Case No. 14-35693

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MELVIN J. HOWARD,

Plaintiff and Appellant,

v.

MAXIMUS, INC., d/b/a
MAXIUMS, CANADA INC., d/b/a
Themis Program Management & Consulting Ltd.,
STEVE KITCHER, in his individual capacity; JOANNE PLATT,
in her individual capacity;

Defendants and Appellees.

On Appeal from the United States District Court, Oregon
PORTLAND DIVISION
Case No. 3:13-CV-01111-ST, Honorable Anna J. Brown, Judge

APPELLANTS' PETITION FOR REHEARING AND REHEARING *EN BANC*

MelvinJHoward@lobbyist.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

FEDERAL CASES

FEDERAL STATUTES

RULE 35(b)(1) STATEMENT

Appellant hereby move for rehearing and rehearing *en banc* of the panel decision of this Court issued on September 19, 2016. On September 29, 2016, this Court granted appellant an extension of time to October 24, 2016, to file this Petition. The panel decision in this case conflicts with decisions of this Court and of the Supreme Court of the United States. Consideration by the full Court is also necessary to secure and maintain uniformity of the Court's decisions. In addition, the panel's decision presents questions of exceptional importance because the panel's decision conflicts with authoritative decisions of other United States Courts of Appeals that have addressed these issues. The panel decision invokes and relies on evidence not taken from the record of the case. The Supreme Court has indicated that a conflict between circuits may be an appropriate reason to grant an en banc rehearing, at least when the judges of a circuit express doubt about the correctness of their own circuit's precedent. See Groves v. Ring Screw Works, 498 U.S. 168, 172 n.8 (1990).

INTRODUCTION

A reading of the very brief Memorandum opinion leads one to believe that this case involves a plaintiff who suffered no cognitive injuries, no business loss and no human rights violations at the hands of a corrupt organization while being arbitrarily detained in a democratic society, governed by the rule of law, with a

transparent government, and access to courts who enjoyed rights under the North America Free Trade Agreement (NAFTA) that was signed by the United States, Canada and Mexico to participate in international commerce. But who simply did not exercise his rights to sue defendants who claim the parent company has similar but divergent interests from their subsidiaries in the venue where the wrongs occurred. In fact, plaintiff suffered extraordinary injury while being arbitrarily detained in Canada and that the human rights abusers — such as defendants' company subordinates and subsidiaries — acted with complete impunity, and where plaintiff knew they faced reprisals if they sued defendants in the foreign venue. Just a quick scan of the defendant's SEC Form 10-K would tell you that the divergent interests is nonexistent when it comes to contributions to their balance sheet. To bolster this meritless position defendants' Canadian subsidiary demonstrates animus towards the same capitalistic system that allowed their parent company to reap millions worth of US government contracts that fueled the acquisition of the Canadian companies in the first place. The predicate acts of corruptions and inference of impropriety exists companywide. Yet in one fell swoop, the panel decisions in this case gave a thumbs up wholesale dismissal of the Appellants appeal and rubber stamped the district court ruling with no discovery, factual analysis or investigation whatsoever. The Plaintiff has documentary evidence that substantiates the asserted claims. The Plaintiff seek

rehearing *en banc* for this Court to address the various intra-circuit and inter-circuit conflicts created by this ruling. In our merits brief as Plaintiff and Appellant, raised arguments that are pertinent to this *en banc* petition.

First, Defendants' argument was that RICO confers a private civil right of action only for domestic injuries, and that Plaintiff here failed to allege any such injuries. Second, Defendants alternatively argued that the substantive provisions of RICO apply only to domestic patterns of racketeering activity, and that the Plaintiffs here failed adequately to allege such domestic activity. Defendants based both arguments largely on the Court's decision in *Chao Fan Xu,* which held that because "RICO is silent as to any extraterritorial application," it "has none" in private civil RICO actions (citations omitted). RICO does not require proof of every alleged predicate act or of any particular predicate acts. See United States v. Basciano, 599 F.3d at 206. The law demands only that a RICO plaintiff prove sufficient predicate acts (but not fewer than two) to demonstrate the required pattern of racketeering. The panel simply did not address our arguments it simply Affirmed the District Court ruling for convenience. In *Swierkiewicz v. Sorema N.A.*, 534 U.S. (2002), it was decided unanimously that it is a gross violation of procedures to dismiss a lawsuit at this stage of the proceedings. Among the points the justices made were that a plaintiff can prevail without establishing a prima facie case at all, that a judge's opinion of whether or not a litigant will prevail

before a jury is irrelevant to decision to dismiss a lawsuit, and that it is fundamentally unfair to dismiss a lawsuit before the whole body of facts can be revealed through discovery. Intra circuit panels have expressly hold that Section 1962 applies to extraterritorial patterns of racketeering activity, at least to the extent that the predicate offenses comprising the pattern apply extraterritorially.

