No. 01-35276

(DIST. CT. NO. CV-00-03024-FLVS)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Appellants,

v.

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

Respondents.

ON APPEAL FROM THE DECISION OF
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
(Honorable Fred L. Van Sickle)

APPELLANTS' BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

I. STATEMENT OF JURISDICTION

Plaintiffs-Appellants Olivia Mendoza and Juana Mendiola appeal from two orders of the United States District Court for the Eastern District of Washington (Van Sickle, J.) dismissing their complaint against defendants Zirkle Fruit Co. and Matson Fruit Company with prejudice pursuant to Fed. R. Civ. P. 12(b)(6) ER 0046-77[1], and denying their motion to reconsider the order of dismissal. ER 0123-130. Plaintiffs also appeal from the district court's order granting the motion of defendant Selective Employment Agency, Inc. to dismiss for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). ER 0131-132.

It is undisputed that the district court had jurisdiction over Count I of the complaint based upon the federal question statute, 28 U.S.C. § 1331 and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq*. As to Count II of the complaint, ER 0013-14, jurisdiction in the district court was based upon 28 U.S.C. § 1367(a), which permits district courts to exercise supplemental jurisdiction over pendent claims and parties. The district court found, however, that pendant party jurisdiction over Selective Employment Agency, Inc., was unconstitutional. ER 0076-77.

[1] Citations to "ER ___" refer to the page numbers of documents contained in appellants' Excerpt of Record submitted herewith.

This Court has jurisdiction to review Plaintiffs' appeal from the district court's order of dismissal and from the order dated February 13, 2001 denying Plaintiffs' motion to reconsider the district court's order dismissing the complaint with prejudice and without leave to amend. That order dismissed the entire action and was thus a "final" judgment pursuant to 28 U.S.C. § 1291. ER 0046-77, ER 0123-130. Plaintiffs timely filed their notice of appeal on March 14, 2001. ER 0131-132.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Did the district court improperly conclude Plaintiffs lack standing to assert their claims for depressed wages under RICO?

B. Did the district court err in assuming facts not pled in the complaint, and contrary to the complaint, in reaching its conclusion that Plaintiffs lack standing to sue?

C. Did the district court err in holding Plaintiffs' claims of damage to "an even higher standard" of "concreteness" than is required by Fed. R. Civ. P. 8(a)?

D. Did the district court err in concluding that the exercise of supplemental jurisdiction over pendent parties, pursuant to 28 U.S.C. § 1367(a), violates U.S. Const., art. III?

III. STATEMENT OF THE CASE

A. Nature of the Case; Statement of Facts

Plaintiffs filed this putative class action in March 2000 against defendants Zirkle Fruit Co. ("Zirkle") and Matson Fruit Company ("Matson"), companies that are primarily engaged in the growing, warehousing and packing of apples and other fruit. ER 0001-15 (¶ 2). Plaintiffs alleged that their wages as employees of defendants were depressed as a result of Zirkle and Matson's widespread and knowing use of illegal immigrant workers ("the Illegal Immigrant Hiring Scheme"). ER 0002 (¶¶ 2, 3). Zirkle and Matson have engaged in the Illegal Immigrant Hiring Scheme consistently since the knowing employment of illegal immigrants became a RICO predicate act in 1996 and to such an extent that the Immigration and Naturalization Service ("INS") determined that Matson's orchard workforce was overwhelmingly comprised of illegal immigrants who had used fabricated documents to obtain employment. ER 0002, 0003, 0007 (¶¶ 2, 6, 24, 27).

The Illegal Immigrant Hiring Scheme violates § 274(a)(3) of the Immigration and Nationality Act, which is incorporated by RICO as a predicate act. ER 0007-8, 0012-13 (¶¶ 28, 48 and 54). Plaintiffs allege that this ongoing pattern of illegal conduct violates 18 U.S.C. § 1962(c). ER 0012-13 (¶¶ 51-56).

As a result of the Illegal Immigrant Hiring Scheme, Plaintiffs, who are legally entitled to work in the U.S., were paid wages "that are substantially depressed," that is, "below the wage rate at which a labor market comprised of workers legally entitled to work - namely, one without the operation of the Illegal Immigrant Hiring Scheme, would be set." ER 0012 (¶¶ 46-47). According to the complaint, these damages – Plaintiffs' depressed wages – were the intended and "direct" result of the Illegal Immigrant Hiring Scheme. ER 0013 (¶ 56).

Plaintiffs further alleged that the Illegal Immigrant Hiring Scheme was facilitated through Matson and Zirkle's use of Selective Employment Agency, Inc. ("Selective") as a "front company" for the recruitment and employment of the illegal immigrants at depressed wages. ER 0002 (¶ 4). Plaintiffs named Selective as a member of the association-in-fact enterprises (with Zirkle and Matson), and sued Selective in Count II for civil conspiracy under Washington State common law. ER 0011, 0013-14 (¶¶ 45, 58-62). Plaintiffs did not name Selective as a defendant in the RICO count. ER 0010-11 (¶¶ 40-45).

