08-5185-cv

United States Court of Appeals

for the

Second Circuit

HANA AHMED KARIM, RANJDAR MUSTAFA HASAN, REBAR JAHUR ISMAIL, HERISH SAID ALI, KARZAN SHERKO TOFIA, FARHAD M. MURASL, HERISH HASSAN YOUSIF, on behalf of themselves and others similarly situated, ZHEAR YOUSIF KAREEM,

Plaintiffs-Appellants,

– v. –

AWB LIMITED, BNP PARIBAS, AWB (U.S.A.) LIMITED, COMMODITY SPECIALISTS COMPANY,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK, 06-CV-15400-GEL

REPLY BRIEF OF PLAINTIFFS-APPELLANTS

JOSHUA D. GLATTER
GARY M. OSEN
ARI UNGAR
OSEN LLC
700 Kinderkamack Road
Oradell, New Jersey 07649
Tel.: (201) 265-6400
Fax: (201) 265·0303
jdg@osen.us

KEVIN P. RODDY
DANIEL R. LAPINSKI
PAMELA GOLD-ZAFRA
WILENTZ, GOLDMAN & SPITZER, P.A.
90 Woodbridge Center Drive
Woodbridge, New Jersey 07095
Tel.: (732) 636-8000
Fax: (732) 726-6686
kroddy@wilentz.com

Attorneys for Plaintiffs-Appellants
(For Continuation of Appearances See Inside Cover)

JAMES P. BONNER
SHALOV, STONE, BONNER & ROCCO LLP
485 Seventh Avenue, Suite 1000
New York, New York 10018
Tel.: (212) 239-4340
Fax: (212) 239-4310
jbonner@lawssb.com

JAY NELKIN
NELKIN & NELKIN P.C.
5417 Chaucer Drive
Houston, Texas 77005
Tel.: (713) 526-4500
Fax: (713) 526-8915
jnelkin@nelkinpc.com

C. TAB TURNER
TURNER & ASSOCIATES, P.A.
4705 Somers Avenue, Suite 100
North Little Rock, Arkansas 72116
Tel.: (501) 791-2277
Fax: (501) 791-1251
tab@tturner.com

Attorneys for Plaintiffs-Appellants

TABLE OF CONTENTS

Page

ARGUMENT 1

A Plaintiffs Properly Alleged Their Standing To Sue Under Article III 1

1. The Oil-For-Food Programme Did Not Grant Complete Discretion To The Hussein Regime 1

2. Plaintiffs' Status As Third-Party Beneficiaries, Under Both Contract And Trust Law, Demonstrates Their Standing To Sue 6

3. A Valid Trust Existed And Plaintiffs' Trust Claims Are Viable Under New York Law 7

4. Class Members Were Specified Intended Beneficiaries Of The Programme With Concrete Benefits And Not Potential Or Possible Beneficiaries Whose Benefits Were Amorphous And Undefined 9

5. Plaintiffs Do Not Lack Authority To Seek Relief For The Damages They Have Suffered 13

B Plaintiffs Properly Allege RICO Standing 15

1. Plaintiffs Allege Each Element Of Their RICO Claims 15

2. Plaintiffs Allege Defendants' "Conduct" Of The "Enterprises" 18

3. Plaintiffs Allege Defendants' "Pattern Of Racketeering Activity" 21

4. Plaintiffs Allege RICO Standing 25

C The District Court May Properly Exercise Subject Matter Jurisdiction Over Plaintiffs' RICO Claims 27

TABLE OF CONTENTS

D Plaintiffs' Amended Complaint Was Not Subject To Dismissal On Grounds Of *Forum Non Conveniens* 32

CONCLUSION 39

#3875821 (150583.002)

TABLE OF AUTHORITIES

Page(s)

Cases:

Agudas Chasidei Chabad of United States v. Gourary,
833 F.2d 431 (2d Cir. 1987)....................8, 9

Alco Gravure, Inc. v. Knapp Foundation,
64 N.Y.2d 458, 490 N.Y.S.2d 116, 479 N.E.2d 752 (1985)....................14

Am. Med. Ass'n v. United Healthcare Corp.,
2006 WL 3833440 (S.D.N.Y. Dec. 29, 2006)....................17

AWB Ltd. v. Breakbulk Marine Serv., Ltd.,
No. 07 Civ. 04011 (PLK) (S.D.N.Y.)....................*passim*

Ayyash v. Bank Al-Medina,
2006 WL 587342 (S.D.N.Y. Mar. 9, 2006).................... 28, 29, 30

Azrielli v. Cohen Law Offices,
21 F.3d 512 (2d Cir. 1994).................... 16, 21

Baisch v. Gallina,
346 F.3d 366 (2d Cir. 2003)....................26

Bank of Crete, S.A. v. Koskotas,
1991 WL 177287 (S.D.N.Y. Aug. 30, 1991)....................31

Bank of New York Trust, N.A. v. Franklin Advisors, Inc.,
522 F. Supp. 2d 632 (S.D.N.Y. 2007)....................4

Basciano v. Herkimer,
605 F.2d 605 (2d Cir. 1978)....................10

Bodner v. Banque Paribas,
114 F. Supp. 117 (E.D.N.Y. 2000).................... 36, 37

Bridge v. Phoenix Bond & Indem. Co.,
128 S. Ct. 2131 (2008)....................27

Cash v. Titan Fin. Svcs., Inc.,
58 A.D.3d 785, 873 N.Y.S.2d 642 (2d Dep't 2009).................... 7-8

TABLE OF AUTHORITIES

Cedric Kushner Promotions, Ltd. v. King,
533 U.S. 158 (2001) 20

Cerasani v. Sony Corp.,
991 F. Supp. 343 (S.D.N.Y. 1998) 35

City of N.Y. v. Smokes-Spirits.Com,
541 F.3d 425 (2d Cir. 2008) 17, 19, 25, 27

Cofacredit, S.A. v. Windsor Plumbing Supply Co.,
187 F.3d 229 (2d Cir. 1999) 16

Commercial Cleaning Svcs. v. Colin Serv. Sys., Inc.,
271 F.3d 374 (2d Cir. 2001) 17

Consarc Corp. v. Marine Midland Bank, N.A.,
996 F.2d 568 (2d Cir. 1993) 4

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006) 10, 13

Day v. Apoliona,
496 F.3d 1027 (9th Cir. 2007) 15

DeFalco v. Bernas,
244 F.3d 286 (2d Cir. 2001) 23, 24

Doe v. Pataki,
481 F.3d 69 (2d Cir. 2007) 1

First Capital Asset Mgmt. v. Satinwood, Inc.,
385 F.3d 159 (2d Cir. 2004) 19, 21

Flickinger v. Harold C. Brown & Co.,
947 F.2d 595 (2d Cir. 1991) 7

Fourth Ocean Putnam Corp. v. Interstate Wrecking Corp.,
66 N.Y.2d 38, 495 N.Y.S.2d 1, 485 N.E.2d 208 (1985) 10, 13

GICC Capital Corp. v. Technology Finance Group, Inc.,
67 F.3d 463 (2d Cir. 1995) 23

TABLE OF AUTHORITIES

Glusband v. Fittin Cunningham Lauzon, Inc.,
582 F. Supp. 145 (S.D.N.Y. 1984)....................14

Goldberg v. Kelly,
397 U.S. 254 (1970)....................11

Hack v. President & Fellows of Yale College,
237 F.3d 81 (2d Cir. 2000)....................7

Hammitte v. Leavitt,
2007 WL 3013267 (E.D. Mich. Oct. 11, 2007)....................13

Ideal Steel Supply Corp. v. Anza,
373 F.3d 251 (2d Cir. 2004)....................26

Iragorri v. United Techs. Corp.,
274 F.3d 65 (2d Cir. 2001)....................33, 35-36, 39

Johnson Elec. N. Am. v. Mabuchi Motor Am. Corp.,
98 F. Supp. 2d 480 (S.D.N.Y. 2000).................... 28, 31

Kapps v. Wing,
404 F.3d 105 (2d Cir. 2005).................... 10, 11, 13

Kensington Int'l Ltd. v. Société Nationale des Pétroles du Congo,
No. 05 Civ. 5101, 2006 WL 846351 (S.D.N.Y. Mar. 31, 2006)............ 24, 26, 28

Laudes Corp. v. United States,
84 Fed. Cl. 298 (Fed. Cl. 2008)....................8

Lerner v. Fleet Bank, N.A.,
318 F.3d 113 (2d Cir. 2003).................... 17, 26, 27

Madanes v. Madanes,
981 F. Supp. 241 (S.D.N.Y. 1997)....................31

Mastafa v. Australian Wheat Bd., Ltd.,
2008 WL 4378443 (S.D.N.Y. Sept. 25, 2008)....................36

Medellin v. Texas,
128 S. Ct. 1346 (2008)....................1

#3875821 (150583.002)

TABLE OF AUTHORITIES

Morrow v. Black,
742 F. Supp. 1199 (E.D.N.Y. 1990) 25

N.S. Fin. Corp. v. Al-Turki,
100 F.3d 1046 (2d Cir. 1996)..28

Nat'l Group for Commc'n & Computers, Ltd. v. Lucent Tech., Inc.,
420 F. Supp. 2d 253 (S.D.N.Y. 2006)..31

National Org. for Women v. Scheidler,
510 U.S. 249 (1994) 25

National Union Fire Ins. Co. v. Proskauer Rose Goetz & Mendelsohn,
165 Misc. 2d 539, 634 N.Y.S.2d 609 (Sup. Ct. 1994)..8

New York Citizens Comm. on Cable TV v. Manhattan Cable TV, Inc.,
651 F. Supp. 802 (S.D.N.Y. 1986).. 10, 11, 13

Norex Petroleum, Ltd. v. Access Indus., Inc.,
2007 WL 2766731 (S.D.N.Y. Sept. 24, 2007).. *passim*

Northrop v. Hoffman of Simsbury, Inc.,
134 F.3d 41 (2d Cir. 1997)..7

OSRecovery, Inc. v. One Groupe Int'l, Inc.,
354 F. Supp. 2d 357 (S.D.N.Y. 2005)..21

Pelt v. Utah,
104 F.3d 1534 (10th Cir. 1996) 15

Pitt County v. Hotels.com, L.P.,
553 F.3d 308 (4th Cir. 2009)..5

Price v. Akaka,
3 F.3d 1220 (9th Cir. 1993)..15

Procter & Gamble Co. v. Big Apple Indus. Bldgs., Inc.,
879 F.2d 10 (2d Cir. 1989)..23

Rega v. United States,
263 F.3d 18 (2d Cir. 2001)..19

#3875821 (150583.002)

TABLE OF AUTHORITIES

Republic of Colombia v. Diageo N. Am., Inc.,
531 F. Supp. 2d 365 (E.D.N.Y. 2007) .... *passim*

Reves v. Ernst & Young,
507 U.S. 170 (1993) 20

Sea Trade Co. Ltd. v. FleetBoston Financial Corp.,
2008 WL 4129620 (S.D.N.Y. Sept. 4, 2008)... 13-14

Sedima, S.P.R.L. v. Imrex Co.,
473 U.S. 479 (1985) 16, 25

Selevan v. N.Y. Thruway Auth.,
470 F. Supp. 2d 158 (N.D.N.Y. 2007) 13

Solutia, Inc. v. FMC Corp.,
385 F. Supp. 2d 324 (S.D.N.Y. 2005)..13

Standardbred Owners Ass'n v. Roosevelt Raceway Assocs., L.P.,
985 F.2d 102 (2d Cir. 1993)..26

Sun Life Assur. Co. of Canada (U.S.) v. Gruber,
2007 WL 4457771 (S.D.N.Y. Dec. 14, 2007) 9

