

12-1189
No. _____

Supreme Court, U.S.
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In the Supreme Court of the United States

BRIAN GRANT; CHENEL GRANT; MARTIN PRIBUSH;
DIANE PRIBUSH; BENJAMIN M. COHAN; ROBERT
PINTO; BONNIE PINTO; ESTATE OF LEONARD
SCHONFELD; MORRIS SEAVEY; LARRY KALINER;
LOIS KALINER, and all persons similarly situated,
Petitioners,

v.

FIA CARD SERVICES, d/b/a Bank of America,
Respondent.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Third Circuit*

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether conspiracy claims brought under 18 U.S.C. § 1962 (d) of the Racketeer Influenced And Corrupt Organizations Act (“RICO”), against a bank or credit card company charged with providing funding intended to facilitate an ongoing scheme of fraud in violation of subsection (c) of that Act, are subject to dismissal solely because they fail to allege that the funding company agreed to commit the predicate acts of the RICO scheme.

PARTIES TO THE PROCEEDING

Petitioners

Petitioners are individuals who purchased memberships in defendants' "travel clubs," and later learned that the "memberships" sold to them were worthless. Several of the petitioners were offered and accepted "point of sale" financing for these fraudulent sales from respondent FIA Card Services ("FIA"), and now owe thousands of dollars in credit card debt to FIA for their worthless "memberships."

Petitioners: Brian Grant, Chenel Grant, Martin Pribush, Diane Pribush, Benjamin M. Cohan, Robert Pinto, Bonnie Pinto, Estate of Leonard Schonfeld, Morris Seavey, Larry Kaliner, Lois Kaliner, and all persons similarly situated.

Respondent

Respondent FIA is a credit card company doing business as "Bank of America." Respondent FIA knowingly participated in the fraudulent sale of these "memberships" by providing "point of sale" financing to the scheme's victims, and then refusing to cancel the sales as soon as the victims discovered they had been defrauded.

The parties hereto are listed in the caption which appears on the cover hereof.

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OPINION BELOW

The ruling appealed from is the opinion of the United States Court of Appeals for the Third Circuit in *Grant et al. v. Turner et al.*, No. 11-2760 (November 27, 2012), affirming in part and reversing in part the May 6, 2011 decision of the United States District Court for the District of New Jersey (Brown, U.S.D.J.). The ruling appealed from is unreported and reproduced in the appendix hereto (“App.”) at 1. The Court of Appeals’ *en banc* opinion dated December 28, 2012, denying Plaintiffs’ Motion for Rehearing and Rehearing *en Banc*, is unreported and reproduced at App. 41.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Third Circuit was entered on November 27, 2012. The Court of Appeals’ *en banc* opinion is dated December 28, 2012. This Court’s jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18 United States Code, Section 1962.

Prohibited Activities.

...
(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

rackeeteering 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.

PROCEEDINGS IN THE DISTRICT COURT

Respondents and the other defendants herein, moved in the District Court for dismissal of Petitioners' civil RICO claims on or about May 4, 2010. Respondents' Motion to Dismiss was brought pursuant to Rule 9(b), Fed. R. Civ. P. , and Rule 12(b)(6), Fed. R. Civ. P. In a decision filed on May 6, 2011, the Honorable Garrett Brown, U.S.D.J., Chief Judge of the District of New Jersey, granted defendants' Motions to Dismiss. App. 15.

PROCEEDINGS IN THE COURT OF APPEALS

Petitioners filed an appeal with the Third Circuit Court of Appeals, contending that they satisfied the "particularity" requirements of Rule 9(b), and also satisfied the requirements for pleading their RICO conspiracy claims, pursuant to 18 U.S.C. §1962(d), against respondent FIA. The Court of Appeals affirmed in part and reversed in part, holding that petitioners' RICO claims against the defendants responsible for orchestrating the sales presentations preceding the fraudulent sales to petitioners *did* satisfy the particularity requirements of Rule 9(b), but affirming the district court's dismissal of petitioners' RICO conspiracy claims against respondent FIA, the credit card company that knowingly provided the

funding for many of those fraudulent sales. App. 10. Petitioners filed a timely petition for Rehearing and Rehearing En Banc, but the Court of Appeals denied that petition on December 28, 2012. App. 41.