B. Statement of the Case

The district court granted Zirkle and Matson's motion to dismiss Count I with prejudice, and without leave to amend, on September 27, 2000.[2] ER 0047-77. The district court also granted Selective's motion to dismiss for lack of subject matter jurisdiction because it concluded pendent party jurisdiction violated U.S. Const., art. III. *Id.*

After the district court dismissed the complaint without leave to amend, Plaintiffs filed a motion for reconsideration pursuant to Fed. R. Civ. P. 59(e) and for leave to file their proposed First Amended Complaint ("FAC"), which was attached. ER 0078-115. The FAC reiterated the facts pled in the first complaint with the additional allegations that the Illegal Immigrant Hiring Scheme was perpetrated by certain additional unnamed fruit companies, all of whom relied upon Selective as a "front company" for recruiting and employing illegal immigrants at sub-market, depressed wages. ER 0099 (¶ 4). Additionally, the FAC alleged that these named and unnamed employers, "comprise a large percentage of the fruit orchards and packing houses in the area, and therefore affect wages throughout the labor market for apple pickers and fruit packers...." ER 0100

[2] However, the district court "remanded" the case to state court pursuant to the theory that the Illegal Immigrant Hiring Scheme constituted a civil conspiracy under Washington common law. ER 0072.

(¶ 5). As a result, the FAC alleged the Illegal Immigrant Hiring Scheme "stifled and suppressed" competition for wages. *Id.*

The district court denied Plaintiffs' motion to reconsider its dismissal with prejudice. ER 0123-130. The district court also denied plaintiff's motion for leave to file the FAC. ER 0124.

Plaintiffs then timely filed their notice of appeal. ER 0131-132.

IV. SUMMARY OF ARGUMENT

A. The District Court Applied the Wrong Legal Standard In Determining Plaintiffs Lack Standing to Sue Under RICO

The district court concluded Plaintiffs lack standing to sue under RICO because their claim for depressed wages was "too speculative to confer standing." ER 0064-65. The district court reached this conclusion because it believed Plaintiffs would be unable to prove the amount of damages caused by defendants' alleged conduct (part two of the Supreme Court's standing requirement as enunciated in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992). ER 0068. In fact, *Holmes* does not require a plaintiff to plead in its complaint either the amount of its damages nor that the damage was caused solely by the alleged acts of racketeering. This Court has never taken the position advanced by the district court.

B. The District Court Improperly Imposed a Heightened Pleading Standard on Plaintiffs

Moreover, the district court's reliance on *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303 (9th Cir. 1992) for the proposition that "district courts are required to subject cases where the plaintiff's loss was not complete to an even higher standard [of pleading]" is unsupported by the *Imagineering* decision. ER 0126. Simply put, the *Imagineering* decision did not alter this Court's view that Fed. R. Civ. P. 8(a) "means what it says" when it requires only "a short and plain statement of the claim." *Lee v. City of Los Angeles*, 250 F.3d 668 *10 (9th Cir. 2001).

C. The District Court Refused to Take As True Plaintiff's Allegations Regarding Causation

Plaintiffs alleged they were damaged "as a direct result of the Illegal Immigrant Hiring Scheme." ER 0013 (¶ 56), ER 0111 (¶ 54). The district court refused to take this allegation as true and instead theorized that plaintiffs' wages are determined by "[a] wide range of factors," making Plaintiffs' case "extremely difficult" to prove. ER 0067. Thus, reasoned the district court, defendants were entitled to dismissal with prejudice.

This reasoning is contrary to Ninth Circuit law. *See Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 991 (9th Cir. 2000) (complaint's allegation as to

causation was required to be taken as true, and district court erred in considering defendant's contention that damages were caused by "independent factors" and were thus too "speculative"); *cf.*, *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) ("[w]here the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts").

D. Pendent Party Jurisdiction Is Not Unconstitutional

The district court concluded that this Court's decision in *Ayala v. United States*, 550 F.2d 1196, 1200 (9th Cir. 1977) stands for the broad proposition that "pendent party jurisdiction in any form simply exceed[s] the scope of Article III [of the Constitution]." ER 0072. However, this Court has suggested that it will no longer take that position in light of the enactment 28 U.S.C. § 1367 in 1990, which specifically provides for pendent party jurisdiction in the federal courts. *See Yanez v. United States.*, 989 F.2d 323, 327, n.3 (9th Cir. 1993). Thus, the district court erred in granting Selective's motion to dismiss for lack of subject matter jurisdiction. ER 0077.

V. ARGUMENT

A. Standard of Review

"When a district court dismisses a claim pursuant to a Rule 12(b)(6) motion, we evaluate the complaint *de novo* to decide whether it states a claim upon which relief could be granted." *Lee v. City of Los Angeles*, 250 F.3d at *9 (internal quotations omitted).

Similarly, this Court conducts *de novo* review of a dismissal for lack of subject matter jurisdiction under Rule 12(b)(1), *see Crist v. Leippe*, 138 F.3d 801, 803 (9th Cir. 1998), which is the same standard under which this Court reviews a dismissal for failure to state a claim under Fed. R. Civ. P. 12(b)(6), *see Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1295 (9th Cir. 1998). At this stage in the proceedings, this Court takes the allegations in Plaintiffs' Complaint as true. *See Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1099 (9th Cir. 1999).

B. Plaintiffs Have Standing to Sue Under RICO for Their Depressed Wages

"A violation under § 1962(c) [of RICO] requires proof of '1) conduct 2) of an enterprise (3) through a pattern (4) of racketeering activity.'" *Howard v. America Online, Inc.*, 208 F.3d 741, 746 (9th Cir.), *cert. denied*, 2000 U.S. Lexis 5208 (2000) (citation omitted). Additionally, a civil RICO plaintiff must satisfy

the requirements of § 1964(c), requiring that the plaintiff have been damaged "in his business or property by reason of a violation of § 1962..."

