

242 F.3d 539, 2001-1 Trade Cases P 73,161, RICO Bus.Disp.Guide 10,020, 58 U.S.P.Q.2d 1008, 29 Media L. Rep. 1449  
(Cite as: 242 F.3d 539)

United States Court of Appeals,  
Fifth Circuit.

The PROCTER & GAMBLE COMPANY and The Procter & Gamble Distributing Company, Plaintiffs–Appellants,

v.

AMWAY CORPORATION, et al., Defendants,  
Amway Corporation; The Amway Distributors Association Council; Ja–Ri Corporation; Donald R. Wilson; Wow International, Inc.; Wilson Enterprises, Inc.; Ronald A. Rummel, Individually Doing Business as Rummel Enterprises; Kevin Shinn; Randy Haugen; Freedom Associates, Inc.; Freedom Tools, Inc.; Randy Walker; Walker International Network; Gene Shaw; John & Jane Does 6–10, Business Entities; Dexter Yager, Sr.; Birdie Yager; and D&B Yager Enterprises, Inc., Defendants–Appellees.

No. 99–20590.  
Feb. 14, 2001.

JERRY E. SMITH, Circuit Judge:

The Procter & Gamble Company (“P&G”) appeals the dismissal of its lawsuit against Amway Corporation and other defendants for defamation, fraud, and violations of the Lanham Act, RICO, and \*542 Texas state law. We affirm in part, reverse in part, and remand.

I.

P&G, a manufacturer and distributor of numerous household products, has been plagued by rumors of links to Satanism since the late 1970's or early 1980's. The most common variant of the rumor is that the president of P&G revealed on a television talk show that he worships Satan; that many of P&G's profits go to the church of Satan; and that there is no harm in such disclosure, because there are no longer enough Christians left in the United States for such devilish activities to make a difference. The rumor often was circulated in the form of a written flier that listed numerous P&G products and called for a boycott.

P&G has spent considerable time and money unsuccessfully trying to determine the original source of the rumor and to squelch it. P&G has not been able to prove how the rumor began, although it asserts here that the rumor was either started or spread by Amway<sup>FN1</sup> or its

distributors in the 1980's. P&G offered no proof that Amway originally started the rumor, but it did offer evidence showing that various Amway distributors spread it in the 1980's. Rather than suing Amway at that time, however, P&G worked with Amway's corporate headquarters, which promised to help stop the rumor.

<sup>FN1</sup> Amway manufactures and distributes household products, many of which compete directly with P&G's products. Amway distributes its products in a fairly distinctive manner, however, using a system of direct marketing in which its distributors are recruited as independent contractors into a hierarchical system of distribution. Amway has more than a million distributors around the world, each of whom is encouraged both to sell Amway products directly to consumers (including the distributor's own household) and to recruit others to be Amway distributors.

The distributors earn money both by a percentage of the income from Amway products they personally sell and by a percentage of the income from sales made by every distributor whom they have directly recruited, and by those distributors further “downline” who have been recruited as recruits of recruits. Amway's success depends on the efforts of its distributors to encourage downline distributors to buy Amway products and continually to recruit new distributors to replace those lost to attrition. Amway encourages “upline” distributors to motivate those below them in the hierarchy and downline distributors to “emulate” those distributors above them.

The rumor re-surfaced on April 20, 1995, when an Amway distributor named Randy Haugen forwarded it to other Amway distributors via a telephone messaging system for Amway distributors known as “AmVox.”<sup>FN2</sup> Haugen is a highly successful \*543 Amway distributor with a network of tens of thousands to possibly 100,000 distributors underneath him throughout Utah, Nevada, Texas, Mexico, and Canada. He also served on Amway's Distributors Association Council (“ADAC”), which is an advisory body for Amway distributors. Defendants Freedom Associates, Inc.; Freedom Tools Inc.; Randy Walker; and Walker International Network are Amway distribu-

242 F.3d 539, 2001-1 Trade Cases P 73,161, RICO Bus.Disp.Guide 10,020, 58 U.S.P.Q.2d 1008, 29 Media L. Rep. 1449

(Cite as: 242 F.3d 539)

tors in Haugen's distribution network.

