UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA

In re BRIDGESTONE/FIRESTONE, INC. ATX, ATX II AND WILDERNESS TIRES PRODUCTS LIABILITY LITIGATION	Master File No. IP 00-9373-C-B/S MDL No. 1373 (Centralized Before Judge Sarah Evans Barker)
THIS DOCUMENT RELATES TO ALL CLASS ACTIONS	

REPLY BRIEF II

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS: REASONS TO DISMISS PLAINTIFFS' RICO CLAIMS (COUNTS II-VII)

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INTRODUCTION

Plaintiffs' warranty, tort, and consumer protection claims are each barred for their own and overlapping reasons. Plaintiffs' opposition to defendants' Motion to Dismiss, however, spends more pages attempting to recast those claims as "federal racketeering" acts than it spends in defending those claims on their own merits. This effort is unavailing. No matter how hard plaintiffs try to justify their attempt to "RICOize" their claims, the alleged facts simply do not fit their legal theory. "Repeated efforts to repackage [plaintiffs'] allegations cannot transform [a] contract [or] fraud suit into a proper civil RICO suit." *J.D. Marshall Int'l, Inc. v. Redstart, Inc.*, 935 F.2d 815, 821 (7th Cir. 1991). "'Adding more warts to the hog still does not make it a dragon.'" *Id.* (quoting district court).

I. PLAINTIFFS SEEK TO STRETCH RICO BEYOND THE STATUTE'S TEXT AND ITS DRAFTERS' INTENT.

Plaintiffs open their RICO arguments by claiming that defendants have argued that RICO relief is barred in "any non-Mafia case." (Pl. Opp. at 64.) They tell the Court that defendants' argument "harkens back to – and was rejected in – the early 1980s." (*Id.*) In reality, defendants have not attempted to "resurrect" any "defunct 'organized crime nexus.'" (*Id.*) Instead, they have merely reiterated what Judge Posner said about RICO in *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 226 (7th Cir. 1997): "When a statute is broadly worded in order to prevent loopholes from being drilled in it by ingenious lawyers, there is a danger of its being applied to situations absurdly remote from the concerns of the statute's framers." When this danger exists, "[c]ourts find it helpful, in interpreting such statutes . . . to identify the prototype situation to which the statute is addressed." *Id.* at 226-27. (*See* Defs. Br. II at 2-4.)

As Judge Posner noted, the "prototypical RICO case is one in which a person bent on criminal activity seizes control of a previously legitimate firm and uses the firm's resources, contacts, facilities, and appearance of legitimacy to perpetrate more, and less easily discovered, criminal acts than he could" commit on his own "without channeling his criminal activities through the enterprise that he has taken over." *Id.* at 227. This is not a characterization of RICO cases concocted by defendants; it is the Seventh Circuit's own view. What the plaintiffs have alleged in this case in no way approaches the "prototypical RICO case," and this Court should not apply RICO to a "situation[so] absurdly remote from the concerns of the statute's framers." *Id.* at 226.

II. THE SEVENTH CIRCUIT'S MOST RECENT ENTERPRISE CASES REVEAL THE DEFICIENCY OF PLAINTIFFS' ENTERPRISE ALLEGATIONS.

Plaintiffs argue that they "unquestionably pled the existence of RICO 'enterprises'" and that defendants only "quibble with how the Enterprises are described." (Pl. Opp. at 66.) Far from "quibbling," defendants bluntly stated that plaintiffs have not pleaded a RICO enterprise: "Plaintiffs have failed to plead structure, continuity, or any other element of an 'enterprise.'" (Defs. Br. II at 6.)

Plaintiffs could sue Firestone and Ford (indeed, they ***have*** sued them) for alleged warranty breaches and torts. But to sue under RICO, plaintiffs are required to identify and plead an "enterprise." *See* 18 U.S.C. §§ 1962(c), 1961(4). This enterprise cannot be Ford, Firestone, or any other defendant. "[S]ection 1962(c) requires separate entities as the liable person and the enterprise which has its affairs conducted through a pattern of racketeering activity." *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384, 400 (7th Cir. 1984). Plaintiffs have acknowledged this fact: "[S]ubsection (c) . . . requires a relationship [and, thus, a distinction,]

between the [allegedly culpable] 'person' and the 'enterprise.'" (Pl. Opp. at 76 (quoting *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1306 (7th Cir. 1987).) But plaintiffs' response – to list three corporations, describe their routine business transactions, and dub that description an "enterprise" – will not suffice. Nor will their use of dramatic labels like "Domestic Enterprise" and "International Enterprise."

A RICO enterprise is "an ongoing 'structure' of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchial or consensual decision-making." *Jennings v. Emry*, 910 F.2d 1434, 1440 (7th Cir. 1990). RICO enterprises have a developed "command structure." *Id.* at 1440 n.14. Their participants are engaged in the "work of an organization." *Bachman v. Bear, Stearns & Co.*, 178 F.3d 930, 932 (7th Cir. 1999). The enterprise must be "meaningfully different in the RICO context from the units that go to make it up." *Richmond v. Nationwide Cassel, L.P.*, 847 F. Supp. 88, 91 (N.D. Ill. 1994), *aff'd*, 52 F.3d 640 (7th Cir. 1995).

As the Seventh Circuit has recently held on three separate occasions, arms-length business relationships, like the one plaintiffs describe between Ford and Firestone, do not amount to RICO enterprises. In *Fitzgerald*, the Seventh Circuit explained that "RICO . . . is not a conspiracy statute. Its draconian penalties are not triggered just by proving conspiracy. Enterprise connotes more." 116 F.3d at 228. The court held that "where a large, reputable manufacturer deals with its dealers and other agents in the ordinary way, so that their role in the manufacturer's illegal acts is entirely incidental, . . . the manufacturer plus its dealers and other agents (or any subset of the members of the corporate family) do not constitute an enterprise within the meaning of the statute." *Id.* at 227.

