

14-226

Supreme Court, U.S.
FILED

MAY 23 2014

OFFICE OF THE CLERK

No. _____

In the
SUPREME COURT OF THE UNITED STATES

MICHAEL L. ROSS, ET AL.,
Petitioners,

v.

ROBERT T. STOOKSBURY, JR.,
Respondent.

On Writ of Certiorari to the United States Court of
Appeals for the Sixth Circuit, Case No. 12-5739

PETITION FOR WRIT OF CERTIORARI

Gerald L. Gulley, Jr., Esq.
Counsel of Record

GULLEY & OLDHAM, PLLC
706 Walnut Street
Suite 301
Knoxville, TN 37902
(865) 934-0753

Questions Presented

1. Is the standing requirement for civil RICO claims under 18 U.S.C. § 1964(c) jurisdictional in nature under Article III of the United States Constitution, such that a RICO plaintiff must demonstrate both causation and injury under 18 U.S.C. § 1964 in order to meet the threshold requirements of Article III?

2. May a plaintiff assert a civil RICO claim based solely on a derivative injury as a minority shareholder in a limited liability company, where the LLC entity is not itself a party, and there is no direct injury to the plaintiff?

List of Parties to the Proceedings Below

1. The Petitioners are Michael L. Ross, the estate of his late brother, Dale M. Ross (by and through Personal Representative Patricia Ross), and Rebecca Rose Ross Jordan, daughter of Dale Ross.

2. The Respondent is Robert T. Stooksbury, Jr.

3. In addition to Petitioners, the following limited liability entities, which were owned by one or more of the Ross petitioners, were also named as parties to the proceedings below: LTR Properties, Inc., RPL Properties, LLC, LC Development Company, LLC, Rarity Communities, Inc., Tellico Lake Properties, L.P., Tellico Communities, Inc., Nickajack Shores Holdings, LLC, Rarity Investment Company, LLC, Rarity Corporation, Rarity Management Company, LLC, Rarity Ridge Club, Inc., Rarity Club Corporation, Rarity Property Management, Inc., Broadberry Development Company, LLC, Hiawassee Properties, LLC, RM Company, LLC, LOM Development Company, LLC, and VPI Company, LLC

Table of Contents

Questions Presented	i
List of Parties to the Proceedings Below	ii
Orders and Opinions Below.....	1
Jurisdictional Statement.....	1
Constitutional Provisions	2
Statutory Provisions	3
Statement of the Case	5
Reasons for Granting the Writ.....	13
I. The Sixth Circuit's Finding That RICO Standing Is Non-Jurisdictional under Article III Conflicts with the Seventh Circuit's Opinion on the Same Question.	13
II. The Decision of the Court of Appeals Misconstrues RICO Law Which Precludes A Minority Shareholder In A Limited Liability Company From Asserting A Civil RICO Claim Based On A Derivative Injury, Thereby Violating The Essential Requirement of Proximate Causation.....	15
Conclusion.....	23
Certificate of Service.....	24
Appendices	25
<i>Appendix A</i> – Sixth Circuit Opinion.....	1
<i>Appendix B</i> – Denial of Rehearing En Banc	27
<i>Appendix C</i> – District Court Memorandum Opinion Granting Stooksbury's Motion for Default Judgment.....	29

<i>Appendix D</i> – District Court’s Amended Pre-Trial Order Governing Damages Trial.....	40
<i>Appendix E</i> – District Court’s Memorandum Opinion Denying Petitioners’ Motions for New Trial	45

Table of Authorities

Statutes

18 U.S.C. § 1962.....	3, 6, 10
18 U.S.C. § 1964.....	passim
28 U.S.C. § 1254.....	2
28 U.S.C. § 1291.....	2
Tenn. Code Ann. § 48-217-101	20

Constitutional Provisions

U.S. Const. art. III, § 2	2, 12, 23
---------------------------------	-----------

