Supreme Court, U.S.
FILED
AUG 1 - 2003
OFFICE OF THE CLERK

No. 07-1501

In The Supreme Court of the United States

IKON OFFICE SOLUTIONS, INC., and
GENERAL ELECTRIC CAPITAL CORPORATION,

Petitioners,

v.

NEWCAL INDUSTRIES, INC.; CPO, LTD.;
PINNACLE DOCUMENT SYSTEMS, INC.;
PACIFIC OFFICE AUTOMATION, INC.; and
KEARNS BUSINESS SOLUTIONS, INC.;

Respondents.

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

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an antitrust relevant product market may exist for replacement copier equipment and service where: (a) there is no reasonable interchangeability of the products in that market with other products; (b) where market imperfections and anticompetitive acts explicitly targeting plaintiff-competitors have created this inelasticity; (c) the relevant market is confined solely to an aftermarket derivative of a competitive market; (d) market power does not derive from contracts in the competitive market; and (e) the competitive market does not discipline anticompetitive practices in the aftermarket, in spite of the fact that consumers in this product market are customers of a single entity having fraudulently procured aftermarket contracts that help exclude business rivals?

2. Whether the RICO proximate-cause requirement is satisfied where the RICO scheme consists of intentional torts committed against defendants' customers and expressly targets plaintiffs, causing plaintiffs to have to pay monies directly to defendants and directly to lose specific customers?

3. Whether the RICO requirements for an associated-in-fact enterprise are met by an organization of corporate entities bound together, operating under long term contracts both for legitimate purposes and to accomplish the RICO scheme, with a mechanism for decision making, controlling and directing the affairs of the enterprise on an ongoing basis, continuity of structure

QUESTIONS PRESENTED – Continued

and personnel, a common and shared purpose, and central administrative functions?

4. Whether the Declaratory Judgment Act may be invoked to determine the validity of contracts which plaintiffs believe to be void but defendants believe to be valid and as to which defendants have threatened suit against plaintiffs for tortious interference with such contracts?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court of appeals were:

NewCal Industries, Inc.; CPO, Ltd.; Pinnacle Document Systems, Inc.; Pacific Office Automation, Inc.;[1] and Kearns Business Solutions, Inc. (plaintiffs-appellants); and

IKON Office Solutions, Inc., and General Electric Capital Corporation (defendants-appellees).

RULE 29.6 STATEMENT

The common stock of Pinnacle Document Systems, Inc. is held by Sharp Electronics Corporation. No publically held corporation owns 10% or more of any of the other respondents' stock.

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[1] Petitioners, apparently following the clerical error in the caption of the Ninth Circuit opinion, have omitted Pacific Office Automation, Inc. as a plaintiff. Pacific Office Automation has been a party from the inception of this suit, was named in the original Complaint and in the First Amended Complaint, and was one of the "[f]ive lessors of copier equipment (collectively "Newcal")" that were the subject of the entire Ninth Circuit opinion. (513 F.3d 1038)

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STATEMENT OF THE CASE

I. Proceedings at the Ninth Circuit

The Ninth Circuit's unanimous opinion of January 23, 2008 reversed the district court's dismissal of the entire case on a Rule 12(b)(6) motion.[2] Petitioners filed a Petition for Panel Rehearing or Rehearing En Banc with the Ninth Circuit on February 13, 2008. On March 7, 2008, the petition to the Ninth Circuit was unanimously denied, with no judge on the court requesting a vote for *en banc* rehearing.

II. Overview of Ninth Circuit Opinion

The Ninth Circuit opinion is very limited in scope. It applied conventional legal standards of this Court in deciding the antitrust, RICO and declaratory relief issues in this case and in finding that, on the extensive facts in the pleadings (which are set out in full below at Respondents' Appendix, App. 1- App. 147,) Newcal had satisfied those standards. It held, on the four issues as to which petitioners seek certiorari, that:

> (1) under this Court's decision in *Kodak*[3] "Newcal's market definition does not fail as a matter of law, at least on a Rule 12(b)(6) motion";

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[2] The Ninth Circuit's opinion is reported at 513 F.3d 1038.

[3] *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 112 S. Ct. 2072, 119 L.Ed.2d 265 (1992) ("*Kodak*").

(2) under this Court's decision in *Holmes*[4] "RICO standing requires compensable injury and proximate cause" and the case should be remanded to the district court for "reconsideration of the compensable injury requirement" and "for further consideration of the proximate cause requirement under the appropriate standard";

(3) under the Ninth Circuit's view of this Court's RICO decision in *Turkette,*[5] and its decisions on RICO in *Sedima,*[6] *Scheidler*[7] and *Kushner*[8] "Newcal's complaint alleges a sufficient enterprise-in-fact"; and

(4) because "IKON had threatened to sue Newcal for 'interfering with its existing and potential business relationships'" Newcal did not lack constitutional standing to request declaratory relief that the business relationships with which it interfered were not legally protectable.

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[4] *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 112 S. Ct. 1311, 117 L.Ed.2d 532 (1992) ("*Holmes*").

[5] *United States v. Turkette*, 452 U.S. 576, 101 S. Ct. 2524, 69 L.Ed.2d 246 (1981) ("*Turkette*").

[6] *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 105 S. Ct. 3275, 87 L.Ed.2d 346 (1985) ("*Sedima*").

[7] *National Organization for Women, Inc. v. Scheidler,* 510 U.S. 249, 114 S. Ct. 798, 127 L.Ed.2d 99 (1994) ("*Scheidler*").

[8] *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 121 S. Ct. 2087, 150 L.Ed.2d 198 (2001) ("*Kushner*").

These factually-bound holdings of the Ninth Circuit (like its holdings on the RICO requirement of injury to "business or property" and Lanham Act which petitioners do not challenge) do not involve novel rules of law. They decide how the facts pleaded apply to established legal standards.[9]

III. Summary of Facts

The facts of the case set out in the petition are incomplete and inaccurate.[10] Because this case is so fact-bound, respondents provide an initial statement of certain essential facts here and provide the detailed facts of the First Amended Complaint ("FAC") in Respondents' Appendix ("Resp. App."), below.

This case involves a widespread fraudulent and anticompetitive practice used by IKON and GE known as "flexing." IKON and GE lease copier equipment to customers on a "cost-per-copy" basis. This lease bundles equipment, service, and supplies.

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[9] The Ninth Circuit held, on the RICO requirement of injury to "business or property," that: "[t]he District Court has not had the opportunity to consider [Ninth Circuit's 2005 *en banc* decision in] *Diaz* [*Diaz v. Gates*, 420 F.3d 897]" and returned this issue to the district court "for reconsideration of the compensable injury requirement under *Diaz*." 513 F.3d at 1055. The Ninth Circuit held, on the Lanham Act claim, that: "[b]ecause the district court's conclusions with respect to four of those five statements rested on factual findings rather than legal conclusions, we reverse the Rule 12(b)6) dismissal and remand Newcal's Lanham Act claim." 513 F.3d at 1052.