Plaintiffs' complaint easily satisfies these standards.

1. Plaintiffs Have Alleged Proximate Cause Under the Factors Enunciated in *Associated General Contractors* ("*AGC*")[3]

The Supreme Court has held that in enacting RICO, Congress intended the "by reason of" requirement of § 1964(c) to be interpreted in the manner of identical language used "in § 7 of the Sherman [Antitrust] Act, and later in the Clayton Act's § 4 .... It used the same words, and we can only assume it intended them to have the same meaning that courts had already given them .... Proximate cause is thus required." *Holmes*, 503 U.S at 268; *see also* D. Smith, *Civil RICO*, (2000) § 6.04 at 86 ("courts grappling with RICO standing issues should focus on antitrust standing principles and, where appropriate, extend them to RICO litigation.") Accordingly, this Court "requires a showing that the conduct constituting the [RICO] violation both directly and proximately caused the alleged injury." *See, e.g., Resolution Trust Corp. v. Keating*, 186 F.3d 1110, 1117 (9th Cir. 1999) (citation omitted).

[3] *Associated General Contractors Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983).

Thus, in analyzing whether a plaintiff has standing to sue under RICO, a court must "examin[e]... claims according to the proximate cause factors set forth in *AGC* and *Holmes*: the directness of the injury, the speculative nature of the harm, and the risk of duplicative recovery and complexity of apportioning damages." *Association of Wash. Pub. Hosp. Districts v. Philip Morris, Inc.*, 241 F.3d 696, 703 (9th Cir. 2001) ("AWP"). As demonstrated below, Plaintiffs satisfy each of these criteria.

a. Plaintiffs have alleged direct injury

The direct injury factor of proximate causation is an inquiry as to "the presence of others more immediately harmed who could bring the action." *See, e.g., Bhan v. NME Hospitals, Inc.*, 669 F. Supp. 998, 1013 (E.D. Cal. 1987), *aff'd after remand*, 929 F.2d 1404 (9th Cir. 1991); *AWP*, 241 F.3d at 702 (direct injury is not "derivative in nature"); *accord, Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 238-39 (2d Cir. 1999) ("[T]he critical question posed by the direct injury test is whether the damages a plaintiff sustains are derivative of an injury to a third party. If so, then the injury is indirect, if not, it is direct"), *cert. denied*, 528 U.S. 1080 (2000); *cf., Holmes*, 503 U.S. at 544 ("Thus, 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 at too remote a distance to recover").

The complaint alleged, in relevant part:

> Plaintiffs and members of the Class have been damaged by reason of defendants' RICO violations because they have been employed by Matson and Zirkle at wages which were depressed as a direct result of the Illegal Immigrant Hiring Scheme. Plaintiffs and members of the Class were the intended and direct victims of defendants' RICO scheme and their injury, working at depressed wages, was both intended and foreseeable. [ER 0013 (¶ 56)]

Defendants contended the complaint did not state a claim of direct injury because "there is no allegation the plaintiffs were paid less than other similarly situated workers in other similarly situated agricultural facilities..." ER 0036. This assertion misconstrues the meaning of "direct injury." Whether Plaintiffs were paid less than other workers is irrelevant to the question at hand; namely, whether Plaintiffs' alleged injury – depressed wages – is derivative of an injury to a third party. Defendants did not allege there was any such third party, nor did they cite any authority in support of their argument as to direct injury.

The district court was therefore correct when it concluded, "plaintiffs have stated a claim that they are the direct victims of defendants' illegal hiring scheme."

ER 0063.[4] Thus, Plaintiffs alleged direct injury, which is considered the "central element" of the proximate causation analysis. *Holmes*, 503 U.S. at 544-545; *AWP*, 241 F.3d at 701.

b. Plaintiffs' damages are not speculative

This Court has sometimes discussed the "speculativeness" of injury in its proximate causation analysis. *See Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris*, 185 F.3d 957, 965 (9th Cir. 1999), *cert. denied*, 528 U.S. 1075 (2000); *AWP*, 241 F.3d 696, 703. Speculativeness is comprised of two elements: (1) whether the injury is direct, and (2) whether the injury "may have been produced by independent factors." *American Ad Mgmt., Inc. v. General Tel. Co.*, 190 F.3d 1051, 1059 (9th Cir. 1999).[5]

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[4] However, in the Order Denying Reconsideration (ER 00123-130) the district court confused direct injury (which is the relevant inquiry) with the notion that directness pertains to whether or not the plaintiffs had a "direct contractual relationship with defendants." ER 0128. Interpreting the direct injury test in this erroneous fashion, the district court determined that a "direct relationship ... does not necessarily mean that proximate cause for RICO purposes has been established." *Id.* As has been stated, *supra*, the Supreme Court and this Court hold that "direct injury" is the "central element" of proximate causation. In fact, as Plaintiffs argued, they were, and remain, unaware of a decision by any court in which a RICO case has been dismissed on standing grounds where a direct injury has been pled. Plaintiffs' Motion for Reconsideration at ER 0088. Neither defendants nor the district court cited any such case.

