2004 WL 3634831 (C.A.11) (Appellate Brief)
United States Court of Appeals,
Eleventh Circuit.

Shirley WILLIAMS, Gale Pelfrey, Bonnie Jones and Lora Sisson, individually and on behalf of a class, Plaintiffs-Appellees,
v.
MOHAWK INDUSTRIES, INC., Defendant-Appellant.

No. 04-13740-AA.
October 12, 2004.

On Appeal from the United States District Court for the Northern District of Georgia, Rome Division

Brief for Appellees

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*I STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs respectfully request the Court to schedule oral argument in this matter. The basic legal principles of the federal Racketeer Influenced and Corrupt Organizations Act (“‘RICO‘’), 18 U.S.C. § 1961, *et seq.,* at issue in this appeal are not novel. Indeed, the District Court’s thorough opinion sets forth in detail how binding precedent from this Court and the United States Supreme Court compels the result in this case. In addition, three other Circuit Courts of Appeal have held that RICO claims like those Plaintiffs have asserted cannot be dismissed on the pleadings. Nevertheless, Plaintiffs agree that oral argument will aid the Court’s consideration and disposition of this appeal.

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*XI STATEMENT OF JURISDICTION

The District Court has jurisdiction over the federal claims asserted in Plaintiffs' Complaint pursuant to 28 U.S.C. § 1331. The District Court has supplemental jurisdiction over Plaintiffs' state law claims pursuant to 28 U.S.C. § 1367(a).

Mohawk Industries, Inc. ("'Mohawk'') appeals the District Court's decision to deny Mohawk's motion to dismiss the Complaint. The District Court certified that decision for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and this Court subsequently exercised its discretion to hear the appeal on July 28, 2004. Accordingly, this Court has jurisdiction over Mohawk's appeal pursuant to 28 U.S.C. § 1292(b).

*xii STATEMENT OF THE ISSUES

I. Whether the District Court Correctly Held that Plaintiffs' Complaint Alleges Mohawk's Participation in the Affairs of an Association-in-Fact Enterprise Pursuant to 18 U.S.C. § 1962(c);

II. Whether the District Court Correctly Held that Plaintiffs Have Standing to Recover Damages;

III. Whether the District Court Correctly Held that Plaintiffs' Complaint States a Claim Under Georgia's RICO Statute; and

IV. Whether the District Court Correctly Held that Plaintiffs' Complaint States a Claim for Unjust Enrichment Under Georgia Law.

*1 STATEMENT OF THE CASE

I. Statement of Facts.

Plaintiffs are current and former hourly Mohawk employees who allege that Mohawk has depressed their wages by illegally employing and harboring large numbers of undocumented aliens. *See* Compl. „ 1 (R1-1).[1] The Complaint alleges that Mohawk conducted and participated in the affairs of an association-in-fact enterprise that includes independent employment agencies, including Temporary Placement Services, Inc. ("'TPS''), and other third-party recruiters. Plaintiffs allege that Mohawk associates with these entities by (1) using the enterprise to procure illegal workers, whom Mohawk then hires as employees; (2) using the enterprise to procure illegal workers who remain employed by TPS and other independent employment agencies, but whom Mohawk harbors and puts to work as temporary employees; and (3) paying the various other members of the enterprise fees for procuring illegal workers. *Id.* „ 76.

Plaintiffs allege that Mohawk's illegal conduct directly injured them by suppressing the wages Mohawk paid them and its other hourly employees. *Id.* „„ 85-87. They bring this suit to recover damages under the federal and Georgia RICO statutes. *Id.* „„ 88-105. In addition, Plaintiffs allege that Mohawk has been *2 unjustly enriched by its unlawful conduct and seek to recover Mohawk's illegal profits. *Id.* „„ 106-110.

II. Course of Proceedings and Disposition in the District Court.

Plaintiffs filed their Complaint on January 6, 2004. (R1-1). On February 9, 2004, Mohawk moved to dismiss the Complaint, arguing *inter alia* that *(1)* Plaintiffs had failed to allege Mohawk's participation in a distinct enterprise; (2) Plaintiffs did not have standing to recover damages; (3) Plaintiffs had failed to allege the predicate acts of illegal hiring and harboring with sufficient particularity; and (4) corporations cannot be held liable under Georgia's RICO statute. (R1-25). The District Court rejected these arguments in a detailed 53-page Order, dated April 12, 2004. *See* Order (R2-44).[2] On May 27, 2004, the District Court granted Mohawk's motion to certify its Order for interlocutory appeal. (R3-58). And on July 28, 2004, this Court granted Mohawk's request for permission to appeal the District Court's Order. (R3-59).

III. Standard of Review.

This Court reviews the District Court's decision to deny a motion to dismiss *de novo. See* ***3** *Mutual Serv. Ins. Co. v. Frit Indus., Inc.,* 358 F.3d 1312, 1318 (11th Cir. 2004). The Supreme Court has held that a civil RICO complaint *""must be sustained* if relief could be granted "under any set of facts that could be proved consistent with the allegations.' "" *NOW v. Scheidler,* 510 U.S. 249, 256 (1994) (quoting *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984)) (emphasis added). Further, ""[a]t this stage of the litigation, [the court] must accept [plaintiffs'] allegations as true.'' *Hishon,* 467 U.S. at 73. As a result, this Court has held that ""the threshold of sufficiency to which a complaint is held at the motion-to-dismiss stage is "exceedingly low.' '' *United States v. Baxter Int'l, Inc.,* 345 F.3d 866, 881 (11th Cir. 2003). The Court ""must find'' that plaintiff has ""no case'' to dismiss a complaint. *Id.* at 884.

SUMMARY OF THE ARGUMENT

Over the past two decades, Congress has endeavored to put teeth into the laws that prohibit illegal immigration and the domestic employment of undocumented aliens. In 1986, Congress made it a crime for an employer to knowingly employ undocumented aliens. *See* 8 U.S.C. § 1324A, *et seq.* In 1996, Congress substantially increased the penalties for employers that knowingly employ significant numbers of undocumented aliens. *See* 8 U.S.C. § 1324. In that same year, Congress added immigration-related crimes to the list of acts that constitute ""racketeering activity'' under the federal RICO statute. *See* ***4** 18 U.S.C. § 1961 (1)(F) (listing any act indictable under 8 U.S.C. § 1324 as a RICO predicate act). In so doing, Congress authorized private civil suits like this one.[3]

In this appeal, Mohawk seeks to defeat those legislative decisions, at least as they apply to ""legitimate corporations.'' Mohawk argues that even when an employer hires and harbors illegal workers through an association with third parties, it somehow engages *only* in its own business and is not participating in the affairs of a RICO enterprise as a matter of law. But Plaintiffs have alleged facts that show Mohawk repeatedly used the services and facilities of the enterprise to make the racketeering activity possible. Under this Court's precedents, nothing more is required to plead Mohawk's conduct of the *enterprise's* affairs.

Rather than confront this authority, Mohawk engages in a game of semantics, improperly recasting its participation in the affairs of the enterprise alleged in the Complaint as Mohawk's individual hiring activity. Mohawk argues that it cannot be held liable under RICO because the conduct Plaintiffs allege supposedly relates solely to Mohawk's own business. But Mohawk offers the Court no limiting principle for this tautological argument. As a result, Mohawk's argument would allow *any* RICO defendant to avoid prosecution whenever the racketeering activity arguably advances both the defendant's own interests and the ***5** interests of the enterprise and its other members. The false premise Mohawk advances here-that an employer's illegal hiring and harboring activity by definition constitutes only the employer's affairs-would prevent the government from using RICO to prosecute any employer for that conduct, even when the employer associates with independent third parties to accomplish its unlawful activity. In addition to defeating Plaintiffs' claims, therefore, the erroneous argument that Mohawk urges on this Court would negate the addition of 8 U.S.C. § 1324 to the list of RICO predicate acts.

This Court should affirm the District Court's thorough and well-reasoned decision to permit Plaintiffs to proceed with their properly-alleged federal RICO claims. *First,* neither the text of the statute nor the governing case law support Mohawk's radical view that corporations are beyond RICO's reach when they join forces with independent, third parties for the common purpose of profiting from illegal activity. Because Plaintiffs' Complaint alleges those facts, *see* Compl. „ 76 (R1-1), the District Court properly rejected Mohawk's enterprise arguments.

The Court should further affirm the District Court's ruling that Plaintiffs have standing to pursue their RICO claims because Plaintiffs properly alleged that Mohawk's illegal conduct proximately caused them injury in the form of suppressed wages. Damages for wages lost due to a RICO violation constitute an injury to business or property that Plaintiffs may recover pursuant to ***6** 18 U.S.C. § 1964(c). And because Plaintiffs sell their services to Mohawk without any intermediary, they suffer this injury directly and may rely on the RICO statute to recover damages.

Second, the Court should hold that corporations like Mohawk may be held liable for violating Georgia's RICO statute pursuant to both subsections of Georgia's corporate criminal responsibility statute, O.C.G.A. § 16-2-22. Because the Georgia RICO statute unquestionably is intended to apply to corporations, this Court should reverse the District Court's decision to preclude Plaintiffs from proving Mohawk's liability via O.C.G.A. § 16-2-22(a)(1). The Court should also affirm the District Court's ruling that Plaintiffs' allegations are sufficient to plead Mohawk's corporate responsibility for violating the Georgia RICO statute under O.C.G.A. § 16-2-22(b)(1).

