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RICO Section 1962(c) Enterprises and the Present Status of the “Distinctness Requirement” in the Second, Third and Seventh Circuits

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RICO SECTION 1962(c) ENTERPRISES AND THE PRESENT STATUS OF THE "DISTINCTNESS REQUIREMENT" IN THE SECOND, THIRD AND SEVENTH CIRCUITS

*Laurence A. Steckman**

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INTRODUCTION

Under Section 1962(c) of the Racketeer Influenced and Corrupt Organizations Act (“RICO”),¹ plaintiff must plead and prove the existence of an enterprise,² distinct from the person(s)³ alleged to have directed criminal enterprise activity,⁴ through which a pattern⁵ of predicate wrongs are committed,⁶ causing injury to plaintiff’s business or property.⁷ “Distinctness” is one of the most heavily

¹ 18 U.S.C. § 1961-1968 (2005). RICO was enacted as Title IX of the Organized Crime Control Act of October 15, 1970, Pub.L. No. 91-452, 84 Stat. 941 (1970).

² An “‘enterprise’ includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity” 18 U.S.C. § 1961(4).

³ The term “‘person’ includes any individual or entity capable of holding a legal or beneficial interest in property” 18 U.S.C. § 1961(3). An “association in fact enterprise” cannot be a RICO “person” because it is not “capable of holding a legal or beneficial interest in property.” *See Haroco, Inc. v. American Nat’l Bank and Trust Co. of Chicago*, 747 F.2d 384, 401 (7th Cir. 1984) (“[N]ebulous association in fact does not itself fall within the RICO definition of ‘person.’ We doubt that an ‘association in fact’ can, as such, hold any interest in property or even be brought into court.”), *aff’d*, 473 U.S. 606 (1985).

⁴ *See generally* *Reves v. Ernst & Young*, 507 U.S. 170, 178-86 (1993) (discussing that a RICO person must exercise appropriate level of control and direction over enterprise’s activities to justify imposition of RICO remedies, and setting forth “operation and management” test).

⁵ Case law holds that a pattern exists where predicate acts are related and pose a threat of continued criminal activity. *See H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 236-37 (1989).

⁶ Predicate wrongs include, for example, any act involving murder, kidnapping, gambling, arson, robbery, bribery, and extortion. *See* 18 U.S.C. § 1961(1).

⁷ *See* 18 U.S.C. § 1964(c). *See generally* Laurence A. Steckman & Robert E. Conner, *Loss Causation Under Rule 10b-5, a Circuit-by-Circuit Analysis: When Should Representational Misconduct be Deemed the Cause of Legal Injury Under the Federal Securities Law?*, 28 RICO L. REP. 173, (1998) (discussing, in addition to federal securities law causation, RICO proximate causation); Laurence A. Steckman & Kenneth M. Moltner, *Recent Developments in Direct Injury Analysis in the Second Circuit: An Examination of the Injury and Causation Elements of RICO Standing*, 15 RICO L. REP. 274, (1992).

litigated requirements in RICO cases and is generally referred to as the "Distinctness Requirement."⁸ Exactly what RICO plaintiffs must plead and prove⁹ to satisfy "distinctness," varies from Circuit to Circuit and, within some Circuits, from case to case, generating substantial confusion.¹⁰ Nevertheless, no systematic efforts have been made to identify the bases on which conflicting Distinctness Requirement decisions have turned nor has any global study of intra-circuit trends been made regarding application of this requirement to different enterprise/person combinations.¹¹

Part I sets out tests, considerations and distinctions which explain outcomes in three leading circuit level Distinctness Requirement cases, the Second Circuit's *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.* ("Riverwoods"),¹² the Third Circuit's *Jaguar Cars Inc. v. Royal Oaks Motor Car Co.*¹³ ("Jaguar Cars"), and the Seventh Circuit's *Fitzgerald v. Chrysler Corp.*

⁸ Some cases use the term "distinctiveness" as opposed to "distinctness." The terms "distinctness" and "distinctiveness" are used interchangeably in the cases. This article refers to the requirement of separation between the enterprise and person as the "Distinctness Requirement."

⁹ Formulations of the elements of a § 1962(c) claim vary. "Distinctness" is often listed as a requirement separate from the RICO claim's listed elements. See, e.g., *Lippe v. Bairnco Corp.*, 225 B.R. 846, 860 (Bankr. S.D.N.Y. 1998).

¹⁰ See ARTHUR F. MATHEWS, ANDREW B. WEISSMAN, & JOHN H. STURC, 2 CIVIL RICO LITIGATION § 6.03, at 6-3 (2d ed. 1992) ("[C]ourts have wide disagreements over when a person and an enterprise are sufficiently distinct to satisfy a separateness requirement.").

¹¹ RICO also requires distinctness between the pattern of predicate misconduct and the enterprise. See Gail A. Feichtinger, Note, *RICO's Enterprise Element: Redefining or Paraphrasing to Death?*, 22 WM MITCHELL L. REV. 1027, 1046 (1996) (discussing the difference between the majority and minority positions on the degree of separateness required to establish the enterprise and the pattern of racketeering activity). This article deals only with person-enterprise distinctness, not pattern-enterprise distinctness.

¹² 30 F.3d 339 (2d Cir. 1994).

¹³ 46 F.3d 258 (3d Cir. 1995).

(“*Fitzgerald*”),¹⁴ each of which articulate different and highly influential approaches to the analysis of distinctness. Part I also examines the Supreme Court’s 2001 decision, *Cedric Kushner Promotions, Ltd. v. King* (“*Cedric*”),¹⁵ in which the Court attempted to resolve a conflict between the Second and Third Circuits regarding the analysis of the recurrent pleading scenario of a corporation enterprise controlled by a natural person corporate officer.

Part II analyzes the historical development of the Distinctness Requirement paradigms that control analysis in the Second, Third and the Seventh Circuits, and discusses how *Cedric* has influenced these analyses.

Part III examines how the Distinctness Requirement has been applied to corporation, partnership, and sole proprietorship business enterprises, by courts of the Second, Third, and Seventh Circuits, historically and currently.¹⁶

Part IV examines how the Distinctness Requirement has been

¹⁴ 116 F.3d 225 (7th Cir. 1997).

¹⁵ 533 U.S. 158 (2001).

¹⁶ Substantial scholarly literature has been devoted to the RICO enterprise element. See, e.g., Christopher W. Madel, *The Modern RICO Enterprise: The Inoperation and Mismanagement of Reves v. Ernst & Young*, 71 TUL. L. REV. 1133 (1997); Feichtinger, *supra*, note 11; Douglas E. Edlin, *Parent and Subsidiary Corporations: The Jaguar Cars Decision and the RICO Distinctiveness Requirement*, 172 N.J.L.J. 42 (1995); Laurence A. Steckman & Kenneth Moltner, *Corporation/Employee Association-in-Fact Enterprises After Jaguar Cars*, 11 CIV. RICO REP. 6, 8 (1995); Thomas S. O’Neill, Note, *Functions of the RICO Enterprise Concept*, 64 NOTRE DAME L. REV. 646 (1989); Henry A. LaBrun, Note, *Innocence by Association: Entities and the Person-Enterprise Rule under RICO*, 63 NOTRE DAME L. REV. 179 (1988); David Vitter, Comment, *The RICO Enterprise as Distinct from the Pattern of Racketeering Activity: Clarifying the Minority View*, 62 TUL. L. REV. 1419 (1988); Michael Goldsmith, *RICO and Enterprise Criminality: A Response to Gerard E. Lynch*, 88 COLUM. L. REV. 774 (1988). See generally Lisa Pritchard Bailey, Rebecca Sasser, Matthew Sikes & Jae Yang, *Racketeer-Influenced and Corrupt Organizations*, 36 AM. CRIM. L. REP. 1035, 1048-1057 (1999); Shaun P. Martin, *Intracorporate Conspiracies*, 50 STAN. L. REV. 399 (1998).

applied to association in fact enterprises between single corporations and their officers or employees and association in fact enterprises composed of multiple, nonrelated businesses and their employees. Part V examines how the courts have applied the Distinctness Requirement to enterprises comprised of corporate entities standing in parent/subsidiary or other affiliate relationships. This article concludes that unless the Supreme Court acts to resolve continuing inconsistencies, taking into account the rationales behind the different approaches courts have taken, RICO cases will continue to be burdened with convoluted distinctions, tests and analyses that further neither the courts' interests in judicial economy in complex cases nor the interests of RICO litigants.

PART I

AN OUTLINE OF THEORIES TESTS AND DISTINCTIONS UPON WHICH THE ADJUDICATION OF THE DISTINCTNESS REQUIREMENT DEFENSE DEPENDS

A. The Third Circuit's Separate Legal Identity Theory

Under 18 U.S.C. § 1961(4), an "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity. . . ." The Distinctness Requirement derives from the language "employed by or associated with any enterprise" set forth at 18 U.S.C. § 1962(c):

It shall be unlawful for any person *employed by or associated with any enterprise* engaged in, or the

activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity¹⁷

This language presupposes separateness between the person "employed" or "associated" and the party doing the "employing" or with whom association occurs.¹⁸ Many courts and commentators have concluded that it is illogical that a person or entity can "associate with oneself," and many cases have been dismissed for this reason.¹⁹ Exactly what type of "separateness" must be pleaded for § 1962(c) purposes is not described in the statute and inconsistent case treatment of similar enterprise/person pleadings plagues the

¹⁷ 18 U.S.C. § 1962(c) (emphasis added). *See generally* Brannon v. Boatmen's First Nat'l Bank of Oklahoma, T.B.A., 153 F.3d 1144, 1146 (10th Cir. 1998) (stating that a well settled rule that enterprise and person must be distinct for § 1962(c) purposes flows from statutory mandate that a person who engages in a pattern of racketeering activity must be "employed by or associated with" the enterprise). *See also* SOLOVY & REES, RICO, ch. 69.3 (1998) ("Most courts of appeals have concluded that this language clearly contemplates an enterprise separate and distinct from the individual or entity who unlawfully conducted its affairs."); *id.* at n.5.

¹⁸ *See Riverwoods*, 30 F.3d at 344 ("[P]lain language of section 1962(c) clearly envisions separate entities, and the distinctness requirement comports with legislative intent and policy," (citing *Bennett v. U.S. Trust Co. of New York*, 770 F.2d 308, 315 (2d Cir. 1985) (stating RICO's plain language requires plaintiff to distinguish between the enterprise and the person conducting its affairs)); *STURC*, *supra* note 10, at 6-7 ("[C]onduct of affairs" language addresses the relationship of predicate acts to the enterprise).

¹⁹ *See, e.g., Bennett*, 770 F.2d at 315 (stating that a corporate entity cannot simultaneously be the enterprise and the person who conducts its affairs; permitting this would be tantamount to permitting an entity to associate with itself); *Hirsch v. Enright*, 751 F.2d 628, 633 (3d Cir. 1984) (stating that it is illogical to suggest that the defendant/enterprise could be associated with itself); *McCullough v. Suter*, 757 F.2d 142, 144 (7th Cir. 1985) ("[Y]ou cannot associate with yourself, any more than you can conspire with yourself, just by giving yourself a nom de guerre"). *See generally* RAKOFF & GOLDSTEIN, RICO: CIVIL AND CRIMINAL LAW AND STRATEGY, 1-57 (1989) ("[M]ost courts have held that, in a RICO violation grounded in Section 1962(c), the same individual or entity may not be alleged as both the liable 'person' (the defendant) and the enterprise (the 'victim'), since it makes little sense to speak of a person being 'employed' by himself or victimizing himself."). *But see Jaguar Cars*, 46 F.3d at 268 (stating that no absurdity is created by permitting a corporation enterprise with officer/employee persons, as long as the officer persons, but not the

courts.²⁰

Jaguar Cars represented a “dramatic departure from the Third Circuit’s prior interpretations of the distinctiveness requirement,”²¹ essentially starting the modern era of Third Circuit distinctness analysis. In *Jaguar Cars*, plaintiff sued a corporation, alleging it was a RICO enterprise, and that its officers were persons controlling enterprise activity. Defendants argued the RICO claim was barred by the Distinctness Requirement but, ultimately, the Third Circuit rejected the defense. The *Jaguar Cars* Court resolved the question of how the corporation enterprise could be “distinct” from its own officers by adopting a “Separate Legal Identity Theory” of 1962(c) distinctness (“Statutory Distinctness”).

Under this theory, the separate legal identities of corporations and their employees permit courts to find “Statutory Distinctness” between a corporate entity enterprise and a natural employee/officer person controlling it, even where the person allegedly engaged in predicate crimes was acting within the scope of corporate obligations.²²

Association between a corporation and its officer or employee

corporation enterprise, are liable under RICO).

²⁰ See generally RAKOFF, *supra* note 19, at 1-44 (“[M]ost of the controversy over the ‘enterprise’ element of RICO derives from the inclusion within this definition of the somewhat amorphous concept of an ‘association of individuals in fact.’ ”). See *Haroco*, 747 F.2d at 401 (“Discussion of this person/enterprise problem under RICO can easily slip into a metaphysical or ontological style of discourse—after all, when is the person truly an entity ‘distinct’ or ‘separate’ from the enterprise?”).

²¹ See Edlin, *supra* note 16, at 42.

²² See *Brook-Med Imaging, P.A. v. Imaging Management Associates, Inc.*, No. Civ. 94-3442, 1995 WL 34864, at *6 (D.N.J. Jan. 27, 1995) (discussing that *Jaguar Cars* expanded the definition of enterprise—because corporations and their employees are legally distinct, they can satisfy the definition of enterprise).

is possible, on this theory, despite the fact that a corporation can only act through its officers or employees.²³ Although the Separate Legal Identity Theory is often traced to the Third Circuit's *Jaguar Cars* jurisprudence, this view of Statutory Distinctness did not actually originate with *Jaguar Cars*. Indeed the *Jaguar Cars* Court relied on authorities from outside the Third Circuit. Six years earlier, the Sixth Circuit adopted a similar view in *Fleischhauer v. Feltner* ("Feltner"),²⁴ in which plaintiff alleged an enterprise comprised of a number of companies, all owned by an individual defendant, Feltner. The Sixth Circuit rejected defendant's Distinctness Requirement argument, refusing to overturn an adverse jury determination:

Appellant contends that the 'enterprise' alleged and proven was not sufficiently distinct from the 'person'—in other words, because Feltner owned 100% of the corporations, they were the equivalent of his 'right arm,' with whom he could not 'conspire.' . . . Such argument has no merit; the fact that Feltner owned 100% of the corporations' shares does not vitiate the fact that *these corporations were separate legal entities* . . . the jury had ample basis to find that all defendants were collectively, the 'enterprise.'²⁵

Commentators have criticized *Feltner* for blurring the distinction between person and enterprise,²⁶ but the *Jaguar Cars*

²³ See Edlin, *supra* note 16, at 42 ("The *Jaguar Cars* holding also provides the conceptual basis for narrowing the distinctiveness requirement's application, so that a corporation may itself be a RICO defendant where its parent or subsidiary serves as the RICO enterprise.").

²⁴ 879 F.2d 1290 (6th Cir. 1989).

²⁵ *Id.* at 1297 (citation omitted) (emphasis added).

²⁶ See, e.g., SOLOVY, *supra* note 17, at 69.3, text at nn.10-11 (1998) (discussing that *Feltner* blurred person/enterprise distinction). See generally STURC, *supra* note 10, at § 6.03[D], at 6-57 (discussing *Feltner*'s adoption of theory that separate legal entities are

Court found it persuasive. *Sever v. Alaska Pulp Corp.*,²⁷ also relied on by the *Jaguar Cars* Court, held that naming individual officers as defendants/persons and the corporation as enterprise was proper: "the inability of a corporation to operate except through its officers is not an impediment to section 1962(c) suits."²⁸ The Ninth Circuit, in *Sever*, recognized that this feature of corporations would only pose a problem where the corporation was simultaneously alleged to be the enterprise and person controlling it. In *Brannon v. Boatmen's First Nat'l Bank of Oklahoma, T.B.A.*,²⁹ the Tenth Circuit notes its own Statutory Distinctness jurisprudence has long accepted *Jaguar Cars'* rule that corporate officers/employees may be liable as persons managing the affairs of a corporation enterprise.³⁰

Although the *Jaguar Cars* holding was not unprecedented, its forceful articulation and defense of the Separate Legal Identity Theory made it a leading precedent.³¹ Under *Jaguar Cars*, plaintiffs must still satisfy the Distinctness Requirement, but this is easily accomplished by pleading a corporation enterprise directed by its

separate for person/enterprise purposes and its conclusion that legal separateness is sufficient for RICO § 1962(c) separateness).

²⁷ 978 F.2d 1529 (9th Cir. 1992).

²⁸ *Id.* at 1534.

²⁹ 153 F.3d 1144 (10th Cir. 1998).

³⁰ *Id.* at 1148, n.4 (citing Board of County Comm'rs v. Liberty Group, 965 F.2d 879, 886 (10th Cir. 1992)) (holding that an employee of partnership may be liable under §1962(c) for conducting the affairs of the partnership).

³¹ In the Third Circuit, RICO's initial organized crime focus and emphasis on "infiltration" were de-emphasized through *Jaguar Cars* and its progeny, largely in response to Supreme Court authorities that suggested RICO's scope was broader than appeared to be the case under prior Third Circuit authorities. *Cf. Fitzgerald*, 116 F.3d at 227 (discussing treating proof of "infiltration" or analogous conduct as a central element in RICO analysis); *Emery v. American Gen. Fin. Inc.*, 134 F.3d 1321, 1324-25 (1998) (same) (citing *Fitzgerald*, 116 F.3d at 227).

officers or employees.³²

B. The Second Circuit's Infiltration Requirement and Nonregular Business Test

When *Jaguar Cars* was decided, the Second Circuit's district courts had largely rejected the Separate Legal Identity Theory, holding that the bare legal "separateness" of corporations and their officers/employees did not allow them to "associate," for Section 1962(c) purposes, unless plaintiffs additionally showed racketeers had "infiltrated" the corporation (the "Infiltration Requirement").³³ This was deemed necessary to protect "legitimate businesses" from becoming RICO litigation victims.³⁴ It was unclear, however, how plaintiff could show "infiltration of a legitimate business," within the meaning of RICO, to allow liability to be imposed on the persons engaged in such conduct. Over time, three tests evolved to help determine when RICO's remedies should be applicable.

Some courts considered whether the conduct at issue was different in kind from the "regular business activity" of the alleged

³² See *Jaguar Cars*, 46 F.3d at 268 ("[A] viable § 1962(c) action requires a claim against defendant 'persons' acting through a distinct 'enterprise.' But, alleging conduct by officers or employees who operate or manage a corporate enterprise satisfies this requirement. A corporation is an entity legally distinct from its officers or employees . . .").

³³ See, e.g., *C.A. Westel de Venezuela v. AT&T Co.*, No. 90 Civ. 6665(PKL), 1994 WL 558026, at *7 (S.D.N.Y. Oct. 11, 1994) (stating that where pleadings did not portray the infiltration of a business by racketeers, enterprise was, in reality, no more than defendants themselves). See generally *Jaguar Cars*, 46 F.3d at 262-68 (3d Cir. 1995) (setting forth the detailed history of the Infiltration Requirement in Third Circuit and rejecting such requirement).

³⁴ See generally STURC, *supra* note 10, at 6-16 ("RICO was designed by Congress to protect legitimate business enterprises from infiltration, not to penalize them for being misused by criminal elements," referring to the widely-accepted interpretation of § 1962(c) as requiring enterprise and person to be separate and distinct from each other). But see Vitter, *supra* note 16, at 1421 (discussing that civil plaintiffs frequently allege illegitimate enterprises in the corporate setting to reach "corporate deep pockets").

infiltrated entity. Courts adopting this "Nonregular Business Test"³⁵ reasoned that if the alleged criminal activity could not be distinguished from the business' ordinary activity, no RICO misconduct was involved.³⁶

Other courts considered whether the corporation was itself victimized by the RICO misconduct (the "Corporate Victim Test").³⁷ The key distinction was whether the corporation was best characterized as a victim or a beneficiary of the alleged RICO wrongdoing. If the corporation was injured through the activities at issue, courts reasoned, it made little sense to identify the employee's conduct with the corporation's conduct,³⁸ as that would mean the corporation was victimizing itself.

³⁵ See, e.g., *Riverwoods*, 30 F.3d at 344-45 (comparing regular loan restructuring activities of bank restructuring group with alleged fraudulent loan restructuring activities, which were supposed to be predicate acts); *C.A. Westel de Venezuela*, 1994 WL 558026, at *6-8 (comparing alleged RICO predicate activities to ordinary business of AT&T). Accord *Brittingham v. Mobil Corp.*, 943 F.2d 297, 303 (3d Cir. 1991) (comparing pre-*Jaguar Cars*, conduct of parties to conduct of association in fact enterprise to determine whether defendants and their agents were merely conducting defendant corporations' normal operations).

³⁶ Non-regular activity outside the scope of corporate responsibilities may be analogous to an "infiltration." See generally *Fitzgerald*, 116 F.3d at 227 (discussing that the court's task is to "determine how close to the prototype [of mob infiltration] the case before the court is - how close, in other words, the family resemblance is between the prototypical case and the case at hand."). Proof of non-regular activity, while not sufficient to establish infiltration, was generally treated as necessary to establish Statutory Distinctness in the Second Circuit after *Riverwoods* and until *Cedric*. See generally Laurence A. Steckman, *RICO Prototypes and Impeaching Presidents: Absurd Applications of Statutory Remedies and Abuse of Constitutional Safeguards*, 29 RICO L. REP. 9 (Jan. 1999).

³⁷ See, e.g., *Riverwoods*, 30 F.3d at 344.

³⁸ Situations could arise where demonstration of corporate "injury" would be difficult. In *Jacobson v. Cooper*, 882 F.2d 717 (2d Cir. 1989), for example, defendants, purported fiduciaries of a business, engaged in activities designed to place them in control of plaintiff's business. There was no indication that the wrongful activities injured the business, but one result of the offending transactions was a shift in control from the legitimate owner to the defendants. While obtaining control of a company by illegal means seems analogous to an "infiltration," in *Jacobson*, the corporation's bottom line may actually have benefited from the alleged RICO activity at issue. If business injury does occur, however, it arguably suggests *prima facie* misconduct directed toward the corporation.

Other courts considered whether the corporation was really just a “passive tool” through which RICO misconduct was being perpetrated by a subset of its employees (the “Passive Tool Test”).³⁹ The key distinction was between “active” and “passive” conduct, the idea being that if the corporation took no “active” role in the alleged wrongful conduct, it should have no liability.⁴⁰ The theory was that RICO was supposed to be targeting perpetrators of the criminal conduct that were actually injuring businesses and if this was not occurring, RICO’s remedies should be inapplicable.

Each of these tests reflected the courts’ understanding that RICO’s primary purpose was to combat organized crime, protecting legitimate businesses and their owners. In trying to properly apply the Distinctness Requirement, many courts took into account the Congressional Statement of Findings and Purpose accompanying the RICO statute:

The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America’s economy by unlawful conduct

³⁹ See *Petro-Tech, Inc. v. Western Co. of North America*, 824 F.2d 1349, 1359 (3d Cir. 1987) (“[Section] 1962(c) was intended to govern only those instances in which an ‘innocent’ or ‘passive’ corporation is victimized by the RICO ‘persons,’ and either drained of its own money or used as a passive tool to extract money from third parties.”).

⁴⁰ In some cases, the distinction between “active” and “passive” conduct may be very difficult to draw. Suppose, for example, a corporation’s serial breaches of law permit employees to engage in predicate acts, yet the corporation plays only a passive role with respect to the commission of the predicates. To the extent its inaction, in breach of duty, establishes conditions permitting or facilitating the commission of predicates, it seems reasonable to conclude the corporation either “brought about” the offending conduct, or should, in any event, be deemed at least one party responsible for it. See *generally* *Sommer v. Fed. Signal Corp.*, 593 N.E.2d 1365, 1369-70 (N.Y. 1992) (discussing the distinction between “misfeasance” and “nonfeasance” is “largely semantical and often illogical – negligent performance may be a result of failing to act as well as doing an affirmative act improperly”).

and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to *infiltrate and corrupt legitimate business* and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear the unlawful activities of those engaged in organized crime and because the sanctions and [sic] remedies available to the Government are unnecessarily limited in scope and impact. It is the *purpose of this Act to seek the eradication of organized crime* in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.⁴¹

RICO has been applied to situations and conduct far removed

⁴¹ Organized Crime Control Act of 1970, § 1 of Pub.L. No. 91-452 (emphasis added). See *Callan v. State Chemical Mfg. Co.*, 584 F. Supp. 619, 621 (E.D. Pa. 1984) ("RICO was enacted . . . because Congress felt that organized crime posed a serious threat to the nation's economic well-being, and because it was felt that the then existing tools available to fight this problem were inadequate." (quoting § 1 of Pub. L. No. 91-453)).

from that contemplated by its drafters,⁴² but trying to identify all and only those situations to which RICO should apply has been problematic. Aside from the tests and theories discussed above, courts in the Second Circuit have also relied heavily on agency concepts to help determine whether RICO is being properly deployed.

1. *Scope of Agency and the Ability to Associate*

Because many § 1962(c) enterprise pleadings rely on the concept of “association,” the question whether RICO defendants have the legal capacity to “associate” has been an important consideration in many cases involving corporation/employee association-based enterprises.⁴³ Employee conduct within the scope of corporate duties and for the corporation’s benefit, under both corporate common law and the common law of torts, has long been deemed coextensive with and non-distinct from the employer’s conduct.⁴⁴ The reason has been

⁴² *Sedima v. Imrex*, 473 U.S. 479 (1985) (discussing that RICO has become a tool for everyday fraud cases involving legitimate and illegitimate enterprises; legitimate enterprises within RICO’s reach).

⁴³ See *Martin*, *supra* note 16, at 411 (“[B]ecause the acts of a corporate agent are the acts of a corporation, no plurality of autonomous agents exists when wholly intracorporate conduct is at issue . . . internal corporate discussions cannot give rise to corporate liability for conspiracy because only the actions of one entity—the corporation, acting through its agent—is alleged.”) (citation omitted).

⁴⁴ See William S. Laufer, *Integrity, Diligence, and the Limits of Good Corporate Citizenship*, 34 Am. Bus. L.J. 157 (1996). Federal law of corporate liability attributed the acts and inactions of agents committed in the scope of agents’ authority for benefit of organization to the business entity. *Id.* at 168-69. “In the vast majority of cases of vicarious liability in both tort and criminal law, responsibility for a criminal act is simply imputed from one person to another, e.g., an employer is liable for the actions of an employee, acting within the scope of his or her authority . . .” *id.* at 171, n.65, citing GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW*, 647-49 (1978) (“The extension of vicarious liability to the corporate criminal law requires an additional abstraction – the attribution of liability from one person (an agent) to an entity.”); Laufer, *supra*, at 171-72.

fundamentally policy based.⁴⁵ When the corporation confers power to act as an agent with a particular scope of authority it inherits the agent's acts as its own.⁴⁶ Identification of tortious employee conduct with corporate conduct thus permits risk shifting, benefiting society.

Although application of the above agency rules is well-settled in common law corporate and tort contexts,⁴⁷ RICO has unique concerns. The Supreme Court has not fully addressed the extent to which agency concepts may play a role in determining Statutory Distinctness.⁴⁸ Nevertheless, district judges in the Second Circuit often rely on agency rules to resolve Statutory Distinctness questions. In analyzing a distinctness issue in *CPF Premium Funding, Inc. v. Ferrarini*,⁴⁹ for example, one district judge observed:

⁴⁵ Laufer, *supra* note 44, at n.69 (citing TONY HONORE, THE MORALITY OF TORT LAW -- QUESTIONS AND ANSWERS, IN PHILOSOPHICAL FOUNDATIONS OF TORT LAW 85 (David G. Owen ed. 1995) ("The conventional reasons given for holding that the employer ought to bear the risk of loss within certain limits for the employee's harmful conduct in the course of his work are that the employer (i) has control over the business, including the work of employees, and (ii) stands to profit from the employee's services.")).

⁴⁶ Laufer, *supra* note 44, at 171-72 ("The deterrence-risk shifting rationale is much the same for vicarious responsibility in tort law." The question of when "distinctness" of legal persons should be recognized or disregarded has long been a central issue in cases applying the common law doctrine of "piercing the corporate veil," a doctrine rarely discussed as an appropriate analogy to RICO distinctness issues. The doctrine is frequently applied where corporate owner's attempt to exploit their legal "distinctness" from the corporation to obtain the protections of the corporate form of business. See generally Robert B. Thompson, *Piercing the Veil Within Corporate Groups: Corporate Shareholders as Mere Investors*, 13 CONN. J. INT'L L. 379 (1999).

⁴⁷ See generally Madel, *supra* note 16, at n.287 (citing *In re Atlantic Fin. MGMT., Inc.*, 784 F.2d 29, 32 (1st Cir. 1986) ("[T]he business enterprise should bear the burden of the losses created by the mistakes or overzealousness of its agents [because such liability] stimulates the watchfulness of the employer in selecting and supervising the agents." (quoting WARREN A. SEAVEY, HANDBOOK OF THE LAW OF AGENCY § 58, at 105 (1964))).

⁴⁸ See Madel, *supra* note 16, at 1147 ("The Supreme Court has not addressed whether traditional agency principles apply to § 1962 violations. Nevertheless, the circuit courts of appeal generally agree that a RICO person may not be held directly liable under § 1962(c) when it and the RICO enterprise are identical."). But See *Cedric*, *infra* nn.101-13 and accompanying text, finding agency concepts inapplicable where plaintiff alleges a corporation enterprise controlled by an officer of a corporation.

⁴⁹ No. 90 Civ. 6665, 1997 WL 158361 (S.D.N.Y. Apr. 3, 1997).

In determining what constitutes conduct outside the scope of one's employment, *I may look to the law of agency*, which uses this concept in establishing an employer's liability for the actions of its servant. In agency law, conduct not involving physical force is within the scope of employment if it is the kind of work the servant is employed to perform; it occurs within authorized time and space limits; and it is actuated, at least in part, by "a purpose to serve the master."⁵⁰

Courts adjudicating RICO claims in the corporation/employee context are frequently faced with allegations of criminal conduct intentionally and systematically disguised within a corporate employer's own business. Agency rules, focusing on the scope of a servant's duty, were designed to help analyze alleged employee torts committed during employee "frolics,"⁵¹ not identify systemic criminal conduct intentionally embedded within a corporation's regular business activity, as a means of avoiding detection.

Where long-term patterns of criminal conduct are intimately

⁵⁰ *Am. Soc'y of Mech. Eng'r v. Hydrolevel*, 456 U.S. 556, 568-69 (1982) ("*ASME*") (discussing that absent clear congressional contrary intent, normal rules of agency apply to federal statutes). LaBrun, however, argues that *ASME* goes too far for RICO purposes: "if the civil rules applied, a corporation could be liable under an apparent authority theory without the requirement that the employee intended to benefit the corporation. Unlike the antitrust laws, RICO is codified as part of the criminal code. As such, the normal rules of agency that should apply would appear to be those of criminal, not civil law." LaBrun, *supra* note 16, at 208 (citations omitted). See also RESTATEMENT (SECOND) OF AGENCY § 228 (1958).

⁵¹ The common law imposes vicarious liability on principals for agent torts, but not where the agent has embarked on a "frolic," that is, where he abandons his employer's interests to further his own interests. See *Primeaux v. United States*, 181 F.3d 876, 879 (8th Cir. 1999). The phrases "detour" and "frolic" suggest deviation from and interruption of the course of employment, and the central tort question has been whether a "total departure" has occurred so that the master should not be answerable for the servant's conduct. See *McNair v. Lend Lease Trucks, Inc.*, 62 F.3d 651, 654-55 (4th Cir. 1995); *Smith v. Gardner*, 998 F. Supp. 708, 710-11 (S.D. Miss. 1998) (stating that where employee, by deviating or departing from his work temporarily suspends the master/servant relationship, he becomes an independent person, even though he intends to and does return to his employer's business after he has

intertwined with the principal's business, the RICO-agent is not "frolicking" as he departs from his principal's business. Rather, he is engaged in systemic, long-term activities different in kind from legitimate corporate conduct.⁵² Holding business entities liable for the conduct of employees acting within the scope of their employment can be justified on policy grounds.⁵³ Under both tort and corporate criminal law, treating employee conduct as "non-distinct" from employer conduct promotes business oversight, which increases detection and elimination of wrongdoing.⁵⁴

Many RICO cases, however, treat an employee's conduct as non-distinct from employer conduct resulting in Distinctness Requirement dismissals. RICO defendants frequently embed their predicate conduct within the corporation's ordinary business activity precisely to make it difficult to detect sustained patterns of criminal activity. If the Distinctness Requirement is violated any time the conduct at issue can be described as "regular business activity," RICO defendants will succeed, very often, in obtaining dismissal.⁵⁵ This is true even where their conduct is far more damaging to society than that of persons engaged in ordinary criminal wrongdoing. In

accomplished the purpose of his detour from duty).

⁵² See *Primeaux*, 181 F.3d at 879 n.3 (noting that "seriously criminal acts," for example, intentional, violent crimes are unlikely to be within scope of employment (citing RESTATEMENT OF AGENCY § 229(2)(j))).

⁵³ See *New York Cent. & Hudson River R.R. v. United States*, 212 U.S. 481 (1909) (discussing that imputation to corporation helps control potential criminal conduct). See *Laufer*, *supra* note 44, at 168-72. *LaBrun*, *supra* note 16, at 184 (holding employer liable for employee tort within scope of employment constitutes a policy rule and deliberate allocation of risk).

⁵⁴ See *Laufer*, *supra* note, 44 at 171-172 (discussing that courts and commentators justify imputed conduct as necessary to incentivise corporation to self-police employee conduct).

⁵⁵ See *infra* notes 56-73 and accompanying text.

RICO cases, therefore, identification of employee's acts with employer conduct *precludes* liability for sustained patterns of severe criminal wrongdoing,⁵⁶ undermining RICO's policy objectives.⁵⁷

In practice, the Nonregular Business Test and scope of agency framework, as applied in the Second Circuit, undermine RICO's effort to reach sustained criminal conduct perpetrated through corporation/employee interactions.⁵⁸ In cases where courts have found employee and corporate conduct RICO indistinguishable, courts generally:

⁵⁶ See LaBrun, *supra* note 16, at 201.

⁵⁷ *Id.* at 201-02. ("Although the person-enterprise rule protects victims, it also protects perpetrators. As such, the rule is both dangerous and superfluous. Criminal agency principles distinguish victims from perpetrators, but the person-enterprise rule precludes their application Apparently panicked by the prospect of guilt by (employment or) association, however, the courts fashioned an equally disturbing rule of innocence by association.") (citations omitted). Common law plaintiffs are frequently successful in piercing the corporate veil to establish tort or ordinary corporate criminal liability where officer conduct is practically indistinguishable from corporate misconduct, but where a court determines that officer and corporate activity are formally indistinguishable in civil RICO cases, RICO plaintiffs frequently found themselves out of court, dismissed under the Distinctness Requirement. Thus, while corporate entity/employee distinctness is conventionally disregarded to deter even sporadic civil tort wrongdoing in piercing the corporate veil cases, in RICO cases, even where the defendant might have engaged in patterns of criminal misconduct, distinctness results in dismissal, undermining RICO's deterrent effect, with respect to the class of persons RICO's remedies were meant to address.

⁵⁸ If the corporation has not directed the alleged RICO activity, however, the corporate employer's assets will remain unavailable to RICO plaintiffs. Permitting the corporation to comprise part of (or even the whole) enterprise has been held to be fair to the corporation. For example, the *Jaguar Cars* Court noted that under its rule, only the wrongdoing officers or employees would be liable under RICO, not the corporate enterprise. See *Jaguar Cars*, 46 F.3d at 268. See also LaBrun, *supra*, note 16, at 189 ("RICO prohibits 'persons,' not 'enterprises' from engaging in the conduct it proscribes. The 'enterprise' is properly regarded as an element of the RICO offense, not a party to the litigation. Corporations satisfy both the RICO definition of 'person' and 'enterprise.' Thus, a corporation may be both a defendant and an element of a RICO offense. To violate RICO as a 'person' (defendant), a corporation must necessarily act through its employees or agents. To qualify as an element of a 'persons' RICO violation (enterprise), the corporation need only exist as a legally recognized artificial entity.") (footnotes omitted)). On the other hand, costs may be associated with a corporation being identified as a criminal enterprise (or participant in a criminal enterprise), particularly reputational costs.

1. *compare* the *type* of activities engaged in by the employee in pursuit of the alleged RICO activity with the *type* of activities engaged in by the employee in the course of and in pursuit of the corporation's regular business;⁵⁹

2. *determine* that the type of activities which allegedly violated RICO were the *same type* of activities in which the employee engaged during the course of his regular business;⁶⁰ and, therefore,

3. *conclude* that because the activities were of the *same type*, nothing more was going on than business as usual.⁶¹

Under the Nonregular Business Test, outcomes frequently turn on a court's categorization of activities as "regular" or "nonregular," but cases provide little guidance as to how "regularity" should be determined. Notably, allegations that misconduct is

⁵⁹ See, e.g., *Riverwoods*, 30 F.3d at 344-45; *Protter v. Nathan's Famous Systems, Inc.*, 925 F. Supp. 947, 956 (E.D.N.Y. 1996); *C.A. Westel de Venezuela v. American Tel. & Tel. Co.*, No. 90 Civ. 6665 (PKL), 1994 WL 558026, at *7-8 (S.D.N.Y. Oct. 11, 1994).

⁶⁰ See, e.g., *Riverwoods*, 30 F.3d at 344-45 (discussing that ordinary loan restructuring activities were same type of activity as alleged fraudulent loan restructuring activity of bank) (citing *Atkinson v. Anadarko Bank & Trust Co.*, 808 F.2d 438, 440-41 (5th Cir. 1987) (finding that an association between bank, its holding company and three employees which extended a line of credit and allegedly mailed false statements seeking monies in excess of agreed-upon amounts were only engaged in normal bank operations (mailing loan statements), requiring dismissal for failure to establish any entity "separate and apart" from the bank)); *Protter*, 925 F. Supp. at 956 (discussing that ordinary franchising activities same type of activity as alleged fraudulent franchising activities).

⁶¹ *Id.* See also *CPF Premium Funding, Inc. v. Ferrarini*, No. 95 CIV. 4621, 1997 WL 158361, at *12-13 (S.D.N.Y. Apr. 3, 1997) (stating that alleged "criminal" activities were indistinguishable from the subsidiary's ordinary business); *Glessner v. Kenny*, 952 F.2d 702, 712 (3d Cir. 1991).

“criminal” have repeatedly been held improper pleadings of “nonregular” conduct.⁶² The Second Circuit’s *Riverwoods* decision illustrates its approach using the Nonregular Business Test and scope of agency considerations.

2. *Riverwoods’ Application of the Nonregular Business Test*

In *Riverwoods*, plaintiff alleged a bank and certain of its officers and employees who operated a restructuring group within the bank and engaged in a pattern of extortion and fraudulent loan restructurings. The restructuring group was alleged to be the enterprise and the bank was the alleged RICO person controlling it. Plaintiff described the restructuring group’s activities in a way, which seemed, *prima facie*, to have been “nonregular” relative to the bank’s other activities, which were not alleged to have involved fraud and extortion.

The Second Circuit, in describing the alleged wrongful activities focused on the fact that the bank’s restructuring group officers were employed by the bank during the alleged wrongdoing and negotiated and executed the (alleged fraudulent) restructured

⁶² See, e.g., *Mayfield v. Gen. Elec. Cap. Corp.*, No. 97 CIV. 2786, 1999 WL 182586, at *8-9 (S.D.N.Y. Mar. 31, 1999) (discussing that regular activities allegedly carried out in an “illegitimate manner” remain the corporation’s activities); *CPF Premium Funding, Inc.*, 1997 WL 158361, at *12 n.12 (holding acts of fraud undertaken on subsidiary enterprise’s behalf were non-distinct from subsidiary’s operations—employee wrongdoer distinct from his employer only if he acts in a manner inimical to, or at least divorced from, the corporation’s interest) (citing *Protter*, 925 F. Supp. at 956); *id.* (“The fact that the acts attributed to the defendants are criminal does not place them outside the scope of defendants’ employment.”); *R.C.M. Executive Gallery Corp. v. Rols Capital Co.*, 901 F. Supp. 630, 641 (S.D.N.Y. 1995); *Langley v. American Bank of Wisconsin*, 738 F. Supp. 1232, 1240-42 (E.D. Wis. 1990); *Glessner*, 952 F.2d at 713-14, 712 n.12 (discussing that the allegation of “fraudulent” marketing treated as merely “playing with words”); *Schmidt v. Fleet Bank*, 16 F. Supp. 2d

loans within the scope of their authority, on the bank's behalf:

Both the allegations in the complaint and the proof at trial showed that the individual members of the Restructuring Group were employed by Marine Midland at the relevant times. These employees were acting within the scope of their authority as officers of Marine Midland, and all of the actions taken by the Restructuring Group, such as negotiating and executing the restructured loan and exacting personal guarantees . . . were undertaken on behalf of Marine Midland and were directly related to the bank's business.⁶³

The *Riverwoods* Court concluded that the restructuring group was not "distinct" from the bank because the group's alleged criminal activities were nothing more than "regular" restructuring group activities. They were "regular" in the sense that administratively similar, noncriminal restructuring activities were engaged in by the bank and its employees, in the course of regular banking business, during the same time period. The alleged activities, however, could have been equally well described as "nonregular" in the sense that they were allegedly undertaken through a pattern of extortion and fraud, different from the banks' conduct of legitimate banking projects. A banks "criminal" activity could be reasonably viewed as different "in kind" from its regular, noncriminal activity.⁶⁴ Indeed, a distinction between criminal and non-criminal action seems

340, 350 n.6 (S.D.N.Y. 1998).

⁶³ *Riverwoods*, 30 F.3d at 344-45.

⁶⁴ Issues of fact regarding the actual "regularity" of alleged RICO activities have been held by some pre-*Riverwoods* courts to be sufficient to defeat a pleadings-based motion. See, e.g., *Center Cadillac, Inc. v. Bank Leumi Trust Co. of New York*, 808 F. Supp. 213, 236

fundamental.

Assume a bank employee arranges discounted financing for Customer One in consideration of new business Customer One sends to the bank. A different employee arranges discounted financing for Customer Two, notwithstanding Customer Two's disclosure that the business he sends will enable him to launder money for his active loan sharking business. In both cases, bank employees engaged in the business of negotiating and providing financing to bank customers. Both bank employees, on the bank's behalf, entered into transactions to financially benefit the bank and themselves. In both cases, the employees may have filled out the same forms, making the same inquiries and using the same bank procedures, during regular banking hours. Arranging financing for Customer Two, however, could subject the bank to criminal charges, even though the activity might be legitimately described as the "negotiation and providing of bank financing"—which can also be properly described as "regular banking business."

The *Riverwoods* Court did not suggest that the alleged criminal quality of the acts at issue should have any relevance to its distinctness analysis.⁶⁵ It set forth a generic, physical description of the employees' administrative conduct and when it occurred and focused on these factors to determine "regularity." Reliance on administrative or physical similarity between alleged criminal conduct and ordinary business activity has often aided defendants in

(S.D.N.Y. 1992).

⁶⁵ It did not, for example, distinguish regularity of conduct, for Distinctness Requirement purposes, from regularity of business conduct, for any other purposes. It simply analyzed the

avoiding liability.⁶⁶ Application of this test permits an employee to exploit his *method* of secreting RICO misconduct, i.e., embedding it within normal business activities so it appears to be "regular business activity," turning the apparent regularity of the conduct into a shield against potential RICO liability claims.⁶⁷

3. *The Indistinguishability and Reducibility Theories*

The Non-regular Business Test is frequently bolstered by two related theories, first, that corporate conduct is reducible to individual employee or officer conduct (the "Reducibility Theory")⁶⁸ and, second, that acts of employees and/or officers by and on behalf of their corporations are logically indistinguishable from the acts of the corporation (the "Indistinguishability Theory").⁶⁹ Corporations can only function through employees or agents and it is a truism that any

issue on an agency/tort model. *See Riverwoods*, 30 F.3d at 344-45.

⁶⁶ *See, e.g.,* CPF Premium Funding, Inc. v. Ferrarini, No. 95 CIV. 4621(CSH), 1997 WL 158361, at *12 n. 12 (S.D.N.Y. Apr. 3, 1997) (discussing that the scope of employment is in part defined by reference to "kind of work the servant is employed to perform"); *R.C.M. Executive Gallery Corp.*, 901 F. Supp. at 641.

⁶⁷ *See generally* LaBrun, *supra* note 16, at 213, n.186.

⁶⁸ *See* C.A. Westel de Venezuela v. AT&T Co., No. 90 Civ. 6665 (PKL), 1994 WL 558026, at *7 (S.D.N.Y. Oct. 11, 1994) (citing *Official Publ'ns, Inc. v. Kable News Co.*, 775 F. Supp. 631, 636 (S.D.N.Y. 1991) (discussing that employees and their employer companies cannot, as a logical matter, associate together to form § 1962(c) enterprises: "The reason this theory fails as a matter of law . . . is that the legal concept of a corporation includes its employees and officers")).