[10] Petition, pages 4-5.

It ostensibly requires monthly payments for a lease term of just 5 years. After 5 years the customer should be able to seek competitive alternatives. But it cannot, because unbeknownst to the customer IKON and GE have extended its lease term – and its payments.

"Flexing" was initiated by IKON in the 1990's. It was subsequently ratified, adopted and carried on by GE, when GE bought IKON's copier leases in 2004, hired IKON personnel and began administering the "flexes." At the heart of "flexing" is the practice of intentionally deceiving customers to obtain extensions of their original 5-year cost-per-copy leases, without the customer knowing.

IKON's fraudulent conduct was colorfully described in a ditty sung about IKON's business practices by IKON salespersons. It was sung to the tune of "Nick Nack Paddy Wack Give the Dog a Bone (This Old Man Goes Rolling Home)":

"I con you;
You con me;
We con customers daily;
With a flex 'em in;
And a flex 'em out;
And cost per copies all about."

IKON had manuals teaching how to "con" customers in order to "flex" them and lock them in when their lease should end after 5 years. It designed deceptive amendment forms to effect the "flex" of its customers. It removed from its forms standardized

written disclosures to the customers about the lease amendment and then refused the requests of its own employees to restore them. It trained its salespersons to present the "flex" to the customer in a way to conceal the lease extension. It trained its salespersons to give false facts and false responses to standard customer inquiries about the amendment. It devised ways of continuing to conceal the "con" from the customer. It kept two sets of books on the customer's account, one specifically labeled "DO NOT SHARE WITH CUSTOMER," since it would reveal to the customer the fact of the "flex" and its economic effect.

IKON expressly stated in writing its targeting of competitors and its anticompetitive intent in its Field Training Manual for "flexing." "Flexing" in IKON's own words was designed to "**creat[e] separation [of the customer] from the competition**" at the end of 5 years. IKON used the following bullet-point training graphic, targeting its competitors:

What is Flexing?

- **Virtually impossible for competition to penetrate account**

These IKON practices were used nationwide, on all manner of customers, including non-profits, schools, hospitals, financial institutions, insurance companies and law firms. IKON's practices raised the prices IKON customers paid for replacement copiers in the aftermarket to 50%, 100%, or more, above potential competitive substitutes. Over 80% of IKON

customers were foreclosed from dealing with competitors of IKON and GE at lease-end by these practices.

In March 2004, GE bought $1.9 billion of IKON's leases and took over administration of IKON's lease accounts. GE immediately began selling GE "cost-per-copy" leases to "flexed" IKON customers. IKON's practices were continued by GE and its "flexes" were enforced by GE, through a series of agreements between GE and IKON and with others. GE continued to prevent competition for "flexed" accounts at lease-end, using the same fraudulent IKON "flexes" and new ones of its own.

IKON and GE were able to exercise market power over flexed customers, to price discriminate between their customers and to prevent competition in the replacement aftermarket at lease-end. This was because of a number of "market imperfections" unique to copier leasing. These included: the custom of financing through cost-per-copy contracts; the impossibility of life-cycle costing such contracts; copier equipment losing 90% of its residual value over its first 5 years; and, inefficient markets for used copier equipment. These "market imperfections" and IKON's and GE's "flexing" practices worked together to prevent reasonable interchangeability and cross-elasticity of demand for competitors' products in the replacement aftermarkets. These replacement aftermarkets have all of the "practical indicia" of economically distinct markets. Potential competitors of IKON and GE for replacement copiers and service were either foreclosed entirely from these aftermarkets or, occasionally,

paid the exorbitant sums demanded by IKON and GE to buy customers out of their "flexes."

ARGUMENT AGAINST GRANTING CERTIORARI

Because the Ninth Circuit carefully applied this Court's legal standards to the facts in the FAC, its holdings are narrow and unremarkable. The case is not worthy of certiorari on this basis. Because the Ninth Circuit's opinion does not conflict with other circuits on the relevant market issue, the RICO "proximate cause" issue or the declaratory relief issue, it is not worthy of certiorari on these issues. On the RICO enterprise issue this Court just denied certiorari in *Odom*, on which the Ninth Circuit relied *in toto*, making this issue also not worthy of certiorari.

I. Antitrust Relevant Markets

On the antitrust relevant market issue, the Ninth Circuit carefully passed Newcal's allegations in the FAC through three increasingly finer legal sieves before concluding that they survived petitioners' Rule 12(b)(6) motion. These sieves were: (a) the classic market definition standards of this Court in *duPont*,[11]

[11] *U.S. v. E. I. duPont de Nemours & Co.*, 351 U.S. 377, 76 S. Ct. 994, 100 L.Ed. 1264 (1956) ("*duPont*").

Brown Shoe[12] and *Kodak*: (b) the *Kodak* dual-market/ separate derivative aftermarket requirements, contrasted with the single-market franchise-type precedents of *Queen City Pizza*[13] and *Forsyth*;[14] and (c) the *Brown Shoe* requirements that "practical indicia" show the derivative aftermarket is "an independent economic entity."

(a) The Ninth Circuit recognized that although market definition was "typically a factual element," there were "some legal principles that govern the definition of an antitrust 'relevant market,' and a complaint may be dismissed under Rule 12(b)(6) if the complaint's 'relevant market' definition is facially unsustainable." It therefore started with the classic standards for defining an antitrust product market, in *duPont* and *Brown Shoe*. The Ninth Circuit found that Newcal's two alleged product markets facially met these requirements.

(b) The Ninth Circuit carefully applied these standards and the more specific market definition standards laid out by this Court in *Kodak* for this situation (*viz.* restraints and monopolization in derivative "aftermarkets"), to determine whether

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[12] *Brown Shoe Company, Inc. v. U.S.*, 365 U.S. 825, 81 S. Ct. 711, 8 L.Ed. 2d 510 (1962) ("*Brown Shoe*").

[13] *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430 (3rd Cir. 1997) ("*Queen City Pizza*").

[14] *Forsyth v. Humana, Inc.*, 114 F.3d 1467 (9th Cir. 1997) ("*Forsyth*").

these applied to the facts, or, whether Ninth Circuit (*Forsyth*) and Third Circuit (*Queen City Pizza*) precedent, used for franchise-type arrangements, applied. It concluded that *Kodak* more closely resembled the facts pleaded here. It held, narrowly, that "[w]e therefore reverse the district court's holding that *Queen City Pizza* and *Forsyth* render Newcal's complaint legally invalid." The Ninth Circuit cautioned that "[a]ll of these questions ["the actual existence" of the defined product market and market power] remain open for resolution – either for or against Newcal – upon remand."