Finally, the Court should reject Mohawk's attempt to dismiss Plaintiffs' unjust enrichment claim on the theory that Plaintiffs ""accepted'' the wages that Mohawk paid them. Plaintiffs allege that Mohawk's illegal hiring has suppressed their wages and allowed Mohawk to earn unlawful profits that Mohawk should not be permitted to retain. As the District Court properly held, nothing more is required to plead unjust enrichment under Georgia law.

**7 ARGUMENT AND CITATIONS OF AUTHORITY*

I. PLAINTIFFS HAVE ALLEGED MOHAWK'S PARTICIPATION IN AN ACTIONABLE ASSOCIATION-IN-FACT RICO ENTERPRISE.

To plead Mohawk's violation of 18 U.S.C. § 1962(c), Plaintiffs need only allege (1) the existence of an enterprise; (2) that Mohawk associated with the enterprise; and (3) that Mohawk participated in the enterprise's affairs through (4) a pattern of racketeering activity.[4] *See United States v. Goldin Industries. Inc.,* 219 F.3d 1271, 1274 (11th Cir. 2000). Plaintiffs satisfied those requirements by alleging Mohawk participated in the affairs of an enterprise that consists of Mohawk and independent, third-party recruiters (including third-party staffing companies) and has the common purpose of profiting from supplying Mohawk's carpet factories with large numbers of undocumented workers. Mohawk offers three erroneous criticisms of Plaintiffs' enterprise allegations: (1) Plaintiffs do not allege an enterprise because Mohawk is somehow not ""distinct'' from *third-party* recruiters; (2) Plaintiffs' allegations that Mohawk associates with third parties to obtain illegal workers somehow do not allege Mohawk's participation in the enterprise's affairs; and (3) Mohawk and the other members of the enterprise do not share a common purpose, even though they all benefit financially from Mohawk's ***8** illegal hiring scheme. As the District Court recognized, each of these criticisms conflicts with Supreme Court and Eleventh Circuit law and would require the Court to ignore, rather than to take as true, the allegations in the Complaint.

A. The Complaint Alleges an Actionable Association-In-Fact RICO Enterprise That Consists of Mohawk and Third-party Recruiters.

The federal RICO statute defines an ""enterprise'' as ""any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.'' 18 U.S.C. § 1961(4). In *United States v. Turkette,* 452 U.S. 576, 580 (1981), the Supreme Court emphasized the absence of any ""restriction upon the associations embraced by this definition: an enterprise includes any union or group of individuals associated in fact.'' This Court similarly has recognized that the statute defines RICO enterprises broadly:
In *United States v. Hawes,* 529 F.2d 472, 479 (5th Cir. 1976), we noted that "Congress gave the term ""enterprise'' a very

broad meaning'.... [W]e are persuaded that ""enterprise'' includes an informal, de facto association such as that involved in this case. In defining ""enterprise'', Congress made clear that the statute extended beyond conventional business organizations to reach " "any...group of individuals whose association, however loose or informal, [that] furnishes a vehicle for the commission of two or more predicate crimes. The statute demands only that there be association ""in fact'' when it cannot be implied in law. There is no distinction, for " "enterprise'' purposes, between a duly formed corporation that elects officers and holds annual meetings and an amoeba-like infra-structure that controls a secret criminal network.

***9** *United States v. Elliott,* 571 F.2d 880, 897-98 (5th Cir. 1978).[5] Accordingly, this Court repeatedly has concluded that an ""enterprise'' includes associations in fact among corporations and among corporations and individuals.[6] Because Plaintiffs allege an association between Mohawk and independent, third-party recruiters, the Complaint properly pleads an actionable enterprise. *See* Compl. „ 76 (R1-1).

Conceding that a corporation plus third parties can form an association-in-fact enterprise, *see* Mhk Br. at 12-13,[7] Mohawk argues Plaintiffs failed to meet the enterprise requirement by pleading an enterprise that consists solely of Mohawk and its agents. This argument requires Mohawk to distort Plaintiffs' allegation that the enterprise includes independent recruiting firms as well as Mohawk. Specifically, Plaintiffs allege:

***10** Mohawk has engaged in an open and ongoing pattern of violations of 8 U.S.C. § 1324 and 18 U.S.C. § 1546 during the last five years through its participation in an association-in-fact enterprise with *third party* employment agencies and other recruiters, including Temporary Placement Services (""TPS''), that supply Mohawk with illegal workers. Each recruiter is paid a fee for each worker it supplies to Mohawk, and some of those recruiters work closely with Mohawk to meet its employment needs by offering a pool of illegal workers who can be dispatched to a particular Mohawk facility on short notice as the need arises. Some recruiters find workers in the Brownsville, Texas area and transport them to Georgia. Others, like TPS, have relatively formal relationships with the company in which they employ illegal workers and then loan or otherwise provide them to Mohawk for a fee. These recruiters are sometimes assisted by Mohawk employees who carry a supply of social security cards for use when a prospective or existing employee needs to assume a new identity. Compl. „ 76 (emphasis added) (R1-1).

As the District Court properly held, this paragraph alleges an ""association-in-fact'' enterprise between Mohawk and separate third parties:

> After consideration of the allegations in the Complaint, the Court concludes that for the purposes of this Motion to Dismiss, *Plaintiffs have adequately alleged that the recruiters are separate and independent entities from [Mohawk]*. Whether the third party recruiters are in fact agents of [Mohawk] is a factual issue, but for the purposes of the instant Motion Plaintiffs have met their burden to allege that the association-in-fact enterprise consisted of [Mohawk] and separate entities. Order at 32-33 (emphasis added) (R2-44).

Plaintiffs expect to prove that TPS and other third parties that recruit undocumented workers for Mohawk include independent, separately incorporated businesses that service many clients, not just Mohawk. In other words, Plaintiffs have not alleged (and do not believe) that Mohawk is the corporate parent for the third-party recruiting firms identified in the Complaint or that all these different ***11** entities are within the same corporate ""family.'' Nor have Plaintiffs alleged that the third-party recruiters are Mohawk's agents.

Accordingly, Mohawk's suggestion that the allegations here are similar to those in *Fitzgerald v. Chrysler Corp.,* 116 F.3d 225 (7th Cir. 1997) is not correct. In *Fitzgerald,* the Seventh Circuit concluded that plaintiffs' allegation that Chrysler sold fraudulent warranties through a network of franchised dealers, exclusively dedicated to selling Chrysler products, did not meet the enterprise requirement.[8] As indicated, Plaintiffs have not alleged (nor could it fairly be inferred) that the employment agencies and other recruiters with whom Mohawk associates are exclusively devoted to recruiting Mohawk employees. Rather, the Complaint alleges that Mohawk associates with these *separate* entities to accomplish its unlawful harboring and employment of undocumented workers. Accordingly, whether these recruiters are Mohawk's ""agents'' is a fact question that cannot be decided on the pleadings and certainly cannot be resolved against Plaintiffs on a motion to dismiss. *See Hishon,* 467 U.S. at 73.[9]

***12** Moreover, even if Mohawk's agency argument could be reconciled with the Complaint, it nevertheless fails because it conflicts with subsequent Supreme Court and Eleventh Circuit authority. In *Cedric Kushner Promotions, Ltd. v. King,* 533 U.S. 158 (2001), the Supreme Court sustained an enterprise that consisted of a closely-held corporation and its president. Although there was no question that the president was an agent of the corporation, ""acting within the scope of his authority,'' *id.* at 163, the unanimous Court was satisfied that separate incorporation was sufficient to distinguish the corporation from the president, so that the two could form an actionable enterprise. *Id.* at 160-65.[10] In other words, the agency relationship between the two members of the enterprise was immaterial; the only question under the RICO statute was whether the corporation and its president were legally distinct. *See generally,* Brief for the United States as Amicus Curiae in *Cedric Kushner Promotions, Ltd. v. Don King,* 2000 WL 85159, at * 19-21 (Jan. 25, 2001) (""Agency doctrines ... do not negate the actual distinctness of principal and agent'' for purposes of defining a RICO enterprise''); Restatement (Third) of the Law of Agency § 1.01 cmt. c (Tentative Draft No. 2, ***13** Mar. 14, 2001) (""Despite their agency relationship, a principal and agent retain separate legal personalities.'').

Mohawk's argument similarly contradicts *Goldin,* in which this Court held that three sister corporations had formed a RICO enterprise consisting of the corporations and the individuals who ran them. Once again, the individual members of the enterprise were unquestionably agents of one or more of the corporate members. *See Goldin,* 219 F.3d at 1273.[11] And if Mohawk's agency argument were correct, the *Goldin* Court would have been compelled to reverse the convictions based on the defendants' argument that the RICO person and enterprise were not distinct. Instead, this Court affirmed because the corporations were legally ""separate and distinct'' and ""free to act independently and advance [their] own interests contrary to those of the other two corporations.'' 219 F.3d at 1277.

