2000 WL 33225470
United States District Court, E.D. Washington.

Olivia MENDOZA and Juana Mendiola, Individually and on Behalf of All Others 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. CS–00–3024–FVS. | Sept. 27, 2000.

Opinion

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND REMANDING CAUSE TO STATE COURT

VAN SICKLE, Chief District J.

***1** BEFORE THE COURT is a motion to dismiss and for a stay of discovery filed by defendants Zirkle Fruit Company ("Zirkle"), Matson Fruit Company ("Matson") and Selective Employment Agency, Inc. ("Selective"). The Court heard oral argument on the motion on August 31, 2000. The plaintiffs were represented by Steve W. Berman, Andrew M. Volk, Kevin P. Roddy, and Howard W. Foster. The defendants were represented by Brendan V. Monahan (Selective), Ryan M. Edgely (Matson and Zirkle), and Walter G. Meyer (Zirkle).

Procedural Background

Defendants Zirkle Fruit Company ("Zirkle") and Matson Fruit Company ("Matson") grow, package, and sell fruit. The plaintiffs/class representatives, Olivia Mendoza and Juana Mendiola, were lawfully employed by Zirkle as laborers. The plaintiffs allege that Zirkle and Matson are engaged in two related illegal schemes for the purpose of depressing employee wages, in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et. seq.:* the "Illegal Immigrant Hiring Scheme" and the "I–9 Mail Fraud Scheme." The plaintiffs further claim in Count 2 that Matson and Zirkle entered into a civil conspiracy with a third defendant, Selective Employment Agency, Inc. ("Selective"), to violate the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1324, in violation of state law.[1] The plaintiffs brought this action individually and on behalf of all other similarly situated laborers.

[1] Selective is an employment agency which has referred workers to Zirkle and Matson. The plaintiffs claim that "Matson and Zirkle have entered into these joint ventures [with Selective] for the primary purpose of shifting certain aspects of Illegal Immigrant Hiring Scheme from themselves to an outside firm." Compl. at ¶ 41.

Defendants Zirkle and Matson seek dismissal of the complaint pursuant to Fed.R.Civ.P. 12(b)(6); defendant Selective has joined in the motion.[2] The defendants argue that the plaintiffs' complaint should be dismissed for the following reasons: (1) the plaintiffs fail to adequately allege the elements of any predicate act under RICO; (2) the plaintiffs lack standing to pursue a claim under RICO; (3) the plaintiffs' claims interfere with the comprehensive enforcement scheme established by the Immigration Reform and Control Act; and (4) federal preemption of the state law civil conspiracy claim.

[2] Defendant Selective has filed a separate motion to dismiss it as a party-defendant for lack of subject matter jurisdiction.

The Court finds that although plaintiffs have properly alleged that defendants have violated federal immigration laws, defendants' motion to dismiss will be granted. The Court finds that plaintiffs' alleged damages are simply too speculative to survive the motion. However, the Court finds that plaintiffs' state law conspiracy claims are not preempted by federal law, and the Court remands the state claims to state court. The Court also finds that plaintiffs' RICO claims do not interfere with the enforcement scheme of the Immigration Reform and Control Act and finds that if this cause were to proceed in federal court, defendant Selective would be dismissed under this Circuit's jurisprudence on "pendent party jurisdiction."

Factual Background As Alleged in Complaint

The following are the facts alleged in the Complaint and in Plaintiff's RICO Case Statement:

A. The "Illegal Immigrant Hiring Scheme"

***2** Since 1996, defendants Matson and Zirkle have

knowingly hired at least 50 undocumented workers per year as part of a scheme to depress employee wages. Defendants have exploited these workers' precarious economic situation and fear of asserting their rights to drive the wage rate for both documented and undocumented workers to a level lower than it would be if defendants did not hire undocumented workers. Defendant Zirkle has entered into an association-in-fact enterprise with defendant Selective, an employment agency, to knowingly hire undocumented workers and depress the hourly wages paid to all of Zirkle's workers. Defendant Matson has entered into an identical association-in-fact enterprise with Selective.

In early 1999 defendant Matson was audited by the Immigration and Naturalization Service ("INS") for its suspected hiring of undocumented workers. The INS found that in 1998 74% of Matson's workforce (493 of 661 workers) was undocumented, and had been hired with false papers. The INS has made similar findings in the past against defendant Zirkle. Matson maintains two sets of books, one that shows all of its workers, and one that excludes all workers known to Matson to be undocumented and working under false papers. Matson and Zirkle have in many cases rehired undocumented workers using different false papers, even after being forced to fire these workers by the INS. Defendants Matson and Zirkle each hire undocumented workers with actual knowledge that each undocumented person was either smuggled into the U.S., or harbored once in the U.S.

B. The "I–9 Mail Fraud Scheme"

Defendants Matson and Zirkle send I–9 forms to the INS through the U.S. mail for the undocumented workers referred to above. Defendants Matson and Zirkle falsely state on these forms (or cause defendant Selective to falsely state when filling out forms for Matson and Zirkle's employees) that these employees' eligibility to work in the U.S. has been verified. Matson and Zirkle (or Selective) complete these forms knowing that the Social Security numbers used to "verify" these workers' employment eligibility are false. This I–9 scheme is perpetrated in furtherance of the illegal hiring scheme discussed above.