[FN2](#). AmVox is a communication system that Amway sells to its distributors to facilitate communication between and among them. Haugen received the rumor about P&G from another Amway distributor via AmVox and forwarded it to all his distributors saying, "This is a great message. Listen to it." The message was:

Hey, Jeff, this is Roger Patton. I wanted to run something by you real quick that I think you'll find pretty interesting. I was just talking to a guy the other night about this very subject and it just so happens that a guy brings information

Duncan Hines	Bounce	Cheer
Bold	Cascade	Joy
Comet	Folgers	Jif
Dawn	Crisco	Always
Downy	Puritan	Attends Undergarments
Gain	Secret	Oil of Olay
Mr. Clean	Sure	Wondra
Oxydol	Head and Shoulders	
Camay	Spic-n-Span	Pert
Coast	Tide	Prell
Ivory	Top Job	Vidal Sassoon
Lava	Luvs	Safeguard
Pampers	Zest	Pepto-Bismol
Charmin	Scope	Puffs
Crest	Gleem	

and says if you're not sure about a product, look for the symbol of the ram's horn that will appear on each product beginning in April. The ram's horn will form the 666 which is known as Satan's number. I tell ya, it really makes you count your blessings to have available to all of us a business that will allow us to buy all the products that we want from our own shelf and I guess my real question is, if people aren't being loyal to themselves and buying from their own business, then whose business are they supporting and who are they buying from. Love ya. Talk to you later. Bye.

There is no evidence that Haugen knew the rumor

in, lays it on my desk this morning, so here it goes. It says the president of Procter & Gamble appeared on the Phil Donahue Show on March 1st of '95. He announced that due to the openness of our society, he was coming out of the closet about his association with the Church of Satan. He stated that a large portion of the profits from the Procter & Gamble products go to support a satanic church. When asked by Donahue if stating this on television would hurt his business, his reply was there are not enough Christians in the United States to make a difference. And below it has a list of the Procter & Gamble products, which I'll read:

was false when he spread it; in fact, he testified that he believed it to be true. The rumor circulated in his and other distribution networks. Some Amway distributors printed fliers containing the rumor, circulating them to consumers, with a message saying, "We offer you an alternative." The fliers also gave contact information for Amway distributors. Although P&G has received complaints and inquiries about this rumor for the last twenty years, it offered evidence to show that, at the time the rumor was circulating on AmVox, the number of complaints and inquiries increased substantially in the states in which the majority of Haugen's distributors live. [FN3](#)

[FN3](#). None of the complaints stated that the complainant had heard the rumor via AmVox.

242 F.3d 539, 2001-1 Trade Cases P 73,161, RICO Bus.Disp.Guide 10,020, 58 U.S.P.Q.2d 1008, 29 Media L. Rep. 1449

(Cite as: 242 F.3d 539)

Within days of the initial message containing the rumor, Haugen sent a short retraction via AmVox.<sup>FN4</sup> Shortly thereafter, an Amway representative contacted Haugen and delivered a copy of a P&G “truth kit,” which explains that the rumor is false. The Amway representative asked Haugen to issue another retraction via AmVox. Using the AmVox system, Haugen then sent out a second, more detailed, retraction.<sup>FN5</sup> Despite Haugen's retractions, \*544 the rumor continued to circulate in Haugen's network and at least one other network for some time.

[FN4](#). The retraction stated:

Hey gang. We sent a message down a while back to do with Procter & Gamble. It cannot be substantiated, that it happened (*drop out on tape*) so I'm going to assume that it didn't actually happen. Um, please do not call Phil Donahue and please do not call Procter & Gamble and just drop it and don't talk about it anymore. We'd just appreciate that a whole bunch. We do not think that it happened. Thank you. Good-bye.