Finally, even the district courts bound to follow *Fitzgerald* have determined that an agency relationship does not defeat an actionable RICO enterprise. In *Chen v. Mayflower Transit, Inc.,* 315 F. Supp.2d 886, 901-05 & n.17 (N.D. Ill. 2004), for example, the court held that *Fitzgerald* did not preclude a RICO enterprise involving separately incorporated local movers and a national moving corporation ***14** even though the plaintiff alleged the local movers acted as the defendant's agents.[12] Because Plaintiffs allege that the enterprise in this case includes third-party recruiters, legally distinct from Mohawk itself, the Complaint satisfies RICO's enterprise pleading requirement, regardless of whether Mohawk ultimately proves an agency relationship with those recruiters.[13]

B. Plaintiffs Allege That Mohawk Participates In the Affairs of the Enterprise.

Building on the false premise that Plaintiffs allege an enterprise that consists only of Mohawk employees and agents, Mohawk argues that Plaintiffs failed to allege Mohawk participated in the affairs of an enterprise, as opposed to participating in Mohawk's own affairs.[14] Because the Complaint alleges that Mohawk associates with third parties and participates in the affairs of the resulting enterprise by hiring, harboring and using illegal workers procured by those third ***15** parties, Mohawk's second argument cannot support dismissal. Mohawk bases this argument almost entirely on *Baker v. IBP, Inc.,* 357 F.3d 685 (7th Cir. 2004), a Seventh Circuit decision that is wrongly decided and conflicts with Eleventh Circuit precedent. This Court should reject *Baker* because it would wreak havoc with criminal RICO prosecutions and immunize corporations from RICO liability even when they associate with third parties to conduct illegal activity.

1. Plaintiffs Allege That Mohawk Participates In the Affairs of the Enterprise By Regularly Using the Enterprise as a Vehicle to Commit the Racketeering Activity.

The Complaint alleges that Mohawk participates in the enterprise's affairs by (1) using and harboring illegal workers employed by third-party employment agencies such as TPS; (2) knowingly employing and accepting false documents from illegal workers supplied by third-party recruiters; and (3) paying fees to third-party recruiters for obtaining these illegal workers. Compl. „ 76 (R1-1). Plaintiffs therefore have alleged that Mohawk directly participates in and conducts the affairs of an enterprise that consists of Mohawk and independent, third-party recruiters. Moreover, under Eleventh Circuit precedent, ""proof that the facilities and services of the enterprise were regularly and repeatedly utilized to make possible the racketeering activity also establishes *the conduct of the affairs of the enterprise* "through' a pattern of racketeering activity.''

United States v. Starrett, 55 F.3d 1525, 1542-43 (11th Cir. 1995) (emphasis added) (quoting ***16** *United States v. Carter,* 721 F.2d 1514, 1527 (11th Cir. 1984)). Accordingly, Plaintiffs' allegation that Mohawk associates with third-party recruiters to effect the hiring and harboring of illegal workers is sufficient to allege Mohawk's conduct of the affairs of an enterprise.[15] Mohawk's argument that it *also* participates in its own affairs by employing these illegal workers in its own business, cannot negate Mohawk's liability for engaging in the conduct the RICO statute proscribes. Accordingly, the District Court correctly held that Plaintiffs had pleaded Mohawk's participation in the affairs of an enterprise. *See* Order at 32 (R2-44).

2. *Baker* is Wrongly Decided, Contrary to Eleventh Circuit Precedent and Would Wreak Havoc with Criminal RICO Prosecutions.

To the extent the Seventh Circuit's decision in *Baker* would impose any additional or different requirements to pleading participation in the affairs of an enterprise, it is at odds with this Court's precedents and should be rejected. As in this case, the *Baker* plaintiffs brought RICO claims against an employer that associated with third party recruiters for the purpose of procuring and employing illegal workers. 357 F.3d at 686-87. Although the *Baker* panel assumed these parties were sufficiently distinct to form an association-in-fact enterprise, the panel held that the complaint did not state a claim because the employer was ***17** participating only in its own affairs, not the affairs of an enterprise. *Id.* at 691. On this point, *Baker* is wrongly decided, inconsistent with Eleventh Circuit law and would curtail the government's ability to use RICO in criminal prosecutions.

Baker's brief discussion of the "'conduct or participate'' element consists of a series of questions that the Seventh Circuit does not answer: "'[H]ow is IBP conducting the affairs of an enterprise through a pattern of racketeering activity?'' and "'Even if the congeries is an enterprise, how is it that IBP operates or manages that enterprise through a pattern of racketeering activity?'' 357 F.3d at 691. In response to these questions, the Seventh Circuit offered only the conclusion that the "'nub'' of the *Baker* complaint was that IBP operated itself rather than an enterprise when it hired illegal workers. *Id.* Without acknowledging the implications of the employer's alleged reliance on the services of the enterprise to procure illegal workers, *id.* at 687, *Baker* concludes that the Complaint failed to allege the employer's participation in the enterprise's affairs.

In this case (as in *Baker),* the answers to the Seventh Circuit's rhetorical questions are obvious: (1) Mohawk uses and harbors illegal workers *employed by other members of the enterprise, such as TPS;* (2) Mohawk hires illegal workers *that the other members of the enterprise supply;* and (3) Mohawk pays fees *to the other members of the enterprise.* Compl. „ 76 (R1-1). Indeed, Plaintiffs expect to prove that Mohawk coordinates closely with TPS and the other members of the ***18** enterprise concerning when, where and how many illegal workers they will supply to Mohawk. All these activities involve Mohawk's reliance on the services and facilities of an enterprise that extends beyond Mohawk itself and thereby establish Mohawk's participation in the affairs of that enterprise. In *Elliott,* 571 F.2d at 898, *Carter,* 721 F.2d at 1527, *Starrett,* 55 F.3d at 1542-43 and most recently in *United States v. Pipkins,* 378 F.3d 1281 (11th Cir. 2004), this Court has confirmed the self-evident point that Mohawk seeks to avoid here: using the enterprise as a vehicle to commit racketeering activity constitutes participation in the enterprise.

Indeed, the Court's recent *Pipkins* decision conclusively rebuts Mohawk's suggestion that it cannot, as a matter of law, participate in the affairs of an enterprise by hiring illegal workers recruited by the enterprise's other members. In *Pipkins,* one of the defendants ("'Pipkins'') challenged his RICO conspiracy conviction for running a child prostitution ring on the ground that the government had failed to prove his participation in the affairs of an enterprise. This Court held that the evidence was sufficient for the jury to find Pipkins had agreed to participate in an enterprise with "'KK,'' another pimp, because KK recruited prostitutes for Pipkins and himself:

Most tellingly, Pipkins and KK had an agreement to operate in tandem. According to KK, Pipkins said that KK "'had a good catch hand and that [Pipkins] had a good turn hand, and that I could catch the girls and he would turn them out.'' KK explained that this meant that he was adept at finding and bringing girls to Pipkins' house; Pipkins would win the girls' loyalties, explain the rules of the game, and convince them to prostitute for him and ***19** KK.... Clearly, there was evidence to support a finding that Pipkins and KK agreed to form an enterprise to make money through juvenile prostitution.

Id. at 1291 (citation omitted). Similarly, Plaintiffs allege that Mohawk associates with third-party recruiters who supply

Mohawk with illegal aliens. At times, Mohawk hires the illegal workers supplied by third-party recruiters to be its own employees, and at other times, it uses them as temporary workers and pays the third-party recruiters a fee. In either case, by accepting these recruits and putting them to work, Mohawk, no less than Pipkins, participates in the enterprise's affairs.

If this Court followed *Baker* as Mohawk advocates, however, Pipkins would have escaped RICO liability. Even though Pipkins associated with KK for the purpose of having KK recruit juvenile prostitutes, Pipkins successfully could have argued he was only participating in his own affairs when he sent the girls out to work as prostitutes. Under *Baker,* Pipkins would not have operated or managed an enterprise when he ran his child prostitution ring, even though he " "regularly and repeatedly utilized'' KK's recruiting activities "'to make possible the racketeering activity.'' *Starrett, 55* F.3d at 1542-43.

Accepting *Baker* and the argument Mohawk urges upon the Court would bar important criminal RICO prosecutions by allowing any organization to escape liability by pretending that it is merely engaged in its own affairs. In addition to freeing Pipkins, *Baker* also would have insulated the defendants in *Goldin* and *Thevis* from criminal RICO liability. In *Goldin,* several corporations joined with ***20** their owners to cheat their customers by short-weighing scrap metal. *If Baker* were the law, however, each corporate defendant would have successfully argued that it was only "'operat[ing] *itself* unlawfully'' since weighing scrap was its business. 357 F.3d at 691. Likewise, in *Thevis,* where the enterprise consisted of a corporation and individuals running a pornography business, the corporate defendant could have argued it was simply operating itself.[16] Eleventh Circuit law does not and should not countenance this result.

3. *Baker* Does Not Support Dismissal in this Case.