STATEMENT OF THE CASE

This petition arises from a legal ruling by the Third Circuit Court of Appeals which represents a marked departure from the standard for pleading RICO conspiracy claims established by this Court in *Salinas v. United States*, 522 U.S. 52 (1997), and followed by every other Circuit which has considered it. Indeed, in its decision in *RSM Production Corporation v. Freshfields Bruckhaus Deringer Us, Llp*, 682 F.3d 1043 (D.C. Cir. 2012), just five months before the Third Circuit's decision in this case, the District of Columbia Court of Appeals reached almost the polar *opposite* conclusion from the one reached by the Third Circuit here. The D.C. Circuit Court of Appeals held that that "A defendant [in a RICO conspiracy claim] need not agree to be the one to commit the predicate acts." *Id.* at 1048. The Third Circuit's holding in this case, that a RICO conspiracy claim is subject to dismissal if it fails to allege that the defendants "agreed to commit the predicate acts" (App. 11), signals an apparent split in the Circuits on this important pleading issue. As explained below, if it is permitted to stand, the Third Circuit's ruling in this case could result in the establishment of a virtual shield from liability for RICO conspiracy claims brought under 18 U.S.C. § 1962 (d), particularly for companies who knowingly provide funding that serves to further the illicit objectives of the promoters of a RICO scheme.

The type of funding at issue in this case is commonly referred to as “point of sale” financing. “Point of sale” financing can be central to a scheme of consumer fraud. It enables the promoters of the fraud to achieve their illicit objectives far more quickly, and far more easily. Deceived “buyers” are able to pay thousands of dollars, with the help of “point of sale” financing, *before* they have the chance to research the backgrounds of the fraudulent promoters. By the time they realize they have been defrauded, the victims of the fraud also discover that they have obligated themselves to thousands of dollars in credit card indebtedness which cannot be reversed. In the absence of this “point of sale” financing, the promoters of consumer fraud schemes like the one at issue in this case would succeed in “scamming” far fewer victims than might otherwise be the case.

The defendants in this case are alleged to have carried on a massive scheme of interstate consumer fraud involving the sale of worthless “memberships” in vacation “travel clubs.” Their victims are, for the most part, senior citizens residing throughout the United States. The defendants responsible for orchestrating the sales presentations that preceded the sale of these fraudulent “memberships” include Daryl Turner, Five Points Travel Company, Vacation Clubs, LLC, Dream Vacations International, Dreamworks Vacation Club, Destination Vacations International, Modern Destinations Unlimited, Bentley Travel, and La Bonne Vie Travel (“the Travel Club Defendants”).¹ The Travel

¹ Defendants change names and states as law enforcement authorities close in on them; in the past two years they have

Club Defendants utilized mass mailings, promising free travel rewards, including free airline tickets and free hotel accommodations, to the recipients of those mailings, and urged them to call a toll-free number to claim their “rewards”. Upon dialing the toll-free number, the recipients were told that they could obtain free airline tickets and hotel accommodations by attending the defendants’ sales presentations. At the sales presentations, the Travel Club Defendants allegedly used high-pressure tactics to convince their victims to purchase lifelong “memberships” in their “travel clubs.” The Travel Club Defendants claimed that by joining their travel clubs, petitioners could enjoy, *inter alia*, free travel rewards, and substantially discounted prices for a variety of travel services.

The Travel Club Defendants offered to their prospective victims instant “point of sale” credit card financing, made available to them by otherwise legitimate business enterprises such as Resorts Condominium International (RCI), and defendant FIA Card Services d/b/a Bank of America (“FIA”). In addition to making “instant” sales possible to prospective fraud victims, the availability of this “point of sale” financing from otherwise reputable companies, like respondent FIA, utilizing the trademarks and logos of well-known and highly regarded companies such as Bank of America, provided an invaluable air of legitimacy to the Travel Club Defendants’ fraudulent scheme.

operated on the West Coast under names such as “Travel Service” and “World Travel”.

