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U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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10 UNITED STATES DISTRICT COURT
11 EASTERN DISTRICT OF WASHINGTON
12 AT YAKIMA

13 OLIVIA MENDOZA and JUANA
14 MENDIOLA, individually and on behalf
15 of all others similarly situated,

16 Plaintiffs,

17 v.

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

21 Defendants.

No. CY-00-3024-FVS

REPLY MEMORANDUM IN
SUPPORT OF PLAINTIFFS'
MOTION FOR THE COURT TO
TAKE SUPPLEMENTAL
JURISDICTION OVER SELECTIVE
EMPLOYMENT AGENCY, INC.

22
23 I. INTRODUCTION

24 As Plaintiffs demonstrated in their Opening Brief, there is every reason for this
25 Court to take jurisdiction over the pendent party claims against Selective Employment
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PLTFS' REPLY MEM. FOR THE
COURT TO TAKE SUPPLEMENTAL
JURISDICTION OVER SELECTIVE

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1 Agency, Inc. (“Selective”), and no reason for the Court to decline. Selective makes
2 two arguments against jurisdiction, neither of which should long detain this Court.

3 **First**, Selective claims that its liability under Washington law is a “novel
4 question” that would justify this Court’s refusal to take jurisdiction over Selective
5 pursuant to 28 U.S.C. § 1367(c)(1). Remarkably, Selective (i) ignores that the claim
6 has already survived a motion to dismiss before this Court, and (ii) does not take issue
7 with Plaintiffs’ description of the plain elements of the tort of civil conspiracy under
8 Washington law – elements that are plainly met here. Moreover, *even if* this Court
9 were to find that Selective’s liability was an open question under State law, Selective
10 is mistaken in its suggestion that would be the end of the inquiry. To the contrary,
11 even if Selective were correct, the Court must still consider “economy, convenience,
12 fairness and comity” – all of which counsel strongly in favor of this Court’s exercise
13 of jurisdiction here. *See Executive Software N. Am. v. United States Dist. Court*, 24
14 F.3d 1545, 1557 (9th Cir. 1994). Selective cannot avoid jurisdiction by improperly
15 truncating the requisite analysis pursuant to 20 U.S.C. § 1367, and distorting clear
16 Washington law concerning civil conspiracy.
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19 **Second**, Selective ignores the Ninth Circuit’s decision in this case, and argues
20 that pendent party jurisdiction may still be unconstitutional. With respect, Selective
21 has lost on this issue in the Ninth Circuit, and did not seek certiorari on this issue.
22 Accordingly, it may not raise this issue yet again before this Court.
23

24 **Finally**, Selective makes the odd assertion that it is unfair to Selective to litigate
25 this case in one (rather than two) forums because its repeated challenges to
26

1 jurisdiction have been “expensive.” Even if that were a cognizable basis for denying
2 jurisdiction (and it is not), Selective does not explain why it would be less expensive
3 for itself, its co-defendants or Plaintiffs to litigate this case in State court.

4 Plaintiffs submit that their motion should be granted so that this case may
5 proceed in an efficient and fair fashion in this Court in keeping with the purposes of
6 the supplemental jurisdiction statute.
7

8 **II. SELECTIVE IMPROPERLY TRUNCATES THE REQUIRED**
9 **ANALYSIS UNDER 28 U.S.C. § 1367**

10 Selective premises its argument on the claim that supplemental jurisdiction may
11 be denied so long as the Court finds applicable one of the bases for declining
12 supplemental jurisdiction under 28 U.S.C. § 1367(c). *See* Selective Opp. at 8.
13 However, the Ninth Circuit has squarely held that such a finding – while a pre-
14 requisite to a refusal to exercise supplemental jurisdiction – is insufficient, by itself, to
15 justify the rejection of supplemental jurisdiction:
16

17 By codifying preexisting applications of *Gibbs* in
18 subsections (c)(1)-(3), however, it is clear that Congress
19 intended the exercise of discretion to be triggered by the
20 court’s identification of a factual predicate that corresponds
21 to one of the section 1367(c) categories. Once that factual
22 predicate is identified, the exercise of discretion, of course,
23 still is informed by whether remanding the pendent state
24 claims comports with the underlying objective of “most
25 sensibly accomodating” the values of “economy,
26 convenience, fairness, and comity.” *See, e.g., Imagineering,*
Inc., v. Kiewit Pac. Co., 976 F.2d 1303, 1309 (9th Cir. 1992)
... *Roe v. Little Co. of Mary Hosp.,* 800 F. Supp. 620, 626-
27 (N.D. Ill. 1992) ...

25 *Executive Software,* 24 F.3d at 1557; *see also O’Connor v. State of Nevada,* 27 F.3d
26 357, 363 (9th Cir. 1994) (same rule applies when opponent of supplemental



1 jurisdiction asserts that jurisdiction should be denied because “the claim raises a novel
2 or complex issue of State law. . . .”)