[5] The third *AGC* factor in the proximate causation analysis asks whether the alleged harm is speculative. *AGC*, 459 U.S. at 542. *Holmes* relied upon *AGC* for its proximate causation analysis. *See Holmes*, 503 U.S. at 545. However, neither the Supreme Court nor this Court has ever held that an antitrust or RICO plaintiff must satisfy all of the *AGC* factors. *See, e.g., Bhan v. NME Hospitals, Inc.*, 772

Here, the district court concluded that the Plaintiffs' claim was speculative because of the possibility that Plaintiffs' alleged damages could have been caused by other factors, even though the complaint pled defendants were the sole and proximate cause. ER 0013 (¶ 56). This allegation should have ended the inquiry, because a district court may not substitute its notions of causation for those alleged in the complaint. *See, e.g., Knevelbaard*, 232 F.3d at 991 (dismissal reversed because district court refused to take allegation of causation as true and improperly determined the injury was "speculative" as the result of "independent factors"); *accord, In re Warfarin Sodium Antitrust Litig.*, 214 F.3d 395, 398 (3d Cir. 2000) (reversing dismissal of antitrust complaint premised upon district court's "consideration of factual assumptions *de hors*" invoking potential defenses not raised in complaint). The *In re Warfarin* court rejected the notion that a district court can consider facts or theories "gleaned from [defense] counsel's argument and from its own experience, factors not contemplated by the dictates of Rule 12(b)(6)." *Id.* Instead, the Third Circuit held, in the context of a motion to dismiss the district court may only take notice of those criteria specifically permitted by

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F.2d 1467, 1470, n.3 (9th Cir. 1985) (noting that "the Supreme Court did not explicitly state that a plaintiff must satisfy all of the [*AGC*] factors, or indeed, any particular factor..."); *American Ad Mgmt., Inc.*, 190 F.3d at 1055 ("Generally no single factor is decisive") (internal quotations and citation omitted). Nevertheless, the district court ignored this multi-factor analysis and concluded, "the plaintiff's alleged injury is too speculative to confer standing." ER 0064.

Fed. R. Evid. 201(b) (judicial notice). *Id.* Hence, the district court's statement that it, "cannot simply pretend that other relevant factors do not exist," ER 0129, was improper and inconsistent with Fed. R. Civ. P. 12(b)(6).

c. This Court permits damages to be speculative at the pleading stage

In any event, there is no *per se* rule against speculativeness, especially at the pleading stage. Thus, it is well established that the speculative nature of the plaintiff's damages will not defeat proximate causation, or standing to sue, unless the damages are "so speculative as to call into question the existence of a link between the defendant's allegedly anticompetitive behavior and the plaintiff's injury." *Id.* This rule is applied in cases where damages are caused by multiple factors. *See, e.g., Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp.*, 951 F.2d 1158, 1163 (9th Cir. 1991) (noting that an antitrust "plaintiff ... need not negative all possible explanations for his decline in profits[,]" this Court held that district court "applied too strict a standard" in concluding plaintiff's damages were speculative because they may have been caused by other factors), *cert. denied*, 504 U.S. 913 (1992); *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1043 (9th Cir. 1987) (affirming antitrust damages where defendant was the "material cause of injury," but other causes, including market forces, existed), *aff'd*, 496 U.S. 543 (1990); *cf.*, *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 811 (9th Cir. 1976) (requirement that

plaintiffs prove causation and damages absent any speculation as to complicated economic forces would amount to a "nearly impossible burden"), *cert. denied*, 433 U.S. 910 (1977); *Blanton v. Mobil Oil Corp.*, 721 F.2d 1207, 1215 (9th Cir. 1983) (affirming antitrust damages challenged on basis that injury could have been caused by "sources other than Mobil's illegal conduct" because the law only requires defendant's conduct be a "substantial factor"), *cert. denied*, 471 U.S. 1007 (1985).[6]

In the employment context, this Court has specifically held, "Suits for damages by persons wrongfully discharged are common; courts are accustomed to assessing such damages; they are neither unduly speculative nor difficult to calculate, obviating another source of judicial concern." *Ostrofe v. H.S. Crocker Co.*, 670 F.2d 1378, 1385, n.20 (9th Cir. 1982), *aff'd after remand*, 740 F.2d 739 (9th Cir. 1984). While Plaintiffs in the case *sub judice* do not allege wrongful termination, the *Ostrofe* decision supports a finding that Plaintiffs have adequately alleged injury here. *Ostrofe* is squarely irreconcilable with the district court's conclusions. Indeed, if the district court's analysis of the Plaintiffs' claims were

[6] For many years this was known as the "*Story-Flintkote* criteria." *See Flintkote Co. v. Lysfjord*, 246 F.2d 368, 391 (9th Cir.) ("liberality in proving damages [is] "grounded in logic and sound policy", following Supreme Court's rule that a "defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered ... is not entitled to complain that they cannot be measured with the exactness and precision."), *cert. denied*, 355 U.S. 835 (1957).

appropriate, this Court would have affirmed the dismissal in *Ostrofe* because the causes of alleged "wrongful" termination can be wide ranging, *i.e.*, the employee's health, disability, work environment, personal relationships with colleagues, discrimination based on gender, age, absenteeism, economic conditions affecting the labor market, etc. If courts were permitted to engage in such a far-reaching analysis, few, if any plaintiffs would have standing to sue under any legal theory.

Accordingly, the district court's conclusion that claims for depressed wages are beyond the capabilities of the judicial system was erroneous and warrants reversal.

