AUG 13 2007

No. 06-1648

IN THE

# Supreme Court of the United States

NDS GROUP PLC; NDS AMERICAS, INC.
*Petitioners,*

v.

SOGECABLE, S.A.; CANALSATELITE DIGITAL, S.L.,
*Respondents.*

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

## BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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## MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, the National Association of Manufacturers (NAM) moves for leave to file the attached brief *amicus curiae* in support of the petition. The Petitioner has consented to the filing of this brief. The Respondent has not, necessitating this motion. The petitioner's consent letter is on file with the Clerk of the Court.

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media and the general public about the vital role that manufacturing plays in America's economic future and living standards.

The NAM has a great concern about RICO pleading standards that encourage strike suits against its members and stifle the ability of American businesses to operate efficiently across multiple jurisdictions. The NAM's members face numerous lawsuits from plaintiffs seeking to use the RICO statute as leverage against legitimate businesses merely because those businesses operate through subsidiaries and agents.

The NAM accordingly submits this brief in support of the petition because it presents an opportunity for this Court to decide whether an association-in-fact "enterprise" can be comprised of nothing more than a corporation and its subsidiaries and agents. The court considered, but did not rule on this same, important issue in *Williams v. Mohawk*

*Indus., Inc.*, 546 U.S. 1075 (2005) (Pet. No. 05-465). Instead, the Court remanded the case in light of its intervening ruling on RICO's proximate cause threshold in *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006). *See Williams v. Mohawk Indus., Inc.*, 126 S. Ct. 2016 (2006). The NAM filed a brief in support of the petitioners in *Mohawk* and continues to believe the issue is of great importance to the industry and merits this Court's attention.

With its brief, the NAM seeks to contribute to the Court's understanding of the harmful effect of the current state of RICO enterprise law on manufacturers. Accordingly, the NAM respectfully requests that the Court grant its motion for leave to file the attached brief *amicus curiae* in support of the petition.

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## INTERESTS OF AMICUS CURIAE[1]

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all fifty states. The NAM's mission is to enhance the competitiveness of American manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital importance of manufacturing to America's economic future and living standards.

The NAM often files amicus briefs in cases that are of great interest and consequence to manufacturers. Members of the NAM, as well as other organizations in their industries and trades, have been named as defendants in a number of private civil suits under RICO. The NAM files this brief to ask the Court to address the important and compelling issue of whether an "enterprise," as defined under the Racketeer Influenced and Corrupt Organizations Act (RICO), may consist solely of a corporate defendant and

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[1] Pursuant to Supreme Court Rule 37.6, the Saint Barnabas Health Care System ("Saint Barnabas") made a monetary contribution to the preparation and submission of this brief. Saint Barnabas is one of many corporate defendants facing RICO suits involving association-in-fact enterprises composed solely of entities and agents within a corporate family. A civil RICO suit raising substantially the same issue presented in this petition was filed against Saint Barnabas in 2006. *See Longmont United Hosp. v. Saint Barnabas Corp.*, No. 06-cv-02802, 2007 WL 1850881 (D.N.J. June 22, 2007). The district court dismissed the suit because, *inter alia*, the enterprise consisted of nothing more than Saint Barnabas Corporation, its subsidiary hospitals and agents. *Id.* The case is currently on appeal before the Court of Appeals for the Third Circuit. *See Longmont United Hosp. v. Saint Barnabas Corp.*, No. 07-3236 (3d Cir. filed July 27, 2007).

its subsidiaries and agents. Many of the NAM's members—and most American businesses—conduct their operations through subsidiaries and agents.

In conflict with the majority of other appeals courts, but in agreement with two circuits, the Ninth Circuit has established a rule that will result in an increase in the number of businesses exposed to RICO liability. The NAM is concerned that the decision below, combined with the intractable circuit split, will encourage civil RICO strike suits against corporations and unduly hamper American manufacturers from expanding business operations into jurisdictions where they may be subjected to costly litigation and massive exposure.

This is the second time the NAM has filed an amicus brief on this important issue. The NAM filed a brief in support of the Petitioner in *Mohawk Indus., Inc. v. Williams*, 411 F.3d 1252 (11th Cir. 2005), *cert. granted, Williams v. Mohawk Indus., Inc.*, 546 U.S. 1075 (2005) (Pet. No. 05-465). After argument, however, the Court dismissed the writ as improvidently granted. *Williams v. Mohawk Indus., Inc.*, 126 S. Ct. 2016 (2006).[2] The irreconcilable split between the circuits that justified *certiorari* in *Mohawk* continues. As evidenced by the Ninth Circuit decision in the present case, the chasm grows wider with time. Lower courts are in need of this Court's guidance.