C. The Relationship with Selective

Matson and Zirkle each have a contractual relationship with Selective, whereby Selective hires workers to work for Matson and Zirkle; Selective takes responsibility for paying the employees' wages (for which it is reimbursed by Matson or Zirkle), withholding taxes and preparing the paper-work for each employee, in return for which it is paid a fee, Matson and Zirkle have directed and continue to direct Selective to hire undocumented workers and to prepare the false I–9 forms referred to above.

D. Harm and Damages

Plaintiffs and the class that they represent have been harmed by the lower wages paid by defendants Matson and Zirkle as a result of the Illegal Immigrant Hiring Scheme.

Analysis

A. Rule 12(b)(6) Standard

***3** "On a motion to dismiss we are required to read the complaint charitably, to take all well-pleaded facts as true, and to assume that all general allegations embrace whatever specific facts might be necessary to support them." *Peloza v. Capistrano Unified Sch. Dist.,* 37 F.3d 517, 521 (9th Cir.1994).

B. Failure to Allege Elements of RICO Predicate Acts

Under RICO, it is unlawful for any person associated with any enterprise to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. *See* 18 U.S.C. § 1962(c). Racketeering activity includes any act which is indictable under § 274 of the Immigration and Nationality Act, if the act "was committed for the purpose of financial gain." 18 U.S.C. § 1961(1)(F). Any act which is indictable as mail fraud under 18 U.S.C. § 1341 also constitutes racketeering activity. *See* 18 U.S.C. § 1961(1)(B). The plaintiffs have alleged mail fraud and violations of § 274 of the INA as RICO predicate acts.

The defendants argue that the predicate acts, as alleged by the plaintiffs, are insufficient to establish a RICO claim. Although not necessary to the Court's ruling on the instant motion, the Court discusses below its findings as to defendants' arguments. The Court finds that plaintiffs have adequately pled the predicate act of violating the Immigration and Nationality Act, but have not adequately pled the predicate act of mail fraud.

1. ***Illegal Immigrant Hiring Scheme.***

Plaintiffs allege that Matson and Zirkle continually and knowingly hire workers of illegal status because those workers are willing to accept sub-market wages. Specifically, plaintiffs allege that Matson and Zirkle each have employed at least 50 illegal aliens in each year from 1996 to the present with actual knowledge of the aliens' illegal status and with knowledge that the aliens were either smuggled into the United States or harbored once in the United States, in violation of the Immigration and Nationality Act ("INA").

Section 274 of the INA provides in part:

> Any person who, during any 12–month period, knowingly hires for employment at least 10 individuals with actual knowledge that the individuals are aliens described in subparagraph (B) shall be fined under Title 18, or imprisoned for not more than 5 years, or both.

8 U.S.C. § 1324(a)(3)(A). An alien described in subparagraph (B) is an alien unauthorized to be employed who "has been brought into the United States in violation of" the provisions of 8 U.S.C. § 1324(a). 8 U.S.C. § 1324(a)(3)(B), 1324a(h)(3). The portion of Section 1324(a) which appears most germane here prohibits bringing a known alien into the United States "in any manner whatsoever" at "a place other than a designated port of entry or place other than as designated by the Commissioner, regardless of whether such alien has received prior official authorization to come to, enter, or reside in the United States..." 8 U.S.C. § 1324(a)(1)(A)(i).

***4** The defendants argue that the plaintiffs' first predicate act fails to the extent that the plaintiffs allege that the defendants knew that the illegal, workers were "harbored" in the United States. On this point, defendants may be correct. Section 1324(a) somewhat redundantly defines "harboring" as concealing, harboring, or "shield[ing] from detection" an alien in any place with knowledge "or in reckless disregard of the fact" that the alien has "come to, entered or remains in the United States in violation of law." 8 U.S.C. § 1324(a)(1)(A)(iii). Plaintiffs may not be able to show that defendants knew more than the legal status of the people that they hired.[4]

[4] Some courts have interpreted the "harboring" provision of the INA to cover a broad range of actions, meaning that the plaintiffs might be able to show that the defendants themselves "harbored" workers, which would constitute a separate RICO predicate act. *See United States v. Klm,* 193 F.3d 567 (2d Cir.1999) (defendant found guilty of harboring alien by knowingly employing illegal alien).

However, plaintiffs do not have to allege that defendants harbored any aliens. The complaint alleges that defendant Matson knew that the undocumented workers were "either *smuggled into the U.S.* and/or harbored once he or she was in the U.S." Compl. at ¶ 29 (emphasis added) and alleges that defendants Zirkle knew that "each [undocumented worker] was either smuggled into the U.S. or harbored once in the U.S." *Id.* at ¶ 32. A common sense understanding of "smuggled" is "unlawfully brought," the language of Section 1324(a)(3)(B).[5] Therefore the plaintiffs have adequately pled a predicate act under RICA by alleging that the defendants knew that some of their workers were unlawfully brought into the United States.

[5] Black's Law Dictionary defines "smuggling" as "[f]raudulent taking into a country, or out of it, merchandise which is lawfully prohibited."

The defendants next argue that the plaintiffs have no factual basis for the assertion that the defendants had "actual knowledge" that workers were unlawfully brought into the United States. The defendants argue that the plaintiffs cannot state a claim without pleading such details as when workers were smuggled into the United States, where workers were smuggled into the United States, how the workers were smuggled into the United States, and how the defendants had "actual knowledge" of those events.