Plaintiffs plead no more here. They simply allege that Firestone made and sold tires and that Ford bought those tires, put them on Explorers, and sold Explorers. Plaintiffs also plead that Ford and Firestone each advertised their products to the public, albeit with phrases and slogans that plaintiffs dislike. (*See* Compl. ¶¶ 212, 215; Defs. Br. II at 6.) In short, these two large, reputable manufactures are alleged to have dealt with each other in nothing more than "the ordinary way." Thus, their dealings cannot comprise a RICO enterprise.[1]

Plaintiffs suggest that *Fitzgerald* offers safe harbor only to enterprises comprised exclusively of manufacturers and their agents and that plaintiffs have never alleged that Ford and Firestone were each other's agents. (*See* Pl. Opp. at 74.) But *Fitzgerald* is not so limited. As Judge Posner observed, some four years before *Fitzgerald* was decided, "an automobile dealer or other similar type of dealer, who . . . merely buys goods from manufacturers or other suppliers for resale to the consuming public, is not his supplier's agent." *See Bushendorf v. Freightliner Corp.*, 13 F.3d 1024, 1026 (7th Cir. 1993).[2]

Two years later, *Fitzgerald* was reinforced by the Seventh Circuit in its *Bachman* decision, a case addressing RICO claims brought against Bear Stearns by a departing employee of a medical imaging company. That employee alleged that Bear Sterns, which had been retained to value the stock he owned in the medical imaging company's parent, had done so fraudulently. *See* 178 F.3d at 931. The alleged enterprise consisted of an "alliance" among Mr.

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[1] Plaintiffs are simply wrong that Bridgestone and Firestone (a parent and its subsidiary), taken together, can comprise an enterprise. (*See* Pl. Opp. at 73-74 n.57.) As *Bachman* made clear, "[a] firm and its employees, or a parent and its subsidiaries, are not an enterprise separate from the firm itself." 178 F.3d at 932; *see also Fitzgerald*, 116 F.3d at 226.

[2] Plaintiffs also assert that *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), somehow undercuts *Fitzgerald's* holding that companies doing business "in the ordinary way" cannot be an enterprise. (*See* Pl. Opp. at 70.) But *Sedima* never discussed whether an enterprise had been adequately pled; indeed, the Court never even identified the alleged enterprise. The business relationship that plaintiffs describe in their brief existed between the plaintiff and the defendant, not among the companies that comprised the alleged "enterprise."

Bachman's employer, its parent, two Merrill Lynch-related entities (one or both of which were also investors in the parent), officers and directors of the parent, and Bear Stearns. *See id.* Then-Chief Judge Posner held that "[t]his suit fails at the 'enterprise' stage." *Id.* The Court could not "see how the acts complained of in this case can be thought the work of an organization, however loose-knit." *Id.* at 932. Mr. Bachman had failed to allege an enterprise with structure and co-managed affairs. Mr. Bachman did not allege that the alleged scheme to defraud was the work of a real "organization" with a command structure. Plaintiffs here did not either – nor could they. Their enterprise allegations, like those of Mr. Bachman, must fail.[3]

Last year, in *Stachon v. United Consumers Club, Inc.*, 229 F.3d 673 (7th Cir. 2000), the Seventh Circuit confirmed that *Bachman* meant what it said. The court affirmed the district court's finding that a purchasing club, along with its members, franchisees, manufacturers and wholesalers, did not constitute an enterprise cognizable under RICO. *See* 229 F.3d at 676-77. Following *Bachman*, the Court found that the plaintiffs "offer nothing to show that this group of participants ever functioned as an ongoing RICO organization," and it specifically noted that the plaintiffs "fail[ed] to offer the slightest sign of a 'command structure' separate and distinct from [the Club] (which is not the purported enterprise.)." *See id.* at 676.

Plaintiffs' enterprise allegations fail here for the same reason. Plaintiffs argue that "[h]ere, the Enterprises' structures are provided by the hierarchy of each business" and that the "Enterprises in this case involve specifically-defined ongoing relationships between two

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[3] *Bachman* requires real allegations of an "organization" because, without them, "every conspiracy to commit fraud is a RICO organization and consequently every fraud that requires more than one person to commit is a RICO violation. That is not the law." 178 F.3d at 932. The commentators agree. In *Bachman*, "the Seventh Circuit says it will no longer tolerate th[e] patent fiction" that an enterprise may "consist[ ] of unrelated individuals and corporations engaged in a long term conspiracy to defraud." David B. Smith & Terrance G. Reed, CIVIL RICO ¶ 3.05 n.6 (2000). "The court apparently will limit the concept of an association-in-fact to true 'organization[s], however loose-knit.'" *Id.* (quoting *Bachman*, 178 F.3d at 932).

identified corporate hierarchies – Bridgestone with its subsidiary, Firestone, and Ford." (*See* Pl. Opp. at 73, 74.) Plaintiffs get it wrong. *Stachon* and its predecessors require that the "enterprise" or "organization" have its ***own*** "command structure." 229 F.3d 673. The "hierarchical decision-making" must be that of the enterprise, not that of the corporations that allegedly go to make it up. The "naming of a string of entities does not allege adequately an enterprise." *See Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 646 (7th Cir. 1995).

Nor will a description of the allegedly nefarious activity perpetrated by the defendants suffice. Plaintiffs tell this Court, without explanation, that '[d]efendants' arguments that the Enterprise must exist separate from the pattern of racketeering activity fail as a matter of law." (Pl. Opp. at 71-72.) The Seventh Circuit has instructed otherwise. As the *Stachon* court put it, "[t]his court has repeatedly stated that RICO plaintiffs cannot establish structure by defining the enterprise through what it supposedly does." 229 F.3d at 676. Nearly twenty years before, the rule was the same. "The 'enterprise' is not the 'pattern of racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages." *See United States v. Turkette*, 452 U.S. 576, 583 (1981). Plaintiffs have pled no enterprise. They cannot remedy this failure by merely pleading that defendants engaged in concerted bad acts.

Because plaintiffs' RICO enterprise allegations fail, their RICO claims must be dismissed.

III. PLAINTIFFS' MAIL AND WIRE FRAUD ALLEGATIONS FAIL, AND PLAINTIFFS THEREFORE ALLEGE NO RACKETEERING ACTIVITY AT ALL, MUCH LESS A PATTERN OF SUCH.

As they must, plaintiffs concede that Fed. R. Civ. P. 9(b) "applies to allegations of mail and wire fraud." (Pl. Opp. at 78.) They then essentially argue that a complaint with an "80+ page" count must, by its length alone, meet the rule's requirement that allegations of fraud

be pleaded with particularity. (*Id.* at 77.) But volume does not equal specificity. However long their complaint may be, plaintiffs have still failed to provide some vital ingredients: the specific ***details*** of the fraud, and the precise ***identity*** of the defrauded persons in each pleaded instance of fraud. Their mail and wire fraud allegations therefore fail.