[FN5](#). The second retraction stated:

Hello guys. This message is going out to all of Valerie and I's frontline and also to every diamond in the organization. Uh, we had an Amvox that came down that talked about Procter & Gamble. A lot of you I understand did not get this Amvox, uh, but if you didn't get it, still pay attention to this because if this rumor ever comes up again you need to stamp it out. Uh, it was rumored that on a television show, on the Phil Donahue show, and it is rumored on other talk shows, that uh, the CEO or officers from Procter & Gamble Company went onto the show and told them that their symbol represents Satanism, the symbol on all their products, and also that they practice Satanism. I'm going to read you a statement here and see if we can get this rumor cleared up because I know a lot of you would like to know the truth and it is very important that you understand this. False rumors: Unfortunately this familiar trademark has been subjected to prosperous, excuse me, preposterous unfounded rumors since 1980–81. The rumors falsely allege that the trademark is a symbol of Satanism or devil worship. Typically the story reports a Procter

& Gamble executive discussed Satanism on a national televised talk show. Another story maintains that the trademark is a result of Procter & Gamble being taken over by the Moonies, followers of Reverend Sun Yung Moon and his Unification Church. The rumors are, of course, totally false. Their trademark originated in 1851 as a symbol for their Star brand candle. Later it was designed to show a man in the moon looking over a field of 13 stars commemorating the original American colonies. It represents only Procter & Gamble. So if you hear any rumors saying anything to the effect that they are practicing Satanism and their symbols on their products, uh, are satanic, then it is absolutely 100% false. Uh, we don't want any bad rumors about any competitors or non-competitor, any company anywhere ever going out from us. So if anybody you hear talking about this in the organization anywhere at all brings this up, it is absolutely not true. Not only is not just substantiated, but is not true, period. Amway Corporation does not endorse spreading false and malicious rumors against Procter & Gamble or any other company. Please do your part as independent distributors by not spreading this rumor any farther or nipping it if you hear it from anybody else. We appreciate that a whole lot, uh, so let's crush that, if you're hearing any kind of stuff anywhere let's get rid of it and let's go on and build us a huge business and not have any of this kind of junk and that's a good lesson to be very, very, very, careful about putting anything down on Amvox that's not substantiated, and if anybody could take the blame on this, I can take it. So, uh, we just don't want anything to do with it and it was a mistake. It did go out to a few people ... (*drop out*).

## II.

In response to the spread of the rumor among Amway distributors, P&G filed a lawsuit in each of two federal district courts. In 1995, in Utah, it sued Haugen, Freedom Associates, Inc., and Freedom Tools, Inc., for spreading the Satanism rumor, claiming it lost customers as a result of the actions of Haugen and other Amway distributors. P&G later joined Amway, Randy Walker, and Walker International Network as defendants. In 1996, P&G filed a second amended complaint containing causes of action for defamation, common-law unfair competition, violations of the Utah Truth in Advertising Act, tortious inter-

242 F.3d 539, 2001-1 Trade Cases P 73,161, RICO Bus.Disp.Guide 10,020, 58 U.S.P.Q.2d 1008, 29 Media L. Rep. 1449

(Cite as: 242 F.3d 539)

ference, negligent supervision, violations of Lanham Act § 43(a), [15 U.S.C. § 1125\(a\)](#), and vicarious liability. P&G then filed a third amended complaint alleging that Amway is an illegal pyramid and alleging fraud and product disparagement; that complaint was dismissed in 1997. Later in 1997, P&G filed a motion for leave to file a fourth amended complaint to assert fraud and disparagement claims; the Utah court denied the motion as untimely.