Cases

<i>Anderson v. Ayling</i> , 396 F.3d 265 (3rd Cir. 2005) ...	13
<i>Bender v. Williamsport Area Sch. Dist.</i> , 475 U.S. 534, (1986)	14
<i>Canyon County v. Syngenta Seeds, Inc.</i> , 519 F.3d 969 (9th Cir. 2008)	13
<i>Elk Grove Unified Sch. Dist. v. Newdow</i> , 542 U.S. 1 (2004)	15
<i>Evans v. City of Chicago</i> , 434 F.3d 916 (7th Cir. 2006)	14
<i>Firestone v. Galbreath</i> , 976 F.2d 279 (6th Cir. 1992)	17, 19
<i>Gallagher v. Canon U.S.A., Inc.</i> , 588 F. Supp. 108 (N.D. Ill. 1984)	19
<i>Grantham and Mann, Inc. v. American Safety Products, Inc.</i> , 831 F.2d 596 (6th Cir. 1987)	18
<i>Hill v. Tangherlini</i> , 724 F.3d 965 (7th Cir. 2013)	14
<i>Holmes v. Securities Investor Protection Corp.</i> , 503 U.S. 258 (1992)	16, 17
<i>In re Boyd</i> , No 99-11760, slip op., (Bankr. E.D. Tenn. Jan. 6, 2000)	21
<i>Lerner v. Fleet Bank, N.A.</i> , 318 F.3d 113 (2nd Cir. 2003)	13
<i>Loren v. Blue Cross & Blue Shield of Michigan</i> , 505 F.3d 598 (6th Cir. 2007)	15

<i>Scharmer v. Carrollton Mfg. Co.</i> , 525 F.2d 95 (6th Cir. 1975)	19
<i>Sherman v. British Leyland Motors, Ltd.</i> , 601 F.2d 429 (9th Cir. 1979)	19
<i>Siddle v. Crants</i> , 650 F. Supp. 2d 773 (M.D. Tenn. 2009)	19
<i>Stevens v. Lowder</i> , 643 F.2d 1078 (5th Cir. 1981) ..	19
<i>Trollinger v. Tyson Foods, Inc.</i> , 370 F.3d 602 (6th Cir. 2004)	13
<i>Warren v. Manufacturers Nat'l Bank of Detroit</i> , 759 F.2d 542 (6th Cir. 1985)	18, 19

Rules

Fed. R. Civ. P. 19	10
Sup. Ct. R. 10.....	2
Sup. Ct. R. 13.....	1, 2
Sup. Ct. R. 29.....	24
Sup. Ct. R. 33.1	2
Sup. Ct. R. 39.....	2

Treatises

W. Keeton, D. Dobbs, R. Keeton, & D. Owen, <i>Prosser and Keeton on Law of Torts</i> § 41, p. 264 (5th ed. 1984)	17
--	----

Orders and Opinions Below

The Sixth Circuit Court of Appeals did not select its opinion for publication in the Federal Reporter. The decision is reported at 528 Fed. Appx. 547 (6th Cir. 2013) and reprinted here in Appendix A, at App. 1. The Sixth Circuit's August 5, 2013 decision denying rehearing *en banc* is reprinted in Appendix B, at App 27.

The District Court did not select its orders for publication. The District Court's January 30, 2012 Memorandum Opinion granting plaintiff-Respondent Stooksbury's motion for default judgment against Petitioners is reprinted in Appendix C, at App. 29. The District Court's pre-trial order governing the jury trial on Stooksbury's damages claims under 18 U.S.C. § 1962 and state law is reprinted in Appendix D, at App. 40. The District Court's May 30, 2012 Memorandum Opinion denying Petitioners' motions for new trial is reprinted in Appendix E, at App. 45.

Jurisdictional Statement

The judgment of the United States Court of Appeals for the Sixth Circuit was rendered June 13, 2013, affirming the jury's damages award against Petitioners. The Petitioner's timely applied for rehearing *en banc*, which denied on August 5, 2013.

This Petition, originally post-marked November 4, 2013, was therefore timely filed pursuant to Sup. Ct. R. 13. This Petition was resubmitted on May 23, 2014 *in forma pauperis* in an effort to comply with

Sup. Ct. R. 39. The Clerk of this Court denied the affidavit of indigency accompanying the *in forma pauperis* petition on June 23, 2014 and directed Petitioners to comply with Sup. Ct. R. 33.1 within 60-days. Petitioners timely file this Rule 33.1 Petition for Writ of Certiorari.

Jurisdiction was conferred upon the court of appeals generally by 28 U.S.C. § 1291. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Sup. Ct. R. 10 and 13.

Constitutional Provisions

Article III, Section 2 of the Constitution of the United States provides:

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress may by law have directed.