On one thing, plaintiffs and defendants agree. To plead mail or wire fraud, plaintiffs must "'describe the time, place, and content of the mail and wire communications, and [they] must identify the parties to these communications.'" (Pl. Opp. at 78 (quoting *Jepson, Inc. v. Makita Corp.*, 34 F.3d 1321, 1328 (7th Cir. 1994)); *see also* Defs. Br. II at 11 (citing the same case and quoting the same language).) But plaintiffs have failed to identify a single fraudulent communication, and nowhere name even one plaintiff who was a party to it. They do not identify even one plaintiff who saw or heard any of the allegedly fraudulent advertisements or any other allegedly fraudulent communication. They claim, without citation, that "it is neither necessary nor desirable" to do so. (Pl. Opp. at 83.) But *Jepson*, which they cite and quote earlier in their brief, squarely rejects such an argument. 34 F.3d 1321.

Though plaintiffs offer excuses, *Jepson* admits of no exceptions. Plaintiffs seek an exemption because they somehow "lack[ ] access" to the facts necessary to detail their claim. (*See* Pl. Opp. at 80.) They assert that, "[w]ithout discovery as to the internal operation of [d]efendants," they "cannot be expected to provide greater specificity." (*Id.* at 83.) But only plaintiffs know who among them may have seen what they call the "specifically-identified advertisement[s]" that form the "bas[is]" of their "alleged numerous predicate acts of mail fraud." (*See* Pl. Opp. at 82.)[4] And ***none*** of the named plaintiffs alleges in the complaint that he

[4] *See also Midwest Grinding Co. v. Seitz*, 976 F.2d 1016, 1020 (7th Cir. 1992) (rejecting claim that plaintiff lacked information necessary to satisfy Rule 9(b), where plaintiff, "not the defendants, had peculiar access to the invoices on which the undercharging scheme was based").

or she saw the offending ads. Plaintiffs have failed to "identify the parties to the[ ] communications" about which they complain. Their mail and wire fraud allegations therefore fail.

Because no plaintiff claims to have seen the advertisements, it is not surprising that plaintiffs spend a good portion of their opposition papers running from the very ads on which their mail and wire fraud allegations are based. Although their complaint labels the advertisements as "fraudulent" and their brief contends that "these advertisements are listed . . . as a series [of] separate uses of the mails, each of which supports an individual predicate act of mail fraud" (Pl. Opp. at 81), that brief nowhere identifies one false fact that was supposedly conveyed by the defendants' ads. Indeed, plaintiffs do not even attempt to defend their claims of fraudulent content in the sales talk in the ads that defendants addressed in their moving papers. Plaintiffs instead describe the eight separate ads that defendants mentioned as a "small subset," apparently conceding that these ads included mere puffery. (*See* Pl. Opp. at 81.)

But plaintiffs point to only a handful of other ads as including anything else. These ads, which refer to "optimum ride and handling" or tire "technology that keeps performance up as your tire wears down," represent no hard facts. (*See* Pl. Opp. at 82.) This, too, is the language of sales. These ads are not actionable as fraud, whether of the common law or criminal variety. (*See* Defs. Br. II at 11-14.) If they were, every product defect case involving an advertised product would be a fraud case, and every two-defendant product defect case involving an advertised product would be a RICO case.

These ads are not actionable, and that may be the reason why plaintiffs retreat to what they believe is safer ground. They now argue that the ads in their complaint also "provided some of the context in which [d]efendants' omissions and nondisclosures were actionable." (Pl.

Opp. at 81.) But in over 80 pages of complaint (and over ***160*** pages of opposition brief), plaintiffs do not identify a single omitted fact that caused any representation to become materially false.

Plaintiffs tell this Court that they "need not plead why [d]efendants' omissions are actionable." (Pl. Opp. at 84.) But the very cases they cite and quote establish that the opposite is true. As plaintiffs themselves acknowledge, "'all Rule 9(b) require[s] . . . [is] that [plaintiff] set forth the date and content of the statements or omissions that it claims[s] to be fraudulent.'" (Pl. Opp. at 79 (quoting *Midwest Commerce Banking Co. v. Elkhart City Ctr.*, 4 F.3d 521, 523 (7th Cir. 1993).) Yet plaintiffs have not done it.

Although they refer the Court to Paragraph 112 of their complaint for a "detailed list of facts Defendants knowingly concealed," a review of that paragraph reveals a list of argumentative assertions, not "facts." (*See* Pl. Opp. at 81.) Each subparagraph begins with the lawyers' form book phrase "[d]efendants knowingly, intentionally, or recklessly concealed, or negligently failed to disclose . . . ." What follows these phrases can be fairly described only as a series of defect allegations, including such obviously tendentious phrases as "the unreasonably dangerous nature of the Tires and the Explorers" and "Explorer[s] posed a significant rollover threat." These are not facts; they are the opinions and positions of plaintiffs' counsel. Of course, Ford or Firestone did not and do not hold these opinions, and they vigorously oppose these positions, both in this case and many others. Defendants thus cannot be held liable for failure to "disclose" them.

Plaintiffs do not contest that "a failure to disclose 'absent something more' is not actionable" in the first place. *Reynolds v. East Dyer Dev. Co.*, 882 F.2d 1249, 1252 (7th Cir. 1989). They cite *Reynolds* (*see* Pl. Opp. at 85), and confirm that it remains "consistent" with

more recent Seventh Circuit omissions precedent. Plaintiffs therefore must believe that there is "something more" here, but they nowhere tell us what it might be. They identify no duty to disclose, much less plead any facts that could support one. They plead no relationship of confidence or trust. They do not argue, nor could they, that the Safety Act or any other statute imposes such a duty. *See Ayres v. GMC*, 234 F.3d 514, 521-22 (11th Cir. 2000) ("[T]he Safety Act was not meant to create the kind of duty, a breach of which would create . . . civil liability under RICO statutes.").

