06-4666-CV

United States Court of Appeals
FOR THE SECOND CIRCUIT

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Karen McLaughlin, Jane Amodeo, David Tuttleman, Susan Bailey, Barbara Bishop, Trevor Campbell, Fergal Furlong, David Rogers, Barbara Schwab, Patricia Scocozza, Jim Sherman,

Plaintiffs-Appellees,

-v.-

American Tobacco Company, Altria Group, Inc., Philip Morris USA Inc., Lorillard Tobacco Co., British American Tobacco Limited, Liggett Group, Inc., B.A.T. Industries P.L.C., R.J. Reynolds Tobacco Co.,

Defendants-Appellants.

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING DEFENDANTS-APPELLANTS AND SUPPORTING REVERSAL OF CLASS CERTIFICATION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23(f)

Pursuant to November 16, 2006, Order Granting Permission to Appeal

From an Order Granting Certification of Class
Entered on September 25, 2006,
By the United States District Court for the Eastern District of New York
No. 04-CV-1945
The Honorable Jack B. Weinstein

December 22, 2006

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, with an underlying membership of more than three million companies and professional organizations nationwide. It regularly advocates the interests of its members in matters before Congress, the Executive Branch, and the courts. The Chamber often submits briefs as *amicus curiae* in litigation raising issues of concern to the Nation's business community.

This is such a case. The class certification decision below raises legal questions of vital importance to the Chamber's members, who are themselves frequently targets of class action litigation. Class certification can transform a routine lawsuit into a "bet-the-company" proposition. With the stakes so high, companies are often compelled to settle even meritless cases rather than risk potentially crippling jury verdicts. Such settlements are destructive to the Chamber's members, their customers, and the national economy.

The problem is particularly acute in cases involving the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961–1968. The Chamber recognizes the importance of consistent and

disciplined application of RICO to deter and remedy wrongdoing prohibited by the statute. But the Chamber also believes that the civil action for treble damages authorized under RICO, 18 U.S.C. § 1964, is susceptible to misuse against legitimate businesses. Accordingly, the Chamber has a special interest in ensuring that district courts require each and every civil RICO plaintiff to demonstrate causation and all other RICO elements.

In this case, however, Judge Weinstein ruled that a massive class may be certified despite acknowledging that only an unknown subset of the class may have actually relied on defendants' alleged misrepresentations, and without requiring any showing — even for that subset — that the alleged misrepresentations actually caused injury to class members' "business or property" (18 U.S.C. § 1964(c)). That ruling contravenes decisions of the Supreme Court and this Circuit and threatens to hasten the proliferation of massive civil RICO class action litigation. The Chamber submits this brief in support of the Defendants-Appellants to address several of the lower court's glaring errors of law.[1]

[1] All parties have consented to the Chamber's filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Class certification can transform a modest set of individual claims into a gargantuan lawsuit that threatens an entire company with ruinous financial liability. This case, for example, arises from the certification of a plaintiff class consisting of tens of millions of people seeking damages of three times their losses, which allegedly amount to billions of dollars. From a defendant's perspective, certification dramatically increases both the risks of litigation and the costs of an adverse verdict. It also increases the *likelihood* of an adverse verdict, because class actions create additional procedural advantages for plaintiffs that make such cases more difficult to defend. See *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996); Irwin A. Horowitz & Kenneth S. Bordens, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 JUDICATURE 22, 24-25 (1989). Consequently, "almost all class actions settle, and the class obtains substantial settlement leverage from a favorable certification decision." Robert Bone & David Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1292 (2002).

In several significant ways, the court below (449 F. Supp. 2d 992) impermissibly increased plaintiffs' leverage to obtain settlements of class

action lawsuits brought against business defendants. It did so not only by applying an erroneous approach to Rule 23 but also by substantially broadening the scope of civil RICO liability. In particular, the court relaxed plaintiffs' obligation to show injury "by reason of" a RICO violation (18 U.S.C. § 1964(c)) — here, by reason of the mail and wire fraud allegedly perpetrated against smokers of "light cigarettes," or "Lights." The court consequently ignored that the appropriate causation standard poses individualized questions of reliance and loss causation that operate to defeat class certification. Judge Weinstein's "less demanding" causation standard (449 F. Supp. 2d at 1124) was premised on his belief that the need to certify the class, by itself, justifies a change in the *substantive* showing plaintiffs must make under the civil RICO statute. This approach to class certification, however, would lead to certification based merely on plaintiffs' *allegations* of widespread fraud. Moreover, the standard would exempt plaintiffs from their obligation to show that defendants' alleged fraud in fact caused injury to the class.

