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No. 00-549

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IN THE

Supreme Court of the United States

CEDRIC KUSHNER PROMOTIONS, LTD.,

Petitioner,

v.

DON KING, DON KING PRODUCTIONS, INC.,
DKP CORPORATION and JOHN DOES 1-10,

Respondents.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Second Circuit — in direct conflict with: (a) the plain language of the RICO statute; (b) this Court's holdings in *United States v. Turkette*, 452 U.S. 576 (1981); *Reves v. Ernst & Young*, 507 U.S. 170 (1993); and *National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249 (1994); and (c) all of the other Courts of Appeals that have considered the same issue — properly affirmed the holding of the District Court, which found deficient as a matter of law a claim under 18 U.S.C. § 1962(c) against a corporate president designated as the RICO "person" for engaging in predicate acts by and through a corporation designated as the RICO "enterprise?"

Whether it is appropriate to continue a rule, which now applies in the Court of Appeals for the Second Circuit, in which persons, including organized crime members, can insulate themselves from RICO liability simply by forming a corporation and engaging in predicate acts through that corporation?

Whether there is a pleading requirement for a claim under 18 U.S.C. § 1962(c) to specially allege distinctness between the RICO "person" and the RICO "enterprise" in addition to identifying a natural person as the RICO defendant and the corporate employer as the separate "enterprise?"

STATEMENT PURSUANT TO RULE 29.6

Petitioner is a non-governmental entity that is a closely-held corporation and does not have any parent or publicly-held company owning 10% or more of the corporation's stock.

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Douglas E. Edlin, *Parent and Subsidiary Corporations: The Jaguar Cars Decision And the RICO Distinctiveness Requirement*, 172 – Nov. N.J. Law 42 (1995) 8-9

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit, decided July 11, 2000, affirming the District Court's judgment of dismissal is reported at 219 F.3d 115 (2d Cir. 2000), and appears in the Joint Appendix at JA 10. The opinion of the District Court for the Southern District of New York, dismissing the complaint on a motion pursuant to Fed. R. Civ. P. 12(b)(6) is reported at 1999 WL 771366, and appears in the Joint Appendix at JA 17.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on July 11, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 10(a) of the Supreme Court of the United States. A petition for a writ of certiorari was timely filed on October 6, 2000, and was granted on December 11, 2000.

STATUTORY PROVISIONS AND RULE INVOLVED

18 U.S.C. § 1961(3) defines "person" to include "any individual or entity capable of holding a legal or beneficial interest in property."

18 U.S.C. § 1961(4) defines "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

18 U.S.C. § 1962(c) provides that

> [I]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Fed. R. Civ. P. 12(b)(6) provides that

> [E]very defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion . . . (6) failure to state a claim upon which relief can be granted. . . . A motion making any of these defenses shall be made before pleading if a further pleading is permitted. . . .

STATEMENT OF THE CASE

This civil case brings up for review whether a natural person can be held liable under Section 1962(c) of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), Pub. L. 91-452, Title IX, 84 Stat. 941, as amended, 18 U.S.C. §§ 1961-1968, for conducting the affairs of a closely held corporation engaged in interstate commerce through a pattern of racketeering activity, where that natural person purports to act within the scope of his employment

as an officer of that corporation. On a motion pursuant to Fed. R. Civ. P. 12(b)(6), the United States District Court, Southern District of New York, dismissed the complaint of petitioner Cedric Kushner Promotions, Ltd. ("Kushner"). The Court of Appeals, Second Circuit, in a *per curium* opinion, affirmed. Both courts determined that the judicially implied requirement of "distinctness" between the RICO "person" and the "enterprise" under 18 U.S.C. § 1962(c) could not be satisfied, as a matter of law, when the alleged RICO "person" is purportedly acting within the scope of his duties as an employee of the "enterprise."

The judgment dismissing Kushner's complaint should be reversed and the matter remanded because the Second Circuit's rationale is contrary to the plain meaning of the statute. Section 1962(c) prohibits, *inter alia*, an employee from conducting the affairs of an enterprise — statutorily defined to include corporations — through a pattern of racketeering activity. This is precisely what Kushner alleged in its complaint. Nothing more is required to satisfy the specific requirements of Section 1962(c).

Petitioner, Kushner, is a New York corporation in the business of promoting professional boxing bouts. Kushner is licensed to promote boxing matches in New York and other states. (Compl. ¶ 10, JA 34). Kushner enters into agreements with boxers to be their exclusive promoter. In that capacity, and otherwise, Kushner arranges bouts for boxers under contract, and often advances funds to the boxers in anticipation of fees generated by the bouts. (Compl. ¶ 15, JA 35).