One day after its third amended complaint was dismissed in the Utah action, P&G filed the suit at issue in this appeal, in Texas. This suit is based on the same transactions, and involves substantially the same parties, as does the Utah suit. It names Haugen, Amway Corporation, ADAC, and various other Amway Distributors (all hereinafter referred to as “Amway”) as defendants.<sup>FN6</sup> The Texas complaint sought remedies for the alleged conduct of defendants in (1) spreading the Satanism rumor, (2) disparaging P&G's Crest toothpaste, and (3) allegedly harming sales of P&G's products by inducing people to become Amway distributors and consumers by luring them into an illegal pyramid scheme and misleading them as to the financial rewards of selling Amway. \*545 P&G asserted various causes of action in its Texas suit, including common-law fraud; several violations of § 43(a) of the Lanham Act, [15 U.S.C. § 1125\(a\)](#); violation of the Racketeer Influenced and Corrupt Organizations Act (“RICO”), [18 U.S.C. § 1962\(c\)](#) and [\(d\)](#); and violation of [TEXAS BUSINESS AND COMMERCE CODE § 16.29](#).<sup>FN7</sup>

<sup>FN6</sup>. ADAC, Ja–Ri Corporation (“Ja–Ri”), Donald Wilson, WOW International, Inc., Wilson Enterprises, Inc., Ronald Rummel, Kevin Shinn, Gene Shaw, Dexter Yager, Sr., Birdie Yager, and D&B Yager Enterprises (all listed as defendants on P&G's brief) were not defendants in the Utah suit, but, as Amway distributors, they were in privity with the distributors who were defendants there. It is uncertain to what extent P&G is appealing the dismissal of some of these defendants. Although P&G's brief claims error on the part of the district court in the dismissals of ADAC and Ja–Ri, P&G admits in its initial brief that, at the time the court below dismissed the remaining claims, “[t]he remaining defendants were Amway ... Randy Haugen, Randy Walker, Dexter Yager, and Donald Wilson.”

P&G does not contest the earlier dismissal of any defendants except ADAC and Ja–Ri.

WOW International, Inc., Wilson Enterprises, Inc., Ronald Rummel, Kevin Shinn, Gene Shaw, Birdie Yager, and D&B Yager Enterprises are not even mentioned in P&G's initial brief other than on its cover. Thus, P&G either does not appeal their dismissals from the suit or has waived any argument against their dismissals. [Cinel v. Connick, 15 F.3d 1338, 1345 \(5th Cir.1994\)](#).

<sup>FN7</sup>. The only claim that remains on appeal from the Texas case that P&G did not assert in the Utah case is for violation of [TEXAS BUSINESS & COMMERCE CODE § 16.29](#). P&G brought a number of other claims in its initial Texas complaint that it had not raised in the Utah suit, but it does not appeal the ruling as to those claims.

The Texas district court granted Amway's [FED. R. CIV. P. 12\(b\)\(6\)](#) motion dismissing P&G's RICO claim, because P&G did not allege that it had relied on Amway's alleged predicate acts of mail and wire fraud. Then, on summary judgment, the court held that P&G lacked standing to bring its § 43(a) claim based on Amway's alleged illegal pyramid scheme and that the fraud claim was time-barred. In September 1998, the Utah court granted defendants' joint motion for summary judgment and dismissed the § 43(a) claim, stating that “the misrepresentation at issue does not relate to a product within the meaning of the Lanham Act.” Inexplicably, in the Utah court, P&G claimed only that Amway's actions constituted a violation of the Lanham Act's prohibition on the misrepresentation of goods or services, even though that act also provides a cause of action for misrepresentation of commercial activity.<sup>FN8</sup>

<sup>FN8</sup>. Section 43(a) provides:

Any person who, in or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsor-

242 F.3d 539, 2001-1 Trade Cases P 73,161, RICO Bus.Disp.Guide 10,020, 58 U.S.P.Q.2d 1008, 29 Media L. Rep. 1449

(Cite as: 242 F.3d 539)

ship, or approval of his or her goods, services, or commercial activities by another person .... shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

[15 U.S.C. § 1125\(a\)\(1\)](#).