If the lower court's decision is permitted to stand, the consequences of relaxing civil RICO standards will be severe. Already, class actions have become tools to extract large settlements from defendants who are unwilling

to bear the risk of ruinous liability that even a weak claim poses. And plaintiffs seeking treble damages for consumer fraud long ago detoured the civil RICO statute from its aim of addressing the problem of organized crime. Consequently, the Supreme Court has warned against permitting "indirectly" injured plaintiffs to pursue "'massive and complex damages litigation'" that would "'burden the courts . . . [and] undermine the effectiveness of treble-damages suits.'" *Holmes* v. *Secs. Investor Protection Corp.*, 503 U.S. 258, 274 (1992) (quoting *Assoc. Gen. Contractors of Cal., Inc.* v. *Carpenters*, 459 U.S. 519, 545 (1983)). Yet, if upheld, the district court's novel and expansive class certification approach will do just that. It will also encourage the filing of numerous class actions by plaintiffs whose common questions are not predominant and whose RICO claims are speculative at best.

ARGUMENT

I. THE TRIAL COURT IMPERMISSIBLY BROADENED CIVIL RICO LIABILITY

A. Fraud-Based Civil RICO Claims Require Individualized Showings Of Causation, Which Defeat Class Certification Under Rule 23(b)(3)

Under Rule 23(b)(3), a district court must make "findings" that common questions "predominate over any questions affecting only individual members." This obligation entails a "close look" at all matters relevant to the predominance inquiry. *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 615 (1997). In civil RICO class actions predicated on consumer fraud, that "close look" places causation squarely at issue. Specifically, if plaintiffs' allegations require "establish[ing] that they relied on the misrepresentations that they have alleged," then "establishing reliance individually by members of the class would defeat the requirement of Rule 23 that common questions of law or fact predominate over questions affecting only individual members." *In re Initial Public Offering Secs. Litig.*, 2006 WL 3499937, *16 (2d Cir. Dec. 5, 2006). In such circumstances, individual issues would

"overwhelm[] the common ones," *Basic Inc.* v. *Levinson*, 485 U.S. 224, 242 (1988), making class treatment inappropriate.[2]

Those circumstances are unquestionably present in civil RICO actions predicated on consumer fraud, such this one. Treble damages under the civil RICO statute are recoverable only by a plaintiff "injured in his business or property *by reason of*" a violation of RICO's prohibitions against racketeering activity. 18 U.S.C. § 1964(c) (emphasis added). That causation standard requires establishing "that the defendant's violation not only was a 'but for' cause of his injury, but was the proximate cause as well." *Holmes*, 503 U.S. at 268. "In a civil RICO action predicated on any type of fraud," that showing requires, at the least, "establish[ing] 'reasonable reliance' on

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[2] See, *e.g.*, *Gariety* v. *Grant Thornton LLP*, 368 F.3d 356, 362 (4th Cir. 2004) ("Because proof of reliance is generally individualized to each plaintiff allegedly defrauded, fraud and negligent misrepresentation claims are not readily susceptible to class action treatment, precluding certification of such actions as a class action."); *Castano*, 84 F.3d at 745 ("[A] fraud class action cannot be certified when individual reliance will be an issue"); *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 342 (4th Cir. 1998) ("claims that 'require[] proof of . . . whether the person justifiably relied on [defendant's] statements to his detriment' are not susceptible to class-wide treatment"); see also Fed. R. Civ. P. 23 advisory committee notes (1966) ("[A]lthough having some common core, a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed.").

the defendants' purported misrepresentations or omissions." *Bank of China, New York Branch* v. *NBM LLC*, 359 F.3d 171, 178 (2d Cir. 2004). This is a quintessentially individualized question; each plaintiff's civil RICO claim can succeed only if *that plaintiff* relied on the defendants' alleged misrepresentations.

B. Upholding The District Court's Ruling That Reliance Can Be Shown By Establishing A Distorted "Body Of Public Knowledge" Would Encourage Civil RICO Litigation Based On Speculative Allegations

Instead of requiring plaintiffs to make the individualized causation showings mandated by *Holmes* and *Bank of China*, the lower court applied a "body of public knowledge" rationale drawn from *Falise* v. *American Tobacco Co.*, 94 F. Supp. 2d 316 (E.D.N.Y. 2000) (Weinstein, J.). That approach, which *Falise* wove from whole cloth, is concededly "'less demanding'" than the standard ordinarily applicable to RICO claims. 449 F. Supp. 2d at 1124 (quoting *Falise*, 94 F. Supp. 2d at 335). It permits classwide proof of reliance if some group of victims can be said to have relied to their detriment on a RICO violation that "'distort[ed] the entire body of public knowledge,'" *id.* at 1116 (quoting *Falise*, 94 F. Supp. 2d at 335). Demonstrating the laxness of this standard, the court's certification ruling below was based on the mere possibility that plaintiffs' allegations of

"broad-based fraudulent schemes" *might* be "borne out" in future proceedings. *Id.* at 1047.