Thai Airways Int'l Ltd. v. United Aviation Leasing B.V.,
842 F. Supp. 1567 (S.D.N.Y. 1994), *aff'd,* 59 F.3d 20 (2d Cir. 1995)......... 28, 31

United States v. Approx. $25,829,681.80,
1999 WL 1080370 (S.D.N.Y. Nov. 30, 1999)...31

United States v. Aulicino,
44 F.3d 1102 (2d Cir. 1995).. 24, 25

United States v. Busacca,
936 F.2d 232 (6th Cir. 1991)..25

United States v. Chalmers,
474 F. Supp. 2d 555 (S.D.N.Y. 2007)... 3, 4, 6

United States v. Coiro,
922 F.2d 1008 (2d Cir. 1991)..24

TABLE OF AUTHORITIES

United States v. Eppolito,
543 F.3d 25 (2d Cir. 2008)....................16

United States v. Indelicato,
865 F.2d 1370 (2d Cir. 1989)....................24

United States v. Turkette,
452 U.S. 576 (1981)....................16

United States v. Viola,
35 F.3d 37 (2d Cir. 1994).................... 20-21

Westinghouse Credit Corp. v. D'Urso,
278 F.3d 138 (2d Cir. 2002)....................8

Williams v. Mohawk Indus.,
465 F.3d 1277 (11th Cir. 2006) 27

World Wrestling Entm't, Inc. v. Jakks Pacific, Inc.,
530 F. Supp. 2d 486 (S.D.N.Y. 2007).................... 17, 24

Zito v. Leasecomm Corp.,
2004 WL 2211650 (S.D.N.Y. Sept. 30, 2004)....................18

Zito v. Leasecomm Corp.,
2003 WL 22251352 (S.D.N.Y. Sept. 30, 2003)....................19

Statutes and Other Authorities:

15 U.S.C. § 78dd-1....................22

18 U.S.C. § 2 21

18 U.S.C. § 1952 .... 21, 22

18 U.S.C. § 1956 .... 21, 22

18 U.S.C. § 1957 .... 21, 22

18 U.S.C. § 1961(5) 22

TABLE OF AUTHORITIES

18 U.S.C. § 1962(c) .... *passim*

18 U.S.C. § 1962(d) 16

18 U.S.C. § 1964(c) 25

28 U.S.C. § 1331 27

RESTATEMENT (SECOND) OF CONTRACTS (1981) 9-10

RESTATEMENT (SECOND) OF LAW OF TRUSTS § 199 (1959)....................................15

Jeffrey A. Meyer & Mark G. Califano, *Good Intentions Corrupted: The Oil-for-Food Program and the Threat to the U.N.* (2006)..30

William Safire, "Tear Down This U.N. Stonewall," *N.Y. Times*, June 14, 2004 35

TABLE OF CONTENTS

Page

ARGUMENT 1

A Plaintiffs Properly Alleged Their Standing To Sue Under Article III 1

1. The Oil-For-Food Programme Did Not Grant Complete Discretion To The Hussein Regime 1

2. Plaintiffs' Status As Third-Party Beneficiaries, Under Both Contract And Trust Law, Demonstrates Their Standing To Sue 6

3. A Valid Trust Existed And Plaintiffs' Trust Claims Are Viable Under New York Law 7

4. Class Members Were Specified Intended Beneficiaries Of The Programme With Concrete Benefits And Not Potential Or Possible Beneficiaries Whose Benefits Were Amorphous And Undefined.................... 9

5. Plaintiffs Do Not Lack Authority To Seek Relief For The Damages They Have Suffered 13

B Plaintiffs Properly Allege RICO Standing 15

1. Plaintiffs Allege Each Element Of Their RICO Claims 15

2. Plaintiffs Allege Defendants' "Conduct" Of The "Enterprises" 18

3. Plaintiffs Allege Defendants' "Pattern Of Racketeering Activity"... 21

4. Plaintiffs Allege RICO Standing 25

C The District Court May Properly Exercise Subject Matter Jurisdiction Over Plaintiffs' RICO Claims 27

TABLE OF CONTENTS

D Plaintiffs' Amended Complaint Was Not Subject To Dismissal On Grounds Of *Forum Non Conveniens* 32

CONCLUSION 39

TABLE OF AUTHORITIES

Page(s)

Cases:

Agudas Chasidei Chabad of United States v. Gourary,
833 F.2d 431 (2d Cir. 1987)....................8, 9

Alco Gravure, Inc. v. Knapp Foundation,
64 N.Y.2d 458, 490 N.Y.S.2d 116, 479 N.E.2d 752 (1985)....................14

Am. Med. Ass'n v. United Healthcare Corp.,
2006 WL 3833440 (S.D.N.Y. Dec. 29, 2006)....................17

AWB Ltd. v. Breakbulk Marine Serv., Ltd.,
No. 07 Civ. 04011 (PLK) (S.D.N.Y.)....................*passim*

Ayyash v. Bank Al-Medina,
2006 WL 587342 (S.D.N.Y. Mar. 9, 2006).................... 28, 29, 30

Azrielli v. Cohen Law Offices,
21 F.3d 512 (2d Cir. 1994).................... 16, 21

Baisch v. Gallina,
346 F.3d 366 (2d Cir. 2003)....................26

Bank of Crete, S.A. v. Koskotas,
1991 WL 177287 (S.D.N.Y. Aug. 30, 1991)....................31

Bank of New York Trust, N.A. v. Franklin Advisors, Inc.,
522 F. Supp. 2d 632 (S.D.N.Y. 2007)....................4

Basciano v. Herkimer,
605 F.2d 605 (2d Cir. 1978)....................10

Bodner v. Banque Paribas,
114 F. Supp. 117 (E.D.N.Y. 2000).................... 36, 37

Bridge v. Phoenix Bond & Indem. Co.,
128 S. Ct. 2131 (2008)....................27

Cash v. Titan Fin. Svcs., Inc.,
58 A.D.3d 785, 873 N.Y.S.2d 642 (2d Dep't 2009).................... 7-8

TABLE OF AUTHORITIES

Cedric Kushner Promotions, Ltd. v. King,
533 U.S. 158 (2001) 20

Cerasani v. Sony Corp.,
991 F. Supp. 343 (S.D.N.Y. 1998)..35

City of N.Y. v. Smokes-Spirits.Com,
541 F.3d 425 (2d Cir. 2008).. 17, 19, 25, 27

Cofacredit, S.A. v. Windsor Plumbing Supply Co.,
187 F.3d 229 (2d Cir. 1999)...16

Commercial Cleaning Svcs. v. Colin Serv. Sys., Inc.,
271 F.3d 374 (2d Cir. 2001)...17

Consarc Corp. v. Marine Midland Bank, N.A.,
996 F.2d 568 (2d Cir. 1993)...4

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006) 10, 13

Day v. Apoliona,
496 F.3d 1027 (9th Cir. 2007) 15

DeFalco v. Bernas,
244 F.3d 286 (2d Cir. 2001).. 23, 24

Doe v. Pataki,
481 F.3d 69 (2d Cir. 2007)...1

First Capital Asset Mgmt. v. Satinwood, Inc.,
385 F.3d 159 (2d Cir. 2004).. 19, 21

Flickinger v. Harold C. Brown & Co.,
947 F.2d 595 (2d Cir. 1991)..7

Fourth Ocean Putnam Corp. v. Interstate Wrecking Corp.,
66 N.Y.2d 38, 495 N.Y.S.2d 1, 485 N.E.2d 208 (1985).................... 10, 13

GICC Capital Corp. v. Technology Finance Group, Inc.,
67 F.3d 463 (2d Cir. 1995)..23

TABLE OF AUTHORITIES

Glusband v. Fittin Cunningham Lauzon, Inc.,
582 F. Supp. 145 (S.D.N.Y. 1984)....................14

Goldberg v. Kelly,
397 U.S. 254 (1970)....................11

Hack v. President & Fellows of Yale College,
237 F.3d 81 (2d Cir. 2000)....................7

Hammitte v. Leavitt,
2007 WL 3013267 (E.D. Mich. Oct. 11, 2007)....................13

Ideal Steel Supply Corp. v. Anza,
373 F.3d 251 (2d Cir. 2004)....................26

Iragorri v. United Techs. Corp.,
274 F.3d 65 (2d Cir. 2001)....................33, 35-36, 39

Johnson Elec. N. Am. v. Mabuchi Motor Am. Corp.,
98 F. Supp. 2d 480 (S.D.N.Y. 2000).................... 28, 31

Kapps v. Wing,
404 F.3d 105 (2d Cir. 2005).................... 10, 11, 13

Kensington Int'l Ltd. v. Société Nationale des Pétroles du Congo,
No. 05 Civ. 5101, 2006 WL 846351 (S.D.N.Y. Mar. 31, 2006).................... 24, 26, 28

Laudes Corp. v. United States,
84 Fed. Cl. 298 (Fed. Cl. 2008)....................8

Lerner v. Fleet Bank, N.A.,
318 F.3d 113 (2d Cir. 2003).................... 17, 26, 27

Madanes v. Madanes,
981 F. Supp. 241 (S.D.N.Y. 1997)....................31

Mastafa v. Australian Wheat Bd., Ltd.,
2008 WL 4378443 (S.D.N.Y. Sept. 25, 2008)....................36

Medellin v. Texas,
128 S. Ct. 1346 (2008)....................1

TABLE OF AUTHORITIES

Morrow v. Black,
742 F. Supp. 1199 (E.D.N.Y. 1990) 25

N.S. Fin. Corp. v. Al-Turki,
100 F.3d 1046 (2d Cir. 1996)..28

Nat'l Group for Commc'n & Computers, Ltd. v. Lucent Tech., Inc.,
420 F. Supp. 2d 253 (S.D.N.Y. 2006)...31

National Org. for Women v. Scheidler,
510 U.S. 249 (1994) 25

National Union Fire Ins. Co. v. Proskauer Rose Goetz & Mendelsohn,
165 Misc. 2d 539, 634 N.Y.S.2d 609 (Sup. Ct. 1994)...8

New York Citizens Comm. on Cable TV v. Manhattan Cable TV, Inc.,
651 F. Supp. 802 (S.D.N.Y. 1986).. 10, 11, 13

Norex Petroleum, Ltd. v. Access Indus., Inc.,
2007 WL 2766731 (S.D.N.Y. Sept. 24, 2007)..*passim*

Northrop v. Hoffman of Simsbury, Inc.,
134 F.3d 41 (2d Cir. 1997)..7

OSRecovery, Inc. v. One Groupe Int'l, Inc.,
354 F. Supp. 2d 357 (S.D.N.Y. 2005)...21

Pelt v. Utah,
104 F.3d 1534 (10th Cir. 1996) 15

Pitt County v. Hotels.com, L.P.,
553 F.3d 308 (4th Cir. 2009)..5

Price v. Akaka,
3 F.3d 1220 (9th Cir. 1993)..15

Procter & Gamble Co. v. Big Apple Indus. Bldgs., Inc.,
879 F.2d 10 (2d Cir. 1989)...23

Rega v. United States,
263 F.3d 18 (2d Cir. 2001)...19

TABLE OF AUTHORITIES

Republic of Colombia v. Diageo N. Am., Inc.,
531 F. Supp. 2d 365 (E.D.N.Y. 2007) .... *passim*

Reves v. Ernst & Young,
507 U.S. 170 (1993) 20

Sea Trade Co. Ltd. v. FleetBoston Financial Corp.,
2008 WL 4129620 (S.D.N.Y. Sept. 4, 2008).. 13-14

Sedima, S.P.R.L. v. Imrex Co.,
473 U.S. 479 (1985) 16, 25

Selevan v. N.Y. Thruway Auth.,
470 F. Supp. 2d 158 (N.D.N.Y. 2007) 13

Solutia, Inc. v. FMC Corp.,
385 F. Supp. 2d 324 (S.D.N.Y. 2005)...13

Standardbred Owners Ass'n v. Roosevelt Raceway Assocs., L.P.,
985 F.2d 102 (2d Cir. 1993)...26