3 Accordingly, even if the Court accepts Selective’s argument that either a “novel
4 state law issue” or other “exceptional circumstances” might warrant the refusal to
5 entertain pendent party jurisdiction here, it should *still* retain jurisdiction for the
6 reasons identified in Plaintiffs’ Opening Brief. *See* Pltfs. Mem. at 5-8.

8 **III. PLAINTIFFS’ CIVIL CONSPIRACY CLAIM RAISES NO NOVEL**
9 **ISSUES OF STATE LAW**

10 Washington law has long-defined a civil conspiracy as “a combination of two
11 or more persons to commit a criminal or unlawful act” that causes damages as a result.
12 *See, e.g., Lewis Pac. Dairymen’s Ass’n. v. Turner*, 50 Wn.2d 762, 772, 314 P.2d 625
13 (1957); *Corbit v. J. I. Case Co.*, 70 Wn.2d 522, 528-29 (1967); *Sterling Bus. Forms v.*
14 *Thorpe*, 82 Wn. App. 446, 451, 918 P.2d 531 (1996). Hence, Selective is
15 unconvincing in its assertion that it is an “open question” as to whether a criminal act
16 (violations of Immigration law) can constitute the “criminal or unlawful act” element
17 of the tort of civil conspiracy. *See* Selective Opp. at 6.¹ To the contrary, “[t]o
18 constitute a conspiracy the purpose to be effected by it *must be unlawful* in its nature
19 or in the means to be employed for its accomplishment.” *Lewis Pac. Dairymen’s*
20

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22 _____
23 ¹ It is of no moment that the Immigration and Nationality Act does not provide a
24 private right of action. Indeed, virtually no criminal statutes do – yet a criminal act
25 (when committed pursuant to a combination that causes damages) is actionable under
26 Washington’s law of civil conspiracy.

1 *Ass'n*, 50 Wn.2d at 772 (emphasis added); *cf. Wilson v. State of Washington*, 84 Wn.
2 App. 332, 351, 929 P.2d 448, 459 (1996) (while “recognizing that Watson’s taping
3 and computer disk appropriation may have been illegal” acts done in achieving lawful
4 purpose of reassigning plaintiff, conspiracy claim failed because there was “no
5 evidence that anyone other than Watson was involved in these acts.”²); *Harstad v.*
6 *Frol*, 41 Wn. App. 294, 704 P.2d 638 (1985) (upholding conspiracy to, *inter alia*,
7 violate RCW 18.85, a civil statute regulating brokers).
8

9 The sole Washington case relied on by Selective, *W.G. Platts, Inc. v. Platts*, 73
10 Wn.2d 434, 438-40, 438 P.2d 867 (1968), is not on point. The *Platts* court dismissed
11 the plaintiff’s claim that the defendants had “conspired” to commit perjury since
12 “from earliest times the giving of false testimony has not been treated as a wrong
13 actionable in civil proceedings.” *Id.* at 440. The policy reasons the *Platt* court
14 articulated for its decision involve the unique concerns which prevent civil suits for
15 perjury – namely, that “[a] witness is absolutely privileged to publish false and
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17
18 ² Taping a phone call without consent is a criminal violation pursuant to RCW §
19 9.73.030, and punishable pursuant to RCW 9.73.080, and theft of the computer disk
20 would likely constitute theft in the third degree pursuant to RCW 9A.56.050. While a
21 civil action is available under RCW 9.73.060, no claim was made under that section in
22 *Wilson*. Rather, the was that the civil conspiracy to achieve the *lawful* purpose of
23 removing plaintiff’s title and reassigning him through the *unlawful* acts of (i) secret
24 taping, and (ii) *theft* of his computer disk.
25
26

1 defamatory matter” in connection with judicial proceedings. *Id.* at n.3, quoting
2 RESTATEMENT OF TORTS, § 558 (1938).³ In contrast here, there is no similar policy in
3 favor of granting civil immunity to employers who violate the Immigration laws.

4 As Selective has not shown that Plaintiffs’ conspiracy claim raises any novel
5 questions of state law, this Court should not decline supplemental jurisdiction
6 pursuant to 28 U.S.C. § 1367(c)(1).
7

8 **IV. NO “COMPELLING REASONS” EXIST FOR DECLINING**
9 **JURISDICTION PURSUANT TO 28 U.S.C. § 1367(c)(4)**

10 Selective proffers one other proposed basis for declining to exercise
11 supplemental jurisdiction—namely, that “compelling” or “exceptional” circumstances
12 exist that would justify the pendency of virtually identical actions in State and federal
13 court. Selective Opp. at 8-10. This argument, too, is unconvincing.