The district court's causation standard, if upheld, would drastically alter the civil RICO class action landscape. It would permit any alleged misrepresentation to support a civil RICO claim, so long as the misrepresentation could be said to have influenced some nebulous body of public knowledge about a consumer product. Consequently, civil RICO claims could be brought by plaintiffs who were not directly injured by RICO violations and whose claims would present novel reliance theories and complex damages questions. The district court's misguided causation standard was another impermissible basis for its flawed conclusion that common issues predominated over individual issues, when in fact plaintiffs' claims are fraught with individualized issues that simply cannot be resolved on a classwide basis.

1. The district court's "less demanding" reliance standard raises concerns that have repeatedly motivated the Supreme Court to enforce the RICO causation standard strictly. The Supreme Court's pronouncements on the civil RICO statute's proximate causation requirement, in particular, are founded on the "fear" that "[a]llowing [civil RICO] suits by those injured

only indirectly would open the door to 'massive and complex damages litigation[, which would] not only burde[n] the courts, but [would] also undermin[e] the effectiveness of treble-damages suits.'" *Holmes*, 503 U.S. at 274 (quoting *Assoc. Gen. Contractors*, 459 U.S. at 545). More recently, the Supreme Court reiterated that "[t]he element of proximate causation recognized in *Holmes* is meant to prevent . . . intricate, uncertain inquiries from overrunning RICO litigation." *Anza* v. *Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 1998 (2006).

Permitting classwide proof of reliance, therefore, implicates "fundamental concerns" about RICO suits involving only an "attenuated connection between . . . injury and . . . conduct." *Anza*, 126 S. Ct. at 1997. It is difficult to imagine an inquiry more hopelessly "speculative [in] nature," *id.* at 1998, than that authorized by the district court's "less demanding" standard. RICO litigation applying this standard would inevitably devolve into complex, and likely unanswerable, questions about what a "body of public knowledge" might be, whether the defendant or another actor is to blame for a particular rumor's supposed distortion of that body, and whether that distortion so infiltrated the marketplace that potentially *all* consumer behavior should be deemed causally linked to it.

Those questions would present an impossible burden for the federal courts and a potentially insurmountable challenge to business defendants, who would be tasked not simply with contesting specific factual allegations but also with litigating nebulous claims about the public consciousness.

2. Notably, the district court's "body of public knowledge" rationale does not incorporate *any* safeguards to mitigate its broadening of civil RICO liability. For example, despite analogizing to the fraud-on-the-market presumption of reliance authorized for securities fraud class actions in *Basic Inc.* v. *Levinson*, 485 U.S. 224, 245 (1988), *e.g.*, 449 F. Supp. 2d at 1116-17, the district court did not heed *Basic*'s guidance about when to reject such a presumption. The court did not require any showing — not even a merely "colorable" one — that consumer products such as Lights "trade[] on well-developed markets reflect[ing] all publicly available information, and, hence, any material misrepresentations." *Basic*, 485 U.S. at 246. Yet only in a well-developed market may "the reliance of individual plaintiffs on the integrity of the market price . . . be presumed." *Id.* at 247. Under those circumstances only, paying market price may constitute reliance on a fraudulent statement because the "fraud ha[s] been transmitted through market price." *Id.* at 248.

There was no showing that those circumstances are present here. Plaintiffs did not demonstrate, and the district court did not find, that consumer products such as Lights are traded on well-developed markets that in turn "'act[] as the unpaid agent of the investor, informing him that given all the information available to it, the value of the [cigarette] is worth the market price.'" *Basic*, 485 U.S. at 244 (quoting *In re LTV Secs. Litig.*, 88 F.R.D. 134, 143 (N.D. Tex. 1980)). Cigarettes are not investments at all; they are inherently dangerous consumer products purchased for many reasons, including taste and dependence on nicotine. Thus, although it is easy to guess that a given stock was purchased in the hope that its price would increase over time, the variegated reasons for purchasing cigarettes mean that any classwide guess about why Lights were purchased will not be an educated one.[3]

Indeed, "'light' cigarettes did *and do* cost the same as regular cigarettes." 449 F. Supp. 2d at 1041 (emphasis added). This fact is significant because, even accepting plaintiffs' allegations, defendants'

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[3] See, *e.g.*, *Sikes* v. *Teleline, Inc.*, 281 F.3d 1350, 1361, 1366 (11th Cir. 2002) (refusing to apply reliance presumptions because of the need for "individual inquiries"); *Poulos* v. *Caesars World Inc.*, 379 F.3d 654, 664 (9th Cir. 2004) (same).

supposed "fraud" was revealed no later than 2001, when the National Cancer Institute published a monograph suggesting that Lights do not reduce the health risks of smoking. See Appellant's Proof Brief at 9. Whereas the revelation of corporate fraud would cause a fraudulent company's stock price to underperform relative to other stocks, the market share of Lights has actually increased from 2000 (before the monograph's publication) to today. 449 F. Supp. 2d at 1180-81. That the exposure of the alleged fraud did not cause the price or market share of Lights to drop relative to regular cigarettes conclusively demonstrates that it would be *incorrect* to presume class-wide reliance (as one might in a case involving securities in well-developed markets).