Petitioners received defendants' promotional mailings and attended defendants' sales presentations, hoping to earn the defendants' promised free travel rewards and ongoing travel discounts. Only after paying anywhere from \$1,000 to nearly \$10,000 each for their "memberships" in defendants' "travel clubs," did petitioners discover that they had been defrauded, and that the enticing picture painted by the defendants was a fantasy. None of the plaintiffs received free airline tickets or free hotel accommodations, despite attending defendants' sales presentations and purchasing memberships in defendants' travel clubs. None of the plaintiffs enjoyed any of the "discounts" that defendants promised on travel-related services. Instead, plaintiffs were left with thousands of dollars in credit card debt, or discovered that their cash payments of thousands of dollars had purchased nothing.

The availability of "point of sale" financing to prospective victims was not only *central* to the fraudulent scheme, it was in many cases determinative. By way of example, plaintiff Leonard Schonfeld, who was over eighty years old at the time, was convinced to purchase a travel club membership from the Travel Club Defendants only after he learned that they had a business relationship with FIA, d/b/a Bank of America. Plaintiff Schonfeld invested more faith in the representations of the Travel Club Defendants after he learned that FIA had authorized them to issue credit cards for the purpose of selling their travel club memberships. Had FIA refused to authorize the Travel Club Defendants to issue "point of sale" credit card financing on their behalf, plaintiff Schonfeld would *not* have purchased a "membership" in

Vacation Travel Club. Second Amended Complaint (“SAC”), ¶¶ 89-90.

Although it reversed the decision of the District Court decision dismissing plaintiffs’ RICO claims against the Travel Club Defendants, the Court of Appeals *upheld* the District Court’s dismissal, *inter alia*, of plaintiffs’ RICO conspiracy claims against respondent FIA. Significantly, in its ruling dismissing petitioners’ RICO conspiracy claims against respondent FIA, under 18 U.S.C. § 1962 (d), The Court of Appeals stated that:

“Plaintiffs’ SAC makes no allegation that the Credit Card Defendants agreed to commit the predicate acts of mail and wire fraud. Therefore, the RICO conspiracy claim was appropriately dismissed as to FIA Card Services.”

App. 11 (emphasis supplied).

As noted above, however, and as the Court of Appeals itself noted in its Opinion, petitioners did allege in their SAC that respondent FIA was fully aware from early 2009 onward that they were playing a central role in an interstate scheme of consumer fraud, providing “point-of- sale” financing (a) as a means of financing the purchase of the Travel Club Defendants’ fraudulent “memberships” by petitioners and their putative class, and (b) as a means of lending an air of “legitimacy” to their fraudulent scheme. (App. 3, 6). Thus, there can be no doubt that the SAC charged respondent FIA with adopting and furthering the goals of the Travel Club Defendants’ fraudulent RICO scheme.

Defendants filed motions for dismissal pursuant to Fed. R. Civ. P. 9(b) and Rule 12(b)(6), Fed. R. Civ. P., on May 4, 2010. The District Court for the District of New Jersey (Garrett E. Brown, Jr., U.S.D.J.), granted dismissal with prejudice on May 9, 2011 as to all defendants except Vacation Travel Club, which was dismissed with prejudice on May 24, 2011. Plaintiffs appealed these dismissals to the United States Court of Appeals for the Third Circuit, which on November 27, 2012, *reversed* and *vacated* as to the Travel Club Defendants, but affirmed as to defendant FIA. On December 10, 2012, plaintiffs-petitioners filed a Petition for Rehearing and Rehearing en Banc as to FIA and one other defendant, which the Court of Appeals denied on December 28, 2012.

This petition follows.

REASONS FOR ALLOWANCE OF THE WRIT

The ruling of the Third Circuit Court of Appeals in this case, affirming dismissal of petitioners' RICO conspiracy claims against respondent FIA, presents a question of exceptional importance, because the Court applied a pleading standard to the RICO conspiracy claims asserted against that defendant which represents a marked departure from the pleading standard applied to RICO conspiracy claims by this Court in *Salinas*, and by every other Circuit that has ruled upon that standard. See, e.g., *United States v. Fernandez*, 388 F.3d 1199, 1229 (9th Cir. 2004); *RSM Production Corporation v. Freshfields Bruckhaus Deringer Us, LLP*, 682 F.3d 1043, at 1048. Ironically, the Court of Appeals applied this stricter pleading standard even though, as the alleged provider of "point

of sale” financing to the promoters of a RICO scheme the Court acknowledged to be adequately pled itself, defendant FIA played a far simpler and more readily understandable role in furthering the fraudulent scheme at issue than did the other RICO defendants.