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[2] The Court remanded *Mohawk* in light of its ruling on another RICO issue in *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006). *See Williams*, 126 S. Ct. 2016.

## STATEMENT OF THE CASE

This petition raises important questions regarding the proper construction of the RICO statute's central liability provision, which makes it unlawful for a "person" to be "associated" with an "enterprise" engaged in a "pattern of racketeering activity." 18 U.S.C. § 1962(c). The Ninth Circuit's decision adds to the already confusing array of circuit court rulings on this issue, encourages RICO strike suits, and hinges potential RICO liability on the jurisdiction in which a particular corporation, or corporate family, operates.

The RICO enterprise pled in this case mirrors scores of RICO cases filed throughout the country every year. Petitioner NDS Group PLC ("NDS Group") was named as a RICO defendant in a suit filed in the Central District of California. The core allegation is that NDS Group conducted the affairs of a RICO enterprise consisting of itself, its wholly-owned subsidiary and its agents. The alleged purpose of the enterprise was for NDS Group to reverse engineer its competitor's computer chip to extract information and facilitate its publication over the internet. Once the information was published, third parties used it to create counterfeit products, resulting in financial harm to plaintiffs. The "technology enterprise" was identified as NDS Group, NDS Group's wholly-owned-subsidiary NDS Americas, Inc. ("NDS Americas"), and a group of employees and agents working for NDS Group. In short, the alleged "technology enterprise" is composed of the defendant corporation, its subsidiary and its agents (Pet. App. 5-6).

As described in detail in NDS's petition, the district court held that the Complaint failed to satisfy RICO's distinctiveness requirement (Pet. App. 7-9). The Ninth Circuit reversed because the "enterprise" consisted of two separate corporations—NDS Group and its wholly-owned

subsidiary, NDS Americas—as well as the agents of NDS Group (Pet. App. 9-10). In the Ninth Circuit's view, this enterprise was distinct from NDS Group, the alleged RICO "person."

The pleading artifice deemed adequate to survive the motion to dismiss in this case has been utilized by plaintiffs in countless cases. While three circuits correctly recognize that an enterprise consisting solely of a corporation and its subsidiaries and agents fails to meet RICO's well established "distinctiveness requirement" (Pet. App. 16-18), the Ninth Circuit and two other circuits permit this pleading artifice (Pet. App. 12-13). Four circuits hold that a RICO person and its subsidiaries or agents sometimes constitute an enterprise (Pet. App. 13-16). The current schism in circuit court jurisprudence allows strategic plaintiffs to circumvent those jurisdictions which correctly hold that a RICO "enterprise" cannot consist solely of a corporate defendant and its subsidiaries and agents by bringing suit in a circuit with more permissive pleading standards. As explained below, the primary source of disagreement between the circuits stems from differing interpretations of the Supreme Court's decision in *Cedric Kushner v. King*, 533 U.S. 158 (2001).

## REASONS FOR GRANTING THE PETITION

### I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE IRRECONCILABLE SPLIT AMONG FEDERAL APPELLATE COURTS OVER WHETHER A RICO "ENTERPRISE" MAY CONSIST SOLELY OF A CORPORATE DEFENDANT AND ITS SUBSIDIARIES OR AGENTS

NDS's petition correctly identifies a significant split among the federal appellate courts over whether an

enterprise may consist solely of a corporate defendant and its subsidiaries or agents (Pet. App. 10-18). *Amicus* agrees with NDS's analysis of this split and briefly offers three additional reasons for why the Court should grant *certiorari* on this issue.

First, the split is an issue of great importance to the nation's business community. Numerous legitimate corporations face RICO suits every year solely because they conduct business through agents—whether employees, subsidiaries, or third-party contractors. Manufacturers, health care companies and other employers utilize subsidiaries and agents to enhance productivity and structure their businesses in the most cost-efficient manner possible.

According to the Administrative Office of the U.S. Courts, 840 civil RICO actions were filed in the year ending March 31, 2005 (of which eight were filed by the United States);[3] 695 in the year ending March 31, 2004 (of which four were filed by the United States); 845 in the year ending March 31, 2003 (of which ten were filed by the United States); 707 in the year ending March 31, 2002 (of which seven were filed by the United States). *See* Federal Judicial Caseload Statistics, Table C-2 (U.S. District Courts-Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit) for each respective year, *available at* http://www.uscourts.gov/library/statisticalreports.html (last visited Aug. 5, 2007). Although the Administrative Office does not keep track of which RICO cases involve corporate defendants, it is the experience of *amicus* that the vast majority of these cases have been filed against corporations. Furthermore, because the corporate defendant must be

[3] The Administrative Office of the U.S. Courts has not posted statistics for 2006.