By its complaint, as clarified by stipulation, in open court, in connection with the underlying motion to dismiss, Kushner alleged that: (i) individual respondent Don King violated Section 1962(c); and (ii) all respondents, including Don King and the

two corporate entities Don King Productions Inc. and, its successor, DKP Corporation (collectively "DKP"), are liable for common law fraud and tortious interference with contract. In support of Kushner's Section 1962(c) claim, the complaint identifies Mr. King as the liable RICO "person." (Compl. ¶ 75, JA 55). The complaint further identifies DKP as the RICO "enterprise." (Compl. ¶¶ 4, 74, JA 31, 55). Kushner does not seek to impose RICO liability upon DKP.

Mr. King is a natural person residing in Florida. (Compl. ¶ 13, JA 34). He is alleged to be an employee of DKP who conducts and participates in the conduct of the affairs of DKP through a pattern of racketeering activity.[1] (Compl. ¶ 75, JA 55).

DKP is a closely held corporation in the business of fight promotion. Like Kushner, DKP also enters into promotional agreements with boxers, arranges bouts for those boxers, and promotes prize fighting events in different major venues across the United States. (Compl. ¶¶ 11-12, JA 34). The activities of DKP affect interstate commerce. (Compl. ¶ 74, JA 55).

The complaint alleges that a person, Mr. King, acting through an enterprise, DKP, committed a variety of predicate acts and engaged in a pattern of racketeering including bribery, extortion, mail and wire fraud, and embezzlement, affecting Kushner, boxers under contract with Kushner, and others. (Compl. ¶¶ 77-84, JA 56-60).

1. Respondents, in their brief to the Court of Appeals for the Second Circuit, acknowledged that Don King "is in fact [Don King Productions'] president and sole shareholder."

The complaint alleges a pattern of racketeering activity by Mr. King, which he conducted through the vehicle of DKP and that damaged Kushner. (Compl. ¶¶ 1-7, JA 29-33). For example, the complaint alleges that Mr. King bribed Hasim Rahman, a young boxer who had signed an exclusive fight promotion agreement with Kushner, with a payment by DKP of $125,000 not to go forward with an arranged bout with a fighter named David Tua. Mr. King allegedly delivered that payment to Mr. Rahman at a meeting in Las Vegas and allegedly threatened Mr. Rahman at that meeting. (Compl. ¶¶ 15-28, JA 35-39). The complaint also alleges wire fraud by Mr. King in connection with a contract between Kushner and DKP pertaining to a bout arranged between Louis DelValle, a former light heavyweight champion under an exclusive promotional contract with Kushner, and Darrio Mattione, a boxer under contract with DKP. (Compl. ¶¶ 34-39, JA 40-42).

The complaint identifies repeated instances where Mr. King conducted the affairs of DKP through a continuing pattern of racketeering activity. Such allegations are organized in the complaint by fighter and type of fraud or other illegal act: Hasim Rahman — mail and wire fraud, bribery, and extortion (Compl. ¶¶ 15-33, JA 35-40); Louis DelValle — wire fraud (Compl. ¶¶ 34-39, JA 40-42); Mike Tyson — theft and embezzlement (Compl. ¶¶ 40-43, JA 42-45); Julio Cesar Chavez — mail and wire fraud in connection with insurance fraud (Compl. ¶¶ 44-61, JA 46-51); and Mike Tyson — mail and wire fraud in connection with insurance fraud (Compl. ¶¶ 62-72, JA 51-55).

Many of these allegations also identify other employees and representatives of DKP who acted at the direction of

Mr. King. (Compl. ¶¶ 3, 23, 41, 42, 53, 65, 67-69, JA 30, 37, 42-45, 48, 52-54). Prominent among these are allegations of wire and insurance fraud whereby Mr. King caused DKP's controller, Joseph Maffia, fraudulently to alter documents and to telecopy such falsified documents to DKP's insurance agents, insurance underwriters, and others. (Compl. ¶¶ 64–69, JA 51-54).

Respondents, without answering the complaint, moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) on several grounds. The District Court (Hon. William H. Pauley III, U.S.D.J.) reached only the issue of whether Mr. King, as the RICO "person" was distinct from DKP, as the RICO "enterprise," as distinctness had been articulated by the Second Circuit Court of Appeals. (JA 17-27). The District Court concluded that the allegations did not satisfy the distinctness requirement and dismissed the complaint with prejudice. Following the Second Circuit's "agency theory," the District Court held that the distinctness requirement cannot be satisfied, as a matter of law, when the defendant employee acts within the scope of his duties. (JA 24).

