

15-1008

No.

Supreme Court, U.S.
FILED

FEB - 3 2016

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

THE KNIT WITH,
A PENNSYLVANIA PARTNERSHIP, PETITIONER

v.

KNITTING FEVER, INC.; DESIGNER YARNS, LTD, A
CORPORATION OF ENGLAND; FILATURA PETTINATA
V.V.G. DISTEFANO VACCARI & C. (S.A.S.), A COMPANY
OF ITALY; SION ELALOUF; DIANE ELALOUF; JEFFREY
J. DENECKE, JR.; JAY OPPERMAN; DEBBIE BLISS,
EISAKU NORO & Co., LTD.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES F. CASALE
Counsel of Record

Law Office of James F. Casale
8226 Germantown Avenue
Chestnut Hill, PA 19118-3402
JFCasaleEsq@msn.com
(215) 247 - 4726

QUESTIONS PRESENTED

1. Does the scope of a false advertising action categorically bar a retailer's redress of marketplace injuries resulting from its wholesaler mis-labeling products supplied for re-sale to consumers when a federal statute mandates product labeling accurately disclose the products' composition?
2. Does the holding in *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496-97 (1985) (A plaintiff only has 1964(c) standing if, and can recover to the extent that, he has been injured in his business or property by the conduct constituting the violation.) no longer reflect this Court's determination whether a plaintiff has a cause of action (standing) under 18 U.S.C. 1964(c) or may courts determine a claim made to the measure of damages provided by 1964(c) negates a cause of action to redress injury to business of property by reason of another's conduct of an enterprise through a pattern of racketeering activity?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
TABLE OF AUTHORITIES.....	iii
OPINIONS BELOW.....	1
JURISDICTION.....	1
RELEVANT PROVISIONS INVOLVED.....	1
STATEMENT.....	1
REASONS FOR GRANTING THE PETITION.....	7
CONCLUSION.....	18
APPENDIX	
<i>Circuit Court Decision</i>	1a
<i>District Court Decision</i>	29a
<i>District Court Decision</i>	64a
<i>Circuit Court Judgment</i>	118a
<i>Order Denying Rehearing</i>	120a
<i>Relevant Provisions Involved</i>	122a

TABLE OF AUTHORITIES

Page

CASES

ALYESKA PIPELINE CO. V. WILDERNESS SOC., 421 U.S. 240, 262 (1975).....	16
ASHCROFT V. IQBAL, 556 U.S. 662 (2009)	11
BCS SERVICES, INC. V. HEARTWOOD 88, LLC, 637 F.3D 750, 759 (CA7, 2011)	3, 15
BELL ATLANTIC V. TWOMBLY, 550 U.S. 544 (2007).....	11
BOND V. BLUM, 317 F.3D 385 (CA 4, 2003).....	16
BRIDGE V. PHOENIX BOND & INDEM, Co., 553 U.S. 639, 660 (2008)	4, 17
CONTE BROS. AUTO., INC. V. QUAKER STATE- SLICK 50, INC., 165 F.3D 221 (CA 3, 1998)	6
GOLD, WEEMS ET AL. V. METAL SALES MFG. CORP., 236 F.3D 214 (CA 5, 2000).....	16
HEMI GRP., LLC V. CITY OF NEW YORK, 559 U.S. 1 AT 13 (2010).....	3, 13, 15
HOLMES V. SECURITIES INV. PROT. CORP., 503 U.S. 258, 271 (1992)	15
KAY V. EHLE, 499 U.S. 432, 436 N. 7 (1991).....	16
LEXMARK INT'L. V. STATIC CONTROL COMPONENTS, INC. ___ U.S. ___, 134 S. Ct. 1377, 1395 (2014)	4, 8, 9
MCCARTHY V. RECORDEX SERV., INC., 80 F.3D 842, 852 (CA3,1996).....	14
MILLER V. POCONO RANCH LANDS PROP. OWNERS ASS'N, 557 FED. APPX. 141 (CA 3, 2014).....	14
RIVERS V. ROADWAY EXP., INC., 511 U.S. 298, 312- 13 (1994).....	12, 14
SEDIMA, S.P.R.L. V. IMREX Co., INC., 473 U.S. 479, 496-97 (1985).....	3, 13
SYNGENTA SEEDS, INC. V. BUNGE N.AM., INC., 773 F.3D 58 (CA 8, 2014)	4, 12