ARGUMENT

I. THE RECENT SUPREME COURT'S JUNE 20, 2016 RULING FIRMLY ESTABLISHES THAT PREDICATED ACTS COMMITTED ABROAD COULD RESULT IN RICO LIABILITY.

The panel erroneously departed from Supreme Court guidance and created a circuit split. Given the differing approaches adopted by the circuit courts, the Supreme Court granted certiorari and reviewed the Second Circuit's decision in European Cmty. Compare, e.g., European Community v. RJR Nabisco, Inc., 764 F.3d 129, 136 (2d Cir. 2014) (RICO can apply to extraterritorial conduct "if, and only if, liability or guilt could attach to extraterritorial conduct under the relevant RICO predicated acts), The federal statute 18 U.S.C. 1961 itemizes a long list of RICO predicate acts including section 1544 (relating to misuse of passport and section 1951 relating to interference with commerce, section 1952 Interstate and foreign travel or transportation in aid of racketeering enterprises.) Section 1962(c) is basically aimed at those persons who use some alliance or entity ("the RICO

enterprise") as a vehicle to carry out a related series of wrongful acts to harm another. It focuses on systematic and organized behavior carried out over time.

With this circuit decision in United States v. Chao Fan Xu, 706 F.3d 965, 974–975, 977 (9th Cir. 2013). The analysis was with a presumption that RICO does not apply extraterritorially in a civil or criminal context. But with regard to RICO's substantive liability provision, § 1962, the Supreme Court agreed with the Second Circuit's decision in European Cmty., holding that "RICO applies to some foreign racketeering activity":

> Separately, RICO creates a private civil cause of action that allows "[a]ny person injured in his business or property by reason of a violation of section 1962" to sue in federal district court and recover treble damages, costs, and attorney's fees. A violation of §1962 may be based on a pattern of racketeering that includes predicate offenses committed abroad, provided that each of those offenses violates a predicate statute that is itself extraterritorial. The statute provides a cause of action to "[a]ny person injured in his business or property" by a violation of § 1962. The statute's reference to injury to "business or property.

In European Community v. RJR Nabisco, Inc., 579 U.S. ____ (2016), the Court held that some foreign conduct may be actionable under RICO and that private civil plaintiffs may predicate RICO claims on certain foreign conduct if they allege "domestic injury" resulting from those foreign acts. Congress did not limit RICO to domestic enterprises. A domestic enterprise requirement would lead to difficult line-drawing problems and counterintuitive results Id. at 15. It would exclude from RICO's reach foreign enterprises—whether corporations, crime

rings, other associations, or individuals—that operate within the United States. Justice Samuel Alito, writing for a four-justice majority, partially agreed with the Second Circuit and held that "a violation of §1962 [RICO] may be based on a pattern of racketeering that includes predicate offenses committed abroad, provided that each of those offenses violates a predicate statute that is itself extraterritorial. Thus, RICO applies to all "patterns of racketeering," regardless of whether they are connected to a 'foreign' or 'domestic' enterprise. In Justice Ginsburg dissent from part IV from the judgement she goes on to say:

> I disagree, however, that the private right of action authorized by §1964(c) requires a domestic injury to a person's business or property and does not allow recovery for foreign injuries. One cannot extract such a limitation from the text of §1964(c), which affords a right of action to "[a]ny person injured in his business or property by reason of a violation of section 1962." Section 1962, at least subsections (b) and (c), all agree, encompasses foreign injuries. How can §1964(c) exclude them when, by its express terms, §1964(c) is triggered by "a violation of section 1962"? To the extent RICO reaches injury abroad when the Government is the suitor pursuant to §1962 (specifying prohibited activities) and §1963 (criminal penalties) or §1964(b) (civil remedies), to that same extent, I would hold, RICO reaches extraterritorial injury when, pursuant to §1964(c), the suitor is a private plaintiff.