⁶⁹ *See generally* STURC, *supra* note 10, § 6.03[C], at 6-54 ("The basic theory . . . is that employees are an indistinguishable part of a corporate enterprise, at least when they are engaging in activities relating to the usual business of the corporation"); *Riverwoods*, 30 F.3d at 344-45 (stating that where defendants acted within the scope of their authority, negotiating and executing restructured loans for benefit of bank, appellants could not "seriously contend that the actions of the Restructuring Group were anything other than activities of Marine Midland employees carrying out the business of that bank"). *See also* *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984).

act of a corporation “can be viewed as an act of such an enterprise.”⁷⁰ However, it does not follow that an enterprise is, in reality “no more than” the defendant.⁷¹ Cases, unfortunately, rarely set forth standards for determining when a corporate agent’s conduct is “distinguishable” from the corporation’s conduct, beyond general reference to the regular or non-regular nature of the activity.⁷²

Many cases have affirmed the proposition that corporate entities are legal entities with lives of their own.⁷³ The *Jaguar Cars* Court relied on this proposition to avoid having to resolve metaphysical questions such as how a company, which can only act through its employees, can “associate with itself” or what it means to be “sufficiently distinct from one’s self” to satisfy the Distinctness Requirement.⁷⁴ It did so by making “legal distinctness” a sufficient condition of Statutory Distinctness, at least in the context of a

⁷⁰ See *Riverwoods*, 30 F.2d at 344-45.

⁷¹ Some courts have referred to this as a question of “merger.” See, e.g., *Wright v. Everett Cash Mut. Ins. Co.*, 637 F. Supp. 155, 157 (W.D. Pa. 1986).

⁷² See *CPF Premium Funding*, 1997 WL 158361, at *12 (discussing that employee officer’s wrongful conduct distinct from his employer’s conduct “only if he acts in a manner inimical to, or at least divorced from, the corporation’s interest”).

⁷³ See, e.g., *Fustok v. Conticommodity Serv., Inc.*, 618 F. Supp. 1074, 1076 (S.D.N.Y. 1985) (“[A]n association in fact which constitutes a RICO enterprise is not merely a synonym for the collective of ‘individuals’ which form the association, but instead, is a distinct entity.”).

⁷⁴ In attempting to explain what “sufficiently distinct from itself” meant, the *Riverwoods* Court, citing *Jacobson v. Cooper*, 882 F.2d 717, 720 (2d Cir. 1989) and *Cullen v. Margiotta*, 811 F.2d 698, 730 (2d Cir. 1987), stated that a “partial overlap” between the RICO person and the RICO enterprise, would not preclude a finding of enterprise. *Riverwoods*, 30 F.3d at 344. *Riverwoods* recognized that a permissible “partial overlap” could exist where defendant was both a RICO person and one of a number of members of an enterprise. It concluded such permissible “overlap” could not exist where a corporate defendant was associated with its employee, carrying on defendant’s “regular affairs.” *Id.* This would “circumvent” the Distinctness Requirement because the acts of the corporation could not be distinguished from those of its employees. *Id.* In other words, because each member of the restructuring group was a bank employee, no member was distinguishable from the bank—because the bank was the alleged person, the Second Circuit interpreted the allegations as pleading that the bank was merely controlling itself, or possibly a sub-set of itself.

corporation enterprise controlled by a corporate officer.

Jaguar Cars treated its conclusion that legal distinctness entails Statutory Distinctness as an inevitable consequence of the truism that corporations and their employees are legally distinct entities, but not all Circuits agree. Indeed, until the Supreme Court's reversal of the Second Circuit's decision in *Cedric*, courts within the Second Circuit routinely de-emphasized bare "legal distinctness," relying on the Indistinguishability and Reducibility Theories, in conjunction with the Nonregular Business Test. These tests continue to be applied in the analysis of many enterprise/person combinations, despite *Cedric*.⁷⁵ Notably, the different analyses in the Second and Third Circuits developed with very little case or academic commentary focusing on their radically different approaches to Statutory Distinctness.⁷⁶

⁷⁵ See *infra* Parts III, IV and V.

⁷⁶ Third Circuit courts obviously realized that under agency and corporate law liability rules, corporation officers/employees would frequently be deemed non-distinct from their entity employer, just as Second Circuit courts realized corporations and their employees have separate legal identities. These inconsistent views, however, generated very little attention in case and academic discussion. Professor Brian Greene, writing on a recent revolution in cosmology involving the development of string theory, notes that as long as there is no perceived need to resolve even fundamental inconsistencies in prevailing paradigms, inconsistencies are largely be ignored. He explains that theorists/practitioners of quantum theory, for example, long failed to acknowledge that quantum theory's predictions are incompatible with predictions of general relativity, and vice-versa—because practitioners/theorists dealt with problems that could usually be addressed without going beyond either theory, inconsistencies were generally not addressed: "In all but the most extreme situations, physicists study things that are either small and light (like atoms and their constituents) or things that are huge and heavy (like stars and galaxies), but not both. This means that they need use only quantum mechanics or only general relativity and can, with a furtive glance, shrug off the barking admonition of the other. For fifty years this approach has not been quite as blissful as ignorance, but it has been pretty close." BRIAN GREENE, *THE ELEGANT UNIVERSE*, at 3-4 (Norton & Co. (1999)).

C. The Seventh Circuit's Prototype Theory and Infiltration Paradigm

In 1997, in *Fitzgerald*, the Seventh Circuit applied several theories which had not previously been part of RICO distinctness jurisprudence, charting a unique, modern path in RICO distinctness jurisprudence. Plaintiffs had alleged an enterprise comprised of a corporation with its subsidiaries, trusts, and dealers. All were engaged in production, financing, and marketing of Chrysler cars. Plaintiffs alleged Chrysler was selling consumers extended warranties which promised protection that it had no intention of providing. Chrysler, itself, was identified as the RICO person controlling the enterprise and the enterprise was the “Chrysler family,” as described above.

1. *RICO Prototype Theory Under Fitzgerald*

In *Fitzgerald*, the Seventh Circuit provided a method courts could use to determine how close a given fact pattern was to the prototypical situation to which RICO's provisions were intended to apply, allowing a court, in a systematic way, to determine whether RICO remedies would be applicable in a given case. Judge Posner cautioned that where a “statute is broadly worded in order to prevent loopholes from being drilled in it by ingenious lawyers, there is a danger of its being applied to situations absurdly remote from the concerns of the statute's framers.”⁷⁷ To avoid such “absurdly remote

⁷⁷ *Fitzgerald*, 116 F.3d at 226.

applications,”⁷⁸ a court should first “identify the prototype situation to which the statute is addressed.”⁷⁹ The facts of a given case can then be compared to the prototype.⁸⁰ Judge Posner described the prototypical RICO fact pattern and a fact pattern, one step removed from it:

The prototypical RICO case is one in which a person bent on criminal activity seizes control of a previously legitimate firm and uses the firm’s resources, contacts, facilities, and appearance of legitimacy to perpetrate more, and less easily discovered, criminal acts than he could do in his own person, that is, without channeling his criminal activities through the enterprise that he has taken over A step away from the prototypical case is one in which the criminal uses the acquired enterprise to engage in some criminal activities but for the most part is content to allow it to continue to conduct is normal, lawful business—and many of the employees of the business may be unaware that it is controlled and being used by a criminal.⁸¹

2. *The Family Resemblance Test*

Once the essential features of the prototype are determined, the court’s task is to: “determine how close to the prototype the case before the court is—how close, in other words, the family

⁷⁸ See *Garner v. Healy*, No. 97 C 3561, 1998 WL 341811, at *2-3 (N.D. Ill. June 15, 1998) (noting that the Seventh Circuit in *Fitzgerald* was “[e]xpressing its frustration with the plethora of RICO claims inundating the courts” and that the Seventh Circuit “attempted to provide a method for interpreting the RICO statute ‘in a way that will avoid absurd applications.’ ” (quoting *Fitzgerald*, 116 F.3d at 226-27)).

⁷⁹ *Fitzgerald*, 116 F.3d. at 227.

⁸⁰ See Lawrence M. Solan, *Law, Language and Lenity*, 40 WM. & MARY L. REV. 57, 66-68 (1998) (discussing that the prototype analysis has been used to explain a great many legal phenomena, but it is sometimes hard to tell whether what happens in the world fits a category a statute proscribes).

⁸¹ *Fitzgerald*, 116 F.3d at 227 (citations omitted).

resemblance is between the prototypical case and the case at hand.”⁸² This concept is frequently traced to the philosopher Ludwig Wittgenstein,⁸³ who used the expression “family resemblance” in his analysis of the logic of “general terms.”⁸⁴ Wittgenstein argued that, with respect to a general term that refers to a class of objects, while there may be no set of common features applicable to each class member, the general term covers class member because of overlapping patchworks of similarities.⁸⁵

The successful application of the “family resemblance” test rests, necessarily, on the accuracy of description of the prototypical case.⁸⁶ How far from the “prototype” the facts of given case appear will often depend on what aspects of the prototype the reviewer perceives to be most important,⁸⁷ with conclusions about what is “most important” depending on what the prototype was intended to do in the first place.⁸⁸ This is a frequently noted weakness of prototype analysis; the process of classification, generally, or identification of the essential features of a prototype, is itself “goal

⁸² *Id.*

⁸³ See Symposium, *Void for Vagueness: Vagueness in Law and Language*, 82 CAL. L. REV. 509, 517-520 (1994) (discussing paradigm theory and language games analysis).

⁸⁴ See generally Laurence A. Steckman, *Risk Arbitrage and Insider and Trading: a Functional Analysis of the Fiduciary Concept Under Rule 10b-5*, 5 TOURO L. REV. 121, 135, n.59 (1988) (citing LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (3d ed. 1968); H.L.A. HART, *THE CONCEPT OF LAW* 15 (1961) (arguing the term “fiduciary” is a general term without sufficient content to permit its useful application across the numerous legal domains in which the concept functions, arguing that a functional analysis of the concept “fiduciary” should replace overly-broad and uninformative generic case definitions, for purposes of insider trading liability under securities laws and, in particular, Rule 10b-5).

⁸⁵ See Waldron, *supra* note 83, at 517-21.

⁸⁶ See Steckman, *supra* note 36, at 9-12.

⁸⁷ See Jay M. Feinman, *The Jurisprudence of Classification*, 41 STAN. L. REV. 661, 702 (1989).

⁸⁸ *Id.* at 709.

directed,"⁸⁹ introducing what is sometimes referred to as "framing bias."⁹⁰ Some commentators have concluded that framing bias is an "inevitable consequence of fixing a doctrinal classification,"⁹¹ with the consequence that any classification scheme, including any delineation of the essential features of a prototypical case, should be suspect.

Notwithstanding these criticisms, where the prototypical situation is fairly well defined and salient prototype characteristics against which proposed set of events are to be compared are reasonably well accepted, the Family Resemblance Test provides a powerful analytical tool.⁹² Where there is substantial agreement as to types of conduct RICO was meant to address, courts may reasonably rely on the prototypical RICO situations as a base-line for determining whether RICO should apply to the factual scenario a purported RICO case presents.

3. *RICO-Incidental Distinctness — "Functionalism"*

Fitzgerald adopted a "functional" analysis of distinctness,⁹³ focusing on what an alleged RICO person did within a scheme, identifying how he helped bring about or conceal the RICO

⁸⁹ See Solan, *supra* note 80, at 69-70.

⁹⁰ See Feinman, *supra* note 87, at 692.

⁹¹ *Id.*

⁹² See generally Solan, *supra* note 80, at 66 (cautioning that as "we stray farther from prototypical instances of a concept, new concepts begin to invade their territory . . . experts often refer to prototype theory as a probabilistic model of conceptualization.").

⁹³ Functionalist themes, however, have occasionally informed Second Circuit analysis. See, e.g., *United States v. Bagaric*, 706 F.2d 42, 56 (2d Cir. 1983) ("[I]t is logical to characterize any associative group in terms of what it *does*, rather than by abstract analysis of its structure.").

misconduct. Analyzing the *Fitzgerald* allegations, Judge Posner wrote:

What we cannot imagine, and what we do not find any support for in appellate case law, is applying RICO to a free-standing corporation such as Chrysler merely because Chrysler does business through agents, as virtually every manufacturer does. If Chrysler were even larger than it is and as a result had no agents, but only employees . . . it could not be made liable for warranty fraud under RICO. What possible difference, from the standpoint of preventing the type of abuse for which RICO was designed, can it make that Chrysler sells its products to the consumer through franchised dealers rather than through dealerships that it owns In the prototypical case . . . it is easy to see how the defendant gains additional power to do evil by taking over a seemingly legitimate enterprise. How, though, was Chrysler empowered to perpetrate warranty fraud by selling through dealers rather than directly to the public? . . . The dealers did not . . . lend an air of legitimacy to a person or entity that unless masked by a legitimate seeming enterprise would be quickly discovered to be engaged in criminal acts.⁹⁴

Judge Posner, citing *Discon* and *Riverwoods*, observed that when an employer and its employees merely engage in the normal business of the employer, bare legal distinctness is not sufficient to render the employee “RICO-distinct.” While RICO was enacted to help preclude individuals and business entities, in combination, from gaining “additional power to do evil,” no previously developed enterprise theory made the way enterprise members *functioned*

together to magnify their potential for misconduct, a focus of distinctness analysis. Judge Posner concluded:

[W]here a large, reputable manufacturer deals with its dealers and other agents in the ordinary way, so that their role in the manufacturer's illegal acts is entirely incidental, differing not at all from what it would be if these agents were the employees of a totally integrated enterprise, the manufacturer plus its dealers and other agents (or any subset of the members of the corporate family) do not constitute an enterprise within the meaning of the statute.⁹⁵

Under *Fitzgerald*, even the pleading of association of *de facto* and *de jure* distinct entities will not satisfy the Distinctness Requirement, unless the alleged enterprise members contribute to bringing about or concealing the RICO misconduct in a "non-incidental" manner. "Non-incidental," in this context, means that the dealers' or other agents' contribution to the wrongdoing could not have been made by a non-distinct member, e.g., a corporate employee.

4. "Control Group" Test v. Indistinguishability Theory

In *Emery v. American Gen. Fin., Inc.* ("Emery"),⁹⁶ a case the Seventh Circuit decided shortly after *Fitzgerald*, Judge Posner noted that while corporations can only act through natural persons, the persons who control corporate conduct are not legally identical to a

⁹⁴ *Id.* at 227-28.

⁹⁵ *Id.* at 228 (emphasis added).

⁹⁶ 134 F.3d 1321 (7th Cir. 1998).

mere aggregation of “employees.” He distinguished a corporate “control group” from both the corporation itself and employees not in control positions.⁹⁷ Where a controlling group in a corporation directs the corporation’s pattern of criminal wrongdoing, a close family resemblance exists to the prototypical mob-style infiltration, permitting application of RICO remedies:

If the scheme is actually hatched or directed by the board of directors or some other controlling group, whether the control is de facto or de jure, it will come close enough to the paradigmatic RICO case to pass muster under the ‘family resemblance’ test that we applied in the *Fitzgerald* case.⁹⁸

From *Emery*’s perspective, *Discon* and *Riverwoods* properly recognized that where an employer and its employees engage in an employer’s normal business, bare legal distinctness is not sufficient to render the employee “RICO-distinct.”⁹⁹ From *Emery*’s perspective, because *Jaguar Cars* involved a corporation being run by defendant corporate officers, the enterprise/person combination should have been sustained not because the Separate Legal Identity Theory accurately identifies the legal status of businesses and the people that run them but because the facts of the case presented a strong family resemblance to mob-style infiltration.

For Judge Posner, the Prototype Theory, Family Resemblance Test and Controlling Group Test ultimately determine RICO-

⁹⁷ *Id.* at 1325.

⁹⁸ *Id.*

⁹⁹ *Id.* at 1324-25.

distinctness, not the Nonregular Business Test underlying *Riverwoods* (with which Judge Posner agreed), nor the Separate Legal Identity Theory. The real issue is whether by coming together defendants amplified their ability to engage in systemic misconduct in a way that closely mirrors how criminals, through infiltration of businesses, amplify their capacity to victimize others.

D. The Supreme Court's Decision in *Cedric Kushner Promotions, Ltd. v. King*

Prior to the Second Circuit's decision in *Cedric*, no Second Circuit case had directly addressed whether a corporation controlled by an officer RICO person would satisfy the Distinctness Requirement. The Second Circuit's district courts, however, rightly perceived the Second Circuit, under *Riverwoods*, would probably find the corporation/officer combination, absent non-regular business conduct or conduct beyond the scope of agency, did not satisfy the Distinctness Requirement.¹⁰⁰ Dismissals of such cases relying on *Riverwoods* appeared to be on particularly strong footing after the Second Circuit, in *Cedric*, acknowledged the disagreement among the federal circuits regarding how the Distinctness Requirement should

¹⁰⁰ See, e.g., *Protter v. Nathan's Famous Sys. Inc.*, 925 F. Supp. 947, 956 (E.D.N.Y. 1996) (corporate enterprise, Nathan's Famous Systems, Inc., and alleged RICO persons, its officers and directors, did not satisfy distinctness requirement under *Riverwoods*, where alleged predicate acts were committed in the course of defendants' employment and on behalf of the corporation, applying *Riverwoods*' association in fact enterprise analysis to analysis of corporation entity enterprise); *Lucky Yeh Int'l, Ltd. v. Happiness Express, Inc.*, No. 96 CV 3365 SJ, 1999 WL 147095, at *2 (E.D.N.Y. Mar. 12, 1999) (dismissing plaintiff's RICO claim under the distinctiveness requirement, where plaintiff alleged that the corporate officers conducted a corporation enterprise, but did not allege individuals were acting outside the scope of their normal business duties as employees) (citing *Riverwoods*, 30 F.3d 339); *Sartini v. Portofino Sun Center Columbus Ave. Corp.*, No. 96 Civ. 4550 (JFK), 1997 WL 400209, at *3 (S.D.N.Y. July 16, 1997) (finding the corporation enterprise and its

be interpreted in the context of a corporation/employee enterprise/person combination, and then rejected the Separate Legal Identity Theory.¹⁰¹

The dispositive facts in *Cedric* structurally mirrored the facts of many RICO cases dismissed by the Second Circuit's district courts. Plaintiff claimed Don King, the president and sole shareholder of a closely held corporation, Don King Productions ("DKP"), conducted DKP's affairs through a "pattern" of predicate crimes and that Don King was non-controversially acting within the scope of his authority as DKP's President, while allegedly engaging in the conduct at issue.¹⁰²

The district court had dismissed the complaint and the Second Circuit affirmed the dismissal, rejecting plaintiff's argument that the Distinctness Requirement was inapplicable when the RICO person, but not the RICO enterprise, was named as a defendant. Extrapolating from its prior decisions, the Second Circuit concluded the Distinctness Requirement was both applicable and *not* satisfied. Don King, acting within the scope of his corporate position, was, in a legal sense, part of, and not separate from, his corporation, DKP. Therefore, there was no RICO "person" distinct from the "enterprise," conducting enterprise activity.

The Supreme Court began its analysis noting the federal circuits were split on how the Distinctness Requirement should be interpreted as applied to a corporation enterprise controlled by its

alleged "manager" did not satisfy distinctness requirement).

¹⁰¹ *Cedric Kushner Promotions, Ltd., v. King*, 219 F.3d 115 (2d Cir. 2000).

¹⁰² *Cedric Kushner Promotions, Ltd., v. King*, 533 U.S. 158, 160-61 (2001).

officer/employee.¹⁰³ Justice Breyer reaffirmed that plaintiff was required to allege "distinctness" between the "person" and the "enterprise." He agreed with the Second Circuit that allegation of Statutory Distinctness is necessary under § 1962(c), even where only the RICO person, not the enterprise, is named as a defendant. He further noted that RICO persons cannot be "employed by themselves" or "associate with themselves" without doing violence to linguistic intuitions, principles frequently cited in cases dismissing RICO claims on distinctness grounds.

Justice Breyer concluded, however, that when a person victimizes a small business or uses a corporation for criminal purposes, the RICO person and its victim, the corporation, are "different entities." The Supreme Court reversed the Second Circuit, adopting the rule that the separate legal identity of corporate entities and their officers renders the corporation and its officers RICO-distinct, without regard to scope of employment and/or the regular or non-regular nature of the business conduct at issue. The Court held that when a corporate employee, even one "acting within the scope of his authority" and "conducting the corporation's affairs" does so through RICO-predicate crimes, the officer and corporate entity are sufficiently distinct to satisfy the Distinctness Requirement:

The corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status. And we can find nothing in the statute that requires more "separateness" than that . . . Linguistically speaking, an employee who

¹⁰³ *Cedric*, 533 U.S. at 161 (citations omitted).

conducts the affairs of a corporation through illegal acts comes within the terms of a statute that forbids any “person” unlawfully to conduct an “enterprise,” particularly when the statute explicitly defines “person” to include “any individual . . . capable of holding a legal or beneficial interest in property,” and defines “enterprise” to include a “corporation.” 18 U.S.C. §§ 1961(3), (4). And, linguistically speaking, the employee and the corporation are different “persons,” even where the employee is the corporation’s sole owner. After all, incorporation’s basic purpose is to create a distinct legal entity, with legal rights, obligations, powers, and privileges different from those of the . . . individuals who created it, who own it, or whom it employs.¹⁰⁴

Justice Breyer distinguished cases upon which the Second Circuit had relied.

Riverwoods involved an association-in-fact (the restructuring group), controlled by the bank itself, as a RICO person, whereas, in *Cedric*, plaintiff had pleaded a single corporate employee was the “person” and a single corporate entity the “enterprise,” i.e., a business entity enterprise (not an association in fact enterprise) controlled by a natural person. Justice Breyer noted “it is less natural to speak of a corporation as ‘employed by’ or ‘associated with’ this oddly constructed entity” (the association in fact), than “to speak of a corporate employee as a ‘person employed by’ a corporation.”

Justice Breyer also distinguished prior Second Circuit authorities based on the composition of the person and enterprise. In

¹⁰⁴ *Cedric*, 533 U.S. at 163. See *United States v. Bestfoods*, 524 U.S. 51, 61-62 (1998); *Burnet v. Clark*, 287 U.S. 410, 415 (1932); 1 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §§ 7, 14 (rev. ed. 1999).

Anatian v. Coutts Bank (Switzerland) Ltd.,¹⁰⁵ plaintiff alleged a bank was both "person" and "enterprise" whereas *Cedric* involved a corporate "enterprise" controlled by a natural "person." *Discon, Inc. v. NYNEX Corp.*,¹⁰⁶ involved allegations that corporate subsidiaries were the RICO "persons" with the subsidiaries and their parent the "enterprise," whereas *Cedric*'s allegations challenged a single corporation enterprise, not a multi-corporation enterprise, controlled by a single, natural RICO person, rather than by multiple subsidiary persons.¹⁰⁷ The way in which Justice Breyer distinguished these authorities suggests *Cedric* may have only been intended to govern the simple person/enterprise structure before the court.

The Court cited various policy considerations for its decision. Justice Breyer observed that RICO was intended to protect a legitimate "enterprise" from those who would use unlawful acts to victimize it.¹⁰⁸ He further noted RICO was intended to protect the public from persons/entities who unlawfully use an "enterprise" (whether legitimate or illegitimate) as a "vehicle" through which "unlawful . . . activity is committed."¹⁰⁹ Where a corporate employee conducts the corporation's affairs through an unlawful RICO pattern of misconduct and uses that corporation as a "vehicle," whether or

¹⁰⁵ 193 F.3d 85 (1999).

¹⁰⁶ 93 F.3d 1055 (1996), *vacated on other grounds*, 525 U.S. 128 (1998).

¹⁰⁷ *Cedric*, 533 U.S. at 164 (citing 93 F.3d at 1064). By distinguishing *Discon* in this manner, Justice Breyer provided implicit support for the Seventh Circuit's limited reading of *Cedric* in the context of parent-subsidiary enterprise/person combinations in which the separate legal identity theory would not be dispositive of Statutory Distinctness contentions. See *Bucklew v. Hawkins, Ash, Baptie & Co., LLP.*, 329 F.3d 923, 934 (7th Cir. 2003); see also *infra* notes 115 and 258-60 and accompanying text, discussing *Bucklew*.

¹⁰⁸ *Cedric*, 533 U.S. at 164 (citing *United States v. Turkette*, 452 U.S. 576, 591 (1981)).

¹⁰⁹ *Id.* (citing *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 259 (1994)).

not he is the sole owner, distinctness is satisfied.¹¹⁰

The Supreme Court expressly rejected the Second Circuit's approach, i.e., close examination of whether officers/employees were acting within "the scope of corporate authority," as a basis for determining Statutory Distinctness.¹¹¹ Application of a concept like "scope of agency" would not be consistent with RICO's purposes because it would immunize from RICO liability many of those at whom RICO directly aims, high-ranking individuals in an illegitimate criminal enterprise, who, seeking to further the purposes of that enterprise, act within the scope of their authority.¹¹² This policy-based analysis is reminiscent of *Jaguar Cars*.

The Court held that the "formal legal distinction" between person and enterprise, i.e., incorporation, was sufficient to render these entities "distinct," for RICO purposes. Apparently realizing the Court was making it far easier for plaintiffs to plead simple-structure §1962(c) enterprise claims, Justice Breyer made clear the Court was *not* holding ordinary *respondeat superior* principles would make a corporation legally liable under RICO for its employees' criminal acts. Nothing this issue was not before the Court, Justice Breyer cited authority for the proposition that a corporation cannot be "vicariously liable" for § 1962(c) violations committed by, for example, its vice president.¹¹³ Insulation of the corporation from

¹¹⁰ *Id.* at 164-65.

¹¹¹ *Id.* at 163; *see, e.g., Riverwoods*, 30 F.3d at 339.

¹¹² *Cedric*, 533 U.S. at 165; *see Reves v. Ernst & Young*, 507 U.S. 170 (1993).

¹¹³ *Cedric*, 533 U.S. at 166 (citing *Gasoline Sales Inc. v. Aero Oil Co.*, 39 F.3d 70 (3d Cir. 1994) (holding that a corporation cannot be vicariously liable for § 1962(c) violations committed by its vice president).

liability decreases the risk that corporate entity enterprises will be pleaded as "deep pocket" defendants, absent further allegation that the business entity participated in a substantial way in directing the activity of a separate criminal enterprise.

After *Cedric*, commentators observed that it was unclear how *Cedric's* rules would apply to other types of enterprise/person combinations including association in fact enterprises and parent/subsidiary constituted enterprises:

While *King's* likely effect on corporation enterprises with natural RICO persons controlling them is obvious, it is less clear how *King's* rule may affect other enterprise/person combinations. It is unclear, for example, what effect, if any, *King* will have on the pleading of association in fact enterprises, or, for that matter, an association comprised of other species of business entities, with natural persons controlling them, e.g., a partnership or sole proprietorship. . . . (or other forms of business entity enterprise), where non natural RICO persons are alleged to be controlling them Time will probably tell.¹¹⁴

Cedric's effect on other RICO combinations remains unclear, as discussed below.¹¹⁵

¹¹⁴ Laurence A. Steckman & Debra J. Guзов, *Reviewing Developments in RICO Litigation*, N.Y.L.J., Jan. 17, 2002, at 4 (discussing *Cedric*).

¹¹⁵ In the Seventh Circuit, for example, parent/subsidiary association in fact enterprises are governed by pre-*Cedric* rules. See *Bucklew*, 329 F.3d at 934 (failing even to cite *Cedric* in analysis of parent/subsidiary enterprise, relying on prior Seventh Circuit RICO precedents and Supreme Court antitrust precedent).

PART II

THE DEVELOPMENT OF THE CONCEPT OF DISTINCTNESS IN THE
SECOND, THIRD AND SEVENTH CIRCUITS

Inquiry into the development of Statutory Distinctness in the Second, Third and Seventh Circuit helps explain how and why courts are applying the tests and theories Part I discusses and provides a historical and analytical context in which the lead precedents discussed in Part I can be understood.

**A. The Second Circuit's Pre-Riverwoods
Jurisprudence of "Distinctness"**

Case reviews of the Second Circuit's Distinctness Requirement jurisprudence frequently begin with *Bennett v. U.S. Trust Co. of New York* ("*Bennett*"),¹¹⁶ in which the Second Circuit established two controlling principles on Statutory Distinctness. Plaintiff alleged that defendant U.S. Trust, a corporation, was both the enterprise and the person directing enterprise affairs.¹¹⁷ The Second Circuit held that RICO's plain language requires a plaintiff to distinguish between the enterprise and the person conducting its affairs—this "focuses . . . on the culpable party and recognizes that the enterprise itself is often a passive instrument or victim of the racketeering activity."¹¹⁸ It also held that a corporate entity cannot simultaneously be the enterprise and the person who conducts its

¹¹⁶ 770 F.2d 308 (2d Cir. 1985).

¹¹⁷ While the complaint did not actually identify the § 1962(c) "person," the Second Circuit concluded U.S. Trust was the intended "person" because it was the named defendant. *Bennett*, 770 F.2d at 315 n.2.

¹¹⁸ *Id.*

affairs.¹¹⁹ The first principle affirmed the Distinctness Requirement and, the second, that a business entity cannot be pleaded as both the enterprise and the person controlling itself, without violating the first principle.

Bennett involved a simple enterprise/person combination, but two years later, the Second Circuit was presented with a fact pattern in which the enterprise was not a single corporate entity, but an association in fact enterprise made up of multiple corporate entities, townships and government committees. In *Cullen v. Margiotta* ("*Cullen*"),¹²⁰ plaintiff pleaded an enterprise composed of multiple corporate entities, the Town of Hempstead, the Town of Hempstead Republican Committee and the Nassau County Republican Committee. Distinguishing *Bennett*, the *Cullen* Court noted that while an entity cannot associate with itself, "there is neither a conceptual nor a doctrinal difficulty in positing an entity associated with a group of which it is but a part."¹²¹

In other words, whereas the Distinctness Requirement in *Bennett* was violated by a single corporate entity trying to associate with itself, the corporations, towns and committees that collectively constituted the enterprise in *Cullen* did not violate the Distinctness Requirement because these different entities were capable of

¹¹⁹ *Id.*

¹²⁰ 811 F.2d 698 (2d Cir. 1987).

¹²¹ *Cullen*, 811 F.2d at 730. See *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995 (8th Cir. 1989) ("[C]ollective entity is something more than the members of which it is comprised," sustaining enterprise comprised of five members, only two of which were named as defendants.) (citing *Galerie Furstenberg v. Coffaro*, 697 F. Supp. 1282, 1287-88 (S.D.N.Y. 1988); *Connors v. Lexington Ins. Co.*, 666 F. Supp. 434, 447-48 (E.D.N.Y. 1987)).

associating together. This was possible because each, individually, was only a part of the association in fact enterprise.¹²² Although there was “some overlap” between the members of the association in fact and the persons that were alleged to be controlling its activity, the overlap was not complete, allowing association to occur.

Two years after *Cullen, Jacobson v. Cooper* (“*Jacobson*”)¹²³ presented the overlap issue to the Second Circuit in a very different context. Plaintiff alleged that his real estate business had become a RICO enterprise directed by his son and a former partner, both of whom jointly wrested control of the business from plaintiff while plaintiff was in jail. Plaintiff alleged that defendants made false representations in real estate transactions and failed to share certain business income with him. The Second Circuit focused on the fact that defendants were alleged to have engaged in conduct inconsistent with plaintiff’s business interests.

The *Jacobson* Court noted the alleged enterprise, which was plaintiff’s real estate business, maintained an identity separate from defendants who had been given only “some interest in the [real estate] business.”¹²⁴ While defendants were supposed to be running plaintiff’s real estate business, they actually used their limited interest to acquire ownership interests in real estate, by illicit means, through

¹²² The Second Circuit vacated the judgment, remanding for further findings. A number of pre-*Riverwoods* cases read *Cullen* as permitting an enterprise composed of a corporate entity and its employee acting together to commit predicate wrongs. See, e.g., *Saud v. The Bank of New York*, No. 89 Civ. 148, 1989 U.S. Dist. LEXIS 6998, at *4-7 (S.D.N.Y. June 23, 1989).

¹²³ 882 F.2d 717 (2d Cir. 1989).

¹²⁴ *Id.* at 719 (noting that Jacobson voluntarily relinquished control over all real estate activities so those activities could be conducted by defendants, during his incarceration).

the enterprise.¹²⁵ The Second Circuit held that where persons, including fiduciaries or agents of a business, act in a manner inconsistent with delegated duties and delimited authority, they will be deemed "distinct" from the business entity enterprise.

Although not discussed in the decision, the Second Circuit may have seen defendants' conduct as analogous to "infiltration." With respect to those "infiltrating" activities, i.e., conduct designed to improperly seize the fruits of plaintiff's business, defendants were not acting as employees of (and, therefore, were distinct from) the business. Thus, they could not exploit their formal status as employees to obtain a Distinctness Requirement-based dismissal.¹²⁶

The *Jacobson* Court then observed that even though defendants, as employees of the real estate enterprise, might be viewed as part of the "enterprise," the Distinctness Requirement was not violated because there was not a complete "identity" between the enterprise and the defendants. Because plaintiff Jacobson was himself a member of his own company (which was the alleged enterprise), there was only a limited overlap because the individual defendants did not exhaust the composition of the enterprise:

Even if both of the defendants are considered components of such an enterprise, there is no complete identity between the RICO persons and the RICO enterprise. Under this reading of the amended complaint, the defendants named in this action would be but members of a larger enterprise that included Jacobson. Where the overlap between the defendants

¹²⁵ *Id.* at 720.

¹²⁶ The decision notes that one of the defendants was "taken into the business" in an unspecified manner. *Id.* at 718. Defendants' status is therefore subject to some question.

and the alleged RICO enterprise is only partial, a RICO claim may be sustained.¹²⁷

The *Jacobson* Court did not address whether defendants' conduct "benefited" plaintiff's real estate business nor whether defendants' activities were "nonregular."¹²⁸

B. Riverwoods' and its Circuit Level Progeny's Jurisprudence of Distinctness

Following *Jacobson*, in 1994, *Riverwoods* held that a bank's restructuring group (the enterprise) and the bank controlling the restructuring group's activity were not sufficiently distinct to satisfy Statutory Distinctness. Although all members of the restructuring group were bank employees, not all employees of the bank were members of the restructuring group. The *Riverwoods* Court did not attempt to apply "overlap" principles as the *Jacobsen* Court had done. Nor did it treat defendants, including one "taken into the business" as "outsiders" who "infiltrated" plaintiff's business.¹²⁹ Instead, it focused on the Nonregular Business Test.

In 1995, the question presented to the Second Circuit was whether two corporations could associate with a single, shared

¹²⁷ *Id.* at 720. One implication of this view is that no Distinctness Requirement defense can even succeed were an action is brought by one officer against a corporate enterprise—one officer will always be distinct and overlap will, a fortiori, always be limited.

¹²⁸ Defendants' conduct would seem to have been the same "type" of activity in which the real estate business had engaged. Even if defendants' activities were an effort to benefit from their wrongdoing, "benefit" is not the basis for determining "regularity" of business conduct; rather, it is analyzed in terms of the physical similarity of challenged conduct to ordinary business or administrative behavior. See authorities cited *supra* notes 56-73 and accompanying text. But see *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 263-64 (2d Cir. 1995) (applying a benefits test, discussed *infra* notes 131-39 and accompanying text).

¹²⁹ This seems to be a correct result. Activities designed to seize control of a corporation cannot, without considerable stretch, be deemed activities of the corporation itself.

common officer agent. In *Securitron Magnalock Corp. v. Schnabolk* ("*Securitron Magnalock*"),¹³⁰ plaintiff alleged an association in fact enterprise comprised of two corporations and a shared common officer/agent. The enterprise was directed by the corporations and the shared officer/agent, each of which was alleged to be a RICO person. The Second Circuit sustained the enterprise, finding the corporations were distinct from each other. One was engaged in manufacturing locks and alarm system components and the other, one engaged in marketing and installing security systems.¹³¹ The corporations were described as "active, operating businesses rather than two stacks of stationery,"¹³² with different employees, with each corporation capable of benefiting from the alleged misconduct:¹³³

While Schnabolk was an officer or agent of each corporation, each was an independent entity that could benefit from his nefarious activities [E]ven if Schnabolk owned 100% of the shares of each corporation, the corporations would be separately existing legal entities capable of constituting an association-in-fact enterprise.¹³⁴

Although the officer/agent could not associate with either corporation individually, the Second Circuit concluded the corporations could associate with each other.¹³⁵ The officer/agent, despite his links to both corporations, was distinct from the

¹³⁰ 65 F.3d at 256 (2d Cir. 1995).

¹³¹ *Id.* at 263.

¹³² *Id.*

¹³³ *Id.* at 263-64.

¹³⁴ *Id.* at 263.

¹³⁵ *Securitron Magnalock*, 65 F.3d at 263.

corporations, and their “association” was a different “combined entity.” The officer was legally capable of directing both entities without violating the Distinctness Requirement.

In the context of multi-corporation association in fact enterprises controlled by a single, common officer,¹³⁶ the *Securitron Magnalock* Court viewed the question of Statutory Distinctness as turning, in part, on the potential to receive “independent benefits,” a factor commentators have questioned as a primary consideration in distinctness analysis.¹³⁷ If Corporation A and Officer Person A are RICO-indistinguishable because Corporation A’s act is nothing more than RICO Person A’s act, and Corporation B and Person A are also indistinguishable, for the same reason, each act of Corporations A and B, effected by Person A, would seem to be reducible to an act of Person A. A would, in effect, be associating with himself. This is an analysis hard to square with prior cases.¹³⁸

¹³⁶ See LaBrun, *supra* note 16, at 192 (“The criminal law’s traditional insistence upon intent to benefit the entity tempers the loss adjusting purposes of vicarious civil liability with the fault-based principles of general criminal liability.”).

¹³⁷ *Id.* at 203 n.173 (arguing that the fact that a person must benefit from a violation of law to be liable for the violation seems “bizarre as a general proposition,” further arguing “it is directly at odds with civil RICO, which focuses upon injuries to businesses or properties sustained by victims of racketeering, not the benefits derived by perpetrators.”). LaBrun argues the proper approach to determining whether an entity should be liable under RICO is to “focus on whether the employees or agents in question intended to benefit their corporate employer or principal, not whether they actually did so.” In discussing *Petro-Tech, Inc. v. Western Co. of North America*, 824 F.2d 1349, 1361 (3d Cir. 1987), LaBrun notes that “attempt to benefit [was] determinative.” See LaBrun, *supra* note 16, at 203 n.173.

¹³⁸ In *Fogie v. Thorn America’s, Inc.*, 190 F.3d 889 (8th Cir. 1999), the Eighth Circuit rejected Seventh and Ninth Circuit authorities: “Neither the Seventh nor Ninth Circuit explains why, when two entities are under common control and there is no distinctiveness or independence of action, an agreement or understanding between them creates any of the special dangers § 1962(d) targets.” *Id.* at 899 (finding that merely alleging “separate legal entities” was insufficient). See also *Gottstein v. Nat’l Ass’n for the Self Employed*, 53 F. Supp. 2d 1212, 1220 (D. Ka. 1999) (finding that alleged common control of not-for-profit corporation by another corporation and the person who had formed both companies satisfied the Distinctness Requirement—control does not establish “indistinguishability,” noting, with

Neither *Bennett*, *Cullen*, *Jacobsen*, or *Riverwoods* had viewed the ability to receive "independent benefits" as a dispositive factor in determining Statutory Distinctness nor was whether the corporate entities functioned "independently." *Securitron Magnalock* added an "Independent Benefits Test" and "Independent Action Test" to Distinctness Requirement jurisprudence, at least where association in fact enterprises comprised of multiple corporations were involved.

In 1997, the Second Circuit had to determine how distinctness rules should apply to an enterprise comprised of a holding company and two subsidiary companies, a situation falling, the Second Circuit observed, somewhere in between *Cullen* and *Riverwoods*. In *Discon, Inc. v. NYNEX, Corp.* ("*Discon*"),¹³⁹ plaintiff alleged an enterprise called the "NYNEX Group." Its members were a holding company, NYNEX Corp. ("NYNEX"), and its wholly owned subsidiaries, NYNEX Material Enterprises ("MECo") and New York Telephone Co. ("NYTEL"). Each corporate person allegedly controlled the NYNEX Group. The Second Circuit, observed that like the *Riverwoods* defendants, the *Discon* defendants were alleged to have operated in a "unified corporate structure,"¹⁴⁰ but like the defendants in *Cullen*, the *Discon* defendants were legally separate entities.¹⁴¹ No prior precedent was directly controlling.

The Second Circuit held the relationship between NYNEX Group, NYTel, NYNEX and MECo was more analogous to the

respect to alternative association in fact enterprise(s), that the members comprising the association had "presumably divergent economic interests").

¹³⁹ 93 F.3d 1055 (2d Cir. 1996).

¹⁴⁰ *Id.* at 1064.

¹⁴¹ *Id.*

relationship between the *Riverwoods* loan officers and the bank than the legally separate business entities in *Cullen*.¹⁴² In both *Riverwoods* and *Discon*, the Second Circuit concluded: “the individual defendants were acting within the scope of a single corporate structure, guided by a single corporate consciousness.”¹⁴³ Dismissing the RICO claim, the Second Circuit noted a different outcome might have resulted had defendants acted outside the scope of their agency, a central aspect in the court’s analysis in *Riverwoods*.¹⁴⁴

In 1999, the Second Circuit was presented with a case in which a bank was alleged to be both the enterprise and person controlling it. In *Anatian v. Coutts Bank (Switzerland) Ltd.*,¹⁴⁵ plaintiff, a borrower, sued a bank, Coutts Bank (Switzerland) Ltd., for RICO violations. The borrower claimed, *inter alia*, that Coutts Bank representatives had fraudulently induced him to borrow \$100 million to purchase TV stations and supply private equity for an initial public offering. Defendants allegedly persuaded plaintiff to create limited liability companies to which the bank could loan money, while circumventing the internal and legal per-borrower lending limits, an arrangement defendants supposedly stated would satisfy internal lending regulations.

Plaintiff claimed he pledged certain stock as collateral for his personal loan and also arranged for the limited liability companies to

¹⁴² *Id.* at 1063-64 (“The difference between *Riverwoods* and *Cullen* appears to lie in the fact that *Riverwoods* involved only a single corporate entity that was associated with its employees, whereas *Cullen* involved three legally separate entities that could be differentiated from the enterprise group.”).

¹⁴³ *Id.* at 1064.

¹⁴⁴ *Discon*, 93 F.3d at 1064.

¹⁴⁵ 193 F.3d 85 (2d Cir. 1999).

pledge stock as collateral. Plaintiff claimed defendants falsely inflated the value of the stock pledged as collateral for the loans in order to extend more credit. After extending loans to Anatian, the related limited liability companies, and associates, defendants allegedly reneged on their commitment, claiming that the bank's main office had put a halt to the arrangement. Plaintiff alleged Coutts, was the "enterprise," as well as a "person" controlling it. The Second Circuit dismissed the allegation under *Bennett*:

[A] corporate entity may not be simultaneously the 'enterprise' and the 'person' who conducts the affairs of the enterprise through a pattern of racketeering activity." *Bennett v. U.S. Trust Co.*, 770 F.2d 308, 315 (2d Cir.1985). Plaintiffs alleged that Coutts was an "enterprise" within the meaning of sections 1961 and 1962 as well as a "person" as defined in section 1961(3). Plaintiffs cannot circumvent the distinctness requirement "by alleging a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant."¹⁴⁶

In year 2000, the Second Circuit heard *Cedric Kushner Promotions, Ltd. v. King*,¹⁴⁷ a case that, as discussed above, eventually reached the Supreme Court. It involved a dispute among rival boxing promoters. The complaint identified Don King Productions, Inc. ("DKP") as the RICO enterprise and Don King ("King"), as the RICO person controlling it. The complaint named

¹⁴⁶ *Id.* at 89 (citing *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir.1994)).

¹⁴⁷ 219 F.3d 115 (2d Cir. 2000).

both King and DKP as RICO defendants, but, on appeal, the parties agreed to drop the RICO claims against DKP, leaving King the sole RICO defendant and DKP the enterprise. It was undisputed

that King was an employee acting within the scope of his authority at DKP, Kushner does not assert that King and DKP are distinct. Instead, Kushner argues that the distinctness requirement is inapplicable when only the RICO person, and not the RICO enterprise, is a defendant. We conclude that the District Court properly rejected this contention. Our decisions in *Riverwoods* and *Discon* preclude the imposition of liability under § 1962(c) unless the RICO person and RICO enterprise are distinct; these cases leave no room for creating exceptions to the distinctness requirement based on the identity of the defendant. . . Accordingly, we affirm the District Court's dismissal of Kushner's RICO claim against King pursuant to 18 U.S.C. § 1962(c), the only claim before us on this appeal.¹⁴⁸

The decision was short. Essentially, after a very brief discussion of *Riverwoods* and *Discon*, and after citing *Anatian*, the Second Circuit affirmed the trial court with a one-paragraph rationale. The Second Circuit did, however, note that its conclusions were contrary to the law of several other Federal Circuits:

We recognize that our conclusion is in tension, if not conflict, with the decisions of other Courts of Appeals, *see Brannon v. Boatmen's First Nat'l Bank of Okla.*, 153 F.3d 1144, 1148 n. 4 (10th Cir. 1998); *Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 646-47 (7th Cir. 1995); *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 265-69 (3d Cir. 1995); *Davis v.*

¹⁴⁸ *Id.*

Mutual Life Ins. Co. of New York, 6 F.3d 367, 377-78 (6th Cir. 1993); *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1534 (9th Cir. 1992), but these decisions are contrary to our understanding of the distinctness requirement, as expressed in *Riverwoods* and *Discon*. We follow here the law of our Circuit and decline to embrace the authority of those other Circuits. *Cf. In re Sokolowski*, 205 F.3d 532, 534-35 (2d Cir. 2000) (per curiam) (explaining that this Court "is bound by a decision of a prior panel unless and until its rationale is overruled, implicitly or expressly, by the Supreme Court or this court en banc.")¹⁴⁹

Prior to *King*, the Second Circuit had not directly addressed the scenario where a single corporate entity was the alleged enterprise and a single officer the alleged person controlling enterprise criminal activity. After *Riverwoods* and *Discon*, this outcome was foreseeable.