Regardless of how this Court ultimately views *Baker,* that decision cannot support dismissal here because *Baker* does not give Mohawk license to ignore the materially different allegations in Plaintiffs' Complaint. *Baker* is distinguishable from this case because Plaintiffs have done more than allege " "that [Mohawk] operates itself unlawfully.'' 357 F.3d at 691. The Complaint specifically alleges that Mohawk associates with third parties to accomplish the hiring and harboring ***21** of illegal workers. *See* Compl. „ 76 (R1-1). And although some of those undocumented workers become Mohawk employees, *Plaintiffs also allege that others remain in the employ of the enterprise's other members, such as TPS. Id.* This allegation demonstrates that Plaintiffs charge Mohawk with doing more than hiring illegal workers for its own business. To the contrary, Plaintiffs allege that Mohawk also has used and harbored illegal worker that "'belong'' to third parties. Because *Baker* did not consider an allegation that the defendant corporation used (as temporary employees) illegal workers who remained in the employ of a separate, third-party member of the enterprise, *Baker* cannot support dismissal in this case.

Finally, Mohawk's claim that it did not participate in the affairs of an enterprise is a factual argument that must be raised on summary judgment or at trial. In *Starrett,* 55 F.3d at 1546, this Court noted that "'[t]he jury was entitled to consider in its entirety all circumstantial evidence of Nolan's participation in the South Florida Outlaws.''[17] Because Plaintiffs allege Mohawk's participation in the affairs of a distinct enterprise, the Court cannot dismiss the Complaint.

*22 C. Plaintiffs Allege That The Mohawk-Plus-Recruiters Enterprise Has The Common Purpose of Profiting From the Illegal Hiring Activity.

Mohawk's final enterprise argument, that Mohawk and the recruiters do not have a common purpose, also ignores the Complaint and Eleventh Circuit law. The Complaint specifically alleges that "'[t]he recruiters and Mohawk share the common purpose of obtaining illegal workers for employment by Mohawk.'' Compl. „ 77 (R1-1).[18] Further, the Complaint alleges that both Mohawk and the recruiters make money when Mohawk hires or uses illegal workers supplied by the recruiters. *Id.* „ 76. "'This circuit has held that proof of an association's devotion to "making money from repeated criminal activity' demonstrates an enterprise's common purpose of engaging in a course of conduct, regardless of whether the criminal activity is diverse.'' *United States v. Church,* 955 F.2d 688, 698 (11th Cir. 1992) (quoting *United States v. Cagnina,* 697 F.2d 915, 921 (11th Cir. 1983)). Given the allegations of the Complaint and Eleventh Circuit law, Mohawk's speculation that recruiters and employers might have "'divergent goals'' is not a basis for dismissal. 357 F.3d at 691. The Complaint does not allege divergence, and it may not be assumed.[19]

***23 II. PLAINTIFFS HAVE STANDING TO PURSUE THEIR RICO CLAIMS FOR LOST WAGES**

The Complaint plainly alleges that Mohawk's repeated RICO violations proximately caused Plaintiffs to suffer a direct injury to their business and property by unlawfully suppressing their wages:

> [Plaintiffs] and the Class have suffered an injury to their ""business or property,'' *i.e.,* lost wages, as a direct result of Mohawk's violations of federal RICO ....'' Complaint „ 86 (R1-1).[20]

In *NOW v. Scheidler,* 510 U.S. 249 (1994), the Supreme Court held that nothing more is required to plead standing in a civil RICO case. In *Scheidler,* plaintiffs alleged only that (1) the defendants' ""conspiracy "has injured the business and/or property interests of the [petitioners]' '' and (2) the defendant had threatened unspecified reprisals against one of the petitioners if she refused to quit her job. *Id.* at 256. The Supreme Court held that these bare allegations were sufficient to confer standing and preclude dismissal on the pleadings:

> We have held that *""at the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.''* ***24** *Id.* (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992)) (emphasis added). The allegations in Plaintiffs' Complaint also preclude dismissal for lack of standing.

Mohawk offers three objections to Plaintiffs' standing: (1) Plaintiffs' lost wages do not constitute a concrete injury to business or property; (2) Plaintiffs damages are *""too* speculative'' and (3) Plaintiffs suffered their injury indirectly. Mhk Br. at 14-24. The thrust of each claim, however, is that Mohawk does not believe Plaintiffs will be able to *prove* a direct injury as a result of Mohawk's use, employment and harboring of thousands of undocumented workers. *See* Compl. „„„ 74-75. Of course, that is not the proper inquiry on a motion to dismiss. Rather, the only question is whether Plaintiffs' allegations-which must be accepted as trueare consistent with any set of facts that would entitle Plaintiffs to relief. *See Scheidler,* 510 U.S. at 256. Because Plaintiffs' claims are more than sufficient to confer standing, the Second, Sixth and Ninth Circuits have rejected all the arguments that Mohawk asserts here.[21] This Court should affirm the District Court's conclusion that Plaintiffs have standing to pursue their claims.

***25 A. Plaintiffs' Allegation That Mohawk Suppressed Their Wages Constitutes an ""Injury to Business or Property.''**

Mohawk cannot and does not dispute that lost wages generally qualify as an injury to business or property that satisfies § 1964(c).[22] Instead, Mohawk contends that these Plaintiffs cannot recover their lost wages because they ""accepted'' the wage that Mohawk paid them and their interest in lost wages is insufficiently concrete. *See* Mhk Br. at 16-17.[23]

These unsupported arguments ignore Plaintiffs' ""concrete'' interest in and entitlement to wages set by a market free from Mohawk's violations of federal law. As the Ninth Circuit court explained in a similar case, civil RICO plaintiffs alleging injury due to illegal hiring need not allege a ""property interest'' in their lost wages as if they were pursuing a constitutional claim for denial of due process. *See Mendoza v. Zirkle Fruit Co.,* 301 F.3d 1163, 1168 n.4 (9th Cir. 2002)[24] Rather ***26** than having to show that they were promised a higher wage as Mohawk demands here, the *Mendoza* court held that plaintiffs need only allege ""a legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes.'' *Id.*

Mohawk's suggestion that Plaintiffs waived this right by bargaining for and accepting a particular wage improperly rewrites the Complaint. Plaintiffs have not alleged any contract for a specific wage. Rather, as the District Court correctly observed, the Complaint alleges that Mohawk's employment and harboring of illegal workers unlawfully expands the pool of workers available to Mohawk and thereby adversely affects the wages Mohawk pays Plaintiffs and its other hourly workers. Order at 37 (R2-44). Just as an employer charged with gender discrimination cannot avoid liability by arguing the plaintiff accepted lower wages than the men who held the same job, Mohawk cannot avoid its duty to comply with the federal hiring and immigration laws by claiming Plaintiffs accepted their unlawfully depressed wages.

Moreover, the Supreme Court's interpretation of the Clayton Act's identical " "business or property'' terminology,[25] establishes that a party who pays, *i.e.,* ***27** ""accepts,'' a price unlawfully inflated by a violation of the antitrust laws has standing to pursue that injury:

We think it sound to hold that when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of section 4 [of the Clayton Act].''

Hanover Shoe v. United Shoe Machine Corp., 392 U.S. 481, 489 (1968). Rather than precluding injury, paying a supra-competitive price gives rise to the injury-in-fact required to state a claim. *See, e.g., In re Polypropylene Carpet Antitrust Litig.,* 178 F.R.D. 603, 609 (N.D. Ga. 1997) (only plaintiffs that absorbed the illegal cost increase by purchasing carpet subject to a price-fixing scheme had standing to pursue antitrust claims). By the same token, Plaintiffs' receipt of lower wages due to Mohawk's illegal conduct gives rise to a concrete injury to property in this case.

To support its contrary argument, Mohawk cites several cases that preclude recovery of gambling losses under RICO. In these cases, the courts found no injury to business or property because the plaintiffs, who paid money to purchase packs of trading cards hoping to receive randomly distributed collectible cards, had received precisely what they bargained for. *See, e.g.,* ***28** *Price v. Pinnacle Brands, Inc.,* 138 F.3d 602, 607 (5th Cir. 1998).[26] The distinction in this case is obvious: Mohawk's compliance with federal immigration law is mandatory, not a game of chance. Plaintiffs did not agree to accept the risk that Mohawk would illegally suppress their wages by hiring and harboring thousands of undocumented workers. As the District Court held, this is a concrete injury to Plaintiffs' business or property. *See* Order at 36-37 (R2-44).

B. Plaintiffs' Claims For Damages Are Not Speculative And Cannot Be Dismissed on the Pleadings.

Mohawk's argument that Plaintiffs' damages are too speculative devolves to a naked claim that Plaintiffs will be unable to prove the precise wage effect of Mohawk's illegal conduct. Mohawk argues that a host of intervening factorsnone of which appear in the Complaint--contradict Plaintiffs' theory of the case and will render Plaintiffs' damages uncertain and impossible to measure. *See* Mhk. Br. at 18-22. Even if Mohawk were correct on these points--and it is not-- Mohawk's arguments must be reserved for summary judgment, after the parties have had the opportunity to conduct discovery and develop expert testimony.