In fact, the allegations of the SAC and RICO Case Statement at issue in this appeal are extremely straightforward. Plaintiffs were sold worthless travel club memberships consisting of false promises that the defendants had no intention of ever delivering. The defendants who perpetrated this scheme were allegedly assisted hand in glove by respondent FIA, d/b/a Bank of America, an otherwise legitimate credit card company which continued to assist the Travel Club Defendants long after it became aware of the fraudulent nature of the latter’s marketing scheme, and *its own role* in perpetuating that fraud.

As explained below, it is beyond cavil that the allegations of petitioners’ SAC and RICO Case Statement included allegations that this Court, and virtually every other Circuit, including the Third Circuit itself, would have found to be sufficient to avoid dismissal of RICO conspiracy claims against virtually every other type of defendant. This Court has not yet issued a decision that provides guidelines for the type of allegations that would be required to sustain RICO conspiracy claims in a case like this one, asserting that a credit-card company knowingly and willfully assisted in a scheme of fraud by providing for the availability of “point of sale” financing for its victims, to a group of other defendants engaged in the fraudulent sale of consumer goods or services. However, based upon the Court’s other decisions regarding the pleading of

conspiracy claims, there is no reason to believe the Court would sanction the Third Circuit's application of a *higher* standard to the pleading of conspiracy claims against a bank or credit card company that knowingly provides funding for a RICO scheme, than is applied to other defendants.

I. Review Is Warranted, Because The Third Circuit's Ruling Creates A Split Among The Circuits Regarding The Pleading Of RICO Conspiracy Claims.

As noted above, in its ruling *affirming* dismissal of petitioners' RICO conspiracy claims against respondent FIA Card Services, the Third Circuit held that:

"Plaintiffs' SAC makes no allegation that the Credit Card Defendants agreed to commit the predicate acts of mail and wire fraud. Therefore, the RICO conspiracy claim was appropriately dismissed as to FIA Card Services."

App. 11 (emphasis supplied).

This holding is in *direct conflict* with this Court's ruling in *Salinas v. United States*, 522 U.S. 52 (1997), which held that:

[a] conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor. He may do so in any number of ways short of agreeing to undertake all of the acts necessary for the crime's

completion. One can be a conspirator by agreeing to facilitate only some of the acts leading to the substantive offense.

Id., 522 U.S. at 65 (emphasis added).

Similarly, as noted above, the District of Columbia Court of Appeals reached precisely the *opposite* conclusion in its ruling in *RSM Production Corporation v. Freshfields Bruckhaus Deringer Us, Llp*, 682 F.3d 1043. *Id.* at 1048.

Here, in their SAC, petitioners specifically allege that “[t]he Credit Card Defendants [including FIA] are aware of the fraud being perpetrated by the Travel Club Defendants, yet they continue to willingly participate in their fraudulent scheme by providing “point of sale” credit card financing to prospective victims of the fraud.” SAC, ¶ 4. The Third Circuit’s holding that this allegation was *not* sufficient to satisfy the requirements for pleading a RICO conspiracy claim against respondent FIA flies in the face of this Court’s ruling in *Salinas*. *Cf. Salinas*, 522 U.S. at 64 (“[i]f conspirators have a plan which calls for some conspirators to perpetrate the crime and others to provide support, *the supporters are as guilty as the perpetrators...*”) (emphasis supplied).