The following year, in *DeFalco v. Bernas*,¹⁵⁰ a developer sued public officials, private individuals and corporations claiming his development was being illegally impeded by defendants' operation of the town as a RICO enterprise. Noting distinctness was required,¹⁵¹ the Second Circuit held the Distinctness Requirement satisfied:

The jury could reasonably have concluded that the RICO persons—Dirie, Bernas, JBI and JML—were a separate and distinct assortment of public officials,

¹⁴⁹ *Id.* at 117 n.4.

¹⁵⁰ 244 F.3d 286 (2d Cir. 2001).

¹⁵¹ *Id.* at 307 ("Under section 1962(c), a defendant and the enterprise must be distinct. Indeed, 'it is well established in this Circuit that, under § 1962(c), the alleged RICO 'person' and RICO 'enterprise' must be distinct.' ") (per curiam) (footnotes omitted) (citing *Anatian v. Coutts Bank (Switzerland) Ltd.*, 193 F.3d 85, 89 (2d Cir.1999); *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 343-45 (2d Cir.1994); *Bennett v. U.S. Trust Co.*, 770 F.2d 308, 315 (2d Cir.1985)).

private individuals and corporations who used their political power to influence the Town of Delaware's exercise of governmental authority over the plaintiffs' development. From the evidence adduced at trial, there was sufficient evidence from which a reasonable jury could conclude that the named defendants were separate, culpable parties and that the alleged enterprise, the Town of Delaware, was the "passive instrument or victim of [their] racketeering activity."¹⁵²

Although the Second Circuit did not cite *Cullen* or *Securitron Magnalock*, *DeFalco* was similar to these cases, involving multiple corporate entities and individuals and an association not reducible to a single person constituting it.¹⁵³

In 2004, the Second Circuit decided *First Capital Asset Management v. Satinwood, Inc.*¹⁵⁴ *Satinwood* extensively discussed enterprise pleading requirements, citing *Riverwoods* and *Cedric*,¹⁵⁵ but added little to existing Statutory Distinctness rules. Its holding focused on the requirement that the enterprise be distinct *from predicate misconduct*, a different enterprise distinctness requirement, with which this article is not concerned.¹⁵⁶

¹⁵² 244 F.3d at 307.

¹⁵³ See *supra* notes 121-123 and 131-139 and accompanying text.

¹⁵⁴ 385 F.3d 159 (2d Cir. 2004).

¹⁵⁵ *Id.* at 173.

¹⁵⁶ *Id.* at 173-74. Because the pleading did not show an ongoing enterprise structure independent of alleged predicate activity, the Second Circuit found the enterprise reducible to predicate activity. The Second Circuit concluded: "At bottom, Plaintiffs have alleged that Sohrab engaged in a single scheme to defraud two creditors by quickly moving his assets to his relatives and then concealing the existence of those assets during his bankruptcy proceeding. But however egregious Sohrab's fraud on Plaintiffs may have been, they have failed to allege that he engaged in a pattern of racketeering activity." *Id.* at 182. The court examined a second enterprise, comprised of a bankruptcy estate and certain individual defendants, but analysis of that enterprise did not consider issues relevant to Statutory

C. The Third Circuit's Pre-Jaguar Cars Jurisprudence of "Distinctness"

In 1984, the Third Circuit addressed the Distinctness Requirement for the first time. In *B.F. Hirsch v. Enright Refining Co.* ("*Enright*"),¹⁵⁷ the Third Circuit held a corporation could not be both the RICO person and RICO enterprise. It first noted that the Section 1962(c)'s language contemplates separate person and enterprise entities capable of being "employed" and being "associated":

Under . . . subsection [1962(c)], the "person" must be employed by or associated with an "enterprise." The Enright Refining Company, Inc. clearly is not employed by the Enright Refining Company, Inc.; nor is it logical to say that the Enright Refining Company, Inc. is associated with the Enright Refining Company, Inc. Thus, the language contemplates that the "person" must be associated with a separate "enterprise" before there can be RICO liability on the part of the "person."¹⁵⁸

The *Enright* Court further recognized that RICO was intended to stop the infiltration of legitimate organizations by criminals or criminal organizations.¹⁵⁹ Because corporations cannot be "infiltrated by," "employed by" or "associated with" themselves, the Third Circuit concluded that a RICO corporation enterprise must be separate and distinct from the RICO person controlling it, a situation

Distinctness.

¹⁵⁷ 751 F.2d 628 (3d Cir. 1984).

¹⁵⁸ *Id.* at 633.

¹⁵⁹ *Id.* at 633-34.

that could not exist where a corporate entity was alleged to be the enterprise and, also, the RICO person controlling it.¹⁶⁰

Enright was followed by *Petro-Tech, Inc. v. Western Co. of North America* (“*Petro-Tech*”),¹⁶¹ a 1987 decision in which the Third Circuit held that Section “1962(c) was intended to govern only those instances in which an ‘innocent’ or ‘passive’ corporation is victimized by the RICO ‘persons,’ and either drained of its own money or used as a passive tool to extract money from third parties.”¹⁶² *Petro-Tech* held that a corporate enterprise could be vicariously liable for its employees’ Section 1962(c) misconduct under aiding and abetting or respondeat superior theories, if the corporation benefited from the wrongdoing.¹⁶³ It further held that Statutory Distinctness would not be violated where the enterprise is alleged to be an association of a corporate entity and individual defendants, only some of which are employees. In other words, a corporate entity could be directly liable for its employees’ § 1962(c) activity where the corporate entity is part of an association in fact, but not when the corporate entity alone is alleged to be both the enterprise and employer of the RICO person(s).¹⁶⁴

In 1989, the Third Circuit, in *Shearin v. The E.F. Hutton Group, Inc.*,¹⁶⁵ recognized that a RICO enterprise can be comprised

¹⁶⁰ *Id.*

¹⁶¹ 824 F.2d 1349 (3d Cir. 1987).

¹⁶² *Id.* at 1359.

¹⁶³ *Id.* at 1361.

¹⁶⁴ *Id.* See generally O’Neill, *supra* note 16, at 668-69 (*Petro-Tech* stands for the proposition that “a corporation that is a member of an association-in-fact enterprise could be held directly liable for the acts of the association.”).

¹⁶⁵ 885 F.2d 1162 (3d Cir. 1989).

of a number of corporations which choose to associate for illicit purposes.¹⁶⁶ The same year, in *Rose v. Bartle*,¹⁶⁷ it held that an entity can be a "person" with respect to some racketeering acts and an "enterprise" with respect to others.¹⁶⁸

In 1991, in *Brittingham v. Mobil Corp.* ("*Brittingham*"),¹⁶⁹ plaintiffs sued Mobil Corporation, its subsidiary (Mobil Oil Corporation) and their advertising agencies for falsely stating their trash bags were bio-degradable. The *Brittingham* Court noted plaintiffs had sued corporate entities "rather than the individuals who may have committed the alleged fraud on behalf of these corporations."¹⁷⁰ It relied on *Enright*, holding the association in fact enterprise could not be sustained:

[A] Section 1962(c) enterprise must be more than an association of individuals or entities conducting the normal affairs of a defendant corporation. A corporation must always act through its employees and agents, and any corporate act will be accomplished through an 'association' of these individuals or entities. Consequently, the *Enright* rule would be eviscerated if a plaintiff could successfully plead that the enterprise consists of a defendant corporation in association with employees, agents, or affiliated entities acting on its behalf. The distinctiveness requirement ensures that RICO

¹⁶⁶ *Id.* at 1165.

¹⁶⁷ 871 F.2d 331, 358-59 (3d Cir. 1989).

¹⁶⁸ *Id.* at 359 (finding an enterprise was possible where plaintiff alleged defendant functioned as an enterprise serving as a vehicle for certain predicate acts, but as a person, in conducting the affairs of the enterprise). *Cf.* *Teti v. U.S. Healthcare, Inc.*, No. 88-9808, 88-9822, 1989 WL 143274, at *2 (E.D. Pa. Nov. 21, 1989) (distinguishing *Rose*, rejecting enterprise on the ground that plaintiffs did not suggest there were any predicate acts, some of which were perpetrated by the parent HMO and some of which perpetrated subsidiaries).

¹⁶⁹ 943 F.2d 297 (3d Cir. 1991).

¹⁷⁰ *Id.* at 300.

sanctions are directed at the persons who conduct the racketeering activity, rather than the enterprise through which the activity is conducted.¹⁷¹

The *Brittingham* Court noted that where a defendant is a collective entity, such as a corporation, rather than an individual defendant, it is more likely that the alleged enterprise will turn out to be indistinguishable “from the association of individuals or entities that constitute the defendant or carry out its actions.”¹⁷² If plaintiff alleges “that the defendant corporation had a role in the racketeering activity that was distinct from the undertakings of those acting on its behalf,”¹⁷³ however, an association in fact between corporation and individual defendants would be permissible, with the corporation potentially liable as a RICO person.¹⁷⁴ Examining the case on summary judgment, the *Brittingham* Court looked beyond the pleadings to the actual relationship between defendants and the alleged enterprise,¹⁷⁵ concluding:

Because Mobil and Mobil Chemical were named as defendants, neither one alone could be alleged as the enterprise. Moreover, as *Petro-Tech* indicates, plaintiffs could not name Mobil as the defendant and its subsidiary, Mobil Chemical, as the enterprise. We do not believe that the grouping of defendants with their advertising agencies changes the result. The

¹⁷¹ *Id.* at 301.

¹⁷² *Id.* at 302.

¹⁷³ *Brittingham*, 943 F.2d at 302.

¹⁷⁴ *Id.* (“It is theoretically possible for a corporation to take a separate ‘active’ role in RICO violations also committed by its employees. The corporation would not be the passive victim of racketeering activity, but the active perpetrator,” but refusing to speculate on “precise circumstances that might give rise to such a claim.”).

¹⁷⁵ *Id.* at 303.

advertising agencies were defendants' agents, and did no more than conduct the normal affairs of the defendant corporations. The defendant corporations were the actual entities through which the alleged racketeers carried out their fraudulent activity. Plaintiffs have produced no evidence indicating that the defendant corporations, in contrast to the individuals or entities acting on their behalf, took a distinct role in the alleged racketeering activity. We therefore will affirm the dismissal of the § 1962(c) claims.¹⁷⁶

Brittingham established three important principles in the Third Circuit. First, addition of distinct corporate entities to an alleged enterprise will not satisfy Statutory Distinctness requirements where the added entities merely conduct normal business operations, in an agent (or agent-like) role. Second, corporations may not be liable unless they play a distinct role in or make a contribution to the RICO activity that is separate from the contribution of the RICO person(s). Third, collective entities are unlikely to be distinguished from their members.

In 1991, in *Glessner v. Kenny*,¹⁷⁷ the Third Circuit examined two alternative enterprises. The first enterprise was comprised of Meenan Oil Corporation ("Meenan"), Blueray Systems, Inc., a wholly owned subsidiary of Meenan which manufactured and sold allegedly defective residential oil furnaces ("Blueray"), and KOV Corporation ("KOV"), which purchased Meenan. Each company was alleged to be a person controlling the enterprise. The second

¹⁷⁶ *Id.*

¹⁷⁷ 952 F.2d 702 (3d Cir. 1991).

enterprise was alleged to be an association in fact “among Meenan, Blueray and Kenny, and other persons.”¹⁷⁸ Kenny was one of Meenan’s former officers and a then present officer of KOV.

The Third Circuit held the district court properly dismissed the first enterprise under *Enright*. On appeal, plaintiffs argued they could “rearrange the parties” so Meenan (the parent) would be the “person” conducting the affairs of Blueray (the subsidiary), or vice versa.¹⁷⁹ The court rejected plaintiff’s attempt to “recast” the enterprise. Under *Brittingham*, plaintiff was required to provide some basis for holding a parent and subsidiary separate and distinct for RICO purposes,¹⁸⁰ but no such basis appeared in the complaint or RICO case statement.¹⁸¹ With respect to the second enterprise, the Third Circuit refused to permit plaintiffs to exploit the *Petro-Tech* rationale as an “association in fact loophole.”¹⁸² The Third Circuit chose to follow *Brittingham*, rather than rely on *Petro-Tech*, and affirmed the district court, noting that nothing suggested the “kind of distinctiveness which *Brittingham* held was necessary to satisfy the *Enright* rule.”¹⁸³

Glessner read *Brittingham* as requiring a plaintiff to allege that the corporate defendants “played some distinct and active role in the alleged racketeering activity apart from the actions of their employees, affiliates, and agents if they are jointly to be regarded as

¹⁷⁸ *Id.* at 710.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* Similarly, it noted *Petro-Tech* upheld a pleadings-based dismissal of claims against a parent when its subsidiary was named an alternative enterprise.

¹⁸² *Glessner*, 952 F.2d at 711 n.8.

¹⁸³ *Id.* at 712.

an association in fact.”¹⁸⁴ Plaintiffs tried to satisfy this requirement by arguing Meenan was an “active participant . . . ‘making a corporate acquisition, expending its assets on marketing and selling activities, and reaping the profits from the sales of the Bluera y ‘blue flame’ products.’ ”¹⁸⁵ The *Glessner* Court held that “none of these alleged activities constituted an ‘active role’ “ distinct from Meenan’s employees’ or agents’ actions.”¹⁸⁶ Plaintiffs also argued that while marketing of Blue Flame products was within the normal course of business, fraudulent marketing was outside the normal course. The *Glessner* Court rejected this as “merely playing with words” and not a “distinction of substance.”¹⁸⁷ It concluded plaintiffs could not so easily circumvent *Enright* when it stated:

We are concerned about the alacrity with which plaintiffs appear to grasp at any theory of alignment of parties which might withstand dismissal. A RICO complaint is not a mix and match game in which plaintiffs may artfully invoke magic words to avoid dismissal. Instead, to plead a claim under section 1962(c) the complaint must be capable of being read to satisfy the statutory requirement that persons were conducting a pattern of racketeering through a separate and distinct enterprise.¹⁸⁸

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* (quoting plaintiff’s Supplemental Letter requested by the court to explain the effect of *Brittingham*).

¹⁸⁶ *Id.*

¹⁸⁷ *Glessner*, 952 F.2d at 712.

¹⁸⁸ *Id.* at 714.

D. Jaguar Cars' and its Circuit Level Progeny's Jurisprudence of Distinctness

Third Circuit distinctness jurisprudence radically changed in 1995 with the *Jaguar Cars* decision. Jaguar had sued one of its dealerships and its president and manager for engaging in a fraudulent warranty claims scheme. The corporate dealership was alleged to be the RICO enterprise with its president and manager the persons directing its wrongful activities. The jury found for Jaguar, and defendants, on appeal, argued Jaguar failed to satisfy the Distinctness Requirement. The *Jaguar Cars* Court did not attempt to distinguish the Third Circuit's prior precedents. Rather, it held prior precedents were *invalid* in light of the Supreme Court decisions *Sedima v. Imrex Co.*,¹⁸⁹ *Reves v. Ernst & Young*,¹⁹⁰ and *National Organization for Women, Inc. v. Scheidler*,¹⁹¹ none of which had directly addressed the Distinctness Requirement.

Sedima, for example, had recognized that RICO was being applied to everyday fraud cases involving both legitimate and illegitimate enterprises.¹⁹² Despite the fact most private civil actions were being brought against defendants who did not fit the "archetypal, intimidating mobster" stereotype,¹⁹³ *Sedima* permitted such suits¹⁹⁴ because Congress wanted RICO to reach both types of enterprises.¹⁹⁵ The *Jaguar Cars* Court held that the Court's decision

¹⁸⁹ 473 U.S. 479 (1985).

¹⁹⁰ 507 U.S. 170 (1993).

¹⁹¹ 510 U.S. 249 (1994).

¹⁹² 473 U.S. at 499.

¹⁹³ *Jaguar Cars*, 46 F.3d 258, 263 (3d Cir. 1995) (quoting *Sedima*, 473 U.S. at 499).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 262-63 (discussing *Sedima*, 473 U.S. at 499).

in *Sedima* not only undermined *Enright's* infiltration-based rationale,¹⁹⁶ but demonstrated the Third Circuit's post-*Sedima* jurisprudence, prior to *Jaguar Cars*, had not properly reflected *Sedima's* insight regarding RICO's ability to reach legitimate enterprises.¹⁹⁷ According to the *Jaguar Cars* Court, this contributed to an erroneous attitude as to the infiltration requirement's continuing viability in the Third Circuit.

The *Jaguar Cars* Court also discussed the implications of the Supreme Court's decision in *Reves*, which involved the potential RICO liability of an outside accounting firm and persons operating within that firm. The *Reves* Court held that only those persons who "operate or manage" an enterprise will be subject to RICO's remedies. Justice Blackman explained how "operation" or "management" was to be understood, for RICO purposes:

Once we understand the word 'conduct' to require some degree of direction and the word 'participate' to require some part in that direction, the meaning of [section] 1962(c) comes into focus. In order to 'participate,' directly or indirectly, in the conduct of such enterprise's affairs," one must have some part in directing those affairs. . . . The 'operation or management' test expresses this requirement in a formulation that is easy to apply.¹⁹⁸

The *Jaguar Cars* Court, citing *Reves*, explained that RICO remedies were designed to stand as a bulwark against criminal

¹⁹⁶ *Id.* at 263.

¹⁹⁷ *Id.* at 263-65.

¹⁹⁸ *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993).

misconduct engaged in by persons operating within business structures, i.e., operational or managerial personnel, who most directly contribute to a business' actual conduct.¹⁹⁹ "Implicit in the [Reves] Court's analysis then, was the recognition that 'inside' managers are the 'persons' [section] 1962(c) was designed to reach."²⁰⁰ Therefore, any analysis of Statutory Distinctness must facilitate (or at least be consistent with) the goal of reaching the persons *Reves* identified as within RICO's reach.

Reves established a very high burden for plaintiffs seeking to prove a RICO case against "outsiders," who generally exercise less direct operational or managerial control than internal managers.²⁰¹ Based on its reading of *Reves* and *Sedima*, the *Jaguar Cars* Court concluded that prior "distinctness" cases had erred in basing their analyses on the infiltration paradigm²⁰²:

¹⁹⁹ *Jaguar Cars*, 46 F.3d at 265-67. Despite the flood of post-*Reves* cases dismissing claims against corporate outsiders under Section 1962(c): "where the activities of an outside professional go beyond the rendition of routine professional services and are so intertwined with the corporate enterprise that the outsider can be said to 'operate' or 'manage' the enterprise, the outsider still faces exposure to a Section 1962(c) claim." SOLOVY & REES, *supra* note 17, ch. 69.3, text at nn. 61-62.

²⁰⁰ *Jaguar Cars*, 46 F.3d at 267.

²⁰¹ The *Jaguar Cars* Court also interpreted *Scheidler* as support for its view that a victim of racketeering may not comprise part of the enterprise through which predicate misconduct is perpetrated. *See id.* at 267 (citing *National Organization for Women v. Scheidler*, 510 U.S. at 249, 259 (1994)). Other courts have disagreed with this reading of *Scheidler*. *See, e.g., LaSalle Bank Lake View v. Seguban*, 937 F. Supp. 1309, 1323 (N.D. Ill. 1996) ("[T]his Court does not agree with the leap of logic made by the Third Circuit [*in Jaguar Cars*] from the Supreme Court's *Scheidler* statement that 'enterprises' 'generally' are not 'victims' to the conclusion that 'enterprises' cannot be 'victims.' "). *See also* *Hansel 'n Gretel Brand, Inc. v. Stuart Savitsky*, No. 94 Civ. 427 (CSH), 1997 U.S. Dist. LEXIS 13324, at *11 (S.D.N.Y. Sept. 3, 1997) (observing disagreement among the courts on interpretation of *Scheidler*, noting agreement with *LaSalle's* reading of *Scheidler*, but concluding resolution of issue would have no bearing on case).

²⁰² The term "paradigm" traces to THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970). *See* Feinman, *supra* note 87, at 696 n.127. Feinman notes that in the *Structure of Scientific Revolutions*, Kuhn "used the term 'paradigm' to stand both for 'the entire constellation of beliefs, values, [and] techniques' shared by practitioners in each

[I]f we fail to overrule this court's interpretation of [section] 1962(c), its combination with *Reves* would hold liable only those persons who are sufficiently connected to an enterprise so as to operate or manage it while still remaining sufficiently distinct from the enterprise so as to victimize or passively control it. Congress could not have intended such a *razor thin zone of application*.²⁰³

Given *Sedima*'s injunction that RICO be broadly construed to effectuate its remedial purposes,²⁰⁴ the *Jaguar Cars* Court concluded that the Third Circuit's prior distinctness jurisprudence was "born of the now defunct, pre-*Sedima*, infiltrating racketeer reading of RICO's legislative history, and is now even more clearly at odds with Supreme Court precedent [leaving] . . . the question: what remains of the statutorily-based distinctiveness requirement after *Reves* and *Scheidler*?"²⁰⁵

Answering its own question, the *Jaguar Cars* Court held although proof of "distinctness" remains part of a RICO plaintiff's case, Statutory Distinctness would be adequately alleged where plaintiff sues corporate officers/employees as RICO persons, controlling a corporation enterprise.²⁰⁶ It rejected the argument that permitting such enterprise/person combinations would produce the

field" *Id.* at 697 n. 132. "[Paradigms] include idealized and abstracted versions of the facts of exemplary cases as well as the principled justifications for the decisions." *Id.* at 699.

²⁰³ 46 F.3d at 267 (emphasis added).

²⁰⁴ *Sedima*, 473 U.S. at 497-98, 105 S. Ct. at 3285 (citing Pub.L. 91-452, § 904(a), 84 Stat. 947).

²⁰⁵ *Jaguar Cars*, 46 F.3d at 267-68 (emphasis added).

²⁰⁶ *Id.* at 268.

“absurd result” that plaintiff can *always* plead a proper enterprise.²⁰⁷ Because only the wrongdoing officers or employees would be liable under RICO, but not the corporate enterprise, there was no “absurdity.”²⁰⁸ Stating it was leaving *Enright’s* holding “undisturbed,”²⁰⁹ the Third Circuit reiterated a corporation may not simultaneously be both the enterprise and person. Only if the corporation engages in wrongdoing through a distinct “enterprise,” as a “corporate person,” will RICO liability attach. “In sum, we conclude that when officers and/or employees operate and manage a legitimate corporation, and use it to conduct, through interstate commerce, a pattern of racketeering activity, those defendant persons are properly liable under Section 1962(c).”²¹⁰

The Third Circuit reaffirmed *Jaguar Cars’* approach in *Rolo v. City Investing Co. Liquidating Trust*,²¹¹ but its rule appears to have

²⁰⁷ *Id.* See generally Goldsmith, *supra* note 16 at 796 (“[The] proposition that an enterprise may not associate with itself. . . . has superficial appeal, [but] it frequently prevents RICO from being used against white-collar enterprises engaged in fraud.”).

²⁰⁸ *Id.* Post-*Jaguar Cars* cases in the Third Circuit are in accord. See, e.g., Civ. Act. No. 97-4038, *Oglesby v. Saint-Gobain Corp.*, No. Civ.A. 97-40, 1997 WL 570925, at *4 (E.D. Pa. Aug. 29, 1997) (dismissing RICO claim against corporation where plaintiff pleaded a corporate entity enterprise directed by individual defendant persons, because corporate defendant did not engage in RICO misconduct as a person through a separate and distinct enterprise and sustaining RICO claim against natural officer persons directing entity enterprise, but refusing to sustain association in fact enterprise claim between two corporations, under control of individual defendants, for lack of formation of distinct enterprise); *Atyeh v. Casino Mgmt. Serv., Inc.*, No. CIV.A 95-0681, 1996 WL 146129, at *2-4 (E.D. Pa. Mar. 28, 1996) (holding that plaintiffs have met the distinctiveness requirement where plaintiff pleaded corporations as enterprises and named natural defendants as RICO persons, although corporate enterprises were named defendants, they were not RICO count defendants).

²⁰⁹ 46 F.3d at 268.

²¹⁰ *Id.* at 269.

²¹¹ 155 F.3d 644, 651 (3d Cir. 1998) (holding that officers or employees of corporations may be liable as RICO persons where they manage their corporation’s affairs as an enterprise).

been limited by *Metcalf v. PaineWebber Inc.* ("*Metcalf*"),²¹² which the Third Circuit affirmed without opinion.²¹³ *Metcalf* considered what effect *Jaguar Cars'* analysis would have where a business entity, rather than natural persons, was alleged to be the controlling "person" of a corporation enterprise.²¹⁴ The trial judge found that with such a combination, the enterprise and person were less likely to be "distinct."²¹⁵ Citing *Brittingham*, he dismissed the RICO claim, apparently limiting application of the Separate Legal Identity Theory to corporation enterprises directed by natural persons; otherwise, *Brittingham* would control.²¹⁶

E. The Seventh Circuit's Jurisprudence of Distinctness

Distinctness jurisprudence in the Seventh Circuit is frequently traced to the heavily cited 1984 decision *Haroco, Inc. v. American Nat'l Bank & Trust Co.* ("*Haroco*"),²¹⁷ a case involving the alleged RICO activity of a parent company, its subsidiary and a subsidiary officer. Plaintiffs alleged they were defrauded with respect to the computation of interest on monies loaned to them by subsidiary

²¹² 886 F. Supp. 503 (W.D. Pa. 1995).

²¹³ *Metcalf v. PaineWebber, Inc.*, 79 F.3d 1138 (3d Cir. 1996). An appellate affirmance of an order without opinion is not an adoption of the reasons the lower court provided as the basis for its opinion where other grounds may exist for affirmance. See *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 384 (1997) (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) ("We do not disturb the settled rule that, in reviewing the decisions of a lower court, it must be affirmed if the result is correct 'although the lower court relied upon a wrong ground or gave a wrong reason.' ") (citation omitted).

²¹⁴ 886 F. Supp. at 513 (substance of allegations was that defendant either was the enterprise or acted as an association in fact along with its subsidiaries, relatives, agents and affiliates).

²¹⁵ *Id.* at n.12.

²¹⁶ *Id.* at 514. *Brittingham* is discussed *supra* at notes 169-177 and accompanying text.

²¹⁷ 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606 (1985).

defendant, American National Bank & Trust Co. (“ANB”), its parent, Walter E. Heller International Corporation (“Heller”) and an ANB officer.²¹⁸ The court concluded that while ANB could not be liable under 1962(c) for merely conducting its own affairs, because plaintiffs pleaded that ANB, the subsidiary, conducted the affairs of its parent, Heller, liability was possible:

The subsection requires only some separate and distinct existence for the person and the enterprise, and a subsidiary corporation is certainly a legal entity distinct from its parent. . . . [T]he complaint alleges that ANB is a wholly owned subsidiary of Heller International, and we think it virtually self-evident that a subsidiary acts on behalf of, and thus conducts the affairs of, its parent corporation.²¹⁹

Three important rules derived from *Haroco*. First, *Haroco* held that the “person” and “enterprise” must be distinct, rejecting then contrary Eleventh Circuit authority,²²⁰ in favor of Fourth Circuit precedent.²²¹ Second, it held that where a corporation is the alleged enterprise, it cannot also be the “person” conducting its own affairs.²²² Third, it held that because subsidiaries conduct their parents’ “affairs,” an enterprise comprised of parent and subsidiary corporations can satisfy the Distinctness Requirement.²²³

²¹⁸ *Id.* at 385.

²¹⁹ *Id.* at 402-03.

²²⁰ *Id.* at 399-401 (rejecting *United States v. Hartley*, 678 F.2d 961, 987-90 (11th Cir. 1982)).

²²¹ 747 F.2d at 400-01 (agreeing with *United States v. Computer Sciences Corp.*, 689 F.2d 1181, 1190-91 (4th Cir. 1982)).

²²² *Id.* at 402 (“ANC may not be held liable under section 1962(c) for conducting its own affairs through a pattern of racketeering activity.”).

²²³ *Id.* at 402-03.

In 1985, in *McCullough v. Suter*,²²⁴ the question was whether a sole proprietorship and its proprietor could “associate” and thereby be a Section 1962(c) enterprise. Two questions were actually involved, first, whether a proprietorship enterprise was distinct from the sole proprietor for Section 1962(c) purposes and, second, if not, whether the existence of employees employed by the proprietorship rendered the proprietorship and proprietor sufficiently distinct to satisfy the Distinctness Requirement. The Seventh Circuit concluded that a proprietor of a sole proprietorship would be sufficiently “distinct” from his business if the business employed persons other than the proprietor, but not otherwise, following the Additional Employees Test.²²⁵

In 1989, the Seventh Circuit revisited the Distinctness Requirement in *Ashland Oil, Inc. v. Arnett* (“*Ashland Oil*”).²²⁶ The question was whether Arnett Oil, a corporation employing several people, was distinct from its principals, the Arnett brothers?²²⁷ Relying on *McCullough*, it held the Arnett brothers were distinct from Ashland Oil because it had additional employees.

In 1993, the Seventh Circuit again relied on the Additional Employees Test in *United States v. Robinson*.²²⁸ Defendant, a controlling shareholder/president of a corporation, Renoja, argued he was not distinct from Renoja requiring dismissal of a RICO

²²⁴ 757 F.2d 142 (7th Cir. 1985).

²²⁵ *Id.* at 144. *McCullough*’s analysis is also discussed *infra* at notes 391-395 and accompanying text.

²²⁶ 875 F.2d 1271 (7th Cir. 1989).

²²⁷ *Id.* at 1280.

²²⁸ 8 F.3d 398 (7th Cir. 1993).

indictment. Reversal was required, he urged, because Renoja was conducting defendant Robinson's affairs, not its own affairs.²²⁹ However, "Robinson was charged with improperly conducting Renoja's activities, not his own activities,"²³⁰ and the Seventh Circuit previously rejected that argument, in *Ashland Oil*. Given Renoja's employment of hundreds of people and filing of income tax forms separate from Ashland Oil, the Distinctness Requirement was satisfied.²³¹

McCullough, *Ashland Oil* and *Robinson* exemplify the Seventh Circuit's early liberal approach to Statutory Distinctness, at least where the enterprise was comprised of a business and its owners, and where persons other than owners were employed by the business, under the Additional Employees Test.

In 1995, the Seventh Circuit's liberal Distinctness Requirement jurisprudence abruptly ended with *Richmond v. Nationwide Cassel L.P.* ("*Richmond*").²³² Plaintiff pleaded an association in fact enterprise called the "Nationwide Group"

²²⁹ *Id.* at 406-07 (discussing *United States v. DiCaro*, 772 F.2d 1314 (7th Cir. 1985) (enterprise cannot consist of only an individual conducting his own affairs through a pattern of racketeering); *Haroco*, 747 F.2d at 402 (holding that a corporation "may not be held liable under section 1962(c) for conducting its own affairs through a pattern of racketeering activity").

²³⁰ *Robinson*, 8 F.3d at 407.

²³¹ *Id.*

²³² 52 F.3d 640 (7th Cir. 1995). Just the prior year, one district court wrote: "Where defendants' assertion fails in that respect is in their unwillingness to recognize the concept that an 'association in fact' (which is a permissible 'enterprise' under Section 1961(4)), such as Ugent Enterprises is alleged to be here, is viewed as sufficiently separable from the individual members of that association so as to allow those members to be sued as RICO-violating 'persons.' Although that issue has not yet been ruled upon by our Court of Appeals, 'the vast majority of courts agree that an association in fact enterprise is distinct from each of its members for purposes of the person/enterprise distinction requirement.' " *D'Last Corp. v. Ugent*, 863 F. Supp. 763, 767 (N.D. Ill. 1994) (citing ARTHUR F. MATHEWS, ANDREW B. WEISSMAN, & JOHN H. STURC, 2 CIVIL RICO LITIGATION § 6.03 at 6-3 (2d ed.1992)).

comprised of a limited partnership (Cassel, a sales finance agency), a corporate general partner of Cassel (NAC, also a minority Cassel owner) and Cassel's majority owner (Nationwide Acceptance), all under common control. Plaintiff also pleaded a second enterprise, comprised of the same members as the first enterprise, with the addition of some unnamed car dealers. Cassel and Nationwide Acceptance were the "persons" controlling both alleged enterprises. The amended complaint also listed four non-defendant entities,²³³ each alleged to be part of the "enterprise," but not alleged to have played any specific role in the misconduct.²³⁴

Plaintiff made no showing that any members of the association in fact, other than Nationwide Acceptance and Cassel, conducted the affairs of either enterprise. The Seventh Circuit, applying a *Riverwoods/Brittingham* analysis, held that plaintiff's

claim begins and ends with the fraud allegedly committed by Nationwide Acceptance and Cassel. There is no showing that other members of the alleged association in fact participated in the fraud, or that the persons, Nationwide Acceptance and Cassel, conducted the affairs of either of the alleged enterprises (rather than their own affairs) through a pattern of racketeering activity . . . The amended complaint's failure to present an enterprise separate and distinct from the persons sought to be held liable is a proper basis for its dismissal.²³⁵

Richmond, citing *Brittingham*, refused to permit plaintiff to

²³³ *Richmond*, 52 F.3d at 645.

²³⁴ *Id.*

²³⁵ *Id.* at 647.

include non-defendant entities in the enterprise to artificially create Statutory Distinctness. Prior cases had held that the mere existence of non-defendant employees in the alleged enterprise was sufficient to satisfy Statutory Distinctness, even if they were not alleged to have played any role in enterprise activity. Under *Richmond*, unless an enterprise member was alleged to have participated in the RICO misconduct,²³⁶ the claim would fail for lack of Statutory Distinctness.

Fitzgerald v. Chrysler Corp.,²³⁷ in 1997, followed *Richmond*, and developed its central ideas. The Seventh Circuit again emphasized that because RICO was meant to deter parties from associating together to magnify their individual potentials to engage in long-term patterns of wrongdoing, the emphasis should be functional. Courts should look to what the alleged distinct person actually did, within the enterprise. Because courts should focus on how enterprise members operate together, merely alleging a “legally distinct” enterprise member will not save a pleading unless plaintiff adds allegations that show the member contributed to bringing about the RICO wrongdoing (or concealing it) and, further, *that the scheme’s goal could not have been accomplished, absent that member*.²³⁸ Finally, it held Statutory Distinctness may only be satisfied by showing a sufficiently close family resemblance to a prototypical infiltration,²³⁹ as discussed above.²⁴⁰

²³⁶ *Id.*

²³⁷ 116 F.3d 225 (7th Cir. 1997).

²³⁸ *Id.* at 227-28.

²³⁹ *Id.*

²⁴⁰ See *supra* notes 77-95 and accompanying text.

Emery v. American General Finance, Inc. ("Emery"),²⁴¹ decided in 1998, continued the development of the "family resemblance" and "prototype" approach. Plaintiff alleged a finance company's offers to refinance borrower loans improperly concealed disadvantageous terms and named a holding company, a wholly owned subsidiary, a company organized to conduct the subsidiary's business in one particular state and several corporate officers and employees as defendants.²⁴² The alleged enterprise was the "corporate group." The Seventh Circuit reaffirmed its use of *Fitzgerald's* Family Resemblance Test:

The firm must be shown to use its agents or affiliates in a way that bears at least a *family resemblance* to the paradigmatic RICO case in which a criminal obtains control of a legitimate (or legitimate-appearing) firm and uses the firm as the instrument of his criminality. . . . It would be different if . . . criminals took over a corporate subsidiary which then managed to wrest control of the parent and use the parent as an instrument for further criminal activities. That would be a case of magnifying the powers of the criminal by seizing control of a legitimate organization.²⁴³

The *Emery* Court, to a limited extent, approved *Jaguar Cars'* Separate Legal Identity Theory, at least as applied to corporation enterprises controlled by their officers, but noted:

The Third Circuit . . . has held that an allegation that

²⁴¹ 134 F.3d 1321 (7th Cir. 1998).

²⁴² *Id.* at 1324.

²⁴³ *Id.* (emphasis added). See generally *Landreth Timber Co. v. Landreth*, 471 U.S. 681 (1985) (applying family resemblance test, discussed in detail in Solan, *supra* note 80 at 75-78, at notes 78-89).

corporate officers or employees are using their corporation to perpetrate the frauds or other predicate acts satisfies the ‘conduct the affairs through’ requirement. . . . However, it is one thing to allege that criminals are using a corporation to commit crimes . . . and another to assert merely that since the corporation’s unlawful scheme must have been hatched by someone connected to the corporation, the scheme . . . violates RICO²⁴⁴

The Seventh Circuit continued:

Corporations can only act through natural persons, so the approach that we are criticizing (and that we do not attribute to the Third Circuit, since *Jaguar Cars* was a case in which the defendants controlled the corporation . . .) would eliminate any separate function for the ‘conducts the affairs of through’ language of the statute if the perpetrator is a firm. *If the scheme is actually hatched or directed by the board of directors or some other controlling group, whether the control is de facto or de jure, it will come close enough to the paradigmatic RICO case to pass muster under the ‘family resemblance’ test that we applied in the Fitzgerald case. That is the teaching of Jaguar Cars but is not alleged here.* The plaintiffs’ inability to identify any actual corporate officers or employees as responsible parties shows that she is trying to truncate the statute in the manner that strikes us as inadmissible. . . . an ‘association in fact’ . . . is a polite name for a criminal gang or ring.²⁴⁵

Seventh Circuit RICO plaintiffs must now plead and prove that the role played by even legally and factually distinct alleged enterprise members could not have been accomplished by nondistinct

²⁴⁴ *Id.* (citations omitted).

²⁴⁵ *Id.* at 1324-25 (emphasis added).

person(s), e.g., officers or employees of a corporation, to establish RICO non-incidental distinctness.

Judge Posner also distinguished the "control group" and board of directors of a corporation from the corporation itself. He concluded there is no contradiction or strain in talking about the owner of a corporation and the corporation as separate entities, since they are legally separate entities.²⁴⁶ *Jaguar Cars* was, in his view, "correct."²⁴⁷ Judge Posner's interpretation of *Jaguar Cars*' rationale, however, may be overly generous.

First, *Jaguar Cars* did not hold the corporate officers distinct for Distinctness Requirement purposes because they were a "control group" of the corporation enterprise. If a corporation and its officers were not "distinct," RICO liability would rarely attach to a class of persons who the Supreme Court clearly identified in *Reves* as RICO's intended targets, i.e., persons in positions to exercise substantial control over business conduct.²⁴⁸ Neither *de facto* nor *de jure* "control" were discussed as bases of *Jaguar Cars*' distinctiveness analysis.²⁴⁹ Second, the Seventh Circuit's Family Resemblance Test relies, in a fundamental way, on the infiltration paradigm which *Jaguar Cars* categorically rejected. While the Seventh Circuit requires a strong "family resemblance" to a criminal "gang" infiltrating a business to satisfy the RICO prototype,²⁵⁰ the Third Circuit has held that mob-style infiltration, post-*Sedima*, is irrelevant

²⁴⁶ *Id.* (emphasis added).

²⁴⁷ *Emery*, 134 F.3d at 1324.

²⁴⁸ *See supra* notes 190-211 and accompanying text.

²⁴⁹ *Id.*

²⁵⁰ *See supra* text at notes 244-246.

to the analysis of Statutory Distinctness.²⁵¹ Judge Posner's approach limits RICO cases to those with strong similarities to organized crime infiltrating a business. The Third Circuit's approach, under *Jaguar Cars*, expanded the number of cases sustainable under the Distinctness Requirement, reflecting the more liberal (expansive) position that the *Jaguar Cars* Court derived from *Sedima* and *Reves*.

Judge Posner's prototype/family resemblance approach relies heavily on analogical reasoning, with the court comparing alleged conduct to "prototype" RICO misconduct. Interestingly, Judge Posner's own general criticism of reasoning by analogy has been noted by commentators.²⁵² Judge Posner questions, for example, "whether reasoning by analogy, when distinguished from logical deduction and scientific induction on the one hand and stare decisis on the other, deserves the hoopla and reverence that members of the legal profession have bestowed on it."²⁵³ In the RICO distinctness context, it apparently deserves the "hoopla."

In *Bachman v. Bear, Stearns & Co.*,²⁵⁴ the Seventh Circuit continued its strict application of the Distinctness Requirement, holding that not all conspiracies are enterprises and that a firm and its employees (or a parent and its subsidiaries), are not an enterprise separate from the firm itself. Under *Emery, Fitzgerald* and *Jaguar*

²⁵¹ See *supra* notes 41, 192-211 and accompanying text.

²⁵² See Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument By Analogy*, 109 HARV. L. REV. 925, 953 (1996).

²⁵³ *Id.* (quoting RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 90 (1990)). See generally Solan, *supra* note 80, at 116 ("Legislators . . . have no choice but to write statutes that incorporate concepts into rules, forcing courts to decide what to do when cases arise that are remote from the prototype, but nevertheless within the periphery of the concept.").

²⁵⁴ 178 F.3d 930, 932 (7th Cir. 1999).

Cars, the *Bachman* Court held that adding corporations to employees adds “nothing” for Distinctness Requirement purposes.

After *Cedric*, the Seventh Circuit, in *United States v. Castellano*,²⁵⁵ upheld a pleading in which plaintiff alleged that a closely held corporation was the enterprise, run by its manager, a case closely mirroring *Cedric*, *Cedric* was the court’s sole Statutory Distinctness authority:

[A] closely held corporation may be an “enterprise” for purposes of RICO, and a manager who pulls its strings through a pattern of racketeering may be convicted under that statute. See *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001). A corporation with sufficient substance to serve as a RICO “enterprise” also has sufficient substance to hold receipts for purposes of the Guidelines. This also means that a top manager’s ability to control the corporation is not enough to treat the corporation and the manager as a single entity; if that were so, *Cedric Kushner Enterprises* would have come out the other way (for no one doubts that Don King exercises absolute control over his boxing promotions).²⁵⁶

A very different result was reached in *Bucklew v. Hawkins, Ash, Baptie & Co., LLP*,²⁵⁷ which involved parent/subsidiary corporation enterprise allegations. Rather than relying on the separate legal identity of parent and subsidiary corporations under *Cedric*, the Seventh Circuit rejected the enterprise/person

²⁵⁵ 349 F.3d 483 (7th Cir. 2003).

²⁵⁶ *Id.* at 486.

²⁵⁷ 329 F.3d 923 (7th Cir. 2003).

combination on the ground that a parent and subsidiary were not sufficiently distinct under the *Fitzgerald* line of cases and certain antitrust precedents:

The RICO claim is another loser. RICO provides a remedy against conducting the activities of an enterprise through a pattern of racketeering activity, and the definition of racketeering includes criminal copyright infringement. But apart from whether Bucklew could show that HAB has engaged in a pattern of such crimes, the RICO claim fails because the enterprise alleged to have been conducted through a pattern of racketeering activity (defendant HAB, Inc.) is a wholly owned subsidiary of the alleged racketeer (the other defendant, Hawkins, Ash, Baptie & Co.). The claim is that the parent stole the software and gave it to the subsidiary to market. A parent and its wholly owned subsidiaries no more have sufficient distinctness to trigger RICO liability than to trigger liability for conspiring in violation of the Sherman Act, *see Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984), unless the enterprise's decision to operate through subsidiaries rather than divisions somehow facilitated its unlawful activity, which has not been shown here. *Bachman v. Bear, Stearns & Co.*, 178 F.3d 930, 932 (7th Cir.1999); *Emery v. American General Finance, Inc.*, 134 F.3d 1321, 1324 (7th Cir.1998); *Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 226-28 (7th Cir.1997); *Bessette v. Avco Financial Services, Inc.*, 230 F.3d 439, 448-49 (1st Cir.2000); *Brannon v. Boatmen's First National Bank of Oklahoma*, 153 F.3d 1144, 1147-49 (10th Cir.1998).²⁵⁸

²⁵⁸ *Id.* at 934.

Parent and subsidiary corporations, however, are at least as legally "distinct" as a corporation and its officer. They are separately incorporated entities, each with its own distinct legal "existence." The Seventh Circuit did not even mention *Cedric* or the Separate Legal Identity Theory in its analysis. Commentators who, after *Cedric*, questioned whether *Cedric* and the Separate Legal Identity Theory would control analysis of Statutory Distinctness in the context of a parent/subsidiary enterprise/person combination, received a clear answer from the Seventh Circuit.²⁵⁹

PART III

BUSINESS ENTITY ENTERPRISES AND THE DISTINCTNESS REQUIREMENT

A. Corporation Enterprises

1. Introduction

Plaintiffs frequently have pleaded a corporation as a 1962(c) enterprise, with the activity of the corporation controlled by officers or employees who are named RICO defendant persons. Because only the RICO defendant person(s), not the enterprise, are subject to RICO liability, failure to allege a corporation as a defendant means the corporation's deep pocket will not be available to satisfy any judgment the RICO plaintiff recovers.²⁶⁰ Plaintiffs have gone to

²⁵⁹ See Steckman & Guзов, *supra* note 114.

²⁶⁰ See generally *Jaguar Cars*, 46 F.3d at 268 ("[P]laintiff can only recover against the defendant officers and cannot recover against the corporation simply by pleading the officers as the persons controlling the corporate enterprise, since the corporate enterprise is not liable

extraordinary lengths to find ways to render corporations liable as RICO persons, even where they are alleged RICO enterprises (or parts of association in fact enterprises), and much Distinctness Requirement litigation has reflected plaintiff efforts to reach corporate assets.

2. *The Second Circuit*

Historically, in the Second Circuit, where plaintiffs pled a corporation enterprise controlled by its officers/employees, RICO claims would be dismissed under the Distinctness Requirement unless plaintiff also alleged facts indicating the officers/employees were acting outside the scope of their regular business duties. Because the Second Circuit had not, prior to *Cedric*, directly confronted a corporation enterprise controlled by a natural person officer/employee, district courts generally looked to *Riverwoods*, even though it dealt with an association in fact enterprise comprised of a bank restructuring group and its officers within a bank, controlled by the bank, as a RICO person.