On appeal, the United States Court of Appeals for the Second Circuit affirmed. (JA 10-14). Although it acknowledged that Mr. King is the sole RICO defendant and that DKP, a separate corporate entity, is the RICO enterprise, the Court of Appeals nevertheless continued to apply its novel agency rule, and concluded that Kushner did not separately allege that the individual, Mr. King, was distinct from the corporate enterprise, DKP. Therefore, it found that the distinctness requirement was not satisfied. The Second Circuit premised its rationale upon its conclusion that Mr. King, as an employee, was inexorably "acting within the scope of his authority at DKP." (JA 13). Legally, the

Second Circuit relied on its prior holdings in *Riverwoods Chappaqua Corp. v. Marine Midland Bank, NA*, 30 F.3d 339 (2d Cir. 1994) and *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055 (2d Cir. 1996), *vacated on other grounds*, 525 U.S. 128 (1998), and concluded that those "cases leave no room for creating exceptions to the distinctness requirement based on the identity of the defendant." (JA 14).

Regardless of the propriety of the holdings in *Riverwoods* and *Discon*, the Second Circuit's determination in this case is directly contrary to the plain language of Section 1962(c), inconsistent with prior decisions of this Court in *United States v. Turkette*, 452 U.S. 576 (1981); *Reves v. Ernst & Young*, 507 U.S. 170 (1993); and *National Org. For Women, Inc. v. Scheidler*, 510 U.S. 249 (1994), and directly in conflict with the Third Circuit's determination in *Jaguar Cars, Inc. v. Royal Motor Car Co.*, 46 F.3d 258 (3d Cir. 1995), the Seventh Circuit's decision in, *inter alia, McCullough v. Suter*, 757 F.2d 142 (7th Cir. 1985), as well as determinations by Courts of Appeals in the Sixth, Ninth, and Tenth Circuits. In both *Jaguar Cars* and *Suter*, the Courts of Appeals recognized as dispositive the individual RICO defendant's separate legal identity from the alleged corporate enterprise. It is precisely for failing to acknowledge this basic principle that the Second Circuit erred and the judgment of dismissal should be reversed.

SUMMARY OF ARGUMENT

I. There is no express requirement in the plain language of Section 1962(c) to plead distinctness between the RICO "person" and the "enterprise." Any viable implied requirement of distinctness is necessarily satisfied by identifying separate legal entities as the RICO "person" and

the "enterprise," without inquiry into the degree of distinctness.

Section 1962(c) provides that an "employee" may be liable as a RICO person for conducting the affairs of an "enterprise" through a pattern of racketeering activity. The term "enterprise" is defined in Section 1961(4) expressly to include corporations. A corporation is both a legal entity and a defined "enterprise" *de jure* regardless of whether its affairs are legitimate or not. *United States v. Turkette*, 452 U.S. 576, 592 (1981). Petitioner Kushner has alleged that the individual natural person, Don King, is an employee of the corporate entity enterprise, DKP. Nothing more is required to satisfy any requirement of distinctness.

Section 1962(c) is directed, in part, at employees of enterprises who have the power to conduct that enterprise's affairs. The statute does not concern itself with whether the employee acts or purports to act within the scope of his or her authority. That is an irrelevant path leading nowhere but to confusion. When there is a formal legal entity identified as the RICO enterprise (here a corporation), there is no issue of scope of authority, legitimacy of activity, type of activity, or degree of distinctness. Rather, the dispositive issue is whether the employee has the ability to operate or manage the enterprise so as to conduct its affairs through a pattern of racketeering. *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993). If so, the person is liable for his or her racketeering activities and the inquiry is over.

II. It is fundamental that "[i]ncorporation creates an entity legally distinct from its officers and employees . . ." Douglas E. Edlin, *Parent and Subsidiary Corporations: The Jaguar Cars Decision And the RICO Distinctiveness*

Requirement, 172 – Nov. N.J. Law 42, 45 (1995); *see Hale v. Henkel*, 201 U.S. 43, 74 (1906) ("there is a clear distinction . . . between an individual and a corporation. . . ."). That legal distinctness is sufficient, as a matter of law, to satisfy any judicially implied distinctness doctrine.

III. The rationale of the Second Circuit Court of Appeals, that an employee acting within the scope of his authority is not distinct from the corporate employer enterprise, is contrary to the rationale of prior decisions of this Court in, among other cases, *Turkette, Reves*, and *Scheidler*. As those cases make plain, Section 1962(c) does not require the enterprise to be a victim otherwise engaged in legitimate business activity. Rather, the enterprise may itself be the perpetrator, thoroughly controlled, or even formed, by the RICO person to accomplish racketeering activity. Even where that employee purports to act within his authority, the employee's racketeering activities fall squarely within the scope of the statute.

IV. Other federal Courts of Appeals have properly found the legal distinctness between the RICO person and a separate legal entity to be dispositive. The distinctness inherent in the status of separate legal entities is all that is required to satisfy that aspect of Section 1962(c). This is precisely the point of the decisions in *Jaguar Cars*, 46 F.3d 258 and *Suter*, 757 F.2d 142. It is reflected too in *Haroco v. American Nat'l Bank & Trust Co. of Chicago*, 747 F.2d 384 (7th Cir. 1984), *aff'd on other grounds*, 473 U.S. 606 (1985), where the Seventh Circuit Court of Appeals held that a parent corporation and its separately incorporated wholly owned subsidiary were distinct legal entities.