Statutory Provisions

Title 18, United States Code Section 1962 provides as follows:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged

in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It 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.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Title 18, United States Code Section 1964(c) provides as follows:

Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

Statement of the Case

1. Pre-Trial Proceedings

a.

This action was filed on November 18, 2009. In his complaint, Stooksbury sought damages against

Petitioners, the defendants below, for violation of 18 U.S.C. § 1962 (civil RICO), breach of contract, and breach of fiduciary duties. An Amended Complaint was filed in which the civil RICO allegations were expanded and elaborated.

In the allegations of civil RICO, the Plaintiff averred that in the mid-1990s, Defendant Michael L. ("Mike") Ross and his brother Dale Ross entered the real estate business and established Rarity Communities, Inc., a Defendant named herein; through Rarity Communities, Inc. and other business entities, Mike Ross developed and marketed a waterfront community named Rarity Bay. After Rarity Bay began having success in sales of lots, a Tennessee limited liability company, Tellico Landing, LLC, was formed in which Mike Ross owned a 50% interest thereof, Plaintiff Robert Stooksbury owned a 25% interest, and an individual named Ward Whelchel owned a 25% interest.

The limited liability company, Tellico Landing, LLC, was formed to develop and market a real estate development named Rarity Pointe. The Amended Complaint further alleged that "as it relates to the operation of Tellico Landing, LLC, at various times throughout the time period between January 1, 2004, and June 30, 2009, Mike Ross . . . diverted and converted Tellico Landing, LLC funds and assets for the use and benefit" of Mike Ross and various other business entities created and/or operated by Mike Ross and/or his brother, Dale Ross, and/or other immediate family members, including, for example, Petitioner Rebecca Rose Ross Jordan.

The Amended Complaint set forth a “Damages” section alleging that “millions of dollars were taken out of Tellico Landing, LLC and were used by Defendants for other purposes” The Plaintiff also recited that among his damages he “suffered losses of millions of dollars on account of the property of Tellico Landing, LLC being converted by Mike Ross . . . and entities owned and controlled by Mike Ross or their own purposes.” The Plaintiff further alleged as a component of his legal injuries that he “suffered damages in excess of five million dollars on account of funds being improperly and unnecessarily drawn down on the credit line of Tellico Landing, LLC . . . such that funds which should have been used to satisfy Tellico Landing, LLC’s indebtedness in full were converted for other improper purposes”

In Count V, the Plaintiff set forth state law causes of action for breach of contract and breach of fiduciary duty by Mike Ross and Defendant LTR Properties, Inc. towards Tellico Landing, LLC. The Plaintiff alleged that the Defendants wrongfully injured “all of the Rarity developments” by removing “funds from the said developments which should have been used or the benefit of the developments and, in turn, caused the property values of each the Rarity developments, including Rarity Pointe, to suffer losses.”

The Plaintiff additionally stated that Defendant Mike Ross breached various agreements with the minority members of Tellico Landing, LLC for the

development of Rarity Pointe. By way of a request for damages on the state law claim, the Plaintiff urged that “a constructive trust should be found to be imposed in favor of Tellico Landing, such that [various Defendants] should be found to have been responsible for holding all money and other things of value derived or held by [Mike Ross] during his operation of Tellico Landing for the benefit of Tellico Landing.” Finally, the Amended Complaint demanded that the “Defendants should be liable to Plaintiff Rob Stooksbury and Tellico Landing, for compensatory and punitive damages. Moreover . . . a constructive trust should be found to be imposed in favor of Rob Stooksbury and Tellico Landing, LLC, for all funds which have been improperly removed from Tellico Landing and co-mingled with other funds, until such time when all such funds can be restored to Tellico Landing for its use and benefit.”

b.

Prior to trial, discovery requests were propounded by the Plaintiff on the defendants; the defendants provided answers to interrogatories, as well as 40,000 pages of documents in response to a request for production of documents. The Plaintiff argued that the responses of the defendants were inadequate and did not comply with one or more Orders of the trial court on discovery; subsequently, the trial court *inter alia* entered a default judgment on the issue of liability against the defendants, including Petitioners. A trial solely on the issue of damages then followed.

2. Trial Proceedings

a.