Plaintiffs quote from *Emery v. American General Finance, Inc.*, 71 F.3d 1343, 1347 (7th Cir. 1995) (*see* Pl. Opp. at 85), but to no avail. In *Emery*, a finance company specifically targeted certain of its current debtors, many of whom "belong[ed] to a class of probably gullible customers for credit," and sent them a personally addressed letter offering to refinance their loans. The letter, however, did not state that the cost of refinancing would be far higher than simply separately borrowing the extra sum. When Ms. Emery, letter in hand, applied in person to refinance her loan, the finance company employee who greeted her also failed to disclose the alternative, and much cheaper, way of structuring her financing request. The *Emery* court found "something more" in the finance company's personal and targeted half-truths. None of these additional elements is present here.[5] Instead, according to plaintiffs, Ford's and Firestone's ads were placed in publications of "enormous readership." (Pl. Opp. at 83.) They were not directed to any plaintiff or anyone in particular. Moreover, those ads, as discussed above, were simple sales materials, and included no "half-truths" or other misrepresentations that

[5] That "something more" is rarely present. *See, e.g., Moore v. Fidelity Fin. Servs., Inc.*, 949 F. Supp. 673, 677 (N.D. Ill. 1997) (no material omission or concealment in RICO case based on insurance sales practices; distinguishing *Emery* on the basis that "the instant complaint contains no allegation that defendants target individuals who do not understand or are incapable of understanding loan documents or security agreements, and that defendants sought to take advantage of such disadvantaged persons").

might require correction. No ad represented that Ford Explorers were immune from serious accidents. No ad represented that Firestone tires would not fail.[6]

Concerned that this Court will rightly determine that the ads which form the basis of plaintiffs' mail and wire fraud allegations are neither misrepresentative nor otherwise actionable, plaintiffs fall back on the argument that even advertisements that are devoid of "false information . . . can support a mail fraud claim." (Pl. Opp. at 84.) Although it is certainly true that the ads contain no false information, and it may be true that "innocent" mailings under certain circumstances can underlie a mail fraud claim, the Supreme Court has made clear that these mailings must be "'incident to an essential part of the scheme.'" *Schmuck v. United States*, 489 U.S. 705, 711 (quoting *Pereira v. United States*, 347 U.S. 1, 8 (1954)) (emphasis added).

In *Schmuck*, on which plaintiffs principally rely, the Court affirmed the mail fraud conviction of a used car distributor who rolled back used car odometers and then sold the cars at

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[6] Nor were defendants' owner's or maintenance manuals materially omissive, as plaintiffs charge. (*See* Pl. Opp. at 86.) Far from "concealing" anything, Ford's owners' guides directly discuss the rollover risks associated with sport utility vehicles. *See, e.g.*, Explorer Owner's Guide, 2001 Model Year, at 3 ("Utility vehicles have a significantly higher rollover rate than other types of vehicles."), 161 ("Utility and four-wheel drive vehicles are not designed for cornering at speeds as high as passenger cars . . . . Avoid sharp turns, excessive speed and abrupt maneuvers in these vehicles. Failure to drive cautiously could result in an increased risk of vehicle rollover, personal injury and death."); Explorer Owner's Guide, 1999 Model Year, at 157 (same); Explorer Owner's Guide, 1997 Model Year, at 133 (same); Explorer Owner Guide, 1993 Model Year (same); Explorer Owner Guide, 1991 Model Year (same). (Excerpts from these owner's guides are attached as Tab 1. Because they are incorporated by reference into plaintiffs' complaint, this Court may consider them at the Rule 12(b)(6) stage. *See. e.g., Dryden v. Sun Life Assurance Co. of Canada*, 737 F. Supp. 1058, 1066 (S.D. Ind. 1989).) Plaintiffs ignore the fact that Ford's disclosure language, in the manuals and in labels prominently displayed on the vehicles, was dictated by ***NHTSA regulations***. *See* 49 C.F.R. § 575.105 (establishing warning language that must be affixed to sport utility vehicles); 64 Fed. Reg. 11724 (1999) (modifying warning language). The fact that Ford's disclosures were set by the very agency charged with maintaining vehicle safety renders plaintiffs' nondisclosure claims absurd.

Firestone's Tire Maintenance, Warranty, and Safety Manuals also openly disclosed that "[a]ny tire, no matter how well constructed, may fail in use" and that "tire failure may create a risk of serious personal injury or property damage." *See* 1991 Tire Manual at 4 (attached to Master Complaint as Ex. C). These manuals cautioned drivers to "[a]lways keep the vehicle manufacturer's recommended air pressure in your tires" and that "[d]riving on tires with too little air pressure is dangerous," "[y]our tires will get overheated," and "this can cause a sudden tire failure that could lead to serious personal injury or death." *See* 1998 Tire Manual (attached to Master Complaint as Ex. C). These are just portions of a few of the various rollover and tire failure warnings included in these guides and manuals.

artificially inflated prices to dealers, who, in turn, unwittingly sold them to customers at artificially inflated retail prices. 489 U.S. at 707. The dealers consummated each transaction by mailing a title application form on behalf of their retail customer. *See id.* The Court found that the mailing of the title registration forms satisfied the "mailing" requirement of the statute because it "was an essential step in the successful passage of title to the retail purchasers." *Id.* at 714. In doing so, it distinguished cases where the scheme's success "in no way depended on the mailings." *See id.* In this case, the success of the "scheme" to conceal alleged defects in Ford Explorers and Firestone tires "in no way depended on" the advertisements. The alleged defect would have remained every bit as concealed with or without the placement of any advertisement.

IV. RICO VIOLATIONS REQUIRE PROOF OF RELIANCE.

Plaintiffs have failed to identify a single named plaintiff who saw or heard any misrepresentation. They urge that this void should not matter, boldly asserting that "the Seventh Circuit has not required reliance by civil RICO plaintiffs when mail or wire fraud are the predicate acts." (Pl. Opp. at 90.) Plaintiffs cite only one Seventh Circuit case for this proposition – *Keplinger v. United States*, 776 F.2d 678 (7th Cir. 1985). (*See* Pl. Opp. at 90.) But *Keplinger* is not a RICO case; it is a criminal mail fraud case. RICO was simply not at issue.

In their moving papers, Ford and Firestone explain that the mail and wire fraud statutes themselves may not require proof of reliance. (*See* Defs. Br. II at 17.) But RICO does. The statute requires a plaintiff to prove that he was "injured in his business or property by reason of" the alleged RICO violation. *See* 18 U.S.C. § 1964(c). Without proof of reliance, this proximate cause requirement cannot be met in a fraud-based RICO claim.