STATUTES

11 U.S.C. §1125(a).....	<i>passim</i>
18 U.S.C. §1964(c).....	<i>passim</i>

RULES

Fed. R. App. P. 28(g).....	12
----------------------------	----

OTHER AUTHORITIES

Virginia E. Scholtes, The Lexmark Test for False Advertising Standing: When Two Prongs Don't Make a Right, 30 Berkeley Tech. L.J. 1023, 1024 (2015).....	11
--	----

OPINIONS BELOW

The September 2, 2015 panel Judgment summarily affirming, in relevant part, the district court's Orders is available at 2015 U.S. App. LEXIS 15575 and reproduced at Appendix 118a. The unpublished November 6, 2015 Order denying rehearing en banc is reproduced at Appx. 120a. The December 18, 2008 district court Opinion dismissing Petitioner's false advertising claim for not showing a competitive injury is reproduced at Appx. 64a; the Order appears at Appx. 116a. The July 19, 2012 Opinion dismissing Petitioner's racketeering action on grounds other than injury to business or property is reproduced at Appx. 29a; the Order is reproduced at Appx. 63a.

JURISDICTION

The Third Circuit judgment issued September 2, 2015. Appx 118a. Rehearing en banc was timely sought on September 15, 2015 and denied November 6, 2015. Appx. 120a. This Court's jurisdiction is invoked under 28 U.S.C. §1954(1) and RULES 10(a) and (c).

RELEVANT PROVISIONS INVOLVED(See Appendix)

STATEMENT

Introduction

This case arises from a wholesaler's delivery, for re-sale to consumers, of yarns purported to be spun with 12% cashmere and no more than 33% artificial fiber. Testing shows the yarns are labeled to overstate the cashmere content and understate the products'

artificial fiber composition. The Wool Products Labeling Act sets certain standards for the wool trade; the Wool Law regulatory regime, among other matters 1.) requires wool products introduced or sold in commerce be labeled to accurately disclose the products' composition and 2.) prohibits all sales of mis-labeled wool products. See, 15 U.S.C. §68a *et seq.*

For over five years, the Respondent supplying importer-wholesaler delivered mis-labeled products to the commercial Petitioner by commercial common carrier. Use of a commercial common carrier to further a scheme to defraud is, statutorily, both mail fraud and racketeering activity. See, 18 U.S.C. §1341 and §1961; 18 U.S.C. §1964(c) provides a civil action for persons injured in their business or property by an enterprise conducted through a pattern of racketeering activity. At discovery of the mis-labeling, Petitioner held in inventory products prohibited from sale valued at approximately \$20K.

Product mis-labeling also misrepresents the "nature, characteristics, qualities" of the yarns in violation of 11 U.S.C. §1125(a)(1)(B); the Lanham Act provides a civil action to redress the use in commerce of any false description of fact or misrepresentation of fact concerning the nature, characteristics or qualities of goods. See, 15 U.S.C. §1125(a) at Appx. 122a.

The Third Circuit summarily decided Petitioner lacks standing to maintain civil actions for false advertising and racketeering.

Facts and Procedural History

This Petition implicates the rule of law and raises questions important to commercial actors. The

simple and straightforward facts, representative of common commercial relationships, provide an opportunity for the Court to clarify principles of false advertising standing, pursuant to 15 U.S.C. §1125(a), and standing for civil racketeering claims under 18 U.S.C. §1964(c). The decision of the Third Circuit panel injects uncertainty into the both statutes' jurisprudence by creating alternative bases to determine a suit is not statutorily authorized. The newly created alternative standards conflict with existing principles established by this Court.

The lower courts deviated from established racketeering jurisprudence to announce a new standard which determines §1964(c) standing based upon damages sought rather than whether an injury to business or property results from another's conduct of an enterprise through racketeering activity. See, *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496-97 (1985)(A plaintiff only has §1964(c) standing if, and can recover to the extent that, he has been injured in his business or property by the conduct constituting the violation.); *Hemi Grp., LLC v. City of New York*, 559 U.S. 1 at 13 (2010)(The compensable injury flowing from a RICO violation necessarily is the harm caused by the predicate acts.). The new standard underlying the Circuit judgment conflicts with *BCS Services, Inc. v. Heartwood 88, LLC*, 637 F.3d 750, 759 (CA7, 2011)(Once the plaintiff proves injury, broad latitude is allowed in quantifying damages and doubts should be resolved against the wrongdoer.).