Moreover, even if there were a well-developed Lights market, its lack of response to the 2001 monograph would still defeat plaintiffs' RICO claims. Even in securities markets, "[*a*]*ny* showing that severs the link between the alleged misrepresentation and . . . the price received (or paid) by the plaintiff . . . will be sufficient to rebut the presumption of reliance." *Basic*, 485 U.S. at 248 (emphasis added); see *In re Burlington Coat Factory Secs. Litig.*, 114 F.3d 1410, 1425 (3d Cir. 1997) (Alito, J.) ("Because the market for BCF stock was 'efficient' and because the July 29 disclosure had

no effect on BCF's price, it follows that the information disclosed on September 20 was immaterial as a matter of law" and prior nondisclosure was therefore "not actionable" under a fraud-on-the-market theory).[4] Despite discussing *Basic*, therefore, the district court simply overlooked that reliance may not be presumed absent a showing of the relevant features of a well-developed market.

3. In this way, the district court's standard combines the breadth of a reliance presumption with the recklessness of a deficient market analysis. The resultant "less demanding" reliance standard risks inundating the federal courts with precisely the intricate, uncertain inquiries that *Holmes* and *Anza* sought to inhibit. The district court believed those speculative, classwide inquiries were required, as opposed to individualized adjudication, because the cigarette industry itself engaged in classwide *marketing* — by "specifically target[ing] a large group and knowingly rel[ying] on the group's dynamics." 449 F. Supp. 2d at 1127. But that approach would

[4] Likewise, if Lights were somehow traded in a well-developed market, "those who [purchased Lights] after the corrective statements" — here, the 2001 National Cancer Institute monograph — "would have no direct or indirect connection with the [alleged] fraud." *Basic*, 485 U.S. at 249.

make all producers of mass-marketed products more vulnerable to civil RICO class actions simply because they have marketing departments.

Not surprisingly, the Supreme Court has disapproved such tit-for-tat jurisprudence: "A RICO plaintiff cannot circumvent" the statute's causation inquiry by making sweeping statements about the "aim" of the alleged RICO violation. *Anza*, 126 S. Ct. at 1998. What is required, instead, is an answer to "the central question . . . whether the alleged violation led *directly* to the plaintiff's injuries." *Ibid.* (emphasis added). The district court's standard impermissibly skips that question.

C. The District Court Improperly Exempted Plaintiffs From Their Responsibility To Show That Defendants Caused Their Losses

The district court's reliance analysis was not its only derogation from civil RICO's causation requirement. The court also deemed "inapplicable" plaintiffs' obligation to establish a causal connection between defendants' alleged misrepresentations and plaintiffs' alleged losses. 449 F. Supp. 2d at 1046. In particular, despite acknowledging case law requiring proof of "loss causation" in "RICO suits alleging fraud in commercial finance transactions," *ibid.* (citing *Moore* v. *PaineWebber*, 189 F.3d 165 (2d Cir.

1999)), the district court held that requiring "[l]oss causation, in the consumer fraud context, would be nonsensical," *ibid.*[5]

That holding completely misunderstands the nature and origins of the loss causation requirement. Although the term "loss causation" appears most frequently in securities cases, the underlying principle is not peculiar to that setting. In fact, "what securities lawyers call 'loss causation' is the standard common law fraud rule . . . merely borrowed for use in federal securities fraud cases." *Bastian* v. *Petren Res. Corp.*, 892 F.2d 680, 683 (7th Cir. 1990) (Posner, J.) (citation omitted). Accordingly, "'[l]oss causation' is an exotic name — perhaps an unhappy one — for [a] standard rule of tort law." *Id.* at 685 (citation omitted). As Judge Calabresi has explained, the "loss causation" requirement "is, in fact, not significantly different from the standard tort law requirement that a defendant's acts cause not only an

[5] The court also deemed inapplicable plaintiffs' obligation to show transaction causation. 449 F. Supp. 2d at 1046. But showing transaction causation in this case is equivalent to showing reliance — *i.e.*, whether plaintiffs would have bought Lights were it not for the alleged fraud — which the district court and all parties agree *is* required. They simply dispute what that showing entails.

accident but also the injury to the plaintiff that followed from the accident." *Moore*, 189 F.3d at 175 (Calabresi, J., concurring).[6]

Civil RICO's causation requirement, moreover, incorporates the common-law obligation to show loss causation. *Holmes*, 503 U.S. at 267-68; *Moore*, 189 F.3d at 179 (Calabresi, J., concurring) (explaining that *Holmes* requires plaintiffs to meet at least the common-law causation showing but observing that "our cases have held RICO plaintiffs to a more stringent showing of proximate cause than would be required at common law"). For *all* civil RICO claims, therefore, "showing that the defendant's wrongful acts led the plaintiffs to enter into [a] transaction is not enough." *Moore*, 189 F.3d at 175 (Calabresi, J., concurring). Rather, "[f]or a RICO