This is hardly, as characterized by petitioners, "far reaching," or deviating from "conventional definition[s]," or creating a "sharp conflict with several other courts of appeals."[15] In fact, the Ninth Circuit merely applied *Kodak*, and its precedent in *Forsyth* does not conflict with, but is consistent with *Queen City Pizza*, and with the additional cases from the Second, Fifth and Eleventh Circuits which petitioners cite.

(c) The Ninth Circuit, after concluding that "there is no *per se* rule against recognizing contractually-created submarkets" like *Kodak* which are "potentially viable when the market at issue is a wholly derivative aftermarket" found that the allegations of Newcal's FAC sufficiently alleged a cognizable market under the *Brown Shoe* "practical indicia."

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[15] Petition, page 2.

A. Classic Relevant Market Precedent of This Court Was Applied by the Ninth Circuit

The two relevant product markets accepted by the Ninth Circuit were defined in terms of:

> (1) "a *product* market";
>
> (2) where "the outer boundaries of [such] product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it . . . and . . . include 'the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business"; and
>
> (3) where the market may be "economically distinct from the general product market" based on "'practical indicia' of an economically distinct submarket: 'industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.' [Citation to *Brown Shoe*]."

513 F.3d at 1045.

Newcal's FAC contains extensive factual allegations showing that the requirements of these precedents were met.[16]

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[16] (Resp. App. 25, 26-28 (product market, separate economic entity); 9, 28, 31-32 (lack of substitutability and cross-elasticity);

(Continued on following page)

B. The Ninth Circuit's Comparison of Newcal's Allegations with *Kodak* versus *Queen City* and *Forsyth* Is Correct

The Ninth Circuit, then carefully compared the franchise-type cases, *Queen City* and *Forsyth* with *Kodak*. It found "three relevant principles" emerged.

> (1) "[T]he law permits an antitrust claimant to restrict the relevant market to a single brand of the product at issue (as in *Eastman Kodak*)."
>
> (2) "[T]he law prohibits an antitrust claimant from resting on market *power* that arises solely from contractual rights that consumers knowingly and voluntarily gave to the defendant (as in *Queen City* and *Forsyth*)."
>
> (3) "[T]he law permits an inquiry into whether a consumer's selection of a particular brand in the competitive market is the functional equivalent of a contractual commitment, giving that brand an agreed-upon right to monopolize its consumers in an aftermarket."

513 F.3d at 1048-1049.

The Ninth Circuit then looked carefully at the basic factual allegations in Newcal's FAC. Its conclusions were again unremarkable – that these allegations were significantly different factually from a franchise case and more economically akin to the

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29-33 (distinct customers, distinct prices, insensitivity to price changes, price discrimination).

derivative aftermarkets in *Kodak*. The Ninth Circuit found that:

> (1) unlike franchise cases, "the complaint . . . alleges the existence of two separate but related markets in interbrand copier equipment and service," an aftermarket "more like the aftermarket in *Eastman Kodak* than the aftermarket in *Queen City Pizza* and *Forsyth* in one critical respect: the aftermarket here is wholly derivative from and dependent on the primary market";[17]
>
> (2) the alleged illegal restraints and monopolization in the flex amendments "relate only to the aftermarket, not to the initial market," the "flex agreements are not part of the initial market as they were in *Queen City Pizza*," and "IKON obtains the flex agreements only *after* obtaining an initial lease or contract";
>
> (3) "IKON does not achieve market power in the aftermarket through contractual provisions that it obtains in the initial market"; and
>
> (4) "market imperfections, as well as IKON's fraud and deceit, prevent consumers from realizing that their choice in the initial

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[17] This economic situation allowed, as in *Kodak*, "exploitation of a natural monopoly to gain monopoly power in the [separate] derivative services market . . . even though its monopoly power in services was neither naturally nor contractually created."

> market will impact their freedom to shop in the aftermarket."

513 F.3d at 1049-1050.

The net result of this portion of the Ninth Circuit's detailed relevant market inquiry is not unusual – that "there is no *per se* rule against recognizing contractually-created submarkets and that such submarkets are potentially viable when the market at issue is a wholly derivative aftermarket." 513 F.3d at 1051.

C. The Ninth Circuit Does Not Conflict with the Second, Fifth and Eleventh Circuits

In their petition for rehearing at the Ninth Circuit, petitioners argued, as they do here, that "[t]he Panel's Decision on the central antitrust issue conflicts with this Court's decision in *Forsyth v. Humana, Inc.*, 114 F.3d 1467 (9th Cir. 1997), and with *Queen City Pizza, Inc. v. Domino's Pizza, Inc.* 124 F.3d 430 (3rd Cir. 1997) and decisions of several other courts of appeals, . . . "[18] No judge on the Ninth Circuit even requested a vote for rehearing *en banc* to consider the alleged intra-circuit conflict. Moreover, the Ninth Circuit opinion does not conflict with its

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[18] Petitioners not only do not address the Ninth Circuit's discussion of *Forsyth*, but intentionally avoid it, misquoting the Ninth Circuit's statement of the case, as "determining whether this case is more like *Queen City Pizza* . . . or more like *Eastman Kodak*" rather than "determining whether this case is more like *Queen City Pizza* ***and Forsyth*** or more like *Eastman Kodak*." (Emphasis supplied.) Petition, page 11.

own precedent in *Forsyth* nor with like precedent in the Second, Third, Fifth and Eleventh Circuits.

In *Forsyth* the Ninth Circuit rejected a proposed market definition based on voluntarily-entered-into Humana insurance policies which contained explicit contractual provisions limiting insured to certain hospitals. "Similar to the franchisees' claim in *Queen City Pizza*, the insureds' antitrust claim defined the 'relevant market' to include only those hospital consumers who had Humana insurance policies" – an alleged submarket "whose boundaries depended entirely on a [single voluntary] written contract." 513 F.3d at 1047.

The Second Circuit case, *Hack v. Yale*, 237 F.3d 81 (2nd Cir. 2000) ("*Hack*") is even further afield from *Kodak* and the Ninth Circuit opinion. In *Hack*, the Second Circuit rejected a relevant market definition consisting of unmarried freshmen and sophomores at Yale College who had matriculated fully aware of the parietal rule requiring them to reside in university housing, only later to claim the rule violated the antitrust laws. The Second Circuit found that "plaintiffs . . . are somewhat unclear about what constitutes the relevant market," and with no more market allegations than that they were contractually bound to the parietal rule, economic power derived solely from a single voluntary contract and was insufficient. 237 F.3d at 85. This is not the case here.