By summarily affirming the district court's §1964(c) standing decision, the Circuit judgment undermines the statutory standard of "injury to business or property by reason of" conduct defined as

racketeering activity. The panel endorses a statutorily inconsistent standard conflicting with every other circuit and departing from this Court's precedent. *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 660 (2008)(It is not for the judiciary to eliminate the private action in situations where Congress has provided it.).

The Circuit not only departed from *Lexmark Int'l. v. Static Control Components, Inc.* ___ U.S. ___, 134 S. Ct. 1377, 1395 (2014)(To invoke the Lanham Act's cause of action for false advertising, a plaintiff must plead ... an injury to a commercial interest in sales or business reputation proximately caused by the defendant's misrepresentations.) to summarily decide on first impression not only that a commercial entity can not redress the false advertising of products supplied for consumer resale but also formulated a new, ambiguous categorical status standard which effectively limits the scope of a false advertising action to direct competitors. This summarily determined new standard – reached in the absence of any briefing by the parties – conflicts with *Syngenta Seeds, Inc. v. Bunge N.Am., Inc.*, 773 F.3d 58 (CA 8, 2014)(declining to determine in the first instance whether *Lexmark's* zone-of-interests test and proximate-causality requirements support false advertising claim).

Without performing the zone-of-interests test and proximate-causality analyses, the panel categorically determines *Lexmark* bars a retailer from suing its wholesaler for falsely advertising products supplied for re-sale. The panel disregards *Lexmark's* caution that categorical standing determinations distort the statutory language. *Lexmark* at 1392. The panel apparently reverts to a discredited 'direct-competitor' status test and defines all purchasers – including

commercial entities purchasing for re-sale – as consumers.

The two questions presented raise purely legal issues concerning the scope and function of the statutes at issue and not merely the lower court's misapplication of established caselaw. These questions are of importance to commercial actors: the rules of law devised by the Third Circuit impact upon commercial confidence. The questions are appropriately resolved by this Court.

The district court opinions partially sets forth the relevant facts. Appx.29a and 64a. In summary, the parties are commercial participants, albeit on different economic levels, in the sale of wool products (yarn) to consumers. Respondents are alleged to have mis-labeled, or participated to cover-up the mis-labeling, of their own products. Respondents' six products are labeled to overstate the cashmere composition and understate the artificial fiber (acrylic) content of yarns Petitioner purchased to re-sale to consumers. Because the yarns at issue are labeled so as to not comply with the Wool Law, the yarns are prohibited from sale and are without commercial value. Respondents delivered the mis-labeled products by commercial common carrier. Petitioner's injury became apparent in 2006 when a seventh yarn distributed by Respondents was rumored to lack the labeled cashmere content. Respondents declined to provide assurances their products inventoried by Petitioner conform to the Wool Products Labeling Act – which Act both requires wool products be labeled to disclose the products' composition and prohibits all sales of mis-labeled wool products by any seller. Petitioner's subsequent testing of six yarns supplied by Respondents disclosed the

products lacked the labeled cashmere content and exceeded the artificial fiber composition indicated on the labeling.

Petitioner initiated suit in September, 2008. The district court identified Petitioner's injury as its legal inability to re-sell inventoried mis-labeled yarns and consequent harms to its business reputation and goodwill among consumers stemming in Respondents' scheme including the costs incurred to mitigate Respondent's scheme. Appx. 91a-92a. Jurisdiction was proper in the district court pursuant to 28 U.S.C. §1331; Petitioner asserts claims arising under federal law. By July, 2012, the district court – having considered Respondents' 15 motions seeking a pre-trial disposition – dismissed all of Petitioner's claims. Eight months later, the district court concluded all proceedings.