The Third Circuit’s ruling in this case, seeking to limit liability under 18 U.S.C. § 1962(d) to those who “*agreed to commit the predicate acts*” of the RICO violation (App. 11, emphasis supplied), effectively reasserts the so-called “operation and management” test, an approach to liability for conspiracy under 18 U.S.C. § 1962(d) which has been discredited since its

implicit rejection by this Court in *Salinas*, and now been rejected by every other circuit which has considered this pleading issue, since the date *Salinas* was decided. See, e.g., *United States v. Fernandez*, 388 F.3d 1199, 1229, noting that the so-called “operation and management” test, applicable prior to *Salinas* is “no longer good law.” (“In *Salinas*, a unanimous decision...the Supreme Court held that a sheriff’s deputy could be convicted of conspiracy under § 1962(d) for his role in a scheme that violated the federal bribery statute *even though he neither committed nor agreed to commit the predicate acts that are required for a substantive violation of § 1962(c)*); see also, *Minnesota Insurance Co. v. Philpot*, 2012 U.S. Dist. LEXIS 139595, *30 (S.D. Cal. Sept. 27, 2012) (citing *Fernandez*, and holding that defendants were *not* entitled to dismissal of the RICO claims against them, on the grounds that “the mere act of providing funding to the entity is not the type of participation sufficient to trigger liability under § 1962(c)”).

In fact, in its own earlier opinion in *Smith v. Berg*, 247 F.3d 532 (3d Cir. 2001), *the Third Circuit itself* stated unequivocally that:

We hold that any reading of *United States v. Antar* to the effect that conspiracy liability under section 1962(d) extends only to those who have conspired personally to operate or manage the corrupt enterprise, *or otherwise suggesting that conspiracy liability is limited to those also liable, on successful completion of the scheme, for a substantive violation under section 1962(c), is inconsistent with the broad application of*

general conspiracy law to section 1962(d) as set forth in Salinas.

Smith v. Berg, 247 F.3d 532, 534 (emphasis supplied)

The Third Circuit's marked departure from the principles set forth by this Court in *Salinas*, and in its own prior ruling in *Smith v. Berg*, can be explained in only one of two ways: either the Third Circuit has concluded that there is a *different* standard for pleading of RICO conspiracy claims applicable to banks and/or credit card companies who provide "point of sale" financing, to facilitate an ongoing scheme of consumer fraud, or the Court has decided to *abandon* its prior ruling in *Smith*. Either way, in light of the Third Circuit's blatant violation of this Court's ruling in *Salinas*, and its marked departure from the standard for pleading of a RICO conspiracy claim now recognized in virtually every other Circuit which has considered this issue, the Court should grant the petition for a writ of certiorari on that basis alone.

II. Review Is Also Warranted Because The Issue Of How Rule 8(a)'s Pleading Requirements Can Be Satisfied, With Respect To Conspiracy Claims Asserted Against Defendants Who Knowingly Provide Funding For Schemes That Violate 18 U.S.C. § 1962(c), Is A Question Of Exceptional Importance.

Plaintiffs respectfully submit that, given the potentially critical significance of "point of sale" financing, and other forms of funding utilized in the promotion and marketing of RICO schemes in violation of 18 U.S.C. § 1962(c), the Court should either reject

the Third Circuit's ruling outright, with respect to the RICO conspiracy claims asserted against respondent FIA in this case, or provide guidelines for satisfying the requirements of Rule 8(a) in the pleading of RICO conspiracy claims against the banks and credit card companies that knowingly provide such funding. Indeed, this Court can take judicial notice of the fact that the "success" of a RICO scheme may often depend upon the ability of its perpetrators to "close the deal" on a fraudulent sale as quickly as possible. "Point of sale" financing, for example, the form of funding involved in this case, enables the promoters of RICO schemes directed at consumers to achieve that illicit objective by completing sales far more quickly, far more easily, and on a far greater number of occasions than might otherwise be the case. Many fraud victims, if given only a few additional hours, or a single day to research the scam being foisted upon them, would be able to escape the clutches of fraudulent promoters. However, when "point of sale" financing is made readily available by an otherwise legitimate bank or credit card company that added time for sober reflection is removed from the equation. As a result, the victim fails to learn about the fraud until the day *after* a deceptive contract is signed, and it is "too late."