Sun Life Assur. Co. of Canada (U.S.) v. Gruber,
2007 WL 4457771 (S.D.N.Y. Dec. 14, 2007) 9

Thai Airways Int'l Ltd. v. United Aviation Leasing B.V.,
842 F. Supp. 1567 (S.D.N.Y. 1994), *aff'd,* 59 F.3d 20 (2d Cir. 1995)......... 28, 31

United States v. Approx. $25,829,681.80,
1999 WL 1080370 (S.D.N.Y. Nov. 30, 1999)...31

United States v. Aulicino,
44 F.3d 1102 (2d Cir. 1995).. 24, 25

United States v. Busacca,
936 F.2d 232 (6th Cir. 1991)...25

United States v. Chalmers,
474 F. Supp. 2d 555 (S.D.N.Y. 2007).. 3, 4, 6

United States v. Coiro,
922 F.2d 1008 (2d Cir. 1991)...24

TABLE OF AUTHORITIES

United States v. Eppolito,
543 F.3d 25 (2d Cir. 2008)........16

United States v. Indelicato,
865 F.2d 1370 (2d Cir. 1989)........24

United States v. Turkette,
452 U.S. 576 (1981)........16

United States v. Viola,
35 F.3d 37 (2d Cir. 1994)........20-21

Westinghouse Credit Corp. v. D'Urso,
278 F.3d 138 (2d Cir. 2002)........8

Williams v. Mohawk Indus.,
465 F.3d 1277 (11th Cir. 2006)........27

World Wrestling Entm't, Inc. v. Jakks Pacific, Inc.,
530 F. Supp. 2d 486 (S.D.N.Y. 2007)........17, 24

Zito v. Leasecomm Corp.,
2004 WL 2211650 (S.D.N.Y. Sept. 30, 2004)........18

Zito v. Leasecomm Corp.,
2003 WL 22251352 (S.D.N.Y. Sept. 30, 2003)........19

Statutes and Other Authorities:

15 U.S.C. § 78dd-1........22

18 U.S.C. § 2........21

18 U.S.C. § 1952........21, 22

18 U.S.C. § 1956........21, 22

18 U.S.C. § 1957........21, 22

18 U.S.C. § 1961(5)........22

TABLE OF AUTHORITIES

18 U.S.C. § 1962(c) .... *passim*

18 U.S.C. § 1962(d) 16

18 U.S.C. § 1964(c) 25

28 U.S.C. § 1331 27

RESTATEMENT (SECOND) OF CONTRACTS (1981) 9-10

RESTATEMENT (SECOND) OF LAW OF TRUSTS § 199 (1959) 15

Jeffrey A. Meyer & Mark G. Califano, *Good Intentions Corrupted: The Oil-for-Food Program and the Threat to the U.N.* (2006) 30

William Safire, "Tear Down This U.N. Stonewall," *N.Y. Times*, June 14, 2004 35

Plaintiffs-Appellants, Hana Ahmed Karim *et al.* (collectively "Plaintiffs"), hereby file their Reply Brief.[1]

ARGUMENT

A Plaintiffs Properly Alleged Their Standing To Sue Under Article III

1. The Oil-For-Food Programme Did Not Grant Complete Discretion To The Hussein Regime

Plaintiffs properly allege their standing to sue under Article III. This Court should reject Defendants' argument that Resolution 986 and the MOU provided the Hussein Regime complete discretion as to when, how and in what quantity humanitarian goods would be purchased for the Class, thereby defeating standing. *Cf.* Plaintiffs' Brief at 24-34 *with* AWB Brief at 17-39; BNP Brief at 18-42; CSC Brief at 13.

Like domestic statutes and contracts, international agreements are subject to familiar rules of interpretation, and the plain text of Resolution 986 and the MOU control their meaning. *See, e.g., Medellin v. Texas*, 128 S.Ct. 1346, 1357 (2008); *Doe v. Pataki*, 481 F.3d 69, 81 (2d Cir. 2007). Resolution 986's and the MOU's plain meaning is irreconcilable with AWB's contention that the UN provided the

---

[1] References to Plaintiffs' Opening Brief are stated herein as "Plaintiffs' Brief at __." References to briefs filed by Defendants AWB Limited and AWB (U.S.A. Ltd.) ("AWB"), BNP Paribas ("BNP"), and Commodity Specialists Co. ("CSC") (collectively "Defendants") are stated herein as "AWB Brief at __," "BNP Brief at __," and "CSC Brief at __," respectively.

Hussein Regime absolute discretion regarding distribution of food, medicine and other humanitarian aid to Kurds in the northern governorates.

The Hussein Regime's brutal persecution of the Kurdish minority that populate Iraq's three northern governorates demonstrated the need for the special protections the Programme provided to those Iraqi citizens. JA 165 (S.C. Res. 986, U.N. Doc. S/RES/986, ¶ 8(b) (Apr. 15, 1995)). Resolution 986 both guaranteed the Kurdish minority a specific share (at least 13%) of the humanitarian goods obtained in exchange for Iraqi oil ***and*** provided that the UN Inter-Agency Humanitarian Programme, ***rather than the Hussein Regime***, would administer the distribution of those goods to Class members. *Id.*; *see* JA 36, ¶ 73. To protect Class members' property interests, the Programme established an Escrow Account subject to stringent rules and oversight by the 661 Committee, thereby further removing the Hussein Regime from decisions regarding the allocation of the humanitarian goods. JA 39, 106; ¶¶ 98, 491-493. To provide specific guarantees for Class members in the Programme documents, the MOU incorporated by reference Resolution 986's specific percentage set-aside for the Kurds, as well as the requirement that the Hussein Regime pay those funds to the UN under a specific, written distribution plan. JA 169 (U.N. Doc. S/1996/356, II, ¶ 7 (May 20, 1996)).

In light of these specific provisions, Defendants' effort to imbue the Hussein Regime with absolute discretion over distributions to the Class falls flat. The regime's discretion was limited ***solely*** to deciding the ***amount*** of oil to sell, a determination dictated by market forces and Iraq's production capacity. JA 103, ¶ 481. Only by falsely assuming that the regime could elect to sell ***no*** oil during the Class Period can one construct an imaginary circumstance in which Class members had ***no*** property interest in humanitarian goods derived from the Programme. As the Amended Complaint makes clear, that fantastic scenario was never a reasonable probability and, more importantly, never came to fruition. The regime's limited discretion regarding ***whether*** to sell oil in connection with the Programme does not stand at odds with the fact that Class members possessed property interests in the Programme's actual oil sale proceeds. *See United States v. Chalmers*, 474 F. Supp. 2d 555, 563 (S.D.N.Y. 2007) (language of Resolution 986 and MOU providing that Programme funds "***shall*** be used to meet the humanitarian needs of the Iraqi population," that "Iraq ***guarantees*** their equitable distribution," and that the Iraqi government "undertakes to effectively ***guarantee*** equitable distribution to the Iraqi population" invested all Iraqi citizens with property interest in humanitarian aid distributed in connection with Programme).[2]

---

[2] Here, as elsewhere in this Reply Brief, emphasis has been added unless otherwise indicated.

The Programme was intended to facilitate the ability of Class members (and other Iraqis) to obtain desperately needed humanitarian aid and was designed to constrict the regime's ability to interfere with those efforts, particularly when it came to Class members; unlike Iraqis in the Central and Southern governorates, the plan for Class members mandated a particular distribution.

Programme documents and the *Chalmers* decision, taken together, warrant this Court's rejection of AWB's illogical construction of Resolution 986 and the MOU. Any dispute regarding their correct interpretation raises factual questions and, rather than dismiss under Article III (or even RICO) standing grounds, the district court should have resolved any interpretive ambiguities in Plaintiffs' favor. *Cf. Bank of New York Trust, N.A. v. Franklin Advisors, Inc.*, 522 F. Supp. 2d 632, 637 (S.D.N.Y. 2007) ("The Court's role on a 12(b)(6) motion to dismiss is not to resolve contract ambiguities. 'Where reasonable minds could be said to differ because the language the parties used in their written contract is susceptible to more than one meaning – each as reasonable as the other – and where extrinsic evidence of the parties' actual intent exists, it should be submitted to the trier of fact.'") (quoting *Consarc Corp. v. Marine Midland Bank, N.A.*, 996 F.2d 568, 573 (2d Cir. 1993)).

At most, AWB's argument that Resolution 986 and the MOU do not provide Plaintiffs with a cognizable property interest presents a merits-based issue, rather

than a viable basis for dismissing Plaintiffs' claims on standing grounds. In *Pitt County v. Hotels.com, L.P.*, 553 F.3d 308 (4th Cir. 2009), the court rejected the online travel companies' contention that a North Carolina county lacked Article III standing to assert claims that they improperly failed to remit occupancy tax in connection with sales of hotel rooms. The court rejected defendants' standing argument, although it ultimately agreed with the contention that defendants did not qualify as "retailers" subject to the occupancy tax under the applicable statute. *Id.* at 314-15.

Importantly, *Pitt County* held that questions regarding whether legislative pronouncements entitle plaintiffs to relief do ***not*** implicate standing issues. *Id.* at 312. Rather, the court found the county's allegations that it suffered injury when defendants failed to remit occupancy tax payments sufficient to allege the injury in fact necessary to demonstrate Article III standing: "Here, Pitt County alleges that it was injured by the failure of the online travel companies to remit occupancy taxes on the full rental rate of hotel rooms in the County. The County's right to recovery depends upon whether online travel companies are subject to the occupancy tax ordinance, a question of statutory construction. That the district court ultimately disagreed with the County regarding the applicability of the tax to online companies does not mean that the County failed to allege an injury in fact." *Id.*

Similarly, Plaintiffs' allegations that Resolution 986 and the MOU entitled Class members to specific Programme benefits that were not provided to them establishes standing, even assuming (incorrectly) that Defendants' reading of those documents is the more persuasive one.

2. Plaintiffs' Status As Third-Party Beneficiaries, Under Both Contract And Trust Law, Demonstrates Their Standing To Sue

The Amended Complaint adequately alleged facts supporting Class members' status as third-party beneficiaries, under both contract and trust law. These factual allegations and the corresponding legal arguments Plaintiffs advanced were specifically addressed by the court below, which stated that Plaintiffs alleged they were the Programme's "intended beneficiaries," SPA 2-3, were seeking to recover benefits they otherwise would have received, and that Escrow Account funds that should have been used to pay for benefits were "siphoned off" and "improperly transferred into the coffers of the Hussein Regime." SA 8 (quoting JA 24, ¶ 15). Moreover, Judge Lynch rejected Plaintiffs' argument, based in part on *Chalmers*, 474 F. Supp. 2d at 562-563, that Class members had an entitlement to the Escrow Account that made its diminishment an injury to their protected property interest. SA 9-11. Thus, Defendants' contention that these claims are being raised "for the first time on appeal" is simply not true. BNP Brief at 47.

Further, it is well settled that this Court "may not affirm the dismissal of [Plaintiffs'] complaint because they have proceeded under the wrong theory 'so long as [they have] alleged facts sufficient to support a meritorious legal claim.'" *Hack v. President & Fellows of Yale College*, 237 F.3d 81, 89 (2d Cir. 2000). When considering an appeal from a district court's grant of a defendant's motion to dismiss, "'factual allegations alone are what matters[].'" *Northrop v. Hoffman of Simsbury, Inc., 134* F.3d 41, 46 (2d Cir. 1997). This is true even if the "district court [had] little or no opportunity to address … [the] theory of liability." *Id.* at 45. In fact, this Court has addressed the exact argument raised here by Defendants and rejected it: "[Defendant] … point[s] out that [plaintiff] failed to plead the third party beneficiary theory in his complaint. To this, we simply respond that federal pleading is by statement of claim, not by legal theory." *Flickinger v. Harold C. Brown & Co.*, 947 F.2d 595, 600 (2d Cir. 1991).