In *Erwin Protter, Fast Food Franchise, Inc. v. Nathan's Famous Systems, Inc.*,²⁶¹ plaintiff alleged Nathan's Famous Systems,

under § 1962(c) in this context.”). Some district courts have suggested vicarious liability does exist, however, in cases of “aggressor corporations.” See *USA Certified Merchants, LLC v. Koebel*, 262 F. Supp. 2d 319, 328 (S.D.N.Y. 2003) (noting a corporation may be liable when the organization itself is “conducted as an illegitimate criminal enterprise” or “in a manner detrimental to the public interest” (quoting *Cedric*, 533 U.S. at 165, 121 S. Ct. 2087)); *Kovian v. Fulton County Nat'l Bank and Trust Co.*, 100 F. Supp. 2d 129, 133 (N.D.N.Y. 2000) (“For purposes of vicarious RICO liability, courts distinguish between aggressor corporations that are central figures in the unlawful scheme and conduit corporations that unknowingly facilitate the illegal behavior and noted that most courts have declined to subject the [latter] to RICO liability.”) (internal quotations omitted).

²⁶¹ 925 F. Supp. 947 (E.D.N.Y. 1996).

Inc. ("Nathan's") was an enterprise²⁶² and that Nathan's officers/directors were RICO persons controlling enterprise activity.²⁶³ The complaint failed to allege any facts indicating defendants were acting outside the scope of their authority when they, allegedly, fraudulently induced plaintiff to purchase three Nathan's franchises.²⁶⁴ Judge Spatt held the case fell "squarely within the Second Circuit's *Riverwoods* analysis . . . the defendant employees and the defendant corporation do not form an enterprise separate and distinct from the corporation."²⁶⁵ Judge Spatt cited *Riverwoods* for the proposition that where alleged predicate acts are committed "in the course of . . . [defendants'] employment and on behalf of the corporation, the employees in association with the corporation do not form an enterprise distinct from the corporation."²⁶⁶

Protter, however, had alleged that only the corporation, Nathan's, not an association in fact composed of Nathan's and its officers and/or employees, was the enterprise, and thus was distinguishable from *Riverwoods*. Judge Spatt did not distinguish enterprises composed solely of a corporation from association in fact enterprises and dismissed the claim: "Stated simply, the defendant employees and the defendant corporation do not form an enterprise separate and distinct from the corporation. In sum, the plaintiffs have

²⁶² *Id.* at 955.

²⁶³ *Id.* at 956.

²⁶⁴ *Id.* (stating that plaintiffs alleged defendants made misrepresentations in connection with the sale of the Nathan's franchises).

²⁶⁵ *Id.*

²⁶⁶ *Id.* at 955 (quoting *Riverwoods*, 30 F.3d 344).

failed to allege an enterprise distinct from the RICO persons.”²⁶⁷ He relied primarily on *Riverwoods*, and *R.C.M. Executive Gallery Corp. v. Rols Capital Co.*,²⁶⁸ a case involving a partnership enterprise, which had relied on *Riverwoods*.²⁶⁹

In *CPF Premium Funding, Inc. v. Ferrarini*,²⁷⁰ plaintiff alleged that a subsidiary corporation was a Section 1962(c) enterprise, controlled by both its parent corporation and the subsidiary’s officers.²⁷¹ Defendants, citing *Riverwoods*, moved to dismiss. Plaintiff distinguished *Riverwoods* association in fact enterprise from its own pleading in which the corporation was the enterprise.²⁷² Plaintiff argued that because the enterprise, CPF, was not a named defendant and because the only defendants were corporation’s officers, employees and parent,²⁷³ *Riverwoods* should not control. Plaintiff relied on *Jaguar Cars*’ and the Separate Legal Identity Theory.²⁷⁴

Judge Haight, noting *Jaguar Cars* was inconsistent with *Riverwoods* and *Discon*, did not focus on separate identities or the fact that CPF was not a named defendant; instead, he applied the Nonregular Business Test,²⁷⁵ concluding the alleged “criminal”

²⁶⁷ 925 F.2d at 956.

²⁶⁸ 901 F. Supp. 630 (S.D.N.Y. 1995).

²⁶⁹ *Id.* at 639-41.

²⁷⁰ No. 95 CIV. 4621(CSH), 1997 WL 158361, at *1 (S.D.N.Y. Apr. 3, 1997).

²⁷¹ *Id.*, at *1, 10.

²⁷² *Id.*, at *11.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *CPF*, 1997 WL 158361, at *12 (stating that although the Seventh and Ninth Circuits had adopted the same approach as *Jaguar Cars* position); see *Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 646 (7th Cir. 1995); *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1534 (9th Cir. 1992). Other courts had rejected the *Jaguar Cars* approach to

activities were indistinguishable from the subsidiary's ordinary business. He held, relying on *Protter*, that the alleged employee wrongdoer would be distinct from his employer "only if he acts in a manner inimical to, or at least divorced from, the corporation's interest."²⁷⁶ He continued:

Plaintiffs' effort to skirt the roadblocks established by recent Second Circuit rulings is further undermined by the inclusion of . . . [the parent corporation] as a RICO defendant. The plaintiffs cannot contend that the members of the . . . [parent] group were acting outside the scope of their employment at [the subsidiary] when one of their number is the . . . [subsidiary's] parent corporation.²⁷⁷

Dismissing the complaint, Judge Haight noted that *Discon* and *Riverwoods* could not be avoided by artful pleading:

[I]f plaintiffs' RICO allegations . . . were found to state a claim, it would raise the specter that a plaintiff could avoid the strictures of *Riverwoods* and its progeny simply by cleverly structuring its pleadings, without altering the nature of its allegations . . . In the instant case, plaintiffs seek to have it both ways—to

corporate/employee distinctness. See, e.g., *Brannon v. Boatman's Bancshares, Inc.*, 952 F. Supp. 1478, 1486 n.6 (W.D. Okl. 1997), *aff'd*, 153 F.3d 1144, 1148 n.4 (10th Cir. 1998) (rejecting *Jaguar Cars* on the basis of contrary Tenth Circuit authority, concluding that employees, in the ordinary course of their duties, cannot form an association apart from the business organization, and that a subsidiary cannot constitute an enterprise through which a defendant parent corporation conducts a racketeering enterprise); *Brannon*, 153 F.3d 1144 (concluding, contrary to the district court, that *Jaguar Cars* articulates the correct rule as to enterprises comprised of an organization directed by a natural RICO person, but that the district court correctly reasoned *Jaguar Cars* is inapposite in cases involving the relationship between parent and subsidiary corporations) (citing *Metcalf*, 886 F. Supp. at 514 n.12) (noting that *Jaguar Cars* cannot be extended to corporate defendants)).

²⁷⁶ *Id.*, at *12 (citing *Protter*, 925 F. Supp. at 956; *Dep't of Econ. Dev. v. Arthur Andersen & Co.*, 924 F. Supp. 449, 471 (S.D.N.Y. 1996)).

²⁷⁷ *Id.*, at *13.

proceed against the individual defendants and the corporation, by naming the parent but not the subsidiary . . . I do not believe that *Riverwoods* and *Discon* may be evaded by such a cosmetic adjustment to the pleadings.²⁷⁸

The district court refused to treat corporation enterprises directed by their officers differently from association in fact enterprises, such as that pleaded in *Riverwoods*, concluding both were subject to the Distinctness Requirement and Nonregular Business Test.²⁷⁹ By requiring plaintiff to show that the defendant acted “inimical to or divorced from” the corporate entity’s interest, the court adopted a strict standard in application of the Nonregular Business Test.

In the late 1990s, district courts in the Second Circuit rejected plaintiff efforts to elide the Distinctness Requirement through artful pleading in cases like *GMAC Mort. Corp. of Pa. v. Weisman*,²⁸⁰

²⁷⁸ *Id.*, at *13-14. Not all courts agree. See, e.g., *Sluka v. Estate of Herink*, No. 94-CV-4999 (ARR), 1996 WL 612462, at *8 (E.D.N.Y. Aug. 13, 1996) (noting that enterprise allegations may be cured by dropping corporations as defendants or dropping alter ego theory subject to heightened Rule 9 pleading burden, requiring particularization of distinct roles); *Sluka*, 1996 WL 612459, at *3 (E.D.N.Y. Aug. 13, 1996) (noting that plaintiff corrected pleading defect by dropping alter ego allegations, but plaintiff would ultimately have to show each defendant was separate from the enterprise to prevail at trial (citing *Securitron Magnalock Corp v. Shnabolk*, 65 F.3d 26 (2d Cir. 1995))).

²⁷⁹ See *CPF*, 1997 WL 158361, at *12-14.

²⁸⁰ No. 95 CIV. 9869 (JFK), 1997 WL 83416, at *3 (S.D.N.Y. Feb. 27, 1997) (noting that where plaintiff attempted to correct enterprise pleading by arguing on motion that a law firm and single attorney employee were an enterprise and that the attorney was the RICO person controlling the enterprise, the district judge held such a pleading, if made, would be defective because the attorney would not be distinct from his firm, noting that the lawyer was, in essence, the firm and no other lawyers were associated with it). Cf. *Park South Associates v. Fischbein*, 626 F. Supp. 1108, 1112 (S.D.N.Y. 1986) (noting in pre-*Riverwoods* case, when plaintiff alleged that individual defendants acted through the enterprise of their law firm, enterprise was properly pleaded; nevertheless, because the law firm was alleged to have only acted through the courts, which were not an illegal enterprise, RICO allegations against law firm were dismissed).*aff’d*, 800 F.2d 1128 (2d Cir. 1986)

Sartini v. Portofino Sun Center Columbus Ave. Corp.,²⁸¹ *Friedlander v. Rhoades*,²⁸² *Lucky Yeh Int'l, Ltd. v. Happiness Express, Inc.*,²⁸³ and *Feirstein v. Nanbar Realty Corp.*²⁸⁴ These cases involved plaintiff efforts to avoid the Distinctness Requirement.²⁸⁵

Courts frequently conclude Statutory Distinctness does not exist where it appears parties have been named solely to satisfy it,²⁸⁶

²⁸¹ No. 96 Civ. 4550 (JFK), 1997 WL 400209, at *1-3 (S.D.N.Y. July 16, 1997) (stating that where plaintiff alleged a corporation, Portofino Sun Center Columbus Ave. Corp., was a RICO enterprise and that its managing "partner" was the RICO person controlling it, Portofino, the corporation enterprise, was not distinct from its managing partner (agent) person (citing *GMAC Mort. Corp.*, 1997 WL 83416, at *3; *Protter v. Nathan's Famous Systems, Inc.*, 925 F. Supp. 947, 956 (E.D.N.Y. 1996)).

²⁸² 962 F. Supp. 428, 431-32 (S.D.N.Y. 1997) ("A corporate entity, such as a law firm, cannot be both the person who conducts the affairs of the enterprise and the enterprise itself; [the Distinctness] requirement cannot be circumvented by plaintiff alleging that the corporate entity's agents or employees and the corporate entity form the enterprise that carries out its regular business." (citing *Riverwoods*, which noted that plaintiffs had pleaded defendants were alter-egos of the law firm corporate enterprise)).

²⁸³ No. 96 CV 3365 SJ, 1999 WL 147095, at *1-3 (E.D.N.Y. Mar. 12, 1999) (holding that when plaintiff alleged that the individual officers of corporation Happiness Express conducted a corporation enterprise, making misrepresentations in connection with corporation's financial condition and ability to pay for goods, but failed to include allegations showing individuals were acting outside the scope of their duties as employees, RICO claim was dismissed under the Distinctness Requirement) (citing *Riverwoods*, *China Trust Bank of New York v. Standard Chartered Bank, PLC*, 981 F. Supp. 282, 286 (S.D.N.Y. 1997)); *Hitchcock v. Woodside Literary Agency*, 15 F. Supp. 2d 246, 250 (E.D.N.Y. 1998)).

²⁸⁴ 963 F. Supp. 254, 257 (S.D.N.Y. 1997) (holding that when plaintiff pleaded an accounting firm partnership as an enterprise and that the person controlling it was the partnership itself, and/or possibly its agents or employees, the accounting firm could not be a proper enterprise because the persons conducting its affairs would not be distinct) (citing *R.C.M. Executive Gallery Corp. v. Rols Capital Co.*, No. 93 Civ. 8571, 1997 WL 27059, at *7 (S.D.N.Y. Jan. 23, 1997)).

²⁸⁵ *Cf. Cullen v. Paine Webber Group, Inc.*, 689 F. Supp. 269, 273 (S.D.N.Y. 1988) (holding that when clients of various brokers and individuals allegedly constituting association in fact lacked "a common purpose to engage in a particular fraudulent course of conduct," aggregation of clients did not form an enterprise) and *In re Sumitomo Copper Litig.*, 995 F. Supp. 451, 454 (S.D.N.Y. 1998) (sustaining enterprise allegations when plaintiff pleaded defendants opened joint trading accounts in one defendant's name, retaining control through powers of attorney and exercised some role in management and trading, coordinating their trading to manipulate copper prices).

²⁸⁶ *See, e.g., Fisher v. Offerman & Co.*, No. 95 Civ. 2566 (JGK), 1996 WL 563141, at *4 (S.D.N.Y. Oct. 2, 1996). When plaintiff alleged an association in fact enterprise consisting of Offerman & Co., Friedman Equities and certain bond trustees and plaintiff had alleged that defendants Offerman & Co. and individual defendant Scott Offerman had conducted the

a point commentators have noted.²⁸⁷ Frequently, plaintiff's pleading error is failure to allege facts supporting the proposition that defendants acted outside the scope of regular duties.

In *Bulkmatic Transport Co., Inc. v. Pappas*,²⁸⁸ however, defendants moved to dismiss a RICO claim on the ground that the two named corporate defendants could not be part of a RICO enterprise because they were allegedly the RICO "persons" controlling it. Defendants relied on *Bennett, Riverwoods, Anatian* and the Second Circuit's decision in *Cedric*. Rejecting the defense argument, the court sustained the RICO claim. Although plaintiff had named the corporations as fraud defendants, they were not named RICO defendants. Instead, plaintiff identified each corporation as an enterprise, each controlled by the individual defendants. Because the corporations were not named RICO defendants, the district judge found the complaint properly drew "a clear distinction" between the RICO "persons" and the RICO "enterprises," distinguishing *Bennett/Riverwoods* and *Cedric*.

Plaintiffs had also pleaded that Bulkmatic's Bronx Terminal, the victim of the purported racketeering activity, was part of the

"Offerman enterprise." "The addition of Friedman Equities and the Bond Trustees appears to be a transparent effort to circumvent the principles that a RICO person must be distinct from the RICO 'enterprise' that is conducted, and employees associating with a corporation in the course of their employment cannot form an enterprise distinct from the corporation." *Id.* Although the district court ultimately decided the case on pattern grounds, its analysis, like that in *CPF Premium Funding, Inc.*, rejected "cosmetic" efforts to circumvent the Distinctness Requirement. *Id.*

²⁸⁷ See, e.g., STURC, *supra* note 10, at § 6.03 at 6-43 ("The courts will usually examine the enterprise allegations carefully to distinguish between mere pleading ruses designed to get past an initial motion to dismiss and allegations of substance that show that the association existed for purposes distinct from (i) the business activities of the corporate enterprise/defendant, and (ii) the conduct constituting the alleged predicate acts.").

²⁸⁸ No. 99 CIV 12070 (RMB) (JCF), 2001 WL 882039, at *1 (S.D.N.Y. May 11, 2001).

RICO enterprise. The court observed that, historically, many courts had permitted the victim to be pleaded as part of the enterprise,²⁸⁹ but that, more recently, in *Nat'l Organization for Women, Inc. v. Scheidler*, the Supreme Court suggested a different result.²⁹⁰

The court discussed the only case it found which had decided to "wade into the post-*Scheidler* thicket," *Hansel 'N Gretel Brand, Inc. v. Savitsky*.²⁹¹ Plaintiff claimed its own senior employee, acting in concert with two of plaintiff's suppliers, defrauded Hansel 'N Gretel through overcharging, illegal bribes, and kickbacks. The alleged enterprise was an association in fact between two suppliers, along with plaintiff corporation, an employee, and other individual defendants. Magistrate Judge Francis concluded that although the language in *Scheidler* was not intended to prescribe a "blanket rule" against including a victim as part of a RICO enterprise, a corporation still could not be a participant in an enterprise whose own guiding purpose was to "bilk it." The *Bulkmatic* complaint, however, did not define the enterprise as an association between Bulkmatic's Bronx

²⁸⁹ *Id.*, at *7 (citing the following cases as permitting a victim to be part of a RICO enterprise: *Sun Savings and Loan Ass'n v. Dierdorff*, 825 F.2d 187, 194 n.6 (9th Cir.1987) (plaintiff corporation can be enterprise); *United States v. Kovic*, 684 F.2d 512, 516-17 (7th Cir.1982) (police department can be both victim and enterprise); *Com-Tech Associates v. Computer Associates Int'l, Inc.*, 753 F. Supp. 1078, 1088 (E.D.N.Y. 1990) (noting that plaintiff can be RICO enterprise or part of enterprise), *aff'd*, 938 F.2d 1574 (2d Cir. 1991); *Jacobson v. Cooper*, 882 F.2d 717, 719-20 (2d Cir. 1989) (plaintiff's own real estate company held to be valid RICO enterprise).

²⁹⁰ 510 U.S. 249, 259 (1994). See *Bulkmatic Transport*, 2001 WL 882039, at * 7; *Compare Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 267 (3d Cir. 1995) (noting corporation victimized by "pilfering officers and employees" could not also be enterprise) with *LaSalle Bank Lake View v. Seguban*, 937 F. Supp. 1309, 1323 (N.D. Ill. 1996) ("[T]his (sic) court does not agree with the leap of logic made by [the *Jaguar Cars* Court] from the Supreme Court's *Scheidler* statement that 'enterprises . . . generally' are not 'victims,' to the conclusion that 'enterprises' cannot be 'victims.'").

²⁹¹ No. 94 Civ. 4027, 1997 WL 543088, at *3 (S.D.N.Y. Sept. 3, 1997).

Terminal and its employees, a configuration that would have been similar to that in *Hansel 'N Gretel*, but, rather alleged, as an alternative enterprise, that Bronx Terminal itself was an enterprise controlled by certain individuals, an enterprise/person structure the court found permissible:

The individual defendants' sole objective may have been to use their place of employment—and the two corporations they had organized—as the instruments to defraud Bulkmatic. Nonetheless, the Bronx Terminal certainly had a number of legitimate functions as one of many transfer terminals in the plaintiff's nationwide network. Accordingly, the Bronx Terminal can serve as a proper RICO enterprise because there is a sufficient distinction between its activities and the schemes that were used to defraud Bulkmatic.²⁹²

In other words, the fact that the victim was alleged as part of the enterprise did not compel dismissal. Moreover, because the Bronx Terminal carried on legitimate functions, the RICO activities of the individual defendants conducted through the Terminal were “distinct from” legitimate Terminal activities. Plaintiff had properly alleged Statutory Distinctness because the complaint alleged non-regular, criminal activity even though, under pre-*Cedric* Second Circuit law, merely alleging defendant's conduct is “criminal” generally would not remove the subject acts from the scope of regular duties.²⁹³

²⁹² *Bulkmatic Transport*, 2001 WL 882039, at *8.

²⁹³ See *supra* note 62.

After the Supreme Court reversed the Second Circuit's decision in *Cedric*, some district courts read *Cedric* and *Riverwoods* as if they were consistent. In *Burrowes v. Combs*,²⁹⁴ for example, plaintiff alleged he was the victim of an extortion and racketeering scheme perpetrated by rapper Sean Combs, Combs' attorney Kenneth Meiselas, and Bad Boy Entertainment, Inc., a recording and music company that at one time employed Burrowes, Combs and Meiselas. Bad Boy was alleged to be the enterprise and the individual defendants were the RICO persons. The *Burrowes* Court read *Cedric* and *Riverwoods* as if they were consistent in mandating dismissal, whereas *Cedric* actually compelled the opposite result. Under the Separate Legal Identity Theory adopted in *Cedric*, Bad Boy, the corporation, was Statutorily Distinct from the individual defendants controlling it. The district judge dismissed the complaint, however, on the ground that the complaint "conflated" defendants:

Count One, which purports to state a violation of subsection 1962(c) of RICO, is deficient because it conflates the defendants (i.e. Bad Boy and its two principals) with the enterprise (i.e., Bad Boy) in contravention of the requirements of that subsection. See *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 162- 64, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001); *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir.1994).²⁹⁵

Other courts embraced *Cedric* and the Separate Legal Identity

²⁹⁴ 312 F. Supp. 2d 449 (S.D.N.Y. 2004).

²⁹⁵ *Id.* at 452.

Theory but were reluctant to apply it beyond business entity enterprises, controlled by natural RICO persons.

For example, in *G-I Holdings, Inc. v. Baron & Budd*,²⁹⁶ plaintiff sued a law firm partnership and its principals alleging the law firm was the enterprise whose activity was directed by the individual defendants, its named principals. Plaintiff also alleged the law firm controlled an association in fact enterprise called the “B & B Enterprise.” With respect to the law firm partnership enterprise, the district judge found *Cedric*, which actually involved a corporation, rather than a partnership enterprise, controlling:

This situation falls squarely under the rule of *Cedric Kushner*. In *Cedric Kushner*, the Supreme Court upheld a RICO claim against fight promoter Don King, who as the “person” was alleged to have conducted an “enterprise” consisting of a corporation in which he was the sole shareholder. 533 U.S. at 166, 121 S.Ct. 2087. The Court held that “the corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its legal status. And we can find nothing in the statute that requires more ‘separateness’ than that.” *Id.* at 163, 121 S.Ct. 2087. Similarly, Fred Baron and Russell Budd, as named partners and members of the law firm of Baron & Budd, are separate and distinct legal entities from the law firm they control, and which in turn purportedly controls the B & B Enterprise.²⁹⁷

As to an alternative association in fact enterprise allegation,

²⁹⁶ 238 F. Supp. 2d 521 (S.D.N.Y. 2002).

²⁹⁷ *Id.* at 547.

the district court viewed the matter differently. It described the association in fact and person controlling it, as follows:

The sole defendant . . . is the law firm Baron & Budd. It is charged with conducting the "Baron & Budd Association-in-Fact Enterprise" (the "B & B Enterprise") through a pattern of racketeering activity consisting of acts of mail and wire fraud related to the falsification of evidence in asbestos cases and the carrying out of the extortionate threats during 1999 and 2000 through the filing and instigation of fraudulent asbestos actions against Holdings. The B & B Enterprise is defined as an "association in fact of Baron & Budd, its various local counsel, various doctors and/or various unions." TAC ¶ 203. Holdings has alleged that the law firm Baron & Budd is part of, but smaller than, an ongoing existing enterprise that includes other law firms, trade unions, and doctors. Further, it alleges that each of the participants in that enterprise has a specific role: the trade unions locate plaintiffs; Baron & Budd and the doctors manufacture evidence; and local counsel process cases through courts around the country. Holdings further alleges that this collection operates under the overall direction of Baron & Budd. The Defendants suggest that the local counsel, unions and doctors are merely agents of the Defendants and thus fail the distinctiveness requirement.²⁹⁸

The district court refused to determine *Cedric*'s effect on association in fact enterprise pleading:

Under Second Circuit case law prior to *Cedric Kushner Promotions Ltd. v. King*, it is clear that if the additional entities are merely agents acting within the scope of their employment, there cannot be an

²⁹⁸ *Id.* at 546.

enterprise. Holdings suggests that *Cedric Kushner* has stretched this rule . . . [note omitted] . . . *There is no need to determine this unsettled issue because, taking the facts in the light most helpful to Holdings, the Complaint fits under the Riverwoods rubric.* Even if the local counsel, unions and doctors are Baron & Budd's agents—which Holdings contests—they were not acting within the scope of the agency. Viewing Holdings' complaint under the applicable standard, the allegations of Holdings' RICO claim can fairly be read to allege that Baron & Budd and its agents went beyond conducting the normal affairs of Baron & Budd, and were acting on behalf of the enterprise with the goal of encouraging large settlements from GAF and others for their own benefit through the device of the enterprise.²⁹⁹

The district judge avoided the question as to whether or how *Cedric* affected the law on association in fact enterprises, but noted authority suggesting *Cedric* “stretched” the law.³⁰⁰

Elsewhere, when the enterprise/person constellation mirrors *Cedric*, courts have recognized *Cedric* has altered the law and have reached more plaintiff-friendly outcomes.

For example, in *Crawford & Sons, Ltd. Profit Sharing Plan v.*

²⁹⁹ *Id.* at 546-47 (citations omitted) (emphasis added).

³⁰⁰ *Id.* at 547 (citing *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV 8386(KMW), 2002 WL 319887, at * 23 (S.D.N.Y. Feb. 28, 2002)) (“[A]lthough some authority weighs against recognizing an ‘enterprise’ that is comprised of a corporation and its agents or subsidiaries, recent Supreme Court case law suggests that the ‘distinctiveness’ requirement imposed by Section 1962(c) is not as rigid as prior circuit precedent suggests.”); *see also* *Chen v. Mayflower Transit, Inc.*, 159 F. Supp. 2d 1112, 1114-15 (N.D. Ill. 2001) (citing *Cedric Kushner* for the proposition that the formal legal distinction created by incorporation is sufficient for the RICO statute and holding plaintiff pleaded RICO enterprise comprising common carrier corporation and its local agents).

Besser,³⁰¹ plaintiff lender sued a borrower, alleging the borrower and its officers fraudulently misrepresented equipment lease financing transactions used as security for loans. Plaintiff alleged that one of the two shareholders of the corporation, who was also a corporate officer, controlled a corporate enterprise. The district judge began by noting the effect *Cedric* had on *Riverwoods*:

Prior to the recent Supreme Court case, *Cedric Kushner Promotions, Ltd. v. Don King*, 533 U.S. 158, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001), the Second Circuit required a plaintiff to establish the existence of two separate entities, a "person" and a distinct "enterprise," the affairs of which that "person" improperly conducts. See, e.g., *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir.1994). In *Cedric*, the Supreme Court held that a corporate employee acting even within the scope of his authority for a corporation was distinct from the corporation and could therefore be subject to RICO liability. *Id.* at 163, 121 S. Ct. 2087. The Supreme Court explained that "[t]he corporate owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its legal status . . . [a]nd we find nothing in the [RICO] statute that requires more separateness than that." *Id.* Furthermore, the Supreme Court instructed that "[a] corporate employee who conducts the corporation's affairs through an unlawful RICO 'pattern of activity' uses that corporation as a vehicle whether he is or is not the sole owner." *Id.* at 164-65, 121 S. Ct. 2087.³⁰²

Based on *Cedric*, the district judge refused to dismiss the RICO claim:

³⁰¹ 216 F.R.D. 228 (E.D.N.Y. 2003).

³⁰² *Id.* at 236-37.

[V]iewing the complaint in the light most favorable to the plaintiffs, the Court finds that Rochelle Besser, one of the two shareholders of RW Leasing and its president, and Drayer, the secretary and vice-president, are separate and distinct from the legal entity RW Leasing. Therefore, the amended complaint adequately establishes the distinctness requirement. Accordingly, the motion to dismiss the plaintiffs' Section 1962(c) claim is denied.³⁰³

In *Moses v. Martin & Deborah Martin Agency, Inc.*,³⁰⁴ plaintiff alleged that a corporation was the enterprise and that its owner and "other individuals" were the persons that controlled the enterprise. The question, as framed by Judge Scheindlin, was "whether a 'person' comprising a corporation's owner and certain of her employees is sufficiently distinct from the corporation itself to fulfill section 1962(c)'s distinctness requirement." Observing that *Cedric* had squarely addressed the issue, it held plaintiff had satisfied the Distinctness Requirement: "Here, plaintiff has met the distinctness requirement by charging Donna Martin as the 'person' associated with or employed by DMA, the 'enterprise,' an incorporated entity of which Martin was the 'exclusive Principal, Owner and President.'"³⁰⁵ Although neither party called *Cedric* to the court's attention, the district judge distinguished pre-*Cedric* law in the Second Circuit on distinctness, noting that the enterprise/person combination would not have survived under the law

³⁰³ *Id.* at 237.

³⁰⁴ 360 F. Supp. 2d 533 (S.D.N.Y. 2004).

³⁰⁵ *Id.* at 546.

prior to *Cedric's* adoption of the Separate Legal Identity Theory.³⁰⁶

3. *The Third Circuit*

Third Circuit district courts, since *Jaguar Cars*, have sustained corporation enterprises directed by their officers/employees. *Perlberger v. Perlberger*,³⁰⁷ considered an enterprise comprised of a law firm, Perlberger Law Associates, P.C. ("PLA") and its sole shareholder principal, with both named as defendant RICO persons. Relying on *Shearin v. E.F. Hutton Group, Inc.*,³⁰⁸ but noting contrary authority in *Kaiser v. Stewart*,³⁰⁹ the district court sustained the pleading:

Although the enterprise is comprised of the named Defendants, it is separate and distinct from its constituent members. In other words, a distinct enterprise exists even when the very same persons named as Defendants constitute the association-in-fact enterprise. . . Unless Defendants are suggesting that PLA is a sham corporation, Perlberger and PLA are separate legal entities and are treated as such under the RICO statute.³¹⁰

³⁰⁶ *Id.* In criticizing the defendant the court stated, "Courts do not approve 'the ostrich-like tactic of pretending that potentially dispositive authority against a litigant's contention does not exist.' " *Id.* (quoting *Szabo Food Serv. Inc. v. Canteen Corp.*, 823 F.2d 1073, 1091 (7th Cir. 1987)).

³⁰⁷ No. CIV. A. 97-4105, 1999 WL 79503 (E.D. Pa. Feb. 12, 1999).

³⁰⁸ 885 F.2d 1162, 1165-66 (3d Cir. 1989).

³⁰⁹ No. Civ. A-96-6643, 1997 WL 476455, at *8-9 (E.D. Pa. Aug. 19, 1997).

³¹⁰ *Perlberger*, 1999 WL 79503, at *2 n.4 (holding that a complete overlap between defendant persons and enterprise members will not preclude satisfaction of the Distinctness requirement). Discovery had also established the existence of an association in fact enterprise composed of two professional corporations and individual defendants. Judge Padova noted that if the enterprise were given an expansive interpretation incorporating the above individuals and corporations, even if all were alleged to be defendant RICO persons who participated in fraudulent scheme to conceal the value of income in divorce

Third Circuit district courts have sometimes permitted liberal pleading where allegations are ambiguous. In *Oglesby v. Saint-Gobain Corp.*,³¹¹ the court observed that although the complaint, on its face, alleged an association in fact enterprise comprised of all the corporate entity defendants and individual defendants, the allegations made clear that plaintiff was pleading that the corporations were the enterprise through which the individual defendants conducted a pattern of racketeering. The court concluded plaintiff actually alleged the two defendant corporations were “one corporate enterprise,” with individual defendants directing the complained of activity as RICO persons, and the facts pleaded did not support the conclusion that the corporations acted as two separate entities to form a distinct (composite) enterprise. The court sustained the RICO action against the individual defendant but dismissed the corporate defendants.³¹² The proposed change, identifying the two corporations as an association in fact operated by the individual defendants, would not cure the defect i.e., that the pleaded facts showed the corporations were not acting as distinct entities.

Other courts have dismissed actions under the so-called “dual role” theory, where plaintiff named the corporate enterprise as the defendant person.³¹³ In *Moore v. Reliance Standard Life Ins. Co.*,³¹⁴ plaintiff pleaded a corporation as both the enterprise and the sole

proceedings, the distinctness requirement would be “clearly satisfied.” *Id.* at n.5.

³¹¹ No. CIV. A. 97-4038, 1997 WL 570925 (E.D. Pa. Aug. 29, 1997).

³¹² *Id.*, at *4-5.

³¹³ See *Jaguar*, 46 F.3d at 268 (dual role impermissible).

³¹⁴ No. CIV. A. 98-4610, 1999 WL 299577 (E.D. Pa. May 10, 1999).

RICO defendant person, acting through its agents and employees.³¹⁵ Citing *Jaguar Cars*, Judge Kelly dismissed the claim, finding the allegations insufficient because the enterprise and person were the same entity.³¹⁶ Judge Kelly suggested that if plaintiff had identified the responsible agents as RICO defendants (rather than the corporation which employed them as defendant), the pleading, as against the individuals would have been sustainable.

In *Bieber v. Sovereign Bank*,³¹⁷ plaintiff pleaded that Sovereign Bank and Sovereign Banco, Inc. were both RICO enterprises and both defendants. The district judge relied on *Jaguar Cars* for the proposition that RICO requires defendant persons to be acting through a separate enterprise, and *Kehr Packages, Inc. v. Fidelcor, Inc.*,³¹⁸ for the proposition that "while an entity can be both an enterprise and a defendant for purposes of Section 1962(a), such a dual role is impermissible in actions based on 1962(c)."³¹⁹ He dismissed the claim against the corporate defendants under the Dual Role Theory.³²⁰

In *Creative Dimensions in Management, Inc. v. Thomas Group, Inc.*,³²¹ plaintiff alleged that a company, TGI, was the enterprise and that TGI and an individual defendant variously identified as a "consultant," "staff member" or a "business relation"

³¹⁵ *Id.*, at *4.

³¹⁶ *Id.*

³¹⁷ No. CIV.A. 95-200, 1996 WL 278813 (E.D. Pa. May 23, 1996).

³¹⁸ 926 F.2d 1406 (3d Cir. 1991).

³¹⁹ 1996 WL 278813, at *8. Discussion of 1962 (a) or (b) is beyond the scope of this article.

³²⁰ *Id.*, at *9.

³²¹ No. 96-6318, 1997 WL 633684 (E.D. Pa. Sept. 30, 1997).

were the persons controlling TGI.³²² The district judge dismissed the complaint under the Dual Role Theory, noting that TGI could not be the enterprise and a “person” liable.³²³ He did, however, permit plaintiff leave to re-plead an association in fact enterprise between the individual defendant and TGI, where the individual might be determined to be functioning in a non-agent capacity relative to the association in fact.³²⁴ Under the Separate Legal Identity Theory and Dual Role Theory, the pleading, from a pure enterprise perspective, should have been sufficient against the individual defendant.³²⁵

Since *Cedric*, district courts in the Third Circuit have resolved a number of distinctness-based dismissal and summary judgment motions, involving corporation/officer enterprise/person pleadings. In *Bonavitacola Electric Contractor, Inc. v. Boro Developers, Inc.*,³²⁶ the complaint alleged that the individual defendants were officers of defendant Boro Developers, Inc., which was an alleged “enterprise.” Boro was an alleged defendant under plaintiff’s § 1962(a) claim, but it was unclear whether Boro was allegedly an enterprise under the complaint’s § 1962(c) claim.

The district court began its analysis discussing *Cedric* and *Jaguar Cars*:

In *Cedric Kushner Promotions Ltd. v. King*, 533 U.S. 158, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001), the

³²² *Id.*, at *3.

³²³ *Id.*, at *3-4.

³²⁴ *Id.*, at *4. While Judge Waldman cited *Jaguar Cars*, he continued to view association in fact distinctness in “agency” terms. *Id.*

³²⁵ Judge Waldman did note that Plaintiff had failed to allege the individual defendant had “played a role in managing or directing the operations or affairs of TGI at the pertinent time,” *Id.*, at *9, violating *Reves v. Ernst & Young*, 507 U.S. 170 (1993).

³²⁶ No. 01-5508, 2003 WL 329145 (E.D. Pa. Feb. 12, 2003).

Supreme Court upheld the Third Circuit's interpretation of § 1962(c) in *Jaguar Cars*, and rejected the views of other circuit courts requiring much more distinctness than a mere separation of a corporation from its officers. . . . It found nothing in the statute that required more separateness than the formal legal distinction between a person and a corporation. . . . The Court held that the distinctness requirement was met when a corporate employee unlawfully conducted the affairs of the corporation of which he was the sole owner, regardless of whether he conducted those affairs within, or beyond, the scope of corporate authority.³²⁷

Applying *Cedric*, the court concluded:

In their § 1962(c) claims against Defendants Frederick Shapiro and Bruce Shapiro, Plaintiffs allege that Defendant Boro constituted an "enterprise" through which "persons," Boro, Frederick Shapiro, and Bruce Shapiro, acted . . . [note omitted] . . . Because Defendants Frederick Shapiro and Bruce Shapiro are alleged to be employees and corporate officers of Boro, the alleged enterprise, Plaintiff may bring § 1962(c) claims against them. The Court, therefore, finds that Plaintiffs have adequately pled "enterprise" under § 1962(c), as to Defendants Frederick J. Shapiro and Bruce H. Shapiro.³²⁸

In both *Cedric* and *Jaguar Cars*, the business entity that was alleged to be the enterprise was not, simultaneously, alleged to be one of the "persons" controlling the enterprise. Thus, the Court in *Cedric* did not rule on the Dual Role Theory. However, the *Bonavitacola* court noted:

³²⁷ *Id.*, at *4.

³²⁸ *Id.* Cf. *Pioneer Contracting, Inc. v. Eastern Exterior Wall Systems, Inc.*, No. 04-CV-

Plaintiffs have not carefully pleaded the allegations as to Boro. Plaintiff do not indicate Boro as a defendant in their introductory headings as to Counts X-XV, which allege violations of § 1962(c). As noted above, Plaintiffs assert Boro is the enterprise as to § 1962(c). However, also indicating that Boro is a “person” under § 1962(c) is somewhat contradictory. Further, by the wholesale incorporation of the § 1962(a) Counts (where Boro is a defendant) into the § 1962(c) Counts, Plaintiffs have, by their literal allegations, named Boro as a defendant under § 1962(c). If Plaintiffs’ Amended Complaint was otherwise sufficient, the Court would overlook these pleading defects.³²⁹

Plaintiff was permitted to replead its claim against Boro to avoid a Dual Role Theory dismissal.

In *Healthguard of Lancaster, Inc. v. Gartenberg*,³³⁰ plaintiff, an HMO, alleged that defendants, operators of a chiropractic business and provider of chiropractic services to Healthguard members, submitted false claims for medical services. The RICO case statement alleged that the RICO scheme was implemented through one of the Defendants, MLM, a management company owned and operated by other defendants, which solicited patients for defendants’ medical practices, and then processed the generated insurance claims.

Plaintiff asserted that in conducting the affairs of MLM, defendants caused thousands of fraudulent insurance claims to be sent through the U.S. mail to Healthguard (and other health insurers) for processing and payment. Although the enterprise element appeared satisfied on the pleading, plaintiff’s counsel’s statements at

01437, 2005 WL 747221, *1, 4 (E.D. Pa. March 29, 2005).

³²⁹ *Bonavitacola Elec.*, 2003 WL 329145, at *4, n.3.

³³⁰ No. 02-2611, 2002 WL 32107627 (E.D. Pa. Dec. 6, 2002).

oral argument undermined the pleading:

In filing its response to the Court’s Order of December 11, 2003, Plaintiff asserted that MLM “constituted an enterprise through which ‘persons’ Mark Gartenberg, Steven Gartenberg, and Mark Tischler acted.” However, at oral argument Healthguard’s counsel identified the enterprise as “a combination of individuals with professional corporations known as Greenfield Sports Medicine and Premier Sports Medicine . . . all of the individuals . . . and the two professional corporations . . . as well as the billing enterprise [MLM].” Plaintiff’s counsel made it explicit that the enterprise “is a combination of the Defendants.” Asked whether there is any difference between the Defendants and the enterprise, he said “the Defendants made up the enterprise, each of the entities provided a different piece.” In response to a question as to whether the enterprise and the Defendants are identical, Plaintiff’s counsel unequivocally stated “yes.” . . . Plaintiff’s counsel subsequently articulated this contention as follows: “It’s the individuals and Main Line Medical acting through an otherwise legitimate business organization, i.e., Greenfield and Premier.”³³¹

Dismissing the case on summary judgment, the district judge wrote:

Cedric . . . endorsed . . . *Jaguar Cars* . . . Plaintiff asserts that its definition of an enterprise consisting of all the Defendants is appropriate, notwithstanding the lack of distinctiveness, under the *Jaguar Cars* ruling, because the Plaintiff alleges, as in *Jaguar Cars*, that the individual Defendants used at least one of the corporate Defendants (MLM) to conduct the pattern of racketeering activity. In *Jaguar Cars*, the Third Circuit noted (despite the caption of the case) that “Jaguar has not brought a claim against Royal Oaks,

³³¹ No. 02-2611, 2004 WL 632722, *1, 5 (E.D. Pa. Mar. 5, 2004).

but instead seeks recovery from the [individual] defendants, as persons operating and managing the Royal Oaks enterprise through a pattern of racketeering activity.” 46 F.3d at 268. Thus, in *Jaguar Cars*, the enterprise and the defendants were not identical. *Although the Amended Complaint and RICO Case Statement assert that the “enterprise” is MLM, the above-quoted statements at oral argument contradict that, and ask the Court to allow the case to proceed with an enterprise identical to the Defendants. This is clearly not proper under . . . [Cedric], because Plaintiff has completely blurred and ignored the distinctiveness requirement. . . .* However, if the Court were to ignore counsel’s expanded definition of an enterprise and consider that the enterprise is, as alleged in the Amended Complaint and RICO Case Statement, limited to MLM, the evidence still does not withstand summary judgment.³³²

In *Gintowt v. TL Ventures*,³³³ plaintiff alleged an enterprise similar to that alleged in *Jaguar Cars*. Plaintiff alleged defendants, directors and officers of a corporation, used their corporation to conduct a pattern of racketeering activity. The court found *Jaguar Cars* and *Cedric* controlling:

The leading Third Circuit case on this requirement is *Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 265-66 (3d Cir.1995), which clarified the distinctiveness requirement by concluding that when officers and employees of a legitimate corporation operate and manage the corporation so as to use it to conduct a pattern of racketeering activity, the distinctiveness requirement is satisfied. *See Cedric*

³³² *Id.*, at *7-8 (emphasis added).

³³³ No. 02-746, 2004 WL 1656606 (E.D. Pa. July 22, 2004).

Kushner Motions Ltd. v. King, 533 U.S. 158, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001) (concluding that where "a corporate employee, acting within the scope of his authority, allegedly conducts the corporation's affairs in a RICO-forbidden way . . . [the] corporate owner/employee . . . is distinct from the corporation itself."), *Healthguard of Lancaster Inc. v. Gartenberg*, 2004 U.S. Dist. LEXIS 4437 (2004) (finding that Plaintiff had fatally blurred the distinctiveness requirement by asserting that the enterprise was identical to the Defendants).³³⁴

The district judge sustained the enterprise allegation noting an issue of fact existed as to whether an "enterprise" existed.³³⁵

In *Tierney and Partners, Inc. v. Rockman*,³³⁶ a private communications agency sued the former vice president of its interactive division, its former vice president of marketing, and companies that the defendant vice presidents each allegedly used to submit false invoices for payment while they were employed by the agency, along with a second company that the vice presidents allegedly used. Plaintiff alleged that one of the corporations was an enterprise and that all defendants conspired to steal from the agency. The court found that the complaint failed to set forth facts showing the alleged corporation "enterprise" was distinct from the other defendants, within the meaning of *Cedric* and *Jaguar Cars*. It held the problem was that plaintiff had "only vaguely suggested" that because of the officers' relationship to the corporation's CEO, they had somehow been able to use the corporation to further their

³³⁴ *Id.*, at *16.

³³⁵ *Id.*

³³⁶ 274 F. Supp. 2d 693 (E.D. Pa. 2003).

scheme. This analysis, however, seems more directed to RICO's particularity requirement or, possibly, *Reves* control, rather than Statutory Distinctness. The court dismissed the RICO claim, without prejudice.³³⁷

4. *The Seventh Circuit*

Seventh Circuit panels in the late 1980s and early 1990s issued a number of plaintiff-friendly decisions in cases where plaintiff alleged a corporation enterprise controlled by its officers, focusing on whether persons other than defendants were employed by the corporate entity. In *Ashland Oil, Inc. v. Arnett*,³³⁸ for example, the Seventh Circuit held the owners of a corporation sufficiently distinct from their business because it employed other people, satisfying the Distinctness Requirement. In *United States v. Robinson*,³³⁹ the Seventh Circuit held that a corporation, which employed several hundred people, was RICO distinct from its controlling shareholder president.

A number of district judges in early Seventh Circuit cases suggested the Distinctness Requirement was inapplicable to business

³³⁷ *Id.* at 699. This Court has, on several recent occasions, addressed the sufficiency of a civil RICO complaint. In all three cases, the Court dismissed the plaintiff's civil RICO complaint, without prejudice, permitting the plaintiff to submit an amended pleading, accompanied by a detailed RICO case statement. See *Healthguard of Lancaster, Inc. v. Gartenberg*, No. 02-2611, 2002 WL 32107627, *1, 2 (E.D. Pa. Dec. 6, 2002); *Bonovitacola Electric Contractor, Inc. v. Boro Developers, Inc.*, No. 01-5508, 2002 WL 31388806, *1, 2-3 (E.D. Pa. Oct. 23, 2002); *Gintowt v. TL Ventures*, No. 02-746, 2002 WL 31190853, *1, 4-5 (E.D. Pa. Oct. 3, 2002).

³³⁸ 875 F.2d 1271, 1280 (7th Cir. 1989). See Labrun, *supra* notes 226-228 and accompanying text (discussing *Ashland* in more detail).

³³⁹ 8 F.3d 398 (7th Cir. 1993). See LaBrun, *supra* notes 228-231 and accompanying text (discussing *Robinson* in more detail).

entity enterprises. For example, in *Baggio v. EC Solar, Inc.*,³⁴⁰ the district judge held the pleading standard for alleging a proper association in fact, i.e., Statutory Distinctness, did not apply in cases where plaintiff alleged a "formal legal entity" as the enterprise.³⁴¹ Judge Pallmeyer, relying on *Baggio*, reached a similar conclusion in *Brown v. C.I.L., Inc.*³⁴² In *Brown*, plaintiffs alleged defendant corporation was the enterprise (an "enterprise-in-law") whose activities were directed by its single owner/officer. Judge Pallmeyer held plaintiffs did not have to *satisfy* the Distinctness Requirement because "distinctness" is required only of enterprises-in-fact, i.e., association in fact enterprises, not "legal entity" enterprises.³⁴³ The Seventh Circuit, in *Emery*,³⁴⁴ appeared to approve *Jaguar Cars'* approach to distinctness, even where a corporation enterprise is pleaded and such enterprise is controlled by its officers/employees.³⁴⁵ Through *Emery's* adoption of *Jaguar Cars*, *Brown* and *Baggio* are probably no longer good law.