That is precisely the role played by respondent FIA in this case, for the "benefit" of the Travel Club defendants. FIA's "point of sale" financing gave the Travel Club Defendants the ability to instantly target senior citizens like plaintiff Leonard Schoenfeld (now deceased), who was more than 80 years old at the time he was victimized by the "travel club" scam at issue in this case. And, as noted in petitioners' SAC and RICO Case Statement, there is ample evidence to indicate

that defendant FIA had been told over and over that its “point of sale” financing was enabling the Travel Club Defendants to achieve their illicit objectives. SAC ¶¶ 92-94. The Third Circuit’s ruling in this case raises the question of precisely *how* the standard for pleading a RICO conspiracy claim can be satisfied, if at all, against banks or credit card companies who *knowingly* assist in the perpetration of RICO schemes in violation of 18 U.S.C. § 1962(c), by providing such “point of sale” financing long *after* they have been placed on “notice” of the fact that they are doing so. That is a question of exceptional importance which should be answered by this Court for the benefit of other senior citizens throughout the United States who, like the late Mr. Schoenfeld, may become the targets of similar schemes in violation of the RICO statute.

Petitioners’ appendix on appeal to the Third Circuit contained exhibits to the SAC, demonstrating unequivocally that respondent FIA received not merely telephone calls, but numerous *written* complaints from plaintiffs Bonnie Pinto, Benjamin Cohan and Leonard Schonfeld on, respectively, January 19, February 6, February 24 and March 20, 2009, detailing the Travel Club Defendants’ fraudulent scheme, specifically what they promised and what Pinto, Cohan and Schonfeld never received, and the specific role of defendant FIA in perpetrating this fraud. The letters at issue, which were attached as Exhibits to the SAC, stated as follows, in pertinent part:

February 6, 2009
WorldPoints
PO Box 15071
Wilmington DE 19850-5071

Att: Deborah Guerin-Murphy

...

Please be advised that I am still disputing \$4,463.00 charges from Dreamworks Vacation Club ...

Absolutely no services were rendered or received by me.

At the end of November we tried to schedule a trip and I realized that the services that we were promised would not be granted. ... From December 1st to the 4th, 2008 I tried contacting the merchant phone numbers to no avail.

...

I had a comfort level at the beginning because I thought that Bank of America was in some way associated with this program. ... There were three different people that spoke to us and were used to get us to sign the agreement. See enclosed Ripoff reports.

...

Yours very truly,

Leonard Schonfeld
Natalie Schonfeld

(*Id.*, underlining emphasis supplied (bold emphasis in original)).

BY US MAIL (Receipt Requested)
3/20/09
Bank of America
Attn: Billing Inquiries
PO Box 15026
Wilmington DE 19850-5026

FBI Duty Agent
600 Arch St., 8th Fl.
Phila. PA 19106

Re: Directive to stop payment to Dreamworks
Vacation Club d/b/a Five Points Travel;
Customer scammed/defrauded; contract
unilaterally rescinded; merchandise
returned to vender; MasterCard account
number [REDACTED]

To Whom it may concern at Bank of America
and the FBI:

On March 10, 2009, my wife (REDACTED)
and I attended a high pressure sales
presentation at a travel agency d/b/a "Five
Points travel" (FPT) . . . FPT solicited us by mail
with the lure of a "free" vacation sponsored by a
business called "Millennium Travel". Because of
the extraordinary and problematic restrictions
and conditions placed on the "free" vacation
offer, *which FPT failed to fully disclose*, the gift
is of no value to us, and we have no intention of
using it . . . *AND testimonial evidence of*

FPT/DWV's pattern and practice of fraud and dishonesty against many other folks, some of whom are going to small claims court over it . . .

. . .

Mr. Bernstein instead solicited Mastercard credit on my behalf – for the *sole* purpose of conducting the subject transaction . . . Mr. Bernstein: 1) illegally solicited me at 9:30 pm under duress, while I was sick and medicated; 2) he failed to provide us with *any* of the customary requisite written terms and conditions of credit, and simply stated in passing that he believed it was a 2.9% interest rate – but nothing else; . . . 3) He failed to provide me with a copy of my Mastercard application (claiming that it had been shredded), along with the bank contact information, full credit card number, and other pertinent information -- making it very difficult to discern this scam in a timely manner; 4) *Most importantly*, Mr. Bernstein/FPT illegally routed or assigned the receivables to an undisclosed 3rd party (“Dreamworks Vacation Club” or “DVC”),

. . .