3. A Valid Trust Existed And Plaintiffs' Trust Claims Are Viable Under New York Law

Defendants' arguments that no trust was created (BNP Brief at 48) cannot withstand scrutiny because under New York law, an escrow account is a trust and an escrow agent (such as BNP) becomes a trustee of anyone with a beneficial interest in the trust with the duty not to deliver the escrow funds to anyone except in strict compliance with the conditions imposed. "Thus an escrow agent can be held liable for … breach of fiduciary duty as an escrowee." *Cash v. Titan Fin.*

Svcs., Inc., 58 A.D.3d 785, 873 N.Y.S.2d 642, 646 (2d Dep't 2009); *see also Westinghouse Credit Corp. v. D'Urso*, 278 F.3d 138, 149 (2d Cir. 2002) ("It is well established that escrow monies are held in trust and that an escrow agent is a trustee").[3] The "escrow agent as trustee owes the highest kind of loyalty" to beneficiaries of the trust. *National Union Fire Ins. Co. v. Proskauer Rose Goetz & Mendelsohn*, 165 Misc.2d 539, 634 N.Y.S.2d 609, 614-615 (Sup. Ct. 1994). As trustee, the escrow agent must make whole any beneficiaries for any damages arising from its breach of fiduciary duty, and the appropriate measure of damages requires placing the beneficiaries in the same position they would have been in had the wrong not occurred. *Id.* Any failure by the trustee to fulfill its duties creates standing "for the third party beneficiar[ies] of the subject matter of the escrow (herein the plaintiff[s]) to bring an action" against the trustee for relief. *Id.*

Even in the absence of the escrow agreement, a trust would still exist here. Under New York law, a trust can be created orally as well as in writing, and no particular form of words is necessary. *Agudas Chasidei Chabad of United States v. Gourary*, 833 F.2d 431, 434 (2d Cir. 1987). A trust may emerge by implication from the acts or words of the person creating the trust. *Id.* All that is needed is

---

[3] Indeed, one of the cases cited by BNP states that the oil-for-food funds were "held in trust." *Laudes Corp. v. United States*, 84 Fed. Cl. 298, 302-303, 318 (Fed. Cl. 2008); *see* BNP Brief at 41 n.15.

either an explicit declaration of trust (like the escrow agreement) or circumstances (such as the specification of Class members as intended beneficiaries) showing "beyond a reasonable doubt" that a trust was intended." *Id.* A valid trust, whether oral or written, requires only four elements, all of which have been alleged here: (1) designated beneficiaries (Class members); (2) a designated trustee (BNP); (3) a clearly identifiable *res* (Programme funds); and (4) the delivery of the *res* to the trustee with the proper intent (escrow account deposits). *Sun Life Assur. Co. of Canada (U.S.) v. Gruber*, 2007 WL 4457771, *6 (S.D.N.Y. Dec. 14, 2007) (collecting New York cases). Given the presence of all four elements, a trust exists here even in the absence of an express escrow agreement.

4. Class Members Were Specified Intended Beneficiaries Of The Programme With Concrete Benefits And Not Potential Or Possible Beneficiaries Whose Benefits Were Amorphous And Undefined

Defendants' argument that Class members were merely "potential beneficiaries" or "possible beneficiaries" of the Programme or the trust funds that funded it (BNP Brief at 48-50) cannot be reconciled with the facts alleged in the Amended Complaint or New York law. It is also at odds with Judge Lynch's repeated acknowledgements that Plaintiffs were "intended beneficiaries" of the Programme established by Resolution 986 and the MOU. SA 2-3. [4]

---

[4] In terms of contract law, the New York Court of Appeals has adopted the formulation of the third-party beneficiary doctrine delineated in the RESTATEMENT

In arguing that Class members only had a potential right too ephemeral for standing purposes, Defendants rely primarily on "taxpayer" cases, such as *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006), that are inapposite. But the plaintiffs in such cases were merely incidental beneficiaries whose interests in the moneys in a government treasury are "too indeterminable, remote, uncertain and indirect to support standing." *Id.* at 345. In contrast, "intended" beneficiaries like Plaintiffs possess interests that are quantifiable, readily determinable, proximate, direct and certain and, thus, protectable property interests. It is axiomatic that Plaintiffs have standing to sue to protect such interests. *See Kapps v. Wing,* 404 F.3d 105, 113-114 (2d Cir. 2005) (beneficiaries of Home Energy Assistance Program, including eligible applicants, had property right in benefits which had fixed eligibility criteria and a standard benefits matrix); *Basciano v. Herkimer,* 605 F.2d 605, 609 (2d Cir. 1978) (city administrative code created property right in receipt of accident disability retirement benefits because it required officials to

---

(SECOND) OF CONTRACTS (1981). *See New York Citizens Comm. on Cable TV v. Manhattan Cable TV, Inc.,* 651 F. Supp. 802, 815-16 (S.D.N.Y. 1986); *Fourth Ocean Putnam Corp. v. Interstate Wrecking Corp.*, 66 N.Y.2d 38, 495 N.Y.S.2d 1, 485 N.E.2d 208, 211-212 (1985). The RESTATEMENT utilizes the terms "intended beneficiary" and "incidental beneficiary" to "distinguish [between] beneficiaries who have rights [and standing] from those who do not." *Id.* at 212. The district court's finding that Plaintiffs and Class members were "intended beneficiaries" of the Programme (SPA 1, 2), but nevertheless lacked standing to challenge its corrupt looting by Defendants, ignores the RESTATEMENT and New York cases holding that ***intended*** third-party beneficiaries have standing to challenge breaches of such agreements.

give benefits to applicants who met specified criteria); *see also Goldberg v. Kelly*, 397 U.S. 254, 262 & n.8 (1970) (where welfare benefits are matter of statutory entitlement they represent protectable property interest).

As recognized by this Court, where statutes or regulations "meaningfully channel" official discretion by mandating a defined outcome, a property interest will be found to exist. *Kapps*, 404 F3d at 113. Where, as here, benefits and eligibility are fixed or can be determined by application of a standardized formula, beneficiaries will be found to possess a legitimate right of entitlement and to possess an actionable property interest in program participation and the resulting program benefits. *Id.* at 113-114. Where, as here, a third-party beneficiary of a governmental contract has suffered money damages resulting from the breach itself, or has been denied the right to obtain goods or services at a rate fixed by the agreement, that beneficiary has the right to enforce the agreement and has standing to do so. *New York Citizens Comm.* 651 F. Supp. at 815-816.

Unlike the amorphous taxpayer-related benefits at issue in cases cited by the court below, SA 11-12, the benefits at issue in the present case are the standard ration baskets of food and household staples that each citizen of the three northern governorates of Iraq was entitled to receive pursuant to the Programme and MOU. These baskets had a targeted calorific value, established and defined components and a concrete, definite and easily calculable economic value. *See, e.g.,* 1998 U.N.

Distribution Plan, pgs. 5-6, 14-15, Tables 2-3. These baskets of commodities were expressly described in Programme documents as the "entitlements" of each Class member. 1998 U.N. Distribution Plan, pgs. 11, 14. Notwithstanding Defendants' erroneous factual assertions to the contrary, Programme documents specifically described the exact number of beneficiaries in the three northern governorates, the exact quantities of each staple (such as wheat flour, rice, sugar, cooking oil, milk powder and iodized salt) to which each beneficiary was entitled and the dollar amounts required to purchase those staples. 1998 U.N. Distribution Plan, pgs. 14-15, Tables 2-3.[5] Pursuant to the MOU and Programme rules, eligibility was fixed and Iraqi authorities lacked discretion to determine which participants/applicants received the specified rations. *Id.* at 11. Moreover, each participant was supposed to receive the same fixed ration benefit. *Id.* As such, the claims of Class members are not generalized claims but, rather, "involve direct claims by intended

---

[5] The annual UN Distribution Plan was an annex to the MOU (JA 168-182) and was signed by all parties. 1998 UN Distribution Plan, pgs. 1-5. This document reveals that Dihouk had 725,047 beneficiaries, of whom 17,939 were children under the age of one; Arbil had 1,123,255 beneficiaries, of whom 23,002 were children under the age of one; and Suleimaniyeh had 1,440,586 beneficiaries, of whom 22,687 were children under the age of one. *Id.* at 14, Table 2. Children under the age of one received a modified ration while all other citizens received a standard ration. *Id.* at 15, Table 3. On a monthly basis the standard ration consisted of 9 kilograms of wheat flour, 2.5 kilograms of rice, 2 kilograms of sugar, 0.15 kilograms of tea, 1 kilogram of cooking oil, 2.7 kilograms of milk powder, 1 kilogram of pulses (a type of legume), 0.15 kilos of iodized salt, 0.25 kilograms of soap and 0.35 kilograms of detergent. Children under the age of one only received the milk powder, soap and detergent. *Id.*

beneficiaries." *See Hammitte v. Leavitt,* 2007 WL 3013267, *5 (E.D. Mich. Oct. 11, 2007) (distinguishing *Cuno* and holding that Native Americans living in Detroit "alleged a concrete injury as a result of the denial of health benefits owed to them under" federal health and welfare statutes); *Selevan v. N.Y. Thruway Auth.,* 470 F. Supp. 2d 158, 169 (N.D.N.Y. 2007) (distinguishing *Cuno* because "the plaintiffs here allege actual economic harm"). Therefore, as eligible participants with concrete, defined benefits, Class members had actionable property interests in these benefits and, thus, had standing to sue to protect these interests in the present action. *Kapps*, 404 F.3d at 113-14.

5. Plaintiffs Do Not Lack Authority To Seek Relief For The Damages They Have Suffered

Under New York law, "an intended third-party beneficiary has standing to enforce an agreement entered into between others." *Solutia, Inc. v. FMC Corp.*, 385 F. Supp. 2d 324, 336 (S.D.N.Y. 2005) (collecting cases). "[T]he same rules apply to contracts with a government or governmental agency except to the extent the application would contravene the policy of the law authorizing the contract or prescribing remedies for its breach." *New York Citizens Committee*, 651 F. Supp. at 816 (quoting *Fourth Ocean Putnam Corp.*, 485 N.E.2d at 212).

Where, as here, third-party beneficiary status is adequately alleged, New York Courts routinely and correctly refuse to dismiss claims for lack of standing. *See, e.g., Sea Trade Co. Ltd. v. FleetBoston Financial Corp.*, 2008 WL 4129620,

*3 (S.D.N.Y. Sept. 4, 2008) (motion to dismiss denied where party "adequately alleged" third-party beneficiary status); *Glusband v. Fittin Cunningham Lauzon, Inc.*, 582 F. Supp. 145, 154 (S.D.N.Y. 1984) (same).

