FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SEP 12 2000

JAMES R. LARSEN, CLERK
DEPUTY

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Honorable Fred VanSickle

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

OLIVIA MENDOZA and JUANA MENDIOLA, individually and on behalf of all other similarly situated, Plaintiffs, v. ZIRKLE FRUIT CO., a Washington corporation, MATSON FRUIT COMPANY, a Washington corporation and SELECTIVE EMPLOYMENT AGENCY, INC., a Washington corporation, Defendants.	NO. CY-00-3024-FVS **RESPONSE TO PLAINTIFFS' UNAUTHORIZED SUPPLEMENTAL MEMORANDUM**

Whether consideration should be given to Plaintiffs' Supplemental Memorandum served by facsimile on the afternoon of Friday, September 8, 2000 is a decision within the court's sound discretion. If the court does consider plaintiffs' Supplemental Memorandum, defendants Zirkle Fruit Co. and Matson Fruit Co. ask the court to also consider this concise response seeking to correct the plaintiffs' continued efforts to erroneously re-state defendants' arguments, and in the interest of obtaining a well- reasoned decision.

The lack of a direct causal connection between the plaintiffs' allegedly "depressed wages" and Zirkle or Matson's alleged hiring practices, puts this case in a clear perspective. This action is an attempt by the plaintiffs and their attorneys to create civil liability by supplanting the federal Government's policies and enforcement concerning unauthorized aliens. The composition of the labor pool in Central or Eastern Washington is not the result of actions by defendants Zirkle or Matson. Rather, this labor pool is a consequence of inadequate or ineffective Government policies concerning immigration control, the inability of the Government to stop the procurement of fraudulent documentation by unauthorized aliens, the lack of job opportunities in neighboring countries, and a myriad of other social and economic factors that influence the flow of unauthorized aliens from outside our borders.

These are the causes for the presence of unauthorized aliens in the relevant labor market, which allegedly "depressed" the wages that could be demanded by the plaintiffs. Zirkle and Matson are not responsible for these causes. And regardless of whether the plaintiffs are attempting to eradicate alleged "racketeering" or seeking to capitalize on a confusing situation created by Government policy, they do not have standing to pursue RICO claims against the defendants.

1. The Plaintiffs Are Not Claiming A Direct Injury.

Although defendants did not rely on or cite the unpublished decision in *Commercial Cleaning Services v. Colin Service Sys., Inc.*, 2000 WL 545126 (D. Conn. March 21, 2000), the plaintiffs attempt to distinguish that decision demonstrates they are not alleging a direct injury necessary for RICO standing. In *Commercial Cleaning Services*, the court reasoned that any causal connection between the hiring of unauthorized workers and the plaintiffs' alleged lost revenue also depended on (1) the actions or inaction of the INS, (2) the comparative quality of services provided by plaintiff and the defendant, and (3) fluctuations in the demand for such services. Hence, there was no direct causal connection between the alleged predicate act and the alleged injury, and, therefore, the plaintiffs lacked standing. *Commercial Cleaning*

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Services, 2000 WL 545126 at *5.

The *Commercial Cleaning Services* court further supported its decision by reasoning that if the defendant was violating the Immigration and Nationality Act (INA), "it is the INS which bears primary responsibility to deter those activities." The court went on to cite a long list of decisions holding there is no private cause of action for enforcement of the INA. *Id.* at *6

Similarly, in this case, the causal connection between Zirkle's and Matson's alleged hiring of unauthorized workers and the plaintiffs' allegedly "depressed" wages would depend on (1) the action (such as in Operation Snowbird) or inaction of the INS, (2) the comparative work experience and ability of the plaintiffs and other workers available in the labor market, (3) fluctuations in the demand for labor, (4) the defendants' ability or inability to profitably pay more for labor, and (5) a myriad of other reasons that influence a business's decision to pay higher wages to particular workers. Hence, the plaintiffs in this case are not alleging a direct injury and, therefore, lack standing to pursue their claims.

The lack of a direct causal connection is further demonstrated by the plaintiffs attempt to sue Matson Fruit Co., for whom they do not allege to have worked. If Matson Fruit Co.'s employment of unauthorized workers depressed wages earned by the plaintiffs at Zirkle, the same effect must also have been primarily caused by employment of unauthorized workers in other fruit warehouses, restaurants, construction companies, manufacturing companies, public and private schools, and a long list of other businesses that employ similarly skilled workers. The plaintiffs' Complaint, at ¶ 22, explicitly acknowledges they are trying to recover for wages that were allegedly "depressed" below what the wages "would be in a labor market comprised solely of legally authorized workers." The harm plaintiffs allege was caused by the presence of unauthorized workers in the entire relevant labor market, not just at Zirkle and Matson.