***29** Two Courts of Appeals have directly rejected the same arguments that Mohawk makes here as premature and reinstated complaints that similarly sought to recover wages lost as a result of an employer's scheme to hire large numbers of undocumented workers.[27] In *Mendoza,* the district court dismissed because other market factors, including the skills and qualifications of each worker, the availability of legal workers and the profitability of defendants' business *could have* prevented plaintiffs from receiving higher wages even in the absence of illegal hiring.[28] The Ninth Circuit reversed because the plaintiffs alleged the defendants had the ability to depress wages through their conduct and had done so. *Id.* at 1171.[29] Those allegations entitled plaintiffs to develop and present proof, including expert testimony, regarding the effect of the defendants' illegal hiring. *Id.*

The Sixth Circuit reached the same conclusion in *Trollinger v. Tyson Foods, Inc.,* 370 F.3d 602, 618-19 (6th Cir. 2004), where Tyson argued that plaintiffs' ***30** chain of reasoning was speculative due to the same laundry list of contingencies. *Id.* Although the district court dismissed, the Court of Appeals reinstated the complaint because Tyson's arguments turned on questions of fact that could only be resolved with evidence:

> Tyson may be right--but we cannot say so at this preliminary stage in the proceeding. Given the unadorned allegations in the complaint, given the requirement that we must assume plaintiffs will be able to prove them and given the absence of any discovery (or expert reports) thus far, Tyson's argument requires us to do as much speculating as plaintiffs' multi-link chain of causation allegedly requires us to do. There are many fact-driven questions here ... and the speculativeness of our answers to all of them counsels against resolving this dispute as a matter of law at this early stage of the case. *Id.* at 619.[30]

As in *Mendoza* and *Trollinger,* Plaintiffs have alleged that Mohawk's illegal conduct allows the company to pay depressed

wages and that Mohawk has done so. *See* Compl. „„ 3, 13-14, 33-35, 38 (R1-1). As in those cases, the issues Mohawk raises ""are exceedingly complex and best addressed by economic experts and other evidence *at a later stage in the proceedings.'' Mendoza,* 301 F.3d at 1171 (emphasis added).[31] Because the questions of whether and to what extent ***31** Mohawk's hiring and harboring of illegal workers has affected Plaintiffs' wages are factual disputes that cannot be resolved on the pleadings, they cannot serve as the basis for a Rule 12 dismissal.

Moreover, this Court has permitted the recovery of RICO injuries far less concrete than those alleged here. In *Maiz v. Virani,* 253 F.3d 641 (11th Cir. 2001), plaintiffs sought and recovered damages for (1) funds the defendants defrauded from them and (2) the ""lost value'' they would have earned had their funds been invested in other ventures. This Court sustained the multi-million dollar judgment because the ""lost value'' damages were a recoverable injury to business and property under RICO, even though the returns were not guaranteed and were contingent on other market factors. *Id.* at 662-66. The financial injury plaintiffs suffered here is far less speculative than the scope of damages recovered in *Maiz.*

Mohawk also argues that the Complaint should be dismissed because Plaintiffs' wage-suppression theory supposedly makes no economic sense. Mhk. Br. at 20-21. Based on the economic laws of supply and demand, Plaintiffs' theory is the same one that repeatedly has led Congress to pass legislation to prevent employers from importing inexpensive labor that drives down wages for domestic workers.[32] It is the same theory that led the Supreme Court to observe that ***32** ""acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens.'' *DeCanas v. Bica,* 424 U.S. 351, 356-57 (1976). The most important point, however, is that Mohawk cannot win dismissal by making economic allegations that contradict the Complaint.[33] As in *Mendoza,* Plaintiffs' theory ""[t]hat wages would be lower if, as alleged, the [defendant] relied on a workforce consisting largely of undocumented workers, is a claim at least plausible enough to survive a motion to dismiss.'' 301 F.3d at 1171.

Mohawk contradicts the Complaint when it argues that Plaintiffs have failed to allege that all the predicate acts contribute to Mohawk's suppression of their wages suppression theory. *See, e.g.,* Compl. „„ 85-86 (R1-1) (attributing Plaintiffs' ***33** injury to all Mohawk's violations of federal law).[34] At the pleading stages of a RICO case, this allegation is sufficient to ""embrace those specific facts that are necessary to support the claim.'' *Scheidler,* 510 U.S. at 256.[35] More importantly, the law does not require Plaintiffs to plead or prove that each predicate is the sole, independent cause of Plaintiffs' injury. *See Cox v. Administrator,* 17 F.3d 1386, 1399 (11th Cir. 1994) (""proximate cause is not ... the same thing as a sole cause''). As the District Court properly held, Plaintiffs may recover on any of these predicate acts by proving that Mohawk's conduct was ""a substantial factor in the sequence of reasonable causation.'' Order at 40 n.7 (R2-44) *(quoting* ***34** *Maiz,* 253 F.3d at 675 and *Cox,* 17 F.3d at 1399); *accord Trollinger,* 370 F.3d at 619-20.[36] As a result, the economic impact of all Mohawk's illegal activity is a matter on which Plaintiffs are entitled to conduct discovery.

C. Plaintiffs Have Alleged A Direct Injury.

Finally, Mohawk contends that Plaintiffs cannot pursue their claims because they are not the direct victims of Mohawk's illegal conduct. In *Holmes v. SIPC,* 503 U.S. 258 (1992), the Supreme Court denied standing to RICO plaintiffs who suffer derivative or "passed-on' injuries. *See Trollinger,* 370 F.3d at 613-14. In an attempt to avail itself of this authority, Mohawk contends that the illegal workers are the direct victims of Mohawk's illegal conduct and Plaintiffs' injury therefore is indirect. *See* Mhk Br. at 23.

The fatal detect in Mohawk's argument is that it contradicts the Complaint, which alleges that Mohawk employs illegal workers for the purpose and with the effect of reducing the wages that Mohawk pays its hourly employees. *See* Compl. „„ 33, 35, 38, 82 (R1-1). Nothing more is required to confer standing in a RICO case. *See Maiz,* 253 F.3d at 656 (proof that defendants targeted plaintiffs, among ***35** other entities, was sufficient to show standing at trial). Because Plaintiffs sell their services directly to Mohawk, they are directly victimized by Mohawk's illegal conduct and have standing to pursue claims for their lost wages in the same way that a direct purchaser may pursue damages for price-fixing under the Clayton Act. *See Trollinger,* 370 F.3d at 616 (""if direct purchasers who pay too much "obviously assert a direct injury', so do direct employees who receive too little.'') (citation omitted); *Mendoza,* 301 F.3d at 1169-70 (same).[37]

Mendoza and *Trollinger* thoroughly consider the substance of Mohawk's argument and reject it. Like Plaintiffs here, the *Mendoza* plaintiffs alleged that their employers' illegal hiring scheme had the purpose and direct effect of depressing their

wages. 301 F.3d at 1170. Because ”“[n]either the government nor the undocumented workers are an intervening third party in this scheme,‘’ the Ninth Circuit held that ”“[t]he claims here thus differ fundamentally from the passed-on injury cases.‘’ *Id.* As a result, the court was ”“unable to discern a more direct victim of the illegal conduct‘’ than defendants’ legal workers. *Id. Trollinger* rejects a similar suggestion that the employees’ union was the only direct victim of the employer’s illegal hiring because ”“the direct employment relationship between ***36** Tyson and plaintiffs distinguishes this dispute from the *Holmes* line of cases, where the plaintiffs had no relationship with the defendants except through intermediaries.‘’[38] Because Plaintiffs here, like the *Mendoza* and *Trollinger* plaintiffs, sell their services directly to Mohawk without any intermediary, their injury is direct and *Holmes* cannot support a dismissal.

III. MOHAWK IS NOT IMMUNE FROM PLAINTIFFS’ GEORGIA RICO CLAIMS

The District Court granted Mohawk’s motion to dismiss Plaintiffs’ Georgia RICO claim to the extent it is predicated on violations of 8 U.S.C. § 1324, but refused to dismiss the Georgia RICO claim based on Mohawk’s violation of 18 U.S.C. § 1546. *See* Order at 45-49 & n.8 (R2-44). On appeal, Mohawk argues it is immune from liability under Georgia’s RICO statute because ”“a corporation itself is not capable of committing a crime.‘’ Mhk Br. at 24. That is not the law, as numerous corporations held liable for violating the Georgia RICO statute can attest.[39]

***37** Rather (and as Mohawk concedes at page 25 of its brief), Georgia law provides that corporations can be held responsible for criminal violations in two circumstances: ( ) if the criminal statute indicates a legislative purpose to impose liability on a corporation, and a corporate agent commits an element of the crime within the scope of his employment and on the corporation’s behalf, *see* O.C.G.A. § 16-2-22(a)(1), or (2) the corporation’s managerial employees approve, request or recklessly tolerate the crime while acting on the corporation’s behalf, *id. §* 16-2-22(a)(2). *See* Order at 46 (R2-44).[40] Because the District Court concluded that the Georgia RICO statute reveals no clear intent to subject corporations to liability, the court held corporations cannot be prosecuted for violating the statute on the basis of § 16-2-22(a)(1). *See* Order at 46-47 (R2-44). As a result, the District Court restricted Plaintiffs to prosecuting their Georgia RICO claim under § 16-2-22(a)(2). *Id.* at 47-49 (R2-44). On appeal, Mohawk seeks total immunity from liability for its Georgia RICO violations by arguing that it cannot be held responsible under either § 6-2-22(a)(1) or (2). This Court should make clear that corporations are subject to prosecution for violating Georgia’s RICO statute under both of § 6-2-22(a)’s provisions.

*38 A. Because Georgia’s RICO Statute Evidences A Clear Intent to Subject Corporations To Liability, Mohawk Can Be Held Responsible Under O.C.G.A. § 16-2-22(a)(1).