The Fifth Circuit case, *United Farmers Agents Ass'n, Inc. v. Farmers Ins. Exchange*, 89 F.3d 233 (5th Cir. 1996), *cert. denied*, 519 U.S. 1116 (1997) ("*United Farmers Agents*") is also far afield from *Kodak* and

the Ninth Circuit opinion. It supports Newcal. *United Farmers Agents* held that "economic power derived from contractual agreements such as franchises or in this case, the agents' [voluntary] contracts with Farmers, 'has nothing to do with market power, ultimate consumers' welfare or antitrust.'" It dismissed the case on summary judgment. The *United Farmers Agents* court, in applying *Kodak*, found that plaintiffs on summary judgment "cited no evidence that information or switching costs were high . . . and offer no evidence that Farmers attempted to engage in price discrimination." 89 F.3d at 237. Newcal, to the contrary, has extensive allegations in the FAC that information and switching costs are high and that IKON and GE engage in price discrimination in the alleged relevant product markets.[19]

The Eleventh Circuit case cited by petitioners, *Maris Distributing Co. v. Anheuser-Busch, Inc.*, 302 F.3d 1207 (11th Cir. 2002) ("*Maris*"), is even further afield from *Kodak* and the Ninth Circuit opinion. After hearing the evidence at trial, the district court in *Maris* directed a verdict that the distributorship agreement knowingly entered into did not allow plaintiffs to merely claim that "contract power should automatically be equated with market power." The Eleventh Circuit, as the Ninth Circuit did here, carefully analyzed the differences between *Kodak* and the franchise cases, and explicitly held that "the instant case does not involve the *Kodak* issue of

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[19] (Resp. App. 27-28, 31-33)

whether or not consumers can switch to a competitor." 302 F.3d at 1223. *Maris* rejected petitioners' claim of *per se* immunity, holding that "[c]ontracts, and the exercise of contract power, may run afoul of the antitrust laws, as evidenced by the fact that § 1 of the Sherman Act prohibits any '*contract*, combination . . . , or conspiracy in restraint of trade.'" 302 F.3d at 1219.

This review of the Second, Third, Fifth and Eleventh Circuit decisions cited by petitioners confirms that the Ninth Circuit's decision in this case is not in conflict with this line of cases, nor with the Ninth Circuit's own precedent in *Forsyth* and not a basis for the grant of certiorari.

D. Petitioners Misrepresent *Kodak* and Its Impact

Even petitioners' description of *Kodak*, is hyperbole. Their contention that *Kodak* "broke new ground by holding that an antitrust market can be defined in terms of a single company's products"[20] is simply not correct.[21] Petitioners' unsubstantiated claims that *Kodak* would "release a torrent of litigation and a

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[20] Petition, page 14.

[21] *Kodak* held that: "Kodak also contends that, as a matter of law, a single brand of a product or service can never be a relevant market under the Sherman Act. We disagree. . . . This Court's prior cases support the proposition that in some instances one brand of a product can constitute a separate market. [citations omitted]"

flood of commercial intimidation" or has "wasted untold amounts of litigation and judicial resources"[22] are also not accurate.[23]

Kodak principally stands for the well-recognized proposition that legal presumptions based on formalistic market theories – like the *per se* legality rule

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[22] Petition, page 14.

[23] Neither the dissenting language from Justice Scalia in *Kodak* nor that cited from Professor Hovenkamp are objective measures of the real effect of *Kodak*. Justice Scalia, of course, was only predicting the future. Professor Hovenkamp was retained by Kodak and its counsel (IKON's present counsel) to advocate this position at the Ninth Circuit and in a certiorari petition in 1998, after a jury found Kodak liable for the alleged antitrust violations. *See*, Supreme Court No. 97-1298, 1998 WL 34103528. Objective sources, surveying actual cases reach conflicting conclusions. The article relied upon by petitioners actually concluded: "[a]fter thoroughly surveying the subsequent case law, we have found few cases in which the plaintiff has survived summary judgment involving Kodak-style lock-in claims. . . . The reality in the trenches is that federal district courts and federal courts of appeal have bent over backwards to construe *Kodak* as narrowly as possible. In our view, it can fairly be said that the Supreme Court decision in *Kodak* has been narrowed to the point where it is simply no longer an effective weapon for antitrust plaintiffs." Goldfine & Vorrasi, *The Fall of the* Kodak *Aftermarket Doctrine: Dying a Slow Death in the Lower Courts*, 72 Antitrust L.J. 209, 210. *See, also* Lampert, *Antitrust in IP Licensing: Selected Concerns and Considerations,* SN 051 ALI-ABA 237 (2007): "Since *Kodak*, few reported decisions have found aftermarkets sufficiently constrained to support the concept that the manufacturer holds a "monopoly" in that market. *See generally* 1 ABA Antitrust Section, *Antitrust Law Developments* (5th Ed. 2002) at 566-573, gathering cases"; 1 ABA Antitrust Section, *Anitrust Law Developments* (6th Ed. 2007) at 588-593.

petitioners urge – must give way to the facts on the record in an antitrust case. *Id.* at 466-67. For the Court in *Kodak*, adopting the *per se* rule petitioners urged there was out of the question in light of the record evidence, just as the Ninth Circuit found IKON's and GE's *per se* rule was here.[24]

E. Newcal's Allegations of "Practical Indicia" Separating Its Derivative Relevant Markets from the Competitive Interbrand Market for Original Contracts

The Ninth Circuit found that Newcal's FAC sufficiently alleges that IKON customers constitute a submarket under *Brown Shoe*'s "'practical indicia' of an economically distinct submarket: 'industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." Newcal's FAC clearly contains

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[24] Kodak's economic theory – that the primary market disciplines aftermarkets so that monopolization in aftermarkets is not profitable and cannot occur – has also not withstood the test of time. MacKie-Mason, Metzler *Links Between Vertically Related Markets: Kodak* (1992), page 392, in *The Antitrust Revolution, Economics Competition and Policy* (3d Ed. 1999) ("Economists writing since the Supreme Court opinion, including at least one who testified for Kodak at trial, have mostly agreed that there are circumstances under which aftermarket monopolization can be profitable overall.").

extensive factual allegations showing that the requirements of this precedent was met.[25]

II. The RICO Issues

The Ninth Circuit opinion reversed the district court on three holdings under RICO, 18 U.S.C. § 1961 et seq. and remanded, all on narrow grounds.

(a) It reversed the district court's holding that Newcal had not sufficiently alleged it was "injured in its business or property" under 18 U.S.C. § 1964(c). It remanded this to the district court for "reconsideration of the compensable injury requirement under *Diaz* [*Diaz v. Gates*, 420 F.3d 897, 900 (9th Cir. 2005) (en banc)]" which was decided after the district court's ruling.

(b) It reversed the district court's holding that Newcal had not sufficiently alleged that its injury was the "proximate result of the alleged racketeering activity." It found that "proximate cause" involved "factual questions which we cannot resolve on a Rule 12(b)(6) motion in this case" and remanded to the district court for further consideration of the proximate cause requirement under the appropriate standard.

