Woods, *District Judge*, concurring in part and concurring in the judgment:

I concur in the judgment because I am persuaded that this conclusion is mandated by the Second Circuit's decision in *Cruz v. FXDirectDealer, LLC*, 720 F.3d 115 (2013). I write separately only because the decision to reaffirm the approach this Circuit took to the application of the "distinctness" principle in this context prior to *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158 (2001), was made four years ago by the panel in *Cruz*. Given that we are not working with a blank canvas—*Cruz* dictates the outcome here—I decline to paint in an analysis here to reconcile the court's decision in *Cruz* with *Cedric*.[1] As a result, I do not join in the discussion on pages 19 to 22 of this decision describing how the Supreme Court's ruling in *Cedric* supports this conclusion.

Cruz reaffirmed the principle that "corporations that are legally separate but 'operate within a unified corporate structure' and 'guided by a single corporate consciousness' cannot be both the 'enterprise' and the 'person' under

[1] As the opinion notes, our Circuit's approach in *Cruz*, which cabins the Supreme Court's decision in *Cedric* to its facts, is consistent with that taken by a number of other federal courts. Several commenters have remarked on this trend. *See, e.g.*, William B. Ortman, *Parents, Subsidiaries, and RICO Distinctiveness*, 73 U. Chi. L. Rev. 377, 398 (2006) (arguing that circuit courts have "ignored the Supreme Court's repeated directives against the use of purposive interpretation to extratextually cabin RICO liability"); Laurence A. Steckman, *RICO Section 1962(c) Enterprises and the Present Status of the "Distinctness Requirement" in the Second, Third and Seventh Circuits*, 21 Touro L. Rev. 1082, 1296 (2006) (observing that "Cedric . . . plainly stated that bare legal distinctness is all the 'distinctness' RICO requires. . . . The Second, Third and Seventh Circuits, plainly, remain committed to their pre-Cedric analytical paradigms.")

§ 1962(c)." *Cruz*, 720 F.3d at 121. In support, *Cruz* cited to the Second Circuit's 1996 decision in *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055 (2d Cir. 1996), *vacated on other grounds*, 525 U.S. 128 (1998). In reaffirming the rule established in *Discon*, the opinion in *Cruz* did not analyze the impact of the Supreme Court's intervening decision in *Cedric* on the Circuit's approach to the "distinctness" principle. The analysis of *Cedric* presented in this case—limiting the Supreme Court's holding in *Cedric* to its facts, applicable only to distinctness analysis involving an individual owner and her wholly-owned corporation, and equating a separately organized subsidiary of a corporation to an "agent or employee" of a corporation—was not stated overtly in *Cruz*.

Nor did *Cruz* expressly grapple with the Second Circuit's first decision addressing the distinctness principle following *Cedric*—*City of New York v. Smokes-Spirits.com, Inc.*, 541 F.3d 425 (2d Cir. 2008). In *Smokes-Spirits*, the panel described the Supreme Court's holding in *Cedric* in a way that is at least arguably broader than the approach reaffirmed in *Cruz*. The *Smokes-Spirits* court wrote:

> In *Cedric Kushner*, the Supreme Court explained that the RICO "person" and alleged "enterprise" must be only legally, and not necessarily actually, distinct. . . . The City has alleged . . . that the enterprise is an innocent corporation, with its own legal basis for existing, and the persons are employees or officers of the organization unlawfully directing the enterprise's racketeering activities.

Id. at 448. In light of this language, I understand why Judge Seibel, writing before *Cruz* was handed down, reached her initial conclusion regarding the proper application of the distinctness principle after *Cedric*. *U1IT4less, Inc. v. FedEx Corp.*, 896 F. Supp. 2d 275, 288 (S.D.N.Y. 2012).

I emphasize too that in affirming the ruling below, we are not endorsing the test applied by Judge Forrest in her opinion, namely "whether the fact of separate incorporation facilitated the alleged unlawful activity." Judge Forrest derived the "facilitation" test from the Seventh Circuit's ruling in *Bucklew v. Hawkins, Ash, Baptie & Co.*, 329 F.3d 923 (2003). While *Bucklew* has been cited favorably by a number of courts evaluating this issue, the test has no foundation in the jurisprudence of the Second Circuit, and the application of existing circuit doctrine suffices to resolve this case.[2]

[2] While decided two years after *Cedric*, *Bucklew* does not mention the Supreme Court's decision in its analysis. Moreover, the single paragraph of analysis of this issue in *Bucklew* relies on cases involving the Sherman Act, principally *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). *Bucklew*, 329 F.3d at 934. In *Cedric*, Mr. King argued that *Copperweld* supported a ruling in his favor. The Supreme Court rejected that argument, stating that its conclusion that legal separateness was all that was required by RICO was not "inconsistent with antitrust law's intracorporate conspiracy doctrine; that doctrine turns on specific antitrust objectives." *Cedric*, 533 U.S. at 166.