As Mohawk acknowledges, a corporation may be held criminally responsible for its agents’ conduct under § 16-2-22(a)(1) if the criminal statute at issue ” “clearly indicates a legislative purpose to impose liability on [a] corporation [s].‘’ Mhk Br. at 25. The Georgia legislature clearly expressed that purpose in the RICO statute by imposing liability on any ”“person‘’ that engages in the proscribed conduct. *See* O.C.G.A. § 16-14-4(a-c). The initial chapter of Georgia’s criminal code provides ”“for the purpose of this title [16], the term ... “Person’ means an individual, a public or private corporation [.]‘’ O.C.G.A. § 16-1-3(12). Because a private corporation is ” “unquestionably a “person’ under the RICO Act,‘’ *Reaugh v. Inner Harbour Hosp., Ltd,* 214 Ga. App. 259, 264, 447 S.E.2d 617, 622 (1994), the statute plainly expresses the legislature’s intent to hold corporations liable.

Further direct evidence of this intent appears in the Georgia RICO statute’s penalty provisions. Section 16-14-6(a)(5) permits a court to forfeit the charter of a *domestic corporation* or revoke *a foreign corporation’s* certificate to do business in Georgia. Similarly, § 16-14-6(a)(3) permits a court to dissolve or reorganize any ”“enterprise,‘’ which the Georgia RICO statute defines to include ***39** ””corporations,‘’ *id.* § 16-14-3(6).[41] Finally, § 16-14-15 requires *alien corporations* to establish an agent for service of process and register with the Secretary of State before acquiring real property within the state to ensure that these foreign corporations cannot evade forfeiture penalties for violating the Georgia RICO statute. *See In re Five Star Partners, L.P.,* 169 B.R. 994, 1006 (Bankr. N.D. Ga. 1994). Any reading of the Georgia RICO act that immunizes all corporations from liability would violate Georgia’s basic canons of statutory construction by depriving these corporate penalty provisions of any meaning whatsoever.[42]

Rather than address these statutory indicators that the legislature intended Georgia RICO to apply to corporations, the District Court relied on a passing parenthetical comment in *Cobb County v. Jones Group,* 218 Ga. App. 149, 153, 460 S.E.2d 516, 521 (1995) that was subsequently repeated in a footnote in *Clark v. Security Life Ins. Co.,* 270 Ga. 165, 167 n.11, 509 S.E.2d 602, 604 n. 11 (1998). *See* Order at 46-47 (R2-44). These remarks were made without analysis because both the *Cobb County* and *Clark* courts already had concluded the defendant faced criminal RICO liability on alternative grounds. *See* ***40** *Clark,* 270 Ga. at 168, 509 S.E.2d at 604 (finding liability under § 16-2-22(a)(2)); *Cobb County,* 218 Ga. App. at 153, 460 S.E.2d at 521 (same). As a result, these additional observations from *Clark* and *Cobb County* do not constitute the holding of either case and they should neither bind nor persuade this Court in the face of clear evidence that the Georgia RICO statute is intended to apply to corporations. In the event, however, that this Court finds itself in any doubt on Georgia's law on this point, Plaintiffs respectfully request the Court to certify this limited question to the Georgia Supreme Court while the parties continue to litigate Plaintiffs' other claims and theories of liability.

B. Plaintiffs' Allegations State a Claim Under O.C.G.A. § 16-2-22(a)(2).

Mohawk also acknowledges that it may be held criminally liable for violations of Georgia RICO, if the crime is authorized, requested or ""recklessly tolerated'' by managerial officials. Mhk Br. at 25 (quoting O.C.G.A. § 16-2-22(a)(2)). The Complaint specifically alleges that Mohawk supervisors have committed the predicate acts, *see* Compl. ,,,, 20-21, 28, 31 (R1-1), and more generally alleges that Mohawk, *i.e.,* the corporation acting through its officers and employees, has committed the predicate acts. Fed. R. Civ. P. 8 requires nothing ***41** beyond this ""short and plain statement,'' to notify Mohawk of the substance of Plaintiffs' claims.[43]

State v. Military Circle Pet Center No. 94, Inc., 257 Ga. 388, 360 S.E.2d 248 (1987), confirms that the additional details Mohawk demands on appeal are matters of proof, not pleading. That case holds the state need not charge the details of corporate criminal responsibility under § 16-2-22(a)(2) in a criminal indictment, which is subject to a far more rigorous pleading standard than applicable here:

> Although the state must prove the applicable provisions of the foregoing code provisions [including § 16-22-2] at trial against a criminal defendant, *it is not necessary that the state allege these provisions in the accusation. Id.* at 389-90, 360 S.E.2d at 249 (emphasis added).[44]

At trial, Plaintiffs certainly expect to prove that Mohawk and its managerial officials authorized, committed or ""recklessly tolerated'' the criminal conduct alleged in the Complaint. Because proving that set of facts certainly would be ""consistent with the allegations'' of the Complaint, the Court may not dismiss Plaintiffs' claims. *Scheidler,* 510 U.S. at 256. Accordingly, this Court should allow Plaintiffs to proceed with their Georgia RICO claims, ***42** and hold that Plaintiffs may establish Mohawk's criminal responsibility under either subsection of § 16-2-22(a).[45]

IV. PLAINTIFFS HAVE ALLEGED A CAUSE OF ACTION FOR UNJUST ENRICHMENT UNDER GEORGIA LAW

Georgia law affords a cause of action for unjust enrichment to recover the value of any benefit conferred upon the defendant and which, under the circumstances, the defendant should not be entitled to retain. *See Regional Pacesetters, Inc. v. Halpern Enters., Inc.,* 165 Ga. App. 777, 300 S.E.2d 180 (1983). Mohawk's sole argument for dismissal is that unjust enrichment cannot lie where there is an express contract. Mohawk's argument contradicts the Complaint because Plaintiffs have not alleged any express contract in which Plaintiffs accepted a particular wage. The Court cannot assume such a contract exists merely because Mohawk says so in its brief, particularly when Mohawk's Answer denies even employing any of the Plaintiffs. *See* R2-48, ,,,, 5-8. More importantly, Mohawk fails to cite a single case that dismisses an unjust enrichment claim for the plaintiffs failure to allege the absence of an express contract.

Second, the decisions that Mohawk cites require proof of an *express* agreement to bar a claim for unjust enrichment. *See, e.g., Pryor v. CCEC, Inc.,* 257 Ga. App. 450, 452 (2002) (express contract); ***43** *Kwickie/Flash Foods, Inc. v. Lakeside Petroleum, Inc.,* 246 Ga. App. 729, 730 (2000) (same). By contrast, an unjust enrichment claim may coexist with an implied contract.[46]

At this stage of the case, the record does not reveal what type of contract may be at issue. In the event the evidence demonstrates an implied contract, Plaintiffs will be entitled to pursue their claim for unjust enrichment. Accordingly, the Court may not dismiss the claim on the pleadings.

More importantly, Mohawk's argument misses the point of Plaintiffs' unjust enrichment claim. Plaintiffs allege Mohawk has unjustly enriched itself at Plaintiffs' expense by employing and harboring thousands of illegal workers. The Complaint further alleges this conduct allowed Mohawk to extract substantial wage savings from *all* its hourly employees and thereby earn millions of dollars in unlawful profits. Because it would be inequitable to permit Mohawk to retain these ill-gotten gains, Plaintiffs seek an order requiring Mohawk to disgorge its illegal profits, not merely an award of back pay. *See* Compl. „„„ 106-110 (R1-1). In this sense, Plaintiffs' unjust enrichment is no different than similar claims ***44** asserted to recover the profits due to unlawful overcharges '"'accepted'' by the plaintiffs in civil antitrust cases.[47]

CONCLUSION

Plaintiffs have pleaded the requisite elements of their claims, and they should be permitted to proceed with their action. This Court should affirm the District Court's thorough and well-reasoned decision to deny Mohawk's motion to dismiss Plaintiffs' federal and Georgia RICO claims. The Court should also affirm the District Court's decision to deny Mohawk's motion to dismiss Plaintiffs' unjust enrichment claim.

Finally, the Court should reverse the District Court's ruling that limits Plaintiffs to pursuing their Georgia RICO claims pursuant to O.C.G.A. § 16-2-22(a)(2). Because the Georgia RICO statute is plainly intended to apply to corporations like Mohawk, Plaintiffs also should be permitted to employ O.C.G.A. § 16-2-22(a)(1) to establish Mohawk's corporate criminal responsibility. In the event this Court concludes that the Georgia law is unclear on this point, Plaintiffs ***45** request that the Court certify this single question to the Georgia Supreme Court while the parties proceed to discovery on Plaintiffs' remaining theories of liability.

Footnotes

1 Specifically, Plaintiffs allege that Mohawk's predicate acts include violations of 8 U.S.C. § 1324 and 18 U.S.C. § 1546. *Id.* „„„ 58-66 (R1-1). Although Mohawk argued to the District Court that Plaintiffs failed to plead the elements of certain of these predicates, Mohawk has not raised that argument on appeal.