The trial court dismissed Petitioner's Lanham Act for lack of standing on a RULE 12(b)(6) motion filed September 24, 2008. The court ostensibly applied *Conte Bros. Auto., Inc. v. Quaker State-Slick 50, Inc.*, 165 F.3d 221 (CA 3, 1998)(Adopting five factor anti-trust test for false advertising standing; limiting false advertising standing to only direct competitors or their surrogates exists in tension with Third Circuit precedent.)(abrogated by *Lexmark Int'l.*, 572 U.S. ___, 134 S.Ct. 1377 (2014)). The district court acknowledged Petitioner suffered a commercial injury resulting from Respondents' conduct. Appx 90a, 92a. The court concluded, nonetheless, the *Conte Bros.* test foreclosed standing in the absence of a competitive injury and where direct competitors have a more direct proximate relationship to the defendant. Appx. 101a. On different grounds, the appellate panel reached the same result –

ruling *Lexmark* makes it apparent “a yarn retailer who alleges to have been misled by its supplier into purchasing mislabeled yarn, is not within the zone of interests protected by the Lanham Act.” Appx. 19a.

As to Petitioner’s racketeering claim, in 2012 the district court – repeatedly acknowledging but not attaching any significance to Petitioner’s injury – determined Petitioner lacks §1964(c) standing because its “enumerated damages were not proximately caused by the Defendants’ predicate acts in furtherance of the scheme” to distribute mis-labeled wool products to yarn retailers. Appx. 57a. Three years later, the Third Circuit affirmed the §1964(c) standing decision “substantially for the reasons stated in the district court’s opinion.” Appx 9a.

REASONS FOR GRANTING THE PETITION

The Court should grant the Petition to clarify the scope of a Lanham Act false advertising action after *Lexmark* and re-affirm the now threatened *Sedima* standard: injury confers §1964(c) standing. The Petition presents purely legal questions; the judgment to be reviewed advances new standards in conflict with established precedents under both statutes. The Court should clarify the judgment announced by the Third Circuit departs seriously from this Court’s precedents and does not adhere to the established rule of law.

§1125(a) Standing

The Court should grant this Petition to clarify that the categorical exclusion of a commercial plaintiff vertically related to a false advertiser is inconsistent with the rule

of law established by this Court in *Lexmark Int'l.*, 572 U.S. ___, 134 S.Ct. 1377(2014)). *Lexmark* holds Congress authorizes a false advertising claim where the “direct application of the zone-of-interest test and proximate-cause requirement supplies the relevant limits on who may sue” for false advertising. *Lexmark*, at 1392. Importantly, the *Lexmark* Court considered and expressly rejected a categorical standing determination based upon status as “distorting the statutory language.” *Id.*

The judgment under review creates a rival categorical standard to *Lexmark* based on an undefined and ambiguous status determination. The panel’s decision that “a yarn retailer who alleges to have been misled by its supplier into purchasing mislabeled yarn, is not within the zone of interests protected by the Lanham Act” is apparently based upon either the status of the parties or no more than a simple purchase relationship so common in commercial transactions. As discussed more fully below, each basis inappropriately departs from *Lexmark*’s analytical framework, enjoys no textual support in the statute and introduces serious uncertainty into commercial transactions.

Categorically excluding vertically-related parties denies commercial marketplace participants the protection of the Lanham Act’s prohibition of false advertising and introduces confusion in the scope of a false advertising action. Barring a retailer’s action against its supplying wholesaler logically dictates excluding wholesalers from claiming against a manufacturer or importer who falsely advertises goods offered for distribution and sale. The categorical exclusion, based upon status, of vertically related parties from enforcing prohibitions against product

misrepresentation undermines commercial confidence in transactions where the purchase is for commercial (re-sale) purposes.

The judgment to be reviewed in effect reverts to a direct competitor test to determine the scope of a false advertising action. Such a status determination, *Lexmark* instructs, is incorrect; “it is thus a mistake to infer that because the Lanham Act treats false advertising as a form of unfair competition, it can protect *only* the false-advertiser’s direct competitors.” *Id.* (original emphasis). The Lanham Act, as *Lexmark* informs, looks to whether a commercial interest is asserted by a commercial party in the goods or services claimed to be falsely advertised resulting in an injury to reputation or sales and not merely the relationship of the parties. District courts have similarly departed from *Lexmark* to the same effect. See *Peter Kiewit Sons', Inc. v. Wall St. Equity Group, Inc.*, 2014 U.S. Dist. LEXIS 137182 * 15-17 (D.C. NE, 2014)(Defendants’ ‘customers’ are unlikely to be plaintiff’s customers, and it is difficult to imagine how the defendants’ false representations – even if they reflected poorly on plaintiff – could result in an actual commercial injury to plaintiff capable of clearing *Lexmark*’s bar).The Court should clarify the prohibition against false advertising is not reserved for horizontally-related parties competing directly for the same customers.