V. At the pleading stage, distinctness is sufficiently pleaded by alleging a RICO person and an enterprise which are identifiably separate legal entities. Thus, the requirements of Fed. R. Civ. P. 12(b)(6) are satisfied as to that element by pleading that a natural person has conducted the affairs of a corporate enterprise through a pattern of racketeering activities.

ARGUMENT

I. BY ITS PLAIN AND UNEQUIVOCAL LANGUAGE SECTION 1962(c) APPLIES TO AN EMPLOYEE OF A CORPORATION REGARDLESS OF WHETHER THAT EMPLOYEE PURPORTS TO ACT WITHIN THE SCOPE OF AUTHORITY

By its very terms, Section 1962(c) contemplates imposition of liability on an employee of a corporate "enterprise." The truism that the affairs of a corporate entity are conducted by its employees is exactly the intended point of Section 1962(c)'s proscription. Culpability arises when an employee, or other person, conducts the corporation's affairs through a pattern of racketeering activity. *Reves,* 507 U.S. at 177.

RICO Section 1962(c) provides:

> [I]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

The term "person" is defined in 18 U.S.C. § 1961(3) as including "any individual or entity capable of holding a legal or beneficial interest in property." The term "enterprise" is defined in 18 U.S.C. § 1961(4) as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[2]

The RICO definition of enterprise does not distinguish among corporations by whether they are closely held, by one person or more widely, or publicly held. Rather, the statute broadly provides that the formal structure of a "corporation," itself a creature of the state, and presumed to be chartered for the benefit of the public with privileges and franchises, *Wilson v. United States*, 221 U.S. 361 (1911), is by definition a RICO "enterprise." 18 U.S.C. § 1961(4). Just as the statute does not require the Section 1962(c) enterprise to have an economic motive, *Scheidler*, 510 U.S. at 261, or to have legitimate rather than illegitimate goals, *Turkette*, 452 U.S. at 587, it does not require the enterprise to have a minimum number of employees, officers, or even controlling shareholders.

The statutory proscription is aimed at employees, (or others associated with an enterprise), who conduct the

2. RICO's definitional sections are purposely broad and thereby allow the possibility of significant overlap. For instance, the corporate form of legal entity is expressly defined as an enterprise. That same corporation, as an entity capable of holding an interest in property, may also be a RICO person. The statute does not itself express any mutual exclusion preventing the same entity from being both "person" and "enterprise." *See* G. Robert Blakely, *The RICO Fraud Action in Context: Reflections on Bennett v. Berg*, 58 NOTRE DAME L. REV. 237 (1982).

affairs of the employer "enterprise" through a pattern of racketeering. The statute is silent as to the relationship between the RICO "person" and the "enterprise" except that such person: (i) must be employed by or associated with the enterprise; and (ii) must have the ability to conduct or participate in the conduct of such enterprise's affairs. The statute does not expressly provide that the employee or other associated RICO person somehow be separate from the enterprise. Nor does the statute suggest any degree of distinctness as a threshold requirement. To the extent there is any implied requirement of distinctness, it is satisfied when the "person" and the "enterprise" are intrinsically separate legal entities.[3] For purposes of this case, an individual is plainly not the same legal entity as his or her corporate employer. In such circumstances, no further inquiry into degree of distinction, be it based on function, activity, authority, or otherwise, is appropriate.

Here, Kushner's complaint alleges that Mr. King is a person employed by DKP. DKP, a legally formed corporation, is alleged to be the subject enterprise. Why then is that not the end of the inquiry as to distinctness? It should be.

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3. Whether the judicially implied requirement of distinctness is a viable doctrine at all is suspect. Even when narrowly applied, requiring distinctness necessarily restricts the Congressionally intended broad remedial reach of RICO. To the extent it has any vitality, it is only when the alleged enterprise is an association in fact, rather than a legal entity such as a corporation, which is an enterprise *de jure*. It was in connection with enterprises alleged as associations in fact that the requirement of distinctness was typically implied and given voice. *See, e.g., Riverwoods* and *Discon*. Here, however, the alleged enterprise is an identifiable discrete legal entity, distinct as a matter of law from any other person or entity.

Congress expressed no statutory limitation pertaining to the subjective evaluation of: (i) whether the employee acted within the scope of authority; (ii) whether that employee's conduct was legitimate or not; (iii) the nature of the employee's activities or the enterprise's affairs; or (iv) the degree of distinctness between the employee and the legal entity employer, no matter how measured. Similarly, nothing in the statute suggests that any inquiry be made into distinctness between the RICO person and the legal entity enterprise based on function, family resemblance to a prototypical RICO scenario, or type of activity, be it characterized as legitimate or not.[4]

Congress could easily have said that the employee must be distinct from the "enterprise." But it did not. Congress could easily have said that the statute does not apply to an employee of a largely "one man band" enterprise. But it did not. Congress could easily have said that the statute does not apply to an employee acting within the scope of authority. But it did not. Congress, although surely knowing the truism that corporations, and other legal entities, act through their employees, nevertheless, prescribed no such limitations. Congress not having done so, it is not proper for the courts to do so. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498-500 (1985) ("Yet this defect — if defect it is — is inherent in the statute as written, and its correction must lie with Congress."); *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930) (warning that courts must avoid "usurpation" of "legislative power").