Rule 8 of the Federal Rules of Civil Procedure does not require the plaintiffs to plead their cause of action in the detail the defendants demand. Rule 8 states that a pleading which sets forth a claim for relief shall contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). The plaintiffs argue that non-fraud RICO claims are subject to the pleading requirements of Rule 8. That appears to be the majority rule. *See MCM v. Andrews–Bartlett & Assoc., Inc.,* 62 F.3d 967 (7th Cir.1995) (applying notice pleading to non-fraud RICO claims); *Rose v. Bartle,* 871 F.2d 331, 356 (3rd Cir.1989) (finding unwarranted the defendant's suggestion that a charge of racketeering, with its implications of links to organized crime, should not be easier to plead than accusations of fraud, which are subject to the special pleading requirements of Rule 9); *Colony at Holbrook, Inc. v. Strata G.C., Inc.,* 928 F.Supp. 1224, 1234 (E.D.N .Y.1996) ("[A]llegations of non-fraud

based predicate acts need only comply with Rule 8(a) and contain a 'short and plain statement' showing the pleader is entitled to relief."); *United States v. International Brotherhood of Teamsters,* 708 F.Supp. 1388, 1369 (S.D.N.Y.1989); *Lewis v. Sporck,* 612 F.Supp. 1316, 1324 (N.D.Cal.1985); *but see Plount v. American Home Assurance Co.,* 668 F.Supp. 204, 206–07 (S.D.N.Y.1987) (requiring non-fraud RICO claims to be pled with particularity). The Court finds that plaintiffs' allegations as to the "Illegal Immigrant Hiring Scheme" satisfy Rule 8.

***5** The Court's inquiry, however, does not end there. The Court must also determine whether Local Rule 3.2, which requires RICO plaintiffs to file a RICO Case Statement, effectively heightens the plaintiffs' pleading requirement for the purpose of a 12(b)(6) motion to dismiss. The plaintiffs indirectly argue that LR 3.2 is inconsistent with Rule 8 to the extent that it heightens the plaintiffs' pleading standard.

Rule 83 of the Federal Rules of Civil Procedure grants district courts the discretion to promulgate local rules, so long as the local rule is "not inconsistent" with a Federal Rule of Civil Procedure. *See Frazier v. Heebe,* 482 U.S. 641, 107 S.Ct. 2607 (1987); Fed.R.Civ.P. 83(a). Plaintiffs raise a valid concern that a local rule which heightens the pleading standard may be inconsistent with the spirit and intent of Rule 8 and its clear mandate of notice pleading. However, as resolution of this issue is not necessary to the Court's ruling on this motion, the Court declines to comment further.

2. *I–9 Mail Fraud Scheme*

The plaintiffs also allege that Matson and Zirkle engage in mail fraud—a separate RICO predicate act. The plaintiffs allege that Matson and Zirkle complete or have Selective complete false Employee Eligibility Verification Forms ("I–9 forms") for illegal workers that they hire; the plaintiffs further allege that some of these forms have been sent through the mails, under penalty of perjury, to the INS, with actual knowledge that the workers being employed were ineligible for employment. The plaintiffs allege that this mail fraud scheme furthers the Illegal Immigrant Hiring Scheme, detailed above. The defendants contend' that the plaintiffs have failed to plead sufficiently the elements of mail fraud and have failed to plead the act with enough specificity, and have thus failed to plead a predicate act under RICO.

a) The Elements of Mail Fraud

To establish a violation of the mail fraud statute, 18 U.S.C. § 1341, the plaintiffs must show: (1) the defendants formed a scheme or artifice to defraud; (2) the defendants used the United States mails or caused a use of the United States mails in furtherance of the scheme; and (3) the defendants did so with the specific intent to deceive or defraud. *See Rothman v. Vedder Park Mgmt.,* 912 F.2d 315, 316 (9th Cir.1990). The mail fraud statute prohibits the use of the mails to obtain money or property from the one who is deceived. *See United States v. Lew,* 875 F.2d 219, 221 (9th Cir.1989) (immigration attorney's conviction for mail fraud overturned because though the attorney sent fraudulent work papers to the Department of Labor on behalf of his illegal alien clients, the Department of Labor was not the source of the financial gain) (cited in *Monterey Plaza Hotel, Ltd. v. Local 483 of the Hotel and Restaurant Employees Union,* 215 F.3d 923, 926 (9th Cir.2000)); *United States v. Thomas,* 32 F.3d 418 (9th Cir.1994). The defendants argue that because the INS was the party that was allegedly deceived by the fraudulent I–9 forms, and because the INS was not the source of the defendants' alleged financial gain, the defendants' alleged conduct does not constitute mail fraud and cannot form the basis of that RICO predicate act.

***6** Plaintiffs claim that *United States v. Kim,* 193 F.3d 567 (2d Cir.1999) supports their contention that mailing false I–9 forms is an actionable violation. The issue here, however, is not whether such a scheme is a violation of the INA, as was the issue in *Kim,* but whether mailing false I–9 forms to the INS constitutes mail fraud in this instance. More to the point is *United States v. Hubbard, et. al.,* 96 F.3d 1223 (9th Cir.1996), cited by plaintiffs at oral argument, in which the court held that in a scheme to sell cars with rolled-back odometers, the state's mailing of new titles with the false odometer readings to the cars' new owners was "sufficiently closely related" to the underlying scheme to constitute mail fraud.