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[25] (Resp. App. 9-10, 29-33)

(c) It reversed the district court's holding that Newcal had failed to allege a RICO enterprise. It did so based on the recent Ninth Circuit case on the "RICO enterprise" requirement, *Odom v. Microsoft Corp.*, 486 F.3d 541 (9th Cir. 2007) on which this Court recently denied certiorari. *Microsoft Corp. v. Odom,* 128 S. Ct. 464, 169 L.Ed.2d 325 (Oct. 15, 2007) (No. 07-138).

Petitioners seek certiorari only on (b) and (c) the RICO "proximate cause" and "enterprise" requirements, apparently conceding that Newcal has sufficiently alleged injury to its "business or property," satisfying 18 U.S.C. § 1964(c).

Although petitioners, in their "Questions Presented" list only RICO's proximate-cause, and enterprise requirement, they raise repeatedly, both directly and by inference, the issue of "whether a civil RICO plaintiff alleging mail or wire fraud as predicate acts must prove that it detrimentally relied on misrepresentations the defendant directed at it, the plaintiff." (Petition, p. 27 n.11).[26] This issue, also argued by

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[26] *See, also*: (a) Petition, page 10, lines 25-30, "[a]s the [district] court explained '[c]ourts regularly dismiss fraud-based RICO claims in which the alleged misrepresentations were directed at third parties rather than at the plaintiff,' and 'Newcal is not the proper party to assert this RICO claim' "; and (b) Petition, page 25, lines 11-13, "[t]he Court held [in *Anza*] that fraud-based claims could be brought only by the direct victim of the alleged fraud."

petitioners in the district court, has now been decided against petitioners by this Court in its unanimous opinion in *Bridge, et al. v. Phoenix Bond & Indemnity Co., et al.*, ___ U.S. ___, 128 S. Ct. 2131, 2008 WL 2329761 (June 9, 2008) (No. 07-210) ("*Bridge*"). *Bridge*, decided after petitioners filed their petition in this Court in May 2008, held: "a plaintiff asserting a RICO claim predicated on mail fraud need not show, either as an element of its claim or as a prerequisite to establishing proximate causation, that it relied on the defendant's alleged misrepresentations." 128 S. Ct. at 2145.

A. "Proximate Cause" Requirement Under RICO

1. "Proximate Cause" Standards in *Bridge*

This Court's well-reasoned opinion in *Bridge* teaches three things about RICO "proximate cause" relevant to the 9th Circuit's opinion. Each of these is antithetical to petitioners' position on proximate cause.[27]

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[27] *Bridge* also, more generally, rejects the argument petitioners here make repeatedly, both as to the antitrust issues and RICO issues in this action: that plaintiffs' claims are nothing more than state court "common law disputes," "common law claims," and "ordinary common law actions" and should not be allowed as federal antitrust or RICO claims. This Court in *Bridge*, following *Sedima*, concluded: "'It is not for the judiciary

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(1) "Proximate cause . . . is a flexible concept that does not lend itself to "'a black-letter rule that will dictate the result in every case.'" 128 S. Ct. at 2142. Petitioners argue for a "black-letter rule" that a competitor may never sue its rival where the predicate mail fraud is against a third party customer and that this "proximate-cause standard requires courts to dismiss RICO claims in these circumstances *as a matter of law*."[28]

(2) "'[P]roximate cause' [is used] to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts,' *Holmes,* 503 U.S. at 268, with a particular emphasis on the 'demand for some direct relation between the injury asserted and the injurious conduct alleged'" 128 S. Ct. at 2142. Petitioners urge, contrary to this teaching, that the Ninth Circuit erred in remanding this issue to the district court to use the "judicial tools" set out in *Holmes* and *Anza* "for further consideration of the proximate cause requirement." Quite contrary to petitioners' contentions, the Ninth Circuit here was following the standards of this Court for determining "proximate cause."

(3) As in the common law, "proximate cause" under RICO "provides only that the plaintiff's loss must be a foreseeable result of *someone's* reliance on

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to eliminate the private action in situations where Congress has provided it.'" 128 S. Ct. at 2145

[28] Petition, page 24, lines 19-20.

the misrepresentation" and there is a "long line of cases in which courts have permitted a plaintiff directly injured by a fraudulent misrepresentation to recover even though it was a third party and not the plaintiff, who relied on the defendant's misrepresentation." 128 S. Ct. at 2143. In an intentional tort, as here, where (a) IKON's and GE's "flex" fraud specifically targeted a plaintiff[29] and (b) the fraud was the "but for" cause of actual injury to the targeted plaintiff, proximate cause is presumed. This is true both under common law specifically dealing with intentional torts,[30] and under

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[29] IKON's Flex Training Manual stated that the intent of its fraudulently obtained contract extensions was to "create[ ] separation [of the customer] **from the competition** at the end of the original Agreement term" and to make it "virtually impossible **for the competition** to penetrate [the customer's] account." Resp. App. 17, 28-29.

[30] *See Restatement (Second) of Torts* (1979) § 870, "Liability For Intended Consequences – General Principle. One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances. This liability may be imposed although the actor's conduct does not come within a traditional category of tort liability"; and, § 435A "Intended Consequences. A person who commits a tort against another for the purpose of causing a particular harm to the other is liable for such harm if it results, whether or not it is expectable . . . "; *Seidel v. Greenberg*, 108 N.J.Super. 248, 261-269, 260 A.2d 863, 871-876 (1969); *Derosier v. New England Tel. & Tel. Co.*, 81 N.H. 451, 464, 130 A. 145, 152 (1925) ("For an intended injury the law is astute to discover even very remote causation.").

the traditional analysis of proximate cause set out in *Palsgraf*.[31]

2. Attenuated Causation in *Anza v. Ideal Steel Supply Co.*

What petitioners are really trying to argue in their petition is that the causation facts in this case are on all fours with those in *Anza*, thus requiring a dismissal of all of Newcal's claims *"as a matter of law"* for lack of "probable cause." This argument is not even close to correct. (1) In *Anza* there was no evidence that National Steel targeted its RICO activity at Ideal Steel, like IKON and GE targeted their RICO activity directly at "competitors." In fact, in *Anza*, the RICO activity was targeted solely at the State of New York. (2) The type of injury alleged under 18 U.S.C. § 1962(c)[32] in *Anza*, lost sales by its competitor Ideal,

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[31] Chief Justice Cardozo in his classic discussion of "proximate cause" in *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99, 100-01 (1928) concedes that the plaintiff there could recover for "intentional invasion of her bodily security." *Id.*, at 341. And, that only [i]f the harm was not wilful" do the theories and policies of proximate cause come into play. This is true Cardozo, holds, since under the common law there was no concept of "negligence" and recovery for injury to person or property was through "trespass" which "did not lie in the absence of aggression, and that [aggression had to be] direct and personal." "Negligence" and "proximate cause" developed later in the common law as "trespass on the case." *Id.*, at 345-346.