"distinct" from the enterprise under *Kushner*, 533 U.S. at 161, a large number of these cases involve creative allegations that the corporation is one member of an association-in-fact enterprise that includes additional entities or natural persons.

Second, the business community would benefit from a uniform rule stating that an association-in-fact enterprise cannot consist solely of a RICO defendant and its subsidiaries and agents. Many of the NAM's members operate in multiple jurisdictions. The current circuit split hampers the ability of businesses to structure their operations in a cost-effective manner while making it easy for plaintiffs to find a jurisdiction that permits these "oddly constructed entities." *Kushner*, 533 U.S. at 164-65. The split exposes American businesses to needless transactional and litigation costs based solely on the circuit in which they operate or, in many cases, based on the circuit in which creative plaintiffs choose to file suit.

Third, unlike issues raised in other writ seeking petitions, the viability of an association-in-fact enterprise consisting solely of a corporation and its subsidiaries and agents has been addressed and ruled on by virtually every circuit court and many district courts. As demonstrated in NDS's petition, the circuit split is severe and the question is ripe for resolution. *Cf. McCroy v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J.) (certiorari denied because issue required "further study" in lower courts "before it is addressed by this Court").

## II. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW IS IN CONFLICT WITH THE REASONING BEHIND THIS COURT'S DECISION IN *CEDRIC KUSHNER PROMOTIONS, LTD. v. KING*, 533 U.S. 158 (2001)

The resolution of conflicts between a Court of Appeals ruling and prior Supreme Court precedent is a compelling factor in favor of a grant of *certiorari*. *See* Sup. Ct. R. 10(c); Robert L. Stern et al., SUPREME COURT PRACTICE § 4.5 (8th ed. 2002), *citing United States v. Doe*, 465 U.S. 605, 610 (1984) (granting *certiorari* to "resolve the apparent conflict between the Court of Appeal's holding and the reasoning underlying the Court's holding in *Fisher*"), *Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 926 (1982) (same), *Army & Air Force Exchange Service v. Sheehan*, 456 U.S. 728, 733 (1982) (same). The Ninth Circuit's ruling, and the jurisprudence of the Eleventh Circuit and Sixth Circuit, misinterprets the reasoning behind *Kushner*.

As set forth in NDS's petition, this Court has twice recognized the importance of resolving whether an "enterprise" can consist of only the RICO person and its subsidiaries or agents (Pet. App. 10-11). In *Kushner,* 533 U.S. at 161, the Court reversed a Second Circuit decision that held boxing promoter Don King could not be considered a RICO "person" under § 1962(c) with respect to the alleged "enterprise," his wholly-owned company. The Court, however, expressly differentiated cases involving combinations of a corporation, its subsidiaries, employees, and agents as an association-in-fact enterprise. Such cases involve "significantly different allegations" and "quite different circumstances." *Kushner*, 533 U.S. at 164-65. The Court cited *Riverwoods Chappaqua 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), as examples of

properly dismissed association-in-fact enterprises involving "oddly constructed entities." The Court did not "consider the merits of these cases," and noted "their distinction from the instant case." *Id.*

The majority of lower courts faced with "artfully pled" association-in-fact enterprises consisting of nothing more than a defendant corporation, its agents and subsidiaries, have correctly held that the pleading artifices deemed inadequate by the Second Circuit in *Riverwoods* and *Discon* remained inadequate after *Kushner*. *See Whelan v. Winchester Prod. Co.*, 319 F.2d 225, 229 (5th Cir. 2003) (no RICO enterprise when "a defendant corporation through its agents committed the predicate acts in the conduct of its own business"); *Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir. 2004), (allegations that the RICO person and its agents are enterprise are insufficient); *City of New York v. Cyco.Net, Inc.*, 383 F. Supp.2d 526, 548 (S.D.N.Y. 2005) ("Plaintiffs' reliance on *Kushner* is misplaced. The Supreme Court was careful to distinguish the facts in *Kushner* ... from other cases ... [i]n particular, ... *Riverwoods*."); *DTEX LLC v. BBVA Bancomer*, 405 F. Supp.2d 639, 651-52 (D.S.C. 2005) ("This case is not like *Kushner*, where there was an identifiable 'person' who was employed by the enterprise. Instead, this case is like *Riverwoods*: the so-called 'enterprise' cannot logically be separated from the person'"); *South Broward Hosp. Dist. v. Medquist, Inc.*, 2007 WL 1041684, *13 (D.N.J. March 30, 2007); *Longmont United Hosp. v. Saint Barnabas Corp.*, 2007 WL 1850881, *9 (D.N.J. June 26, 2007).