However, the underlying basis for the court's finding in *Hubbard* was that the party defrauded was the party deceived by the mailing, even though the mailing did not come from the defendant. *See Hubbard,* 96 F.3d at 1229 (defendants could be charged with mail fraud because use of U.S. mails by state agency to mail new owners titles containing false odometer readings was reasonably foreseeable by defendants, although not made intentionally part of scheme to defraud). Here, by contrast, the party that plaintiffs allege was defrauded of money is the plaintiff class, while the party deceived by the mailings was the INS. Thus, although it is not necessary to the underlying conclusion reached on this motion, the Court finds that plaintiffs have not as a matter of law adequately alleged the elements of mail fraud.

b) Sufficiency of the Pleadings Under Rule 9

In addition, defendants argue that the plaintiffs have failed to plead the allegation of mail fraud with enough specificity to satisfy Fed. Rule Civ. P. 9(b). Rule 9(b) requires "the identification of the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations," including the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations. *Schreiber Distrib, Co. v. Serv–Well Furniture Co., Inc.,* 806 F.2d 1393, 1400–01 (9th Cir.1986) (internal quotation omitted).

The plaintiffs concede that their fraud-based RICO claim is subject to the heightened pleading requirement of Rule 9(b) of the Federal Rules of Civil Procedure. *See e.g., Lancaster Community Hosp. v. Antelope Valley Hosp. Dist.,* 940 F.2d 397, 405 (9th Cir.1991). However, the plaintiffs argue that they need to conduct discovery before they can satisfy all of the requirements of Rule 9(b); they also argue that defendants have been put on sufficient notice as to the nature of their claim to proceed to the discovery phase. Plaintiffs point out, accurately, that *Wool v. Tandem Computers, Inc.,* 818 F.2d 1433, 1439 (9th Cir.1987), established precedent for relaxing the requirements of Rule 9 where the "plaintiffs cannot be expected to have personal knowledge of the facts constituting the wrongdoing." *Id.*

***7** Although the plaintiffs need not plead their allegation with the specificity suggested by defendants, here the plaintiffs' inability to plead the particulars of the alleged mail fraud scheme is intimately connected to the flawed pleading of the elements of the offense; that is, plaintiffs do not know the particulars of the mailings in question because, as discussed above, although they are the party allegedly harmed by the fraud, they were not the party deceived by the mailings. Therefore, although plaintiffs and defendants raise interesting issues regarding the requirements of Rule 9 in this situation, the Court declines to consider the issue further.

C. RICO Standing

The defendants argue that the plaintiffs lack standing to bring a RICO claim because they have not been injured by the defendants' practices. RICO provides a private cause of action for damages only to those individuals "injured in [their] business or property by reason of" a violation of the law's substantive provisions. *See* 18 U.S.C. § 1964(c). The defendants argue that the plaintiffs' alleged injury does not confer standing because (1) the injury was not proximately caused by the defendants' alleged violations and (2) the claimed injury is not sufficiently concrete.

1. ***Direct Injury***

The Supreme Court has held that to satisfy the injury requirement of RICO, the alleged RICO predicate acts must be a "but for cause" and a "proximate cause" of the alleged injury. *See Holmes v. Securities Investor Protection Corp.,* 503 U.S. 258, 268 (1992). In determining whether an injury is too remote to allow for recovery under RICO, courts are to apply a three-factor test: (1) whether there are more direct victims of the alleged violation who can be counted on to vindicate the law; (2) whether it will be difficult to ascertain the amount of damages attributable to the violation; and (3) whether allowing recovery for indirect injuries would force the court to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury to obviate the risk of multiple recoveries. *See Oregon Laborers–Employers Health & Welfare Trust Fund v. Philip Morris Inc.,* 185 F.3d 957, 963 (9th Cir.1999) (citing *Holmes,* 503 U.S. at 269–70). This three-part "remoteness" test blends together what previously had been two distinct concepts: (1) proximate causation and (2) a concrete injury. Although *Holmes* blends these two concepts together, because the Court today reaches different conclusions about the sufficiency of plaintiffs' case as to each element the Court will discuss each element separately.

The first remoteness factor addresses the issue of proximate causation. In *Holmes,* the Supreme Court dismissed a RICO claim brought by a securities insurance corporation that insured a group of securities brokers because the plaintiff did not establish that the defendant's violation was the proximate cause of the plaintiff's injury. *See Holmes,* 503 U.S. at 271–73, 112 S.Ct. at 1319–21. The plaintiff-insurer alleged that the defendant defrauded the brokers' customers; the customers thereupon lost their securities; the customers' brokers could not cover the losses; and the plaintiff-insurer was then contractually obligated to cover the losses. *Id.* The Supreme Court found that the racketeering activity was not the proximate cause of the plaintiff's injury because the plaintiff's duty to cover the debts was triggered only by the brokers' intervening insolvency. *Id.*

***8** Similarly, the Ninth Circuit recently held that a health plan did not have standing to bring a RICO suit against a tobacco company to recover the costs of medical care to smokers covered by the plan because the injury to the plan was entirely derivative of the harm suffered by the plan participants. *See Oregon Laborers,* 185 F.3d at 964. The Ninth Circuit also found proximate cause lacking in *Imagineering, Inc. v. Kiewit Pacific Co.,* 976 F.2d 1303,

1310–11 (9th Cir.1992), where subcontractors of the second-lowest-bidding prime contractor on a government project alleged that the defendant-contractor who was awarded the contract had violated federal setaside regulations in its bidding. 976 F.3d at 1311. The court found that although the defendants' actions might have injured the plaintiffs, "it was the intervening inability of the prime contractors to secure the primary contracts that was the direct cause of plaintiffs' injuries." *Sheperd v. American Honda Motor Co., Inc.,* 822 F.Supp. 625, 628 (N.D.Cal.1993) (discussing *Imagineering*).