[32] The Court in *Anza* did not address Ideal's claim under 18 U.S.C. § 1962(a) for use or investment of RICO proceeds, but remanded this for the Second Circuit to "determine whether

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was several steps of causation removed from the fraud on the State of New York – without sufficient allegations of causative linkage. (3) The RICO activity caused direct monetary damage only to the State of New York, whereas here there are very specific allegations that Newcal paid monies to IKON and GE resulting directly from of the actual RICO predicate acts.

3. The Ninth Circuit Opinion Is Not in Conflict With the Seventh Circuit Decision in *Israel Travel*

Petitioners cite the Seventh Circuit case in *Israel Travel Advisory Service, Inc. v. Israel Identity Tours, Inc.*, 61 F.3d 1250, 1258 (7th Cir. 1995), which they relied on in the Ninth Circuit, as creating a circuit conflict on "proximate cause" with the Ninth Circuit.[33] The *Israel Travel* case involved claims that one of two rival travel agencies that competed for tours to Israel engaged in mail fraud by misrepresentations to customers that defamed its business rival, giving rise to RICO claims by the rival.

First, the Seventh Circuit in *Israel Travel accepted* the ruling in of the Fourth Circuit in *Mid*

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petitioners' alleged violation of § 1962(a) proximately caused the injuries Ideal asserts."

[33] Petition, pages 26-27.

Atlantic Telecom,[34] that RICO reaches business rivals where damage is also done to customers. There is no conflict with the Ninth Circuit as to this holding of the Seventh Circuit – both of which contradict petitioners' claim that business rivals cannot sue under RICO where the RICO predicate offenses influence customers and derivatively injure rivals.

Second, however, the Seventh Circuit in *Israel Travel*, found that the mail fraud statute, 18 U.S.C. § 1341, "does not protect vendors to persons who may be deceived, and firms suffering derivative injury from business torts therefore must continue to rely on the common law and the Lanham Act rather than resorting to RICO."

This holding by *Israel Travel* was overturned by *Bridge.* This Court in *Bridge* rejected the argument that 18 U.S.C. § 1341 required a RICO plaintiff to have relied on the fraudulent misrepresentations constituting the indictable predicate act of mail fraud and rejected the *Bridge* petitioners' claims that "rival businesses would have no cause of action under RICO . . . even though they were the primary and intended victims of the scheme to defraud." *Bridge*, using the *Israel Travel* facts, stated:

> Or, to take another example, suppose an enterprise that wants to get rid of rival businesses mails misrepresentations about them

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[34] *Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc.* 18 F.3d 260 (4th Cir. 1994).

> to their customers and suppliers, but not to the rivals themselves. If the rival businesses lose money as a result of the misrepresentations, it would certainly seem that they were injured in their business "by reason" of a pattern of mail fraud, even though they never received, and therefore never relied on the fraudulent mailings.

128 S. Ct. at 2139.

Newcal and other respondents, as competitors of IKON and GE, were intended victims of the fraudulent "flexing" practices and "lose money as a result of the misrepresentations" to IKON and GE customers. "[T]hey . . . were injured in their business 'by reason' of a pattern of mail fraud, even though they never received and therefore never relied on the fraudulent mailings." *Id.*

4. "Judicial Tools" for Determination of "Proximate Cause" of *Anza* and *Bridge* Were Correctly Applied by the Ninth Circuit

The Ninth Circuit, in addressing "whether a plaintiff has shown proximate cause" as required by RICO, used the three factors that this Court employed in *Anza* and *Bridge*, which were derived from *Holmes*: (1) whether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general; (2) whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's

wrongful conduct; and (3) whether the courts will have to adopt complicated rules for apportioning damages to obviate the risk of multiple recoveries. 513 F.3d 1056. *See*, *Anza*, 547 U.S. at 459-460; *Bridge,* 128 S. Ct. at 2142. It remanded for consideration of these factors based on the facts of this case. The Ninth Circuit's limited holding on proximate cause is directly in step with this Court and unremarkable.

B. "Associated-in-Fact Enterprise" Requirement Under RICO

The Ninth Circuit opinion, in reversing the district court's dismissal of the RICO claim for failure to allege a RICO enterprise, relied on its recent *en banc* decision in *Odom v. Microsoft Corp.*, 486 F.3d 541 (9th Cir. 2007). This Court, in its October 2007 Term, denied certiorari on this very issue. *Microsoft Corp. v. Odom,* 128 S. Ct. 464, 169 L.Ed.2d 325 (Oct. 15, 2007) (No. 07-138).

All of the reasons for denying certiorari in *Odom* apply with equal force here. Other reasons also apply. (a) The Ninth Circuit's discussion and holding on the RICO "associated-in-fact enterprise" requirement here consisted of only four sentences and is merely derivative of the *en banc* decision in *Odom*. (b) The Ninth Circuit did not address the extensive allegations of the RICO Statement filed as Exhibit C to the FAC which were submitted to satisfy, and do satisfy the strictest "associated-in-fact enterprise" standard which the Ninth Circuit had until *Odom* was decided in 2007.

Resolving the circuit split in favor of the strict standard would not change the outcome in this case. (c) The issue here is only one of four posited by petitioners for granting certiorari, whereas it was the sole issue in *Odom*.

It would, therefore, make little sense to use the holding here as a vehicle to decide this RICO requirement after denying certiorari in *Odom*.

1. The Circuit Split Over the Degree of Structure an Associated-in-Fact RICO "Enterprise" Requires Is Decades Old, With No Action by Congress or This Court and No Ill-Effects

The circuit split on the degree of structure required for a RICO enterprise has existed since the 1980's.[35] At the time *Odom* was decided by the Ninth Circuit in 2007, five circuits, including the Ninth Circuit, required an "ascertainable separate structure" for an associated-in-fact RICO enterprise.[36] One

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[35] Compare *United States v. Weinstein*, 762 F.2d 1522, 1537 n. 13 (11th Cir. 1985) (stating that 11th Circuit cases "have repeatedly rejected" the contention that "a RICO enterprise must possess an 'ascertainable structure' distinct from the associations necessary to conduct the pattern of racketeering activity"), *modified, reh'g denied in part,* 778 F.2d 673 (11th Cir. 1985), *cert. denied*, 475 U.S. 1110 (1986), with *United States v. Riccobene*, 709 F.2d 214, 223-24 (3d Cir.) ("[I]t is not necessary to show that the enterprise has some function wholly unrelated to the racketeering activity, but rather that it has an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses."), *cert. denied*, 464 U.S. 849 (1983).