5. Summary—Corporation Enterprises

Until *Cedric*, the Second Circuit had, through

³⁴⁰ No. 88C 1893, 1990 WL 70722 (N.D. Ill. May 9, 1990).

³⁴¹ *Id.*, at *7.

³⁴² No. 94 C 1479, 1996 U.S. Dist. LEXIS 4917 (N.D. Ill. Jan. 28, 1996) The magistrate report adopted No. 94 C 1479, 1996 WL 164294 (N.D. Ill. April 1, 1996). *Id.*, at *1.

³⁴³ *Id.*, at *20 n.9.

³⁴⁴ See *Emery*, 134 F.3d at 1325.

³⁴⁵ *Id.* See generally Board of Trustees of Ironworkers Local No. 498 Pension Fund v. Nationwide Life Ins. Co., 2005 WL 711977, *1, *3-6 (N.D. Ill. Mar. 28, 2005) (sustaining to two enterprises, one consisting of Nationwide Mutual Insurance Co. and two of its third party administrators, which the court sustained on the ground that the two named third party administrator defendants and their corporate parent were distinct from the insurer defendant and an association in fact enterprise consisting of the named defendants and other unknown third-party administrators, not detailing its analysis of Statutory Distinctness).

Riverwoods/Discon, refused to recognize corporation enterprises with officer/employee persons, even where an officer actually used the corporation to effectuate a pattern of RICO predicate acts, absent proof of nonregular business activity or conduct beyond the scope of agency. The Third Circuit, through *Jaguar Cars*, permitted RICO remedies to apply to natural “persons” who conduct corporate enterprise affairs, including its officers/employees, but the corporation would not be liable for paying a judgment levied against its officers. The Seventh Circuit, through *Fitzgerald* and *Emery*, permitted corporation enterprises with controlling officer persons, under the Family Resemblance Test and Prototype Theory, as well as the Separate Legal Identity Theory.³⁴⁶ After *Cedric*, the Second, Third, and Seventh Circuits have sustained RICO claims where plaintiff pleaded a corporation enterprise controlled by natural RICO persons, but where plaintiff alleges the corporation is a RICO person, as well as the enterprise, Third Circuit district courts will likely dismiss under the Dual Role Theory, even after *Cedric*.

B. Partnership Enterprises

1. Introduction

Partnerships may be held liable under RICO for their

³⁴⁶ Corporation enterprises directed by officer and/or employee RICO persons have been sustained by other federal circuits. *See, e.g.,* *Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143, 156 (5th Cir. 1997), *vacated on other grounds sub nom.* *Teel v. Khurana*, 525 U.S. 979 (1998); *United States v. Robinson*, 8 F.3d 398, 407 (7th Cir. 1993); *Ashland Oil, Inc. v. Arnett*, 875 F.2d 1271, 1280 (7th Cir. 1989); *McCullough v. Suter*, 757 F.2d 142, 144 (7th Cir. 1985); *Sever v. Alaska Pulp Corp.*, 978 F.2d 1529, 1534 (9th Cir. 1992). *See also* *Webster v. Omnitrition, Int'l Inc.*, 79 F.3d 776, 787 (9th Cir. 1996); *United States v.*

partners' misconduct.³⁴⁷ Distinctness-based defenses to partnership enterprise pleadings have generally been governed by the same body of law applicable to corporation enterprises. Different rules have applied in the Third Circuit, however, depending on whether the partners are natural or "business entity" persons. The Seventh Circuit will probably treat partnership enterprises in the same way it treats corporate entities. After *Cedric*, where a partnership is controlled by natural person partners who engage in racketeering through the partnership enterprise, the Separate Legal Identity Theory will sustain the enterprise. If the general partner(s) are business entities, however, the Seventh circuit will likely examine whether the general partner entities played a significant role in perpetrating or concealing RICO wrongdoing that could not have been accomplished through non-distinct employees or other agents, under the Prototype and Family Resemblance Tests.

2. *The Second Circuit*

In *R.C.M. Executive Gallery Corp. v. Rols Capital Co.*,³⁴⁸ a frequently cited Distinctness Requirement precedent, plaintiff brought a RICO claim against defendant Rols Capital Co., a partnership (the "Rols Partnership"), its partners, J.K. Funding, which purchased the Rols Partnership's assets in bankruptcy, individuals

Blinder, 10 F.3d 1468, 1474 (9th Cir. 1993).

³⁴⁷ See *Thomas v. Ross & Hardies*, 9 F. Supp. 2d. 547, 558 (D. Md. 1998) ("Holding a partnership liable for the RICO violations of its partner under doctrines of agency and partnership liability serves Congress' goal of deterring individuals from controlling organizations through a pattern of racketeering activity.").

³⁴⁸ No. 93 CIV. 8571 (JGK), 1997 WL 27059 (S.D.N.Y. Jan. 23, 1997).

associated with J.K. Funding, and an attorney the Rols Partnership retained. Plaintiffs pleaded an enterprise composed of individuals, partnerships, corporations, associations, legal entities, individuals associated in fact, banks, and the partnership's attorney. All defendants were alleged to be RICO persons. Plaintiffs moved for summary judgment and defendants sought a Distinctness Requirement-based dismissal.

Judge Koeltl required plaintiffs to show how the partnership and alleged association were distinct. He noted that while the Distinctness Requirement cases arose in the context of corporate defendants: "Neither side has argued or suggested in any way that the fact that the Rols Partnership was a partnership, and not a corporation, makes these cases any less relevant to the issue of whether the plaintiffs have alleged a sufficiently distinct enterprise under 1962(c)."³⁴⁹ He then proceeded to apply *Riverwoods* and *Discon*, finding, under *Riverwoods*, that the individual defendants had done no more than conduct the partnership's regular affairs.³⁵⁰

Plaintiff argued that because the attorney employed by the partnership was "distinct" from the partnership, the Distinctness Requirement was satisfied. Plaintiff also noted that the attorney was not alleged to be an "agent" or "employee," but, rather, an

³⁴⁹ *Id.*, at * 7 n.6. Efforts to distinguish partnerships from corporations for Distinctness Requirement purposes were unavailing in the Second Circuit even prior to *Riverwoods*. See, e.g., *Dep't of Econ. Dev. v. Arthur Andersen & Co.*, 683 F. Supp. 1463, 1481 n.18 (S.D.N.Y. 1988) (rejecting plaintiff's argument that Distinctness Requirement does not apply to partnerships) (citing *First Fed. Sav. & Loan Ass'n of Pittsburgh v. Oppenheim, Appel, Dixon & Co.*, 629 F. Supp. 427, 446 (S.D.N.Y. 1986)); *Park South Associates v. Fischbein*, 626 F. Supp. 1108, 1112 (S.D.N.Y.), *aff'd*, 800 F.2d 1128 (2d Cir. 1986); *Equitable Life Assur. Soc'y of the United States v. Alexander Grant & Co.*, 627 F. Supp. 1023, 1028 (S.D.N.Y. 1985).

"independent" person hired to represent Rols. Being hired to represent the partnership, Judge Koeltl held, did not render the attorney sufficiently distinct from it (or the association in fact) to satisfy the Distinctness Requirement.³⁵¹ Relying on *Discon, Riverwoods, C.A. Westel de Venezuela v. American Tel. & Tel. Co.*,³⁵² and a prior decision *R.C.M. Executive Gallery Corp. v. Rols Capital Co.*,³⁵³ he dismissed the RICO claim.³⁵⁴ The court observed that although plaintiffs are generally free to allege they are themselves an enterprise (or part of one) without violating the Distinctness Requirement,³⁵⁵ under the facts alleged, these defendants were indistinguishable from the enterprise. They would have been in the position of intending to defraud themselves because the complaint had merely alleged the partnership employees had engaged in the partnership's regular activities. That is, they would have violated the Nonregular Business Test.³⁵⁶

In *Dep't of Economic Development v. Arthur Andersen &*

³⁵⁰ *R.C.M. Executive Gallery Corp.*, 1997 WL 27059, at *8.

³⁵¹ *Id.*, at *12.

³⁵² No. 90 Civ. 6665(PKL), 1994 WL 558026 (S.D.N.Y. Oct. 11, 1994).

³⁵³ 901 F. Supp. 630, 640-41 (S.D.N.Y. 1995).

³⁵⁴ *R.C.M. Executive Gallery Corp.*, 1997 WL 27059, at *9. Judge Koeltl also distinguished *Securitron Magnalock* on the ground that it had involved separate and distinct corporations, unlike the entities alleged to constitute the enterprise he was considering. *Id.*, at *8 n.7.

³⁵⁵ See, e.g., *Aetna Cas. Sur. Co. v. P&B Autobody*, 43 F.3d 1546, 1557 (1st Cir. 1994). Plaintiff Aetna was a RICO enterprise and RICO victim where Aetna employees were bribed and participated in claims processing fraud, within Aetna. *Id.*

³⁵⁶ *R.C.M.*, 1997 WL 27059, at *8, n.8. See also *Pontchartrain Leasing Co. v. First Nat. Bank of Commerce*, Civ. A. No. 86-1541, 1987 WL 4932 (E.D. La. June 24, 1987), where plaintiff identified itself as enterprise and bank as RICO person controlling it, "indirect control" argument failed for lack of a "continuing proprietary right," such as partnership or stock interest, making "control" viable.

Co.,³⁵⁷ an agency of the British government, the Department of Economic Development (“DED”), which had provided financing for an automobile manufacturer, DeLorean, sued the manufacturer’s accounting firm, Arthur Andersen & Co. (“AA”), alleging what Judge Mukasey identified at least fifteen versions of enterprises between AA and DeLorean entities.³⁵⁸ Certain theories were superseded and others dismissed under the operation and management test with the remaining theories described as follows: “In each, DED alleges that the partners and employees of AA or AA itself participated in the operation or management of (a) one or more AA-affiliated entities, or (b) an association in fact of AA partners and employees.”³⁵⁹ Citing *Riverwoods*, Judge Mukasey held:

Under theories (9), (11), (13), and (15), DED asserts various permutations of AA entities and AA partners and employees as persons and enterprises. Liability in each case is premised on accounting work and related services performed by partners and employees in the course of AA’s ‘regular affairs’ as a major accounting firm. Under theory (15), DED alleges two AA entities as person and enterprise, but this does not change the result. Even if AA observes administrative separation . . . AA’s different geographical units still perform the same ‘regular affairs’ of AA’s accounting business. Accordingly, all of these theories fail the distinctness test.³⁶⁰

As in *R.C.M.*, the enterprise allegations were dismissed.

³⁵⁷ 924 F. Supp. 449 (S.D.N.Y. 1996).

³⁵⁸ *Id.* at 455, 469-70 (setting forth table of pleaded alternative enterprises).

³⁵⁹ *Id.* at 471.

³⁶⁰ *Id.*

3. *The Third Circuit*

In *Gurfein v. Sovereign Group*,³⁶¹ plaintiff sued to recover losses sustained in connection with real estate limited partnerships. Judge Pollak held that plaintiff had satisfied the *Enright* test because the partnership's general partners were distinct from defendants; indeed, the general partners, notwithstanding their partner status, had been removed due to disagreements over how the partnership was being run.³⁶²

In *Kress v. Hall-Houston Oil Co.*,³⁶³ plaintiffs named Hall-Houston Off-Shore, a limited partnership owning a controlling interest in Hall-Houston, a company engaged in oil and gas drilling and production, and certain partnerships owning interests in the oil and gas wells Hall-Houston operated through Hall-Houston Offshore, as the enterprise. Plaintiffs also named Hall-Houston and, also, Hall, chairman of Hall-Houston, as RICO persons. Judge Wolin held that the alleged association in fact enterprise comprised of the partnerships and Hall-Houston Offshore had to be distinct from the persons Hall and Hall-Houston, and their employees, agents and affiliates, citing *Enright* and *Brittingham*.³⁶⁴

Gurfein and *Kress* appear to be overruled by *Jaguar Cars*, at least where the controlling person is a natural person. The Third

³⁶¹ 826 F. Supp. 890 (E.D. Pa. 1993).

³⁶² *Id.* at 915. The court determined that the *Enright* test was met because the partnership's general partners were persons distinct from defendants. *Id.*

³⁶³ No. 92-543, 1993 WL 166274 (D.N.J. May 12, 1993).

³⁶⁴ *Id.*, at *8. The court ultimately concluded that it needed an expanded record to determine whether the Distinctness Requirement was satisfied. *Id.*, at *9.

Circuit's affirmance without opinion of *Metcalf*,³⁶⁵ suggests that where a partnership is controlled by a business entity person, *Brittingham*, not *Jaguar Cars*, sets forth the applicable distinctness rule. *Metcalf* applied the Distinctness Requirement as it would have in the pre-*Jaguar Cars* era, noting the complaint did not allege the enterprise included a person or entity operating outside of defendant's normal scope of business and that all members of the alleged enterprise were acting in furtherance of defendant's business.

4. *The Seventh Circuit*

Prior to *Fitzgerald/Emery*, efforts to obtain Distinctness Requirement based dismissals in cases involving partnership enterprises controlled by their partners and/or affiliated entities met with mixed results. In some cases, Separate Legal Identity Theory counter-arguments prevailed while in others, particularly after *Richmond* and *Reves*, dismissals resulted. In light of *Fitzgerald/Emery* prototype and family resemblance approach and acceptance of the traditional infiltration paradigm, it seems likely that partnership entities controlled by partners will be subject to the same rules that the Seventh Circuit has been applying to corporation enterprises controlled by their officers. That is, to the extent the interrelationship between partnership and partner(s) shows a close family resemblance to a prototypical infiltration, the Distinctness Requirement will probably be deemed satisfied. If corporate general partners are controlling alleged partnership enterprise activity, as

³⁶⁵ 886 F. Supp. 503 (W.D. Pa. 1995), *aff'd without opinion*, 79 F.3d 1138 (3d Cir. 1996).

opposed to natural person partners, *Fitzgerald/Emery* considerations may result in distinctness-based dismissal. Although there are relatively few partnership cases addressing the distinctness issue, some are instructive.

In *Gagan v. American Cablevision, Inc.*,³⁶⁶ a case relying on the Separate Legal Identity Theory, plaintiff, a limited partner in a cable television limited partnership, alleged that the partnership, called South Hesperia, was a RICO enterprise defendants controlled. Defendants argued they could not be liable because they and the enterprise were "one and the same." The Seventh Circuit rejected this argument: "South Hesperia was a duly organized Arizona limited partnership which had a separate and distinct legal existence independent from each of the defendants."³⁶⁷ The Separate Legal Identity Theory prevailed.

In *Northwestern Neurosurgical Associates, S.C. v. Esteves*,³⁶⁸ plaintiff sued two defendants alleging they constituted a partnership enterprise. Rejecting the RICO claim, Judge Nordberg, citing *Reves* and *Richmond*, noted that liability under the RICO statute "depends on showing that the defendants conducted or participated in the conduct of the 'enterprise's affairs,' not just their own affairs."³⁶⁹ "The complaint must present an enterprise separate and distinct from the persons sought to be held liable."³⁷⁰ Judge Nordberg concluded that, like the plaintiff in *Richmond*, plaintiff had not pleaded "an

³⁶⁶ 77 F.3d 951 (7th Cir. 1996).

³⁶⁷ *Id.* at 964.

³⁶⁸ No. 94 C 153, 1996 WL 164390 (N.D. Ill. Apr. 2, 1996).

³⁶⁹ *Id.*, at *2 (quoting *Reves*, 113 S. Ct. at 1173) (citing *Richmond*, 52 F.3d at 647).

³⁷⁰ *Id.* (quoting *Richmond*, 52 F.3d at 647).

enterprise separate and distinct from the persons it seeks to hold liable.”³⁷¹

The “infiltration model” presently associated with *Fitzgerald/Emery* had early roots in partnership distinctness cases. For example, in *Orrison v. Balcor Co.*,³⁷² limited partners sued various defendants under RICO, but did not name the partnership as a defendant. They identified the enterprise as the combination of persons and entities involved in the organization and operation of the partnership business and in the sale of limited partner interests. Judge Zagel, refusing to dismiss held: “Construing these allegations against the backdrop of the complaint as a whole, one might reasonably infer that defendants infiltrated the Partnership and perpetrated the alleged fraud through it.”³⁷³

5. *Summary—Partnership Enterprises*

In the Second Circuit, prior to *Cedric*, if a partnership and affiliated individuals or entities were merely engaged in the partnership’s ordinary business, a distinctness-based defense would likely have prevailed. Partnership enterprise allegations were then governed by the same body of law that governed corporation involved association in fact enterprises, primarily *Riverwoods*. In the Third Circuit, prior to *Cedric*, if a partnership was the alleged enterprise and an individual (natural) partner was the alleged person

³⁷¹ *Id.*, at *2.

³⁷² No. 90 C 752, 1991 WL 556996 (N.D. Ill. Dec. 6, 1991).

³⁷³ *Id.*, at *18 n.9.

conducting its affairs, the Distinctness Requirement would probably have been satisfied under *Jaguar Cars*' reasoning, even though *Jaguar Cars* dealt with a corporation and its officers, not partnerships and partners. If, however, a partnership was the alleged enterprise and a corporate general partner, rather than a natural person partner, was alleged to have controlled the enterprise, plaintiff, under *Metcalf/Brittingham*, would probably have had to show conduct beyond the scope of agency to exploit RICO remedies.

In the Seventh Circuit, prior to *Cedric*, if plaintiff pleaded a partnership enterprise controlled by natural persons, he was required to show a strong family resemblance to the Infiltration Prototype. If the partnership enterprise was allegedly controlled by a corporation partner, distinctness analysis was controlled by *Fitzgerald/Emery*, with the central questions focusing on whether the corporation made a distinct contribution to perpetrating or concealing alleged RICO wrongdoing. After *Cedric*, partnership enterprises directed by natural RICO persons will likely be governed by the Separate Legal Identity Theory and will be sustained unless plaintiff also pleads that natural person RICO partner defendants are part of the enterprise, in which case application of the Dual Role Theory may result in dismissal.

C. Sole Proprietorship Enterprises

1. Introduction

Analysis of sole proprietorship enterprises, unlike other types of business entity enterprises, has largely focused, in the Second, Third and Seventh Circuits, on whether the sole proprietorship

employed persons other than the proprietor during the period in which the alleged misconduct occurred.³⁷⁴

2. *The Second Circuit*

Prior to *Riverwoods*, in *United States v. Weinberg*,³⁷⁵ the Second Circuit affirmed conviction of an individual defendant, noting that the enterprise, a real estate sole proprietorship he allegedly controlled, had full and part-time employees. Reasoning that the business was not a “one man show,” association was deemed possible and the RICO claim was sustained.³⁷⁶ In *Three Crown Limited Partnership v. Caxton Corp.*,³⁷⁷ plaintiff investors alleged that Soros Fund Management (“SFM”), a sole proprietorship, owned and controlled by George Soros was a 1962(c) enterprise and George Soros the RICO person controlling SFM’s activities. District Judge Carter concluded that because SFM, a sole proprietorship, was owned by Soros, its president and chairman, the person and enterprise were not distinct entities for Section 1962(c) purposes.³⁷⁸ He noted, however, referencing *Jacobson*,³⁷⁹ that if there had been only a partial overlap between defendants and the enterprise, the claim might have been sustained.³⁸⁰

Today, Second Circuit sole proprietorship distinctness cases

³⁷⁴ See generally LaBrun, *supra* note 16, at 200.

³⁷⁵ 852 F.2d 681 (2d Cir. 1988).

³⁷⁶ *Id.* at 684 (stating that the district court correctly concluded indictment alleged a business entity enterprise distinct from its owner/manager).

³⁷⁷ 817 F. Supp. 1033 (S.D.N.Y. 1993).

³⁷⁸ *Id.* at 1046.

³⁷⁹ 882 F.2d 717, 720 (2d Cir. 1989).

³⁸⁰ *Three Crown Limited Partnership*, 817 F. Supp. at 1046.

will probably be governed by a *Cullen*-style analysis, at least where non-proprietor employees are employed by the sole proprietorship – in other words, where only a partial overlap exists, a Distinctness Requirement dismissal is not required. Absent the presence of non-proprietor employees, however, application of the Indistinguishability and Reducibility Theories will probably result in dismissal.

3. *The Third Circuit*

Cases in the Third Circuit dealing with sole proprietorship enterprises have adopted the approach taken by the Seventh Circuit in *McCullough*.³⁸¹ In *Blue Cross of Western Pennsylvania v. Nardeau*,³⁸² for example, a pharmacy sole proprietorship was the alleged RICO enterprise, and its sole owner/proprietor the RICO person. Judge Mencer held that, at least for motion purposes, he would assume employees other than the proprietor were employed by the proprietorship, rendering the owner and business “separate entities.”³⁸³ He cautioned that if it turned out that the proprietor was the pharmacy’s only employee, however, the Distinctness Requirement would compel dismissal. In another pre-*Jaguar Cars* decision, *Standard Chlorine of Delaware, Inc. v. Sinibaldi (Sinibaldi I)*,³⁸⁴ the distinctness issue was framed as follows:

The question for the court is whether, in light of the pleadings before it, the individual defendant who was an officer and sole shareholder of the corporation and

³⁸¹ 757 F.2d 142, 144 (7th Cir. 1985).

³⁸² 680 F. Supp. 195 (W.D. Pa. 1988).

³⁸³ *Id.* at 199.

³⁸⁴ No. 91-188-SLR, 1994 WL 796603 (D. De. Dec. 8, 1994).

the sole proprietor of the sole proprietorship can be the 'person' who was conducting a pattern of racketeering through the corporation/sole proprietorship as an enterprise.³⁸⁵

Dismissing the action in reliance on pre-*Jaguar Cars* authority, particularly *Enright*, *Petro-Tech*, *Brittingham* and *Glessner*, Judge Robinson held "the court cannot find that . . . [defendant] is a 'person' separate and distinct from a 'victimized,' 'innocent' and 'passive' enterprise."³⁸⁶ *Jaguar Cars*, however, was decided shortly thereafter. Revisiting her initial decision,³⁸⁷ Judge Robinson heavily relied on *McCullough*. Because the sole proprietorship employed persons other than the sole proprietor, Judge Robinson concluded the Statutory Distinctness requirement existed.³⁸⁸ Cases after *Jaguar Cars* suggest the *McCullough* approach continues to govern sole proprietorship enterprises.³⁸⁹

4. *The Seventh Circuit*

In *McCullough*, as discussed above, the Seventh Circuit held that a sole proprietorship could be an "enterprise" associated with its proprietor, because the proprietorship had other employees:

If the one-man band incorporates, it gets some legal protections from the corporate form, such as limited liability; and it is just this sort of legal shield for illegal activity that RICO tries to pierce. A one-man

³⁸⁵ *Id.*, at *5.

³⁸⁶ *Id.*, at *6.

³⁸⁷ See *Standard Chlorine of Delaware, Inc. v. Sinibaldi*, No. CIV.A. 91-188 - SLR, 1995 WL 562285 (D. De. Aug. 24, 1995).

³⁸⁸ *Sinibaldi*, 1995 WL 562285, at *9 (relying on *McCullough*).

³⁸⁹ See, e.g., *Emcore Corp. v. PricewaterhouseCoopers LLP*, 102 F. Supp. 2d 237, 258 (D.N.J. 2000).

band that does not incorporate, that merely operates as a proprietorship, gains no legal protections from the form in which it has chosen to do business; the man and the proprietorship really are the same entity in law and fact. But if the man has employees or associates, the enterprise is distinct from him, and it then makes no difference . . . what legal form the enterprise takes. The only important thing is that it be either formally (as when there is incorporation) or practically (as when there are other people besides the proprietor working in the organization) separable from the individual.³⁹⁰

The *McCullough* Court articulated a number of rules relevant to application of the Distinctness Requirement. First, RICO was intended to “pierce” corporate protections where persons engaged in systemic misconduct attempt to abuse corporate protections. Indeed, the language chosen by the Seventh Circuit suggests analogy to the doctrine of piercing the corporate veil.³⁹¹ Readiness to “pierce” corporate protections is reflected in the Seventh Circuit’s early, liberal jurisprudence. Second, where a proprietor and his business fail to avail themselves of the corporate protections, there is no “formal” basis for deeming them distinct, for RICO purposes.³⁹² Third, either “formal” or “practical” separateness may be sufficient to sustain an enterprise pleading.

³⁹⁰ *McCullough*, 757 F.2d at 144.

³⁹¹ Laufer, *supra*, note 46; LaBrun, *supra*, note 57.

³⁹² LaBrun, *supra*, note 16, at 213 n.156 (stating it is “difficult to comprehend how the reasoning of *McCullough* and *Benny* can co-exist in the same circuit as *Haroco*,” arguing that the sole proprietor in *McCullough* would appear to be associating with sole proprietorship, which is similar to a Distinctness Requirement-banned association between a sole shareholder of a corporation associating with the corporation). Accord O’Neill, *supra*, note 16, at 657 (stating that “the reasoning in *McCullough* is seemingly at odds with the

While RICO stands ready to pierce the corporate veil under *Fitzgerald/Emery* prototype theory, “piercing” is unnecessary where the proprietor has neither exploited the corporate form nor voluntarily acted with (distinct) natural person employees to engage in patterns of RICO wrongdoing. Other Circuits have followed *McCullough*,³⁹³ and, generally, courts have favorably viewed its analysis. “The [*McCullough*] rule avoids the ontological conundrum of interpreting RICO to make liable an individual who associates with himself or herself, while it maintains at the same time RICO’s ability to discourage and punish illegal activity associated with various groups.”³⁹⁴

5. *Summary—Sole Proprietorship Enterprises*

In the sole proprietorship context, the critical question is likely to be whether the proprietorship is really a “one man show” or a “troupe” of distinct persons associating together. Cases in the Second Circuit have combined the *McCullough* approach with the Second Circuit’s own Distinctness Requirement jurisprudence. Post-*Jaguar* cases arising in the Third Circuit have relied on *McCullough*, which remains the Seventh Circuit’s leading precedent on sole

Seventh Circuit’s own *Haroco* opinion”).

³⁹³ See *Guidry v. Bank of LaPlace*, 954 F.2d 278 (5th Cir. 1992) (adopting *McCullough* approach, but noting that the present case fell directly within *McCullough*’s exception). Accord *United States v. Benny*, 786 F.2d 1410 (9th Cir. 1986). The operator of a sole proprietorship which employed four people was convicted of violating Section 1962(c). Benny was the alleged person and the proprietorship was the alleged enterprise. The Ninth Circuit held that the sole proprietorship could be a RICO enterprise and its sole proprietor could associate with that business entity, because, given its four employees, it “was a troupe, not a one man show.” *Id.* at 1416. Accord *United States v. London*, 66 F.3d 1227, 1244 (1st Cir. 1995) (citing the *McCullough* rule, which states that where a sole proprietorship had more than one employee, “separateness requirement”).

proprietorship “distinctness.” Whether the Separate Legal Identity theory that *Cedric* adopted will be applied to the legal identities of the sole proprietorship and its sole proprietor is presently unresolved.

PART IV

ASSOCIATION IN FACT ENTERPRISES AND THE DISTINCTNESS REQUIREMENT

A. **Association in Fact Enterprises Between a Corporation and its Officers/Employees, with the Corporation or Individual Defendant Persons Directing the Activity of the Enterprise**

1. *Introduction*

Association in fact enterprises are composite entities whose legal status derives from 18 U.S.C. § 1962(c). In the Second Circuit, the capacity to associate remains intimately tied to questions of agency. In the Third Circuit, the Separate Legal Identity Theory ensures the capacity for corporations and their officers to associate, subject to the Dual Role Theory. In the Seventh Circuit, *Fitzgerald/Emery* articulate the controlling principles—if a corporation and its controlling officer bear a sufficiently close family resemblance to the Infiltration Prototype, Statutory Distinctness requirements will probably be satisfied.

2. *The Second Circuit*

Some Pre-*Riverwoods* cases held that a corporation (or

³⁹⁴ *Benny*, 786 F.2d at 1416.

corporations under common ownership) and its employees could associate together to constitute a proper Section 1962 (c) enterprise. In *Kudo v. Simels*,³⁹⁵ the complaint alleged art galleries and their common owner as RICO defendants, and an association in fact enterprise consisting of all the defendants. The RICO claim survived the Distinctness Requirement defense:

While defendants argue correctly that ‘a Section 1962(c) RICO claim must allege the existence of an enterprise that is separate and distinct from the defendant’ . . . it is clear that an association-in-fact has a legal existence that is separate and distinct from that of its components . . . There is no logical support for the assertion that an association-in-fact may not consist entirely of named defendants.³⁹⁶

Without clear guidance from the Second Circuit, a substantial number of district cases took a similar position relying, implicitly or explicitly, on the separate legal identities of the association in fact and the distinct legal identities of each member constituting it.³⁹⁷

³⁹⁵ No. 91 Civ. 3167(JFK), 1991 WL 222165 (S.D.N.Y. Oct. 22, 1991).

³⁹⁶ *Id.*, at *2.

³⁹⁷ See *Sluka v. Herink*, No. 94 CV 4999, 1996 WL 612462, at *7 (E.D.N.Y. Aug. 13, 1996) (noting that the court in *Giuliano v. Everything Yogurt*, 819 F. Supp. 240, 247 (E.D.N.Y. 1993) found that a corporation and officers may constitute a RICO enterprise distinct from corporation itself and the court in *Center Cadillac v. Bank Leumi Trust Co.*, 808 F. Supp. 213, 236 (S.D.N.Y. 1992), found an enterprise composed of corporation and present or former employees would be separate and distinct from the RICO persons. Both are inconsistent with *Riverwoods*. In *Center Cadillac*, Judge Motley relied on *Kuczynski v. Ragen Corp.*, 732 F. Supp. 378 (S.D.N.Y. 1989), *Richardson Greenshields, Inc. v. Mui-hin Lau*, 693 F. Supp. 1445, 1449 n.6 (S.D.N.Y. 1988), and *Metzner v. D.H. Blair & Co.*, 663 F. Supp. 716, 722 (S.D.N.Y. 1987), for the proposition that corporation/employee enterprises were permissible in the Second Circuit. The court also noted contrary authority such as *Official Publications, Inc. v. Kable News Co.*, 775 F. Supp. 631 (S.D.N.Y. 1991) and the fact that the Second Circuit had not yet directly addressed the issue. See also *In re Energy Systems Equipment Leasing & Litig.*, 642 F. Supp. 718, 740 (E.D.N.Y. 1986) (holding that defendants companies and their officers were RICO persons and their “interaction and

Today, *Riverwoods* and *Discon* are the Second Circuit's leading precedents on association in fact enterprises comprised of a corporate entity with a corporate defendant and/or individual defendant employees directing its activities. Under the defense-friendly analyses of these cases, many more cases have resulted in dismissal.

In *Moy v. Terranova*,³⁹⁸ for example, plaintiffs alleged enterprises comprised of corporate entities in association with an officer, CEO and controlling shareholder. On motion to dismiss, plaintiffs attempted to distinguish *Riverwoods*. They argued for a narrow construction of *Riverwoods* so that its rule would be inapplicable where an individual RICO defendant person, not a corporate RICO defendant-person, is alleged. Noting that the Second Circuit had not actually addressed the scope of *Riverwoods*' rules on distinctness, Judge Johnson rejected plaintiffs' construction:

Other courts have squarely rejected Plaintiffs' interpretation of *Riverwoods*, and Plaintiffs' position appears to be foreclosed by the opinion in *Discon*. See *Discon*, 93 F.3d at 1064 (stating that it would be 'especially inappropriate' to hold that individual defendants 'acting on behalf of the enterprise-corporation' are 'distinct' from the enterprise); *CPF Premium funding, Inc. v. Ferrarini*, No. 95 Civ. 4621, 1997 WL 158361, at **12-13 (S.D.N.Y. April 3, 1997) ('*Discon* leaves little room for doubt: when an individual . . . has acted in a corporation's behalf, he does not function as an entity distinct from that

relationship" with regard to scheme to sell securities constituted an association in fact enterprise separate and distinct from the persons themselves); *Kovian v. The Fulton County Nat'l Bank and Trust, Co.*, No. 1990 WL 36809, at *15, *22 (N.D.N.Y. Mar. 28, 1990) (discussing bank enterprise and alternative association in fact enterprise between bank, its president and vice-president sustained, citing partial-overlap rule).

³⁹⁸ No. 87 CV 1578(SJ), 1999 WL 118773 (E.D.N.Y. Mar. 2, 1999).

corporation, and should not be held liable under Section 1962(c).”); *see also Protter v. Nathan’s Famous Sys. Inc.*, 925 F. Supp. 947, 956 (E.D.N.Y. 1996)(holding, prior to *Discon*, that corporate officers acting in the course of their employment did not form an association-in-fact enterprise distinct from the corporation and could not be held individually liable under RICO).³⁹⁹

In *Goldberg v. Merrill Lynch*,⁴⁰⁰ plaintiff alleged, among other Section 1962(c) enterprises, an association in fact between Merrill Lynch and its attorneys. Analyzing the distinctness issue as one of “agency,” Judge Patterson, citing *Riverwoods*, dismissed the complaint, stating:

There are no allegations . . . that Merrill Lynch’s lawyers were acting in any capacity other than as Merrill Lynch’s agents. While it may be possible to infer an enterprise between a client and their attorneys when the attorneys are acting other than as agents, for their own benefit, plaintiff’s claim . . . that Merrill Lynch’s attorneys were motivated by the money and prestige they gained through their association with Merrill Lynch, is insufficient to allow an inference that they were acting other than as Merrill Lynch’s agents.⁴⁰¹

In *NRB Ind., Inc. v. R.A. Taylor & Assoc., Inc.*,⁴⁰² a management consulting firm and its alter egos and agents allegedly stole confidential information. Judge Rakoff first noted that the

³⁹⁹ *Moy*, 1999 WL 118773, at *4.

⁴⁰⁰ No. 97 Civ. 8799 (RPP), 1998 WL 321446 (S.D.N.Y. June 18, 1998).

⁴⁰¹ *Id.*, at *3.

⁴⁰² No. 97 Civ. 181 (JSR), 1998 WL 3638 (S.D.N.Y. Jan. 7, 1998).

complaint effectively alleged that the defendants operated as a single entity. He concluded, relying on *Discon* and *RCM Executive*, that the fact that some defendants were "legally separate" from a corporate defendant was "not sufficient in itself to make them distinct in terms of section 1962(c) where operative identity, in terms of the relevant conduct, was otherwise complete. . . ."⁴⁰³ While Judge Rakoff used the expression "operative identity," his analysis is very similar to *Fitzgerald's* functionalism. Citing *Sterling Interiors Group, Inc. v. Haworth, Inc.*,⁴⁰⁴ he suggested the existence of agency or a person hired to act on behalf of a corporation, would be inconsistent with Statutory Distinctness. Judge Rakoff did not, however, specify what plaintiff should have alleged to render distinctness "sufficient."

Other *Riverwoods*-based dismissals involving similar enterprise/person structures are found in *New York Automobile Ins. Plan v. All Purpose Agency & Brokerage, Inc.*,⁴⁰⁵ *Lorentzen v. Curtis*,⁴⁰⁶ *Hitchcock v. Woodside Literary Agency*,⁴⁰⁷ *Skylon Corp. v.*

⁴⁰³ *Id.*, at *3.

⁴⁰⁴ No. 94 Civ. 9216 (CSH), 1996 WL 426379 (S.D.N.Y. July 30, 1996).

⁴⁰⁵ No. 97 Civ. 3164 (KTD), 1998 WL 695869, at *5-6 (S.D.N.Y. Oct. 6, 1998) (concluding the facts presented a classic "hub and spoke" conspiracy, but not a RICO enterprise, where plaintiffs alleged that fraudulent insurance applications were submitted through one insurance broker on behalf of numerous unrelated insured. The court cited *First Nationwide Bank v. Gelt Funding, Inc.*, 820 F. Supp. 89, 98 (S.D.N.Y. 1993), *aff'd*, 27 F.3d 763 (2d Cir. 1994), and noted that even if the enterprise were deemed to be comprised of a corporation and its sole shareholder and employee, it would fail under *Riverwoods* and *Sulka*).

⁴⁰⁶ No. 97 CIV. 6895 BDP, 1998 WL 546950 (S.D.N.Y. Aug. 27, 1998) (finding a corporation whose current employees and agents carried out regular business affairs were not saved by additional allegation that enterprise included law firms retained to help carry out fraudulent litigation practices).

⁴⁰⁷ No. 97 CV 166 (NG) (JA), 1998 WL 472319 (E.D.N.Y. July 28, 1998) (finding that an enterprise comprised of owners and operators of literary agency corporation could not form a RICO enterprise under *Riverwoods*).

Guilford Mills, Inc.,⁴⁰⁸ *Greenes v. Empire Blue Cross & Blue Shield*,⁴⁰⁹ *Black Radio Network, Inc. v. NYNEX Corp.*,⁴¹⁰ and *Communication Opportunity, Inc. v. Davis*.⁴¹¹

In *Sterling Interiors Group, Inc. v. Haworth, Inc.*,⁴¹² however, Judge Haight held the Distinctness Requirement satisfied where plaintiff, a furniture retailer, sued furniture manufacturer (Haworth), its employees and officers, and independent dealers as a RICO enterprise. The independent dealers were not alleged to be agents of the defendant corporation and were:

not hired by Haworth, to perform acts on behalf of Haworth. Nor can they be said to have carried out their fraudulent activity “through” Haworth. Rather, they are independent entities authorized to carry Haworth’s line of furniture. In participating in the scheme, they were acting in part to advance their own monetary interests, not simply those of Haworth. That Haworth benefited financially from their cooperation

⁴⁰⁸ No. 93 Civ. 5581 (LAP), 1997 WL 88894 (S.D.N.Y. Mar. 3, 1997) (dismissing the claim under *Discon*, *Riverwoods*, and *R.C.M. Executive Gallery Corp.* where conspiracy allegations were predicated on an enterprise composed of corporation employees carrying out their duties within the scope of their employment).

⁴⁰⁹ No. 92 CIV. 8599 (KMW), 1996 WL 640873, at *4 (S.D.N.Y. Nov. 4, 1996) (relying on *Riverwoods*, Judge Wood held plaintiff’s failure to allege that the individual defendants were doing anything but working within the scope of their employment, on Empire’s behalf, in committing the alleged predicate acts, precluded the individual defendants, in association with Empire, from forming an enterprise distinct from Empire).

⁴¹⁰ 44 F. Supp. 2d 565 (S.D.N.Y. 1999). Where plaintiffs, creators of 976 messages, alleged that defendants NYNEX Corporation and New York Telephone Company had secretly been using estimates of caller volume to decrease their compensation through an association in fact enterprise comprised of the Downstate Dedicated MAS or 976 component of New York Telephone, its executives and employees and long distance providers, Judge Chin, after eliminating certain enterprise members on non-distinctness-based grounds, held the enterprise, left with only employees of NYNEX and its corporate affiliates, was improperly pleaded for lack of distinctness, under *Riverwoods*, *Bennett* and *R.C.M.*.

⁴¹¹ No. 97-CV-3604 (NG), 1998 WL 240527 (E.D.N.Y. Apr. 28, 1998) (citing *Riverwoods* to dismiss claim, the court held that the proposition that corporation and its agent may not be an enterprise is “uncontroversial”).

⁴¹² No. 94 CIV. 9216 (CSH), 1996 WL 426379 (S.D.N.Y. July 30, 1996).

does not render them instrumentalities of that corporation.⁴¹³

Although Judge Haight indicated that if only a corporation and its employee/agents was alleged, he would have dismissed the complaint, the independent dealers provided the requisite "distinctness." Similarly, in *Mark v. Iselin*,⁴¹⁴ where plaintiff pleaded an enterprise consisting of an association in fact of corporation, officer, and certain nonparty individuals and entities, "distinctness" was not compromised merely because the corporation and officer were also identified as RICO persons. Because the nonparty individuals and entities were capable of associating, Statutory Distinctness existed.⁴¹⁵

In *Dornberger v. Metropolitan Life Ins.*,⁴¹⁶ although the complaint pleaded that many members of the enterprise were agents carrying out a corporation's regular business, Judge Sand held that the pleading was sustainable because plaintiffs also pleaded that certain governmental entities that were not agents of the business were part of the enterprise.⁴¹⁷ He specifically rejected the argument that permitting a plaintiff to satisfy the Distinctness Requirement by including a government regulatory authority would allow such

⁴¹³ *Id.*, at *11.

⁴¹⁴ No. 92-CV-5285 (FB), 1997 WL 403179 (E.D.N.Y. July 9, 1997).

⁴¹⁵ See also *Banco de Desarrollo Agropecuario, S.A. v. Gibbs*, No. 86 CIV. 8547 (PKL), 1988 WL 75449, at *4-5 (S.D.N.Y. July 18, 1988) (holding that association in fact comprised of defendants and others was distinct from defendants for Distinctness Requirement purposes).

⁴¹⁶ 961 F. Supp. 506 (S.D.N.Y. 1997).

⁴¹⁷ *Id.* at 524.

pleadings to always circumvent the requirement.⁴¹⁸

After *Cedric*, a number of district courts continued to rely on *Bennett/Riverwoods*, ignoring or narrowly reading *Cedric*, to permit dismissals of association in fact claims. For example, in *International Telecom, Inc. v. Generadora Electrica del Oriente S.A.*,⁴¹⁹ plaintiff International Telecom, Inc. (“ITI”) sued defendant and defendant filed a RICO counterclaim. Plaintiff claimed the counterclaim was deficient because defendant had alleged an enterprise consisting solely of ITI and its employees or agents. The district court’s analysis began by noting that a RICO plaintiff cannot

circumvent this distinctness requirement by alleging a RICO enterprise that “consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant.” *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir.1994); accord *Anatian v. Coutts Bank (Switzerland) Ltd.*, 193 F.3d 85, 89 (2d Cir.1999); *Bennett v. United States Trust Co. of New York*, 770 F.2d 308, 315 (2d Cir.1985); *Black Radio Network, Inc. v. NYNEX Corp.*, 44 F.Supp.2d 565, 581 (S.D.N.Y. Apr. 14, 1999). . . .⁴²⁰

After citing these authorities and comparing them with *Cedric*, the district court relied on pre-*Cedric* authorities:

cf. Cedric Kushner Promotions, Ltd. V. King, 121

⁴¹⁸ *Id.* In response to this argument, Judge Sand noted that courts had repeatedly held that an enterprise can include a governmental entity. He cited *United States v. Freeman*, 6 F.3d 586, 597 (9th Cir. 1993) and *United States v. Angelilli*, 660 F.2d 23, 30-35 (2d Cir. 1981). In the instant case, the regulatory agencies were not in the position of ordinary regulatory entities “because the agencies, by contractual agreement, had agreed to function in a way that rendered them a ‘legitimate front’ . . . to disguise MetLife’s illegal sales of policies.” *Dornberger*, 30 F.3d at 524.

⁴¹⁹ No. 00 CIV. 8695 (WHP), 2002 WL 465291 (S.D.N.Y. Mar. 27, 2002).

⁴²⁰ *Id.*, at *8.

S.Ct. 2087, 2092 (2001) (holding that president and sole shareholder of closely held corporation is a "person" distinct from the corporate entity and subject to liability under RICO). While "a single entity simultaneously can be both the person and one of a number of members of the enterprise," *Dornberger v. Metropolitan Life Ins. Co.*, 961 F.Supp. 506, 524 (S.D.N.Y.1997), this is so only when the enterprise is distinct from each of the RICO persons. See *NRB Indus., Inc. v. R.A. Taylor & Assocs., Inc.*, 97 Civ. 181(JSR), 1998 WL 3638, at *2 (S.D.N.Y. Jan. 7, 1998) (citing *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 263 (2d Cir.1995)). The first counterclaim names ITI and Lapin as RICO persons and further states that the enterprise is an "association-in-fact" consisting of ITI, Lapin, and "others in and outside of [ITI], as yet to be identified." Without further factual allegations that enlarge the group comprising the enterprise, this pleading runs afoul of the distinctiveness requirement. While it is alleged that the enterprise acted outside the "regular affairs" of ITI, GEDO names no additional persons outside the corporate plaintiff and its president, Lapin. On such a basis alone, an enterprise does not exist for purposes of RICO.⁴²¹

The enterprise allegation could have been sustained, under *Cedric*, if plaintiff had merely alleged that the enterprise was ITI (a business entity enterprise) and the person directing its activity was defendant Lapin, its officer, rather than an association in fact enterprise that Lapin directed. The "group" constituting the "enterprise" would not have needed to be "enlarged" and the issue whether the RICO activity involved "regular affairs" would have

⁴²¹ *Id.*

been irrelevant. The court dismissed under *Bennett/Riverwoods*, when a slight pleading revision would have resulted in a *Cedric*-sustainable RICO claim.

In *Burrell v. State Farm and Cas. Co.*,⁴²² plaintiff alleged a RICO enterprise consisting of State Farm and its employees, all named as defendant RICO persons. The district judge wrote:

As State Farm correctly argues, “[a] corporate entity may not be simultaneously the ‘enterprise’ and the ‘person’ who conducts the affairs of the enterprise through a pattern of racketeering activity.” *Anatian v. Coutts Bank (Switzerland) Ltd.*, 193 F.3d 85, 88-89 (2d Cir.1999) (internal quotation marks omitted); *see also Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161-62, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001) (§ 1962(c) requires some distinctness between the RICO “person” and the RICO “enterprise,” which cannot be met by referring to the same entity by a different name); *Bennett v. United States Trust Co.*, 770 F.2d 308, 315 (2d Cir.1985).⁴²³

The district judge dismissed the RICO claim with leave to re-plead, as plaintiffs argued they could allege a proper enterprise between State Farm parent and subsidiary corporations, under *Cedric*:

The plaintiffs respond in their papers that the relevant RICO enterprise consists of “State Farm subsidiaries and its parent corporation as well as . . . all those who have aided and abetted defendant State Farm in its fraudulent schemes,” apparently including Fleet . . . The plaintiffs argue, in addition, that a defendant can

⁴²² 226 F. Supp. 2d 427 (S.D.N.Y. 2002).