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[6] Judge Calabresi's view is consistent the Supreme Court's pronouncements in *Dura Pharmaceuticals, Inc.* v. *Broudo*, 544 U.S. 336, 343-44 (2005) (explaining that loss causation requirement in securities fraud actions relates to the "the common law['s] . . . insist[ence] that a plaintiff in [a deceit or misrepresentation action] show not only that had he known the truth he would not have acted but also that he suffered actual economic loss"), and with this Court's statements in numerous cases, *e.g.*, *Emergent Capital Inv. Management, LLC* v. *Stonepath Group, Inc.*, 343 F.3d 189, 197 (2d Cir. 2003) (comparing loss causation to proximate cause); *Castellano* v. *Young & Rubicam, Inc.*, 257 F.3d 171, 186 (2d Cir. 2001) (same); *Suez Equity Investors, L.P.* v. *Toronto-Dominion Bank*, 250 F.3d 87, 96 (2d Cir. 2001) (same); *Citibank, N.A.* v. *K-H Corp.*, 968 F.2d 1489, 1495 (2d Cir. 1992) (same).

suit to lie, the plaintiffs must also demonstrate that the defendant's wrongful acts were responsible for the *loss* that occurred." *Ibid.*

Consumer fraud cases are no exception. See *Moore*, 189 F.3d at 176-77 (applying loss causation analysis to hypothetical consumer-fraud scenarios involving cabbages). Indeed, if Judge Weinstein's legal analysis were correct, then it would be "nonsensical" to describe scenarios in which defendants' alleged misrepresentations caused a plaintiff to purchase Lights yet were not responsible for any loss that occurred. But at least two such scenarios make perfect sense. First, if a plaintiff in fact received less tar and nicotine from smoking Lights, then that plaintiff cannot show loss causation even if she was induced to buy Lights — a loss of money — through a false representation that she was *guaranteed* to receive less tar and nicotine from them. Second, a plaintiff who purchased Lights as an alternative to regular cigarettes could have incurred the same losses — the money spent on cigarettes and the tar and nicotine inhaled — if she had not been induced to switch to Lights but had continued smoking regular cigarettes. In this second scenario as in the first, the plaintiff could show reliance but not loss causation because her losses would have occurred with or without the alleged misrepresentations. See *Bastian*, 892 F.2d at 686 ("If the plaintiffs

would have lost their shirts in the oil and gas business regardless of the defendants' violations of RICO, they have incurred no loss for which RICO provides a remedy.").

By ignoring these plausible scenarios and exempting plaintiffs from their obligation to show loss causation, the district court removed yet another check against overbroad civil RICO litigation. In conjunction with the court's "less demanding" reliance standard, the court's ruling, if permitted to stand, will invite a torrent of consumer-fraud litigation by plaintiffs advancing tenuous theories of injury. In addition to overburdening the federal courts and subjecting businesses to increased civil liability (including the threat of treble damages), acceptance of this standard simply ignores the numerous individualized reliance and loss-causation possibilities that, under a proper standard, would require individualized as opposed to classwide adjudication.

II. ADOPTION OF THE DISTRICT COURT'S CAUSATION STANDARD BY THIS CIRCUIT WOULD HAVE SERIOUS ADVERSE EFFECTS

In addition to unnecessarily extending class certification and encouraging the proliferation of speculative civil RICO claims, a decision to

uphold the district court's rulings would have other far-reaching, negative consequences for the business community.

A. Upholding The District Court's Reliance And Loss-Causation Rulings Would Encourage The Filing Of Frivolous Civil RICO Class Action Lawsuits

This Court's requirement that civil RICO plaintiffs show causation — including individualized reliance and loss causation — is perhaps the most important safeguard against frivolous civil RICO claims. This is because few other safeguards exist.

The civil RICO statute has "evolv[ed] into something quite different from the original conception of its enactors." *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 500 (1985). "Congress plainly enacted RICO to address the problem of organized crime, and not to remedy general state-law criminal violations." *Anza*, 126 S. Ct. at 2004 (Thomas, J., concurring in part and dissenting in part) (citing *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229, 245 (1989)). Common-law fraud claims, however, and not cases involving organized crime, now dominate the nearly 1,000 civil RICO actions filed per year.[7] The reason is simple: "Any good lawyer who can

[7] *E.g.*, *Sedima*, 473 U.S. at 499 n.16 (quoting an ABA Task Force determination that, over the period reviewed, only nine percent of civil RICO cases at the trial court level involved "'allegations of criminal activity of a type

bring himself within the terms of the federal civil RICO provisions will sue in federal court because of the prospect of treble damages and attorney's fees which civil RICO holds out." William H. Rehnquist, *Remarks of the Chief Justice*, 21 ST. MARY'S L.J. 5, 10 (1989). It should surprise no one, therefore, that the civil RICO statute has "achieved an unimagined level of use against legitimate individuals and businesses in the civil litigation context." Lee Applebaum, *Is There a Good Faith Claim for the RICO Enterprise Plaintiff?*, 27 DEL. J. CORP. L. 519, 520 (2002).[8]