Granting the Petition would clarify a false advertising action extends to purchasers acting for commercial purposes as distinguished from non-actionable non-commercial purchases even when made by a commercial entity – the point addressed by the panel’s *Lexmark* quotation (cited without any analysis)

and upon which the judgment to be reviewed rests. To categorically bar all purchasers from the Lanham Act's protection against false advertising injects uncertainty into commercial transactions – the very mischief which §1125(a) seeks to secure against, however partially. Stated another way, a status categorical bar based upon no more than a purchase relationship enjoys no textual support in the statute; §1125(a) is directed to the use of false or misleading descriptions of fact concerning products wholly apart from any sale of the falsely advertised product. See, 15 U.S.C. §1125(a).

Like status defined by the plaintiff's marketplace role or the parties' relationship, the mere existence of a purchase transaction in goods claimed to be falsely advertised is not categorically determinative whether a false advertising action lies. After all, all commercial sales involve a purchase. But, not all purchases are for commercial purposes; a commercial purchaser may act for either a commercial (re-sale) or a consumption (use) purpose. The Lanham Act protects commercial parties in their commercial purchase transactions even though it does not protect purely consumptive transactions. The functionality of the purchase certainly informs and even may be determinative of the scope of a false advertising action. Commercial marketplace participants have a commercial interest in and are exposed to harm when products purchased for re-sale are falsely advertised. In other words, where a purchase of goods, later claimed to be falsely advertised, is made for commercial purposes, the purchaser comes within the zone-of-interests described by *Lexmark*'s analytical framework. Here too, courts have diverged from *Lexmark*'s simple (but not entirely elusive) focus on

functionality to announce all purchasers are categorically barred from claiming against another for falsely advertising goods purchased for resale. See, *Locus Telecomm., Inc. v. Talk Global, LLC*, 2014 U.S. Dist. LEXIS 120137 *5-7 (D.C. NJ, 2014)(That plaintiff purchased component product for resale does not alter its role as a purchaser in the subject transaction; the complained-of conduct involves the parties as purchaser and seller and not as competitors.). The cause of action authorized in §1125(a) depends upon conduct constituting use of a “false or misleading description of fact” in commerce and not the existence of a transaction between the parties as purchaser and seller. See, 11 U.S.C. §1125(a). Nothing in *Lexmark* instructs otherwise.

The instant facts provide a vehicle for the Court to re-affirm *Lexmark* and clarify the scope of a false advertising action much the same as *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) clarified the holding of *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007). Granting the Petition would clarify that neither a plaintiff’s status as a retailer, nor its vertical commercial relationship with the claimed false advertiser nor its participation in a purchase transaction for purely commercial purposes renders the plaintiff outside the scope of a false advertising action.

Granting the Petition would allow the Court to clarify the *Lexmark* analysis against commonly occurring and easily understood facts. At least one commentator notes *Lexmark*’s analysis remains incomplete. Virginia E. Scholtes, *The Lexmark Test for False Advertising Standing: When Two Prongs Don’t Make a Right*, 30 BERKELEY TECH. L.J. 1023, 1024 (2015)(The *Lexmark* test serves the Lanham Act’s goal

of protecting persons engaged in commerce against unfair competition better than the previous tests, but it is not perfect.).

Alternatively, the categorical judgment to be reviewed expresses a competing rule of law to *Lexmark*. Stated another way, the judgment does not simply mis-apply *Lexmark*. See, Rebecca Tushnet, REBECCA TUSHNET'S 43(B)LOG, *Third Circuit Confirms That Consumers Still Lack Lanham Act Standing* (Sep. 08, 2015, 07:03 AM), <http://tushnet.blogspot.com/search> (Last accessed Jan. 28, 2016)(The court of appeals needed to apply *Lexmark*.). The panel failed to apply the *Lexmark* framework. Instead, the judgment rests upon a status decision which undermines *Lexmark*'s analytical framework. In doing so, the judgment renders uncertain *Lexmark*'s rule of law. *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994)(It is this Court's responsibility to say what a statute means, and once the Court has spoken, it is the duty of other courts [such as the Court of Appeals for the Sixth Circuit] to respect that understanding.). Procedurally, the decision conflicts with *Syngenta Seeds, Inc. v. Bunge N. Am., Inc.*, 773 F.3d 58 (CA 8, 2014)(Declining to determine in the first instance and remanding for the district court's decision whether plaintiff has standing to bring the claim under the zone-of-interests test and proximate causality requirement.). Unlike the *Syngenta* court, the panel reached a judgment without benefit of anything more than a FED. R. APP. P. 28(g) statement, without the parties' complete advocacy or without being informed by a district court decision applying the *Lexmark* framework. The categorical judgment to be reviewed is no more than an uninformed citation to