At the trial on damages, the Plaintiff testified that his damages were based on the failure of monies to be paid to Tellico Landing LLC, and not to him directly. Thus, the following colloquy with defense counsel:

Q. Do you agree with the statement in [the Complaint] that the reason that you were damaged is because millions of dollars were taken out of the Tellico Landing and you didn't get your money from Tellico Landing?

A. Yes.

* * *

Q. Let me phrase this another way then. How did you make money on this deal? Did someone write a check to you directly? Say, did Mr. Ross write checks to you directly or did Tellico Landing, LLC write checks to you?

A. We got distributions based off lot sales. We weren't involved in the amenities.

Q. Okay. Listen to my question again. Did Mr. Ross write checks directly to you for whatever purpose or did the checks to you come from Tellico Landing, LLC?

A. Tellico Landing, LLC.

b.

After a jury verdict was rendered in favor of the Plaintiff, a Judgment in a Civil Case was filed March 6, 2012 in which the Plaintiff was awarded compensatory damages against all defendants in the amount of \$3,546,915.00 for violations of 18 U.S.C. §§ 1962(c) and 1962(d); the Plaintiff was also awarded compensatory damages against all defendants in the amount of \$11,300,000.00 for violations of various state laws, including breach of fiduciary duties and fraud. Additionally, the Plaintiff was awarded punitive damages variously against the defendants, including your Petitioners. Subsequently, by Order dated May 30, 2012, the trial court trebled the compensatory damages awarded for violations of 18 U.S.C. §§ 1962(c) and 1962(d), thereby awarding the Plaintiff the sum of \$10,640,745.00 for the civil RICO violations.

3. Proceedings in the Court of Appeals

a.

In their Brief to the court of appeals, the Petitioners argued, *inter alia*, that the Plaintiff lacked standing to file suit against the Petitioners, and also failed to join an indispensable party pursuant to Federal Rule of Civil Procedure 19. The Petitioners argued that the Plaintiff had no standing to pursue his RICO claims against the defendants,

because he suffered no direct losses in the alleged RICO scheme, and any injuries to him were merely derivative from alleged losses to a limited liability company of which he was a partial owner. The Petitioners also argued that the trial court erred by failing to dismiss the lawsuit on the grounds that an indispensable party — namely, the limited liability company of which the Plaintiff was a partial owner — was not joined as a party plaintiff, thereby placing the defendants in the position of incurring legal liability to a non-party.

b.

A three-judge panel of the United States Court of Appeals for the Sixth Circuit affirmed the verdicts below in an opinion dated June 13, 2013. In an unpublished opinion, the panel reasoned that RICO standing was non-jurisdictional and therefore the standing requirements of Article III of the United States Constitution did not come into play. Appendix A, *infra*, at App. 12. The panel below reasoned that because Section 1964(c) of the RICO law lacked specific language regarding the necessity of a direct injury requirement. (Id. at App. 13.)

c.

A timely filed Petition for Rehearing *En Banc* was filed, in which the Petitioners argued that the Sixth Circuit panel's conclusion that RICO standing is not jurisdictional, was not supported by either precedent of the United States Supreme Court or of the United States Court of Appeals for the Sixth

Circuit. The Petition for Rehearing *En Banc* was denied by Order dated August 5, 2013. (Appendix B, at App. 27.

3. Basis for Review

Petitioners now seek review by this Court to resolve two important questions of constitutional law. First, is standing in civil RICO cases jurisdictional in nature, and thus a function of Article III, § 2? In other words, is the phrase “injured in business or property” from Title 18 U.S.C. § 1964(c) is a standing requirement — rather than an element of the cause of action — which must be satisfied in order for a plaintiff to prevail on a RICO claim?

Second, can a minority shareholder in a limited liability company created under state law establish RICO standing, when the applicable law of the jurisdiction under which the limited liability company was created expressly precludes standing on the grounds that the action of a minority shareholder is merely a derivative action?

Reasons for Granting the Writ

I. The Sixth Circuit's Finding That RICO Standing Is Non-Jurisdictional under Article III Conflicts with the Seventh Circuit's Opinion on the Same Question.

A.