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4. The affairs of a RICO enterprise will always be at least partially tainted by the conduct of the RICO person.

The statute makes no distinction between employees who act within the scope of their employment, and rogues who commit only *ultra vires* acts. Rather, the statutory proscription is directed at employees who, in that capacity, conduct the employer's affairs as a vehicle to accomplish racketeering activity regardless of whether that enterprise might also be a victim of such activity. *Reves,* 507 U.S. at 178; *Scheidler*, 510 U.S. at 259.

Attendant to the ability to operate and manage is the power to act with authority. *See, e.g., Rothman & Schneider, Inc. v. Beckerman*, 2 N.Y.2d 493, 497, 161 N.Y.S.2d 118, 121 (N.Y. 1957) ("While in the normal course the implied authority vested in an actively functioning president will not devolve upon a secretary or treasurer, such officer will be deemed to have authority to act on behalf of the corporation where he has been the one actively managing its business."). The Second Circuit creates the unacceptable paradox of the employee who has the power to act with authority, and thereby use the enterprise as a vehicle for racketeering activity, being immune from RICO liability by reason of that very power to conduct the enterprise's affairs. As a consequence, the statute would have only razor thin applicability.

This is the fundamental flaw in the Second Circuit's decision below. It is a flaw so basic that its application would wholly undermine Section 1962(c) because it would allow any group of civil or criminal racketeers to avoid liability altogether merely by appointing themselves as officers of a corporation. This is not — nor could it be — what Congress intended.

Moreover, to imply, as did the Second Circuit, a limitation based upon whether the employee is acting within

the scope of his or her duties, is contrary to Congress' direction to construe RICO liberally and to apply it broadly. As this Court has made abundantly clear:

> RICO is to be read broadly. This is the lesson not only of Congress' self-consciously expansive language and overall approach but also of its express admonition that RICO is to "be liberally construed to effectuate its remedial purposes" Pub.L. 91-452, § 904(a), 84 Stat. 947.

Sedima, 473 U.S. at 497-98 (internal citation omitted). To immunize persons, such as Mr. King, who have the ability to control an entity and thereby vest themselves with authority, defeats the express legislative goal.

II. CORPORATIONS ARE LEGAL ENTITIES INHERENTLY DISTINCT FROM THEIR EMPLOYEES

The Second Circuit's formulation of its distinctness requirement ignores the fundamental nature of corporations as inherently distinct legal entities. It is one thing to conclude that the RICO "person" and the RICO "enterprise" cannot be the same entity, it is quite another to conclude, as the Second Circuit did here, that because a corporation acts through its employees, a particular employee — purporting to act within the scope of his authority — cannot be "distinct" from the corporate employer. Under this construction, an organized crime family would merely need to incorporate to escape Section 1962(c) liability altogether. This cannot be a result Congress intended.

Quite remarkably the Second Circuit's determination ignores not only the plain meaning of Section 1962(c), but also ignores, albeit *sub silentio*, some of the fundamental rudiments of Anglo-American corporation law.

The distinctness between Mr. King and DKP is self-evident. It is inherent in their being two legal entities, separate as a matter of law. One is a natural person, the other is a creature of the state, organized pursuant to law expressly to have an independent existence. *See Hale v. Henkel*, 201 U.S. 43, 74 (1906) ("the corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter."). No further pleading is required by statute or by common parlance. It is hardly necessary to cite authority for the principle that corporations are creatures of statute separate and distinct from their owners, officers, and employees. *Id.* ("we are of the opinion that there is a clear distinction . . . between an individual and a corporation . . .").

Corporations have the status of statutory "persons" capable of holding a legal or beneficial interest in property, of conducting all manner of business affairs, of suing and being sued, and even of being held criminally culpable. Even when the corporation consists of but one owner who is the sole director, officer, and employee, every law student learns of the corporate shield arising from the inherent distinctness between the individual and the corporate entity. This inherent distinctness is evident, and sustained, even in the application of constitutional privileges. Thus, in *Braswell v. United States*, the Court, after reviewing the long line of cases which recognize the inherent distinctness of a corporation from its owners, officers, and employees, held that the corporate

president and sole shareholder, as custodian of the corporate records, could not resist a subpoena for corporate documents on the ground that the act might tend to incriminate him. 487 U.S. 99 (1988) (affirming Fifth Circuit's holding that due to the separate corporate structure, "a corporation's records custodian may not claim a Fifth Amendment privilege no matter how small the corporation may be.").