The Seventh Circuit spoke to the existence of the reliance element in *Associates in Adolescent Psychiatry v. Home Life Insurance Co.*, 941 F.2d 561, 570-571 (7th Cir. 1991),

when it confirmed that "[f]raud occurs only when a person of ordinary prudence and comprehension would rely on the misrepresentations." That same year, in *In re EDC, Inc.*, 930 F.2d 1275, 1280 (7th Cir. 1991), the Seventh Circuit put a finer point on it. It held that RICO plaintiffs "can complain only of misrepresentations which were made to them and on which they reasonably relied." *Id.* The import of these pronouncements is unmistakable: a RICO violation requires proof of reliance. (*See* Def. Br. II at 18 n.6.)[7]

The district courts have taken the Seventh Circuit at its word – even the district court opinions that plaintiffs cite. For example, plaintiffs claim that *Cannon v. Nationwide Acceptance Corp.*, No. 96 C 1136, 1997 WL 779086, at *7 (N.D. Ill. 1997), somehow supports their "reliance is not an element" argument. (S*ee* Pl. Opp. at 90.) On the very page that plaintiffs highlight, however, the *Cannon* decision reiterates that "civil RICO claims that involve mail fraud as a predicate offense incorporate reliance as an element." *Cannon*, 1997 WL 779086, at *7.

Plaintiffs did ***not*** cite *State Farm Mutual Automobile Insurance Co. v. Abrams*, No. 96 C 6365, 2000 WL 574466, at *17 (N.D. Ill. May 11, 2000). That court explained that "[t]he Seventh Circuit has interpreted [RICO's] 'by reason of' language to require a causal connection between the prohibited conduct and the plaintiff's injury. . . . In order to establish the required causal connection in the context of an alleged RICO violation based on an act of mail fraud, [the plaintiff] must demonstrate that it relied on the alleged misrepresentations."

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[7] *See also* Smith & Reed, *supra* at ¶ 9.05[b] & n.51 (including the Seventh Circuit among the "[i]ncreasing number of courts" that "have begun to require civil RICO plaintiffs to allege and prove reliance in cases using the mail and wire fraud statute"). Plaintiffs' citations to scattered trial court decisions and their comments on materiality in securities cases, or reliance as an element of mail or wire fraud themselves, or reliance in the context of class certification predominance determinations (*see* Pl. Opp. at 90), cannot alter the Seventh Circuit's clear directive. Reliance must be pled and proved.

Plaintiffs do not plead reliance, and their § 1962(c) RICO claims therefore fail.

V. PLAINTIFFS' § 1962(a) ALLEGATIONS ARE INVALID BECAUSE THEY DO NOT INDICATE ANY INVESTMENT INJURY AND BECAUSE THERE IS NO AIDER AND ABETTOR LIABILITY UNDER § 1962(a).

Defendants explained in their Motion to Dismiss that plaintiffs' § 1962(a) claims are fatally deficient on multiple grounds: plaintiffs cannot make out the underlying predicate acts required for any RICO claim, they do not allege any injury proximately caused by the use or investment of racketeering income as required by § 1962(a), and they improperly allege aider and abettor liability under § 1962(a). (*See* Mot. to Dismiss, Brief II, Part III.) ***None*** of plaintiffs' rejoinders shake these arguments. Plaintiffs' § 1962(a) claims must therefore be dismissed.

First, as a host of courts have recognized, RICO's plain language and structure compel the conclusion that plaintiffs must show an injury as a result of the use or investment of racketeering income under § 1962(a), not merely the reinvestment of that income:

> The plain language of the statute provides the principal support for [the majority] position [requiring investment injury]. Section 1964(c) provides that a civil RICO plaintiff may recover only if injured "by reason of" a § 1962 violation. As noted above, a § 1962(a) violation occurs when the defendant uses or invests the proceeds of its racketeering activity in an enterprise; a defendant does not violate § 1962(a) merely by engaging in the predicate acts of racketeering. Therefore, under a natural reading of the statute, a RICO plaintiff must, in order to recover under § 1962(a), allege an injury caused by the defendant's use or investment of racketeering income in an enterprise.

Early v. K-Tel, Inc., No. 97 C 2318, 1999 WL 181994, at *5-6 (N.D. Ill. March 24, 1999). A majority of the courts that have considered the question have concluded that "[t]o establish a § 1962(a) violation, . . . there must be a nexus between the claimed violation and the plaintiff's injury. In other words, for a viable § 1962(a) claim, any injury must flow from the use or investment of racketeering income." *St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 441

(5th Cir. 2000) (citations omitted). Plaintiffs rely on the outlier case of *Busby v. Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990). But that opinion is decidedly the minority view; "virtually all the other circuits [that] have reviewed this issue" have lined up in favor of the investment injury requirement. *St. Paul Mercury*, 224 F.3d at 443 (joining six other circuits in requiring investment injury under § 1962(a)); *see also Beck v. Prupis*, 120 S. Ct. 1608, 1616 n.9 (2000) (acknowledging that "arguably a plaintiff suing for a violation of § 1962(d) based on an agreement to violate § 1962(a) is required to allege injury from the 'use or invest[ment]' of illicit proceeds."). [8]

Despite their assertions to the contrary, plaintiffs have failed to plead investment injury. (*See* Pl. Opp. at 94.) Plaintiffs allege only that the alleged racketeering conduct that is the core of their complaint "was made possible by the ***continued operation and expansion*** of the [variously pleaded alleged enterprises] ***through reinvestment and use of racketeering proceeds*** by each Defendant." (Compl. ¶ 267 (cited in Pl. Opp. at 92-93) (emphasis added).) This "reinvestment" allegation is not sufficient to meet § 1962(a)'s pleading requirements.[9]

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[8] As plaintiffs are forced to concede, the Seventh Circuit has expressly left open the question whether investment injury is required under § 1962(a), *see Vicom, Inc. v. Harbridge Merchant Services, Inc.*, 20 F.3d 771, 779 n.6 (7th Cir. 1994), and there is every reason to conclude it will side with the vast majority of its sister circuits. *See Seibel v. A.O. Smith Corp.*, No. 97-C-0874-S, 1998 WL 656569, at *6 (W.D. Wis. July 1, 1998) (agreeing with both parties that "the majority view will be the view of this circuit").