The Sixth Circuit incorrectly opined that “RICO standing is not jurisdictional.” *Stooksbury v. Ross*, No. 12-5739, slip op. at 12 (6th Cir. June 13, 2013) (hereinafter cited as Appendix A, *infra* at App. 1). The Sixth Circuit noted that “Section 1964(c) lacks any language which suggests that the direct injury requirement is jurisdictional,” and in support of this proposition referenced its own precedent as well as that of several other Circuit Courts of Appeals. (*Id.* at App. 13-14 (citing *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 612-15 (6th Cir. 2004); *Lerner v. Fleet Bank, N.A.*, 318 F.3d 113, 129-30 (2nd Cir. 2003); *Anderson v. Ayling*, 396 F.3d 265, 269 (3rd Cir. 2005); *Canyon County v. Syngenta Seeds, Inc.*, 519 F.3d 969, 974 & n.7 (9th Cir. 2008).)

In so doing, however, the Sixth Circuit's ruling squarely contradicts the authority of the United States Court of Appeals for the Seventh Circuit, which has held that in fact

[t]he phrase “injured in business or property” has been interpreted as a **standing requirement** — rather than an element of the cause of action — which must be satisfied in

order to prevail on a RICO claim. See *Gagan v. American Cablevision, Inc.*, 77 F.3d 951, 958-59 (7th Cir. 1996). The causation component of § 1964(c) — whether an alleged RICO injury was caused “by reason of” a violation of the statute — has also been considered a **component of standing**. See, e.g., *Beck v. Prupis*, 529 U.S. 494, 120 S.Ct. 1608, 146 L.Ed.2d 561 (2000); *Lerner v. Fleet Bank*, 318 F.3d 113, 123 (2d Cir. 2003).

Evans v. City of Chicago, 434 F.3d 916, 924 (7th Cir. 2006) (emphasis added), *ovr’l on other grounds*, *Hill v. Tangherlini*, 724 F.3d 965, 967 & n.1 (7th Cir. 2013).

The decision of the Sixth Circuit in this case thus directly conflicts with the rule in effect in the Seventh Circuit, which recognizes that RICO standing is jurisdictional in nature, and must meet the stringent requirements of Article III. As the Sixth Circuit itself has observed,

[b]ecause “federal courts . . . have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto,” a plaintiff must possess both constitutional and statutory standing in order for a federal court to have jurisdiction. *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986). . . . As the Supreme Court has explained, “[n]o principle is more fundamental to the judiciary’s proper role in

our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.” Id. at 818, 117 S.Ct. 2312 (internal quotation marks omitted). “Article III standing . . . enforces the Constitution’s case-or-controversy requirement.” *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004). . . .

Loren v. Blue Cross & Blue Shield of Michigan, 505 F.3d 598, 606-07 (6th Cir. 2007).

In this case, the derivative injury of the Plaintiff does not confer Article III standing to sue pursuant to RICO; and the Sixth Circuit’s ruling improperly expands the realm of standing in civil RICO cases where it should be limited. This Court should grant the Petition for Writ of Certiorari to resolve a conflict between the Circuits, and reverse the decision of the Sixth Circuit.

II. The Decision of the Court of Appeals Misconstrues RICO Law Which Precludes A Minority Shareholder In A Limited Liability Company From Asserting A Civil RICO Claim Based On A Derivative Injury, Thereby Violating The Essential Requirement of Proximate Causation.

A.

Civil RICO is a specialized cause of action that is intended to control specifically targeted criminal

activity, and the effectiveness of such remedy should not be diminished by the misguided attempts of plaintiffs who see mail and wire fraud violations in every civil lawsuit. Recognizing the need to maintain the integrity of the RICO statute, federal courts have generally held that, in civil RICO litigation, a cause of action will not stand unless the plaintiff can establish that damages are directly caused "by reason of" the activities that RICO was designed to address. In other words, there must be a proximate cause relationship between acts of a RICO defendant, and the damages suffered by a RICO plaintiff. The Sixth Circuit disregarded this concept, however. Consequently, this Court should grant the Petition for Writ of Certiorari in order to review this case, and reverse the decision of the Sixth Circuit.

B.

In *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992), the United States Supreme Court observed that civil RICO involves a proximate cause analysis that presents a legal, not a factual, issue, based on analogies to the Sherman Antitrust Act and the Clayton Act. Just as the operative language in those federal laws mandated "that a plaintiff's right to sue . . . required a showing not only that the defendant's violation was a 'but for' cause of his injury, but was the proximate cause as well," *Holmes*, 503 U.S. at 268, so in civil RICO actions the concept of "proximate cause" is used

to label generically the judicial tools used to limit a person's responsibility for the

consequences of that person's own acts. At bottom, the notion of proximate cause reflects "ideas of what justice demands, or of what is administratively possible and convenient."