2. Defendant need not be the sole cause of the plaintiffs' injury

Neither RICO nor antitrust law requires a plaintiff to allege in his complaint, nor subsequently prove, that the defendant was the sole cause of his damages.[7]

[7] Although the Ninth Circuit has not squarely faced this question in a RICO case, other circuits have, and have followed antitrust law. *See, e.g., Cox v. Administrator United States Steel & Carnegie*, 17 F.3d 1386, 1399 (11th Cir. 1994) ("A proximate cause is not, however, the same thing as a sole cause.... It is beside the point whether the depressed condition of the steel industry also contributed to the [injury]") (citations omitted); *Chisolm v. TranSouth Fin. Corp.*, 95 F.3d 331, 337 (4th Cir. 1996) ("Inasmuch as an injury may have more than one proximate cause, our rule that reliance be shown in civil RICO fraud actions does not also dictate that the fraud be the sole legal cause of the plaintiff's injury, so long as it is a legal cause"); *Brokerage Concepts v. U.S. Healthcare, Inc.*, 140 F.3d 494, 521 (3d Cir. 1998) (RICO damages properly entered against defendant because injury was "not ... more appropriately attributable to an intervening cause that was not a predicate act under RICO"); *c.f., Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 23-24 (2d Cir. 1990) ("the RICO pattern or acts proximately cause a plaintiff's injury if they are a substantial factor in the sequence of responsible

This accords with the cases interpreting standing under U.S. Const., art. II, antitrust and the common law, all of which hold that a plaintiff has standing to sue even if the defendant is not the sole cause of his injury. *See, e.g., Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1515 (9th Cir. 1992); *accord,* 8 J. von Kalinowski, ANTITRUST LAWS AND TRADE REGULATION, § 161.02[2] at 11 (2000) ("As a basic principle, the antitrust violation must be a material or direct cause of plaintiff's injury, although it need not be the only cause"); RESTATEMENT (SECOND) OF TORTS, § 875 (1979) ("Each of two or more persons whose tortuous conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm").

Thus, the district court's conclusion in the case *sub judice* that "the plaintiffs' main flaw is their inability to concretely establish the degree to which their wages have been affected by the defendants' alleged violations", ER 0066, was not a "flaw" at all. Plaintiffs ultimately must establish the degree to which defendants are responsible for their injuries in order to recover. However, there is absolutely no requirement that they do so in their complaint. (Nevertheless, the

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causation, and if the injury is reasonably foreseeable or anticipated as a natural consequence"). For this Court to reach the opposite conclusion would not only be inconsistent with the treatment accorded this issue by every other circuit to consider it, but would be inconsistent with the plain language of RICO that it is to "be liberally construed to effectuate its remedial purposes." Pub. L. 91-452 §904(a), 84 Stat. 947.

complaint and FAC alleged defendants had *directly and proximately* caused their injuries. [ER 0013 (¶ 56)].) Thus, Plaintiffs satisfied all of the rules for pleading damages, except the district court's, which were insurmountable because the court refused to take plaintiff's allegations as true and misconstrued this Court's holding in *Imagineering*.

3. The law does not require the certainty of pleading damages demanded by the district court here

The following cases apply the established rules of pleading and proving damages, which the district court refused to follow in this case.

a. The common law does not require certainty

> Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.

Story Parchment Co., 282 U.S. at 563; *see also, Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946) ("The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty

which his own wrong has created .... That principle is an ancient one ... and is not restricted to proof of damage in antitrust suits...") (citations omitted); *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 114, n.9 (1969) ("It is enough that the illegality is shown to be a material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury...").[8]

The Washington Supreme Court has applied the same principle in tort and contract cases. *See, e.g., Wenzler & Ward Plumbing & Heating Co. v. Sellen*, 53 Wn.2d 96, 99-100, 330 P.2d 1068, 1070 (1958) ("A party who has breached a contract or committed a tortious act is generally not permitted to escape his liability in damages therefor simply by reason of difficulty in the ascertainment of the damage to the plaintiff," permitting calculation of damages by "a pure guess" if necessary); *Lewis River Golf, Inc. v. O.M. Scott & Sons*, 120 Wn.2d 712, 718, 845 P.2d 987, 990 (1993)("[D]amages... [must] be proved with whatever definiteness and accuracy the facts permit, but no more.").[9]

[8] Moreover, at common law, proximate causation was not required in cases of intentional torts, which is what Plaintiffs essentially allege here. *AGC*, 459 U.S. at 548 (Marshall, J. dissenting) ("An inquiry into proximate cause has traditionally been deemed unnecessary in suits against intentional tortfeasors.")

[9] Apart from the application of antitrust law, which has its own foundation in the common law of damages, the Supreme Court has held that in enacting RICO, congress intended to incorporate into the damages provision, § 1964(c), "the

Plaintiffs cited these cases to the district court but to no avail. ER 0089. The district court erroneously failed to consider, or even mention, these precedents. ER 0123-130.

b. In antitrust law and under RICO, damages are liberally assessed

In the analogous area of antitrust violations, this Court has ruled that damages are held to a less stringent standard of proof than at common law. *E.g.*, *Flintkote*, 246 F.2d at 391 ("A study of the adjudicated cases in this area readily dispels any impression that this question of damages is governed by an application of the common law rule of reasonable certainty. The cases have long since departed from this rule in antitrust litigation"). Because proximate causation in RICO cases is assessed under the same *AGC* factors that govern the antitrust causation inquiry, *see*, *e.g.*, *Holmes*, 503 U.S. at 268, the same liberal causation rules that govern the antitrust inquiry should be applied in RICO cases.

