracy claim, their failure to plead sufficient facts to establish the elements of either predicate act would require that the amended complaint be dismissed." Pet. App. 10a.

The Amended Complaint also would be subject to dismissal, as the District Court found without contradiction by the Fourth Circuit, because the pleadings of *conspiracy* to commit either predicate act were utterly conclusory in nature and failed to establish any agreement among each of the alleged co-conspirators. Pet. App. 34a. As noted above, none of the cases relied on by Petitioners addressed remotely similar conspiracy claims, and every other court that has considered RICO conspiracy claims similar to those of Petitioners has dismissed them. *See*, *e.g.*, *American Dental*, 605 F.3d at 1294 (dismissing similar conclusory allegations of conspiracy); *Cruz*, 574 F. Supp. 2d at 1294 (same); *Nichols*, 608 F. Supp. 2d at 547 (same).

Another alternative ground for affirmance of the Fourth Circuit decision lies in the District Court's uncontradicted finding that Petitioners' Amended Complaint failed to meet the higher pleading standards of Rule 9 of the Federal Rules of Civil Procedure. Pet. App. 33a. Numerous courts have held that Rule 9 fraud pleading standards apply to claims of false attestations under 18 U.S.C. § 1546. *See*, *e.g.*, *Cruz*, 574 F. Supp. 2d at 1236.

Finally, unlike any of the other cases relied on by Petitioners, the Amended Complaint in this case attempted to state a RICO conspiracy claim entirely against employees of a single corporate entity. The District Court properly held that Petitioners' Amended Complaint was barred by the intra-corporate conspiracy doctrine. Pet. App. 41a-43a. Though the Fourth Circuit expressly concluded that it did not need to address the merits of the District

Court's intra-corporate conspiracy finding, that complicated question would have to be addressed in the event that the Petition were to be granted.

In light of the numerous additional deficiencies in Petitioners' Amended Complaint that are not addressed in the Petition, any of which would compel affirmance of the dismissal of Petitioners' pleading, the Petition is a poor vehicle for review of the narrow question presented, even if that question were cert-worthy, which it is not. For this reason as well, the Petition should be denied.

CONCLUSION

The Petition should be denied, because it does not set forth an important question of federal law that has not been, but, should be, settled by this Court, nor does it demonstrate that the Fourth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court or in a manner inconsistent with other circuits.

Respectfully Submitted,

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