No. 13-873

IN THE

Supreme Court of the United States

US FOODS, INC.,

Petitioner,

v.

CATHOLIC HEALTHCARE WEST *ET AL.*, CASON, INC., AND FRANKIE'S FRANCHISE SYSTEMS INC., ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

GLENN M. KURTZ
DOUGLAS P. BAUMSTEIN
WHITE & CASE LLP
1155 Avenue of the Americas
New York, NY 10036
(212) 819-8200

KATHLEEN M. SULLIVAN
Counsel Of Record
PETER E. CALAMARI
STEPHEN R. NEUWIRTH
SANFORD I. WEISBURST
STEIG D. OLSON
CLELAND B. WELTON II
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Ave.
22nd Floor
New York, NY 10010
(212) 849-7000
kathleensullivan@quinnemanuel.com

Counsel for Petitioner

April 8, 2014

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

ARGUMENT

As *amici curiae* Chamber of Commerce of the United States and DRI correctly observe, "the decision below threatens to promote rampant abuse of class action procedure" (Chamber-DRI Br. 2), expanding the reach of a device that creates "enormous, irresistible, or hydraulic pressure to settle . . . , simply to avoid the risk of ruinous liability" (*id*. at 14 (quotations omitted)). The practical consequences are magnified further when a class of tens of thousands of plaintiffs is able to invoke RICO's treble-damages remedy, without individualized proof of causation, to recover for intangible injury. The latter issue is presented in *Jackson* v. *Sedgwick Claims Management Services* (No. 13-712), in which this Court has called for a response; at a minimum, the instant petition should be held pending this Court's decision in *Jackson*.

Unable to contest the importance of the questions presented, respondents attempt to refute the petition's showing that the lower courts are divided. The attempt fails. The decision below clearly conflicts with decisions by multiple other circuits with respect to each of the three questions presented. This Court's review is necessary to resolve these conflicts and to clarify the unsettled law of RICO and class certification.

1. In asserting that there is no conflict as to the availability of expectation (*i.e.*, benefit-of-the-bargain) damages under RICO, respondents barely acknowledge that the statutory requirement of an injury to "'business or property'" has "'restrictive significance.'" Pet. 13-14 (quoting *Reiter* v. *Sonotone Corp*., 442 U.S. 330, 339 (1979)). Circuits other than the Second Circuit below have appropriately recognized that this requirement is a restrictive one, and thus have

prohibited or limited recovery of expectation damages under RICO. The three-way circuit conflict that presently exists warrants this Court's review and resolution.

a. Respondents unpersuasively seek (Opp. 13) to distinguish the decisions in *Chaset* v. *Fleer/Skybox Int'l, LP*, 300 F.3d 1083 (9th Cir. 2002), and *Price* v. *Pinnacle Brands, Inc*., 138 F.3d 602 (5th Cir. 1998) (per curiam). In this case, just as in *Chaset* and *Price*, the plaintiff alleged that he paid for a product; that he received less value from the transaction than he expected; and that the defendant's RICO violation caused this failure to capture the plaintiff's full contractual expectancy. See Pet. App. 18a-19a; *Chaset*, 300 F.3d at 1087; *Price*, 138 F.3d at 607. But whereas the Fifth and Ninth Circuits denied recovery under RICO of trebled expectancy damages, the Second Circuit allowed it.

Respondents assert (Opp. 12-13) that this case is different because they allegedly incurred "concrete" "losses . . . when they paid [US Foods'] invoices." See also Opp. 17 (denying that respondents seek "some sort of intangible expectancy"). But respondents ignore that they received valuable goods in exchange for their payments, and that the only "loss" alleged is the difference between the benefits they expected from the cost-plus contracts and the benefits they actually obtained. Respondents' own pleadings confirm that their RICO claim seeks the same expectation damages that they demand on their state-law contract claim. See C.A. J.A. A76 (alleging as RICO injury that plaintiffs "paid too much" under the cost-plus contracts), A79 (alleging as contract injury that

plaintiffs "paid higher prices" than they would have absent the alleged breach); Pet. App. 78a-82a.[1]

Jackson v. *Sedgwick Claims Management Services*, 731 F.3d 556 (6th Cir. 2013) (*en banc*), cert. pending (No. 13-712), held that an expectation of workers'-compensation benefits is not "business or property" protected by RICO, *id*. at 566, because neither a personal-injury claim nor a resultant legal entitlement to compensation constitutes the requisite "proprietary type of damage," *id*. at 569 (citation omitted). The decision thus is not limited to the personal-injury context (*contra* Opp. 13-14), but is a particular application of the general principle that a mere expectation of a benefit is not a property interest protected by RICO.