[36] The Third, Fourth, Eighth, Ninth and Tenth Circuits.

circuit, the Seventh Circuit required "some" kind of ascertainable structure, although not a "separate" structure. Four circuits at that time rejected any requirement that there be an "ascertainable structure" for an associated-in-fact RICO enterprise.[37] 486 F.3d at 549-550. As petitioners point out, the Seventh Circuit in 2008 adopted the stricter standard of requiring an ascertainable separate structure for an associated-in-fact RICO enterprise.[38] The circuit split is now five to five on this issue.

Although this split has existed for over twenty years, with the debate over interpretation of the statutory language establishing an "associated-in-fact" RICO enterprise[39] still active,[40] Congress has not acted to amend the statute. Nor has this Court sought to revisit *Turkette* and its progeny, on which the Ninth Circuit relied to reach its conclusion that

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[37] The First, Second, Eleventh and District of Columbia Circuits.

[38] *Limestone Development Corp. v. Village of Lemont, Ill.*, 520 F.3d 797 (7th Cir. 2008)

[39] The definition of "enterprise" in the text of RICO, in its entirety, reads: "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not an legal entity." 18 U.S.C. § 1964(c).

[40] Judge Posner, in a terse analysis in the 2008 *Limestone Development* case asserts that the statutory language dictates requirement of a separate ascertainable structure. The Ninth Circuit in *Odom*, defining the dispute more broadly ('what is disputed is the manner in which a group must be associated") and exploring in depth this Court's decisions bearing on this language and interpretation of RICO reached the opposite conclusion.

there is no separate structure requirement. Petitioners do not cite authority nor attempt to make the case that the circuit split on this issue has led to unreasonable litigation under RICO, forum shopping or other problems in the courts. In fact, this Court long ago dismissed the concern that a broad reading of RICO was unwarranted ("RICO is to be read broadly") and held that correction, if it is to occur "must lie with Congress." *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 497-99, 105 S. Ct. 3275, 87 L.Ed.2d 346 (1985).

2. *Odom*, on Which the Ninth Circuit Relied, Was Properly Decided under This Court's Precedent in *Turkette*

In *Odom* a diverse *en banc* panel of fifteen judges reached a unanimous consensus that the district court's dismissal of plaintiffs' RICO claim for failure to allege properly an associated-in-fact enterprise should be reversed. Ten judges, including the author of the Ninth Circuit opinion here, "join[ed] the circuits that hold that an associated-in-fact enterprise under RICO does not require any particular organizational structure, separate or otherwise." They held:

> In *Turkette*, the Supreme Court carefully articulated the criteria for an associated-in-fact enterprise under RICO. We do not believe that we are at liberty to add to them. Applying the criteria articulated in *Turkette*, we conclude that plaintiffs have sufficiently alleged an associated-in-fact enterprise.

486 F.3d at 553. The remaining five judges disagreed and sided with the prior law of the Ninth Circuit requiring an ascertainable separate structure for an associated-in-fact RICO enterprise.[41]

The criteria of this Court for an associated-in-fact enterprise under RICO in *Turkette*, adopted by *Odom*, were: (a) "a group of persons associated together for a common purpose of engaging in a course of conduct"; (b) " 'evidence of an ongoing organization, formal or informal' "; and (c) " 'evidence that the various associates function as a continuing unit.' " 486 F.3d at 553. The separate-structure requirement of the conflicting circuits as urged by petitioners here is nowhere to be found in *Turkette*.

This Court in five (5) significant RICO decisions since *Turkette* has consistently followed its lead in not construing RICO narrowly – as petitioners here urge it to do. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S. Ct. 2893, 106 L.Ed.2d 195 (1989); *Sedima*; *Scheidler*; *Kushner*; *and Bridge.* It would be inconsistent for the Court to grant certiorari to break from this string of precedents.

Requiring a separate organizational structure for an associated-in-fact RICO enterprise akin to recognized legal entities, as suggested by petitioners and

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[41] *Chang v. Chen,* 80 F.3d 1293 (9th Cir. 1996). This case, and two other Ninth Circuit cases, to the extent that they required any particular organizational structure, separate or otherwise, for an associated-in-fact RICO enterprise, were expressly overruled.

the Seventh Circuit on which they rely[42] would create an anomalous result and turn RICO on its head – preventing prosecution of large scale criminal operations where the entire structure was engaged in the RICO enterprise and preventing prosecution of groups of criminals who had a loose association without corporate-like enterprises.

3. Newcal's RICO Statement Satisfies The Stricter Standards of RICO Associated-in-Fact Enterprise Structure of Other Circuits

When this case was before the district court, Ninth Circuit precedent required a separate organizational structure for an associated-in-fact RICO enterprise.[43] Newcal, as requested by the district court, filed a detailed RICO Statement which was incorporated into the FAC as Exhibit C. In this RICO Statement Newcal satisfies the separate structure requirement. It alleges a separate structure from the RICO scheme, and the mechanism for decision making and for controlling and directing the affairs of the

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[42] Judge Posner suggests that such a structure might include: "a system of governance, an administrative hierarchy, a joint planning committee, a board, a manager, a staff, headquarters, personnel having differentiated functions, a budget, records or . . . other indicator of a legal enterprise."

[43] *See, Wagh v. Metris Direct, Inc.*, 348 F.3d 1102 (9th Cir. 2003); *Simon v. Value Behavioral Health, Inc.*, 208 F.3d 1073 (9th Cir. 2000) and *Chang v. Chen*, 80 F.3d 1293 (9th Cir. 1996).

enterprise on an ongoing basis, continuity of structure and personnel, a common and shared purpose, and central administrative functions.[44] These allegations meet even the stricter RICO enterprise standards. If certiorari were granted and the current Third, Fourth, Seventh, Eighth and Tenth Circuit standards were adopted by this Court, the outcome in this case would not change.

III. The Declaratory Judgment Claim

The Ninth Circuit opinion, in reversing the district court's dismissal of Newcal's declaratory relief claim for lack of constitutional standing under the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.* ("Act"), did so on narrow and unremarkable grounds.

IKON had threatened in writing to sue Newcal for interference with its existing and potential business relationships under IKON contracts, which Newcal believed were not legally protectable.[45] Newcal sought a judicial declaration on the validity of the contracts at

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[44] (Resp. App. 131-135)

[45] The allegation in the original complaint was as follows. "IKON, on June 18, 2004, by letter from its attorneys, threatened NewCal with 'legal action' over NewCal's position in this action. The letter claimed that IKON's "Image Management Plus Flex Program" and other practices alleged in this action were "legitimate business practices," and that NewCal was 'interfering with its [IKON's] existing and potential business relationships,' including relationships with customers pursuant to contracts for which a declaratory judgment is sought in this action."

issue. While Newcal was not a party to the contracts, it had standing under the language of the Act and case law to bring the suit for a declaration of its legal rights.