This case also appears superficially similar to a number of cases in which district courts have found that plaintiffs who alleged predicate acts of making false statements to, or otherwise misleading, governmental agencies were merely "indirect" victims. *See Medgar Evers House Tenants Ass'n. v. Medgar Evers Houses Associates, L.P.,* 25 F.Supp.2d 116, 121 (E.D.N.Y.1998); *Barr Laboratories, Inc. v. Quantum Pharmics, Inc.,* 827 F.Supp. 111 (S.D.N.Y.1993); *Kingston Square Tenants Ass'n. v. Tuskegee Gardens, Ltd.,* 792 F.Supp. 1566 (S.D.Fla.1992). Similarly, bere one of the predicate acts alleged by plaintiffs is filing false I–9 forms with the INS, and even the illegal hiring scheme could be seen as having the INS as its most direct victim. Indeed, defendants argue that the INS is the party to most properly bring an action for defendants' alleged violations of law.

However, this case is distinguishable. The illegal hiring scheme alleged here does not depend on the intervening actions—or inactions—of any government agency or any other third person. By operation of the laws of supply and demand, simply by expanding the available labor pool through the predicate act of knowingly hiring illegal workers (as alleged by plaintiffs), defendants Matson and Zirkle could have driven down wages for documented and undocumented workers alike to some degree.[6] Therefore, plaintiffs have stated a claim that they are the direct victims of defendants' illegal hiring scheme.

[6] The Supreme Court's observation that the direct injury requirement of RICO is predicated on the idea that "[A] plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand a too reniote a distance to recover." *Holmes,* 503 U.S. at 267, is useful in addressing this issue. Plaintiffs' alleged harms here do not flow from a third person's misfortunes, although they may be related to the misfortunes of the undocumented workers who are allegedly exploited by defendants, and may be related to the misfortunes of the INS, the agency allegedly deceived by defendants' mail fraud scheme.

2. Speculative Damages

This is not to say, however, that other intervening factors have not influenced plaintiffs' damages. Indeed, it is the degree to which defendants could have caused plaintiffs alleged injuries in light of these other factors that is the most troubling aspect of plaintiffs' case. Thus, after turning to the second and third elements in the *Holmes* remoteness analysis, the Court finds that the plaintiffs' alleged injury is too speculative to confer standing.

***9** The second and third *Holmes* elements are: "(2) whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct: and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries." *Oregon Laborers,* 185 F.3d at 963. A showing of "injury" requires proof of a concrete loss. *See Imagincering,* 976 F.2d at 1310–11. "Speculative" injuries are insufficient to confer RICO standing. *Id.* at 1311. Although the third *Holmes* element is not operative here because there is no other method known to the Court for plaintiffs to recover for defendants' alleged wrongdoing, the second element is crucial.

In *Imagineering,* the Ninth Circuit considered a plaintiff-subcontractor's claim that it suffered a loss of profits when defendant received contract bid through racketeering activity and plaintiff's contractor was the next lowest bidder. *Id.* The court held that the plaintiff's claim of damages was too speculative to confer standing because (1) the plaintiff could not prove that its contractor would have actually acquired the bid absent the defendant's racketeering activity; (2) there was no proof that the contractor would not switch sub-contractors during the pendency of the project; and (3) the plaintiff failed to specify whether it was claiming loss of the opportunity to realize profits or loss of specific, identifiable profits. *Id., see also Oscar v. University Students Co-operative Ass'n,* 965 F.2d 783, 785 (9th Cir.1992) (*en banc*) (claim that plaintiff suffered losses in the reduced rent she could charge to sublet her apartment was insufficient where plaintiff did not allege that she had a right to sublet her apartment nor that she ever had sublet the apartment or wanted to sublet the apartment).[7]

[7] Indeed, *Imagineering* could be read to require proof that a plaintiff actually paid money as a result of the racketeering activity in order to have standing to bring a RICO claim. *See id.* at 1310 ("[T]he facts alleged do not establish 'proof of concrete financial loss,' let alone show that money was paid out as a result of [the defendant's] alleged racketeering activity."); *see also Sheperd v. American Honda Motor Co.,* 822 F.Supp. 625, 628 (N.D.Cal.1993).

Also instructive on this issue is *Sheperd v. American Honda Motor Co.,* 822 F.Supp. 625 (N.D.Cal.1993). In *Sheperd,* the plaintiffs, owners of a Honda car dealership, alleged that American Honda, which allocated new cars to Honda dealerships, conspired with other dealerships to fabricate the number of Honda cars being sold in the United States. The plaintiffs further alleged that when they refused to misreport the number of cars sold by their dealership, they were allocated a lower number of popular cars. The plaintiffs were unable to compete with deaterships that received a high number of popular cars and were forced to sell their dealership at a distressed price. *Sheperd;* 822 F.Supp. at 627.

The district court found that the plaintiffs lacked standing to bring a RICO claim because the injury to their car dealership was too speculative:

> There can be no doubt that the alleged diversion tactics and reduced allocations would have been likely to have some adverse effect on the profitability of the Sheperds' dealership, and consequently affect the market value of the dealership. But the financial losses reflected in reduced profitability and a distressed sale price are too attenuated from the alleged wrongful conduct of defendants to give plaintiffs standing to recover treble damages under RICO.... For this Court, or a jury, to assess what portion of the dealership's diminished profitability and market value were attributable to the defendants' wrongful conduct, apart from other factors, would be an exercise in sheer speculation.
>
> ***10** Although courts may be willing to permit such speculation in other contexts, Supreme Court and Ninth Circuit precedent indicate that it is not tolerable in the context of RICO with its provision for treble damages.