But a significant minority of lower courts incorrectly interpreted the Court's ruling in *Kushner* to reach the opposite conclusion. *See, e.g., Williams v. Mohawk Indus.*, 465 F.3d 1277, 1284 (11th Cir. 2006) (upholding association-in-fact enterprise comprise of RICO defendant and agents; "This Court has never required anything other than a 'loose

or informal' association of distinct entities); *Living Designs, Inc. v. E.I. Dupont de Nemours and Co.*, 431 F. 3d 353, 361 (9th Cir. 2005) (corporation is formally separate and distinct from its agents); *Kirwin v. Price Commun. Corp.*, 391 F.3d 1323, 1327 (11th Cir. 2004); *State of Florida v. Tenet Healthcare Corp.*, 420 F. Supp.2d 1288, 1305-06 (S.D. Fla. 2005) (RICO "enterprise" consisting of corporate defendant its subsidiaries and agents was viable because "in recent years, both the Supreme Court and the Eleventh Circuit have held that the existence of a legal distinction between the RICO defendant and the RICO enterprise is sufficient to establish an enterprise under RICO.").

The importance of addressing this issue was confirmed when the Court granted *certiorari* in *Mohawk Indus., Inc. v. Williams*, 411 F.3d 1252 (11th Cir. 2005), *cert. granted, Williams v. Mohawk Indus., Inc.*, 546 U.S. 1075 (2005). The question presented was whether "a defendant corporation and its agents can constitute an 'enterprise' under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ('RICO')." Pet. No. 05-465. The NAM filed an amicus brief in support of the petitioners in *Mohawk* advocating a bright line rule excluding corporations from the definition of an "association-in-fact" enterprise. After argument, however, the Court dismissed the writ as improvidently granted and remanded the case in light of its decision in *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006). *Williams v. Mohawk Industries, Inc.*, 126 S. Ct. 2016 (2006).

This issue continues to be of great importance to the manufacturing industry and corporations in other business sectors, many of whom operate in multiple jurisdictions and are subjected to civil RICO suits merely because they operate through subsidiaries and agents. The NAM respectfully submits that the nation's business community is in need of a clear, uniform rule clarifying an issue several

courts believe was left unresolved in *Kushner*. Clear statements of legal norms are particularly important where the norms affect commonplace business transactions, because the costs of repeated inefficient transactions, economically distorted business practices, and foregone commercial opportunities can accumulate rapidly. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 621 (1992). In the area of state use and sales taxes, for instance, this Court has observed:

> Th[e] artificiality [of a bright-line rule], however, is more than offset by the benefits of a clear rule. Such a rule firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes, and reduces litigation concerning those taxes .... Moreover, a bright-line rule in the area of sales and use taxes also encourages settled expectations, and in doing so, fosters investment by businesses.

*Quill Corp. v. North Dakota*, 504 U.S. 298, 315-16 (1992). A concurrence by four Justices of this Court recognized that "clarity and predictability in RICO's civil applications are particularly important" and that "RICO, since it has criminal applications as well, must even in its civil applications, possess the degree of certainty required for criminal laws." *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 255 (1989) (Scalia, J. concurring) (criticizing this Court's ruling in *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), for creating "years" of litigation and "countless millions in damages and attorney's fees").

As many courts of appeals have recognized, the use of agents, employees and subsidiaries to accomplish corporate ends is not merely a commonplace practice, it is a necessity arising from the incorporeal nature of the corporate entity. *See Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 227

(7th Cir. 1997); *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994); *Brittingham v. Mobil Corp.*, 943 F.2d 297, 301 (3d Cir. 1991). Neither the RICO statute, nor the Supreme Court's decision in *Kushner*, were intended to subject legitimate businesses to racketeering liability merely because they conduct business through subsidiaries and agents. Yet that is precisely the situation that now exists under the jurisprudence of the Ninth, Eleventh, and Sixth Circuits.

Indeed, the distinctiveness requirement "would be eviscerated if a plaintiff could successfully plead that an enterprise consists of a defendant corporation in association with employees, agents, or affiliated entities acting on its behalf" because it would turn every act of alleged corporate wrongdoing into a RICO action. *Brittingham*, 943 F.2d at 301 (dismissing RICO complaint for failure to satisfy distinctiveness requirement). The NAM has a strong interest in avoiding this result. The allure of treble damages combined with overwhelming discovery costs in RICO suits will produce a groundswell of new RICO litigation against legitimate corporations merely because those corporations operate through subsidiaries or agents. The RICO statute was enacted to protect legitimate businesses from criminal misuse and to facilitate the prosecution of organized crime. *Kushner*, 533 U.S. at 162; *United States v. Turkette*, 452 U.S. 576, 584 (1981). RICO was not intended to subject legitimate business entities to such draconian exposure merely because they operate through subsidiaries and agents.

## CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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