Turning to *Regions Bank* v. *J.R. Oil Co., LLC*, 387 F.3d 721 (8th Cir. 2004), respondents attempt to downplay the conflict with the decision below by relegating their discussion to a footnote (Opp. 14 n.4) that examines only the Eighth Circuit's *causation* holding. But the decision separately held, as to the damages element, that a "contractual right to repayment" (like respondents' asserted contractual right to pay a particular price) is an "intangible property interest[]" that "*is not injury that may support standing to bring RICO claims*." *Id*. at 730 (emphasis added) (quotations omitted).

Respondents finally seek to reframe the foregoing decisions as holding that the plaintiffs "ran afoul of the

---

[1] Contrary to respondents' suggestion (Opp. 13), the Fifth/Ninth Circuit rule is not limited to the trading-card context. *Price* relied on *In re Taxable Mun. Bond Sec. Litig*., 51 F.3d 518, 523 (5th Cir. 1995), which applied the same rule to a claim for legal entitlement to a low-interest loan.

rule that RICO damages cannot place plaintiffs in a *better* position than they would have been in if the racketeering had not occurred." Opp. 14 (quoting *Elsevier Inc.* v. *W.H.P.R., Inc*., 692 F. Supp. 2d 297, 311 (S.D.N.Y. 2010)). In fact, none of the decisions purported to apply such a rule. Moreover, *Elsevier* is inapposite, as it "[was] not a 'benefit of the bargain' case," 692 F. Supp. 2d at 310, like this one, in which the plaintiffs seek to recover a purported property interest in a contractual expectancy.[2] In any event, respondents *do* seek the sort of windfall that even *Elsevier*'s rule would preclude: Respondents admit that they could not have obtained better prices from US Foods' competitors. See C.A. J.A. A1905, A1952-53.

b. Respondents also fail to refute the conflict (discussed at Pet. 15-16) between the Second Circuit's decision below and the decisions of the First, Third, and Seventh Circuits, which permit recovery in RICO of an expectancy interest, but only (unlike the Second Circuit below) to the extent it constitutes a "right[] under [a] contract" independent of the RICO violation. *Liquid Air Corp*. v. *Rogers*, 834 F.2d 1297, 1310 (7th Cir. 1987). Respondents argue (Opp. 12-13) that

---

[2] Nor, contrary to respondents' argument (Opp. 16-17), is the circuit split dispelled by the fact that *Price* (but not *Chaset*) cited *Heinold* v. *Perlstein*, 651 F. Supp. 1410, 1412 (E.D. Pa. 1987), upon which the First and Third Circuits relied in *Scivally* v. *Graney*, 1994 WL 140413, at *3 (1st Cir. Apr. 15, 1994) (per curiam), and *Wishnefsky* v. *Carroll*, 44 F. App'x 581, 582 (3d Cir. 2002). As shown, *Price*'s strict rule against recovery of expectation damages in RICO is in conflict with the actual holdings in *Heinold* and the circuits following it. See *supra*, at 2; Pet. 16-18 & n.5. And even if the *Price* line of cases were consistent with the *Heinold* line, the decision below would still conflict with all of those circuits.

this case is "about USF's false invoices" and not "fraudulent inducement" predating the cost-plus contracts, but, as the petition explained (at 7, 16-17), many of those contracts were executed after the VASPs' inception.[3] The invoices were accurate statements of the prices set forth in the order guides; they were "false" only insofar as they varied from what the (allegedly fraudulently induced) cost-plus contracts allegedly dictated. See Pet. 5-6. Both the cost-plus contracts and individual food orders under those contracts thus formed integral parts of the alleged fraud, and the expectation of a lower price existed only to the extent that US Foods allegedly concealed the VASPs. Thus the alleged RICO "predicate acts" *did* give rise to the expectation interest here, and the First, Third, and Seventh Circuits would reject respondents' claim.

c. Respondents' reliance (Opp. 12-13, 15) on *Sedima*, *S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479 (1985), is misplaced. *Sedima* did not consider whether expectancy damages may be recovered in RICO; it held only that the statute contains no "'racketeering injury' requirement." *Id.* at 495. And respondents unpersuasively dismiss (Opp. 17 n.5) *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426 (2013), as irrelevant. Here, as in *Comcast*, see *id.* at 1433-34, respondents seek to recover a measure of damages (expectation) that is unavailable under their theory of liability (RICO mail and wire fraud). See Pet. 32-33.