By reason of its incorporation, DKP has a formal structure with continuity. It is a separate legal entity, independent of and distinct from any officer, employee, or shareholder. Those persons may come and go, but the corporation survives as its own entity. By its certificate of incorporation and by-laws it purports to have certain purposes and existence independent from that of any particular individual. Even if it is assumed that Mr. King has himself created and unilaterally controls DKP, (and there is no such allegation in the complaint), that would not mean that DKP does not have a separate identity. It does.

This is not an elevation of form over substance. On the contrary, the very essence of incorporating an entity is to create an enterprise separate from the individuals who, in most instances, seek to take advantage of that same shield of separate legal existence. With the enactment of RICO, Congress refused to allow the corporate form to insulate individual racketeers from liability.

The Second Circuit's determination ignores these rudiments. On a Rule 12(b)(6) motion, the Second Circuit effectively pierced the corporate veil to conclude, as a matter of law, that there is no distinctness between the individual employee, Mr. King, and the corporate entity, DKP, through

which he operated.[5] Ironically, corporate veils are pierced to expand, not constrict, liability. The corporate veil may be pierced to impose liability on a shareholder "for the corporation's conduct when, *inter alia*, the corporate form would otherwise be misused to accomplish certain wrongful purposes, most notably fraud on the shareholder's behalf." *United States v. Bestfoods*, 524 U.S. 51, 63 (1998) (citation omitted). Consonant with this is the goal of Section 1962(c), to punish the employee who uses the corporate form to accomplish wrongful purposes by conducting its affairs through a pattern of racketeering activity. In this context, the judgment of the Second Circuit Court of Appeals defeats rather than furthers the plain meaning of the statute. Quite simply, that court got it backward.

If there is any requirement of distinctness under Section 1962(c), it is satisfied by reason of Mr. King being a separate legal entity, i.e. a natural person, from DKP, i.e. a corporation. This distinctness arising from legal status exactly comports with the definitional sections of 18 U.S.C. §§ 1961(3) and 1961(4), as well as with the plain language of 18 U.S.C. § 1962(c), and the broad remedial scope intended by Congress. The courts should look no further.

5. One suspects that Mr. King might not be quite so eager to have the corporate veil so easily invalidated.

III. THE DISTINCTNESS REQUIREMENT ADOPTED BY THE SECOND CIRCUIT COURT OF APPEALS IS CONTRARY TO PRIOR AUTHORITY OF THIS COURT

Don King is precisely the type of RICO defendant envisioned by this Court in *Reves* and *Scheidler*. By immunizing King from liability at the pleading stage, the Second Circuit has ignored the rationale of those cases and has committed error.

This Court has made clear, time and again, that when determining the scope of a statute, courts must begin with the language of the statute itself. Absent ambiguity or a clearly expressed legislative intent to the contrary, the language of the statute is dispositive and there the inquiry should end. *Turkette*, 452 U.S. at 580. In *Turkette*, this Court, reversing a judgment of the First Circuit, parced the definition of enterprise as defined in 18 U.S.C. § 1961(4) and concluded that it encompassed both legal entities and those associations which are not by themselves recognized as legal entities. Both entities that conduct legitimate business activities and those which do not are encompassed by the statutory definition that was intended to be broadly inclusive, not exclusive. As the Court noted, "insulating the wholly criminal enterprise from prosecution under RICO is the more incongruous position." *Turkette*, 452 at 587.

This incongruity becomes manifest by the approach adopted by the Second Circuit. The criminal need only incorporate and thereby both take advantage of the corporate shield attendant to that separate legal entity, and yet be immune from RICO prosecution because of the Second Circuit's overbroad distinctness rule that pierces the separate legal corporate entity.

In the Second Circuit, the employee who most successfully subverts a corporate entity to become the instrumentality of racketeering activity will be the very person who can avoid prosecution. More than once has this Court warned against such an anomalous result.

In *Reves*, the Court addressed the meaning of the phrase "to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs." *Reves*, 507 U.S. at 177. Using the same analytical framework as in *Turkette*, the Court concluded that liability under Section 1962(c) is aimed at those persons who have the ability to operate or manage the affairs of the enterprise. *Reves*, 507 U.S. at 185. It is the ability to direct the affairs of the enterprise through a pattern of racketeering that the statute seeks to proscribe. Typically, that ability comes from the power attendant to corporate authority. As in *Turkette*, it is an incongruous position to suggest that having the authority to conduct the enterprise's affairs immunizes that employee from liability.

Any lingering doubt was resolved in *Scheidler*. There, the Court clarified that "the 'enterprise' in subsection (c) connotes generally the vehicle through which the unlawful pattern of racketeering activity is committed, rather than the victim of that activity." *Scheidler*, 510 U.S. at 259. This reflects the earlier view of the Court in *Turkette* that the wholly criminal enterprise is not protected from prosecution under RICO.