⁴²³ *Id.* at 443.

be a "person" for RICO purposes and also be a part of the relevant RICO "enterprise," so long as the defendant is not the only entity comprising the "enterprise" and there is an association-in-fact between the defendant and other alleged RICO co-conspirators. *See, e.g. Bennett*, 770 F.2d at 315; *see also generally Cedric*, 533 U.S. at 163, 121 S.Ct. 2087 (noting that owner or employee of a corporation is sufficiently distinct from a corporation to allow for a RICO claim identifying the owner or employee as the RICO "person" and the corporation as the "enterprise"). However, despite many arguments in their papers to the contrary, the plaintiffs do not define the relevant RICO enterprise or person or persons in the Second Amended Complaint . . . On its face, the Second Amended Complaint therefore fails to plead sufficiently a civil RICO violation.⁴²⁴

In an extremely extensive post-*Cedric* decision, *City of New York v. Cyco.Net*,⁴²⁵ New York City sued sixteen defendants, which the court broke into three sub-groups, which allegedly directed seven enterprises.⁴²⁶ The City alleged defendants agreed to sell cigarettes to New York City residents without informing City tax authorities of the sales, and/or by falsely advertising the cigarettes as "tax-free," and/or by advertising that sales would not be reported to the state tax

⁴²⁴ *Id.* at 433-34.

⁴²⁵ No. 03-CV-383 (DAB), 2005 WL 174482 (S.D.N.Y. Jan. 27, 2005).

⁴²⁶ *Id.*, at *1 ("For the purposes of this lawsuit, Defendants Cyco.net, Richard A. Urrea, Daniel R. Urrea, Hemi Group, Kai Gachupin, Michael E. Smith, Hooray's Inc., Stephen F. Knopp, and Dmitriy Zilberman have joined together as the 'Multistate Defendants' . . . Defendants S4L, Inc., William C. Baker, Double B, and William Bevins filed their motion jointly under common representation as the 'Bulkcigs Defendants.' Defendants www.Dirtcheapcigs.com, Fred Teutenberg IV, and Fred Teutenberg V, have joined together as the 'Dirtcheap Defendants.' Otherwise, aside from the employee-employer relationships described below, these individuals and enterprises are separate and unrelated enterprises . . .") (note and citations omitted).

authorities. Fraud was the alleged purpose of each enterprise and defendants' plans each depended on (1) concealment of their customers' purchases from state tax authorities; (2) informing their customers of defendants' policies of concealment; and (3) concealing the purchasers' tax liability from the purchasers. Each time a defendant used the mails or wires to effect a cigarette sale to City residents and then failed to file a record of the sale with State tax authorities, per statutory requirements, mail or wire fraud was committed. Defendants moved to dismiss under *Riverwoods* and plaintiff responded, citing *Cedric*. The court began its analysis by summarizing the allegations relevant to defendants' Statutory Distinctness defense:

Plaintiff alleges that the 16 Defendants (who are both corporations and natural persons) are associates of seven named Internet cigarette enterprises. . . . It further alleges that the enterprises are comprised of individuals with a common purpose, a continuity of structure and personnel, and a consensual decision-making structure that is used to engage in conduct that is both legal and illegal. . . . Plaintiff also states in its RICO Statement that "No individual or business entity alleged to be a liable person herein is the same entity as the enterprise."⁴²⁷

The court then summarized defendants' distinctness defense:

The Dirtcheap Defendants argue that the Plaintiff's identification of various enterprises fails because it "cannot identify any 'enterprise' apart from the Defendants themselves." . . . The Dirtcheap Defendants further argue that each enterprise alleged by the Plaintiff is comprised of a corporation and its

⁴²⁷ *Cyco.net*, 2005 WL 174482, at *16.

officers and employees, which is fatal to its claims. . .
 The Multistate Defendants argue along similar lines,
 specifying that officers and employees of a business
 are not separate persons from their corporation and
 regularly carrying out their business does not
 constitute a separate enterprise. . .⁴²⁸

District Judge Batts concluded *Cedric* was inapposite, noting observed that the Supreme Court had differentiated the facts in *Cedric*, where Don King, an employee, was the "person" and the defendant corporation was alleged to be the RICO "enterprise," from cases, like *Riverwoods*, where the "person" was allegedly the corporation and the "enterprise" allegedly an aggregate entity, i.e., the corporation and its employees and agents. Judge Batts found this distinction accorded with *Riverwoods*' rule that a corporate entity can be a defendant and an enterprise, but only where the corporation "associates with others to form an enterprise that is sufficiently distinct from itself," and where "there is only a partial overlap between the RICO person and the RICO enterprise."⁴²⁹ Judge Batts cited *Riverwoods*' rule that where employees of a corporate entity are merely conducting the business of the corporation, distinctness is not satisfied. Judge Batts distinguished *Cullen v. Margiotta*,⁴³⁰ which had involved three legally separate entities that could be differentiated from the enterprise-group, from *Riverwoods*, in which individual defendants acted on behalf of their single corporate

⁴²⁸ *Id.*

⁴²⁹ *Id.*, at *17 (quoting *Riverwoods*, 30 F.3d at 344).

⁴³⁰ See *supra* notes 121-23 and accompanying text.

employer, which was part of an alleged association in fact enterprise.

Judge Batts, relying on *Riverwoods*, concluded the Distinctness Requirement was not satisfied and that *Cedric* was intended to govern the different situation in which a corporation was alleged to be an enterprise under a natural person's control:

Plaintiff alleges that a predicate act of mail or wire fraud occurs "when the enterprise is directed to conceal cigarette sales from state tax authorities by failing to file Jenkins Act reports or directed to effect sales by means of misrepresentations." . . . *However, the "persons" associated with the enterprises—those who "direct" the enterprises to conduct these activities—are none other than the 16 named Defendant corporations and their officers and employees. . . . Plaintiff has not shown that the persons who conduct the affairs of the enterprises and the enterprises themselves are distinct. Instead, all the entities that comprise the enterprise are Defendants.*⁴³¹

Judge Batts held that the conclusion that the Distinctness Requirement was not satisfied was supported by post-*Cedric* cases decided in New York's federal courts, but a close reading of these cases shows they do not support the outcome in *Cyco.net*.⁴³²

Panix Promotions, Ltd. v. Lewis,⁴³³ for example, merely held that *Cedric* would control where plaintiff alleged that a natural person controlled an association in fact enterprise comprised of corporation

⁴³¹ *Cyco.net*, 2005 WL 174482, at *18 (note and citations to complaint omitted) (emphasis added).

⁴³² *Id.*, at *19.

⁴³³ No. 01-CIV-2709 (HB), 2002 WL 72932 (S.D.N.Y. Jan. 17, 2002). See *infra* notes 493-96 and accompanying text (discussing *Panix Promotions*, in detail).

and its officers (not just a corporation enterprise, as in *Cedric*), but that *Riverwoods/Discon* would control where a corporation was alleged to be the "person" controlling an association in fact.

In *Sony Music Entertainment Inc. v. Robison*,⁴³⁴ Sony sued a rock group which counterclaimed under RICO alleging Sony was a RICO person controlling an association consisting of companies, societies, record clubs and other persons engaged in the distribution of sound recordings. Citing *Cullen* and *Riverwoods*, the district judge held that although Sony was alleged to be part owner of one business that was named as one member of the association in fact, no violation of the Distinctness Requirement was stated because Sony was not alleged to have been the enterprise, just a part owner of one member, so there was merely a partial overlap, an outcome which does not support the outcome in *City of New York*.

In *G-I Holdings, Inc. v. Baron & Budd*,⁴³⁵ plaintiff alleged a law firm conducted an association-in-fact enterprise called the "B & B Enterprise," comprised of the law firm, various local counsel, and doctors and/or unions. Upholding the allegation, the court concluded it need not determine *Cedric*'s effect on the pleading because, under pre-*Cedric* cases, the enterprise-person allegation would have survived, a holding which does not lend support *Cyco.net*.

In *Stolow v. Greg Manning Auctions Inc.*,⁴³⁶ plaintiff alleged an enterprise comprised of nine corporations and seven individuals but did not alleged all the individuals were employees or agents of

⁴³⁴ No. 01-6415, 2002 WL 272406 (S.D.N.Y. Feb. 26, 2002).

⁴³⁵ 238 F. Supp. 2d 521 (S.D.N.Y. 2002).

⁴³⁶ 258 F. Supp. 2d 236, 247 (S.D.N.Y. 2003).

the corporation; it alleged the enterprise was “an amalgam of unrelated individual defendants and corporations.” The court distinguished *Riverwoods* on the ground that some enterprise members were “unrelated,” creating “distinctness” and sustained the pleading.

In *Moses v. Martin*,⁴³⁷ the court sustained a RICO claim against a corporation, the Deborah Martin Agency, Inc., and its principal, Deborah Martin. Judge Batts distinguished *Moses* because the “persons” were individuals, not corporations, and the “enterprise” was a corporation, not an association in fact. *Moses* did not address how an association in fact enterprise comprised of a corporation and its officers, with the corporation identified as the person controlling the association, should be treated.

Citing the above cases, Judge Batts attempted to reconcile *Cedric* and *Riverwoods*:

[W]hile Plaintiff is correct that it is possible for an entity to be both a RICO person and a member of a RICO enterprise, the enterprise must meet the distinctness requirement, i.e., that other entities in the enterprise are not defendants or that the entities that comprise the enterprise are different corporations or where an employee is alleged to be the person and the company is alleged to be the enterprise. Here, Plaintiff is alleging that each of the named Defendants is the “person” and those same Defendants are the entities that comprise the various enterprises. The Court finds that the Plaintiff has not sufficiently alleged individual “persons” who are distinct from the respective “enterprises.” Viewing the Complaint in the light most

⁴³⁷ No. 04 Civ. 1533, 2004 WL 2809198 (S.D.N.Y. Dec. 3, 2004).

favorable to the Plaintiff, as the Court must, the Court holds that the distinctiveness requirement is not met here.⁴³⁸

3. *The Third Circuit*

Jaguar Cars confirmed the applicability of the Distinctness Requirement to business entity enterprises but left unaddressed how its Statutory Distinctness rule would be applied to association in fact enterprises with a business entity member. Some cases in the Third Circuit interpret *Jaguar Cars* rule as applying to association in fact enterprises comprised of corporations and their employees/officers (not just corporation enterprises) just as some cases have interpreted *Riverwoods*, an association in fact enterprise case, as being applicable to business entity enterprises, especially corporations.

In *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*,⁴³⁹ plaintiff alleged an association in fact enterprise comprised of a corporate entity, a wholly owned subsidiary, and certain employees of the corporate defendants. Each was an alleged RICO person directing the activity of the association in fact enterprise. Defendants argued *Jaguar Cars* was inapplicable to association in fact enterprises but Judge Newcomer disagreed:

⁴³⁸ *Cyco.net*, 2005 WL 174482, at *20. See also *Advance Relocation & Storage Co., Inc. v. Local 814, Intern. Broth. of Teamsters, AFL-CIO*, 2005 WL 665119, at *8-9 (E.D.N.Y. Mar. 22, 2005). "Extortion Enterprise" consisting of association in fact among defendants whose purpose was to threaten job owners if they failed to use a Local 814-affiliated moving company and obtain property from the job owners, and a second enterprise, the "Local 814 Enterprise," consisting of all defendants except Local 814, were properly pleaded because where a corporate employee acts within the scope of his authority and allegedly conducts the corporation's affairs in a RICO-forbidden way, the employee is distinct from the corporation for RICO purposes. Implicit in the holding is that the "criminal quality" of corporate conduct renders the criminal actor "distinct" even for conduct within the scope of agency. *Id.*

⁴³⁹ No. 95 Civ. A. 1698, 1995 WL 455969 (E.D. Pa. July 27, 1995).

No defendant is alleged to be both a RICO person and the RICO enterprise; they are all alleged to be both RICO person and component of the RICO enterprise. This Court can discern no principled distinction between *Jaguar Cars*, where the corporation was held distinct from its officers/ employees despite the fact that a corporation is nothing more than a legal fiction unable to act except through its officers/employees, and the instant case, where the alleged association in fact may be regarded as distinct from its members even though it only acts through one or more of the members. . . . No one corporate defendant is alleged to be the enterprise and a person; if this were so, the allegations would fail for lack of distinctiveness under *Jaguar Cars*. The complaint alleges, however, that each corporation is only a portion of the enterprise, being one member of an association in fact. This differentiation is a vital one in terms of conceptualizing the distinctiveness element.⁴⁴⁰

Defendants cited *Brittingham* for the proposition that an association of individuals or entities conducting a corporation's normal affairs is not distinct from the corporation. Because all members of the association in fact "share corporate identity," they argued, the members could not be distinct entities.⁴⁴¹ Judge Newcomer rejected Defendants' argument, holding that this aspect of *Brittingham's* rationale did not survive *Jaguar Cars*. Thus, the legal distinctness between corporations and their controlling officers would satisfy Statutory Distinctness Requirements for both corporate entity enterprises, such as that pleaded in *Jaguar Cars*, and also association

⁴⁴⁰ *Id.*, at *6-7 (emphasis added).

⁴⁴¹ *Id.*, at *7.

in fact enterprises.⁴⁴²

Indeed, *Brittingham* had held that identification of an enterprise as an association in fact or business entity should not affect inquiry into whether the alleged enterprise was distinct from the defendant.⁴⁴³ In *Lorenz*,⁴⁴⁴ the Third Circuit recognized that its holding in *Brittingham* "did not depend upon whether the enterprise was an association in fact, but upon whether it was a distinct entity from the defendant."⁴⁴⁵ Consistent with *Brittingham*'s and *Lorenz*'s refusal to articulate different distinctness rules for different species of enterprise, *Jaguar Cars* continues to be liberally applied to association in fact enterprises and business entity enterprises, at least where natural persons are alleged enterprise members who direct enterprise activity.

Where an association in fact is pleaded solely among natural persons, however, courts have dismissed enterprise/person pleadings, even after *Cedric*. For example, in *Stursberg v. Todi*,⁴⁴⁶ plaintiff sued a lender and two attorneys that represented it in a number of prior litigations, alleging a prior suit was really an effort to cover up the attorney's negligence in improperly negotiating a settlement on the lender's behalf. Plaintiff pleaded that the two attorneys and the lender were each RICO persons that controlled an association in fact

⁴⁴² *Id.*

⁴⁴³ *Brittingham*, 943 F.2d at 300-01 ("definition does not affect the separate inquiry into whether the alleged enterprise is distinct").

⁴⁴⁴ 1 F.3d 1406 (3d Cir. 1993).

⁴⁴⁵ *Id.* at 1412. *Jaguar Cars*'s distinctness analysis appears to have been articulated without regard to whether association in fact enterprises or business entity enterprises are the pleaded vehicle of RICO misconduct.

⁴⁴⁶ No. 04 Civ.A. 1333, 2004 WL 2244539 (E.D. Pa. Oct. 1, 2004).

enterprise, comprised of themselves, engaged in a pattern of mail and wire fraud. The court, citing *Cedric* and *Jaguar Cars*, nevertheless, dismissed the RICO claims:

[P]laintiff's complaint does not aver that the individual defendants are in any way separate and distinct from the alleged racketeering enterprise. To the contrary, given that Plaintiffs allege only that the three defendants "have together formed and operated an association-in-fact enterprise and have together conducted the affairs of that enterprise through a pattern of racketeering activity," we can only speculate as to what form the "enterprise" purportedly takes in this case or as to how each defendant directly participated. Given the Supreme Court's recent affirmation that to establish liability under Section 1962(c) one must allege and prove the existence of two distinct entities: (1) a "person" and (2) an "enterprise" that is not simply the same "person" referred to by a different name, we simply cannot find that pleading requirement to have been met here. *See, Cedric Kushner Promotions, supra*. Accordingly, we conclude that the plaintiffs have not pled a viable claim under Section 1962 (c) of RICO and Count VI is dismissed with prejudice.⁴⁴⁷

4. *The Seventh Circuit*

In early cases, the Seventh Circuit liberally construed the relationship between corporations and their officers and employees. *State v. Robinson*⁴⁴⁸ held that the president and controlling shareholder of a corporation-enterprise were distinct from the

⁴⁴⁷ *Id.*, at *6.

⁴⁴⁸ 8 F.3d 398 (7th Cir. 1993).

corporation enterprise,⁴⁴⁹ the same conclusion reached in *Jaguar Cars*. In *Ashland Oil, Inc. v. Arnett*,⁴⁵⁰ the owners of Arnett were held distinct from their incorporated business. While these early cases dealt with business entity enterprises, not association in fact enterprises, plaintiffs could easily have repleaded their business entity enterprise allegations as association in fact enterprises, if more favorable rules would have applied.

Association in fact enterprises comprised of partnerships are subject to the same rules as enterprises comprised of other business entities. In *Richmond*,⁴⁵¹ plaintiff pleaded an association in fact enterprise called the "Nationwide Group" comprised of a limited partnership (Cassel, a sales finance agency), a corporate general partner of Cassel (NAC, also a minority Cassel owner) and Cassel's majority partner and owner (Nationwide Acceptance), all under common control, and a second enterprise, comprised of the same members as the first enterprise, with the addition of some unnamed car dealers. Cassel, NAC and Nationwide Acceptance were each alleged persons controlling both alleged enterprises. Plaintiff, however, made no showing that any members of the association in fact, other than Nationwide Acceptance and Cassel, conducted the affairs of any enterprise. The Seventh Circuit, applying a *Riverwoods/Brittingham* analysis, held that plaintiff's:

claim begins and ends with the fraud allegedly committed by Nationwide Acceptance and Cassel.

⁴⁴⁹ *Id.* at 407.

⁴⁵⁰ 875 F.2d 1271, 1280 (7th Cir. 1989).

⁴⁵¹ 52 F.3d 640 (7th Cir. 1995).

There is no showing that other members of the alleged association in fact participated in the fraud, or that the persons, Nationwide Acceptance and Cassel, conducted the affairs of either of the alleged enterprises (rather than their own affairs) through a pattern of racketeering activity . . . The amended complaint's failure to present an enterprise separate and distinct from the persons sought to be held liable is a proper basis for its dismissal.⁴⁵²

Richmond, following *Brittingham*, held that before members can be properly alleged as part of an enterprise, such members must actually have participated in the misconduct. Plaintiff made no such showing and the claim failed.⁴⁵³ Regardless of whether plaintiff pleads an association in fact enterprise comprised of a business entity and its officer, directed by the officer, or a business entity enterprise, controlled by an officer, family resemblance to the Infiltration Prototype will probably be the central inquiry, in the Seventh Circuit.

In *Newkirk v. Village of Steger*,⁴⁵⁴ plaintiffs, former employees of the Village of Steger Police Department ("SPD"), alleged the SPD police chief and two officers waged a vendetta against them, alleging discrimination, retaliation and RICO direct and conspiracy violations based on extortion and other predicates. Plaintiffs alleged that defendants, as well as "others known and unknown to Plaintiffs," were associated in fact, constituting a 1962(c)

⁴⁵² *Richmond*, 52 F.3d at 647.

⁴⁵³ See generally *Epps v. The Money Store, Inc.*, 1997 U.S. Dist. LEXIS 17964, at *12-16 (N.D. Ill. Sept. 30, 1997) (relying on *Richmond* and *Jaguar Cars*, sustained an enterprise comprised of The Money Store, a corporation, and officers, alleged to be RICO persons).

⁴⁵⁴ 2004 WL 2191589 (N.D. Ill. Sept. 24, 2004).

enterprise. The court cited *Cedric*, but found plaintiff, nevertheless, failed the distinctness requirement.⁴⁵⁵

Plaintiffs allege that all Defendants . . . were associated in fact and constituted a separate "enterprise." . . . Whether Plaintiffs allege that the enterprise consisted of an association-in-fact of all Defendants, or merely the Village and the SPD, the court concludes that Plaintiffs have not identified an enterprise that is distinct from Defendants themselves. If Plaintiffs believe that the Village and the SPD constituted the enterprise, their claim fails, for, as noted, a RICO defendant must be separate and distinct from the enterprise.⁴⁵⁶

The court did not explain why the police chief and the two other individual defendants were non-distinct, given they were separate legal entities under *Cedric*.⁴⁵⁷ Generally, if plaintiff wishes to place liability in the business entity by alleging it is a member of an association in fact enterprise, it must allege that the business entity played a distinct role and made its own contribution, independent of its officer's conduct, to perpetrating or concealing the wrongdoing.

5. Summary

Analysis of association in fact enterprises comprised of corporations or other business entities and their officers/employees have been governed largely by the same rules as business entity

⁴⁵⁵ *Id.*, at *10.

⁴⁵⁶ *Id.*, at *14-16.

⁴⁵⁷ The court provided an alternative explanation, i.e., that the RICO allegation failed for lack of a proper pleading of organizational structure. This argument, however, appeared to be addressing the possibility that the pleading was actually attempting to articulate a broader association in fact enterprise, and was not an amplification of the court's views on Statutory

enterprises controlled by their officers and employees. Courts in the Second Circuit have long viewed the dispositive issue as one of agency. Whether enterprise members or RICO persons are “distinct” has depended on whether the alleged “agents” have acted “through” the corporation or business entity which is the central player in the wrongdoing.⁴⁵⁸ Judge Rakoff has suggested the question is one of “operative identity”—an inquiry echoing Seventh Circuit functionalist themes.⁴⁵⁹

In the Third Circuit, *Jaguar Cars*’ rule has been applied to association in fact, as well as business entity enterprises. In the Second and Third Circuits, efforts to distinguish business entity from association in fact entity enterprises, involving corporations and their employees, have generally failed. In the Seventh Circuit, association in fact pleadings involving corporations and their employees or officers have been sustained where the interrelationship of corporation and officers is functionally no different from a enterprise comprised of a single corporation controlled by a corporate officer or employee. In such cases, the structural relationships among the

Distinctness.

⁴⁵⁸ Corporate employees act “through” their corporation when, by virtue of powers they wield as a result of their corporate office (or through their access to corporate resources and instrumentalities) they bring about events. In the case of nonemployee agents, for example, attorneys, conduct is engaged in “through” the corporation when it is paid for with corporate resources or is directed by the corporation.

⁴⁵⁹ Exactly what Judge Rakoff meant by the expression “operative identity” in *NRB* is not clear. See *supra* notes 402-03 and accompanying text. It seems to imply that where separate legal actors “operate” as a single unit to bring about the same RICO event, through agency or agency-like relationships, because they are not operating as the distinct entities their legal status would otherwise indicate, they will not be treated as distinct entities for RICO-purposes. In Seventh Circuit terms, their legal status as distinct entities would be “incidental” to their function within an alleged enterprise and causal role in bringing about or concealing RICO events. No case appears to have addressed whether any contribution a defendant makes to perpetrating or concealing a RICO violation that renders it distinct under

RICO person and association in fact enterprise could present a strong family resemblance to an "infiltration" by organized crime.⁴⁶⁰

**B. Association In Fact Enterprises Between
Non-related Corporations and/or Their Officers,
Directors or Employees**

1. Introduction

In the Second Circuit, three tests govern the analysis of Statutory Distinctness in the context of association in fact enterprises composed of multiple, nonrelated corporations and/or their officers or employees, with the corporation(s) and/or their officer or employees as defendant persons directing enterprise activity. First, courts examine whether the business entities are controlled by a "single corporate consciousness"—if they are so controlled, Statutory Distinctness may be precluded (the "Single Corporate Consciousness Test"). Second, courts examine whether the nature of the businesses are sufficiently delineated to satisfy Statutory Distinctness (the "Insufficient Delineation Test"). Third, courts examine the extent of overlap between the enterprise and the members constituting it (the "Overlap Test").

Plaintiffs generally attempt to bring such pleadings within *Cullen* or *Securitron Magnalock*. With respect to *Cullen*-style defenses, RICO claims founder if defendants are able to show agency

Distinctness Requirement, would satisfy *Reves*'s operation and management test.

⁴⁶⁰ The combination of corporation and lower level employee would probably fail for either failure to satisfy *Reves*-control of enterprise activity or inability to show sufficient

relationships or sufficient interrelationship between corporate enterprise members to strain analogy to (clearly distinct) *Cullen* type defendant entities. With respect to *Securitron Magnalock*-style arguments, the question frequently comes down to whether plaintiff's pleading satisfactorily alleges different businesses being conducted by different companies, with inquiry sometimes focusing on the ability of each business to independently benefit from challenged activity. In *Securitron Magnalock*, the Second Circuit also found that enterprise activity was not the "regular business" of any defendant entity and the Nonregular Business Test was applied and found satisfied. The Third Circuit's law regarding association in fact enterprises between nonrelated corporations and/or their officers or employees focuses on the "overlap" between the person and enterprise. The Seventh Circuit requires pleading and proof of something approximating the "wresting of control" from a legitimate business, within the infiltration paradigm.

2. *The Second Circuit*

a. The Single Corporate Consciousness Test

The Single Corporate Consciousness Test provides that if only one entity is actually directing the activity of enterprise members, regardless of the corporate or natural member's distinct legal entity status, they will be treated as one nondistinct entity for Distinctness Requirement purposes. *Discon*, for example, dismissed

enterprise allegations where “the individual defendants were acting within the scope of a single corporate structure, guided by a single corporate consciousness.”⁴⁶¹

In *China Trust Bank of New York v. Standard Chartered Bank, PLC*,⁴⁶² a leading pre-*Cedric* case applying the Single Corporate Consciousness Test, plaintiff alleged that a foreign bank and its United States branch were an enterprise. Plaintiff’s pleading, while identifying legally separate members, also alleged, in effect, that these entities operated within the same corporate structure, guided by a single corporate consciousness, with the foreign corporation using its United States branch to conduct its own United States business. The district judge, relying on *Riverwoods* and *Discon*, dismissed the claim on the ground that the corporation and branch were not distinct for RICO enterprise purposes.

In *Moy v. Terranova*,⁴⁶³ plaintiffs Adelphi Institute, Inc. former students, alleged defendants fraudulently induced them to enroll and ask for state and federal assistance. Defendants’ fraudulent activities were allegedly perpetrated through various enterprises. One was an association in fact comprised of vocational institutions called the “interstate network” and another was an association in fact comprised of Adelphi’s New York facilities, controlled by defendant Terranova, Adelphi’s chairman, CEO and principal shareholder. The district judge first discussed the rules set

⁴⁶¹ *Discon*, 93 F.3d at 1064.

⁴⁶² 981 F. Supp. 282 (S.D.N.Y. 1997).

⁴⁶³ No. 87 CV 1578(SJ), 1999 WL 118773 (E.D.N.Y. Mar. 2, 1999).

forth in *Riverwoods* and *China Trust*.⁴⁶⁴ He then rejected plaintiffs' facilities "enterprise" claim, noting *Riverwoods*, through interpretation in *Discon* and *China Trust*, precludes distinctness where even legally separate entities act within the scope of a single corporate structure, guided by a single corporate consciousness.⁴⁶⁵ In *China Trust*, the companies ran the same business, with a single consciousness controlling activity, in different locations. *Securitron Magnalock* was distinguished as it involved different companies with different businesses, allowing a "partial overlap" between the companies and a common shareholder, taking the case outside *Riverwoods*.

b. The "Delineation of Distinct Entities" Test

Second Circuit district courts frequently dismiss RICO claims where plaintiff fails to delineate distinct entities in association in fact enterprises. In *Sluka v. Herink*,⁴⁶⁶ plaintiff pleaded an association in fact enterprise comprised of multiple corporations, together with officers, employees and agents of those corporations, engaged in the business of selling bakery franchises. Unlike *Cullen*, where plaintiffs adequately alleged distinct entities, the *Sluka* Court held plaintiffs did not adequately define the differences between the corporate entities constituting the enterprise. The *Sluka* plaintiffs alleged one corporate

⁴⁶⁴ *Moy*, 1999 WL 118773 at *3 (citing *Riverwoods Chappaqua Corp. v. Marine Midland Bank*, 30 F.3d 339 (2d Cir. 1994); *China Trust Bank of New York v. Standard Chartered Bank*, 981 F. Supp. 282, 286 (S.D.N.Y. 1997)).

⁴⁶⁵ *Moy*, 1999 WL 118773 at *5 (Plaintiffs' enterprise allegation failed the Distinctness Requirement because they had not alleged that the facilities were independent legal entities).

⁴⁶⁶ No. 94 CV 4999, 1996 WL 612462 (E.D.N.Y. Aug. 13, 1996).

entity was in the "retail" end of the subject bakery business and another involved in manufacturing and distribution, but plaintiffs undermined their own pleading by also alleging the retail corporation owned the manufacturing plant. Plaintiff, in an effort to show concerted action between constituent companies, inadvertently pleaded an alter-ego relationship between the corporate entities, rendering the pleading vulnerable to a Distinctness Requirement defense.⁴⁶⁷

Although the *Sluka* plaintiffs attempted to bring their pleading within *Securitron Magnalock*, Judge Ross held that the corporations before him, unlike the member entities in *Securitron Magnalock*, were pleaded as a "single entity, conducting a single business,"⁴⁶⁸ violating the Distinctness Requirement:

If the corporate defendants are merely separate entities on paper, however, a much more logical and natural view is that . . . the . . . individual defendants were conducting the affairs of each of the . . . corporations through a pattern of racketeering activity, or, alternatively, that they were conducting the affairs of an association-in-fact of all the . . . corporations that is not distinct from any individual corporation. In either case, the "enterprise" plaintiffs have alleged is not distinct from the . . . corporations, and the corporations are therefore not proper parties to this case.⁴⁶⁹

⁴⁶⁷ This error is common in association in fact pleadings. See e.g., *Moy*, 1999 WL 118773 (dismissing claim that Adelphi Institute, Inc. was a corporation enterprise controlled by defendant Terranova, Adelphi's chairman, CEO and principal shareholder, on ground that complaint had actually pleaded an alter ego claim, prefacing discussion with citations to *Riverwoods*; *China Trust Bank of New York*, 981 F. Supp. at 286 and *Hitchcock v. Woodside Literary Agency*, 15 F. Supp. 2d 246, 250 (E.D.N.Y. 1998)).

⁴⁶⁸ *Sluka*, 1996 WL 612462, at *6.

⁴⁶⁹ *Id.*

Judge Ross, noting *Cullen* did not involve an association in fact enterprise of interrelated corporations and their employees and agents,⁴⁷⁰ held that *Riverwoods* precludes *Cullen* from being “interpreted to mean that a corporation and its own agents can form an association-in-fact enterprise that is distinct from the corporation.”⁴⁷¹ Because plaintiffs had pleaded that the regular business of the corporations was franchise sales,⁴⁷² and that the fraud at issue was in connection with those sales,⁴⁷³ plaintiffs failed *Riverwoods*’ Nonregular Business Test. While the *Sluka* plaintiffs cited pre-*Riverwoods* law to attempt to avoid dismissal,⁴⁷⁴ Judge Ross held that plaintiff’s cases were not consistent with the Second Circuit’s more recent statement of the law, in *Riverwoods*.

In *Mayfield v. General Electric Capital Corp.*,⁴⁷⁵ plaintiffs alleged an enterprise between General Electric Capital Corp. (“GE”) and certain “merchant agents” who sold goods and services financed by GE. Plaintiffs attempted to bring the case within *Securitron Magnalock*. Judge Batts, distinguishing *Securitron Magnalock*, noted the Second Circuit had concluded that alleged enterprise activities

⁴⁷⁰ *Id.*, at *7.

⁴⁷¹ *Id.*

⁴⁷² *Id.*, at *6 (complaint “merely states that they are all alter egos of one another, engaged in the business of franchising Glendale Bake Shop stores”).

⁴⁷³ *Sluka*, 1996 WL 612462, at *1 (“Each group of plaintiffs essentially alleges that it was duped into purchasing a Glendale Bake Shop franchise through a series of deceptions employed by defendants.”).

⁴⁷⁴ *Id.*, at *7 (cases pre-dating *Riverwoods*, and contrary to it, not controlling, rejecting reliance on *Giuliano v. Everything Yogurt*, 819 F. Supp. 240 (E.D.N.Y. 1993) and *Center Cadillac v. Bank Leumi Trust Co.*, 808 F. Supp. 213, (S.D.N.Y. 1992), both reaching conclusions contrary to *Riverwoods*).

⁴⁷⁵ No. 97 CIV 2786 (DAB), 1999 WL 182586 (S.D.N.Y. Mar. 31, 1999).

were distinct from regular activities of the enterprise members and no agency relationship between the participants had been alleged with respect to the execution of the activities. In *Mayfield*, the activities carried out by the corporation and the corporation's agents, were their regular activities. Citing the Third Circuit's decision in *Brittingham*, Judge Batts rejected the view that the distinctness requirement could be met by merely alleging the agent was a separate corporation.⁴⁷⁶

Whether corporate enterprise members are "adequately delineated" may be a function of their decision making structure. The Single Corporate Consciousness Test and the Delineation of Distinct Entities Test are, in many cases, interrelated. If a court concludes that enterprise activity has not been effected through "interrelated" companies that are "agents" of a single company, *Securitron Magnalock* will probably control. For example, in *American Special Risk Ins. Co. v. Greyhound Dial Corp.*,⁴⁷⁷ plaintiff alleged that a corporation, through related *but distinct* corporate entities, carried out enterprise affairs. Judge Patterson, distinguishing *Riverwoods*, relied on *Securitron Magnalock*, sustaining the pleading.⁴⁷⁸

⁴⁷⁶ *Id.*, at *9 Many cases involving similar pleadings have been dismissed under *Riverwoods*. See, e.g., *Bernstein v. Misk*, 948 F. Supp. 228, 236 (E.D.N.Y. 1997) (holding that where plaintiff pleaded an enterprise composed of individuals and various related companies involved in the procurement of fraudulent financing for the acquisition of commercial real estate, the complaint failed to satisfy the Distinctness Requirement under *Riverwoods* and *Bennett*); *Katzman v. Victoria's Secret Catalogue*, 167 F.R.D. 649, 658 (S.D.N.Y. 1996) (analogizing the case to *Riverwoods* Judge Sweet held that where plaintiff alleged an association in fact enterprise composed of The Limited, Inc., companies in which it had a controlling interest, plaintiff ignored the Distinctness Requirement thus requiring dismissal)).

⁴⁷⁷ No. 90 Civ. 2066 (RPP), 1996 WL 551659, at *83-84 (S.D.N.Y. Sept. 26, 1996).

⁴⁷⁸ *Id.*, at *83-84.

c. The Overlap Test

With respect to “overlap” issues, Second Circuit district courts, consistent with *Cullen*, have permitted partial overlap. In *First Interregional Advisors Corp. v. Wolff*,⁴⁷⁹ plaintiff alleged the enterprise was the named defendant and various co-conspirators who, while being identified in the complaint as part of the association in fact, were not named as defendants. Judge Chin first distinguished cases holding that a solitary entity cannot be the entire enterprise and the person controlling it, from cases holding that a corporation associated with its employees or agents carrying on regular corporate affairs cannot be RICO enterprises.⁴⁸⁰ While he noted partial overlap between the pleaded enterprise and defendants, he cited *Cullen* for the proposition that some overlap was permissible,⁴⁸¹ distinguished *Riverwoods*, and sustained the pleading.

In *Dornberger v. Metropolitan Life Ins.*,⁴⁸² plaintiffs alleged that members of an enterprise were corporate agents carrying out regular business. The pleading was saved by plaintiffs’ addition of governmental entities, creating a “partial overlap.”⁴⁸³

A few cases have even permitted “total overlap.” In *Colony at Holbrook, Inc.*,⁴⁸⁴ each alleged enterprise member was named as a defendant but this “did not preclude the existence of a valid

⁴⁷⁹ 956 F. Supp. 480 (S.D.N.Y. 1997).

⁴⁸⁰ *Id.* at 488.

⁴⁸¹ *Id.* at 488 (citing *Cullen*, 811 F.2d 698 (2d Cir. 1987)).

⁴⁸² 961 F. Supp. 506 (S.D.N.Y. 1997).

⁴⁸³ *Id.* at 524.

⁴⁸⁴ 928 F. Supp. 1224 (E.D.N.Y. 1996).

enterprise.”⁴⁸⁵ Citing *Cullen*, Judge Spatt stated that because the Second Circuit had held that a defendant could be both a RICO person and one of several members of a RICO enterprise, even a total overlap between defendants and enterprise members was permissible.⁴⁸⁶

In *Wiwa v. Royal Dutch Petroleum Co.*,⁴⁸⁷ for example, plaintiffs alleged a RICO enterprise between the two separately incorporated corporate defendants, Shell Nigeria (“Shell”) and Willbros West Africa, Inc. (“Willbros”), and certain Nigerian authorities. Plaintiffs alleged that to facilitate oil extraction, defendants subjugated a local populace through a pattern of murder, rape and other atrocities. Defendants sought to dismiss the allegations, arguing plaintiffs had merely alleged an enterprise that consisted of defendants and their agents, and, as such, the “association” failed to satisfy the Distinctness Requirement, under *Riverwoods* and *Discon*.

The district court held that because the alleged “enterprise” included at least three separate entities, the two corporate defendants, Shell and Willbros, and, also, the Nigerian military, plaintiffs satisfied the Distinctness Requirement. Although defendants argued the Nigerian military could not be part of an enterprise with corporate defendants because plaintiffs had, elsewhere, alleged that the military functioned as the corporate defendants’ “agents,” the court observed

⁴⁸⁵ *Id.* at 1235-36.

⁴⁸⁶ *See id.* at 1235.

⁴⁸⁷ 2002 WL 319887, at *23 (S.D.N.Y. Feb. 28, 2002).

that the Second Circuit has left open the possibility that corporations and their agents or subsidiaries could be an “enterprise” if the alleged predicate acts were not committed within the scope of the agency relationship.⁴⁸⁸

The court continued to rely on the “scope of agency” analysis, despite its recognition that the *Cedric* Court had rejected it. Rejecting the argument that plaintiffs had not sufficiently alleged Willbros as part of the enterprise, the district court wrote:

The Court disagrees with defendants’ contention that plaintiffs have not alleged facts that support a finding that Willbros was part of the alleged RICO enterprise. Plaintiffs’ RICO statement alleges involvement by Willbros that is sufficient to support plaintiffs’ contention that Willbros formed part of the enterprise, at least through part of 1993. (RICO Stmt. at 21) In addition, even if Willbros was not a participant in the alleged “enterprise,” the Court knows of no requirement that an enterprise must involve more than two “persons.” See *Cedric Kushner Promotions*, 121 S.Ct at 2092 (recognizing a RICO enterprise constituting the president and sole shareholder).⁴⁸⁹

The district court expressly rejected defendants’ reliance on *Riverwoods* and *Discon*, as follows:

Defendants again rely on *Riverwoods* and *Discon* to support the proposition that the corporate defendants could not be part of an “association-in-fact” with their alleged agent, the Nigerian military. . . . [note omitted]. . . . Although *Riverwoods* and *Discon* foreclose the possibility that an RICO “enterprise” can

⁴⁸⁸ *Id.*, at *23 n.28 (citing *Riverwoods*, 30 F.3d at 344; *Discon*, 93 F.3d at 1064).

⁴⁸⁹ *Id.*, at *23 n.29.

be comprised of a corporation and its employees or subsidiaries in most situations, they do not preclude the possibility that two entities in a principal-agent relationship might also function as separate "persons" in a RICO "enterprise" when the agent-subsiary is not acting in the scope of the agency relationship. Moreover, the Supreme Court has recently suggested that, in certain circumstances, a corporation and its president can be considered an "enterprise" for RICO purposes, even when the alleged predicate acts were committed by the president "acting in the scope of his employment." *Cedric Kushner Promotions*, 121 S.Ct at 2092 ("[The Second Circuit's] critical legal distinction—between employees acting within the scope of corporate authority and those acting outside that authority—is inconsistent with [RICO's] basic statutory purpose."). Thus, although some authority weighs against recognizing an "enterprise" that is comprised of a corporation and its agents or subsidiaries, recent Supreme Court case law suggests that the "distinctiveness" requirement imposed by section 1962(c) is not as rigid as prior circuit precedent suggests. Given the facts of the instant case, the Court finds that plaintiffs have alleged facts sufficient to plead the existence of a RICO enterprise involving corporate defendants, Shell Nigeria, the Nigerian military, and perhaps Willbros.⁴⁹⁰

Although defendants' argued plaintiffs allegation that the Nigerian military functioned as corporate defendants' "agent," rendered its enterprise allegation defective, the court found plaintiffs had not relied on that "characterization" to support their RICO claims.⁴⁹¹ Although the court plainly perceived *Cedric* as

⁴⁹⁰ *Id.*, at *23.

⁴⁹¹ *Id.*, at *23 n.30.

“liberalizing” Distinctness Requirement analysis, it continued to understand distinctness through “scope of agency,” at least where plaintiff pleads that a number of corporate entities constitute a RICO enterprise.⁴⁹²

In *Panix Promotions, Ltd. v. Lewis*,⁴⁹³ defendant and third-party plaintiff Lennox Lewis (“Lewis”), the world heavyweight boxing champion and subject of a lawsuit by his promoters, alleged RICO counterclaims against his promoters, Panix Promotions, Ltd. (“Panix”), Panix of the United States, Inc. (Panix U.S.), and third-party claims against Panos Eliades (“Eliades”). Lewis’ promoters Panix and Panix U.S. had sued him for a variety of claims sounding in breach of contract. Lewis countered with RICO claims against Panix, Panix U.S. and third-party defendant Eliades, a shareholder in, and head of, the Panix companies. Lewis alleged three enterprises: (1) the Eliades Enterprise, an association-in-fact enterprise formed by Panix, Panix U.S., Eliades, and other persons employed by Eliades or Panix; (2) the Panix Enterprise, and (3) the Panix U.S. Enterprise. All three purported enterprises were alleged to have defrauded Lewis in various ways. The court sustained all of the enterprise allegations against a Distinctness Requirement challenge:

Lewis’ purported Panix and Panix U.S. Enterprises must stand as well, in light of the Supreme Court’s recent holding in *Cedric Kushner Promotions*. With respect to these enterprises, Lewis claims that Eliades participated in both the “Panix Enterprise” and the

⁴⁹² *Wiwa*, 2002 WL 319887, at *23; see also *United States v. Kim*, 303 F. Supp. 2d 150, 156-57 (D. Conn. 2004) (rejecting the argument that Government failed to establish an enterprise separate from the defendant, citing *Cedric* and *Riverwoods*).

⁴⁹³ *Panix*, 2002 WL 72932, at *1. See also *supra* note 433 and accompanying text.

"Panix U.S. Enterprise" through a pattern of racketeering. In *Cedric Kushner Promotions*, the Court held that an individual acting even within the scope of his authority for a corporation was distinct from the corporation, and thus could be subject to RICO liability. In a fact pattern not dissimilar from ours, the Court found that the defendant Don King, a boxing promoter, was a distinct "person" from the "enterprise", Don King Productions, which was a corporation that promoted boxers and of which King was president. See *Cedric Kushner Promotions*, 121 S. Ct. at 2091 ("The corporate owner/employee, a natural person, is distinct from the corporation itself . . . and we find nothing in the [RICO] statute that requires more separateness than that."). Eliades' relationship with Panix, and Panix U.S., provides a mirror image of the facts in *Cedric Kushner Promotions*. Consequently, I find the enterprise prong of the statute is satisfied with respect to the Panix Enterprise and Panix U.S. Enterprise.⁴⁹⁴

However, the district court rejected Lewis' additional assertions in his Third Counterclaim/Third-Party Claim that Panix U.S. participated as a "person" in the Panix Enterprise, and similarly, in his Fifth Claim/Fifth Third-Party Claim, that Panix participated as a "person" in the Panix U.S. Enterprise. Specifically, the district court noted:

The Second Circuit has held that such a construct, where a division or subsidiary of an "enterprise" is alleged to also constitute a distinct "person," cannot constitute a RICO claim. See *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1063-64 (2d Cir.1996) (holding that affiliated corporations are not "persons" distinct

⁴⁹⁴ *Panix*, 2002 WL 72932, at *6.

from an alleged “enterprise” consisting of the affiliated corporations), *rev’d in part on other grounds*, 525 U.S. 128 (1998); *Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir.1994) (affirming dismissal of a RICO claim that alleged a corporation was the person, and the corporation, together with all its employees and agents, was the enterprise). Therefore, Panix is not liable in connection with the Panix U.S. Enterprise, nor is Panix U.S. liable in connection with the Panix Enterprise. Neither Panix company, however, is insulated from liability with respect to their activity under the Eliades Enterprise, nor Eliades as to his activity under the Panix and Panix U.S. Enterprises.⁴⁹⁵

The district judge did not view *Cedric’s* adoption of the Separate Legal Identity Theory for corporation/officer enterprise/person combinations as authority in the context of subsidiaries or divisions. When such entities are alleged to be part of the enterprise and, also, alleged as RICO persons, the RICO claim will fail.⁴⁹⁶

3. *The Third Circuit*

a. *Overlap Between Person and Enterprise*

Overlap issues are treated inconsistently in the Third Circuit, with different judges taking the following positions: (a) total overlap between the person and enterprise is not permissible; (b) total overlap

⁴⁹⁵ *Id.*, at *6.

⁴⁹⁶ This is the same reading the Seventh Circuit has adopted. *See supra* notes 255-59 and accompanying text.

is permissible; (c) no overlap is permissible; and (d) some overlap is permissible.