Holmes, 503 U.S. at 268 (citing W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 41, p. 264 (5th ed. 1984)).

Because of the difficulty in determining whether injuries are proximately caused by a RICO violation, plaintiffs in civil RICO litigation must do more than merely demonstrate monetary loss. Thus, in considering the *Holmes* decision there is

flawed logic in [a plaintiffs] insistence that an "actual monetary loss" equates to a "direct injury." The Supreme Court recently explained the direct injury requirement of 18 U.S.C. § 1964(c), the civil RICO statute. The Court held that RICO contains a proximate cause requirement mirroring that of the Sherman and Clayton Acts. This requirement forces the plaintiff to demonstrate a direct relation between the injury suffered and the alleged injurious conduct. Thus, the concept of direct injury refers to the relationship between the injury and the defendants' actions, not the plaintiffs' pocketbooks.

Firestone v. Galbreath, 976 F.2d 279, 285 (6th Cir. 1992) (internal citations omitted). Thus, a breach of contract — a state law claim — did not constitute a predicate act of racketeering activity that would

provide a basis for recovery on a theory of civil RICO. *Grantham and Mann, Inc. v. American Safety Products, Inc.*, 831 F.2d 596, 606 (6th Cir. 1987).

C.

The Sixth Circuit, in reaching its conclusion “that RICO standing is a non-jurisdictional issue,” Appendix 1, *infra*, at 14, effectively disregarded its own controlling precedent of *Warren v. Manufacturers Nat’l Bank of Detroit*, 759 F.2d 542 (6th Cir. 1985), which in turn relies on this Court’s rulings in analogous antitrust cases:

The question we are called upon to address is whether plaintiff may bring an action in his individual capacity under RICO for injuries apparently inflicted upon the corporation. Plaintiff claims his injuries are different from those inflicted upon [the corporation at issue], and that he has standing to pursue his claim under the “any person” language of 18 U.S.C. § 1964. That statute provides in relevant part that “[a]ny person injured in his business or property by reason of violation of section 1962 . . . may sue therefor in any appropriate United States district court. . . .”

We cannot agree with plaintiff’s contention. In his capacity as a shareholder . . . , any injury he incurred was actually one sustained by the corporation. An action to redress injuries to a corporation

cannot be maintained by a shareholder in his own name but must be brought in the name of the corporation. The shareholder's rights are merely derivative and can be asserted only through the corporation. Although this rule does not apply in a case where the shareholder shows a violation of duty owed directly to him, diminution in value of the corporate assets is insufficient direct harm to give the shareholder standing to sue in his own right.

Stevens v. Lowder, 643 F.2d 1078, 1080 (5th Cir.) (citation omitted), *reh'g denied*, 652 F.2d 1001 (1981). *See also Sherman v. British Leyland Motors, Ltd.*, 601 F.2d 429, 439-40 (9th Cir. 1979); *Scharmer v. Carrollton Mfg. Co.*, 525 F.2d 95 (6th Cir. 1975). Though plaintiff correctly points out that *Stevens*, *Sherman* and *Scharmer* were all cases dealing with the antitrust laws, we hold that this general rule applies with equal force to actions brought under RICO. *See also Gallagher v. Canon U.S.A., Inc.*, 588 F. Supp. 108, 110-11 (N.D. Ill. 1984).

Warren, 759 F.2d at 544. *See Firestone v. Galbreath*, 976 F.2d 279, 285 (6th Cir. 1992) ("a shareholder lacks standing to bring a suit where the alleged injury is diminution or destruction of the value of the stock due to acts aimed at a corporation."); *Siddle v. Crants*, 650 F. Supp. 2d 773, 783 (M.D. Tenn. 2009) ("if the plaintiff in a RICO suit asserts an injury that is purely derivative of a corporate injury, that

plaintiff would not have standing to sue under RICO for that injury”).