Lexmark.

The Court should review the judgment which rests upon the panel's categorical status determination that *Lexmark* bars a retailer's false advertising action against its supplying wholesaler. Review would clarify some of the confusion expressed by courts and commentators concerning the scope of a false advertising claim in light of *Lexmark's* instruction that §1125(a) confers a cause of action upon commercial entities with a commercial interest in products falsely advertised by another which conduct results in harm to the complainant's reputation or sales. As the facts of this case are broadly applicable to most commercial transactions, the Court's clarification of the *Lexmark* framework would assist in settling a point of law described as incomplete or confusing and provide guidance to commercial actors.

§1964(c) Standing

The Court should grant the Petition to re-affirm *Sedima's* rule that injury caused by a racketeering act conducted through a pattern of racketeering activity in the conduct of an enterprise confers standing under 18 U.S.C. §1964(c). See, *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 495 (1985)(If the defendant engages in a pattern of racketeering activity in a manner forbidden by §1962(a-c) and the racketeering activities injure the plaintiff in his business or property, the plaintiff has a claim under §1964(c).). Since *Sedima*, the Court has consistently held to the injury-confers-1964(c)-standing rule. See, *Hemi Grp., LLC v. City of New York*, 559 U.S. 1 at 13 (2010)(The compensable injury flowing from a RICO violation necessarily is the

harm caused by the predicate acts.).¹ The district court identified but otherwise disregarded Petitioner's injury: Respondents' delivery of misbranded wool products. Appx. 37a.

The decision supporting the Judgment for review cites to *Sedima* and *Hemi* but inappropriately departs from the rule of law derived from those cases. See, *Rivers v. Roadway Exp., Inc.*, 511 U.S. 298, 312-13 (1994).

Instead, the judgment affirms the district court's introduction of two, new and alternative standards for assessing whether a plaintiff's action is authorized by §1964(c): apart from any injury inquiry, the damages sought must be proximately caused by defendants' predicate racketeering acts and the damages constitute a concrete financial loss.² Appx. 40a. The novel requirement that damages be proximately caused by

¹Previously, the Third Circuit so ruled. See, *McCarthy v. Recordex Serv., Inc.*, 80 F.3d 842, 852 (CA3,1996)(To survive summary judgment on treble damages RICO claims, plaintiffs must establish they are the direct purchasers of defendants' goods.); *Miller v. Pocono Ranch Lands Prop. Owners Ass'n*, 557 Fed. Appx. 141 (CA 3, 2014)(To have standing to litigate a civil RICO claim, a plaintiff must show that she suffered an injury to her business or property and that the injury was proximately caused by the defendant's racketeering activities.).

²The district court's §1964(c) analysis focused on whether Petitioner's damages were proximately caused by the Respondents' predicate acts – not whether the damages flowed from the injury inflicted by those acts. Appx. 40a. The Circuit panel agreed with the district court. Appx. 9a. The district court previously recognized Petitioner's claimed damages are “concrete, quantifiable pecuniary losses stemming ... from defendants' asserted misrepresentation.” Appx. 99a. Neither court below explained how quantified and concrete damages do not constitute a concrete financial loss.

the predicate racketeering acts conflicts with *BCS Services, Inc. v. Heartwood 88, LLC*, 637 F.3d 750, 759 (CA7, 2011)(Once the plaintiff proves injury, broad latitude is allowed in quantifying damages and doubts should be resolved against the wrongdoer.). The novel legal determination ‘substantially’ adopted by the panel undermines this Court’s §1964(c) standing jurisprudence and enjoys no support in the statutory language.