Id. at 630.

Here, as in *Imagineering* and *Sheperd,* the plaintiffs' main flaw is their inability to concretely establish the degree to which their wages have been affected by the defendants' alleged violations. As the Ninth Circuit stated in *Imagineering* "[e]ssentially, the [direct injury] rule has more to do with problems of proof than foreseeability," 976 F.2d at 1312.

A wide range of factors determines the wage for orchard laborers in the Yakima Valley. Plaintiffs have argued that they will be able to show, through expert testimony and statistical and demographic modeling, what the relevant labor market would look like absent the hiring of undocumented workers. However, such evidence would not be sufficient to remove plaintiffs' damage claim from the realm of sheer speculation. Plaintiffs may be able to show what the prevailing wage rate might be if no illegal workers were hired by any employers in the region. However, it would be extremely difficult to show with the required specificity what impact defendant's alleged wrongdoing has had in the context of the whole labor market. In addition, the wage rate that plaintiffs might have been paid would depend on the wage rate paid by other orchardists and similar employers, the general availability of laborers, documented and undocumented, in the Yakima Valley, the profitability of the defendants' businesses, the qualifications of each plaintiff, whether the plaintiffs individually or as a class would have been hired at a higher rate, and other factors.

Sifting through those factors to determine the exact amount of loss attributable to the defendants' alleged violations would be a daunting task at best. And, as the court in *Sheperd* stated. "[a]lthough courts may be willing to permit such speculation in other contexts, Supreme Court and Ninth Circuit precedent indicate that it is not tolerable in the context of RICO with its provision for treble damages." 822 F.Supp. at 630. The Court finds that plaintiffs have failed to allege a sufficiently non-speculative financial loss that resulted from defendants' wrongdoing to sustain their RICO claim. Plaintiffs have thus failed to establish standing to bring this action. On that basis, the Court will grant defendants' motion to dismiss.

D. "Preemption" of Plaintiffs' RICO Claims

Defendants argue that plaintiffs' RICO claims interfere with the "comprehensive enforcement scheme" of the Immigration Reform and Control Act ("IRCA"). This assertion has no merit. Congress would not have included violations of the immigration laws, including 8 U.S.C. § 1324(a), as a predicate act under RICO if it had not intended for citizens to bring exactly the kind of action now before the Court.

E. Preemption of Plaintiffs' State Law Civil Conspiracy Claim

***11** Defendants assert both that plaintiffs' state conspiracy claim is preempted by the "comprehensive... enforcement scheme mandated by the IRCA" and that plaintiff's claims are expressly preempted by the language of the IRCA. Neither assertion bears out.

Defendants' more general assertion fails because IRCA's express preemption language limits the preemptive scope of the statute. IRCA states that "[t]he provisions of [IRCA] preempt any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws)

upon those who employ, or recruit, or refer for a fee for employment, unauthorized aliens." 8 U.S.C. § 1342a(h)(2). Because Congress has expressly defined the preemptive reach of IRCA, this language both defines and limits the preemptive reach of the statute. *See Cipollone v. Liggett Group, Inc.,* 505 U.S. 504, 517 (1992). Therefore, defendants' claim that plaintiff's state law conspiracy claim is preempted by the "comprehensive... enforcement scheme mandated by the IRCA" is rejected.

Defendant's second assertion fails because the preemption language quoted above refers only to "civil or criminal sanctions," 8 U.S.C. § 1342a(h)(2), which does not cover plaintiffs' claims for civil money damages. As stated above, because IRCA contains an express preemption provision, the language of that provision provides strict limits on the scope of the statute's preemption of state law. *See Cipollone,* 505 U.S. at 524 ("[E]ach phrase within [a preemption clause] limits the universe" of laws preempted.) Because "sanctions" are distinct from the "damages" sought by plaintiffs, the preemption clause of IRCA does not cover the remedy sought by plaintiffs, and IRCA does not preempt plaintiffs' state law conspiracy claim for civil damages.

F. Defendant Selective's Motion to Dismiss It as a Pendant Party

Selective moves to dismiss the state law civil conspiracy claims against it on the grounds that this Court lacks subject matter jurisdiction to hear a claim against a pendent party. Prior to 1990, district courts had little explicit statutory authority to exercise supplemental jurisdiction over parties and claims that lacked an independent basis for being in federal court. Case law focused on two rather amorphous concepts: "ancillary jurisdiction" and "pendent jurisdiction." In 1990, Congress passed the supplemental jurisdiction statute. codified at 28 U.S.C. § 1367, which granted broad authority for supplemental jurisdiction in federal-question cases while limiting supplemental jurisdiction in diversity cases.

This case presents the type of supplemental jurisdiction that prompted Congress to enact § 1367; pendent party jurisdiction.[8] Because of the Ninth Circuit's historically hostile view toward pendent party jurisdiction, and its pre- § 1367 holdings that such jurisdiction is unconstitutional, an overview of the development of this law is necessary.

[8] In addition to involving a state claim that is appended to the claim that provides the anchoring source of federal jurisdiction, a pendent party claim requires for its resolution the inclusion of a new party.