The Ninth Circuit found that: "Newcal had a stake in the controversy even though it was not a party to the relevant contracts," and that the Ninth Circuit had "held under similar circumstances that the threat of suit is enough to create standing, such that the threatened party may seek a declaration that the threatening party's putative rights are invalid." This holding is well-supported in Ninth Circuit as well as Eleventh Circuit precedent.[46]

Petitioners' claim, that this holding of the Ninth Circuit creates a circuit conflict with a thirty-nine-year-old and rarely-cited Seventh Circuit case[47] that this split is one worthy of granting certiorari, is far fetched. The Seventh Circuit case, involving an insured and its two insurance companies litigating

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[46] *Societe de Conditionnement en Aluminium v. Hunter Engineering Co.*, 655 F.2d 938 (9th Cir. 1981) (declaratory relief for plaintiff where threat of patent infringement litigation was made by defendant to third party potential customer of plaintiff); *National Basketball Association v. SDC Basketball Club, Inc.*, 815 F.2d 562 (9th Cir. 1987) (declaratory relief for plaintiff where threat of antitrust litigation was made by defendant); *GTE Directories Publishing Corporation v. Trimen America, Inc.*, 67 F.3d 1563 (11th Cir. 1995) (declaratory relief for plaintiff not in privity with defendant where defendant claimed contacting defendants' customers would constitute tortious interference).

[47] *Diamond Shamrock Corp. v. Lumbermens Mutual Casualty Co.*, 416 F.2d 707, 710 (7th Cir. 1969).

liability for a boiler explosion, simply held little more than that all three were proper parties to the suit under the Act. 416 F.2d at 710.

Nor does petitioners' claim that the Act cannot be employed unless all parties potentially affected by the judgment are before the court (under Rule 23 if necessary) have merit. The statutory language, refutes this, allowing "[i]n a case of actual controversy . . . any court of the United States, upon the filing of an appropriate pleading, [to] declare the rights and other legal relations of *any interested party* seeking such declaration, *whether or not further relief is or could be sought*." 28 U.S.C. § 2201 (emphasis supplied). The simple fact that a declaration of the rights of non-litigants may be affected by collateral estoppel in a later proceeding does not require that they be joined in every suit where this possibility is present. It is common place for a single party to bring a suit under the Act for a declaration of its rights where the outcome may affect the rights of non-parties.[48]

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[48] This Court in *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 S. Ct. 764, 166 L.Ed.2d 604 (2007) reviewed cases seeking declaratory relief, both under the Act and not. In several, declarations were sought by individuals, where a judgment they might obtain would affect the rights of many (who were not joined under Rule 23) through collateral estoppel. *See, Terrace v. Thompson*, 263 U.S. 197, 44 S. Ct. 15, 68 L.Ed. 255 (1923) (individual challenging Washington's anti-alien land law); and *Steffel v. Thompson*, 415 U.S. 452, 94 S. Ct. 1209, 39 L.Ed.2d 505 (1974) (individual challenging Georgia trespass statute).

CONCLUSION

IKON's and GE's petition for a writ of certiorari should be denied.

Petitioners purport to raise multiple and diverse issues, both factual and legal. These involve diverse antitrust, RICO and declaratory relief questions. They urge that established rules be applied that don't fit the facts (franchise antitrust cases and RICO proximate cause cases), or, that sweeping new rules be fashioned (abrogation of *Kodak* for *per se* legality and Rule 23 trumping the Declaratory Judgment Act.) They claim circuit conflicts on the law. Most do not exist. One that is present has existed for over two decades, without Congress or this Court acting to resolve it. They would have the Court, in this fact-specific case, with extensive and detailed allegations on the record, ignore these facts (which petitioners largely have) and decide all of these issues in their favor under Rule 12(b)(6), as a matter of law.

On the antitrust issue – defining a relevant product market and assessing market power in that market – petitioners want the Court to abandon the classic market criteria of *du Pont* and *Brown Shoe*, which was used by respondents in their complaint and in the Ninth Circuit opinion. They urge adoption of a ***per se*** *legality* rule that if a group of buyers of a product have all contracted with an alleged Sherman Act defendant, the antitrust laws simply do not apply. As *Kodak* held, such *per se* rules are disfavored. Legal presumptions based on formalistic market theories

must give way to the facts on the record in an antitrust case.[49] Petitioners' invitation for this court to establish a *per se* rule of legality and ignore the facts should be declined.

The Ninth Circuit decision here is not in conflict with the decisions in the Second, Third, Fifth and Eleventh Circuits. The Ninth Circuit opinion reaffirmed the Ninth Circuit holding in *Forsyth* which follows the franchise holdings petitioners cite from these other circuits. Because of the significant differences in the facts of this case from the alleged conflicting cases in the other circuits, it is unlikely that this case would be decided differently in those circuits.

On the two RICO issues raised by petitioners, neither is even close to suitable for the grant of certiorari in this case.

Petitioners, in trying to fit this case into the *Holmes* and *Anza* molds, where proximate cause under RICO was found not to exist, grossly distort the facts alleged by Newcal. Their claims that this case simply alleges "that the defendant's aim was to increase market share at a competitor's expense,"[50] and "that a corporate rival defrauded its customers into extending their contracts at the purported expense of

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[49] 504 U.S. at 466-467.

[50] Petition, page 3, lines 24-26.

the plaintiff's commercial ambitions"[51] are not true. (1) Newcal, unlike the SIPC in *Holmes* and Ideal Steel Supply in *Anza,* was specifically targeted, in writing, by the RICO scheme which was not just designed to defraud customers generally. (2) Newcal and other plaintiffs paid monies directly to IKON and GE, as a direct result of the RICO scheme.

As this Court unanimously held in *Bridge,* proximate cause under RICO "is a flexible concept that does not lend itself to 'a black-letter rule that will dictate the result in every case'" and (quoting *Holmes*) under RICO" we use[d] 'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts." The Court should reject petitioners' attempt to short circuit this factual inquiry here and to "dismiss RICO claims in these circumstances *as a matter of law.*"[52]

This Court denied certiorari in *Odom* on the issue of a RICO associated-in-fact enterprise. This case is a less appropriate candidate for certiorari than *Odom* because it relied on that case without discussion and because Newcal's FAC, pled under the stricter standard of *Wagh*, *Simon* and *Chang* which were overruled by *Odom*, meets the stricter standard urged by petitioners.

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[51] Petition, page 24, lines 7-9.

[52] Petition, page 24, lines 23-24.

Petitioners' claim that any declaratory judgment action where collateral estoppel might affect a large number of non-parties is required to be brought as a class action under Rule 23 is unprecedented. They have provided no precedent for this and there is considerable precedent against it. This issue is simply not worthy of a grant of certiorari.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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AUGUST 2008