This rule also comports with the applicable state law governing such lawsuits. The sections in the Tennessee Code Annotated regarding personal liability regarding limited liability companies provide in relevant part as follows:

MEMBER NOT A PROPER PARTY TO PROCEEDING. A member, holder of financial interest, governor, or manager of an LLC is not a proper party to a proceeding by or against an LLC except:

- (1) Where the object of the proceeding is to enforce such person’s right against or liability to the LLC;
- (2) In a derivative action brought pursuant to chapters 201-248 of this title, the articles or the operating agreement; or
- (3) Where the proceeding asserts personal liability of such member, holder of financial interest, governor, or manager as described in the last sentence of subsection (a).

Tenn. Code Ann. § 48-217-101(c). This language has been interpreted by a federal bankruptcy court to bar suits by members of the limited liability companies (LLCs) except under limited circumstances which do not include derivative lawsuits:

The statute sets out a general rule that a member [of an LLC] is not a proper party to a suit by the LLC or against the LLC. This is an odd way of saying that a member generally is not the correct person to sue if the claim is against the LLC and that a member generally is not the correct person to bring suit on a claim by the LLC against someone else.

In re Boyd, No 99-11760, slip op. at 3 (Bankr. E.D. Tenn. Jan. 6, 2000) (concluding that an individual plaintiff cannot assert a derivative claim on behalf of a limited liability company).

D.

At trial in the case at bar, the only proof of damages testified to by the Plaintiff related to loss of value of Tellico Landing, LLC, a Tennessee limited liability company of which the Plaintiff was a 25% owner:

Q. Do you agree with the statement in [the Complaint] that the reason that you were damaged is because millions of dollars were taken out of the Tellico Landing and you didn't get your money from Tellico Landing?

A. Yes.

....

Q. Let me phrase this another way then. How did you make money on this deal? Did someone write a check to you directly? Say, did Mr. Ross write checks to you directly or did Tellico Landing, LLC write checks to you?

A. We got distributions based off lot sales. We weren't involved in the amenities.

Q. Okay. Listen to my question again. Did Mr. Ross write checks directly to you for whatever purpose or did the checks to you come from Tellico Landing, LLC?

A. Tellico Landing, LLC.

In other words, the only damage sustained by Plaintiff for civil RICO was indirect — the damages were direct to Tellico Landing, LLC but only indirect to the Plaintiff as a part owner of Tellico Landing, LLC. The Plaintiff therefore failed to prove that he had been proximately damaged by a predicate act of racketeering activity. Indeed, there was no proof of damages to the Plaintiff that were proximate to the allegations of the predicate acts of racketeering needed to satisfy the requirements of civil RICO; consequently, the Plaintiff has proved no damages directly attributable to civil RICO activity.

This decision of the Sixth Circuit to allow RICO standing in this case, where there is no proximate causation, clearly runs contrary to the rule stated in *Holmes*, in which this Court observed that civil RICO involves a proximate cause analysis that presents a

legal, not a factual, issue, based on analogies to the Sherman Antitrust Act and the Clayton Act. Because the United States Court of Appeals for the Sixth Circuit incorrectly characterized the question of RICO standing as a mixed question of law and fact, Appendix 1, *infra*, at App. 1, this Court should grant the Petition for Writ of Certiorari to correct this erroneous interpretation, and reverse the decision of the Sixth Circuit.

Conclusion

This case presents several important issues involving fundamental questions regarding whether Article III standing may be extended to RICO plaintiffs who have suffered only derivative injuries as minority shareholders in a limited liability company, thereby contravening the requirement of being “injured in business or property” as set forth in Title 18 U.S.C. Section 1964(c).

No material facts of this case are in dispute. This Court can resolve the questions presented, which will have an important impact on the requirements for standing in civil RICO, by accepting review of this case.

Respectfully submitted this 22nd Day of August,
2014.

Gerald L. Gulley, Jr., Esq.
Counsel of Record

GULLEY & OLDHAM, PLLC

706 Walnut Street
Suite 301
Knoxville, TN 37902
(865) 934-0753
gulleylaw@vol.com

Certificate of Service

I have this 22nd Day of August 2014 caused the foregoing Petition for Writ of Certiorari, pursuant to Rule 29 of the Rules of the Supreme Court, to be served through the United States Postal Service by first-class mail, postage prepaid, on each separately represented party.

Gerald L. Gulley, Jr., Esq.
Counsel of Record

GULLEY & OLDHAM, PLLC
706 Walnut Street
Suite 301
Knoxville, TN 37902
(865) 934-0753
gulleylaw@vol.com