In *United Mine Workers of America v. Gibbs,* 383 U.S. 715, 86 S.Ct. 1130 (1966), a unanimous Supreme Court enunciated a test for determining when supplemental jurisdiction meets the constitutional requirement of Article III, § 2. *Gibbs* involved the most basic pendent jurisdiction scenario—a plaintiff sought to bring a federal claim and a state claim against the same non-diverse defendant. The Court held that jurisdiction exists when the relationship between the federal claim and "the state claim permits the conclusion that the entire action before the court comprises but one constitutional 'case.' " *Gibbs,* 383 U.S. at 725, 86 S.Ct. at 1138 (1966). "The state and federal claims must derive from a common nucleus of operative fact" such that the plaintiff "would ordinarily be expected to try them all in one judicial proceeding." *Id.*

***12** Soon after *Gibbs,* the federal courts began to grapple with pendent party jurisdiction. While the language in *Gibbs* strongly suggests that its test applies to all variations of supplemental jurisdiction, the Ninth Circuit was quick to limit the new test to the facts of that case. The Ninth Circuit refused to apply the broad *Gibbs* test to pendent parties and instead relied on the pre-*Gibbs* constitutional rule that jurisdiction exists only if the new claim involves the same parties. *See Hymer v. Chai,* 407 F.2d 136, 137 (9th Cir.1969) (holding that "[j]oinder of claims, not joinder of parties" was the object of the pendent jurisdiction doctrine, and that the doctrine "was not designed to permit a party without a federally cognizable claim to invoke federal jurisdiction by joining a different party plaintiff asserting an independent federal claim growing out of the same operative facts"); *Williams v. United States,* 405 F.2d 951 (9th Cir.1969).

After *Hymer,* the Supreme Court itself began to limit pendent party jurisdiction, but always for lack of statutory authority rather than on constitutional grounds. In *Aldinger v. Howard,* 427 U.S. 1, 96 S.Ct. 2413 (1976), the Court held that there was no statutory authority whereby a plaintiff could attach a state claim against a county to a § 1983 action against county officials. *See Aldinger,* 427 U.S. at 16–17, 96 S.Ct. at 2421–22. The Court also noted that its decision was buttressed by the fact that the plaintiff could have brought all claims in state court. *Id.,* 427 U.S. at 18, 96 S.Ct. 2422.

The great majority of circuits interpreted *Aldinger* to allow pendent party jurisdiction in cases in which the plaintiff could not sue all defendants in state court: for example, in cases in which the United States was a party. The Ninth Circuit, however, retained its firm stance that pendent party jurisdiction in any form simply exceeded the scope of Article III. *See Ayala v. United States,* 550 F.2d 1196, 1200 n. 8 (9th Cir.1977) ("our difficulty with pendent party jurisdiction is a constitutional one under

Article III"). The *Ayala* court explained that:

> It should be emphasized that, putting to one side the potential statutory analysis underlying our decision in *Williams,* it is clear that *Hymer* 's rejection of pendent party theory was not based on a ferreted congressional disinclination, but rather rested on a more fundamental constitutional consideration.
>
> The Supreme Court's affirmance in *Aldinger,* grounded as it was on a congressional disinclination to allowing pendent party jurisdiction. may thus be read merely as another avoidance of the ultimate question of constitutional power left unanswered by the Court in *Moor v. County of Alameda.*

Ayala, 550 F.2d at 1199–1200 (citation omitted). The Ninth Circuit has never overruled *Ayala.*

The issue came to a head in 1989 with the Supreme Court's decision that pendent party jurisdiction had to be expressly authorized by statute, effectively eliminating all pendent party jurisdiction. *See Finely v. United States,* 490 U.S. 545, 109 S.Ct. 2003 (1989). In *Finely* the plaintiff had brought a claim against the United States under the Federal Tort Claims Act; the plaintiff had no choice but to bring the claim in federal court. The Supreme Court held that the district court lacked jurisdiction to hear the plaintiff's state claims against other defendants, even though the claims arose out of a common nucleus of operative fact. The Court made very clear that its holding was statutory and not constitutional; it closed the opinion by inviting Congress to change the result. *Id.,* 490 U.S. at 556, 109 S.Ct. at 2010 ("Whatever we say regarding the scope of jurisdiction conferred by a particular statute can of course be changed by Congress.").

***13** In 1990, Congress did just that when it enacted 28 U.S.C. § 1367. That statute provides that, except for a few specific types of cases,[9] the district courts have "supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III" including claims "that involve the joinder or intervention of additional parties." 28 U.S.C. § 1367(a). Thus, Congress extended the bounds of supplemental jurisdiction in federal-question cases as far as Article III permits.

[9] The exceptions stated in § 1367(b) involve cases in which the anchoring claim is brought to federal court under diversity jurisdiction.

Since the enactment of § 1367, other courts have embraced pendent party jurisdiction as long as the *Gibbs* "common nucleus of operative fact" test is met. *See, e.g., Franceskin v. Credit Suisse,* 2000 WL 719494, *4 (2nd Cir.2000); *In Re Prudential Insur. Co.,* 148 F.3d 283, 383 (3rd Cir.1997). As one commentator has put it:

> Only one federal circuit, the Ninth, has ever indicated that the exercise of pendent party jurisdiction may be constitutionally impermissible under Article III. The Ninth Circuit, however, which openly acknowledged its 'historic hostility to pendent party jurisdiction,' never expressly identified the nature of this constitutional infirmity and stood alone among the federal courts on this issue. As previously argued, Article III does not compel the position espoused by the Ninth Circuit, and such a position is clearly contrary to the long judicial history of permitting supplemental jurisdiction over claims involving additional parties under other circumstances.