2 The District Court granted Mohawk's motion to dismiss Plaintiffs' claim for unjust enrichment with respect to Mohawk's savings on workers' compensation benefits. *See* Order at 53 (R2-44). The District Court also denied Plaintiffs leave to amend their Georgia RICO claim specifically to include predicate violations of 8 U.S.C. § 1324. *Id.* at 49 n.8 (R2-44).

3 *See generally Agency Holding Corp. v. Malley-Duff & Assocs.,* 483 U.S. 143, 151 (1987) ('"'Both... [RICO and the antitrust laws] bring to bear the pressure of private attorneys general on a serious national problem for which public prosecutorial resources are deemed inadequate'').

4 By contrast, Georgia's RICO statute does not require Plaintiffs to plead or prove an enterprise. *See* O.C.G.A. § 16-14-4(a); *Dover v. State,* 192 Ga. App. 429, 430, 385 S.E.2d 417, 420 (1989). Accordingly, Mohawk cannot extend its enterprise arguments to defeat Plaintiffs' Georgia RICO claims.

5 *See also United States v. Valera,* 845 F.2d 923 (11th Cir. 1988) (a RICO enterprise may be as amorphous as a pick-up basketball game in which the core players '"'sub-in'' as needed); *United States v. Hewes,* 729 F.2d 1302, 1311 (11th Cir. 1984) ('"'[A] RICO enterprise exists when a group of persons associates, formally or informally, with the purpose of conducting illegal activity.'').

6 *See Goldin Indus.,* 219 F.3d at 1275 n.6 (corporations and individual owners who associated to defraud corporations' customers constituted enterprise); *United States v. Thevis,* 474 F. Supp. 134, 137 (N.D. Ga. 1979) ('"' "a group of individuals associated in fact with various corporations' '' to operate a pornography business constituted a RICO enterprise) (quoting indictment), *aff'd,* 665 F.2d 616, 625 (5th Cir. 1982).

7 This concession belies Mohawk's insinuation that Plaintiffs seek to expand RICO beyond all recognizable boundaries. *Compare* Mhk Br. at 12-13 & n.6 (RICO's prototypical purpose is to protect legitimate business from criminal infiltration) *with Cedric*

Kushner Promotions. Ltd. v. King, 533 U.S. 158, 164 (2001) (RICO is also intended to protect the public from enterprises used as a vehicle to commit unlawful activity) *and Turkette,* 452 U.S. at 589-91 (rejecting argument that RICO is addressed *only* to the criminal infiltration of legitimate business).

[8] *See, e.g.. Westways World Travel v. AMR Corp.,* 182 F. Supp.2d 952, 959 (C.D. Cal. 2000) *(Fitzgerald* does not preclude an enterprise consisting of an airline defendant and a separate company operating a reservation system for the benefit of the defendant and other airlines).

[9] *See also Begala v. PNC Bank, Ohio N.A.,* 214 F.3d 776, 781 (6th Cir. 2000) (where Plaintiffs did not allege that dealers were agents or members of the defendant RICO person, it would violate established Rule 12(b)(6) procedures for the court to infer that relationship in order to dismiss the complaint).

[10] *Cedric Kushner* distinguished cases, like those cited at page 10 of Mohawk's brief, in which the plaintiff attempted to construct an enterprise out of the defendant corporation and its employees. 533 U.S. at 164 (distinguishing but not approving *Riverwoods Chappaqua Corp. v. Marine Midland Bank,* N.A., 30 F.3d 339 (2d Cir. 1994) and *Discon, Inc. v. NYNEX Corp.,* 93 F.3d 1055 (2d Cir. 1996)). Both *Riverwoods* and *Discon* are cited prominently in *Fitzgerald,* 116 F.3d at 226, a *pre-Cedric Kushner* decision upon which Mohawk so heavily relies.

[11] *See* Restatement (Third) of the Law of Agency § 1.01 cmt. c (""The elements of common-law agency are present in the relationships between employer and employee, corporation and officer'').

[12] *Accord Westways,* 182 F. Supp.2d at 959-60 (""Merely *acting as an agent at times does not negate the distinctiveness* of [the defendant] as an entity separate from [another member of the enterprise].'')(emphasis added).

[13] Mohawk's agency argument would preclude a RICO prosecution even if the company engaged a hit man to assassinate the president of a competing carpet company. Although, the hit man undoubtedly would qualify as Mohawk's agent, there can be no doubt that Mohawk's association in fact with this agent would be sufficient to sustain a RICO enterprise. *See, e.g., United States v. Muyet,* 994 F. Supp. 501, 506 & 515-16 (S.D.N.Y. 1998) (affirming RICO convictions where the enterprise consisted of a criminal gang and a ""freelance'' killer for hire who was not a gang member).

[14] RICO makes it ""unlawful for any person employed by or 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....'' 18 U.S.C. § 1962(c).

[15] *See also Elliott,* 571 F.2d at 898 (the RICO statute extends to reach any association of individuals that ""furnishes a vehicle for the commission of two or more predicate acts'').

[16] The same argument also would have afforded immunity from RICO prosecution to the defendants in *United States v. Massey,* 89 F.3d 1433 (11th Cir. 1996) (attorney convicted of violating RICO for purpose of generating court appointed representations); *United States v. Castro,* 89 F.3d 1443 (11th Cir. 1996) (same); *United States v. Norton,* 867 F.2d 1354 (11th Cir. 1989) (defendants who paid kickbacks to union health plan to win contracts for their business participated in RICO enterprise); and *United States v. Hewes,* 729 F.2d 1302 (11th Cir. 1984) (defendants violated RICO by operating corporations in a manner designed to fraudulently induce the extension of credit). *See also Klay v. Humana, Inc.,* __ F.3d __, 2004 WL 1938845 (11th Cir. Sept. 1,2004) (certifying a civil RICO class action against HMO's each engaged in their own businesses).

[17] *See also Chen,* 315 F. Supp.2d at 901-08 (addressing the enterprise questions considered in *Baker* and *Fitzgerald* at summary judgment).

[18] Order at 35 (R2-44) (""Because the Complaint in this case explicitly alleges that a common purpose exists - obtaining illegal workers for employment by [Mohawk] - the Court cannot agree with [Mohawk] that Plaintiffs' Complaint is deficient.'').

[19] Moreover, *Baker's* suggestion that divergent goals exist because recruiters want to be paid more and employers want to pay them less is untenable. In ""traditional'' RICO drug distribution enterprises, dealers want to be paid more and suppliers want to pay them less, but that does not destroy the dealers and suppliers' common purpose of making money from repeated criminal activity. Indeed, in *Church,* 955 F.2d at 691-92, the enterprise members' goals diverged to the point where one ordered the other murdered, but that did not destroy their enterprise's common purpose. *Id.* at 698.

[20] *See also id.* „„ 3, 35, 38, 43, 47, 85-87, 89-92, 105 (R1-1).

[21] *See Trollinger v. Tyson Foods, Inc.,* 370 F.3d 602, 619 (6th Cir. 2004); *Mendoza v. Zirkle Fruit Co.,* 301 F.3d 1163, 1168-70 (9th Cir. 2002); *Commercial Cleaning Servs., Inc. v. Colin Serv. Sys., Inc.,* 271 F.3d 374, 380-85 (2d. Cir. 2001).

22 *See, e.g., Dailey v. Quality School Plan, Inc.,* 380 F.2d 484, 486-87 (5th Cir. 1967) (claims for diminished commissions allege an injury to business or property under § 4 of the Clayton Act); *Libertad v. Welch,* 53 F.3d 428, 437 n.4 (1st Cir. 1995) (lost wages qualify as a concrete injury to business or property in a civil RICO case); *Jund v. Town of Hempsted,* 941 F.2d 1271, 1286 (2d Cir. 199 1) (lost wages are property under RICO).

23 The Georgia RICO statute does not restrict civil recovery to injuries to ”“business or property.‘’ *See Reaugh v. Inner Harbor Hosp., Ltd.,* 214 Ga. App. 259, 265, 447 S.E.2d 617 (1994). To the extent Mohawk’s standing arguments depend on this federal requirement, they have no bearing on Plaintiffs’ Georgia claims.

24 Unlike this case, *Turnquist v. Elliott,* 706 F.2d 809, 812 (7th Cir. 1983) and *Daneielsen v. Burnside-Ott Aviation Training Ctr.,* 941 F.2d 1220, 1229 (D.C. Cir. 1991) upon which Mohawk relies, involve claims that the defendant failed to pay the plaintiff a wage set by statute.

25 Like § 1964(c) of the RICO statute, § 4 of the Clayton Act allows ”“person[s] who shall be injured in his business or property by reason of anything forbidden in the antitrust laws‘’ to bring private civil suits for treble damages. 15 U.S.C. § 15(a). And the Supreme Court has recognized that ”“even a cursory comparison of the two statutes reveals that the civil action provision was patterned after the Clayton Act.‘’ *Agency Holding Corp.,* 483 U.S. at 151 (noting the Congress’s reliance on the Clayton Act model in drafting RICO).

26 *Chaset v. Fleer/Skybox Int’l,* 300 F.3d 1083 (9th Cir. 2002), *Dumas v. Major League Baseball Props., Inc.,* 104 F.Supp.2d 1220 (S.D. Cal. 2000) and *Doug Grant, Inc. v. Great Bay Casino Corp.,* 3 F. Supp.2d 518 (D.N.J. 1998) are to the same effect.