Similarly, Judge Tinder's decision in *Clark v. Integrity Finance Group, Inc.*, No. TH00-0028-C-T/H, 2000 WL 988516 (S.D. Ind. July 17, 2000), cited by plaintiffs as authority for their minority reading of § 1962(a) (*see* Pl. Opp. at 95), acknowledged that "a § 1962(a) claim may require the use or investment of racketeering income to proximately cause a plaintiff's injury that is in addition to any injury caused by the predicate racketeering acts." *Id.* at *5 n.18 (citing *Vicom*, 20 F.3d at 779 n.6). Judge Tinder did not have to resolve this question because plaintiffs failed to plead the underlying predicate acts with sufficient particularity. *Id.* at *8.

[9] *See, e.g.*, *Early*, 1999 WL 181994, at *6 ("[T]o establish that his or her injuries were caused by the use or investment of racketeering income in an enterprise, a RICO plaintiff must allege more than that the defendants reinvested the racketeering income."); *Kaczmarek v. Int'l Bus. Machs. Corp.*, 30 F. Supp. 2d 626, 628 (S.D.N.Y. 1998) ("Mere reinvestment of racketeering income into the same racketeering enterprise that generated the income does not satisfy the Second Circuit's holding in *Ouaknine* [*v. MacFarlane*, 897 F.2d 75 (2d Cir. 1990)].").

Plaintiffs' boilerplate appeal to the "remedial purposes" of RICO cannot overcome the investment injury obstacle. (*See* Pl. Opp. at 94.) A vague appeal to broad remedial purposes cannot overcome the majority view of the courts and the specific language of § 1962(a). "[A] specific subsection – in this instance § 1962(a) – may not provide a universal remedy to serve the purposes, or to fit the mandate, of § 1964." *Rose v. Mony Life Ins. Co.*, 82 F. Supp. 2d 920, 923 (N.D. Ill. 2000). Moreover, the investment injury requirement comports with a sound reading of RICO. Because corporations generally reinvest their profits, without an investment injury requirement "almost every pattern of racketeering activity by a corporation would be actionable under § 1962(a), and the distinction between § 1962(a) and § 1962(c) would become meaningless." *R.R. Brittingham v. Mobil Corp.*, 943 F.2d 297, 305 (3d Cir. 1991); *see also Early*, 1999 WL 181994, at *6; *Pearle Vision, Inc. v. Eye Exam Illinois-Lansing Facility, Ltd.*, No. 93 C 1975, 1994 WL 374272, at *2 (N.D. Ill. July 12, 1994).

Second, plaintiffs' effort to smuggle a claim of aiding and abetting liability into their § 1962(a) counts is equally unavailing. As defendants established in their motion to dismiss (*see* Defs. Br. II, Part III), a growing chorus of courts has concluded that "there is no private right of action for aiding and abetting a RICO violation." *Goldfine v. Sichenzia*, 118 F. Supp. 2d 392, 406 (S.D.N.Y. 2000).

Plaintiffs argue that this Court should ignore the Supreme Court's decision in *Central Bank of Denver, N.A. v. First Interstate Bank*, 511 U.S. 164 (1994), because it dealt with

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The two isolated cases cited by plaintiffs in support of the adequacy of their investment injury allegations hardly prove this point. (*See* Pl. at 94 n.77.) In *General Motors Corp. v. Johnson Mathey Inc.*, 855 F. Supp. 1005 (E.D. Wis. 1994), the court specifically noted that plaintiffs alleged an injury ***directly*** resulting from the use of materials fraudulently obtained from plaintiffs. *See id.* at 1008. And contrary to plaintiffs' representations, the court in *Dunham v. Independent Bank of Chicago*, 629 F. Supp. 983 (N.D. Ill. 1986), a pre-*Vicom* case, did ***not*** assume an investment injury requirement.

securities law. (*See* Pl. Opp. at 97-99.) But the Third Circuit recognized in *Rolo v. City Investing Co. Liquidating Trust*, 155 F.3d 644 (3d Cir. 1998), that the analysis in *Central Bank* closely tracks and clearly applies to RICO. As the *Central Bank* Court pointed out, "Congress knew how to impose aiding and abetting liability when it chose to do so." 511 U.S. at 176. Thus, when a statute provides a civil remedy for a statutory violation, "there is no general presumption that the plaintiff may also sue aiders and abettors." *Id.* at 182. The fact that a statute providing for civil remedies, such as RICO or the Securities Act, also provides for criminal penalties, does not import principles of federal criminal law, such as the applicability of 18 U.S.C. § 2 to federal criminal offenses, into the civil realm. *Central Bank* rejected precisely that argument:

> Congress has not enacted a general civil aiding and abetting statute. . . . [W]hile it is true that an aider and abettor of a criminal violation of any provision of the [Securities] Act, . . . violates 18 U.S.C. § 2, it does not follow that a private civil aiding and abetting cause of action must also exist. We have been quite reluctant to infer a private right of action from a criminal prohibition alone. . . .

511 U.S. at 182, 190. As *Rolo* and a host of other opinions recognize, "the same analysis controls [the] construction of the civil RICO provision." *Rolo*, 155 F.3d at 657.[10]

The text of RICO's civil remedy provision contains no language indicating an express grant of a private right of action for aiding and abetting. Moreover, where Congress ***did*** choose to import 18 U.S.C. § 2 into RICO, it did so for highly limited purposes. Thus, by the very terms of the statutory language, 18 U.S.C. § 2 only applies to § 1962(a) to establish ***criminal*** liability for the "collection of an unlawful debt in which such person has participated as

[10] *See also Pennsylvania Ass'n of Edwards Heirs v. Rightenour*, 235 F.3d 839 (3d Cir. 2000) (reaffirming *Rolo*'s rejection of aiding and abetting liability under civil RICO); *In re Mastercard Int'l Inc.*, Nos. CIV. A. MDL1321, CIV.A. MDL1322, 2001 WL 197834 (E.D. La. Feb. 23, 2001); *Jubelirer v. Master Card Int'l, Inc.*, 68 F. Supp. 2d 1049 (W.D. Wis. 1999); *Touhy v. Northern Trust Bank*, No. 98 C 6302, 1999 WL 342700 (N.D. Ill. May 17, 1999).

a principal within the meaning of [18 U.S.C. § 2]." 18 U.S.C. § 1962(a); *cf. Goldfine*, 118 F. Supp. 2d at 406. In sum, there is simply no basis for civil aiding and abetting liability in RICO in light of the Supreme Court's analysis in *Central Bank* and of the statutory text itself. Plaintiffs' effort to shoehorn such a claim into their § 1962(a) count should be squarely rejected.