Denis F. McLaughlin, *The Federal Supplemental Jurisdiction Statute—A Constitutional and Statutory Analysis,* 24 ARIZ.ST.L.J. 849, 903–04 (1992).

A resigned Eastern District of California, facing the very issue that is now before the Court, found that it lacked subject matter jurisdiction to hear a state claim against a pendent party. *See Elsaas v. County of Placer,* 35 F.Supp.2d 757 (E.D.Cal.1999). First, the court acknowledged that Congress had provided authorization for pendent party jurisdiction, but recognized that "congressional approval of pendent party jurisdiction, as manifested in 28 U.S.C. § 1367, is effective only if pendent party jurisdiction is permitted under Article III." *Id.* at 759. It then noted that the Supreme Court has yet to decide whether pendent party jurisdiction is permissible under Article III. *See id.* at 760.

Left with no authoritative decisions of the Supreme Court, the district court felt bound by pre § 1367 Ninth Circuit precedent:

> Whatever its deficiency in analysis, *Ayala* clearly expressed the Ninth Circuit's view that Article III does not permit pendent party jurisdiction. No decision of the United States Court of Appeals for the Ninth Circuit or the United States Supreme Court has overruled *Ayala* 's rejection of pendent party jurisdiction on constitutional grounds, nor does the passage of § 1367 alter the holding. Thus, *Ayala*

> remains the law on pendent party jurisdiction in the Ninth Circuit, and this court, being bound, may not exercise jurisdiction over plaintiffs' claims against the Union....
>
> ***14** Despite my firm conviction that the result of *Ayala* does not comport with practical governance, and even in the absence of articulated justification, I am, of course, bound by it unless overtaken by subsequent law. I must conclude that *Ayala* represents the last expression of the law by which I am bound. While I can hope that the Court of Appeals will reconsider, until then I am obligated to apply *Ayala* 's holding.

Id. at 760–61; *see also, Eads v. Eads,* 135 B.R. 387, 394 n .11 (Bankr.E.D.Cal 1991) (noting, in dicta, that "this circuit has expressed the view that adding pendent parties in connection with pendent claims exceeds the bounds of Article III").

The only indication from the Ninth Circuit itself that the result should be otherwise is found in *Yanez v. United States,* 989 F.2d 323 (9th Cir.1993). In *Yanez,* a federal defendant complained that the theory of relief posited by the plaintiff in federal court was inconsistent with the plaintiff's theory in a related claim previously brought in state court. The Ninth Circuit allowed the inconsistent theories, in part because under *Ayala* the plaintiff had no choice but to bring two separate actions in two separate forums, *See id.* at 327. The Court noted:

> Although Congress has now explicitly authorized pendent party jurisdiction ("supplemental jurisdiction"), 28 U.S.C.A. § 1367 (West Supp.1992), the section is not retroactive. Section 1367 applies to civil actions commenced on or after Dec. 1, 1990. The Judicial Improvements Act of 1990, Pub.L. No. 101–650, § 310(c).

Id. at n. 3.

Yanez could be read as an acknowledgment that pendent party jurisdiction is now permissible in civil actions commenced after December 1, 1990. The Court declines to adopt such a reading, however. If the Ninth Circuit truly intended to reverse *Ayala,* one would think that it would do so explicitly and not through dicta placed in a footnote.

As plaintiffs point out, some district courts within the Ninth Circuit have recently permitted pendent party jurisdiction, at least in the pendent-plaintiff context, *see Ziegler v. Ziegler,* 28 F.Supp.2d 601, 618–19 (E.D.Wash.1998) (Nielsen, C.J.); *c.f. Guzman v. Onard Lemon Assoc., Ltd.,* 1992 WL 510094, *8–9 (C.D.Cal.1992) (permitting pendent-plaintiff jurisdiction, though it recognized such jurisdiction was questionable); *Irwin v. Mascott,* 1999 WL 1814712, *4 (N.D.Cal.1999), perhaps casting some doubt upon the continued vitality of *Ayala.* As that decision has not been overruled, however, this Court has no choice but to acknowledge that if this cause were to be maintained in federal court, the Court would lack jurisdiction over defendant Selective.

IT IS HEREBY ORDERED:

Defendants' Motion to Dismiss (Ct.Rec.15) is GRANTED.

1. Plaintiffs have alleged facts to support the predicate act of hiring undocumented aliens (the "Illegal Immigrant Hiring Scheme"), a predicate act under RICO.

***15** 2. However, plaintiffs' alleged injury is too speculative for purposes of RICO standing. Plaintiffs thus lack standing to bring this action.

3. The complaint is dismissed without leave to amend because amendment would be futile. *See Allwaste, Inc. v. Hecht,* 65 F.3d 1523, 1530 (9th Cir.1995).

4. Plaintiffs' RICO claims do not interfere with the enforcement scheme of the federal immigration laws.

5. Plaintiffs' state law conspiracy claim is not preempted by federal law.

6. If this cause were to remain in federal court, the Court would not have jurisdiction over defendant Selective.

7. All remaining state law claims are REMANDED to state court.

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this order and furnish copies to counsel.

Parallel Citations

RICO Bus.Disp.Guide 9997