Defendants' argument that potential beneficiaries of charitable trusts lack standing to seek relief because that authority is vested with the attorney general (BNP Brief at 49) is unavailing. First, Plaintiffs were not potential beneficiaries but actual beneficiaries who had already been selected and awarded defined, concrete benefits. Plaintiffs seek to recover for the shortfall in benefits that they were already awarded. Second, even in the context of potential beneficiaries of a charitable trust, courts have repeatedly recognized an exception to the rule advanced by Defendants. As acknowledged by Defendants (BNP Brief at 49), an exception exists where, as here, the beneficiaries enjoy a preference in the distribution of funds and the class of potential beneficiaries is sharply defined and limited in number. *Alco Gravure, Inc. v. Knapp Foundation*, 64 N.Y.2d 458, 490 N.Y.S.2d 116, 479 N.E.2d 752, 755-756 (1985); Plaintiffs' Brief at 44-46. In the present case, Plaintiffs, as residents of three northern governorates, were entitled to a preference in distribution of Programme funds with both a specified percentage carve out (13%) and a defined periodic dollar draw ($130-150 million every 90 days). They also were specifically defined in number and constituted a defined subset of the Iraqi nation as whole. *See* note 5, *supra.*

Courts have not hesitated to find standing for members of a discrete class of beneficiaries of charitable trusts – like the one here – whose beneficiaries comprise the entire membership of a discrete ethnic group, tribe, or nation. *See Day v. Apoliona,* 496 F.3d 1027, 1032-1033 (9th Cir. 2007) (Native Hawaiians had standing to sue to ensure that trust funds were spent for their betterment and not dissipated) (relying on RESTATEMENT (SECOND) OF LAW OF TRUSTS § 199 (1959); *Price v. Akaka,* 3 F.3d 1220, 1223 (9th Cir. 1993) (same); *see also Pelt v. Utah,* 104 F.3d 1534, 1541-1543 (10th Cir. 1996) (statutory scheme created "common-law trust" and Navajo nation beneficiaries had standing to sue). This is true even when the number of potential beneficiaries is large and, given the facts alleged in the Amended Complaint, Plaintiffs have standing to seek relief.

B Plaintiffs Properly Allege RICO Standing

1. Plaintiffs Allege Each Element Of Their RICO Claims

Contrary to Defendants' arguments, Plaintiffs properly allege each element of their RICO claims, including their standing to sue. JA 141-152, ¶¶ 686-720.[6]

---

[6] Defendants' challenges to Plaintiffs' RICO claims are narrow but overlapping. CSC concedes that the "enterprise" element is properly pled, but claims there is no allegation that it participated in the "operation" or "management" of the RICO "enterprise," or that it did so through a "pattern of racketeering activity." CSC Brief at 13-17. BNP contends that Plaintiffs do not have standing to sue, BNP Brief at 42-46, but also joins in CSC's pleading challenges, *see id.* at 15 n.6. AWB challenges Plaintiffs' standing to sue under RICO, AWB Brief at 39-47, but it also joins in CSC's pleading challenges, *see id.* at 3 n.2.

Plaintiffs assert claims against AWB, BNP and CSC for violations of § 1962(c) and (d).[7] The aim of the RICO statute "is to divest the association [-in-fact enterprise]" – the Kickback Scheme, in which AWB, BNP and CSC were each a willing, central, and active participant – "of its ill-gotten gains." *United States v. Turkette,* 452 U.S. 576, 585 (1981). The statute's "'remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 498 (1985). Section 1964(c) provides that "[a]ny person injured in his business or property by reason of a violation of [§] 1962" has the right to "recover threefold the damages he sustains…." 18 U.S.C. § 1964(c). To state a claim for a civil RICO violation, Plaintiffs must allege that they were injured by Defendants' "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Cofacredit, S.A. v. Windsor Plumbing Supply Co.,* 187 F.3d 229, 242 (2d Cir. 1999) (quoting *Azrielli v. Cohen Law Offices,* 21 F.3d 512, 520 (2d Cir. 1994)). Plaintiffs must allege (1)

Although such pleading challenges were extensively briefed in the district court, Judge Lynch did not address them. Because Defendants assert that the decision of the court below can be affirmed on such alternate grounds, they are addressed herein.

[7] Section 1962(d) states that it "shall be unlawful for any person to conspire to violate" § 1962(c). 18 U.S.C. § 1962(d); *United States v. Eppolito,* 543 F.3d 25, 48-49 (2d Cir. 2008) (explicating RICO conspiracies). Plaintiffs allege that Defendants conspired with the "Hussein Affiliates" and the "non-defendant conspirators" to violate § 1962(c). JA 151-152, ¶¶ 715-720. The "Hussein Affiliates" include former Iraqi dictator Saddam Hussein and other Iraqi government officials and agencies. JA 141-142, 144, ¶¶ 689-692, 700.

a substantive RICO violation under § 1962; (2) injury to their "business or property," and (3) that such injury was "by reason of" Defendants' RICO violation. *City of N.Y. v. Smokes-Spirits.Com,* 541 F.3d 425, 439 (2d Cir. 2008); *Lerner v. Fleet Bank, N.A.,* 318 F.3d 113, 120 (2d Cir. 2003).[8]

Plaintiffs properly allege each element of their RICO claims:[9] (a) AWB, BNP and CSC are each a liable "person," JA 27-29, 141, ¶¶ 29-38, 688; (b) each Defendant committed at least two predicate acts of "racketeering activity," JA 147-150, ¶¶ 706-711; (c) their predicate acts constituted a "pattern of racketeering activity," JA 21-22, 147-150, ¶¶ 2, 706-707, 708(a)-(d), 710-711; (d) each Defendant directly or indirectly participated in the conduct of an "enterprise" or "enterprises," JA 142-143, 144-147, ¶¶ 693-699, 700-706; and (e) the activities of the "enterprises" affected interstate ***or*** foreign commerce. JA 142, 149-150, ¶¶ 693, 709. Plaintiffs "spell[ed] out … clearly the nature of the enterprise alleged, the specific predicate acts that constitute the pattern of racketeering, and the

---

[8] *City of N.Y.,* 541 F.3d at 440 n.19, described these three issues as "elements of standing." *See also Commercial Cleaning Svcs. v. Colin Serv. Sys., Inc.,* 271 F.3d 374, 380 (2d Cir. 2001).

[9] "[A] RICO plaintiff normally need only satisfy the general notice pleading requirements." *World Wrestling Entm't, Inc. v. Jakks Pacific, Inc.,* 530 F. Supp.2d 486, 496 (S.D.N.Y. 2007). Rule 8(a)'s liberal pleading standard applies to ***each*** element of Plaintiffs' RICO claims. *Am. Med. Ass'n v. United Healthcare Corp.,* 2006 WL 3833440, *13-16 (S.D.N.Y. Dec. 29, 2006); *see also Republic of Colombia v. Diageo N. Am., Inc.,* 531 F. Supp. 2d 365, 382 (E.D.N.Y. 2007). Significantly, Plaintiffs' predicate act allegations do ***not*** include mail or wire fraud, JA 128-131, ¶¶ 707-710, thus, Rule 9(b) does not apply.

persons who are alleged to have committed each of those predicate acts," *Zito v. Leasecomm Corp.,* No. 02 Civ. 8074 (GEL), 2004 WL 2211650, *7 (S.D.N.Y. Sept. 30, 2004) (Lynch, J.) (citation omitted).

2. Plaintiffs Allege Defendants' "Conduct" Of The "Enterprises"

Through the Kickback Scheme, Defendants stole money from Class members: Escrow Account funds earmarked for the benefit of Class members were instead illegally siphoned off and transferred into the coffers of the Hussein Regime, or used to indemnify goods suppliers for bribes they had paid to Iraq. JA 24, ¶ 15. The Kickback Scheme continued as a RICO "enterprise" with the same core membership from 1999 until it was exposed in 2003. JA 142, ¶¶ 693-694. Defendants concede that the "Kickback Scheme Enterprise" was an association-in-fact comprised of Defendants and the non-defendant conspirators, including the Hussein Affiliates. JA 141-142, 144, ¶¶ 689-692, 700. Each Defendant violated § 1962(c) by participating in the enterprise's affairs through a pattern of racketeering activity. JA 142, ¶ 695.[10]

---

[10] Plaintiffs allege the existence of three other association-in-fact "enterprises," including the "AWB Enterprise," an association-in-fact enterprise consisting of AWB, CSC, the Hussein Affiliates and other co-conspirators, including the unauthorized parties to which BNP released payments from the Escrow Account. JA 145, ¶ 702. The "Hussein Affiliates" are Iraqi dictator Saddam Hussein, Deputy Prime Minister Tariq Azizk, Iraqi Grain Board ("IGB") directors Zuhair Daoud and Yousif Rahman, and Minister of Trade Dr. Mohammed Medhi Saleh. JA 141, ¶ 689. The alternative enterprises are the "BNP Enterprise," consisting of BNP, the Hussein Affiliates and other known and unknown co-conspirators, JA

CSC claims that it merely provided "brokerage-type services" to AWB, an admitted central figure in the Kickback Scheme Enterprise, *id.* at 16, and analogizes its role to an innocent "middleman" in "two routine commodities transactions" with AWB. *Id.* CSC inexplicably portrays itself, in the words of Judge Winter, "[m]uch like the proverbial piano player in the brothel who had no idea what was going on upstairs." *Rega v. United States,* 263 F.3d 18, 23 (2d Cir. 2001). CSC ignores the findings of the Cole Commission which, after examining voluminous evidence and numerous witnesses' testimony, stated that "AWB ***and*** CSC had ***jointly participated*** in wheat sales that violated Programme rules by generating kickbacks for the Hussein Regime ***and*** had used deceptive paperwork to conceal their scheme." JA 139, ¶ 680. To the extent that CSC disagrees with the Cole Commission's conclusions, that is a matter for discovery and trial, not Rule 12(b)(6) motion practice.[11]

145, ¶ 702, and the "Programme Enterprise," JA 146-147, ¶ 704. Defendants concede that each enterprise is properly pled. *See City of N.Y.,* 541 F.3d at 446-448.

[11] The "operation and management" element of a § 1962(c) claim is a "low hurdle" for plaintiffs to clear at the pleading stage. *First Capital Asset Mgmt. v. Satinwood, Inc.,* 385 F.3d 159, 176 (2d Cir. 2004). In *Zito v. Leasecomm Corp.,* 2003 WL 22251352 (S.D.N.Y. Sept. 30, 2003), which upheld § 1962(c) claims against various members of an association-in-fact enterprise, Judge Lynch observed that "there is no heightened pleading requirement for the 'conduct' element of a RICO claim," stating that "it is hard to imagine what more plaintiffs could allege at this stage, when the precise role of these defendants is information peculiarly within their knowledge and not the plaintiffs' [knowledge]." *Id.* at *18.

CSC "sold wheat to Iraq under the Programme in collaboration with AWB, and knew, or recklessly disregarded, that illegal kickbacks were being paid to the Hussein Regime." JA 28, ¶ 35. Two known transactions between AWB and CSC – Contract A4908 and Contract A0101 – are described in the Amended Complaint. JA 86-92, ¶¶ 392-426. CSC knew that AWB was paying improper Transport Fees, as evidenced by two telexes (wire transmissions) that CSC received from the Iraqi Grain Board and then forwarded to AWB. JA 89-91, ¶¶ 413-416. Based upon these facts, the Cole Commission concluded that the contracts that AWB submitted for UN approval were deceptive and improper because they hid the unlawful payments being made to the Hussein Regime. JA 92-97, 139, ¶¶ 427-448, 680.