The Second Circuit Court of Appeals erred in this case by not recognizing the import of this Court's prior decisions. Indeed, the Second Circuit's distinctness doctrine as first enunciated in *Bennett v. U.S. Trust Co.*, 770 F.2d 308, 315 (2d Cir. 1985), *cert. denied*, 474 U.S. 1058 (1986), was premised

upon the assumption that the enterprise is a victim. This Court, in *Scheidler*, rejected that assumption. Other federal Courts of Appeals have not made that error. They have correctly focused on the narrow issue of legal distinctness without looking to limit the scope of the statute by a subjective inquiry into the degree of practical distinctness between the person and the enterprise.

IV. THE RULE IN OTHER CIRCUITS CORRECTLY FOCUSES ON LEGAL STATUS AS THE TEST OF DISTINCTNESS

The inherent distinctness of the corporate entity from any individual employee, or even owner, whether or not acting within the scope of that person's duties, is articulated in *McCullough v. Suter*, 757 F.2d 142 (7th Cir. 1985).[6] In that case the Seventh Circuit affirmed a judgment against the individual defendant Richard Suter under Section 1962(c), where the alleged enterprise was the sole proprietorship which Mr. Suter conducted. The Seventh Circuit concluded that the sole proprietorship could be a RICO "enterprise," and its owner the RICO "person." In so holding, the court illustrated why a closely held corporation even more than a sole proprietorship, is plainly within the statutory language of an enterprise.

> It is true that if Suter were all by himself, and yet adopted the corporate form for his activity, he might well fall under section 1962(c), for the

6. The Seventh Circuit's decision in *Haroco* also focused on separate legal entities in finding that a corporate parent is necessarily distinct from its incorporated subsidiaries. The Second Circuit, again ignoring legal separateness in favor of subjective evaluations of functional control, reached the opposite result in *Discon*.

> corporation would be an enterprise within the meaning of section 1961(4). And from this it could be argued that since subsection (4) defines enterprise so broadly, even a sole proprietorship is an enterprise and Suter is therefore caught by section 1962(c) — thus showing the absurdity of ever treating a sole proprietorship as an enterprise. But these cases are different. If the one-man band incorporates, it gets some legal protections from the corporate form, such as limited liability; and it is just this sort of legal shield for illegal activity that RICO tries to pierce. A one-man band that does not incorporate, that merely operates as a proprietorship, gains no legal protections from the form in which it has chosen to do business; the man and the proprietorship really are the same entity in law and fact. But if the man has employees or associates, the enterprise is distinct from him, and it then makes no difference, so far as we can see, what legal form the enterprise takes. *The only important thing is that it be either formally (as when there is incorporation) or practically (as when there are other people besides the proprietor working in the organization) separable from the individual.*

Id. at 144 (emphasis added).

To the same effect are *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1280 (7th Cir. 1989) and *United States v. Robinson*, 8 F.3d 398, 407 (7th Cir. 1993). Those cases illustrate that the Seventh Circuit, although enforcing the distinctness requirement, recognizes the inherent distinctness between a corporate entity and the individuals through whom

it acts. As envisioned by the definitional subsections of 18 U.S.C. § 1961, a corporation is, by definition a formal structure that has an existence independent from that of any natural person. Although a single shareholder may create, and control the operations of that separate entity, the independent entity exists, and typically, shields the individual. Section 1962(c) recognizes that shield and proscribes its use to accomplish a pattern of racketeering activity.

Also contrary to the Second Circuit is the Court of Appeals for the Third Circuit. In *Jaguar Cars*, that court concluded that its prior jurisprudence on the distinctness requirement as applied to corporate officers and employees did not survive this Court's holdings in *Reves* and *Scheidler*. *Jaguar Cars*, 46 F.3d 258. In *Jaguar Cars*, a Section 1962(c) claim was alleged against the individual owners and officers of a closely held automobile dealership. The evidence at trial established that those individuals operated the dealership to perpetrate a fraudulent warranty scheme. The principal issue on appeal was the individual's claim that they were not distinct from the enterprise. In affirming the judgment against those RICO "persons," the Third Circuit rejected its prior analytical framework, which had, similar to the Second Circuit, focused on the degree of distinctness. Under the framework rejected by the Third Circuit, the distinctness requirement would not have been satisfied because the individual defendants were not distinct infiltrating racketeers taking advantage of an enterprise as an innocent passive tool, but rather had fully managed and operated the corporate entity as the vehicle for racketeering activity.

The Third Circuit, following *Reves* and *Scheidler*, recognized, however, that reaching those persons who control

the corporate entity was exactly what this Court had articulated in connection with its "operation or management test." *Reves*, 507 U.S. at 179. Section 1962(c) is directed at those persons who operate or manage a corporate enterprise through a pattern of racketeering activity. The enterprise is the "vehicle through which the unlawful pattern of racketeering activity is committed, rather then the victim of that activity." *Scheidler*, 510 U.S. at 259.