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cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Beck v. Prupis*, 592 U.S. 494, 501 (2000); *accord*, *Reynolds v. East Dyer Dev. Co.*, 882 F.2d 1249, 1253 (7th Cir. 1989) ("Civil RICO is a statutory tort, so causation principles that generally apply in tort cases apply in civil RICO cases").

c. The governing standards are still more liberal in proving the *amount* of damages

This Court follows the well-established rule that the amount of damages is subject to a lesser standard of proof than the fact (or causation) of damage itself. *See, e.g., Hasbrouck v. Texaco, Inc.*, 634 Supp. 34, 41 (E.D. Wash. 1985) ("once a plaintiff has proven an antitrust injury, a lesser burden is faced in quantifying the damages), *aff'd*, 830 F.2d 1513 (9th Cir. 1987); *Knutson*, 548 F.2d at 811 ("The Supreme Court has also established a relaxed standard for proving the amount of damages in an antitrust case once the fact of damage has been shown," relying upon *Story Parchment*, *Bigelow* and *Zenith*). *See also*, 2, I. Scher, ANTITRUST ADVISER, § 10.49 at 101 (4th ed. 1999) ("Generally, the standard of proof for the amount of damages is less stringent than for the fact of injury.")

d. The liberal standards governing damages are further relaxed at the pleading stage

The very lenient standards discussed above are applicable in *proving* damages. At the pleading stage, an even more liberal standard applies. *See, e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("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.'"); *see also N.O.W. v. Scheidler*, 510 U.S. 249, 256 (1994) (same principle applied to RICO complaint).

e. *Imagineering* does not bar plaintiffs' claims here

The *Imagineering* plaintiffs, subcontractors on construction projects, alleged that if (1) a particular general contractor – an unsuccessful bidder on a particular public works project – had been awarded the project instead of the defendant; (2) this unsuccessful bidder had then selected the plaintiffs as its subcontractors, and (3) plaintiffs had successfully completed their subcontracts, then (4) the plaintiffs would have earned undisclosed profits. *Imagineering*, 976 F.2d at 1305-06. Thus, the plaintiff's theory necessitated a finding that at least three key contingencies would have redounded in their favor before they would have been entitled to any damages.

In dismissing the plaintiffs' RICO complaint in *Imagineering*, the district court reasoned that "[b]ecause the [plaintiffs] could not set forth a reasonable business expectancy in particular subcontracts, they could not establish that they were injured by reason of [defendant's] purported RICO violation." *Id.* at 1306. This Court affirmed the dismissal, concluding that the plaintiffs could not "establish" the first contingency in their theory, *i.e.*, that defendant would have been awarded the prime contract. Plaintiffs' theory was premised upon the

assertion that had defendant not improperly obtained the prime contract it would have been awarded to their prime contractor because it was the next lowest bidder. *Id.* at 1310. However, as this Court pointed out, Washington law did not require prime contracts to be awarded to the lowest bidder. Thus, this Court concluded, "it is not at all clear that [the plaintiffs] suffered such an injury .... It is impossible to determine ... whether the plaintiffs are claiming loss of opportunity to realize profits or loss of specific identifiable profits." *Id.* at 1311.

Thus, the *Imagineering* court was uncertain as to whether the plaintiffs had alleged an injury at all (which this Court characterized as proof of a "concrete financial loss"). *Id.* at 1310. *See Pharmacare v. Caremark*, 965 F. Supp. 1411, 1420 (D. Haw. 1996) ("Thus, the Plaintiffs in *Imagineering* were asserting a two-tier injury, i.e. if Defendant did not act improperly, Firm A would have been picked and in turn Firm A would have picked us.") As the authorities discussed *supra* indicate, while courts will relax the burden on proving the amount of damages, a plaintiff must still allege *the fact of damage* in order to have standing. *See also, In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 73 (9th Cir.) ("Difficulty of ascertainment [of damages] is no longer confused with right of recovery"), *cert. denied*, 444 U.S. 900 (1979). Therefore, the dismissal of the complaint in *Imagineering* was consistent with this Court's precedent. In contrast,

dismissal of Plaintiffs' complaint in this case was not consistent with precedent, and can only be affirmed through a sweeping rejection of all of the antitrust precedents discussed above.[10]

Here, Plaintiffs allege that an actual injury has already occurred. They received depressed wages. Thus, the complaint and FAC alleged concrete financial loss. ER 0013 (¶ 56), ER 0111 (¶ 54). Accordingly, the district court's statement, "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," ER 0066, is an erroneous application of the *Imagineering* holding.[11]

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[10] *Imagineering* is also distinguishable from the case *sub judice* because the Court expressly concluded the complaint did not state a claim for direct injury and did not satisfy the *Holmes* proximate causation test. *Imagineering*, 976 F.2d at 1311. Here, in contrast, the district court concluded the complaint stated a claim of direct injury. ER 0063.

[11] The district court's reliance on *Sheperd v. American Honda Motor Co.*, 822 F. Supp. 625 (N.D. Cal. 1993) is erroneous for two reasons. First, as in *Imagineering*, the plaintiff did not establish damage had occurred. *Sheperd*, 822 F. Supp. at 632 ("the Sheperd plaintiffs encountered only the *possibility* of diminished profits) (emphasis added). Secondly, the district court was not bound by the unappealed opinion of another district judge. *See, e.g., Stairmaster Sports/Medical Prods. v. Pacific Fitness Corp.*, 916 F. Supp. 1049, 1056 (W.D. Wash. 1996) ("This Court, however, is not bound by the decision of another district court..."); *accord, Abbs v. Sullivan*, 963 F.2d 918, 924 (7th Cir. 1992) ("the unappealed holdings of district judges have no precedential weight[,] that is, no significance as authority").