(i) *Total Overlap Not Permissible*

In *Kaiser v. Stewart*,⁴⁹⁷ plaintiff alleged three enterprises, Summit National Life Insurance Company ("SNLIC"), Equitable Beneficial Life Insurance Company ("EBL") and an association in fact enterprise which included, among other persons, a partnership (ML&B), one of its partners (Stewart), its attorney (Harbaugh) and certain Stewart-owned entities.⁴⁹⁸ Plaintiffs alleged these individuals and entities were the "persons" conducting the enterprise's affairs in a scheme to acquire and syphon assets from the insurance companies, then in liquidation. Judge Bartle recognized that *Jaguar Cars'* district level progeny were in conflict on the overlap issue.⁴⁹⁹ Noting a complete overlap between members of the association in fact enterprise and persons controlling it, he rejected plaintiffs' argument that a complete overlap was permissible:

Simply put, the enterprise under Section 1962(c) cannot be either the victim or the wrongdoer. Since none of the three alleged enterprises (SNLIC, EBL, and the association in fact) would be separate and apart from both victims (SNLIC and EBL) and the wrongdoers (those named as the association in fact), the [plaintiff's] proposed amendment . . . would be futile.⁵⁰⁰

⁴⁹⁷ No. 96-66431, 1997 U.S. Dist. LEXIS 12788 (E.D. Pa. Aug. 20, 1997).

⁴⁹⁸ *Id.*, at *11-12 (providing a full listing of these entities).

⁴⁹⁹ *Id.*, at *26-30.

⁵⁰⁰ *Id.*, at *29-30.

(ii) *Total Overlap Permissible*

In *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*,⁵⁰¹ plaintiff alleged an association in fact enterprise of individual and corporate defendants, each of whom was simultaneously named as a RICO person. Judge Newcomer, rejecting defendants' argument that *Jaguar Cars* compelled dismissal, and, contrary to *Kaiser*, permitted a *total* overlap between the enterprise and person(s) controlling it:

No defendant is alleged to be both a RICO person and the RICO enterprise; they are all alleged to be both RICO person and component of the RICO enterprise. This Court can discern no principled distinction between *Jaguar Cars*, where the corporation was held distinct from its officers/ employees despite the fact that a corporation is nothing more than a legal fiction unable to act except through its officers/employees, and the instant case, where the alleged association in fact may be regarded as distinct from its members even though it only acts through one or more of the members. . . . A part of the whole does not share identity with the whole. . . . No one corporate defendant is alleged to be the enterprise and a person; if this were so, the allegations would fail for lack of distinctiveness under *Jaguar Cars*.⁵⁰²

Judge Newcomer noted that the complaint alleged each corporation was only a portion of the enterprise, that is, one member of the association in fact. He held this differentiation was "vital" in terms of "conceptualizing the distinctiveness element,"⁵⁰³ and

⁵⁰¹ *Brokerage*, 1995 WL 455969, at *1; *see supra* notes 439-42.

⁵⁰² *Id.*, at *6.

⁵⁰³ *Id.*

sustained the enterprise. In other words, because the association in fact was a legal entity that was different from each legal entity (component) that constituted the association, Statutory Distinctness was preserved under the Separate Legal Identity Theory, just as it was in *Jaguar Cars*, which applied the same rule in the different context of a corporate legal entity enterprise controlled by its officer.

In *Brown v. Siegal*,⁵⁰⁴ Judge Troutman liberally construed plaintiff to have properly alleged an association in fact enterprise between the president of Station WLTW ("Siegal") and certain volunteers associated with its "On Air Auction" ("auction volunteers"). These auction volunteers were also alleged to be defendants controlling the enterprise. This association in fact enterprise, he concluded, was "separate and distinct" from defendants themselves: "Construing the subsection (c) enterprise as the association in fact between Siegal and the auction volunteers and the subsection (c) persons as Siegal and the auction volunteers . . . satisfies the enterprise element."⁵⁰⁵ Although Judge Troutman noted that station WLTW could properly be included among defendants, he dismissed the claim against WLTW on other grounds. Like Judge Newcomer in *Brokerage Concepts*, he permitted *total* overlap.

In *Perlberger v. Perlberger*,⁵⁰⁶ Judge Padova held that an association in fact enterprise comprised of five individuals and two professional corporations satisfied the Distinctness Requirement. In

⁵⁰⁴ No. 94 Civ. A. 1829, 1995 WL 66860 (E.D. Pa. Feb. 13, 1995).

⁵⁰⁵ *Id.*, at *6.

⁵⁰⁶ No. 97 CIV. A. 4105, 1998 WL 76310 (E.D. Pa. Feb. 20, 1998).

a subsequent *Perlberger* decision,⁵⁰⁷ after dismissal of certain defendants resulted in association in fact enterprise comprised of only a law firm and its attorney principal, Judge Padova again held the enterprise pleading was permissible, even though all members of the association in fact were named as RICO persons, citing *Schuylkill Skyport Inn, Inc. v. Rich*.⁵⁰⁸

In *S&W Contracting Serv., Inc. v. Philadelphia Housing Authority*,⁵⁰⁹ Judge Dubois held: “After *Jaguar Cars*, it appears that a defendant may be liable for a violation of 18 U.S.C. Sec. 1962(c) so long as it is alleged to be one member of an association-in-fact enterprise.” Judge Dubois relied on *Hanrahan v. Britt*,⁵¹⁰ in which the Distinctness Requirement was satisfied where Amway was the alleged RICO person and the enterprise was alleged to be Amway and its network of distributors.⁵¹¹

In *Stewart v. Assocs. Consumer Discount Co.*,⁵¹² defendant

⁵⁰⁷ *Perlberger*, 1999 WL 79503.

⁵⁰⁸ *Id.*, at *2 (citing *Schuylkill Skyport Inn, Inc. v. Rich*, Civ. A. No. 95-3128, 1996 WL 502280, at *31-32 (E.D. Pa. Aug. 21, 1996)). Where plaintiff alleged an association in fact enterprise between corporate attorneys and their companies, Judge Cahn, citing *Jaguar Cars*’ liberalization of distinctness jurisprudence, held that while the corporate attorneys were pleaded to be both persons and part of the association in fact, distinctness was satisfied. *Id.* While *Schuylkill* focused on *Jaguar Car*’s implications for the Dual Role Theory, Judge Cahn did not hesitate to apply *Jaguar Cars* Statutory Distinctness rule to an association in fact enterprise. See also *Perlberger*, 1999 WL 79503, at *2 (citing *Miller v. Cohen*, Nos. Civ. A. 93-5371 and 94-2700, 1996 WL 560525, at *3 n.8 (E.D. Pa. Sept. 30, 1996) (holding an association in fact enterprise comprised of three corporations, an employee and certain individual defendants sustained noting that although the Third Circuit has held corporations are improper defendants where they are pleaded to be the entire enterprise and, also, a RICO person in a corporation enterprise pleading, they may be proper defendants, in an association in fact enterprise pleading, under *Glessner*, 952 F.2d at 710-12, and *Petro-Tech*, 824 F.2d at 1361)).

⁵⁰⁹ No. Civ. A. 96-6513, 1998 WL 151015, at *6 (E.D. Pa. Mar. 25, 1998).

⁵¹⁰ No. Civ. A. 94-4615, 1995 WL 422840 (E.D. Pa. July 11, 1995).

⁵¹¹ *Id.*, at *6.

⁵¹² 1 F. Supp. 2d 469 (E.D. Pa. 1998).

corporations were all alleged to be members of an association in fact enterprise. Noting that each of the corporations was alleged to have played a different role in the racketeering activity, and in reliance on *Brokerage Concepts*, *Schuylkill* and *Lorenz*, Judge Joyner sustained the enterprise.

In *State Farm Mut. Auto. Ins. Co. v. Midtown Med. Ctr. Inc.*,⁵¹³ the district judge, citing *Cedric*, held that even a complete overlap between the Defendant persons and the members of an association-in-fact enterprise does not defeat the Distinctness Requirement. Therefore, despite the fact that plaintiffs sued defendant persons and the corporations they "owned, operated or contracted with" and that the enterprise was comprised only of the named defendants, the enterprise was still separate and distinct from its constituent members. Citing *Perlberger*, the court concluded that a distinct enterprise existed even though the same persons named as defendants constituted the membership of the association-in-fact, a distinct enterprise was plead.

(iii) *No Overlap Permissible*

In *Klein v. Boyd*,⁵¹⁴ Judge Yohn refused to permit any overlap. Plaintiff had named Mercer Ltd. and Mercer Inc. as both RICO enterprises and RICO persons associated with the enterprises. Judge Yohn, without citing *Brokerage Concepts* or *Brown*, held the claim could not proceed with the pleaded enterprise/person structure.

⁵¹³ No. Civ.A. 02-7389, 2005 WL 627969, at *6-7 (E.D. Pa. Mar. 14, 2005).

⁵¹⁴ No. CIV. A. 95-5410, 1996 WL 230012 (E.D. Pa. May 3, 1996).

He noted, however, that plaintiff had also pleaded a claim against another person, an individual defendant. A RICO claim naming that other person as a RICO person was permissible.⁵¹⁵

(iv) *Partial Overlap Permissible*

Judge Cahn, in *Schuylkill Skyport Inn, Inc. v. Rich*,⁵¹⁶ in contrast to *Klein*, sustained an enterprise in which there was a partial overlap. Plaintiff pleaded an enterprise composed of two corporations or, alternatively, an association in fact composed of directors, officers, shareholders, corporate attorneys and “other defendants” (including, presumably, corporate defendants) with persons that included corporate attorneys and, apparently, the corporate entities’ officers and directors. Judge Cahn noted that, even under the pre-*Jaguar Cars* cases *Petro-Tech* and *Shearin*, distinctness could be satisfied where there was “some overlap” between the person and association in fact.⁵¹⁷ He held that because the attorneys were alleged to be RICO persons and, also, part of the association in fact, there was partial, but not complete overlap;⁵¹⁸ therefore, Statutory Distinctness was satisfied.⁵¹⁹

⁵¹⁵ *Klein*, 1996 WL 230012, at *11.

⁵¹⁶ No. CIV. A. 95-3128, 1996 WL 502280, at *31-32 (E.D. Pa. Aug. 21, 1996).

⁵¹⁷ *Id.*, at *32.

⁵¹⁸ *Id.* “In the instant case, Plaintiffs’ allegations that the Corporate Attorneys are both persons and part of the association in fact satisfies the distinctiveness requirement of Section 1962(c).”

⁵¹⁹ In *Gurfein v. Sovereign Group*, 826 F. Supp. 890 (E.D. Pa. 1993), plaintiff alleged an association in fact enterprise between corporate defendants, three partnerships and two individual defendants. While the corporations were affiliated with the partnerships, the individual defendants, general partners of three partnerships, were not officers of the corporations and, in fact, opposed partnership policies. The trial judge deemed the association in fact enterprise properly pleaded. *Id.* at 914-15. In *Crown Cork & Seal Co. v. Aschah*, Civ. No. 93-2933, 1994 WL 57217 (E.D. Pa. Feb. 18, 1994), plaintiff pleaded an

b. Overlap Involving Separate and Independent Corporations

Where separate and independent corporations are involved, overlap issues, even in the Third Circuit's district courts, are generally controlled by a *Securitron Magnalock*-style analysis; that is the courts largely attempt to determine if the companies at issue are actually active and independent entities capable of experiencing independent benefits, rather distinct solely on paper.⁵²⁰

For example, in *Eagle Traffic Control, Inc. v. James Julian, Inc.*,⁵²¹ plaintiff pleaded an enterprise composed of two corporations and an individual associated with each of them. Plaintiff alleged that the defendant companies were distinct from each other and that the individual defendant, manager of both companies (and a vice-president of one), was distinct from each corporation.⁵²² Judge Joyner, looking primarily to Second Circuit authority, distinguished *Riverwoods*, holding that because plaintiff alleged that the companies were separate entities and that their manager was "independently associated with each" to form an enterprise, distinctness was properly alleged under *Securitron Magnalock*. Similarly, in *Katz v. Food Scis. Corp.*,⁵²³ plaintiff sued a corporation and its president, alleging that they understated profits and diverted funds from defendant

association in fact enterprise comprised of four corporations and seven individuals "and other independent parties not in an agency relationship with the defendant corporation," with the alleged common goal of defrauding plaintiff. The trial judge deemed the enterprise properly pleaded because the individuals and corporations were "to some extent independent of each other." *Id.*, at *4.

⁵²⁰ *Securitron Magnalock Corp. v. Schnabolk*, 65 F.3d 256, 263 (2d Cir. 1995). See *supra* notes 130-37 and accompanying text for a full discussion of *Securitron Magnalock*.

⁵²¹ 933 F. Supp. 1251 (E.D. Pa. 1996).

⁵²² *Id.* at 1257-58.

corporation to two foundations the president managed. The alleged enterprise was the two foundations, controlled by individual and corporate defendants. Citing *Jaguar Cars*, Judge Bartle sustained the enterprise allegations.⁵²⁴

In *Miller v. Cohen*,⁵²⁵ plaintiff alleged an enterprise of three corporations and a group of individual defendants. Judge Reed upheld the enterprise, noting while corporations are improper defendants where they are alleged to be the whole enterprise,⁵²⁶ because the *Miller* plaintiffs alleged defendants were an association of both corporations and individual defendants, the enterprise was properly pleaded under *Glessner*, *Petro-Tech* and *Jaguar Car*.

In *Keystone Helicopter v. Textron Inc. AVCO Corp.*,⁵²⁷ plaintiff alleged an enterprise consisting of AVCO defendants (manufacturer companies of allegedly defective helicopters) and Allied Signal (purchaser of assets of an AVCO subsidiary) and corporations American Eurocopter (which purchased and installed defective AVCO engines), and its predecessor MMB.⁵²⁸ Judge Ludwig sustained the enterprise because the companies constituting the alleged association in fact enterprise were alleged to be independent corporations, each of which supposedly participated in a

⁵²³ No. Civ. A. 99-622, 1999 WL 387154 (E.D. Pa. May 6, 1999).

⁵²⁴ *Id.*, at *3.

⁵²⁵ Nos. CIV. A. 93-5371, CIV. A. 94-2700, 1996 WL 560525 (E.D. Pa. Sept. 30, 1996).

⁵²⁶ *Id.*, at *3, n.8 (citing *Gasoline Sales, Inc. v. Aero Oil Co.*, 39 F.3d 70, 72-73 (3d Cir. 1994) (two wholly-owned subsidiaries were not proper defendants where they were alleged to be an “enterprise”); *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1411 (3d Cir. 1991) (naming bank as both enterprise and defendants dismissed); *Banks v. Wolk*, 918 F.2d 418, 419 (3d Cir. 1990) (naming insurance company and financial group as both enterprise and defendants impermissible)).

⁵²⁷ No. Civ. A. 97-257, 1997 WL 786453 (E.D. Pa. Dec. 2, 1997).

⁵²⁸ *Id.*, at *2.

scheme to defraud the FAA.⁵²⁹ In other words, because the pleaded association was of independent companies alleged to have participated in scheme separate from their regular businesses, the enterprise allegations were sustained.

c. Distinguishing Natural and Business Persons

Some courts narrowly read *Jaguar Cars*, holding that its application of the Separate Legal Identity Theory to a corporation enterprise controlled by a natural person officer cannot be extended to enterprises controlled by other businesses.

In *Dow Chemical Co. v. Exxon Corp.*,⁵³⁰ for example, plaintiff sought to have the court "interpret the Third Circuit's

⁵²⁹ *Id.*, at *2-3 (noting that the amended complaint had alleged that defendants, working together, had formed a single enterprise separate and distinct from the individual defendants and that "Courts have reached different conclusions on whether an association-in-fact enterprise may be comprised solely of defendant 'persons' "). Judge Ludwig observed that "[O]ur Circuit has permitted a corporation to be both a defendant 'person' and a member of an association-in-fact-enterprise." *Id.* See also, e.g., *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1165-66 (3d Cir. 1989) (finding an association-in-fact enterprise consisting of the three corporate defendants). Additionally, a member of an association-in-fact may "associate" or "participate" with the other entities in the enterprise." Note 14, however, suggested a comparison of authorities as follows: "*Compare, e.g.,* *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, Civ. A. No. 95-1698, 1995 WL 455969, at *6 (E.D. Pa. July 27, 1995) (stating that each defendant may be both a RICO person and a component of the RICO enterprise – "a part of the whole does not share identity with the whole"), and *Ascah*, 1994 WL 57217, at *2 (finding that an overlap between defendants and members of association-in-fact enterprise permissible), with *Kaiser v. Stewart*, No. Civ. A. 96-6643, 1997 WL 476455, at *20-21 (E.D. Pa. Aug 19, 1997) (maintaining that an enterprise consisting of all defendants does not support a § 1962(c) claim because no defendant is separate from the enterprise). The district court further observed: "The distinctiveness requirement would not be satisfied if the AVCO defendants constituted an enterprise in and of themselves. An association between a corporation and its own subsidiaries will not meet enterprise requirement. Here, however, American Eurocopter and its predecessor MMB are independent corporations alleged to have been associated with the AVCO defendants and AlliedSignal in a RICO enterprise." *Keystone Helicopter*, 1997 WL 786453, at *3 n.14.

⁵³⁰ 30 F. Supp. 2d 673 (D. Del. 1998).

holding in *Jaguar Cars* so as to encompass the proposition that a corporation may be liable for racketeering through an association-in-fact composed not only of the corporation itself but also its own employees, subsidiaries, and affiliates.”⁵³¹ Judge Robinson prefaced her analysis by pointing out that *Jaguar Cars* did not address a situation in which the RICO “person” was a corporation. She noted, however, that after *Jaguar Cars*, the Third Circuit affirmed *Metcalf v. PaineWebber Inc.*,⁵³² which held that a corporation is not distinct from its subsidiaries, relatives, agents, and affiliates, relying on *Brittingham*.

The district judge in *Metcalf*, Judge Robinson noted, read *Jaguar Cars* as “not altering *Brittingham*’s analysis of corporate ‘persons’ and ‘enterprises.’ ”⁵³³ Relying on *Metcalf* and, implicitly, on *Brittingham*, she refused to apply (or to “expansively read”) *Jaguar Cars*. She dismissed the RICO allegations under the Distinctness Requirement, noting the varying interpretations of *Jaguar Cars* in *Brokerage Concepts* (permitting total overlap), *Klein* (permitting no overlap), and *Kaiser* and *Schuylkill* (permitting some overlap).

4. *The Seventh Circuit*

In *Williams v. Ford Motor Co.*,⁵³⁴ a 1998 decision, plaintiff sued Ford Motor Company and its authorized dealer, Highland Park

⁵³¹ *Id.* at 700.

⁵³² 886 F. Supp. 503, 513 (W.D. Pa. 1995), *aff’d without opinion*, 79 F.3d 1138 (3d Cir. 1996).

⁵³³ *Dow Chemical Co.*, 30 F. Supp. 2d at 701.

⁵³⁴ 11 F. Supp. 2d 983 (N.D. Ill. 1998).

Ford, Inc., for charging undisclosed fees in connection with extended service plans ("ESPs"). Plaintiffs alleged two enterprises, the first an association in fact enterprise comprised of Ford and its affiliated dealers and, the second, an association in fact comprised of the two corporations, Ford and Highland, with Highland as the RICO person.⁵³⁵ Judge Moran dismissed the first enterprise for lack of enterprise structure and continuity and for lack of a common course of conduct, relying on *Richmond v. Nationwide Cassel L.P.*⁵³⁶

With respect to the second enterprise, Judge Moran noted that Highland and Ford operated through a structure formalized by contractual relationships defining the sale and processing of extended service plans. Plaintiffs had not pleaded a corporate parent person directing the activity of an affiliated company, but rather an independent company, Highland, as the alleged RICO person. Plaintiffs were, therefore, required to allege that the offending predicate acts were not committed in the conduct of Highland's regular business, but, rather, in pursuit of the enterprise's alleged criminal activity.

Although plaintiffs argued that Ford's affiliation was "crucial" and "necessary" to Highland's effectuation of its scheme, Judge Moran concluded plaintiffs had only alleged that Highland had engaged in its own policy and practice of charging undisclosed fees. The "necessity" of Ford's participation, upon which plaintiffs

⁵³⁵ Plaintiffs' original complaint alleged Ford was an enterprise managed and controlled by Highland, rather than an association in fact enterprise. Its allegations were dismissed under *Reves*.

⁵³⁶ 52 F.3d 640, 645 (7th Cir. 1995).

attempted to rely, merely established Highland took advantage of an opportunity Ford provided to conduct Highland's own fraudulent business practice. Plaintiffs attempted to avoid dismissal arguing that Highland was Ford's agent, but Judge Moran concluded there was no showing that Ford controlled the imposition of fees. Because Highland had not "'wrested control' from Ford in such a way as to convert a formerly legitimate business into a front for illegal activity,"⁵³⁷ and, moreover, because Ford was not alleged to have *benefited* from Highland's practices, plaintiffs claims against Ford failed:

[T]here is nothing to indicate that Ford either *actively participated* in the perpetration of this scheme . . . *knowingly acquiesced* in this pattern of fraud, or that it had unwittingly come under the control of Highland, who influenced it to turn its legitimate operation into a *conduit of illegal activity* Of course, without Ford, there would have been no ESP's to begin with and therefore no fraudulent scheme. But, under that logic, the scope of RICO liability could be expanded indefinitely.⁵³⁸

In *El-Issa v. Compaq Computer Corp.*,⁵³⁹ plaintiffs sued Compaq, alleging an association in fact enterprise comprised of Compaq and its retail distribution agents, which defrauded plaintiff purchasers of Compaq computers in connection with false "free service" representations. Plaintiffs argued that the retailers trained together to use Compaq's products and acted as conduits for its

⁵³⁷ *Williams*, 11 F. Supp. 2d at 990.

⁵³⁸ *Id.* (emphasis added).

⁵³⁹ No. 97 C 5839, 1997 WL 790730 (N.D. Ill. Dec. 19, 1997).

advertising. Compaq argued the retailers were independent and competed against Compaq in the sale of computers. Judge Kokorus held that *Fitzgerald* was controlling and closely followed its analysis:

[W]e do not see how Compaq's use of the enterprise enabled it to commit warranty fraud that it would not otherwise be able to do without the retailers. In fact, it is clear that the warranties were not issued by the retailers, but rather by Compaq. Thus, any criminal activity was done in Compaq's 'own person' rather than being channeled through the enterprise. Compaq's relationship with the retailers is that of an ordinary manufacturer-retailer relationship and their *role* in the allegedly fraudulent acts of the defendant is *entirely incidental*.⁵⁴⁰

In *Siebel v. A.O. Smith Corp.*,⁵⁴¹ defendants A.O. Smith Corporation ("AOS") and its subsidiary A.O. Smith Harvestore Products ("AOSHPI") were alleged to have designed and manufactured defective silos sold through authorized dealer Brave Harvestore, Inc. ("Brave"). Brave was part of a "Dealer Organization," established by AOS and AOSHPI. The silos allegedly failed to properly preserve cattle feed. The complaint alleged two enterprises, the first, the association in fact between AOS, AOSHPI and Brave and the second, the Dealer Organization, of which Brave was a member.

Judge Shabaz first rejected plaintiffs' argument that AOS' and

⁵⁴⁰ *Id.*, at *4 (emphasis added). Judge Kokorus held that the training sessions and provision of advertising materials were merely part of the typical relationship between a manufacturer and its retailers.

⁵⁴¹ No. 97-C-0874-S, 1998 WL 656569 (W.D. Wis. July 1, 1998).

AOSHPI's use of dealers rather than employees saved its RICO claim. He reasoned, following *Fitzgerald*, that defendants could just as easily have accomplished their alleged fraudulent purposes through a vertically integrated arrangement using their own employees, rather than dealers, without any increased appearance of legitimacy.⁵⁴² *The fact that the dealers were factually and legally distinct was not a controlling factor, under Siebel's distinctness analysis.*

Plaintiffs then argued that AOS' and AOSHPI's ability to "do evil" was magnified through their Dealer Organization's ability to systematically mis-train dealers and conceal the fraud. They argued the case did not involve a manufacturer dealing with its agents "in the ordinary way."⁵⁴³ Judge Shabaz held this distinction was immaterial under *Fitzgerald*. It was not the dealers' existence as "separate entities" that enhanced their capacity to perpetrate the fraud, but rather, defendants' alleged policy of keeping dealers uninformed. This could as easily have been fostered through employees as dealers.⁵⁴⁴ He concluded:

[U]nder *Fitzgerald* a manufacturer's use of agents rather than employees must be shown to contribute something to the manufacturer's capacity to engage in racketeering activity if an association among those agents is to be deemed a RICO enterprise distinct from the manufacturer itself. In this case no such showing has been made⁵⁴⁵

⁵⁴² *Id.*, at *5-6 (citing *Fitzgerald*, 116 F.3d at 228).

⁵⁴³ *Id.*, at *5.

⁵⁴⁴ *Id.*, at *6.

⁵⁴⁵ *Id.*

After *Cedric*, in *Chen v. Mayflower Transit, Inc.*,⁵⁴⁶ plaintiff alleged an enterprise comprised of Mayflower Transit, a moving company, and various business entities with which it did business. The enterprise was alleged to be controlled by Mayflower, the RICO person. Defendants sought a Distinctness Requirement-based dismissal on the pleading on the ground that Mayflower, an interstate carrier, was not sufficiently distinct from its agents, including separately incorporated business entities that were alleged to be part of the enterprise:

The recent Supreme Court decision in *Cedric Kushner Promotions Ltd. v. King*, 533 U.S. 158, 121 S.Ct. 2087, 150 L.Ed.2d 198 (June 11, 2001), had not been issued at the time of the May Opinion, although its pendency was noted. . . . However, the *Cedric Kushner* decision does not support dismissing Chen's RICO claim. While not precisely on point to this case, in that decision the Supreme Court held that the Second Circuit had construed the distinctiveness requirement too narrowly. The Supreme Court rejected the Second Circuit's holding that a corporate employee conducting the affairs of a corporation of which he is the sole owner is not distinct enough from the corporation in order to satisfy RICO. The defendant in *Cedric Kushner* cited the same principles cited by Mayflower here: That a corporation acts only through its employees and agents, and that a corporation cannot conspire with its employees in violation of antitrust laws. 121 S.Ct. at 2092. However, the *Supreme Court stated that the formal legal distinction created by incorporation is sufficient*

⁵⁴⁶ 159 F. Supp. 2d 1112 (N.D. Ill. 2001).

for the RICO statute. Id. Mayflower now argues that “[t]he legal unity of the interstate carrier and its agents is compelled by federal law.” . . . However, *Mayflower’s argument does not dissolve the legal distinction that exists between Mayflower and the other corporations that Chen alleges constitute the association that is the “enterprise.”* At most Mayflower cites authority suggesting that it may be liable for actions by the associated local agents. That in itself is not enough to demonstrate that Mayflower and its agents could *never* form an association that would constitute a RICO enterprise. Mayflower argues that a corporate defendant cannot be liable under RICO for conducting *its own affairs* through its agents. . . . The May Opinion made the same point . . . but concluded that Chen’s Count V contains allegations supporting the inference that Mayflower and its local agents went beyond conducting the normal affairs of Mayflower.⁵⁴⁷

This reasoning relies largely on the Separate Legal Identity Theory and rejects defendants’ reliance on the Nonregular Business Test and Indistinguishability Theory. The district court looked to *Fitzgerald*:

Chen’s RICO claim can fairly be read to allege that Mayflower and its local agents went beyond conducting the normal affairs of Mayflower, and were acting on behalf of the enterprise with the goal of extorting additional money out of Chen and others for their own benefit through the device of the enterprise. . . . *Fitzgerald* . . . asks the following rhetorical questions: *What possible difference, from the standpoint of preventing the type of abuse for which RICO was designed, can it make that Chrysler sells its*

⁵⁴⁷ *Id.* at 1114-15 (emphases added),

*products to the consumer through franchised dealers rather than through dealerships that it owns, or finances the purchase of its motor vehicles through trusts, or sells abroad through subsidiaries? . . . In the prototypical case with which we began, it is easy to see how the defendant gains additional power to do evil by taking over a seemingly legitimate enterprise. How, though, was Chrysler empowered to perpetuate warranty fraud by selling through dealers rather than directly to the public?*⁵⁴⁸

The district judge held that plaintiff could successfully answer the *Fitzgerald* questions, at least for purposes of a motion to dismiss, as follows:

In this case, those questions are answered by Chen's pleading. The use of separately incorporated local agents permitted the enterprise (the agents and Mayflower working together) to take Chen's goods representing that certain terms of the agreement were as Chen understood them, and use the fact that the goods were being held by employees of a different local agent (Century) as a basis to refuse to honor the agreements that Chen had made, requiring Chen to pay additional amounts in order to get the local agent to release her goods . . . Contrary to Mayflower's argument, this Court has not "concluded that there is a distinct 'enterprise.' " . . . The Court has concluded that it is possible that Chen may be able to prove a set of facts that would entitle her to relief under RICO. That is all that is at issue on a motion for leave to amend or a motion to dismiss.⁵⁴⁹

⁵⁴⁸ *Id.* at 1115 (emphasis added) (citing *Fitzgerald*, 116 F.3d at 227).

⁵⁴⁹ *Id.* at 1115-16.

Three years later, defendants again sought dismissal,⁵⁵⁰ this time on summary judgment, again relying on the Distinctness Requirement. By the time defendants summary judgment motion was heard, however, the Seventh Circuit had decided *Bucklew v. Hawkins, Ash, Baptie & Co., LLP*,⁵⁵¹ discussed above.⁵⁵² *Bucklew* had involved allegations of a parent/subsidiary enterprise and the Seventh Circuit had, without even citing *Cedric*, rejected that enterprise/person combination, under *Fitzgerald/Emery*, which became a basis of Mayflower's motion:

Mayflower argues that Chen cannot demonstrate that Mayflower—the “person” she alleges is liable to her under RICO—is sufficiently distinct from the enterprise identified by Chen, i.e., Mayflower and the local moving companies with which it does business. . . . Mayflower argues that the enterprise is insufficiently distinct from Mayflower because “the alleged enterprise consists only of Mayflower and its agents acting within the scope of their authority as agents.” . . . Mayflower further argues that there is no distinct enterprise because the one identified by Chen does not bear a “family resemblance” to the prototypical RICO case. . . . Mayflower claims that the Seventh Circuit has “repeatedly held” that “a combination of various members of a corporate family cannot constitute a distinct enterprise.” . . . In this regard, Mayflower argues that it merely deals with its agents in an ordinary way, so that the agents' role in the enterprise is merely incidental. . . . Chen responds that the enterprise and Mayflower are legally different entities with different rights and responsibilities and roles to play. . . . Chen further argues that it is irrelevant

⁵⁵⁰ *Chen v. Mayflower Transit, Inc.*, 315 F. Supp. 2d 886, 891 (N.D. Ill. 2004).

⁵⁵¹ 329 F.3d 923 (7th Cir. 2003).

⁵⁵² See *supra* notes 258-60 and accompanying text.

whether the local moving companies acted within the scope of their authority as agents . . . and that the agents' role in the enterprise is not entirely incidental. . . . Mayflower replies that it is not enough that the enterprise and Mayflower play distinct roles; rather, the person (Mayflower) must control the enterprise in some way. . . . Mayflower further argues that the fact that the local moving companies are "independent corporations, incorporated in different states, with different ownership from Mayflower and, generally, from each other" is meaningless in the distinctiveness analysis.⁵⁵³

Discussing *Fitzgerald* and *Cedric*, the district court observed that although *Bucklew* suggested a parent corporation and its subsidiaries will "generally not meet the distinctiveness requirement, they may be found distinct if the unlawful activity is facilitated by the enterprise's decision to operate through subsidiaries."⁵⁵⁴

The district judge held that Chen had produced evidence establishing Mayflower and the enterprise *might* be distinct entities. First, the district court observed that the enterprise was not simply Mayflower "by another name." Mayflower and the other alleged participants in the enterprise did not stand in an employer-employee or parent-subsidiary relationship and the agreement between Mayflower and its affiliates provided "the parties agree that they have not established a partnership, cooperative, joint venture, franchise or any other business relationship."⁵⁵⁵ Second, plaintiff produced evidence that the affiliates associated with her move did significant

⁵⁵³ *Chen*, 315 F. Supp. 2d at 901.

⁵⁵⁴ *Id.*

business apart from their relationship with Mayflower. One witness had testified that only 50-60% of its revenue was based on its work derived from its relationship with Mayflower. Another testified that approximately 55% of its business, such as local and international moving, packing and unpacking, and storage, was separate from its Mayflower business.⁵⁵⁶ Third, plaintiff produced evidence that Mayflower and the enterprise each played a distinct role within the purported RICO scheme.

Evidence plaintiff submitted also showed that the local moving companies booked shipments, issued estimates, provided local marketing services, determined (within an authorized range) what discounts to offer, performed physical services such as packing, unpacking, hauling, loading, unloading, storing the goods, and contributed movers and trucks, none of which Mayflower did. Mayflower, it was alleged, provided a:

[C]entralized communication system via interstate wire to coordinate moves, provides a customer service department for the shippers, oversees operations, provides guidelines regarding discounts that may be offered by the affiliates, processes payments in connection with the moves (e.g., processes credit transactions and collects and disburses the receipts from the shipments to other participants in the enterprise), provides the federal authority to operate interstate and contributes its name.⁵⁵⁷

The district judge, citing *Cedric*, found that plaintiff had

⁵⁵⁵ *Id.* at 903.

⁵⁵⁶ *Id.*

⁵⁵⁷ *Id.* at 904.

submitted evidence that Mayflower and the other entities played distinct roles and had different rights and responsibilities,⁵⁵⁸ distinguishing *Fitzgerald*:

[U]nlike the plaintiffs in *Fitzgerald* . . . Chen has produced evidence indicating that the enterprise is more than simply an association that conducts the normal affairs of the RICO person (Mayflower). . . . Specifically, the enterprise's alleged activity is extorting money for additional origin and destination service charges and providing fraudulently low estimates. The enterprise does not constitute Mayflower's regular business because Mayflower does not physically conduct moves, decide to impose the additional charges or share in the charges collected from the "additional services," including shuttles, long carries, and stair and elevator charges; only the enterprise does. . . . Chen has also produced sufficient evidence that Mayflower does not deal with its affiliates in merely the "ordinary way." *Cf. Fitzgerald*, 116 F.3d at 228 (court found that where the agents' role in the enterprise's illegal acts is entirely incidental, differing in no way from what it would be if the agents were the employees of a totally integrated enterprise, there is no "enterprise" within the meaning of the RICO statute). Rather, in the present case, the affiliates can determine on their own what additional services are necessary (at additional cost to the shippers) and can then collect payment for those additional services.⁵⁵⁹

The evidence suggested that the success of the enterprise depended on the existence of distinctness between Mayflower and the

⁵⁵⁸ *Id.* at 903-04 (citing *Cedric*, 533 U.S. at 163) (finding corporate owner distinct from corporation which was a legally different entity with different rights and responsibilities).

⁵⁵⁹ 315 F. Supp. 2d at 904.

enterprise. Specifically, use of local moving companies as “agents” or “affiliates” permitted the enterprise to take plaintiff’s goods under the representation that certain terms would be met. It then used the fact that the goods were being handled by a different local company as a basis for refusing to honor the agreement with plaintiff, and demanding improper additional payments:

For instance, when Century’s representative refused to accept Chen’s credit card, she did so on the basis that they “didn’t book [Chen’s] order.” . . . Likewise, when Chen complained to Mayflower’s customer service representative, Mayflower’s representative told Chen that Admiral (the booking agent) refused to approve Chen’s credit card. . . . [E]vidence indicates that by working through the enterprise, Mayflower was enabled to engage in the alleged racketeering activity in a way that would be impossible if Mayflower had internalized the agent-affiliate function. *Cf. Fitzgerald*, 116 F.3d at 228. Put differently, the person-enterprise relationship in this case may have “empowered [Mayflower] to perpetrate . . . fraud by selling through [its affiliates] rather than directly to the public.” *Id.* at 227. *See also Emery*, 134 F.3d at 1324 (affirming dismissal where there was “no allegation that by using subsidiaries rather than divisions [the defendants] somehow made it easier to commit or conceal the fraud of which the plaintiff complains”). Thus, Chen has produced evidence tending to show that more than Mayflower’s “normal affairs” were being conducted by the enterprise, namely, the extortion and sharing of improper additional amounts beyond the initial estimates that would have been proper compensation for the move.⁵⁶⁰

⁵⁶⁰ *Id.* at 904-05. Although Mayflower argued that the Distinctness Requirement could not be met because the enterprise consisted only of Mayflower and its agents acting within the scope of their authority as agents, the district judge noted that, under *Cedric*: “[I]t makes

The court continued, noting that the requirement that a RICO defendant engage in the enterprise's affairs rather than just its own affairs is simply "another reference to the fact that a RICO defendant must be distinct from the alleged enterprise" and it cited *Cedric* as support.⁵⁶¹ This analysis, the district court found, further supported a finding of distinctness:

Chen has established facts which could support a conclusion that the alleged wrongdoing (Mayflower's collection and distribution of money obtained through fraud, extortion and theft) was performed on behalf of the enterprise rather than Mayflower and, therefore, was not solely Mayflower's "own affairs." For instance, Mayflower is not in the business of issuing estimates to shippers. . . . Thus, the enterprise's activity of issuing misleadingly low estimates to shippers (fraud) cannot constitute Mayflower's "own affairs." Similarly, Mayflower is not in the business of picking up or delivering shippers' property (indeed, it does not even have the trucks or laborers to perform such services). . . . Thus, the enterprise's activity of refusing to load or unload a shipper's property until additional charges have been paid (extortion and theft) cannot constitute Mayflower's "own affairs." Although some of the activities conducted by Mayflower may be "everyday business functions," as Mayflower contends, the facts discussed above suggest that Mayflower nevertheless conducted or participated in the conduct of the "enterprise's affairs," as required by the RICO statute.⁵⁶²

no difference whether participants in a RICO enterprise act within or beyond the scope of their authority as agents." *Id.* at 905 n.17 (citing *Cedric*, 533 U.S. at 165).

⁵⁶¹ *Chen*, 315 F. Supp. 2d at 906 (citing *Cedric*, 533 U.S. at 163).

⁵⁶² *Id.* at 906.

The district court also examined the distinctness issue from the perspective of enterprise control and found Mayflower deeply involved:

[T]hat Mayflower develops policies and procedures, which its affiliates are required to follow. . . . Mayflower directly controls the customer service department and the disbursement of funds to the local moving company affiliates, including the disbursement of the amounts received for the additional origin and destination charges. . . . Mayflower also provides its name to the enterprise. . . . Mayflower is the link between the booking agent who provides the allegedly fraudulent estimate and the hauling agent who extracts the additional charges.⁵⁶³

Mayflower argued that it was merely performing services for the enterprise and that the local moving company agents committed the alleged predicate acts, including issuing fraudulent estimates, and unilaterally imposing higher charges at the point of origin or destination—but the evidence showed that:

Mayflower issues the policies, procedure and guidelines which permits the alleged predicate acts to be committed. . . . [S]ignificantly, Mayflower recruits and has the power to admit affiliates at will and, when dissatisfied, end its relationship with an affiliate “without cause.” . . . *Mayflower’s role in the enterprise therefore goes far beyond the mere giving of directions or performance of tasks helpful to the enterprise. Indeed, without Mayflower’s involvement, it appears the enterprise would fail to exist altogether.*⁵⁶⁴

⁵⁶³ *Id.* at 907.

⁵⁶⁴ *Id.* at 907-08 (emphasis added).

5. Summary

In the Second Circuit, plaintiffs alleging *Securitron Magnalock*-style claims will be met with the Single Corporate Consciousness defense and Nonregular Business Test. They will be required to establish differences in corporate decision-making structures and to show businesses sufficiently delineated to justify the conclusion that the alleged RICO activity is not the activity of a single, composite entity. Proof of independent benefit is helpful in establishing different businesses. Because efforts to plead concerted action may undermine distinctness, clearly delineated roles should be expressly pleaded. Any pleading that suggests alter-ego or agency relations may undermine distinctness and special concern should be paid to overlap issues, per *Cullen* and *Securitron Magnalock*.

Third Circuit plaintiffs, to the extent possible, should avoid overlap problems; at a minimum, total overlap should be avoided, notwithstanding *Brokerage Concepts*, *Brown*, *Perlberger* and *Stewart*. Corporation defendants should be delineated, per *Eagle Traffic* and *Katz*, sensitive to *Metcalfe's* distinction between corporate entity RICO persons and natural RICO persons.

Seventh Circuit plaintiffs must establish each RICO person actively participated or knowingly acquiesced in the alleged scheme, or unwittingly permitted legitimate business operations to become a conduit of criminal activity. Bare legal and factual distinctness, notwithstanding *Cedric*, is inadequate to establish Statutory Distinctness in the Seventh Circuit. In this context plaintiff must prove the role played by the legally distinct person was RICO-

nonincidental to bringing about (or secreting) the RICO activity. Plaintiff must plead and prove a type of distinctness that amplifies defendants' ability to engage in RICO-wrongdoing, different from that which would attend an enterprise comprised of related, non-distinct entities. Proof of independent benefit will not establish Statutory Distinctness unless plaintiff also establishes a strong family resemblance to a RICO prototypical infiltration, e.g., defendant wresting control of a legitimate business.

PART V

ENTERPRISES INVOLVING PARENT AND SUBSIDIARY CORPORATIONS

A. Introduction

Where parent and subsidiary corporations are alleged to constitute a Section 1962(c) enterprise, either individually or through association, cases frequently turn on whether the companies acted separately,⁵⁶⁵ or as a combined unit, in engaging in the alleged wrongful activity.⁵⁶⁶ Cases involving affiliated business entity enterprise members often generate fact-intensive analyses. Some federal circuits distinguish subsidiary corporation enterprises controlled by parent corporations from parent corporation enterprises

⁵⁶⁵ See STURC, *supra* note 10, § 6.03[D], at 6-63.

⁵⁶⁶ *Id.* at 6-64. If the affiliates are deemed separate, then the court must: (i) in the case of an alleged association in fact of affiliates, carefully examine whether the association has the characteristics required of an enterprise under the statute -- whether the association has organizational characteristics independent of the members of the enterprise; and (ii) analyze the racketeering acts alleged in relation to the alleged enterprise, to determine whether the acts alleged involve conducting the affairs of that enterprise, or whether, in fact, the acts

controlled by their subsidiaries.

**B. Subsidiary Corporation (or Subsidiary-Group)
Enterprises Directed by Parent Corporation(s)
and/or Related Groups**

1. The Second Circuit

Pre-*Riverwoods* cases in the Second Circuit recognized that a subsidiary corporation could be a proper enterprise, controlled by a corporate parent RICO person. In *Rouse v. Rouse*,⁵⁶⁷ Judge Munson recognized that because corporations are distinct entities, a parent company, even though it wholly owns a subsidiary, might conduct the affairs of the subsidiary through a pattern of racketeering. He concluded a RICO criminal indictment could name the parent as the defendant and the subsidiary as the enterprise.⁵⁶⁸ In *Fustok v. Conticommodity Serv., Inc.*,⁵⁶⁹ the question was whether an association in fact enterprise between a parent corporation and subsidiary corporations violated the Distinctness Requirement. The trial judge held that where several corporations standing in a parent-subsidiary relationship join together to engage in wrongdoing, they may form an entity distinct from any individual defendant.⁵⁷⁰

involve conducting the affairs of a defendant. *Id.*

⁵⁶⁷ No. 89-CV-597, 1990 WL 160194 (N.D.N.Y. Oct. 17, 1990).

⁵⁶⁸ *Id.*, at *14. "More fundamental, however, is the question of corporate form. Corporations are distinct entities. Thus, a parent corporation, even though it wholly owns a subsidiary, might conduct the affairs of the subsidiary through a pattern of racketeering. Thus, in a RICO criminal indictment it would seem appropriate to name the parent as the defendant and the subsidiary as the enterprise." *Id.*, at *19 n.4.

⁵⁶⁹ 618 F. Supp. 1074 (S.D.N.Y. 1985).

⁵⁷⁰ *Id.* at 1075-76.

In the Second Circuit, the rules regarding corporate parent RICO persons controlling a subsidiary enterprise (or subsidiary and its agents in association) are set forth in *Discon*. In essence, where either (a) the parent is the person controlling the activity of the subsidiary enterprise or (b) the parent corporation is alleged to be the person controlling an association in fact enterprise comprised of the subsidiary and parent, plaintiff will be required to satisfy the Nonregular Business Test.

For example, in *CPF Premium Funding, Inc. v. Ferrarini*,⁵⁷¹ plaintiff alleged that a subsidiary corporation was a Section 1962(c) enterprise controlled by its parent and certain individual defendants. Because Judge Haight concluded the alleged “criminal” activities were indistinguishable from the subsidiary’s ordinary business and undertaken on the subsidiary’s behalf, he dismissed the claim. Relying on *Riverwoods* and *Discon*, he refused to treat a subsidiary corporation enterprise allegedly controlled by its parent and/or its officers any differently from association in fact enterprises comprised of such business entities, controlled by affiliated entities. After *Cedric*, however, some courts have taken a more liberal view.

In *Zito v. Leasecomm Corp.*,⁵⁷² plaintiffs sued Leasecomm Corporation (“Leasecomm”), its parent Microfinancial Inc. (“MFI”), three dealers and vendors, several shareholders of the dealer defendants, and shareholders of other dealers. The complaint alleged that the dealers and MFI/Leasecomm constituted a single enterprise

⁵⁷¹ No. 95 CIV. 4621(CSH), 1997 WL 158361 (S.D.N.Y. Apr. 3, 1997).