14 **A. Selective’s Constitutional Argument Was Rejected By The Ninth Circuit**

15 Selective is wrong to suggest that “pendent party jurisdiction may still present
16 Constitutional problems here, even after [the Ninth Circuit’s decision in] *Mendoza*.”
17 Selective Opp. at 8. Indeed, in its prior ruling, this Court felt compelled by *Ayala v.*
18 *United States*, 550 F.2d 1196, 1199-1200 (9th Cir. 1977) to find that pendent party
19 jurisdiction was unconstitutional. *Mendoza v. Zirkle Fruit Co.*, 2000 U.S. Dist. Lexis
20
21

22 _____
23 ³ Indeed, *all* the authorities relied on by the *Platts* court concern the policy reasons
24 for disallowing civil damage claims based upon allegations of perjury. *See, e.g.,*
25 *Kantor v. Kessler*, 40 A.2d 607 (N.J. 1945); *Ginsburg v. Halpern*, 383 Pa. 178, 180,
26 118 A.2d 201 (1955).

1 21126, at * 42 (E.D. Wash. Sept 27, 2000), *rev'd, remanded*, 301 F.3d 1163 (9th Cir.
2 2002). On appeal, Plaintiffs argued that pendent party jurisdiction was indeed
3 constitutional, and Selective argued to the contrary. The Ninth Circuit squarely
4 rejected "Selective Employment's invitation to impose a per se constitutional bar on
5 supplemental jurisdiction over claims against additional parties." *Mendoza v. Zirkle*
6 *Fruit Co.*, 301 F.3d 1163, 1173 (9th Cir. 2002).

8 Of course, federal jurisdiction must ultimately comport with Article III of the
9 Constitution – but, after *Mendoza*, (i) the constitutional standards are the same,
10 regardless of whether "pendent party" or "pendent claim" jurisdiction is at issue, and
11 (ii) both are governed by the *Gibbs* standard. *Mendoza*, 301 F.3d at 1174-75. *Most*
12 *significantly, the mere fact that Plaintiffs assert "pendent party" jurisdiction is*
13 *simply not a "compelling" or "exceptional" reason for declining jurisdiction*, as
14 Selective asserts. *See, e.g., Executive Software*, 24 F.3d at 1558 ("[D]eclining
15 jurisdiction outside of subsection (c)(1)-(3) should be the exception, rather than the
16 rule.") After *Mendoza*, it cannot be said that pendent party jurisdiction is exceptional.

18 **B. Principles Of Comity Do Not Constitute Exceptional Circumstances Here**

19 In a rehash of its "novel" state law argument, Selective asserts that
20 "adjudication of Count II will require this Court to guess as to whether a conspiracy to
21 violate the INA, if proved, is actionable under Washington law." Selective Opp. at
22 10. As Plaintiffs have pointed out, however, their claim is not a novel one, and this
23 Court is well-capable of resolving the claim under clear Washington precedent.
24 Moreover, it is Selective's approach that invokes concerns of comity: namely, given
25
26

1 that this Court will of necessity resolve the question as to whether violations of the
2 federal Immigration laws have occurred, concerns of comity are raised by the notion
3 of having a State court resolve the very same issues.

4 **C. Selective Is Not Prejudiced By Trying This Case In Federal Court In**
5 **Yakima**

6 Finally, Selective cannot prevail in its suggestion that "exceptional" or
7 "compelling" circumstances arise from its defense of this suit in federal court in
8 Yakima. Indeed, if *that* were exceptional, then supplemental jurisdiction would *never*
9 be exercised. Moreover, Selective does not explain why it is somehow more
10 expensive for it to defend these claims in a single federal action (as opposed to (a)
11 defending in a state action, *and* (b) simultaneously providing discovery and testimony
12 in this federal action.)
13

14
15
16 **V. CONCLUSION**

17 For the reasons stated above, as well as those stated in their opening brief,
18 Plaintiffs respectfully request that this Court exercise jurisdiction over Plaintiffs' state
19 law civil conspiracy claims against Selective.

20 DATED: January 27, 2003

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PLTFS' REPLY MEM. FOR THE
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DECLARATION OF SERVICE

I, Lynn Brammeier, declare under penalty of perjury under the laws of the State of Washington that the following facts are true and correct:

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within-entitled cause. I am an employee of the law firm Hagens Berman LLP, and my business address is 1301 Fifth Avenue, Suite 2900, Seattle, Washington 98101.

On January 27, 2003 I caused an original and one copy of the following document to be sent via UPS overnight mail for filing with the Clerk of the District Court, Eastern District of Washington, West 920 Riverside Ave., Room 840, U.S. District Courthouse, Spokane, WA., 99201 on January 28, 2003:

I also caused a copy of the following document to be served on counsel of record in the manner indicated below:

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR THE COURT TO TAKE SUPPLEMENTAL JURISDICTION OVER SELECTIVE EMPLOYMENT AGENCY, INC.; and

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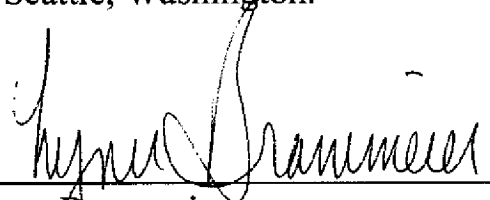
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