Additionally, the district court's subsequent statement that, "plaintiffs lost out only on the possibility that they could earn higher wages if not for the illegal activity of the defendants[,]" ER 0127, demonstrates a more fundamental misunderstanding of both the facts as alleged in the Complaint and Fed. R. Civ. P. 8. In fact, the complaint alleged that Plaintiffs' wages were depressed as a result of the illegal immigrant hiring scheme, not that their wages *would have been* depressed had they accepted (or rejected) employment with defendants (or other potential employers). ER 0013 (¶ 56). Secondly, as discussed above, the district court was required to accept the allegations of the complaint as true and interpret them in the light most favorable to plaintiffs. Because the district court did not do so, reversal is required. *See, e.g., Poland v. Stewart*, 117 F.3d 1094, 1103 (9th Cir. 1997) ("An abuse of discretion is a 'plain error ... a judgment that is clearly against the logic and effect of the facts as are found.'"), *cert. denied*, 523 U.S. 1082 (1998).

4. Plaintiffs satisfy the remaining *AGC* Factors

Neither the defendants nor the district contended that Plaintiffs' complaint ran afoul of the remaining *AGC* proximate causation factors: duplicative damages

or the need to apportion damages. Thus, these *AGC* factors, as well the others, which have been examined, *supra*, weigh in favor of standing.[12]

C. *IMAGINEERING* Does Not Permit District Courts to Impose a "Higher Standard" on Plaintiffs Alleging "Incomplete" Losses

The district court justified its dismissal by stating its belief that "after *Imagineering* it must take an especially hard look at the concreteness of the injury alleged in a case, like this one, where the plaintiffs did not suffer a total financial loss in their dealings with the defendants." ER 0126. The district court did not cite any language from *Imagineering* directly supporting either its assertion that Plaintiffs' alleged injury was not concrete, or its assertion that claims not alleging "total financial loss" should receive more scrutiny than other claims.

1. Plaintiffs allege a "Concrete Injury"

As indicated, *supra*, *Imagineering* simply held that "'injury' [under RICO] requires proof of concrete financial loss." *Imagineering*, 976 F.2d at 1310. As Plaintiffs argued, the concrete injury requirement pertains to the fact of injury, not to causation or the amount of damages, which was the basis for the *Imagineering* court's conclusion as to concreteness. ER 0119-120. *Compare, In re American*

[12]By contrast, the *Imagineering* court concluded that the plaintiff's complaint would have raised the problem of "apportion[ing] damages among the subcontractors and prime contractors without permitting multiple recoveries." *Imagineering*, 976 F.2d at 1312.

Honda Motor Co. Dealership Realtors Litig., 941 F. Supp. 528, 540 (D. Md. 1996) (Ninth Circuit's "concrete loss" requirement for RICO damages "restricts standing to plaintiffs alleging that they have suffered a specific, tangible financial injury," rejecting defense claims that lost profits were too speculative), *with*, *Oscar v. University Students Co-Operative Ass'n.*, 965 F.2d 783, 786 (9th Cir.) (denying standing where claims for "physical and emotional injuries" were not concrete), *cert. denied*, 506 U.S. 1020 (1992). Thus, Plaintiffs' claim for depressed wages is concrete. As there is no authority interpreting the use of the word "concrete" in the manner suggested by the district court, the court erred in finding that Plaintiffs' damages were not "concrete."

2. The district court improperly demanded that plaintiffs allege "Total Financial Loss"

Similarly, there is no authority supporting the district court's decision to subject Plaintiffs' claim to heightened scrutiny because Plaintiffs did not allege "total financial loss." To the contrary, Fed. R. Civ. P. 8(a)(2) merely requires the complaint to contain "a short and plain statement of the claim." District courts may not impose heightened pleading requirements. *See, e.g., Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) ("We think that it is impossible to square the 'heightened pleading standard' ... with the liberal system of 'notice pleading' set up by the Federal

Rules"); *accord, Lee*, 250 F.3d 668 ("The Supreme Court has stated that 'the Rule [8(a)] means what it says,"' citing *Leatherman* and rejecting heightened pleading standard imposed by district court); *Gilligan v. Jamco Dev. Corp.*, 108 F.3d 246, 249 (9th Cir. 1997) (reversing dismissal because "district court asked far more of [plaintiffs] than the federal rules require at the pleading stage").

There is no Ninth Circuit or Supreme Court authority supporting the district court's interpretation of *Imagineering*. In fact, the concept of a vague, judicially created bar to RICO standing has been emphatically rejected. *Cf., Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 (1985) ("There is no room in the [RICO] statutory language for an additional, amorphous 'racketeering injury' requirement"). Thus, the district court's new requirement – that plaintiffs must plead "total financial loss" or face heightened scrutiny – raised the bar well beyond the requirements of Fed. R. Civ. P. 8(a), and therefore was error.