---

[3] Indeed, respondents' assertion that this is not a fraudulent inducement case is belied by their complaint's allegation that the fraud "was designed to, and did, induce USF's customers to . . . enter into contracts with USF, place orders for products from USF, and make payments to USF" (C.A. J.A. A48).

d. On the merits, respondents do not respond to the petition's explanation (at 18) that the "restrictive significance," *Reiter*, 442 U.S. at 339, of RICO's damages element is best interpreted as precluding any attempt to recover intangible expectation damages (as opposed to concrete, out-of-pocket damages). In other words, such an expectation interest is not "business or property" within the meaning of RICO. See Pet. 18. But even if the Second Circuit's gloss on the damages element were defensible, the three-way circuit conflict warrants this Court's review.

2. Respondents also fail to negate the split of authority concerning whether RICO causation may be established on the basis of a class-wide presumption of reliance. As the petition showed (at 19-26), the decision below (along with decisions by the First and Eleventh Circuits) conflicts with decisions of the Fifth and Ninth Circuits.

First, respondents mistake (Opp. 20-22) the significance of *Poulos* v. *Caesars World, Inc*., 379 F.3d 654 (9th Cir. 2004). There is no dispute that respondents' proffered causal chain here requires proof of reliance (see Pet. App. 17a-18a); the question is whether causation can be established by a presumption of reliance *even without individualized proof*. *Poulos* held that individualized proof is necessary, particularly where individual plaintiffs made the decisions that allegedly caused their injuries for multiple, idiosyncratic reasons. See 379 F.3d at 668. The Second Circuit below held to the contrary notwithstanding that the putative class members here likewise decided to purchase products from petitioner based on prices (relative to those offered by petitioner's

competitors) that varied from product to product and region to region.[4]

Second, respondents fail to distinguish (Opp. 23-24) *Sandwich Chef of Texas* v. *Reliance National Indemnity Insurance Co*., 319 F.3d 205 (5th Cir. 2003), on the supposed ground that petitioner here purportedly did not present evidence of individualized defenses. Like the Second Circuit below (see Pet. 23-24), respondents ignore the evidence that some class members were not even aware of the cost-plus provisions, that others would have bought from petitioner even if the VASPs had been disclosed, that all of them made their purchasing decisions on the basis of published order-guide prices, that the contracts were terminable at will, and that survey evidence showed that customers were aware that food distributors like petitioner used VASP-like companies to maintain "inside margins" (see Pet. 5-6; Chamber-DRI Br. 9 & n.2). Respondents' assertion (Opp. 25) that the alleged misrepresentations "need only cause the *payment*" thus misses the mark, for as *amici* explain (Chamber-DRI Br. 8), petitioner showed that at least some individual "purchasers could not have relied on the cost-plus formula" (or any purported misrepresentations related thereto) in any aspect of their dealings with petitioner. In the face of the varied reasons for the class members' conduct, the Fifth Circuit would hold that respondents'

---

[4] Respondents' district-court cases (Opp. 21-22) do not support a contrary reading of *Poulos*. *In re Apple, AT&T iPad Unlimited Data Plan Litigation*, 2012 WL 2428248 (N.D. Cal. June 26, 2012), was not a RICO case, and *In re National Western Life Insurance Deferred Annuities Litigation*, 2013 WL 593414 (S.D. Cal. Feb. 14, 2013), effectively departed from *Wal-Mart Stores, Inc.* v. *Dukes*, 131 S. Ct. 2541, 2560-61 (2011), in holding the class-action device appropriate despite defendants' evidence of individual plaintiffs' *non*-reliance.

"invoice theory" is "*legally* flawed" and "does not . . . eliminate individual issues of reliance and causation that preclude a finding of pre-dominance." *Sandwich Chef*, 319 F.3d at 221. The Second Circuit below reached the contrary conclusion; this Court's review is warranted to resolve the conflict.

Respondents again decline to defend the merits of the Second Circuit's rule. They do not dispute that they lack individualized proof of causation, nor do they deny that a rule permitting their claims to proceed on the basis of a presumption of reliance would "sacrific[e] procedural fairness," *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 615 (1997), and expand absent class members' rights in violation of the Rules Enabling Act, see *Ortiz* v. *Fibreboard*, 527 U.S. 815, 845 (1999). And as *amici* emphasize (Chamber-DRI Br. 10-15), the question whether causation may be established by presumption has wide-ranging implications, touching numerous cases and areas of law. Certiorari should be granted to resolve the deepening circuit conflict over this important issue.

3. With respect to the third question presented, respondents do not deny that the clear majority rule among the circuits requires the *proponent* of a multi-jurisdiction state-law class to demonstrate that there are no material differences in the relevant legal regimes (see Pet. 26-29). Nor do respondents deny that the state laws here differ materially with respect to the admissibility and weight of extrinsic evidence, and to the scope of the duty of good faith (see Pet. 30 n.9).