Plaintiffs' effort to suggest that the Seventh Circuit will reject the growing consensus in favor of the post-*Central Bank* view of aiding and abetting liability under civil RICO (*see* Pl. Opp. at 97) badly distorts the import of the two cases upon which plaintiffs rely. *In re Vicars Insurance Agency*, 96 F.3d 949 (7th Cir. 1996), a pre-*Rolo* case, simply acknowledged that there was adequate existing district court authority to permit a bankruptcy court to maintain jurisdiction of a case involving RICO issues, while noting that the Seventh Circuit "has not commented on the possibility of aiding and abetting liability in civil RICO actions." *Id.* at 954; *see also id.* at 954-55. And in *American Auto Accessories, Inc v. Fishman*, 175 F.3d 534 (7th Cir. 1999), the court expressly stated that it had "not yet determined whether aiding and abetting liability applies in civil RICO actions." *Id.* at 543. Contrary to plaintiffs' characterization, the court did not embrace the pre-*Rolo* case of *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258 (3d Cir. 1995), but cited it merely to demonstrate that it did not need to decide the issue, because "[a]ppellants' claim fails even under an aider and abettor theory." *Id.* The issue of aider and abettor liability is thus entirely open in this Circuit, and the Court is free to adopt the reasoning of other district courts of the Seventh Circuit that have addressed the issue. *See, e.g.*, *Jubelirer*, 68 F. Supp. 2d 1049; *Touhy*, 1999 WL 342700; *Soranno v. New York Life Ins. Co.*, No. 96 C 7882, 1999 WL 104403 (N.D. Ill. Feb. 24, 1999); *In re Lake States Commodities, Inc.*, 936 F. Supp. 1461 (N.D. Ill. 1996).

Nor can plaintiffs evade the plain meaning of RICO's civil liability provision by attempting to bootstrap aiding and abetting liability into civil RICO through the predicate acts listed in § 1961(1). As several courts have recognized, that reading is inconsistent with the *Central Bank* Court's careful, case-by-case approach to civil aiding and abetting liability. That approach is reluctant to import criminal law principles into the civil realm and thus refuses to expand the scope of civil liability to include aiding and abetting absent a clear Congressional statement. It would be a logically perverse end-run around the reasoning in this and other cases to simply locate civil aider and abettor liability at one remove from § 1962(a), in § 1961(1), when Congress's silence, and the narrow terms of § 2 liability expressly provided in § 1962(a), make clear that Congress did not approve any importation of civil aider and abettor liability. For this reason, courts have rejected plaintiffs' effort to find civil aider and abettor liability under § 1961(1). *See, e.g., Loc. 875 I.B.T. Pension Fund v. Pollack*, 992 F. Supp. 545, 568 (E.D.N.Y. 1998) ("Our Circuit has specifically held that *Reves* demands a demonstration that a defendant is more than an aider or abettor of the enterprise's illegal actions before he is subjected to RICO liability."); *Ross v. Patrusky, Mintz & Semel*, No. 90 Civ. 1356(SWK), 1997 WL 214957, at *11 (S.D.N.Y. April 29, 1997) (rejecting argument that "those who knowingly aid and abet the commission of at least two predicate acts are liable as principals under 18 U.S.C. § 2, and thus have secondary liability under Section 1962(c)").[11]

[11] The two cases cited by plaintiffs on this score fail to fully acknowledge the import of *Central Bank* and are thus unpersuasive authorities. By relying on criminal law principles to find that § 1961(1) implicitly embraces § 2 even under civil RICO, *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, No. 93 CIV 6876 LMM, 2000 WL 1694322 (S.D.N.Y. Nov. 13, 2000), ignores the Supreme Court's clear emphasis on the distinction between civil and criminal liability under statutes providing for both. Unlike the criminal presumption that any charge necessarily includes aiding and abetting liability, statutes creating civil liability give rise to "***no general presumption that the plaintiff may also sue aiders and abettors***." *Central Bank*, 511 U.S. at 182 (emphasis added). And the policy arguments raised by the district court in *In re American Honda Motor Co. Dealerships Relations Litigation*, 958 F. Supp. 1045 (D. Md. 1997), have been considered and rejected by the courts. *See, e.g., Rolo*, 155 F.3d at 657 (despite policy arguments for civil RICO aiding and abetting liability, "under *Central Bank of Denver*, we must

This Court should therefore reject plaintiffs' efforts to smuggle aider and abettor liability into the ***civil*** provisions of RICO. Even if such liability were available, however, plaintiffs' failure to allege a violation of § 1962(a) requires dismissal of Counts II and III.

VI. PLAINTIFFS' CONCLUSORY ALLEGATIONS FALL WELL SHORT OF THE PLEADING REQUIREMENTS FOR A CLAIM OF RICO CONSPIRACY.

The courts of this Circuit have repeatedly reaffirmed that a viable RICO conspiracy claim requires more than simply alleging conspiracy in vague or conclusory terms or rehashing non-conspiracy RICO allegations. *See, e.g., Goren v. New Vision Int'l, Inc.*, 156 F.3d 721, 733 (7th Cir. 1998) ("a complaint may be dismissed if it contains only conclusory, vague and general allegations of a conspiracy."); *Buck Creek Coal, Inc. v. United Workers of America*, 917 F. Supp. 601, 614 (S.D. Ind. 1995) ("It is not enough [for a RICO conspiracy charge] to allege participation in the predicate acts"). Instead, a plaintiff must allege "a ***specific agreement*** by . . . defendants to participate in the affairs of an enterprise [and] an ***agreement to the commission of two specific predicate acts***." *Goren*, 156 F.3d at 732-33 (emphasis added); *see also Lachmund v. ADM Investor Servs., Inc.*, 191 F.3d 777, 785 (7th Cir. 1999). Plaintiffs must plead such a conspiracy with ***particularity***, providing details about matters such as "what roles the various defendants played in the conspiracy," "when the agreement to conspire was entered into," and other pertinent specifics of the agreement to conspire. If they do not, the conspiracy claim must be dismissed. *See Soranno v. New York Life Ins. Co.*, No. 96 C 7882, 2000 WL 748142, at *10 (N.D. Ill. May 31, 2000): *see also Singleton v. Montgomery Ward Credit Corp.*, No. 99 C 6894, 2000 WL 796163, at *3 (N.D. Ill. June 19, 2000).

'interpret and apply the law as Congress has written it, and not [ ] imply private causes of action merely to effectuate the purported purposes of the statute.'" (quoting *In re Lake States Commodities, Inc.*, 936 F. Supp. at 1475).