Regardless of whether a RICO claim is predicated upon state or federal criminal violations (or a combination of both), the defendant need not be criminally convicted before a civil plaintiff can sue for treble damages under RICO. Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 493 (1985). The statute requires only that the criminal activities are "chargeable" or "indictable" under

state or federal law, not that the defendant has already been charged or indicted. Additionally, however, the court held that even when a RICO claim is permissibly predicated on foreign conduct, a RICO enterprise must engage in, or affect in some significant way, commerce directly involving the United States. It would stand to reason a claim of intentional tortious economic interference by a US company. Designed to disrupt and block the expansion of another US company into Canada who filed a claim under the North America Free Trade Agreement would fit squarely in this cube. Following review en banc, this Circuit held that a plaintiff's loss of employment and employment opportunities due to false imprisonment was an injury to "business or property" within the meaning of RICO. This court rejected the notion that business or property interests harmed by a defendant's acts must actually be the target of the predicate act, and remanded the case to determine if the plaintiff could satisfy the remaining aspects of his claim. See Diaz v. Gates, 420 F.3d 897 (9th Cir. 2005). The Supreme Court held in Salinas v. United States, 522 U.S. 52, 63 (1997) that "[a] conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense." The Court went on to state: "The interplay between subsections (c) and (d) [of RICO] does not permit us to excuse from the reach of the conspiracy provision an actor who does not himself commit or agree to commit the two or more predicate acts requisite to the underlying offense." The recent

Supreme Court dicision held that the provision of RICO authorizing private civil suits permits those claims that are based on a "domestic injury" to the plaintiff's business or property, rather than those based on a "foreign injury the Plaintiff has the unenviable and undeniable position to experience both. The Plaintiff has been consistent in his pleadings he suffered domestic injuries to their US business and property.

II. THE PANEL MISAPPLIED THE STANDARD OF REVIEW AND IMPROPERLY SUBSTITUTED ITS FACTUAL DETERMINATIONS FOR THOSE OF THE DISTRICT COURT.

With regards to compliance with Fed.R.Civ.P. 8(a) and Fed.R.Civ.P. 9(b). PLAINTIFF submits that the COMPLAINT provided enough details to satisfy the requirements under Fed.R.Civ.P. 8(a) and Fed.R.Civ.P. 9(b), if not Code Pleading, due the number of facts alleged in the AMENDED COMPLAINT. However, it appears that the panel is not interested in analyzing the facts alleged in the complaint or briefs. The interests of the Appellant have been obliterated in the interest of simplicity rather than merit. The panel implies that the district court did not error in examining the record including attachments the Plaintiff strongly disagrees with this assertion. The tone of derision that pervades in the opinion demonstrates that this appeal was not properly heard. It is obvious from even a superficial reading of the panel opinion the decision is not based on the appellate record but on an automatic preconceived prejudicial notion that pro se litigants do

not deserve full consideration by the court and their cases are not winnable. But this is would be putting the cart before the proverbial horse without due process. It is clear that pro se litigants do not have most favored nation status when it comes to presenting their case. But none of the factual assertions in the panel opinion was based on any exploratory hard evidence. But on mis-construing legal standards for sustaining a complaint and trying to litigate the matter "without going to trial," which is how the disputed facts should be litigated. The Opinion just simply rejects these factual findings, yet fails to explain why they are clearly erroneous the Panel heard the appeal cold. For instance, the Magistrate's report and recommendations are erroneous for the following reasons. In the Magistrate FINDINGS AND RECOMMENDATION (Doc 27) she opened the door to the so called "second bite at the apple" maxim. In summary, she states moreover, as recently held by the Supreme Court, statutes do not apply to extraterritorial conduct absent an explicit statement from Congress to the contrary. *Kiobel v. Royal Dutch Petroleum Co.*, __US__, 133 S Ct 1659, 1669 (2013) (holding that the Alien Tort Statute does not apply to conduct occurring outside of the United States); *Morrison v. Nat'l Austl. Bank, Ltd.*, 561 US 247, __, 130 S Ct 2869, 2883 (2010) (holding that § 10-b of the Securities and Exchange Act of 1934 does not apply to extraterritorial conduct when the security is bought or sold on a foreign market). The Plaintiff simply asserted his right in expanding this line of questioning that the Magistrate brought

forth in her findings. There was no attempting to assert new claims under the Alien Tort Statute, 28 U.S.C. § 1350, and the Torture Victim Protection Act of 1991, 106 Stat. 73 (note following 28 U.S.C. § 1350) only clarification and justification in terms of how it applied to the Plaintiff's case.