Even if CSC was not the "mastermind" of the Kickback Scheme Enterprise, that does not shield it from liability in this Action. Section 1962(c) liability can be found where a defendant has "***some part*** in directing [the enterprise's] affairs…. RICO liability is not limited to those with primary responsibility for the enterprise's affairs, … [or] limited to those with a formal position in the enterprise." *Reves v. Ernst & Young,* 507 U.S. 170, 179 (1993); *see also Cedric Kushner Promotions, Ltd. v. King,* 533 U.S. 158, 165 (2001).[12] Significantly for

---

[12] To phrase CSC's argument somewhat differently, even though *Reves* attaches § 1962(c) liability to those down the "ladder of operation," it claims that it "was not on the ladder at all, but rather, as [the Kickback Scheme's] janitor and handyman, was sweeping up the floor underneath it." *United States v. Viola*, 35

CSC's liability in this case, "***one who assists in the fraud also conducts or participates in the conduct of the affairs of the enterprise***." *First Capital Asset Mgmt.,* 385 F.3d at 178 (emphasis added; citing 18 U.S.C. § 2). Where, as here, CSC's liability "is also premised on a RICO conspiracy theory …, the standard … appl[ied] to [the defendant] is even more relaxed." *OSRecovery, Inc. v. One Groupe Int'l, Inc.,* 354 F. Supp. 2d 357, 375-376 (S.D.N.Y. 2005). Even if CSC was just a "middleman" (and the findings of the Cole Commission are to the contrary, JA 139, ¶ 680) the question of CSC's participation in the Kickback Scheme Enterprise cannot properly be resolved on a motion to dismiss.[13]

3. Plaintiffs Allege Defendants' "Pattern Of Racketeering Activity"

Predicate acts of "racketeering activity" committed by Defendants (including CSC) constituted a "pattern of racketeering activity," JA 21-22, 147-148, 148-149, 150, ¶¶ 2, 706-707, 708(a)-(d), 710-711. Defendants engaged in (a) violations of the Travel Act, 18 U.S.C. § 1952; (b) money laundering, 18 U.S.C. § 1956; and (c) monetary transactions involving unlawfully derived property, 18

F.3d 37, 43 (2d Cir. 1994). This contention ignores Plaintiffs' detailed allegations. JA 86-92, 139, ¶¶ 392-426, 680.

[13] CSC ignores *Azrielli*, 21 F.3d 512, which held that the district court erred in granting summary judgment in dismissing a § 1962(c) claim against a defendant who served as "the ***middle person*** in [a] flip sale" of a building by, in the words of the plaintiffs' allegations, "allowing his name to be used on the bogus contract and showing up at the closing." *Id.* at 514-515, 521 (emphasis added).

U.S.C. § 1957.[14] Defendants' violations constituted a "pattern of racketeering activity," 18 U.S.C. § 1961(5), because the Kickback Scheme Enterprise "was continuous, extended over a substantial period of time, involved multiple acts of bribery, was directed at numerous Programme contacts, and caused numerous separate and distinct injuries. But for the exposure of the scheme and the intervention of the UN, the U.S. Congress and Australian investigators, the Kickback Scheme would have continued indefinitely." JA 150, ¶ 711. Such allegations satisfy the applicable pleading requirement because, minimally, they demonstrate "open-ended" continuity, even if the two known CSC-AWB wheat transactions occurred over a period of less than one year.

A "pattern of racketeering activity" requires "at least two acts of racketeering activity" committed in a 10-year period, 18 U.S.C. § 1961(5), and also requires allegations that the predicate acts are "related, ***and*** that they amount to or pose a threat of continued criminal activity." *H.J.*, 492 U.S. at 239. The continuity necessary to prove a pattern can be either "closed-ended continuity," ***or*** "open-ended continuity." *See id.* at 239, 241. "Closed-ended" continuity is demonstrated

---

[14] Defendants also violated (a) the International Emergency Economic Powers Act ("IEEPA"), as implemented by 31 C.F.R. Part 575 (Iraqi Sanctions Regulations); and (b) the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. § 78dd-1 *et seq.* Those statutory violations satisfy, directly or indirectly, the "unlawful activity" requirements specified in the statutes that serve as the basis for Defendants' predicate RICO violations, namely 18 U.S.C. §§ 1952, 1956 and 1957. JA 21-22, 27, 41, 147-150, ¶¶ 2, 28, 107, 707, 708(a)-(d).

by predicate acts that "amount to continued criminal activity" committed by a particular defendant, such as CSC. Although "closed-ended" continuity is primarily a temporal concept, other factors such as the number and variety of predicate acts, the number of both participants and victims, and the presence of separate schemes are also relevant in determining whether closed-ended continuity exists. *Id.*

On the other hand, to allege "open-ended" continuity, Plaintiffs need not charge that the predicate acts committed by CSC (and its co-Defendants) extended over a substantial period of time, but must show that there was a ***threat*** of continuing criminal activity beyond the period during which the predicate acts were performed. *H.J.*, 492 U.S. at 242-43. In assessing whether Plaintiffs have alleged "open-ended" continuity as to CSC, the nature of the Kickback Scheme Enterprise and the predicate acts alleged (here, bribery and money laundering) are critical. *DeFalco v. Bernas,* 244 F.3d 286, 323 (2d Cir. 2001); *GICC Capital Corp. v. Technology Finance Group, Inc.*, 67 F.3d 463, 466 (2d Cir. 1995). Once again, at the pleading stage, the hurdle is relatively low. *Procter & Gamble Co. v. Big Apple Indus. Bldgs., Inc.,* 879 F.2d 10, 18 (2d Cir. 1989). The district court must conduct a separate analysis as to "closed ended" and "open ended" continuity as to each Defendant; thus, even if CSC's alleged wrongdoing does not fit with AWB's misconduct and BNP's wrongdoing under the first ("closed ended") prong,

CSC is still subject to § 1962(c) liability under the second ("open ended") prong of the *H.J.* "continuity" analysis. *World Wrestling Entm't,* 530 F. Supp.2d at 513-514; *Kensington Int'l Ltd. v. Société Nationale des Pétroles du Congo,* 2006 WL 846351, at *11 (S.D.N.Y. Mar.31, 2006).

Where a RICO enterprise, such as the Kickback Scheme Enterprise, is engaged primarily in racketeering activity and the predicate acts – such as bribery and money laundering – are inherently unlawful, there is a threat of continued criminal activity and, thus, "open-ended" continuity is properly found. *H.J.,* 492 U.S. at 242-43. Bribery and money laundering predicate acts are "inherently unlawful." *DeFalco,* 244 F.3d at 323-324; *United States v. Coiro,* 922 F.2d 1008, 1017 (2d Cir. 1991). Where, as here, the Amended Complaint alleges "open ended" continuity, at least as to CSC, the duration of time within which it pursued inherently unlawful goals is irrelevant. *United States v. Aulicino*, 44 F.3d 1102, 1111 (2d Cir. 1995). Thus, because Defendants' racketeering activities (bribery and money laundering) were inherently unlawful, it is irrelevant that CSC's direct involvement in such wrongful activities in the two wheat transactions it consummated with AWB spanned less than six months. *United States v. Indelicato,* 865 F.2d 1370, 1383 (2d Cir. 1989). Because CSC brokered contract A4908 in December 1999 and contract A0101 in April 2000 – a relatively early

phase of the Class Period – Plaintiffs properly pled "open ended" continuity as to CSC.[15]

4. Plaintiffs Allege RICO Standing

The remaining elements of RICO standing, namely, ***injury*** to Class members' business or property and ***causation*** of the injury by Defendants' violations were adequately pled. In terms of "injury," Defendants cannot contradict the Supreme Court's cogent analysis of the applicable pleading burden in *Sedima,* 473 U.S. at 496-497, and *National Org. for Women v. Scheidler,* 510 U.S. 249, 256 (1994) ("*NOW*"). *Cf.* Plaintiffs' Brief at 36-39 *with* BNP Brief at 45 n.17 *and* AWB Brief at 43-44. Defendants have not explained why this Court should "import an additional standing requirement" and impose any additional pleading burden upon Plaintiff beyond those specified by § 1964(c) and the Supreme Court. *City of N.Y.,* 541 F.3d at 445.

RICO's two-part causation test is met here. Plaintiffs allege that their injury was proximately caused by a pattern of racketeering activity or by individual RICO predicate acts, and Plaintiffs allege that they suffered a direct injury that was

---

[15] Any "analysis of the threat of continuity ***cannot be made solely from hindsight***." *Aulicino*, 44 F.3d at 1112; *United States v. Busacca*, 936 F.2d 232, 238 (6th Cir. 1991). Rather, "open-ended" continuity may be shown if, "at the time of occurrence," the racketeering activity threatens future criminal activity. *Morrow v. Black*, 742 F. Supp. 1199, 1207 (E.D.N.Y. 1990). In determining whether Plaintiffs alleged "open ended" continuity as to CSC, it is irrelevant that the Programme ended in 2003.

foreseeable. *See Baisch v. Gallina,* 346 F.3d 366, 373-374 (2d Cir. 2003); *Lerner,* 318 F.3d at 122-123. Plaintiffs allege that their injuries were caused by Defendants' Travel Act violations and money laundering that resulted in the theft of the Class's earmarked Escrow Account funds, which were illegally transferred to the Hussein Regime or impermissibly used to indemnify goods suppliers (including AWB) for bribes they had paid to Iraq. JA 24, ¶ 15. These allegations sufficiently allege the requisite direct injury and RICO causation. *See Republic of Colombia*, 531 F. Supp. 2d at 430-438.

As to the second part of the test, namely, the "foreseeability" of Class members' injuries,

> [t]he foreseeability component of proximate cause is established where the plaintiff was a "target[ ]" and "intended victim[ ] of the racketeering enterprise," even if he was not the primary target or victim, and ... "no precedent suggests that a racketeering enterprise may have only one 'target,' or that only a primary target has standing."

Kensington Int'l, 2006 WL 846351, at *9 (quoting *Ideal Steel Supply Corp. v. Anza,* 373 F.3d 251, 259 (2d Cir. 2004) (quoting *Baisch,* 346 F.3d at 374, 375)).

Stealing money from the Escrow Account was "inevitably an injury to" Plaintiffs and Class members, who were the intended beneficiaries of those funds. *Standardbred Owners Ass'n v. Roosevelt Raceway Assocs., L.P.,* 985 F.2d 102, 104 (2d Cir. 1993). The fact that other wrongdoers (namely, the Hussein

Defendants and other non-Defendant conspirators) may be partially to blame for Plaintiffs' and Class members' losses "does not defeat proximate causation." *City of N.Y.,* 541 F.3d at 442. Defendants are liable to Plaintiffs and Class members because "their actions were a substantial factor that caused the loss." *City of N.Y.,* 541 F.3d at 442 (citing *Lerner,* 318 F.3d at 123, and *Williams v. Mohawk Indus.,* 465 F.3d 1277, 1288 n.5 (11th Cir. 2006)). A contrary rule "would effectively require that a plaintiff's injury be caused by only one source, and, as this is often not the case, it would operate to insulate from liability defendants who scheme with others in violation of RICO." *City of N.Y.,* 541 F.3d at 443. AWB's assertion that Plaintiffs' injuries "depended on the 'inherently speculative' intervening actions of nonparty actors," AWB Brief at 42 (quoting *Lerner,* 318 F.3d at 123-124), ignores the fact that the wrongful actions undertaken ***by Defendants' co-conspirators*** are hardly the "independent" factors the Supreme Court has found would defeat a showing of causation. *Bridge v. Phoenix Bond & Indem. Co.,* 128 S. Ct. 2131, 2144 (2008); *see also City of N.Y.,* 541 F.3d at 442.

C The District Court May Properly Exercise Subject Matter Jurisdiction Over Plaintiffs' RICO Claims

Contrary to Defendants' contentions (AWB Brief at 52-54), the district court may properly exercise subject matter jurisdiction over Plaintiffs' RICO claims. Subject matter jurisdiction exists if the claims asserted in the Amended Complaint involve a federal question. 28 U.S.C. § 1331. Plaintiffs' claims alleging civil

RICO claims, based upon violations of the Travel Act and federal money laundering statutes, clearly invoke federal questions. Moreover, "foreign entities are not, due to their foreign status alone, shielded from RICO's reach." *Ayyash v. Bank Al-Medina,* 2006 WL 587342, *4 (S.D.N.Y. Mar. 9, 2006).[16] AWB urges this Court to find that the Kickback Scheme occurred outside the U.S. and, thus, to apply this Court's "conduct" or "effects" tests to determine jurisdiction. AWB Brief at 53 (citing *N.S. Fin. Corp. v. Al-Turki,* 100 F.3d 1046, 1050 (2d Cir. 1996)). "However, ***where racketeering activities … occur within the United States, it is unnecessary to apply any test for determining the extraterritorial reach of the [RICO] Statute***." *Kensington Int'l,* 2006 WL 846351, *2 (citing *Johnson Elec. N. Am. v. Mabuchi Motor Am. Corp.,* 98 F. Supp. 2d 480, 485 (S.D.N.Y. 2000) (citing *Thai Airways Int'l Ltd. v. United Aviation Leasing B.V.,* 842 F. Supp. 1567, 1570 (S.D.N.Y. 1994), *aff'd,* 59 F.3d 20 (2d Cir. 1995)). The Kickback Scheme, and AWB's role within it, present obvious U.S.-centered racketeering conduct and "[i]t is not necessary to apply the Court of Appeals' conduct or effects test to determine jurisdiction because a sufficient amount of activity is alleged to have occurred domestically." *Kensington Int'l,* 2006 WL 846351, at *3.