27 The Second Circuit rejected a substantially similar proximate cause challenge when it reinstated a RICO complaint that sought to recover profits lost due to a competitor’s employment of illegal aliens. *See Commercial Cleaning Servs., LLC v. Colin Serv. Sys., Inc.,* 271 F.3d 374, 382 (2d Cir. 2001).

28 *Compare Mendoza,* 301 F.3d at 1170-71 (describing district court’s recitation of possible intervening factors) *with* Mhk Br. at 19-20.

29 Mohawk cannot distinguish *Mendoza* on the basis of the Ninth Circuit’s discussion of antitrust market power. Although RICO and the Clayton Act are analogous, RICO plaintiffs do not have to allege market power, antitrust injury or RICO equivalents to state a claim. *See Sedima, S.P.R.L. v. Imrex Co.,* 473 U.S. 479, 493-99 (1985). Indeed, the Sixth Circuit affirmed plaintiffs’ standing to pursue lost wages due to a similar illegal hiring scheme absent any apparent allegation or discussion of the single employer’s market power. *See Trollinger,* 370 F.3d at 619-20.

30 *See also Cox v. Administrator United States Steel & Carnegie,* 17 F.3d 1386, 1399 (11th Cir. 1994) (evidence that other economic factors may have contributed to plaintiffs’ loss is not sufficient to grant summary judgment on proximate cause element of a RICO claim).

31 The *dictum* from *Baker,* 357 F.3d at 692, on which Mohawk relies suggests only that it will be difficult for plaintiffs to prove (not plead) that suppressed wages are attributable to violations of immigration law. Those questions of proof cannot support dismissal. *See* Order at 44-45 (R2-44).

32 For example, Congress enacted alien contract labor laws in the late 1800s to respond to employers’ practice of encouraging excess immigration ” “to oversupply the demand for labor so that the domestic laborers would be forced to work at reduced wages.‘’ H.R. Rep. No. 1365, 82d Congress, 2d Sess., 1952 U.S.C.C.A.N. 1653 (1952). *See also* S. Rep. No. 44-689, at IV-V (1877) (noting Congressional conclusion that competition from foreign workers depressed wages to ”“ruinously low rates‘’); House Comm. on the Judiciary, 100th Cong., *Grounds for Exclusion of Aliens Under the Immigration and Nationality Act: Historical Background and Analysis* at 8 (Comm. Print 1988) (same). The same economic considerations led Congress to enact the Immigration Reform Control Act in 1986. *See Patel v. Quality Inn South,* 846 F.2d 700, 704 (11th Cir. 1988) (”“Congress enacted the IRCA to reduce illegal immigration by eliminating employers’ economic incentive to hire undocumented aliens‘’).

33 The heightened summary judgment standards the Supreme Court announced for certain antitrust claims in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574 (1986) and which Mohawk invokes *sub silentio,* have not been extended to permit dismissal of a RICO complaint before any discovery or expert analysis. The lone case Mohawk cites to support dismissal for failure to plead a viable economic theory, *Lerma v. Univision Communications, Inc.,* 52 F. Supp. 2d 1011 (E.D. Wis. 1999), is inapplicable here because it concerns the pleading requirements for a refusal to deal claim under Wisconsin antitrust law.

34 *See also* Compl. ,,,, 13-38 (R1-1).

35 In a footnote, Mohawk argues that because Plaintiffs have invoked RICO, they must satisfy Fed. R. Civ. P. 9(b)'s heightened pleading requirements. *See* Mhk Br. at 21 n. 11. The text of Rule 9(b), however, imposes that requirement only on averments of fraud or mistake. As the District Court properly held, Plaintiffs' complaint includes no such averment and Rule 9(b) therefore does not apply. *See* Order at 16-21 (R2-44). *See also Leatherman v. Tarrant County Narcotics Intel. & Coord. Unit,* 507 U.S. 163, 168 (1993) (rejecting attempts to extend Rule 9(b) by judicial interpretation); *Mendoza,* 301 F.3d at 1168 (applying Rule 8 to the same RICO predicates). Plaintiffs' allegation that Mohawk violated 18 U.S.C. § 1546 by accepting false documents does not aver fraud. To the contrary, Plaintiffs allege a total absence of fraud in that Mohawk accepted documents it knew or had reason to know were false or obtained by false statement. *Compare* Compl. „„ 16-17, 19-21, 63-64 (R1-1) with *United States v. Polar,* 369 F.3d 1248, 1252-53 (11th Cir. 2004) (§ 1546(a) requires only that the defendant act with knowledge; it does not impose any additional scienter requirement).

36 These authorities similarly answer Mohawk's argument that Plaintiffs' cannot '"establish'' proximate cause to support their Georgia RICO claims. Mhk Br. at 27-28. To prevail at trial, Plaintiffs need only prove that Mohawk's practice of knowing acceptance of false employment documents in violation of 18 U.S.C. § 1546 is a substantial factor in the chain of causation. At this stage, however, plaintiffs need only plead that Mohawk's conduct has proximately caused their injury, as they do at Compl. „„ 93-95. (R1-1).

37 It is this direct employment relationship that distinguishes Plaintiffs from every other hourly worker in Georgia and renders Plaintiffs' injury direct. *See* Mhk Br. at 23. Moreover, even if Mohawk's illegal conduct causes some additional injury to any other class of worker, that collateral injury does not render Plaintiffs' injury less direct. *See, e.g., Commercial Cleaning,* 271 F.3d at 383-84 (defendant's illegal hiring may have more than one category of direct victim).

38 *See also Commercial Cleaning,* 271 F.3d at 382-84 (holding that a competitor claiming the loss of profitable contracts due to defendants' illegal hiring alleged a direct injury that could not be dismissed under *Holmes).*

39 *See, e.g., Reaugh v. Inner Harbour Hosp., Ltd.,* 214 Ga. App. 259, 264-65, 447 S.E.2d 617, 622 (1994) ('"[t]he fact that [defendant] was a legitimate corporation does not insulate it from RICO liability.''); *Cotton, Inc. v. Phil-Dan Trucking, Inc.,* 270 Ga. 95, 507 S.E.2d 730 (1998) (affirming entry of preliminary injunction against corporate defendant under Georgia RICO); *Federal Ins. Co. v. Westside Supply Co., Inc.,* 264 Ga. App. 240, 590 S.E.2d 224 (2003) (affirming denial of summary judgment to corporate defendant on Georgia RICO claim); *Schoenbaum Ltd. Co., LLC v. Lenox Pines, LLC,* 262 Ga. App. 457, 585 S.E.2d 643 (2003) (same).

40 Indeed, the passage from *Byrne v. Nezhat,* 261 F.3d 1075, 1105 (11th Cir. 2001), upon which Mohawk bases its suggestion that corporations cannot commit *any* crime under Georgia law, expressly acknowledges that corporations may be held criminally liable for the acts of their employees and agents pursuant to § 16-2-22.

41 *See also* O.C.G.A. § 16-14-6(a)(4) (authorizing the revocation of any license issued to an enterprise); *id. §* 16-14-13(c) (authorizing state investigative agency to file RICO liens against persons, including any corporate names).

42 *See Motors Acceptance Corp. v. Rozier,* 278 Ga. 52, 53, 597 S.E.2d 367, 368 (2004) ('"This Court is to construe the statute to give sensible and intelligent effect to all of its provisions and to refrain from any interpretation which renders any part of the statute meaningless.''); *State v. English,* 276 Ga. 343, 348, 578 S.E.2d 413 (2003) (applying same canon in the criminal context).

43 In the event this Court concludes that Plaintiffs' Complaint is lacking on this point, Plaintiffs request leave to clarify the point by amending their complaint. *See* Fed. R. Civ. P. 15(a).

44 *See also Clark,* 270 Ga. at 168, 509 S.E.2d at 605 (question of corporate criminal liability under this provision is for the jury).

45 For Plaintiffs' response to Mohawk's proximate cause arguments under Georgia RICO see supra Part II(B) & n.36.

46 *See e.g., Federal Ins. Co. v. Westside Supply Co.,* 264 Ga. App. 240, 247-48, 590 S.E.2d 224, 232 (2003) (absent a breach of an express contract, questions of fact would preclude summary judgment on unjust enrichment and implied contract claims); *A.D. Adair & McCarty Bros. v. Central Bank & Trust. Corp.,* 20 Ga. App. 811, 93 S.E. 542 (1917) (unjust enrichment claim depends upon implied promise to pay).

47 *See e.g., In re Lorazepam & Clorazepate Antitrust Litig.,* 295 F.Supp.2d 30, 51 (D.D.C. 2003) (plaintiffs who '"absorbed millions of dollars in overcharges, which significantly increased [defendant's] revenue and net earnings'' could assert unjust enrichment claims under the laws of several states) (citing cases); *In re Terazosin Hydrochloride,* 220 F.R.D. 672 (S.D. Fla. 2004) (certifying class of plaintiffs to pursue unjust enrichment claims to recover unlawfully inflated profits); *In re Cardizem CD Antitrust Litig.,* 90

F. Supp. 2d 819, 825 (E.D. Mich. 1999) (reviewing unjust enrichment claims to recover an illegal payment made to the defendant).