In other words, the plaintiffs' own Complaint concedes the wages paid by Zirkle

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and Matson are largely dependent on the wage rates paid by other businesses competing for the labor of similarly skilled workers. The availability of other workers and the wages paid by other businesses are not caused by Zirkle or Matson's alleged hiring practices, and there is no direct causal connection between the plaintiffs' alleged injury and Zirkle or Matson's alleged hiring practices.

Absent such direct causal connection, plaintiffs do not have RICO standing under *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992); and *Imagineering, Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303 (9th Cir. 1992). And no proposed expert testimony can cure this flaw in plaintiffs' case.

2. Plaintiffs Do Not Allege An *Injury* To Business Or Property, Nor "Concrete Financial Loss."

The plaintiffs in this case have not alleged "lost wages," which is a term of art in tort claims, but have instead alleged "depressed" wages for which they willingly agreed to work. This fact clearly distinguishes this case from the authority cited by plaintiffs in their proposed Supplemental Memorandum at pp. 3-4.

One court has addressed a similar issue by pointing out the error of attempting to equate a property *interest* with a property *injury*. *Dumas v. Major League Baseball Properties, Inc.*, 104 F. Supp.2d 1220 (S. D. Cal. 2000). In *Dumas*, the court held that the plaintiffs could not allege an injury to their property interest caused by an alleged gambling scheme constituting "racketeering activity," where the plaintiffs received exactly what they had bargained for. Here, the plaintiffs received the wage for which they agreed to work, and cannot claim an injury to any property interest.

The Court of Appeals for the District of Columbia has stated in *dicta* that an employer's failure to pay wage rates required by the Service Contract Act is not an injury to property within the meaning of the RICO civil enforcement statute. *Danielson v. Burnside-Ott Aviation Training Center, Inc.*, 941 F.2d 1220, 1229 (C.A. D. C. 1991). In Danielson, the court expressed serious doubt that plaintiffs were injured in their "business or property," within the meaning of the RICO provision for a private

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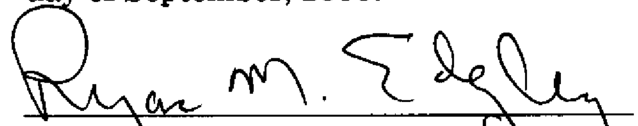
cause of action, by alleged violations of the Service Contract Act because: "While the employees may have been entitled to higher paying job classifications than they received under the defendants' employment schemes, each employee in fact received precisely the compensation bargained for in return for the agreed work." *Id.*

The plaintiffs' proposed Supplemental Memorandum misconstrues the argument presented to the court by Zirkle and Matson. While the defendants do not challenge the principle that wages constitute a property interest, Zirkle and Matson do contend the plaintiffs' admission they received the wages for which they agreed to work precludes any claim that they have been *injured* within the meaning of RICO.

CONCLUSION.

If the court considers the plaintiffs' proposed Supplemental Memorandum, the defendants' Motion To Dismiss should nevertheless be granted for the reasons stated above, and the plaintiffs' failure to adequately plead any RICO predicate act.

Respectfully submitted this 12th day of September, 2000.



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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

OLIVIA MENDOZA and JUANA MENDIOLA, individually and on behalf of all other similarly situated,

Plaintiffs,

v.

ZIRKLE FRUIT CO., a Washington corporation, MATSON FRUIT COMPANY, a Washington corporation and SELECTIVE EMPLOYMENT AGENCY, INC., a Washington corporation,

Defendants.

NO. CY-00-3024-~~AAM~~ FVS

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
: ss.
COUNTY OF YAKIMA)

The undersigned, being first duly sworn on oath, deposes and says: That affiant is a citizen of the United States of America and of the State of Washington, living and residing in Yakima County in said state, of legal age, not a party to the above-entitled action, and competent to be a witness herein. On the 12th day of September, 2000,

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affiant deposited in the United States mail a properly stamped and addressed envelope directed to:

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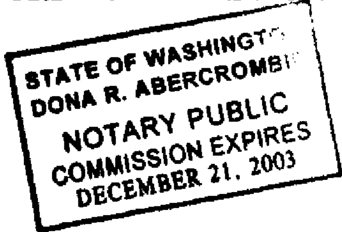
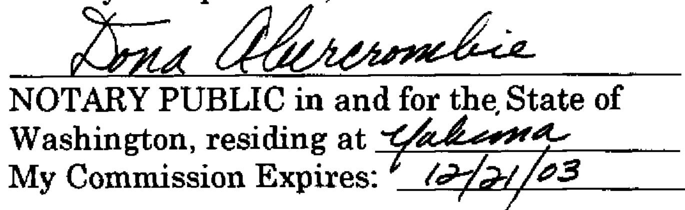
Said envelope containing a copy of:

Response to Plaintiffs' Unauthorized Supplemental Memorandum.

KAREN A. HILL

SUBSCRIBED AND SWORN TO this 12th day of September, 2000.





NOTARY PUBLIC in and for the State of Washington, residing at Yakima
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