As *Sedima* identifies, §1964(c) authorizes a civil action to redress another’s conduct of a racketeering enterprise dependant upon no more than an injury to business or property by reason of another’s violation of 1962. While §1964(c) does speak to damages, it does so only by way of providing a remedy and not as a standing requirement. See, 18 U.S.C. §1964(c). The new standards underlying the judgment to be reviewed conflict with this distinction. Moreover, this Court has consistently instructed §1964(c) standing requires the first step of injury. See, *Hemi Grp., LLC v. City of New York*, 559 U.S. 1 at 9 (2010)(The general tendency of the law, in regard to damages at least, is not to go beyond the first step [of injury].); *Holmes v. Securities Inv. Prot. Corp.*, 503 U.S. 258, 271 (1992)(same). The judgment to be reviewed renders uncertain this Court’s §1964(c) standing precedents.

The Court should clarify that §1964(c) standing rests upon the injury resulting by reason of a violation of 1962 and that neither the damages sustained from that injury nor the special damages the statute provides defeats standing. Except for the statutorily mandated recovery of attorney’s fees ³ and costs, the

³With respect to the statute’s mandated recovery of attorney fees,

form of damages flowing from a §1964(c) injury necessarily vary according to the factual contexts which give rise to the injury. For this reason, the statute broadly provides for the recovery of damages sustained as a consequence of an injury to business or property. Stated another way, the statute requires no more than that the measure of incidental and consequential damages a §1964(c) plaintiff seeks result from (be sustained by) the injury inflicted; the statute does not tie the damages sustained to the predicate racketeering acts committed. See, 18 U.S.C. §1964(c).

The present facts allow the Court to re-affirm *Sedima*: injury confers §1964(c) standing and not the plaintiff's measure of damages sustained. Petitioner's injury is the receipt of mis-labeled wool products for commercial sale to consumers, delivered by Respondents by use of a commercial common carrier

the panel departs from this Court's precedents when determining Petitioner is effectively a pro se plaintiff. See, *Kay v. Ehler*, 499 U.S. 432, 436 n. 7 (1991)(An organization is not comparable to a pro se litigant because the organization is always represented by counsel, ... and thus, there is always an attorney-client relationship.); *Alyeska Pipeline Co. v. Wilderness Soc.*, 421 U.S. 240, 262 (1975) (The circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine.). The panel's determination conflicts with the decisions of two circuit courts. See, *Gold, Weems et al. v. Metal Sales Mfg. Corp.*, 236 F.3d 214 (CA 5, 2000)(Organization represented by an attorney employed by the organization has a status separate from the attorney.); *Bond v. Blum*, 317 F.3d 385 (CA 4, 2003)(When an attorney is a member of an entity and represents the entity, he is in an attorney-client relationship with the entity and, even though interested in the affairs of the entity, he would not be so emotionally involved in the issues to distort the rationality and competence that come from independent representation.).

and which act constitutes both mail fraud and racketeering activity; the measure of damages sustained from that injury is the various costs incurred flowing directly from the injury wrought by Respondents' conduct in addition to the special damages the statute mandates.

The Court should accept this Petition to clarify that a plaintiff's claim to statutorily-provided damages does not negate the statute's authorization of a civil action to redress the injury resulting from another's conduct of an enterprise through a pattern of racketeering activities. By requiring the incidental and consequential damages sustained be proximately caused by the racketeering activity rather than naturally flow from the injury sustained, the judgment to be reviewed renders §1964(c) a nullity by way of a swirling analytical vortex. The judgment is based upon a view of §1964(c) which abjures this Court's precedents. See, *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 660 (2008)(Courts are not at liberty to rewrite RICO. It is not for the judiciary to eliminate the private action in situations where Congress has provided it.).

Review of the Circuit's serious departure from this Court's established §1964(c) precedents is necessary to forestall any uncertainty injected into racketeering practice and procedure by the Circuit Judgment which announces a novel and internally-inconsistent standard which enjoys no textual support in the statute.

CONCLUSION

For all the foregoing reasons this Petition for Writ of Certiorari should be granted as to both questions presented.

Respectfully submitted,
James F. Casale
Counsel of Record
LAW OFFICE OF JAMES F. CASALE
8226 Germantown Avenue
CHESTNUT HILL, PA 19118
(215) 247-4726