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generally associated with professional criminals'"); Jed S. Rakoff & Howard W. Goldstein, *RICO: Civil and Criminal Law and Strategy* § 2.03 at 2-41 (2005) (nearly 1,000 civil RICO cases per year since 1986); G. Robert Blakey & Scott D. Cessar, *Equitable Relief under Civil RICO: Reflections on* Religious Technology Center *v.* Wollersheim*: Will Civil RICO Be Effective Only against White-Collar Crime?*, 62 NOTRE DAME L. REV. 526, 619-22 (1987) (finding that in 1986, 54.9% of all civil RICO cases involved common-law fraud).

[8] See also *Sedima*, 473 U.S. at 529-30 (1985) (Powell, J., dissenting) ("Only a small fraction of the scores of civil RICO cases now being brought implicate organized crime in any way. Typically, these suits are being brought — in the unfettered discretion of private litigants — in federal court against legitimate businesses seeking treble damages in ordinary fraud and contract cases."); Philip A. Lacovara & Geoffrey F. Aronow, *The Legal Shakedown of Legitimate Business People: The Runaway Provisions of Private Civil RICO*, 21 NEW ENG. L. REV. 1, 3 (1985-86) ("Although RICO was intended to protect legitimate business, the statute is now being used almost exclusively to attack established businesses and firms. The threat to bring a 'racketeering' charge sometimes coerces settlements before the filing of a RICO complaint, while the actual filing of a RICO complaint exposes businessmen to continuing embarrassment and expense.").

Consequently, "[j]udicial sentiment that civil RICO's evolution is undesirable is widespread." *Anza*, 126 S. Ct. at 2004 (Thomas, J., concurring in part and dissenting in part) (collecting cases); see also *Sedima*, 473 U.S. at 501 (Marshall, J., joined by Brennan, Blackmun, and Powell, JJ., dissenting) (lamenting "the federalization of broad areas of state common law of frauds"); William H. Rehnquist, *Get RICO Cases Out of My Courtroom*, WALL ST. J., May 19, 1989, at A14. Yet the expansion of civil RICO has continued apace, including to areas formerly the exclusive province of product liability law, in part because judges have so few opportunities to stop it. Some of the statute's provisions are "inherent[ly]" susceptible to abuse against legitimate businesses, and "[their] correction must lie with Congress." *Sedima*, 473 U.S. at 499.

But the requirement that plaintiffs must show "injur[y] . . . by reason of" a RICO violation is not such a provision. 18 U.S.C. § 1964(c). It is manifestly restrictive, limiting recovery to those "directly" injured by a RICO violation. *Anza*, 126 S. Ct. at 1998. Thus, whatever else may be said of the district court's lax reliance and loss-causation rulings, they were not *compelled* by the statutory text. Rather, as Judge Weinstein reiterated time and again, his rulings depended largely upon a belief that the plaintiffs

deserve a class-action remedy against the cigarette industry. See, *e.g.*, 449 F. Supp. 2d at 1123 ("Denying certification would bring a premature end to a series of related claims that appear to have considerable merit.").

The civil RICO statute's boundaries need policing, however, not broadening. And although the statute's causation requirement did not prevent the civil RICO litigation explosion from happening in the first place, at least it provides judges with some means to limit suits based on purely speculative theories of widespread fraud. See *Szabo* v. *Bridgeport Machines, Inc.*, 249 F.3d 672, 677 (7th Cir. 2001) (Easterbrook, J.) ("Certifying classes on the basis of incontestable allegations in the complaint moves the court's discretion to the plaintiff's attorneys — who may use it in ways injurious to other class members, as well as ways injurious to defendants."). Preserving that limiting function merely entails applying the statute as written and resisting the district court's entreaty to expand the civil RICO universe even further.

Faithful enforcement of the requirement that plaintiffs show "injur[y] . . . by reason of" a RICO violation (18 U.S.C. § 1964(c)) would also prevent a deluge of new class action lawsuits based on RICO. Although

RICO was enacted more than 35 years ago, until recently very few RICO class actions have been brought. As one commentator recently explained:

> [B]efore a plaintiff class can even get a shot at recovering treble damages, proposed class actions alleging a civil RICO cause of action must satisfy all the requirements for class certification under Rule 23 of the Federal Rules of Civil Procedure and satisfy the stringent pleading requirements of the RICO statute. Accordingly, there are few reported cases involving class actions that have been successful in their civil RICO claims. Most cases that satisfy the pleading requirements for civil RICO and Rule 23 of the Federal Rules of Civil Procedure are likely to settle out of court as a result of the treble damages provision.