. . . [B]ecause this matter involved mail and credit card fraud, I am referring this matter to the financial fraud division of the US Attorney's office (Eastern District). Thank you for cooperating with them if they open an investigation.

. . .

Sincerely,

Benjamin M. Cohan, Esq.

(*Id.*, underling emphasis supplied).

January 19, 2009

Bank of America
P.O. Box 15026
Wilmington, DE 19850-5026

I am writing to dispute the charge on my credit card for \$3,963 from DREAMWORKS VACATION . . . Upon contacting the Attorney Generals Office of NJ, we were advised that there is already an on going investigation of this company. I have attached a copy of an e-mail I received from their office where they state ... ***“Please forward this e-mail to the credit card company so that they are aware of the ongoing investigation”.***

...

Sincerely,

Bonnie Pinto

(*Id.*, v.2, at 10, emphasis in original).

February 24, 2009

WorldPoints
c/o Bank of America
P.O. Box 15071
Wilmington, DE 19850-5071

...

As I stated in my original dispute letter,

FIVE POINTS/DREAMWORKS TRAVEL IS BEING INVESTIGATED BY THE NJ ATTORNEY GENERALS OFFICE. I had attached a copy of the e-mail I received from the, along with contact information. *Did your office try to contact them?* The Attorney General's office would not get involved unless they had received numerous complaints and a good reason to investigate, such as FRAUD.

Very truly yours,
Bonnie Pinto

(*Id.*, emphasis in original).

In view of these letters, it is clear that the plaintiffs did not merely “*call*”[] to dispute charges or obtain refunds”, as the Court of Appeals asserted in its Opinion of November 27, 2012 (App. 6, emphasis added). Instead, Plaintiffs wrote to defendant FIA Card Services, N.A., *four times* in early 2009 to advise FIA that many large “travel club purchases” to which it was then a processing partner were under investigation by the New Jersey Attorney General and the U.S. Attorney for the Eastern District. The letters which FIA sent in answer to the Plaintiffs unmistakably indicated FIA’s willful refusal to acknowledge either the ongoing existence of the fraud, or its own role in it.

If the four plaintiffs in this case submitted these letters to respondent FIA, in all likelihood hundreds, if

not thousands of other victims of the fraudulent scheme submitted similar letters as well. Nonetheless, defendant FIA saw fit to continue processing these fraudulent sales of “memberships” in the defendants’ “travel clubs,” long after they received these complaints.

Adding to the Petitioners’ injuries, unlike other credit card companies *inadvertently* involved in the fraud, respondent FIA flatly refused to refund moneys stolen by the Travel Club Defendants, and refused to cancel disputed charges. After the filing of plaintiffs’ initial Complaint, in an obvious effort to undermine plaintiffs’ collective effort to obtain class-wide relief, defendant FIA *did* provide refunds to “certain” plaintiffs, such as Martin and Diane Pribush and Brian and Chenel Grant. (SAC ¶ 91). However, they did so only on a selective and apparently arbitrary basis.

These letters, and the petitioners’ specific allegations detailing specific transactions in which defendant FIA provided “point of sale” financing (SAC ¶¶ 31-32, 89-93, 71-72); RICO Case Statement ¶ 2, at 5, *id.* ¶ 5f, at 29, *id.* ¶ 5g, at 30-31, *id.* ¶ 6b, at 32-33, *id.* ¶ 14 at 38, beg the question: if this information does not supply the “plausibility” element required, for pleading a RICO conspiracy claim, pursuant to this Court’s rulings in *Salinas*, *Twombly* and *Iqbal*,² what *possible* additional allegations could Plaintiffs provide, absent any pretrial discovery, in connection with the

² Reference is to the Court’s rulings in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

pleading of its RICO conspiracy claims against a credit card company like respondent FIA, in order to make plausible RICO conspiracy claims like those asserted by petitioners in this case? The Court should review this case, to make clear that its rulings in *Salinas*, *Twombly* and *Iqbal*, taken together, do *not* permit dismissal of a RICO conspiracy claim against a company that furthers the objectives of the conspiracy by supplying funding integral to its promotion, merely for its failure to allege that “the funding company agreed to commit the predicate acts of the RICO scheme.”

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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