---

[16] Any contention that Congress intend that RICO be applied domestically ignores the statute's express language. RICO proscribes certain wrongful activities when undertaken "with any enterprise engaged in, or the activities of which affect, interstate ***or foreign commerce***." 18 U.S.C. § 1962(c).

AWB's arguments ignore the Amended Complaint's express allegations, well-developed evidence of which this Court can take judicial notice, and controlling and persuasive precedents. Plaintiffs allege that

> [a] substantial part of the conduct alleged herein occurred in the United States. Specifically, AWB maintained bank accounts at the Bank of New York in New York [City] that were used to receive amounts payable to AWB for the sale of wheat to Iraq from the Escrow Account during the Class Period. These accounts were also used to illegally transfer money to the government of Iraq via its agents in furtherance of the [Kickback Scheme] [E]nterprise's conspiracy during the Class Period. Without these accounts, the money laundering and bribery scheme could not have occurred.

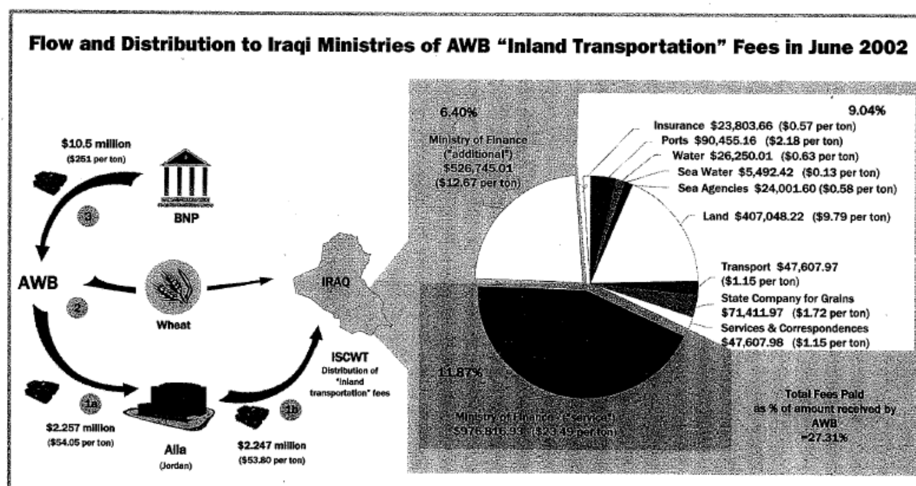
JA 149-150, ¶ 709.[17] *See also* JA 30, ¶ 43 ("AWB repeatedly used this New York account to funnel money to a known Hussein Regime front company…."). AWB does not mention these allegations in its jurisdictional arguments but, instead, proclaims that "the alleged unlawful conduct of which Plaintiffs complain all occurred outside the U.S." AWB Brief at 53. However, the Amended Complaint also alleges that AWB's U.S. office (based in New York City until October 2000) liaised with Australia's UN mission to ensure that AWB was paid efficiently and

---

[17] Rule 8(a)'s "liberal pleading standard" applies to Plaintiffs' allegations concerning subject matter jurisdiction. *Republic of Colombia*, 531 F. Supp. 2d at 420-421. In *Ayyash,* 2006 WL 587342, Judge Lynch stated that "[p]rior to discovery, a plaintiff challenged by a jurisdiction testing motion may defeat the motion by pleading in good faith, … legally sufficient allegations of jurisdiction. At that preliminary stage, the plaintiff's prima facie showing may be established solely by allegations." *Id.* at *3.

promptly for its Programme shipments. JA 29-30, ¶ 41; *see also* JA 30, ¶ 42 (noting that AWB senior manager Timothy Snowball, based in New York City, communicated with other AWB employees globally via U.S.-based mail and wire facilities to ensure AWB's prompt payment under the Programme).[18]

The flow of money through AWB's New York bank accounts is illustrated in the following published chart:



Jeffrey A. Meyer & Mark G. Califano, GOOD INTENTIONS CORRUPTED: THE OIL-FOR-FOOD PROGRAM AND THE THREAT TO THE U.N. 119 (2006).

As Judge Lynch recognized in *Ayyash,* 2006 WL 587342, "courts have held the jurisdictional requirement satisfied where a wire transfer to or from the United

---

[18] *See also* JA 11, Docket Nos. 40-43 (Gold-Zafra Decl. at 18) (Cole Report 's observations regarding use of New York bank accounts to carry out Kickback Scheme). Contrary to AWB's assertions (AWB Brief at 52-54), it cannot be denied that such transfers to and from the U.S. dollar accounts with the Bank of New York were incidental, preparatory, or peripheral to the Kickback Scheme. *Norex Petroleum, Ltd. v. Access Indus., Inc.*, 2007 WL 2766731, *6 (S.D.N.Y. Sept. 24, 2007).

States is integral to the fraud." *Id.* at *6 (citing *Madanes v. Madanes,* 981 F. Supp. 241, 251 (S.D.N.Y. 1997) (subject matter jurisdiction found where wire transfers were integral to fraud because they served to hide assets from plaintiffs)). Here, "the complaint alleges that wire transfers through and to the U.S., which constitute the wire-fraud and money laundering predicates underlying the RICO claims, were similarly integral to defendants' conspiracy." *Id.* at *6. *Accord Republic of Colombia,* 531 F. Supp. 2d at 422 (finding that "Plaintiffs have adequately alleged sufficient United States conduct by Defendants" to satisfy "Rule 8's liberal pleading standard").[19] The same result should obtain here.

[19] *See also United States v. Approx. $25,829,681.80,* 1999 WL 1080370, *4 & n.2 (S.D.N.Y. Nov. 30, 1999) (subject matter jurisdiction existed where tainted foreign funds were transferred through New York accounts and transfers constituted underlying RICO predicate acts); *Bank of Crete, S.A. v. Koskotas,* 1991 WL 177287, *6 (S.D.N.Y. Aug. 30, 1991) (jurisdiction found where defendant transferred funds from plaintiff's U.S. bank account to defendant's U.S. bank account for personal use). Other cases supporting Plaintiffs' position include *Nat'l Group for Commc'n & Computers, Ltd. v. Lucent Tech., Inc.,* 420 F. Supp. 2d 253, 263 (S.D.N.Y. 2006) (subject matter jurisdiction existed in civil RICO action arising out of schemes to extort funds from companies and bribe Saudi government officials; although "many of the key events in this case took place in Saudi Arabia and primarily involved the Saudi plaintiff and various Saudi defendants, a significant number of predicate acts supporting plaintiff's RICO claim took place in the United States"); *Johnson Elec.,* 98 F. Supp. 2d at 486 ("Mabuchi has alleged sufficient activity occurring inside the United States to fall within the RICO statute"); and *Thai Airways,* 842 F. Supp. at 1571 (finding subject matter jurisdiction over RICO claims where, *inter alia,* defendants allegedly made wire transfer of security deposits from New York bank account to Swiss bank, which transfer constituted "not merely a preparatory act, but … an integral part of the alleged conversion").

D Plaintiffs' Amended Complaint Was Not Subject To Dismissal On Grounds Of *Forum Non Conveniens*[20]

This Court's review of AWB's assertion of *forum non conveniens* begins with "a strong presumption in favor of" Plaintiffs' choice of forum. *Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 154 (2d Cir. 2005). "Indeed, it is generally understood that, 'unless the balance is ***strongly*** in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.'" *Id.* (Emphasis added.) Here, the balance is not in Defendants' favor and Plaintiffs' choice of forum should not be disturbed.

AWB's contention that "Plaintiffs' choice of forum in the U.S. deserves little deference because Plaintiffs are foreign residents, and thus there is no reason to assume a U.S. forum is convenient," AWB Brief at 51, is wrong. Plaintiffs' choice of forum was dictated by considerations of convenience, not "forum-shopping" and, contrary to AWB's belief, a foreign plaintiff's choice of a U.S. forum is not automatically provided "little deference."[21]

---

[20] Plaintiffs' responses to AWB's *forum non conveniens* arguments are more thoroughly delineated in their opposition to AWB's motion to dismiss. Compare JA 10, Docket Nos. 28-31 (filed Oct. 10, 2007) *with* JA 11, Docket No. 42 (filed Feb. 8, 2008). Once again, the district court did not address AWB's contentions in its ruling.

[21] *Norex Petroleum* was also a civil RICO action involving a foreign plaintiff. 416 F.3d at 149-150. Many of the RICO predicate acts occurred in Russia, but this Court acknowledged that some of them involved "***wiring through United States banks*** to bribe officials in Russia, to buy corporate assets in Russia, or to hide profits of allegedly illegal activities in Russia." *Id.* at 151 (emphasis added).

In *Iragorri v. United Techs. Corp.*, 274 F.3d 65 (2d Cir. 2001), this Court recognized a sliding-scale analysis to determine the deference provided to plaintiff's choice of a U.S. forum. "The more it appears that a domestic or foreign plaintiff's choice of forum has been dictated by reasons that the law recognizes as valid, the greater the deference that will be given to the plaintiff's choice of forum." *Id.* at 71-72. Thus, courts should "consider the totality of the circumstances supporting a plaintiff's choice of forum." *Norex Petroleum*, 416 F.3d at 154.

Plaintiffs chose to file their case in the U.S. (specifically, in the Southern District of New York) because this is where a substantial part of the wrongdoing occurred and, therefore, where much of the relevant evidence and necessary witnesses are located. Most significantly, from 1999 to 2003 Defendants used U.S. banking institutions to secretly funnel monies to the Hussein Regime.[22] Refusing to acknowledge the *bona fide* connection to the U.S. here, Defendants deliberately

---

Although this Court acknowledged that Russia had a greater interest than the U.S. in the subject matter of the dispute, it also stated that even if a foreign plaintiff "is not entitled to the same ***high deference*** for its New York forum choice as a residential plaintiff, the totality of the *Iragorri* factors strongly suggests that its choice warranted ***substantial deference***." *Id.* at 156 (emphasis added).

[22] Plaintiffs allege that Defendants violated RICO, conducted substantial business in the U.S. throughout the Class Period in furtherance of the Kickback Scheme, violated IEEPA and the FCPA (U.S. statutes), and directly violated UN Resolutions that the U.S. was obligated to comply with. JA 21-22, 24, 27, 30-31, 62, 141-152, ¶¶ 2, 5, 16, 28, 45, 239, 686-720.

ignore that the gravamen of this case involves their violations of RICO and the nexus of the money laundering predicate acts to New York City.