The Third Circuit further refused to torture its interpretation of Section 1962(c) by adopting a "razor thin zone of application" to those persons who "are sufficiently connected to an enterprise so as to operate or manage it while still remaining sufficiently distinct from the enterprise so as to victimize or passively control it." *Jaguar*, 46 F.3d at 267. Yet this "razor thin zone" is the approach incorrectly adopted by the Second Circuit.

Other Circuit Courts of Appeals also have taken a narrow approach to the distinctness requirement more consonant with a broad reading of RICO. *See Brannon v. Boatmen's First Nat'l Bank of Okla.*, 153 F.3d 1144, 1148 n.4 (11th Cir. 1998); *Fleischhauer v. Feltner*, 879 F.2d 1290 (6th Cir. 1989), *cert. denied*, 493 U.S. 1074 (1990); *Davis v. Mut. Life Ins. Co.*, 6 F.3d 367, 377-78 (6th Cir. 1993), *cert. denied*, 510 U.S. 1193 (1994); and *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1534 (9th Cir. 1992).

V. THE SECOND CIRCUIT COURT OF APPEALS IMPROPERLY IMPOSED A SPECIAL RICO PLEADING REQUIREMENT

The Second Circuit suggested that Kushner did not specially plead distinctness between the RICO person and enterprise other than by identifying Mr. King as the individual being sued and DKP as the enterprise which employed Mr. King. Nothing else, however, is required.

On a motion pursuant to Fed. R. Civ. P. 12(b)(6), the allegations of the complaint are to be construed liberally giving all favorable inferences to the plaintiff. This Court may affirm dismissal of the complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *See H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 249 (1989); *Hoover v. Ronwin*, 466 U.S. 558, 585 (1984); *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246-47 (1980). The reviewing court must further "presume that general allegations embrace those specific facts that are necessary to support the claim." *Scheidler*, 510 U.S. at 256 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). Issues of fact are not to be resolved at all, and certainly not contrary to the plaintiff. *See H.J. Inc.*, 492 U.S. 229, 249 (1989); *Hoover*, 466 U.S. at 585; *Hughes v. Rowe*, 449 U.S. 5, 10 (1980) (*per curium*).

Kushner's complaint separately identifies Mr. King as an individual (Compl. ¶ 13, JA 34) and DKP as a corporation in the business of prize fighting promotion (Compl. ¶¶ 11-12, JA 34). Mr. King is throughout the complaint identified as participating in the conduct of the operation and management of DKP's affairs through a pattern of

racketeering activity. Other consultants and employees of DKP are identified. (Compl. ¶¶ 41, 76, JA 42, 55). DKP is a corporation formally organized as a separate entity pursuant to state law whether it has one or one thousand employees. *See Suter*, 757 F.2d at 144. Any requirement to plead distinctness was satisfied by identifying the separate legal entities of the natural person, Mr. King, as the RICO defendant, and the corporation, DKP, as the enterprise. At least for pleading purposes, nothing else need be alleged.

Nevertheless, this is in essence what the Second Circuit has decreed. What those additional allegations might be is hard to fathom. Indeed, the court's judgment, with prejudice and without leave to replead, suggests that the pleading defect is not curable — that there is something fundamental in the relationship of Mr. King, as employee, and DKP as corporate enterprise, that defies distinctness.

That rationale is contrary to the purpose and structure of 18 U.S.C. § 1962(c) — to impose liability in the very circumstance of an employee acting through a corporate entity to cause it to engage in a pattern of racketeering activity. *Reves*, 507 U.S. at 179; *Scheidler*, 501 U.S. at 259. The employee with authority to co-opt legitimate business activity is one of those persons against whom the statute is most plainly directed.

At the pleading stage, the inference of distinctness should be presumed from the allegations of the employee-individual as the RICO defendant, and the allegation of the separate corporate entity as the enterprise. The statute contains no requirement either to plead or to ascertain function, activity, or any other subjective degree of distinctness no matter how

measured.[7] When the enterprise is alleged to be its own formal legal entity, "no further facts are necessary in order to properly plead a RICO enterprise." *Baggio v. E.C. Solar, Inc.*, 1990 WL 70722 (N.D. Ill. May 9, 1990).

CONCLUSION

For the foregoing reasons the judgment dismissing the complaint should be reversed, the complaint reinstated, and the matter remanded to the United States District Court for the Southern District of New York.

Respectfully submitted,

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7. If distinctness is to be a further issue, it should be the difficult burden of Respondents to plead and prove, so as to convince the trial court that the fundamental legal distinctness should be ignored without conflicting with the statute or the Congressional intent of liberal construction to achieve a broad remedial purpose.