Amy A. Weems, Note, *A New Use for Civil RICO: Employees Attempt to Combat the Hiring of Illegal Immigrants*, 28 AM. J. OF TRIAL ADVOCACY 429, 429 (2004).

If upheld, Judge Weinstein's novel approach to causation and reliance would remove a substantial impediment to plaintiffs seeking to win class certification of civil RICO claims.[9]

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[9] Relaxing civil RICO's reliance and causation standards would have especially troubling implications and effects in the Second Circuit in light of this Court's broad understanding of the definition of "property" that is protected by the mail and wire fraud statutes. See *United States* v. *Wallach*, 935 F.2d 445, 463 (2d Cir. 1991) (shareholders possess property rights in receiving complete and accurate information concerning the corporation); see also *United States* v. *D'Amato*, 39 F.3d 1249, 1258 (2d Cir. 1994).

B. Upholding The District Court's Causation Standards Would Lead To Overly Punitive Damages Awards

Because the district court thought itself unfettered by the loss causation requirement, it authorized a damages measure far in excess of what is necessary to deter consumer fraud. In particular, the court "ruled that plaintiffs could recover 'benefit of the bargain' damages and did not have to show, *as courts have consistently held*, 'out-of-pocket' loss to establish injury to business or property." 2 MCLAUGHLIN ON CLASS ACTIONS § 8:16 (3d ed. Dec. 2006 update) (criticizing Judge Weinstein's ruling) (emphasis added).[10] This holding, which would permit recovery for the health benefits plaintiffs thought they were getting from smoking Lights, and not simply for their losses, cannot be squared with civil RICO's loss causation requirement:

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[10] See also *Maio* v. *Aetna, Inc.*, 221 F.3d 472, 483 (3d Cir. 2000) (civil RICO statute's damages provision "can be satisfied by allegations and proof of actual monetary loss, i.e., an out-of-pocket loss"); *Steele* v. *Hosp. Corp. of Am.*, 36 F.3d 69, 70-71 (9th Cir. 1994) (holding that plaintiffs who did not pay allegedly excessive medical charges out of their own pockets lacked standing to bring a RICO claim); *First Nationwide Bank* v. *Gelt Funding Corp.*, 27 F.3d 763, 768 (2d Cir. 1994) (stating, in a civil RICO case, "[t]he general rule of fraud damages . . . that the defrauded plaintiff may recover out-of-pocket losses caused by the fraud"); *Anglo-Iberia Underwriting Mgmt. Co.* v. *Lodderhose*, 282 F. Supp. 2d 126, 133 (S.D.N.Y. 2003) ("RICO's damages provisions only apply to 'actual, out-of-pocket financial loss.'" (quoting *Dornberger* v. *Metro. Life Ins. Co.*, 961 F. Supp. 506, 521 (S.D.N.Y. 1997))).

> RICO was intended to combat organized crime, not to provide a federal cause of action and treble damages to every tort plaintiff. Requiring that a plaintiff demonstrate a financial loss to her business or property is consistent with that purpose. It is also consistent with what the Supreme Court has termed the "restrictive significance" of the phrase "injured in his business or property."

Oscar v. *Univ. Students Co-op. Ass'n*, 965 F.2d 783, 786 (9th Cir. 1992) (quoting *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979)).

Nevertheless, the district court believed a benefit-of-the-bargain model was necessary for "sufficient deterrence" and to avoid a "windfall to the wrongdoer." 449 F. Supp. 2d at 1059, 1064. But because they are trebled, *any* reasonable calculation of civil RICO damages is sufficiently "punitive and remedial." *Commercial Union Assur. Co., plc* v. *Milken*, 17 F.3d 608, 613 (2d Cir. 1994). This is especially true in large class action lawsuits, where trebled damages are in turn multiplied by thousands or millions of plaintiffs. In such cases, civil RICO claims threaten defendants with potentially crippling liability — not the windfall that concerned Judge Weinstein. Because all businesses must heed the threat of class-action litigation, even an out-of-pocket damages model is far more likely to over-deter legitimate business behavior than it is to under-deter illicit conduct. And finally, because all RICO predicate acts are punishable by federal

criminal law as well as the civil RICO statute, the district court's concern that such acts are under-deterred rings hollow. Thus, requiring defendants to pay three times what plaintiffs expected to gain (particularly where that estimate is based on hypothetical facts and subjective values), instead of three times what plaintiffs actually lost, would simply increase the civil RICO statute's already punitive effects.

C. A "Less Demanding" Civil RICO Causation Standard Would Increase The Likelihood And Severity Of Erroneous Certification Rulings

If plaintiffs can win class certification simply by making the modest causation showings the district court required, plaintiffs' lawyers can be expected to file numerous civil RICO class actions — no matter how tenuous — in the district courts within this Circuit in an effort to exploit certification and causation standards that would be substantially lower than in other jurisdictions. Armed with those certifications, plaintiffs' counsel will be able to pressure defendants to reach financial settlements to avoid the huge costs and uncertainties associated with defending a class action — even in actions advancing claims that are utterly lacking in merit.