Respondents unpersuasively assert (Opp. 27-29) that the courts below conducted the necessary inquiries into state-law variations. In fact, as the petition showed (at 11-12, 29-30), neither the Second

Circuit nor the district court conducted the analysis required under *Walsh* v. *Ford Motor Co*., 807 F.2d 1000 (D.C. Cir. 1986), and its progeny. To the contrary, the courts below rested their decisions on textual similarities among versions of the U.C.C. (see Pet. App. 29a-30a, 33a-34a, 72a-73a), notwithstanding that "[t]he Uniform Commercial code is not uniform," *Walsh*, 807 F.2d at 1016. Moreover, both courts contravened the prevailing rule by requiring *petitioner* to make a "showing" (Pet. App. 34a) and to put forward "evidence of significant variation" in state law (Pet. App. 73a), rather than insisting that *respondents* establish the *nonexistence* of material differences, see *Walsh*, 807 F.2d at 1016.

Respondents' assertion (Opp. 29-30) that other circuits would reach the same result here is thus incorrect. In fact, the courts below "failed to consider" and to conduct "serious analysis of the variations in applicable state law," and thus "completely sidestepped" the existence of material variations in state law. *Contra* Opp. 30 (quoting *In re Am. Med. Sys., Inc*., 75 F.3d 1069, 1085 (6th Cir. 1996); *Sacred Heart Health Sys*., *Inc.* v. *Humana Military Healthcare Servs., Inc*., 601 F.3d 1159, 1180 (11th Cir. 2010)). Respondents also misstate the holding in *Cole* v. *General Motors Corp*., 484 F.3d 717 (5th Cir. 2007), which rested not "on the defendant's contrary evidence of important differences among the state laws" (Opp. 30 n.9), but on the plaintiffs' shortcomings—their "largely textual presentation," their "failure to articulate" how state-law variations "would not preclude predominance," and so on, *Cole*, 484 F.3d at 725-26—despite the fact that the plaintiffs' evidence in that case was far more extensive than that provided here (see Pet. 28-29).

The decision below is being applied as a new rule of law by the district courts, which are already relying on it for the proposition that, "[i]n the Second Circuit, the prevalence of material variation in state laws must be demonstrated in order to defeat predominance," *Johnson* v. *Nextel Commc'ns, Inc*., 293 F.R.D. 660, 675 (S.D.N.Y. 2013), when the reverse holds true in the rest of the nation. Certiorari should be granted to clarify the burden of proof and the scope of a district court's obligation to consider state-law variations prior to approving the sort of multi-state class that is involved here.

4. Respondents' remaining arguments do not defeat the need for this Court's review.

First, the petition does not ask the Court to "rewrite RICO" (Opp. 32 (quoting *Bridge* v. *Phoenix Bond & Indem. Co*., 553 U.S. 639, 660 (2008))). Instead, the petition seeks resolution of circuit conflicts regarding the meaning of "business or property" under RICO and the sort of proof that is required to satisfy RICO's causation element in a class-action context.

Second, the petition does not seek adoption of "different, stricter standards for RICO claims in class actions than in other cases" (Opp. 33). To the contrary, it seeks to *conform* the rule applied in this class-action case with the rule applied in every civil RICO case.

Third, that the petition arises from a Rule 23(f) appeal does not make it a poor vehicle. This Court granted certiorari in similar circumstances in *Comcast*, 133 S. Ct. 1426, and respondents do not deny the petition's showing (at 18-19, 26, 29-30) that each of the questions presented is dispositive of class-action treatment. Moreover, there is no dispute over the facts relevant to the questions presented, so there is no need

to develop a trial record prior to this Court's review. And given the settlement pressure generated by certification of any treble-damages class (let alone one as vast as this), there may never be an opportunity to take an appeal following judgment on a "full trial record" (Opp. 33). This Court's timely review is thus warranted.

CONCLUSION

The petition should be granted. At minimum, the petition should be held pending *Jackson*.

Respectfully submitted,

GLENN M. KURTZ
DOUGLAS P. BAUMSTEIN
WHITE & CASE LLP
1155 Avenue of the Americas
New York, NY 10036
(212) 819-8200

KATHLEEN M. SULLIVAN
Counsel Of Record
PETER E. CALAMARI
STEPHEN R. NEUWIRTH
SANFORD I. WEISBURST
STEIG D. OLSON
CLELAND B. WELTON II
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Ave.
22nd Floor
New York, NY 10010
(212) 849-7000
kathleensullivan@quinnemanuel.com
Counsel for Petitioner

April 8, 2014