⁵⁷² No. 02 Civ. 8074 (GEL), 2004 WL 2211650 (S.D.N.Y. Sept. 30, 2004).

by virtue of an arrangement between the dealers and MFI/Leasecomm⁵⁷³:

[P]laintiffs have alleged a hierarchical hub and spoke type structure, whereby Leasecomm carefully vetted and supervised its dealers, each of which .. obtained customers for Leasecomm "through heavy-handed, high-powered mass marketing" . . . that these dealers in turn joined in the goal of the enterprise to obtain money from the purchasers of the Leasecomm contracts . . . through trick, deceit, chicane and overreaching . . . and that they "were aware that [their] products were being sold through fraudulent marketing practices and that [Leasecomm's] contracts were unconscionable, unfair and deceptive. . . . They further allege that this scheme lasted "for a period beginning no later than 1998 and continuing until October 2002. ⁵⁷⁴

Citing *Riverwoods* and *Anatian*, but not *Cedric*, the district judge, without detailed discussion of the Distinctness Requirement sustained the RICO claim.

2. *The Third Circuit*

Application of the Distinctness Requirement to subsidiary enterprises directed by parent persons may, for present purposes,⁵⁷⁵ be traced to *Brittingham*,⁵⁷⁶ in which the Third Circuit observed:

⁵⁷³ *Id.*, at *2.

⁵⁷⁴ *Id.*, at *8.

⁵⁷⁵ Prior to *Jaguar Cars*, a number of cases had held that a parent corporation could be a person separate and distinct from a wholly-owned subsidiary enterprise. *See, e.g., Elysian Fed. Sav. Bank v. First Interregional Equity Corp.*, 713 F. Supp. 737, 758 (D.N.J. 1989).

⁵⁷⁶ 943 F.2d 297. The *Brittingham* Court, however, traced the rule to *Petro-Tech*, noting that in *Brittingham*, plaintiff could not name Mobil as the defendant and its subsidiary Mobil Chemical, as the enterprise, where plaintiff did not allege that the corporations took a distinct

“[W]hen a defendant is itself a collective entity, it is more likely that the alleged enterprise is in reality no different from the association of individuals or entities that constitute the defendant or carry out its actions.”⁵⁷⁷ Based on this observation, the *Brittingham* Court held: “Without additional allegations . . . a subsidiary corporation cannot constitute the enterprise through which a defendant parent corporation conducts a racketeering enterprise . . . claims will be dismissed when the enterprise and defendant, although facially distinct, are in reality no different from each other.”⁵⁷⁸

The Third Circuit applied this rule to cases in which the corporate parent and subsidiary corporation were both alleged to be RICO persons. In *Lorenz*,⁵⁷⁹ for example, the Third Circuit affirmed dismissal of a Section 1962(c) enterprise in which plaintiff alleged that a parent corporation and its wholly-owned subsidiary had, as RICO persons, conducted the affairs of a subsidiary enterprise:

[T]he plaintiff must plead facts which, if assumed to be true, would clearly show that the parent corporation played a role in the racketeering activity which is distinct from the activities of its subsidiary. . . . [S]tating that the parent directed the subsidiary’s fraudulent acts does not satisfy the distinctiveness requirement in *Brittingham* . . . instead, it suggests that the subsidiary carried out the affairs of the parent . . . [certain of] the alleged frauds which constitute the RICO predicate acts . . . are described as being committed by both the parent and subsidiary corporations. Thus, many of the pleaded facts

role in the alleged racketeering activity. *Id.* at 300-03.

⁵⁷⁷ *Id.* at 302.

⁵⁷⁸ *Id.* at 302-03.

⁵⁷⁹ 1 F.3d 1406 (3d Cir. 1993).

undercut plaintiffs' theory that the corporate defendants are distinct from the enterprise consisting of their subsidiary. . . . A parent company normally can be expected to benefit from its subsidiary. For purposes of a section 1962(c) claim, it does not matter whether that benefit can be characterized as direct or indirect.⁵⁸⁰

In *Glessner*,⁵⁸¹ plaintiffs argued they could "rearrange the parties," so that Meenan (the parent) would be the "person" conducting the affairs of Blueray (the subsidiary), or vice versa. The Third Circuit dismissed the "recast" enterprise, holding that under *Brittingham*, plaintiff would have had to provide some basis for holding a parent and subsidiary separate and distinct for RICO purposes.⁵⁸²

In *Eli Lilly v. Roussel Corp.*,⁵⁸³ where plaintiff failed to plead any facts showing that parent or its subsidiaries and affiliates, which were named as RICO persons, played a role distinct from the enterprise itself, the RICO claim was dismissed. Plaintiff, by alleging that the enterprise and RICO person acted in "concert" and together "directed" certain alleged offending activities of the enterprise, undercut its own distinctness allegations.⁵⁸⁴

⁵⁸⁰ *Id.* at 1412-13.

⁵⁸¹ 952 F.2d 702 (3d Cir. 1991).

⁵⁸² *Id.* at 714. *Accord* *Gasoline Sales, Inc. v. Aero Oil Co.*, 39 F.3d 70, 73 (3d Cir. 1994) ("[A] corporation generally cannot be a defendant under Section 1962(c) for conducting an 'enterprise' consisting of its own subsidiaries or employees, or consisting of the corporation itself in association with its subsidiaries or employees. This is because we have interpreted corporate identity expansively so that the actions of a corporation's agents conducting its normal affairs are constructively its own actions for Section 1962(c) purposes.").

⁵⁸³ 23 F. Supp. 2d 460 (D.N.J. July 7, 1998).

⁵⁸⁴ *Id.* at 488. *See also* *T.I. Construction Co. v. Kiewit Eastern Co.*, No. CIV. A. 91-2638, 1992 WL 195425 (E.D. Pa. Aug. 5, 1992) (relying on *Glessner* distinctness rules and

Although some commentators have agreed *Jaguar Cars* modified the law regarding parent-subsidary enterprises,⁵⁸⁵ *Metcalf v. PaineWebber, Inc.*⁵⁸⁶ seems to contradict this view. In *Metcalf*, plaintiff pleaded a large number of corporations and partnerships, all under the control of either defendant or its parent, were a Section 1962(c) enterprise. Judge McLaughlin held that *Jaguar Cars* applied only to corporation enterprises controlled by natural persons, not the enterprise before him, which was comprised of business entities, controlled by business entities:

[I]ndividual defendants, in contrast to collective entities, are generally distinct from the enterprise through which they act. Unlike a collective entity, it is unlikely that an individual defendant by himself would constitute a valid enterprise . . . But when a defendant is itself a collective entity, it is more likely that the

alternative enterprise of plaintiff itself to dismiss plaintiff's enterprise allegations based on plaintiffs' failure to properly allege that defendants conducted the affairs of the enterprise). *But see* Kress v. Hall-Houston Oil Co., 1993 WL 166274 (D.N.J. May 12, 1993) (refusing to dismiss on ground that expanded factual record would be necessary); *Advanced Power Systems v. High-Tech Systems*, No. CIV. 90-7952, 1992 U.S. Dist. LEXIS 6479 (E.D. Pa. Apr. 30, 1992) (citing *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1165-66 (3d Cir. 1989) holding that two corporations, each named as defendants, could properly combine to form a RICO enterprise, even if one of the corporations was a wholly owned subsidiary of the other.) Although, under pre-*Jaguar Cars* law, a parent corporation could not be a defendant where its subsidiary was alleged to be the RICO enterprise, *Advanced Power* reached the conclusion that where plaintiff makes parent and subsidiary corporations defendants and, at the same time, alleges they are jointly the enterprise, distinctness would be satisfied. *But see* Edlin, *supra* note 16, at 46 (describing *Advanced Power's* rationale as anomalous).

⁵⁸⁵ See, e.g., Edlin, *supra* note 16, at 45 ("There is no meaningful legal distinction between a corporation as a legal entity separate from its officers or employees and a corporation as a legal entity separate from its parent or subsidiary. Intellectual honesty and logical consistency require that *Jaguar Cars* be read as establishing that, just as a corporation is an entity distinct from its employees or officers, a corporation also is sufficiently distinct from its parent or subsidiary such that one corporation may constitute the enterprise through which the other corporation conducted a pattern of racketeering activity.").

⁵⁸⁶ 886 F. Supp. 503 (W.D. Pa. 1995), *aff'd*, 79 F.3d 1138 (3d Cir. 1996).

alleged enterprise is in reality no different from the association of individuals or entities that constitute the defendant or carry out its actions.⁵⁸⁷

Judge McLaughlin concluded: "Nothing in Plaintiff's proposed Second Amended Complaint suggests that these subsidiaries were acting in some way other than in furtherance of Defendant's business."⁵⁸⁸ Where association in fact enterprises between parent and subsidiary corporations are alleged, the Third Circuit, like the Second Circuit, has applied the Nonregular Business Test to determine distinctness, limiting *Jaguar Cars'* holding to business entity enterprises, controlled by natural persons. In *Dugan v. Bell Tel. of Pa.*,⁵⁸⁹ where plaintiff alleged an association in fact enterprise between Bell Atlantic (the parent), Bell of Pa (a subsidiary of Bell Atlantic) and a single employee of the parent, plaintiffs failed to satisfy the Distinctness Requirement. However, where plaintiff has been able to plead functionally separate companies, a common officer will not preclude a *Securitron Magnalock* style analysis. For example, in *Eagle Traffic Control, Inc. v. James Julian, Inc.*,⁵⁹⁰ plaintiff alleged that two companies were separate entities with a single person who associated with both to commit RICO predicate acts. Judge Joyner, distinguishing *Riverwoods*, held *Securitron Magnaloc* provided the correct rule.⁵⁹¹

⁵⁸⁷ *Metcalf*, 886 F. Supp. at 514-15 n.12.

⁵⁸⁸ *Id.* at 514.

⁵⁸⁹ 876 F. Supp. 713 (W.D. Pa. 1994).

⁵⁹⁰ 933 F. Supp. 1251 (E.D. Pa. 1996).

⁵⁹¹ *Id.* at 1258. (Many courts have required pleading and proof of separate and distinct activity. In *Khurana v. Innovative Health Care Systems, Inc.*, 130 F.3d 143 (5th Cir. 1997),

3. *The Seventh Circuit*

Historically, the Seventh Circuit, unlike the Second and Third Circuits, distinguished parent and/or subsidiary enterprises controlled by their affiliated corporate entity, which are generally permissible,⁵⁹² from association in fact enterprises involving parent/subsidiary members. In *Ewing v. Midland*,⁵⁹³ for example, plaintiff pleaded that a subsidiary (Midland), its owner/officer (Mizel) and a Midland's parent (Mercury), were engaged in a loan flipping scheme. Mizel and Mercury were alleged RICO persons, with Mizel having formulated the scheme, executed through the enterprise, Midland.⁵⁹⁴ Mizel and Mercury argued the complaint should be dismissed under the Distinctness Requirement, since they could not be distinguished from the enterprise.

Judge Manning, citing *Jaguar Cars*,⁵⁹⁵ sustained the allegations against Mizel, but followed *Metcalfe*, dismissing the RICO claim against the corporations. He reasoned *Jaguar Cars* was

for example, plaintiff alleged that a subsidiary or affiliated entity was a perpetrator-defendant, but failed to allege it played any role distinct from its parent's role. The Fifth Circuit dismissed the enterprise allegations, holding the person and enterprise were not properly alleged to be distinct).

⁵⁹² See generally *Martinez v. Weyehaeuser Mortg. Co., Inc.*, No. 94 C 4191, 1994 WL 374237 (N.D. Ill., July 14, 1994) (“ ‘Absent a piercing-of-the-corporate-veil situation, it is scarcely accurate to characterize a subsidiary corporation as automatically ‘conduct[ing]’ or even as automatically ‘participat[ing], directly or indirectly, in the conduct of its parent company’s affairs, or of a sister company’s affairs, or of the affairs of an entire corporate group (see the text discussion and numerous cases cited in 2 ARTHUR MATHEWS, ANDREW WEISSMAN AND JOHN STURC, CIVIL RICO LITIGATION § 6.03[D] (2d ed. 1992)).’ ”). See *Haroco, Inc. v. American Nat’l Bank & Trust Co.*, 747 F.2d 384 (7th Cir. 1984) (satisfying distinctness requirement where plaintiff named a subsidiary as person and parent corporation as enterprise).

⁵⁹³ 1997 U.S. Dist. LEXIS 15694 (N.D. Ill. Sept. 26, 1997).

⁵⁹⁴ *Id.*, at *11-13.

⁵⁹⁵ *Id.*, at *12.

inapposite where a corporation was the person allegedly controlling activity perpetrated through another corporate entity.⁵⁹⁶ Because the alleged person, Mercury, was a corporation, its liability was controlled by *Fitzgerald*, which refused to find a corporation person distinct from an enterprise composed of its subsidiaries or subsidiaries and dealer-agents.⁵⁹⁷

Judge Manning carefully distinguished cases, such as *Richmond*,⁵⁹⁸ and *Brittingham*, which had dealt with enterprises comprised of a number of affiliated companies, employees and agents, rather than "a parent 'person' and an 'enterprise' composed of a single subsidiary."⁵⁹⁹ He observed that *Fitzgerald* had "reaffirmed that it is generally inappropriate to define an 'enterprise' as composed of the employees, agents or subsidiaries of the corporate 'parent.' "⁶⁰⁰ He noted:

[C]ase law has interpreted section 1962(c) as not covering theories of liability wherein it is alleged that a corporate 'person' is a . . . parent company. . . . Instead, Section 1962(c) was designed to generally cover theories of liability naming the employees, affiliates, agents, or other associated entities, as the 'persons' who, by taking some part in the direction of a distinct corporate or similar 'enterprise,' engage in a pattern of racketeering. While the distinction between individual and corporate owners may appear

⁵⁹⁶ *Id.*, at *15. See also *Brannon v. Boatman's Bancshares, Inc.*, 952 F. Supp. 1478 (W.D. Okl. 1997) (Judge Cauthron noting that in *Metcalf*, Judge McLaughlin narrowly read *Jaguar Cars*, noting "there is good reason to distinguish between corporate 'persons' and individual 'persons' in applying the *Enright* rule . . .").

⁵⁹⁷ *Ewing*, 1997 U.S. Dist. LEXIS 15694, at *13-14.

⁵⁹⁸ 52 F.3d 640 (7th Cir. 1995).

⁵⁹⁹ *Ewing*, 1997 U.S. Dist. LEXIS 15694, at *16.

⁶⁰⁰ *Id.*, at *16 (citing *Fitzgerald*, 116 F.3d at 226-28).

somewhat oblique, it is the artifice of corporate structuring that underlies the suspicion where the 'person' is a parent corporation, or single affiliate among a number of related entities. . . . This suspicion, in turn, drives the requirement that the complaint allege some conduct on the part of a corporate 'person' other than just directing the normal affairs of the corporate family.⁶⁰¹

Judge Manning held that plaintiff would have to "distinguish between the corporate entities by alleging how each played a distinct role within the purported scheme."⁶⁰² The complaint before him, however, failed to allege any role for Mercury that was distinct from Midland's role. It merely alleged Mercury continued Midland's policy, which Mizel established. Judge Manning concluded Mercury was not distinct from Midland, the alleged corporate enterprise.⁶⁰³ Because Mercury, the RICO person, was merely conducting its own normal business affairs and that of a financing business through agent subsidiaries, plaintiff failed to establish a distinct role for the parent, within the alleged scheme.⁶⁰⁴

In *Chamberlain Mfg. Corp. v. Maremont Corp.*,⁶⁰⁵ plaintiff alleged a RICO enterprise comprised of the parent (Maremont) and wholly owned subsidiary (Maremont-Saco), controlled by parent Maremont, the RICO person. Plaintiff alleged Maremont had committed fraud in connection with the sale of subsidiary Maremont-

⁶⁰¹ *Id.*, at *17-18 (citations omitted).

⁶⁰² *Id.*, at *14.

⁶⁰³ *Id.*, at *19.

⁶⁰⁴ *Ewing*, 1997 U.S. Dist. LEXIS 15694, at *19.

⁶⁰⁵ 919 F. Supp. 1150 (N.D. Ill. 1996).

Saco. Judge Plunket stated he could find no directly analogous cases where the parent was alleged to be the person controlling the enterprise, an association of the parent and subsidiary corporations.

Plaintiff argued it need only allege separate legal entities under *Richmond*,⁶⁰⁶ but Judge Plunket observed that if *Richmond's* rule were applied to association in fact enterprises comprised solely of corporations, rather than a combination of natural persons and corporations, it would mandate results different from those reached in *Riverwoods* and *Brittingham*, which dismissed association in fact enterprises comprised of natural persons and business entities.⁶⁰⁷ Judge Plunket distinguished *Haroco*,⁶⁰⁸ on the ground that while *Haroco* had held that the distinctness requirement would be satisfied when the RICO person is a subsidiary and the enterprise is its parent corporation, its rule of "distinct legal entities is much more difficult to apply where the enterprise is an association in fact which lacks its own identity or form under the law."⁶⁰⁹

Moreover, even if the enterprise was "legally distinct" from the RICO person, no distinct roles were performed, within the

⁶⁰⁶ 52 F.3d 640 (7th Cir. 1995).

⁶⁰⁷ 919 F. Supp. at 1158. Judge Plunket distinguished *Securitron Magnalock*, 65 F.3d 256 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 916 (1996) on the ground that it involved distinct businesses, whereas the relationship between the companies supposedly comprising the association before him was more similar to the relationship between the non-distinct companies in *Brittingham*.

⁶⁰⁸ 747 F.2d 384 (7th Cir. 1984).

⁶⁰⁹ 919 F. Supp. at 1158. The same rule has been applied in other federal circuits. *See, e.g.,* *Compagnie De Reassurance D'Ile de France v. New England Reins. Corp.*, 57 F.3d 56 (1st Cir.) (holding that where plaintiff pleaded a subsidiary corporation enterprise controlled by its corporate parent, Distinctness Requirement was not satisfied because subsidiary did not act independently of its parent; the subsidiary had first been a division and then a wholly-owned subsidiary of the underwriter parent and the subsidiary's employees were really underwriter employees).

scheme.⁶¹⁰ Judge Plunket concluded that a greater showing of “distinctness” should be called for where affiliated corporations, rather than a single corporation, is the alleged enterprise, and corporate persons, rather than natural persons, are allegedly directing enterprise activity.⁶¹¹ He held that the alleged fraudulent sale under consideration was the parent’s affair, not the affair of a “distinct entity” comprised of the parent and subsidiary, i.e., the alleged “enterprise.”⁶¹²

Relying on the Third Circuit decision *Lorenz*,⁶¹³ Judge Plunket held Maremont and Maremont-Saco had not satisfied the Distinctness Requirement. He rejected the proposition that mere “legal separation” should satisfy the Distinctness Requirement, at least in the context of association in fact enterprises comprised of corporate entities. Thus, where plaintiffs allege a parent corporation controlling a subsidiary corporation enterprise (or an enterprise comprised of parent and subsidiary corporations), pleading and proof of the distinct roles each corporate entity played within the enterprise is crucial.⁶¹⁴

Post-*Cedric*, as indicated above,⁶¹⁵ in *Bucklew v. Hawkins*,

⁶¹⁰ 919 F. Supp. at 1157.

⁶¹¹ *Id.* at 1158.

⁶¹² *Id.* at 1157-58.

⁶¹³ 1 F.3d 1406 (3d Cir. 1993).

⁶¹⁴ Although some cases have held that receipt of a benefit is directly relevant to the analysis of distinctness, other cases have implicitly held the opposite. *See, e.g.,* NCNB Nat’l Bank v. Tiller, 814 F.2d 931, 936 (4th Cir. 1987), where plaintiff alleged that a bank, NCNB, was the RICO “person” and NCNB’s holding company was the enterprise. The RICO claim was dismissed because there was no evidence regarding NCNB’s relationship with NCNB Corporation, other than that NCNB Corporation received a substantial portion of its revenue as dividends from NCNB. *Id.*

⁶¹⁵ *See supra* notes 258-260 and accompanying text.

Ash, Baptie & Co., LLP,⁶¹⁶ the Seventh Circuit held that parent/subsidiary person/enterprise combinations fail to satisfy the Distinctness Requirement under Seventh Circuit authorities, relying on the Prototype and Family Resemblance Tests. As to this combination, *Fitzgerald/Emery* continue to control, despite the Separate Legal Identity Theory, and a greater showing of distinctness than either bare legal distinctness or factual distinctness, or even both, will be required.

4. Summary

In the Second Circuit, where an association in fact enterprise is allegedly comprised of a subsidiary, with or without agents, controlled by a parent corporation, unless plaintiff pleads facts distinguishing the parent's and subsidiary's activities and contribution to the alleged wrongdoing, the RICO allegations will likely be dismissed under the Distinctness Requirement. The sustainability of such allegations will depend on plaintiff's satisfaction of the Nonregular Business Test under a *Riverwoods/Discon* analysis and whether the parent and subsidiary corporations are acting within a single corporate consciousness. In the Third Circuit, plaintiff will have to satisfy the same standard as in the Second Circuit, and, also, *Metcalf's* requirements. The Seventh Circuit follows the same rules as the Third Circuit, and *Metcalf's* interpretation of *Jaguar Cars*, requiring careful delineation of the "distinct roles" played by parent and subsidiary, particularly where

⁶¹⁶ 329 F.3d 923 (7th Cir. 2003).

the affiliated companies are alleged to be an association in fact enterprise.⁶¹⁷ In such cases, the pleading must satisfy the requirements of *Fitzgerald/Emery*.

C. Parent Corporation (or Parent-Group) Enterprises Directed by Subsidiary Corporation(s) and/or Related Groups

1. The Second Circuit

Courts in the Second Circuit have not generally distinguished enterprise/person combinations involving subsidiary and parent corporations based on which entity is identified as enterprise or person nor treated an enterprise comprised of either a parent or subsidiary corporation differently from an association in fact enterprise, comprised of both corporate entities. In *Lippe v. Bairnco Corp.*,⁶¹⁸ for example, plaintiff pleaded that a parent company was

⁶¹⁷ The Eighth Circuit rejected the Seventh Circuit's approach to enterprises comprised of parent and subsidiary corporations in *Fogie v. Thorn Americas, Inc.*, 1999 WL 632251 (8th Cir. Aug. 20, 1999). In *Fogie*, plaintiffs alleged that the RICO enterprise consisted solely of wholly owned and related business entities, and that some of the wholly owned subsidiaries conducted the racketeering activities of the enterprise. The Eighth Circuit concluded that the RICO statute does not permit liability to be imposed on a subsidiary conducting an enterprise comprised solely of the parent of the subsidiary and related businesses. It rejected the Separate Legal Identity Theory, expressly holding that while parent and subsidiary corporations are separate legal entities, this is not enough to establish Statutory Distinctness. It further concluded that merely establishing that the parent and subsidiary corporations played different roles in an alleged enterprise would be insufficient, since that situation would typically apply to every parent/subsidiary relationship. It required a "greater showing" than mere legal distinctness and (apparently) even *functional* distinctness. While the Eighth Circuit did not specify what would constitute a "greater showing," it did reject the parent/subsidiary enterprise because all the entities comprising the enterprise were "part of one corporate family operating under common control . . . driven by a single consciousness." *Id.*, at *7-8. The Eighth Circuit seems to have rejected Seventh Circuit functionalism and the Third Circuit's Separate Legal Identity Theory in favor of the Single Corporate Consciousness Test, frequently applied in the Second Circuit.

⁶¹⁸ 225 B.R. 846 (S.D.N.Y. 1998).

the alleged enterprise, operated or managed by its subsidiaries.⁶¹⁹ Judge Chin held that plaintiff had not properly pleaded distinctness under *Riverwoods*, *Discon* and *R.C.M.*⁶²⁰ Plaintiff had, in effect, pleaded that the companies were part of a single corporate consciousness, undermining Statutory Distinctness.⁶²¹ The Second Circuit and its district courts apply the Distinctness Requirement and the Nonregular Business Test, as indicated above in *Riverwoods*, and the Single Corporate Consciousness Test, as in *Discon*.

2. *The Third Circuit*

The Third Circuit and its district courts are likely, under *Metcalfe*, to continue applying the Nonregular Business Test to enterprises comprised of a parent corporation controlled by its subsidiary, following *Brittingham/Glessner*, which illustrate the Third Circuit's traditional impatience with plaintiff efforts to rearrange entities constituting RICO enterprises and/or transpose the activities of parent and subsidiary corporations to avoid Distinctness Requirement-based dismissals.⁶²²

3. *The Seventh Circuit*

In the Seventh Circuit, plaintiffs must allege that the multiple business entities constituting an association in fact enterprise have each played a *nonincidental*, *necessary* and *distinct* role in facilitating or concealing RICO activity. In *Moore v. Fidelity Financial*

⁶¹⁹ *Id.* at 859.

⁶²⁰ *Id.*

⁶²¹ *See Discon*, 93 F.3d at 1064.

Services, Inc. (Moore I),⁶²³ a financial services company subsidiary was the alleged RICO person controlling two corporate group enterprises headed by its parent and an indirect parent. Both parents delegated their loan servicing businesses to the subsidiary to benefit their alleged “forced place” insurance scheme, which benefited the parents. Judge Gettleman held that plaintiffs had failed to state a claim. First, they had failed to allege that the subsidiary and parents had a common purpose of “engaging in a prohibited course of conduct,” since neither played a direct role in imposing the subject insurance plan on plaintiffs, and, second, the pleading of “delegation” of the parents’ loan servicing businesses was so “nebulous and vague,” as to require dismissal.⁶²⁴

In *Moore v. Fidelity Financial Services, Inc. (Moore II)*,⁶²⁵ plaintiffs amended their complaint and identified, in different counts, a number of enterprises headed by the corporate parents of two subsidiary RICO persons:

In Count I, charging Fidelity as the RICO defendant, plaintiff identifies seven potential enterprises: (1) Fidelity’s corporate parent, FAC; (2) FAC’s corporate parent, Bank of Boston Corp. (“BBC”); (3) FAC’s corporate parent prior to 1993, Society for Savings Bank Corp., Inc. (“Society”); (4) the corporate enterprise headed by BBC; (5) the corporate enterprise headed by FAC; (6) the corporate enterprise headed by Society; (7) the combination of Fidelity and the automobile dealers with which it has long term

⁶²² See *Glessner*, 952 F.2d at 710.

⁶²³ 897 F. Supp. 378 (N.D. Ill. 1995).

⁶²⁴ *Moore I*’s analysis has been sharply criticized. See *infra* notes 648-649 and accompanying text.

⁶²⁵ 949 F. Supp. 673 (N.D. Ill. 1997).

relationships defined by written contracts. In Count II, which names FAC as the RICO defendant, plaintiff identifies five corporate enterprises: (1) BBC; (2) Society; (3) the corporate enterprises headed up by BBC; (4) the corporate enterprise headed by Society; and (5) the corporate enterprise headed by FAC. In Count III, which names certain officers, directors and employees as the RICO defendants, plaintiff identifies the same seven enterprises named in Count I.⁶²⁶

Plaintiff also alleged details of the parents' and subsidiaries' roles within the corporate structures. Relying on *Riverwoods*, *Brittingham*, and the district level decision in *Fitzgerald*,⁶²⁷ however, Judge Gettleman held that where companies and individual defendants do no more than conduct their own corporate affairs, a RICO claim cannot be sustained. He concluded the pleading was an effort to circumvent the Distinctness Requirement.⁶²⁸

In *Wesleyan Pension Fund, Inc. v. First Albany Corp.*,⁶²⁹ Judge Barker sustained a parent corporation enterprise, holding that subsidiary or sister corporations could be RICO persons, under *Jaguar Cars, United States v. Robinson*,⁶³⁰ and *Ashland Oil, Inc. v. Arnett*.⁶³¹ An alleged enterprise constituted of a subsidiary and

⁶²⁶ *Id.* at 678.

⁶²⁷ No. 96 C 0021, 1996 WL 473456, at *7 (N.D. Ill. 1996).

⁶²⁸ The opposite result was reached in *Aitken v. Fleet Mortgage*, No. 90 C 3708, 1992 WL 33926 (N.D. Ill. Feb. 12, 1992). Plaintiff alleged that Fleet Mortgage Corp. was part of the Fleet/Norstar Financial Group, which consisted of commonly owned corporations involved in commercial and consumer finance. *Id.* Fleet was involved in the business of servicing residential mortgage transactions. *Id.* Plaintiff alleged that subsidiary, Fleet, fraudulently conducted these businesses through an enterprise comprised of a subsidiary and a group of commonly owned corporations. Judge Zagel sustained the enterprise. *Id.*

⁶²⁹ 964 F. Supp. 1255 (S.D. Ind. 1997).

⁶³⁰ 8 F.3d 398, 407 (7th Cir. 1993).

⁶³¹ 875 F.2d 1271, 1280 (7th Cir. 1989).

controlled by a parent of a sister corporation was also sustained, under *Haroco, Elysian Fed. Sav. Bank v. First Interregional Equity Corp.*,⁶³² and *Philadelphia TMC, Inc. v. AT&T Information Systems*.⁶³³ Judge Barker sustained the alleged association in fact enterprise of corporate entities and their owners, distinguishing *Riverwoods* and *Richmond*, noting that neither case: “preclude a plaintiff from asserting a group or association-in-fact enterprise made up, not just of a corporation and its officers and employees, but of two sister corporations or a parent and subsidiary corporation and their officers and employees.”⁶³⁴

In *Miller v. Chevy Chase Bank*,⁶³⁵ plaintiff alleged an enterprise comprised of Chevy Chase Bank (“Chase”) and its corporate parents and subsidiaries, through which defendants engaged in schemes involving unlawful, excessively high escrow deposits. The question was whether Chase, a subsidiary, had violated RICO by using powers which its parent and affiliates had delegated to it to engage in mortgage servicing, to commit escrow fraud. The fraudulent escrow practices were allegedly affected through a pattern of mail fraud and monies unlawfully generated were allegedly upstreamed to the parent companies and the corporate group enterprise.

Judge Zagel framed the 1962(c) distinctness issue as whether Chase was conducting its own affairs or the affairs of the enterprise

⁶³² 713 F. Supp. 737, 758-59 (D.N.J. 1989) (stating the parent can be a person distinct from wholly-owned subsidiary enterprise), *overruled on other grounds*, *Ballay v. Legg Mason Wood Walker, Inc.*, 925 F.2d 682 (3d Cir. 1991).

⁶³³ 651 F. Supp. 169, 173 (E.D. Pa. 1986).

⁶³⁴ *Wesleyan*, 964 F. Supp. at 1276.

⁶³⁵ No. 97 C 4494, 1998 WL 142394 (N.D. Ill. Mar. 24, 1998).

as a "lower rung participant" directing corporate group enterprise affairs.⁶³⁶ He upheld the enterprise, reasoning that Chase had exercised sufficient "control" over the parent and affiliates to sustain the allegation. Because Chase was able to determine how much to demand in escrow payments on the serviced mortgages, it was held "directing" and "controlling" enterprise activities. Thus, the question of "distinctness" turned on whether operational management and control was exercised, an analysis associated with the *Reves* test, rather than criteria usually applied in determining Statutory Distinctness.⁶³⁷

A similar result was reached by Judge Castillo in *Majchrowski v. Norwest Mortgage, Inc.*⁶³⁸ *Majchrowski*, a 1998 decision, presents one of the most comprehensive and careful analyses of the Seventh Circuit's distinctness jurisprudence. Chapter 13 debtor-mortgagors had sued a mortgage service company, Norwest Mortgage ("Norwest") and its officers for improperly including certain fees in a bankruptcy proof of claim. Plaintiffs alleged Norwest used its mortgage servicing business as a means of defrauding bankrupt customers into paying bogus charges and fees.

Judge Castillo applied the following method: "identifying the

⁶³⁶ *Id.*, at *3.

⁶³⁷ *Majchrowski v. Norwest Mortgage, Inc.*, 6 F. Supp. 2d 946, 960-61 (N.D. Ill. 1998). In *Robinson v. Empire of Am. Realty Credit Corp.*, plaintiff alleged that subsidiary Empire of America Realty Credit Corp. ("Empire"), a lender, and its parent, the Empire Group, associated together as part of an enterprise. No. 90 C 5063, 1991 WL 26593, at *3 (N.D. Ill. Feb. 20, 1991). Judge Zagel held that Empire and the Empire Group were sufficiently distinct to survive the Distinctness Requirement. *Id.*, at *3. While the decision is somewhat unclear, the pleading also appears to have also alleged that the parent, Empire Group, was the enterprise.

⁶³⁸ 6 F. Supp. 2d at 946.

enterprise, demonstrating that the enterprise is distinct from the RICO 'person,' i.e., the defendant, and pleading that the person participated in the operation or management of the enterprise."⁶³⁹ Plaintiffs pleaded that Norwest conducted the affairs of two enterprises. The first was Norwest Corporation ("NC"), Norwest's "indirect parent" and the second, a corporate group headed by NC. Plaintiffs alleged Norwest officers controlled the enterprises. Defendants relied on *Richmond*, *Fitzgerald* and *Emery* in making their distinctness defense and, in examining these authorities, Judge Castillo identified the precise factual predicates upon which each case turned, the rules each applied, and he synthesized their holdings.

In *Richmond*, although legally separate members were alleged as part of the enterprise, the pleading failed because the member entities were not implicated in the fraud. Because defendants conducted their own affairs, the bare addition of legally separate entities which played no *necessary role* in the RICO misconduct could not save the enterprise.

In *Fitzgerald*, Chrysler, the RICO person, was not distinct from the alleged enterprise comprised of itself, its dealers and subsidiaries. The dealers played only an "incidental" role in the fraud and did not "lend an air of legitimacy to an otherwise obviously illegitimate practice."⁶⁴⁰ Because Chrysler could have made the warranties at issue directly, the dealers' role with respect to the warranties was "incidental" to the RICO conduct; they were not RICO-distinct from Chrysler, even though they were separate legal

⁶³⁹ *Id.* at 953.

entities.

In *Emery*, because plaintiff had not alleged that using subsidiaries, rather than corporate divisions, to engage in the questioned conduct made it easier for defendants to commit misconduct or to conceal it, so the pleading failed. Each case, in Judge Castillo's view, failed to satisfy the Distinctness Requirement because:

[E]ither (1) the entities in the RICO enterprise did not have a role in facilitating or masking the RICO persons' alleged fraud or (2) the RICO person had no role in the alleged fraud perpetrated by its agents. Consequently, the RICO persons in these cases were held to be conducting only their own affairs. As shown in *Fitzgerald* and *Emery*, the problem in general with parent-person and subsidiary-enterprise pleading is that subsidiaries conduct the affairs of their parent, *see Haroco*, 747 F.2d at 402, not vice versa.⁶⁴¹

Distinctness, therefore, comes into play in different ways in the analysis of enterprise elements. First, with respect to distinctness *between the enterprise and the person*, plaintiff must allege each purported enterprise member played a distinct role in "facilitating" or "masking" RICO activity. Although plaintiff need not allege each defendant exercised *Reves* level operation or management of enterprise activity, alleging *Reves* level control is one way plaintiff's have shown the person and enterprise are distinct. Under this analysis, proof of separate legal identity is not enough. With respect

⁶⁴⁰ *Id.* at 955 (citing *Fitzgerald*, 116 F.3d at 228-29 [sic, 227-28]).

⁶⁴¹ *Id.* at 956.

to *distinctness between each of the person(s)* alleged to be controlling the enterprise, plaintiff must allege each such person played a distinct role in “perpetrating” the fraud. This appears to require, *at a minimum*, that plaintiff plead and prove *Reves* control; again bare separate legal identity is not enough.

No case appears to have determined whether these analyses are consistent with *Cedric* which held, in the context of an enterprise comprised of a single corporation controlled by a natural person not alleged to be part of the enterprise, that the only distinctness RICO requires is the separate legal identity of a business entity and natural person.

Judge Castillo upheld plaintiffs’ allegations. First, he noted that by making the subsidiary, Norwest, the RICO person, and the parent (NC) and its corporate group the enterprise, plaintiffs had pleaded the case within the *Haroco* rule—“a subsidiary is presumptively (and perhaps conclusively) distinct from its parent.”⁶⁴² Moreover:

[T]he NC enterprises (unlike those in *Richmond* and *Fitzgerald*) did have some part in masking or facilitating the unauthorized fee scheme, and that Norwest (unlike the RICO person in *Emery*) had its own distinct role. The complaint forthrightly alleges that Norwest is responsible for devising and implementing the alleged scheme to defraud. NC, meanwhile, delegated its mortgage servicing line of business to Norwest, enabling Norwest to implement its allegedly illicit design to charge bankrupt borrowers illegal fees under the claimed authority of

⁶⁴² *Id.*

the mortgage contracts. In short, the legitimate mortgage servicing business delegated by NC allegedly masked Norwest's fee scheme. Moreover, the fruits of this fraud were allegedly upstreamed to NC and reported on NC's financial statements—statements that begot capital investments that NC in turn used to fund Norwest's operations, including its nefarious mortgage service fee collection business . . . the fraud did not "begin and end" with Norwest; rather it integrally involved NC⁶⁴³

Judge Castillo noted that plaintiffs' fraud pleading was based on financial benefits to a parent corporation derived from a delegated line of business and that such a pleading "stretches *Fitzgerald's* RICO prototypes to their very limits."⁶⁴⁴ He was "hard-pressed" to say that Norwest's conduct bears a "family resemblance" to the situation in which a criminal seizes control of a subsidiary, perverting it into a criminal enterprise that seizes control of or improperly influences a parent corporation.⁶⁴⁵ Despite these observations, he upheld the pleading:

[T]he complaint clearly does more than set forth a possible corporate structure for doing business. It explains how one of the entities in that corporate structure allegedly carved out a legitimate line of business and used it as a front to perpetrate fraud. Read broadly, the allegations fit (if somewhat loosely) into the *Fitzgerald* prototype in which the 'criminal uses the acquired enterprise to engage in some criminal activities but for the most part is content to allow it to continue to conduct its normal lawful

⁶⁴³ *Majchrowski*, 6 F. Supp. 2d at 956.

⁶⁴⁴ *Id.* at 960.

⁶⁴⁵ *Id.*

business.’ *Id.* . . . Norwest allegedly took control of this aspect of NC’s business and employed it to engage in a pattern of racketeering activity. This activity, in turn, served as a means of financing the corporate group’s operations and obtaining market capitalization. This is sufficient under the liberal federal pleading standards to establish that Norwest played some part in directing the enterprise’s affairs.⁶⁴⁶

Judge Castillo was, however, troubled by the conclusion he felt compelled to reach:

[T]he case before us comes dangerously close to what *Fitzgerald* might characterize as an ‘absurd application’ of the RICO statute. It requires us to equate exercising delegated authority that produces some financial benefit to affiliated corporate entities with directing those companies’ affairs. This is a logical stretch, to say the least. . . we are troubled by the insertion of RICO claims into what would otherwise be a garden-variety breach of contract or (perhaps) fraud case. But because RICO jurisprudence has evolved to permit RICO claims in a wide range of cases that have nothing to do with organized crime, and because the allegations before use are consistent with showing that Norwest had some part in directing the affairs of NC and its corporate-group enterprise, we must retain Count I.⁶⁴⁷

Defendants relied on *Moore I*, but Judge Castillo distinguished it on three grounds. First, he noted the Seventh Circuit had never required that each business comprising an enterprise

⁶⁴⁶ *Id.*

⁶⁴⁷ *Id.* at 961.

composed of business entities share “a purpose of engaging in a prohibited course of conduct.”⁶⁴⁸ Second, *Moore I* ignored both *Haroco* and *Richmond*, failing, in Judge Castillo’s view, to properly distinguish cases involving subsidiary persons and parent enterprises from cases involving parent persons and subsidiary enterprises. Finally, *Moore I* erred in concluding that the pleading of an enterprise delegating and financing a line of business “later perverted to accomplish a fraudulent purpose” is too vague to survive a motion to dismiss under liberal pleading standards.⁶⁴⁹

Defendants also relied on *Moore II*, but Judge Castillo concluded that it incorrectly failed to treat *Haroco* as valid and controlling authority, and improperly relied on *Fitzgerald*, which involved the converse situation of a parent person and subsidiary enterprise. He also distinguished *Ewing* and *Chamberlain*, on similar grounds.⁶⁵⁰ Judge Castillo held *Majchrowski* was closer to, and should be controlled by *Miller v. Chevy Chase Bank*, which involved a subsidiary person and parent group enterprise.⁶⁵¹

Notably, cases in other circuits have rejected the “delegation” argument that Judge Castillo found persuasive and dismissed similar allegations. For example, the Tenth Circuit, in *Brannon v. Boatmen’s First Nat’l Bank of Oklahoma, T.B.A.*,⁶⁵² wrote:

It is irrelevant to plaintiffs’ RICO claim against

⁶⁴⁸ *Majchrowski*, 6 F. Supp. 2d at 957.

⁶⁴⁹ *Id.* at 958.

⁶⁵⁰ *Id.* at 956-57 (stating that *Chamberlain* and *Ewing* “are inapposite because their RICO claims involved parent corporation RICO persons, enterprises that included subsidiary agents, and facts that belied any finding of distinct roles for both”).

⁶⁵¹ See *supra* note 635 and accompanying text, discussing *Miller*.

⁶⁵² 153 F.3d 1144 (10th Cir. 1998).

Boatmen's that the responsibility for organizing and servicing consumer credit obligations was delegated to it by Bancshares. This allegation does not show that the subsidiary was engaged in the conduct of its parent's affairs; to the contrary, it suggests that the handling of consumer credit obligations was Boatmen's affair. Moreover, plaintiffs' allegations that Boatmen's revenue and profits benefited Bancshares establish nothing more than that the bank holding company benefited financially from the success of its subsidiary—a fact that on its own is unrelated to RICO Liability.⁶⁵³

The Tenth Circuit questioned *Haroco's* continued precedential value, even in the Seventh Circuit, citing the Seventh Circuit's statement in *Emery* that before a subsidiary corporation will be found liable under RICO for conducting the affairs of its parent, plaintiff must allege the parent made it easier to commit or conceal the fraud. The Tenth Circuit has expressly declined to "adopt a rule in this circuit that a mere allegation that the RICO 'person' is the subsidiary conducting the affairs of the parent is sufficient to state a claim under §1962(c)."⁶⁵⁴ The Eighth Circuit has also questioned *Haroco's* continuing viability in the Seventh Circuit.⁶⁵⁵

4. Summary

In the Second Circuit, where parent corporations are alleged

⁶⁵³ *Id.* at 1148-49. *Accord* *Reyes v. FCC Nat'l Bank*, Bankruptcy No. 96-10402, Adversary No. 98-1064, 1999 WL 669298, at *8-9 (Bankr. D.R.I., 1999) (stating that the delegation by parent to subsidiary and agents not sufficient to establish "separateness" under *Fitzgerald* and *Emery*, absent proof of control of the enterprise itself).

⁶⁵⁴ *Brannon*, 153 F.3d at 1147-48.

⁶⁵⁵ *See* *Fogie v. Thorn Americas, Inc.*, 190 F.3d 889 (8th Cir. 1999).

to be RICO enterprises controlled by subsidiary corporation(s) (and/or related entity groups), the same rules applicable to association in fact enterprises generally control. Plaintiff will have to satisfy the Nonregular Business Test, establish that the parent and subsidiary companies are not controlled by a Single Corporate Consciousness, and show the businesses of parent and subsidiary are separate and distinct, with, among other things, the potential for "independent benefit." Pleadings that express only alter-ego relations are likely to be dismissed.

In the Third Circuit, *Brittingham/Glessner* will control. *Jaguar Cars* will have little effect on association in fact enterprises, at least where the controlling RICO person(s) are alleged to be business entities, rather than natural persons. Rules similar to those applied by the Second Circuit apply and Courts in the Third Circuit will continue to apply a presently-confused "overlap" jurisprudence.

Seventh Circuit plaintiffs must allege each business entity played a *nonincidental*, *necessary* and *distinct* role in facilitating or concealing RICO activity. Detailed factual allegations of "devising" or "financing" a scheme to defraud may be sufficient for pleading purposes, as would a claim that defendant "masked" or "facilitated" RICO wrongdoing, in some significant way. Proof of benefit is helpful, but not dispositive. *Haroco*, despite criticism, continues to be good law, so long as its rule is applied to parent enterprises controlled by their subsidiaries, and not vice versa.

CONCLUSION

Despite *Cedric*, Second, Third and Seventh Circuits courts are continuing to follow their own paradigms of distinctness, applying them to a wide range of enterprise/person combinations, distinguishing the enterprise/person constellation presented in *Cedric*.

In the Second Circuit where an association in fact enterprise is alleged to have been controlled by natural persons, *Riverwoods* continues to control analysis, under the Nonregular Business Test, the Corporate Victim Test and the Passive Tool Test. These tests continue to reflect pre-existing corporate, tort and agency liability rules, which themselves reflect the Indistinguishability and Reducibility Theories. Where non-natural persons are alleged and multiple corporations involved, *Securitron Magnalock* overlap principles and/or the Delineation of Separate Entities and/or the Single Corporate Consciousness Tests will likely control.

Cedric, however, plainly stated that bare *legal distinctness* is all the “distinctness” RICO requires. Although natural persons and business entities are just as “legally distinct” from an aggregate “association-in-fact” as a natural person officer is from his or her corporation, the Second Circuit’s post-*Cedric* association in fact case law seems to have not taken seriously just how little distinctness *Cedric* held RICO requires. Although *Cedric* vindicated the Third Circuit’s Separate Legal Identity Theory, it has not vindicated the Third Circuit’s wholesale rejection of the infiltration paradigm or Dual Role Theory. Because the Seventh Circuit’s prototype and family resemblance tests operate by examining how closely alleged

misconduct, and the vehicles through which it is perpetrated, resemble a prototypical mob "infiltration," the Third and Seventh Circuit fundamentally conflict.

The Second, Third and Seventh Circuits, plainly, remain committed to their pre-*Cedric* analytical paradigms. Absent Supreme Court intervention to resolve continuing disagreements among the Circuits, RICO cases will likely continue to be burdened with convoluted distinctions and inconsistent tests and analyses that further neither the courts' interests in judicial economy in complex cases nor the interests of RICO litigants.