P&G did not argue that repetition of the Satanism rumor constituted misrepresentation of its commercial activities until its [FED.R.CIV.P. 60\(b\)](#) motion for reconsideration of the Utah court's grant of summary judgment. The Utah court denied P&G's motion for reconsideration, finding no excuse for P&G's failure to raise the commercial activities claim earlier.

In March 1999, the Utah court granted summary judgment to defendants on the defamation *per se*, vicarious liability, and negligent supervision claims. A few days later, before the Texas case went to trial, the Utah court entered a final judgment dismissing all of P&G's claims.

After the final judgment from the Utah court, Amway moved for judgment as a matter of law (“j.m.l.”) in the Texas case. The district court denied the motion because it was filed after the deadline for pre-trial motions. At the close of P&G's case, Amway again moved for j.m.l. The court granted the motion and dismissed the § 43(a) claim against Amway, Walker, and Haugen based on the *res judicata* effect of the Utah court's decision. The Texas court dismissed the § 43(a) claim for disparagement of commercial activities against the remaining defendants (and against Amway, Walker, and Haugen for purposes of vicarious liability), because it found that P&G had not presented sufficient evidence of “actual malice,” which the court held to be a requirement of § 43(a) suits brought by “limited-purpose public figure” plaintiffs.<sup>FN9</sup> The court also dismissed\*546 the [TEXAS BUSINESS AND COMMERCE CODE § 16.29](#) claim and all remaining claims.

<sup>FN9</sup> The court ruled that P&G was a “limited-purpose public figure” with regard to the Satanism rumor and that thus the First Amendment protection of the [New York Times v. Sullivan](#), 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), “actual malice” test applied to shield erroneous but non-malicious speech regarding an issue of public concern—in this case, P&G's alleged links to Satanism.

After oral argument had been heard in this court, the Tenth Circuit reversed the Utah summary judgment. *P&G v. Haugen*, 222 F.3d 1262 (10th Cir.2000). The Tenth Circuit addressed P&G's misrepresentation of commercial activities claim, even though P&G had not timely raised it before the Utah district court. The Tenth Circuit explained its willingness by stating that where an issue is purely a matter of law, its resolution is certain, and public interest is implicated, it should be addressed on appeal. *Id.* at 1271. The Tenth Circuit concluded that the repetition of the Satanism rumor raised a claim under the “commercial activities” prong of the Lanham Act, and it therefore reversed and remanded as to the Lanham Act claim and reversed the dismissal of P&G's Utah state law tortious interference claim. *Id.* at 1280.

\* \* \* \*

#### VII.

The district court dismissed P&G's RICO claims under [FED.R.CIV.P. 12\(b\)\(6\)](#). P&G argues that Amway's repetition of the Satanism rumor and its alleged illegal pyramid scheme constitute violations of RICO, [18 U.S.C. § 1962\(c\)](#) and (d). P&G listed mail fraud and wire fraud as the predicate acts for its RICO claims but does not claim to have relied on any of the misrepresentations that Amway allegedly made via mail and wire. Instead, P&G argues that it is not required to allege and prove reliance. We affirm in part and reverse and remand in part on this issue.

We review *de novo* the dismissal of a complaint for a failure to state a claim for which relief can be granted under [rule 12\(b\)\(6\)](#). [Fernandez–Montes v. Allied Pilots Ass'n](#), 987 F.2d 278, 284 (5th Cir.1993). A claim may not be dismissed unless it appears beyond doubt that the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief. [Benton v. United States](#), 960 F.2d 19, 21 (5th Cir.1992). For purposes of our review, we must accept the plaintiff's factual allegations as true and view them in the light most favorable to the plaintiff. [Campbell v. City of San Antonio](#), 43 F.3d 973, 975 (5th Cir.1995).