During the Class Period, each Defendant maintained U.S. offices from which conduct occurred in furtherance of the Kickback Scheme Enterprise and in violation of RICO.[23] CSC's international grain trading is coordinated from Minnesota, where evidence of communications, correspondence and contracts pertaining to Programme deals with AWB would be located. JA 86, 87-92, 96-97, ¶¶ 395, 400-426, 443-446. CSC's bank accounts are located in the U.S. JA 89-90, ¶¶ 411-416. Moreover, AWB performed numerous bank transactions that were integral to the Kickback Scheme from and to New York bank accounts, including The Bank of New York (two separate AWB accounts); Chase Manhattan Bank, American Express Bank Ltd., State Street Bank & Trust Co. and BNP. JA 27, 29-30, 149-150, ¶¶ 30, 41, 709. Of significant importance, the BNP Escrow Account – from which funds were illegally siphoned and improperly transferred into the Hussein Regime, or used to indemnify goods suppliers (including AWB) for the bribes they paid to Iraq – was maintained in New York City. JA 24, 29, ¶¶ 15, 37-38. Numerous employee witnesses, communications, contracts and financial

[23] AWB maintained an office in New York City and then Oregon; AWB U.S.A., a Delaware corporation now headquartered in Oregon, maintained an office in New York City; CSC, headquartered in Minnesota, only has U.S. offices; and BNP has a large U.S. presence and the Escrow Account at issue was maintained in New York City. JA 24, 27, 28-29, 29-30, ¶¶ 15, 30, 34-38, 41.

transactions relating to BNP's knowledge of illegal kickbacks paid to the Hussein Regime and BNP's participation in the Kickback Scheme Enterprise will most easily be discoverable in New York.[24] Regarding AWB's manufactured concerns of witnesses and documents located in Australia (AWB Brief at 50), the Australian government and the UN have made the Cole Report and the IIC Report (as well as all related documentary evidence and testimony) available on the Internet, and these sources of proof have already been electronically stored and transported to the district court. JA 11, Docket Nos. 40-43. The fact that all potential "witnesses and evidence will be more easily available to all parties in New York than in [Plaintiffs'] home forum [Iraq] also supports according deference to [P]laintiff[s]' choice." *Norex Petroleum*, 416 F.3d at 156.

Even if Defendants have succeeded in demonstrating that an adequate alternative forum – Australia – exists, that modest demonstration is insufficient to *per se* compel dismissal on *forum non conveniens* grounds. *See Iragorri*, 274 F.3d

[24] News reports state that BNP documents related to Programme transactions and contracts are likely located in New Jersey. *See, e.g.,* William Safire, *Tear Down This U.N. Stonewall*, N.Y. TIMES, June 14, 2004 (two BNP sources reveal that "copies of the damning documents are stored by BNP Paribas in New Jersey"). *See also Cerasani v. Sony Corp.*, 991 F. Supp. 343, 354 n.3 (S.D.N.Y. 1998) (explaining that court may take judicial notice of information contained in news articles and listing cases wherein federal courts did so); JA 130-132, ¶¶ 641-651 (discussing BNP internal audits conducted in New York); JA 133, ¶ 656 (citing *N.Y. Times* article authored by Safire discussing relevant documents located in New York or New Jersey).

74-75. Where Defendants have not met their burden of proving that the private and public interest factors ***strongly*** weigh in favor of dismissal, Plaintiffs' choice of forum stands. *Norex Petroleum*, 416 F.3d at 154. Defendants do not meet that burden here.[25]

Despite AWB's contention, AWB Brief at 50, regulatory investigations conducted by the Cole Commission in Australia do not warrant dismissal on *forum non conveniens* grounds. In *Bodner v. Banque Paribas*, 114 F. Supp. 117 (E.D.N.Y. 2000), an independent French government commission had been established to study accusations and publish proposals regarding redress of Holocaust atrocities in France. The defendants provided full compliance and maximum cooperation to the commission's inquiry and claimed that full restitution would eventually be achieved for plaintiffs through the commission's efforts. *Id.* Like AWB, the *Bodner* defendants claimed that relevant documents and witnesses

[25] In a related case, *Mastafa v. Australian Wheat Bd., Ltd.*, 2008 WL 4378443, at *1 (S.D.N.Y. Sept. 25, 2008), Iraqi victims of torture inflicted by the Hussein Regime alleged violations of the law of nations, the Torture Victims Protection Act and the Alien Tort Claims Act. Dismissing the claims against AWB on *forum non conveniens* grounds, Judge Lynch noted that "little, if any, of the evidence exists" in the U.S. and "the abstract interest of the United States in enforcing international law does not compel an assertion of jurisdiction." *Id.* at *8-9. Contrary to the result reached in *Mastafa*, the core allegations in this case concern violations of RICO and U.S. money laundering statutes and the illegal use of this country's banking institutions by co-conspirators located in the U.S. and throughout the world, which is a matter of significant local and national interest. AWB cannot dispute that much evidence regarding those banking transactions is located in the U.S.

were located in a foreign country, asserting that "discovery is greatly complicated by the fact that many key documents are in the hands of the French government rather than the hands of the banks themselves, due to the investigative commissions the government established." They stated that "the Court will be frustrated in the eventual resolution of this case, since the French government may not be sued or compelled to participate in discovery," and that "they are fully cooperating with the ongoing political redress efforts in France." *Id.* at 131.

The *Bodner* court nevertheless denied defendants' request for dismissal on *forum non conveniens* grounds, holding that private and public interest factors as well as the fact that "substantial relevant primary documentation exists in historical archives, collections, and elsewhere outside France," tilted against dismissal. *Id*. at 132. The *Bodner* court further noted that the actions of the French government resulting from that commission's reports would "serve to reveal and catalogue the very discovery information at issue in this case." *Id.* at 132-133. In this case, given the Cole Report's detailed revelations, issues of convenience and expense do not merit dismissing this action in favor of Australia.

Moreover, any civil litigation being prosecuted in Australia by AWB's stockholders, who alleged they were defrauded by material misstatements or omissions when they purchased AWB's securities, cannot seriously be analogized to this case, wherein Plaintiffs seek compensation for conduct that threatened to

starve them to death, not subject them to losses from their investment portfolio. JA 11, Docket Nos. 41-43 (Gold-Zafra Decl., Ex. 6). Therefore, risks of inconsistent judgments between this case and the Australian case are non-existent.

Most significantly, New York and the U.S. have an obvious localized and national interest, respectively, in preventing their banking institutions from being used to illegally transfer money in violation of RICO, federal money laundering statutes, and U.S. Government regulations – particularly given New York City's status as the world's center of finance and commerce and the involvementof the Hussein Regime, the subject of two U.S. major military actions, and a designated entity on the U.S. Government's State Sponsors of Terrorism list during the Class Period, from 1999 to 2003. In *Republic of Colombia*, defendants' *forum non conveniens* motion was denied, even though Colombia was found to be an adequate alternative forum, the foreign plaintiffs were Colombian, an "extremely significant body of evidence" was most likely to be found in Colombia, "a significant amount of the money laundering process occurred in Colombia … documents concerning and witnesses to those stages of the money laundering process" were all located in Colombia, and "key non-party witnesses" were located in Colombia where there is no "procedural device for compelling the testimony of a witness to a case pending in [N.Y. federal court]" because "the case [was] about whether Defendants violated U.S. money laundering and related laws" and U.S.

law predominates the dispute where a RICO claim is the primary claim, which clearly raises questions of federal law. 531 F. Supp. 2d at 406-408, 410-411 n.15.

This Court should heed *Iragorri*'s advice to have "an appropriate degree of skepticism" in evaluating Defendant AWB's request for dismissal under the doctrine of *forum non conveniens*: "Courts should be mindful that, just as plaintiffs sometimes choose a forum for forum-shopping reasons, defendants also may move for dismissal under the doctrine of *forum non conveniens* not because of genuine concern with convenience but because of similar forum-shopping reasons." *Iragorri*, 274 F.3d at 75.[26] This case should not be dismissed on *forum non conveniens* grounds; even assuming Australia's adequacy, the private and public interest factors favor deference to Plaintiffs' forum choice.

CONCLUSION

For the reasons stated herein (and in their Opening Brief), Plaintiffs-Appellants respectfully submit that the judgment entered by the district court should be reversed and this case should be remanded for discovery, other pretrial proceedings and trial on the merits.

---

[26] AWB certainly has no problem litigating in U.S. federal courts when it suits it own needs. For example, it has brought admiralty and maritime claims as a plaintiff. *See AWB Ltd. v. Breakbulk Marine Serv., Ltd.*, No. 07 Civ. 04011 (PLK) (S.D.N.Y.).

Dated: May 26, 2009

WILENTZ, GOLDMAN & SPITZER, P.A.

By: ______________________________________
Kevin P. Roddy (KR-2359)

90 Woodbridge Center Drive, Suite 900
Woodbridge, NJ 07095
Telephone: (732) 636-8000

-and-

Pamela R. Gold-Zafra (PG-7767)
110 William Street, 26th Floor
New York, NY 10038
Telephone: (212) 267-3091

OSEN LLC
Joshua D. Glatter (JG-0184)
Gary M. Osen (GO-5790)
Ari Ungar (AU-3232)
700 Kinderkamack Road
Oradell, NJ 07649
Telephone: (201) 265-6400

SHALOV, STONE, BONNER & ROCCO LLP
James P. Bonner (JB-0629)
485 Seventh Avenue, Suite 1000
New York, NY 10018
Telephone: (212) 239-4340

TURNER & ASSOCIATES, P.A.
C. Tab Turner
4705 Somers Avenue, Suite 100
North Little Rock, AR 72116
Telephone: (501) 791-2277

NELKIN & NELKIN P.C.
Jay Nelkin
5417 Chaucer Drive
Houston, TX 77005
Telephone: (713) 526-4500
Facsimile: (713) 526-8915

Counsel for Plaintiffs-Appellants

CERTIFICATE OF COMPLIANCE

I, Kevin P. Roddy, hereby certify that the total word count in the brief is 10,066 in Times New Roman, 14 pt. type and that it is in compliance with Federal Rule of Appellate Procedure, 32(a)(7)(B).

By: ______________________________________
Kevin P. Roddy (KR-2359)

AFFIDAVIT OF SERVICE

DOCKET NO. 08-5185-cv

--X

Karim

vs.

AWB Limited

--X

I, , swear under the pain and penalty of perjury, that according to law and being over the age of 18, upon my oath depose and say that:

on May 26, 2009

I served the **Reply Brief of Plaintiffs-Appellants** within in the above captioned matter upon:

Elliot G. Sagor
Hogan & Hartson LLP
Attorneys for Defendant-Appellee
Commodity Specialists Company
875 Third Avenue
New York, NY 10022
egsagor@hhlaw.com

Robert H. Baron
Cravath Swaine & Moore
Attorneys for Defendants-Appellees AWB Limited and AWB (USA) Limited
825 Eighth Avenue
New York, NY 10019
rbaron@cravath.com

Jennifer L. Spaziano
Skadden Arps Slate Meagher
& Flom LLP
Attorneys for Defendant-Appellee
BNP Paibas
1440 New York Avenue, NW
Washington, DC 20005
Jen.spaziano@skadden.com

Also Electronically Filed & Served

via **Express Mail** by depositing **2** copies of same, enclosed in a post-paid, properly addressed wrapper, in an official depository maintained by United States Postal Service.

Unless otherwise noted, copies have been sent to the court on the same date as above for filing via Hand Delivery.

Sworn to before me on May 26, 2009

______________________________ ____________________

Robyn Cocho
Notary Public State of New Jersey
No. 2193491
Commission Expires January 8, 2012

Job#222999

ANTI-VIRUS CERTIFICATION FORM
Pursuant to Second Circuit Local Rule 32(a)(1)(E)

CASE NAME: Karim v. AWB Limited

DOCKET NUMBER: 08-5185-cv

I, Elissa Matias, certify that I have scanned for viruses the PDF version of the

______ Appellant’s Brief

________ Appellee’s Brief

_____X___ Reply Brief

________ Amicus Brief

________ Petitioner Brief

that was submitted in this case as an email attachment to civilcases@ca2.uscourts.gov. and that no viruses were detected.

Please print the **name** and the **version** of the anti-virus detector that you used:

Symantec AntiVirus version 10.0 was used.

____
Elissa Matias

Date: May 26, 2009