Erroneous certification rulings create "inordinate or hydraulic pressure on defendants to settle." *Newton* v. *Merrill Lynch, Pierce, Fenner*

& Smith, Inc., 259 F.3d 154, 164 (3d Cir. 2001); see also *IPO*, 2006 WL 3499937, at *19 n.9. "Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 476 (1978).[11] The district court's "less demanding" approach to civil RICO causation, if upheld, would exacerbate this settlement pressure in at least two ways.

First, the court's "body of public knowledge" rationale would invite litigation focused on an imagined "typical" class member, rather than the actual members of the class. Such litigation is fundamentally unfair. "[P]laintiffs enjoy[] the practical advantage of being able to litigate not on behalf of themselves but on behalf of a 'perfect plaintiff' pieced together for litigation." *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998). Instead of probing weaknesses of actual plaintiffs,

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[11] See also *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016 (7th Cir. 2002) (aggregating millions of claims in a class action lawsuit "makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable — and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims"); *West* v. *Prudential Secs., Inc.*, 282 F.3d 935, 937 (7th Cir. 2002) (class action settlements "reflect [a] high risk of catastrophic loss" and force "defendants to pay substantial sums even when the plaintiffs have weak positions").

defendants would be forced to defend against a "fictional composite," *id.* at 345, or a jury's guess as to what proportion of the class suffered compensable RICO injuries.

Second, authorizing juries to determine the percentage of the class that was defrauded exposes defendants to risks even more severe than those typically posed by class certification. Even where, as here, it is undisputed that not all class members were defrauded, it will be impossible for defendants to predict whether a jury's assessment will be wildly over-inclusive. Indeed, defendants may rightly suspect that the greater the pool of class members, the harder it will be to convince a jury that any portion of that class should be denied recovery. See *Castano*, 84 F.3d at 746 ("Aggregation of claims also makes it more likely that a defendant will be found liable and results in significantly higher damage awards."); Kenneth S. Bordens & Irwin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 JUDICATURE 22, 24-25 (1989) (empirical studies showing that, as the number of plaintiffs in a case increases, juries become more likely to find fault and to impose greater damages).

As a practical matter, the burden will likely fall on defendants to rebut, plaintiff-by-plaintiff, the classwide showing of reliance. This reversal of the ordinary burden makes litigation both more expensive and more risky. Because defendants must consider such risks in deciding whether to proceed to trial, *all class members* — even those lacking valid claims — will exert settlement pressure on the defendants. See *Helvesi* v. *Citigroup Inc.*, 366 F.3d 70, 80 (2d Cir. 2004) ("[N]umerous courts and scholars have warned that settlements in large class actions can be divorced from the parties' underlying legal positions.").

Those are some of the reasons why the requirements of Rule 23 and to demonstrate causation under civil RICO are stringent. The Supreme Court has admonished judges to respect Rule 23's rigor: "Rule 23 . . . must be interpreted with fidelity to the Rules Enabling Act. . . . [T]he rulemakers' prescriptions for class actions may be endangered by 'those who embrace [Rule 23] too enthusiastically just as [by] those who approach [it] with distaste.'" *Amchem*, 521 U.S. at 629. Likewise, the Supreme Court has cautioned judges against allowing plaintiffs to "circumvent" the civil RICO's statute's "requirement of a direct causal connection" between the alleged RICO violation and the plaintiffs' injuries. *Anza*, 126 S. Ct. at 1998.

Those are precisely the errors made by the court below, and its certification order accordingly should be reversed.

CONCLUSION

For the foregoing reasons, and those set forth in Defendants-Appellants' brief, the order granting certification should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that true and complete copies of the foregoing Brief for the Chamber of Commerce of the United States of America as *Amicus Curiae* Supporting Defendants-Appellants and Supporting Reversal of Class Certification Pursuant to Federal Rule of Civil Procedure 23(f) were served via First-Class United States mail, postage prepaid, on the all counsel of record at the following addresses this 22nd day of December, 2006:

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CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies on this 22nd day of December, 2006, that this brief complies with the type-volume limitation of FED. R. APP. P. 29(d) because it contains 6,404 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(b)(iii). Undersigned counsel further certifies that this brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) because this brief has been prepared using Word Perfect X3 for Windows in 14-point typeface, Times New Roman style.

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ANTI-VIRUS CERTIFICATION

Case Name: American Tobacco v. Karen McLaughlin

Docket Number: 06-4666-cv

I, Alan E. Untereiner, hereby certify that the Brief for the Chamber of Commerce of the United States of America as *Amicus Curiae* Supporting Defendants-Appellants and Supporting Reversal of Class Certification Pursuant to Federal Rule of Civil Procedure 23(f) submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using Symantec Antivirus Corporate Edition 2002 (with virus definition version 12/20/2006 rev. 18) and found to be VIRUS FREE.

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