III. THE PANEL'S ANALYSIS OF THE PRIVATE AND PUBLIC INTEREST FACTORS IGNORES THE STANDARD OF REVIEW AND CREATES ADDITIONAL SPLITS OF AUTHORITY

Where the plaintiff is a United States citizen, the defendant must satisfy a heavy burden of proof, Boston Telecomms. Grp., Inc. v. Wood, 588 F.3d 1201, 1207 (9th Cir. 2009) (quoting Lueck v. Sundstrand Corp., 236 F.3d 1137, 1143 (9th Cir. 2001)), and, unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed, id. (quoting Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1334-35 (9th Cir. 1984). The district court did not weigh the Plaintiff's residency or consider the deference due Plaintiff 's chosen forum. The district court also failed to consider the forum's convenience to the litigants, a private interest factor for which Defendants provided the district court no evidence. A plaintiff need not select the optimal forum for his claim, but only a forum that is not so oppressive and vexatious to the defendant 'as to be out of proportion to plaintiff's convenience. Tuazon v. R.J. Reynolds Tobacco Co., 433 F.3d 1163, 1180 (9th Cir. 2006) (quoting Ravelo Monegro v. Rosa, 211 F.3d 509, 514 (9th Cir. 2000)). Defendants made no effort to shoulder their burden of

showing oppressive and vexatious inconvenience in litigating in Oregon. Further, the district court failed to explicitly consider any of the public interest factors, such as the strengths of international investment law. The public deserves to know why the Plaintiff was not able to complete his NAFTA proceedings the circumstances of which can be considered as affecting the "public interest". In addition to the district court's failure to consider relevant factors, the district court made several errors in weighing the factors that it did consider. First and foremost, the district court erred by focusing solely on the location of the witnesses. The focus for this private interest analysis should not rest on the number of witnesses . . . in each locale but rather the court should evaluate the materiality and importance of the anticipated . . . witnesses' testimony and then determine their accessibility and convenience to the forum." Carijano v. Occidental Petroleum Corp., 643 F.3d 1216, 1231 (9th Cir. 2011), cert. denied, 133 S.Ct. 1996 (2013) (quoting Boston Telecomms., 588 F.3d at 1209) (internal quotation marks omitted). The district court failed to perform the required analysis, and Defendants failed to provide enough information to do so. A district court abuses its discretion in the forum non conveniens context "when it fails to hold a party to its 'burden of making a clear showing of facts which establish such oppression and vexation of a defendant as to be out of proportion to plaintiff's convenience,' or when it 'fail[s] to consider relevant private and public interest factors and misconstrue[s] others. Carijano, 643

F.3d at 1236 (citations omitted) (quoting Boston Telecomms., 588 F.3d at 1212; Gates Learjet, 743 F.2d at 1337).

CONCLUSION

For the foregoing reasons, plaintiffs respectfully request rehearing by the panel or, in the alternative, rehearing by the full court sitting en banc.

Dated: October 24, 2016

By: *s/*Melvin J. Howard
*s/*Melvin J. Howard

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 35(b)(2) of the Federal Rules of Appellate Procedure, I hereby certify that this petition complies with the volume limitations in that the Petition for Rehearing and Rehearing *En Banc* does not exceed 15 pages, exclusive of material not counted under Federal Rule of Appellate Procedure 32. Is proportionally spaced using Times New Roman typeface with a point size of 14, and contains 3,460 words.

Dated: October 24, 2016

By: *s/*Melvin J. Howard
*s/*Melvin J. Howard

CERTIFICATE OF SERVICE

I, Melvin J. Howard hereby certify that on October 24, 2016, I electronically filed the foregoing with the Clerk of the court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users will be served by the appellate CM/ECF system. I declare under penalty of perjury under the laws of the State of Oregon that the foregoing is true and correct.

*s/*Melvin J. Howard

*s/*Melvin J. Howard