In civil RICO claims in which fraud is alleged as a predicate act, reliance on the fraud must be shown: “[W]hen civil RICO damages are sought for injuries resulting from fraud, a general requirement of reliance by the plaintiff is a commonsense liability limitation.” [Summit Properties, Inc. v. Hoechst Celanese Corp.](#), 214 F.3d 556 (5th Cir.2000), *cert. denied*, 531 U.S. 1132, 121 S.Ct. 896, 148 L.Ed.2d 802 (2001).

242 F.3d 539, 2001-1 Trade Cases P 73,161, RICO Bus.Disp.Guide 10,020, 58 U.S.P.Q.2d 1008, 29 Media L. Rep. 1449

(Cite as: 242 F.3d 539)

P&G points out that in *Summit* we also set out a narrow exception to this rule. “In general, fraud addresses liability between persons with direct relationships—assured by the requirement that a plaintiff has either been the target of fraud or has relied upon the fraudulent conduct of defendants.” [Summit, 214 F.3d at 561](#).

Thus, in *Summit* we ruled that a target of a fraud that did not itself rely on the fraud may pursue a RICO claim if the \*565 other elements of proximate causation are present.<sup>FN53</sup> We cited with approval [Mid Atlantic Telecom, Inc. v. Long Distance Services, Inc., 18 F.3d 260, 263–64 \(4th Cir.1994\)](#), which “held open the possibility that a plaintiff company may not need to show reliance when a competitor lured the plaintiff’s customers away by a fraud directed at the plaintiff’s customers.” [Summit, 214 F.3d at 561](#).

[FN53](#). Although in [Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 112 S.Ct. 1311, 117 L.Ed.2d 532 \(1992\)](#), the Court held that simple “but-for” causation is not enough to confer civil RICO standing, that conclusion “is no more than that common law ideas about proximate causation inform the understanding of RICO.” [Israel Travel Advisory Serv., Inc. v. Israel Identity Tours, Inc., 61 F.3d 1250, 1257 \(7th Cir.1995\)](#).

Consequently, P&G’s RICO claims based on Amway’s alleged spreading of the Satanism rumor to lure customers from P&G are claims on which relief can be granted. P&G has alleged that using the wire and the mail, Amway attempted to lure P&G’s customers away by fraud. Although P&G did not rely on the fraud, this falls into the narrow exception carved out by *Summit*, in which we said that “[i]n the current case, for example, the defendants’ competitors might recover for injuries to competitive position....” [Summit, 214 F.3d at 561](#). Thus, if P&G’s customers relied on the fraudulent rumor in making decisions to boycott P&G products, this reliance suffices to show proximate causation.

P&G’s RICO claims for injury based on Amway’s alleged illegal pyramid structure cannot meet the requirement that the alleged predicate acts proximately caused P&G’s damages, however. Although some Amway distributors may have bought more P&G products “but-for” being lured into joining Amway, injury to P&G did not flow directly from such inducements. Further, there are

too many intervening factors for proximate causation to be proven here. Allowing RICO claims for such tenuous causation would open floodgates similar to those that we are unwilling to open under the Lanham Act. See [Holmes, 503 U.S. at 267, 272, 112 S.Ct. 1311](#). “Life is too short to pursue every human act to its most remote consequences; ‘for want of a nail, a kingdom was lost’ is a commentary on fate, not the statement of a major cause of action against a blacksmith.” [Holmes, id. at 287, 112 S.Ct. 1311](#) (Scalia, J., concurring).

We affirm the dismissal of P&G’s RICO claims based on Amway’s allegedly illegal pyramid scheme, and we reverse the dismissal of the RICO claims based on Amway’s spreading of the Satanism rumor. The complaint, as pleaded, does state a claim upon which relief may be granted.

\* \* \* \*

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings in accordance with this opinion.

C.A.5 (Tex.),2001.

Procter & Gamble Co. v. Amway Corp.

242 F.3d 539, 2001-1 Trade Cases P 73,161, RICO Bus.Disp.Guide 10,020, 58 U.S.P.Q.2d 1008, 29 Media L. Rep. 1449