Despite rehabilitation efforts, plaintiffs' conspiracy allegations remain vague and conclusory. The sum total of their conspiracy allegations is the wholly conclusory remark that "Ford conspired with Bridgestone and Firestone to advertise, promote, market, lease and/or sell Explorers and Tires and to conceal the . . . nature of Explorers and Tires from the public . . . ." (Compl. ¶¶ 291, 295.) Although plaintiffs now point to other parts of their complaint, those paragraphs only underscore the deficiency: those paragraphs are also "utterly devoid of allegations indicating either a ***specific agreement*** by these defendants to participate in the affairs of the enterprise or an ***agreement*** to the commission of two ***specific predicate acts***." *Goren*, 156 F.3d at 732-33. "It is not enough to allege participation in the predicate acts" – even if, as in this complaint, the allegations are repeated *ad nauseam*. *Buck Creek Coal*, 917 F. Supp. at 614.[12] Having failed to allege the specific agreements required for a RICO conspiracy claim, plaintiffs' § 1964(d) counts must be dismissed.

VII. PLAINTIFFS SEEK NO INJUNCTIVE RELIEF UNDER RICO, AND THE STATUTE COULD NOT AFFORD IT IF THEY DID.

Plaintiffs nowhere dispute that the only circuit court to squarely address whether RICO provides for injunctive relief held that it did not. *See Religious Tech. Ctr. v. Wollersheim*, 796 F.2d 1076, 1088-89 (9th Cir. 1986). (*See also* Defs. Br. II at 24.) "Congress did not intend to give private RICO plaintiffs any right to injunctive relief." 796 F.2d at 1088. Nevertheless, plaintiffs assert that "equitable relief is available to private plaintiffs under RICO and may be

[12] In their attempt to preserve their conspiracy claims, plaintiffs cite various Seventh Circuit cases for the proposition that these claims may go forward because the Court may simply draw an inference that defendants conspired. (*See* Pl. Opp. at 100.) Plaintiffs' citation to these cases is specious, for they all share two common traits: all of them deal with the sufficiency of ***actual evidence*** produced for summary judgment or at trial, and none deal with plaintiffs' pleading requirements at the Rule 12(b)(6) stage. *See Gagan v. Am Cablevision, Inc.*, 77 F.3d 951, 961 (7th Cir. 1996) (finding sufficient evidence ***at trial*** to support RICO conspiracy conviction); *United States v. Ashman*, 979 F.2d 469, 485 (7th Cir. 1992) (same); *United States v. Melton*, 689 F.2d 679, 683 (7th Cir. 1982) (same); *State Farm Mut. Auto Ins. Co. v. Abrams*, No. 96 C 6365, 2000 WL 574466 (N.D. Ill. May 11, 2000) (summary judgment motion).

sought by plaintiffs here." (Pl. Opp. at 101-02.) On the same page of their brief, plaintiffs concede that their "requests for . . . injunctive relief do not depend on their RICO claims." (*Id.*) This concession obviates the need to address the issue further. However, should this Court choose to do so, caution on several points is warranted:

- ***First***, although plaintiffs cite selected district court opinions that may conclude that RICO does permit injunctive relief (*see* Pl. Opp. at 102-03), the district court opinions that carefully review the relevant legislative history follow or agree with *Wollersheim.*[13]

- ***Second***, RICO's liberal construction clause cannot authorize a form of relief that the statute itself nowhere confers. (*See* Pl. Opp. at 103-04.) As the Supreme Court noted in *Reves v. Ernst & Young*, 507 U.S. 170, 183 (1993), the liberal construction clause "is not an invitation to apply RICO to new purposes that Congress never intended."

- ***Third***, a court's "inherent powers" do not extend to the redrafting of federal legislation. (*See* Pl. Opp. at 103 n.85.) Courts may have inherent equitable power to provide relief that was "traditionally accorded by courts of equity," but not to "create remedies previously unknown to equity jurisprudence." *See Grupo Mexicano de Desarrolo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319, 332 (1999). Because the type of injunctive relief sought here – a product recall and notification campaign – is not a traditional use of a court's equitable powers, this Court's inherent powers cannot be invoked to award such relief and rewrite RICO in the process.

- ***Fourth***, the Safety Act's "savings clause" in no way limits the Safety Act's displacement or preemption of a RICO-based recall here. "When the remedial devices provided in a particular Act are sufficiently comprehensive, they may suffice to demonstrate congressional intent to preclude the remedy of suits under" other federal statutes. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 20 (1981) In *Sea Clammers,* the Court explicitly addressed the "savings clauses" in several environmental statutes and concluded that those clauses could not work to limit the effect of the overall remedial schemes provided expressly in the Acts: "In sum, we think it clear that those express remedies preclude suits for damages under § 1983, and that ***the saving clauses do not require a contrary conclusion***." 453 U.S. at 21 n.31 (emphasis added). *Cf. In re Lifschultz Fast Freight Corp.*, 63 F.3d 621, 629 (7th Cir. 1995) ("[W]hen we are forced to choose between specific statutory provisions and a general savings clause, we

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[13] *See, e.g., Curley v. Cumberland Farms Dairy, Inc.*, 728 F. Supp. 1123, 1137-1138 (D.N.J. 1989); *Town of W. Hartford v. Operation Rescue*, 726 F. Supp. 371, 376-378 (D.Conn. 1989), *vacated on other grounds*, 915 F.2d 92 (2d Cir. 1990); *Vietnam Veterans of Am., Inc. v. Guerdon Indus., Inc.*, 644 F. Supp. 951, 960-961 (D. Del. 1986); *Miller v. Affiliated Fin. Corp.*, 600 F. Supp. 987, 994 (N.D. Ill. 1984); *DeMent v. Abbott Capital Corp.*, 589 F. Supp. 1378, 1382-1383 (N.D. Ill. 1984); *Kaushal v. State Bank of India*, 556 F. Supp. 576, 581-585 (N.D. Ill. 1983).

> err on the side of the specific provisions in the belief that they reflect congressional intent more clearly.").

This Court should not entertain a request that plaintiffs have not made. RICO-based injunctive relief is not statutorily authorized and cannot be awarded.

CONCLUSION

For these reasons, defendants respectfully request that this Court dismiss all of plaintiffs' RICO claims (Counts II, III, IV, V, VI, and VII).

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