D. Supplemental Jurisdiction is Constitutionally Proper

In addition to dismissing Plaintiffs' RICO claim against Zirkle and Matson, the district court found that it lacked subject matter jurisdiction over defendant Selective. ER 0077. The court did so even though it did not question that Selective was a pendant party defendant in Plaintiffs' conspiracy claim under the common law of the State of Washington. Because such jurisdiction is expressly

provided in 28 U.S.C. § 1367, and because any constitutional objections to that statute are easily dispensed with, this Court should reverse that decision. In so doing, this Court can make clear that the law in this Circuit is no different from the other circuits that have found pendant party jurisdiction to be constitutional.

In 1990, Congress enacted 28 U.S.C. § 1367, providing "supplemental jurisdiction" over claims "that involve the joinder or intervention of additional parties." Thus, as the statute provides, when a district court has original jurisdiction of a case (as did the district court over Count I, as a federal question), the court also has jurisdiction "over all other claims that are so related...." Here, it is undisputed that Count II of Plaintiffs' Complaint against Selective is related to Count I, as it arises from the same facts and controversy (the Illegal Immigrant Hiring Scheme). ER 0013-14 (¶¶ 57-62). Accordingly, the district court had subject matter jurisdiction over Count II and over Selective.

As the district court recognized, "[t]his case presents the type of supplemental jurisdiction that prompted Congress to enact § 1367: pendent party jurisdiction." ER 0070. The district court also recognized that, since the enactment of § 1367, many courts have found that pendent party jurisdiction is appropriate so long as the pendant party claim stems from a "common nucleus of operative fact" as enunciated by the United States Supreme Court in *United Mine*

Workers of America v. Gibbs, 383 U.S. 715 (1966). *See* ER 0073-74, *citing Franceskin v. Credit Suisse*, 2000 WL 719494, *4 (2d Cir. 2000); *In re Prudential Insurance Co.*, 148 F.3d 283 (3d Cir. 1997). Indeed, even district courts within this Circuit have found pendent party jurisdiction appropriate under § 1367. *See, e.g., Ziegler v. Ziegler*, 28 F. Supp. 2d 601, 618-19 (E.D. Wash. 1998); *Irwin v. Mascott*, 96 F. Supp. 2d 968 (N.D. Cal. 1999).

However, the district court believed that it was bound to find § 1367 unconstitutional on the basis of this Court's decision in *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.") Though this statement was dicta – since the United States Supreme Court had ruled that pendant party jurisdiction was not appropriate in the absence of statutory authority which did not then exist[13] – this Court has never explicitly rejected the *Ayala* dicta. *But see Yanez v. United States*, 989 F.2d 323, 327 n.3 (1993) (concluding pendant party jurisdiction was inappropriate in the case before it which arose prior to the effective date of § 1367 since "the section is not retroactive.")

Plaintiffs respectfully submit that this Court should resolve the ambiguity created by *Yanez*, and expressly find that 28 U.S.C. § 1367 can be constitutionally

[13] *Aldinger v. Howard*, 427 U.S. 1, 16-17 (1976).

applied where, as here, the pendant party claim is closely related to the claim over which the district court has an independent jurisdictional basis. Accordingly, the decision of the district court finding that it lacked jurisdiction over defendant Selective should be reversed.

VI. CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that this Court (i) reverse the orders of the district court dismissing Plaintiffs' RICO claim for lack of standing and denying Plaintiffs' Motion for Reconsideration; (ii) reverse the order of the district court dismissing Plaintiffs' civil conspiracy claim for lack of subject matter jurisdiction and (iii) remand this case to the district court for further proceedings.

DATED: June 28, 2001.

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STATEMENT OF RELATED CASES

Pursuant to the Ninth Circuit Rule 28-2.6, Counsel for plaintiffs-appellants are not aware of any related cases pending in this Court.

DATED: June 28, 2001.

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CERTIFICATE OF COMPLIANCE

Pursuant to the Ninth Circuit Rule 32(a)(7)(B)(i), I certify that the appellants' brief is double spaced in 14 point proportionally spaced Times New Roman typeface. The word count, excluding the cover page, table of contents, table of authorities, proof of service, certificate of compliance and statement of related cases, is 7,412.

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*** CURRENT THROUGH P.L. 107-15, APPROVED 6/5/01 ***

TITLE 18. CRIMES AND CRIMINAL PROCEDURE

PART I. CRIMES

CHAPTER 96. RACKETEER INFLUENCED AND CORRUPT ORGANIZATIONS

18 USCS § 1964 (2001)

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter [*18 USCS § § 1961* et seq.] shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

HISTORY: (Added Oct. 15, 1970, P.L. 91-452, Title IX, § 901(a), 84 Stat. 943; Nov. 8, 1984, P.L. 98-620, Title IV, Subtitle A, § 402(24)(A), 98 Stat. 3359.)

(As amended Dec. 22, 1995, P.L. 104-67, Title I, § 107, 109 Stat. 758.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1984. Act Nov. 8, 1984 (applicable as provided by § 403 of such Act, which appears as *28 USCS § 1657* note), in subsec. (b), deleted "In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof." preceding "Pending final".

1995. Act Dec. 18, 1995 (applicable as provided by § 108 of such Act, which appears as *15 USCS § 77l* note), in subsec. (c), inserted ", except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final".

*** CURRENT THROUGH P.L. 107-15, APPROVED 6/5/01 ***

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE

PART IV. JURISDICTION AND VENUE

CHAPTER 85. DISTRICT COURTS; JURISDICTION

28 USCS § 1367 (2001)

§ 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall 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 of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

HISTORY: (Added Dec. 1, 1990, P.L. 101-650, Title III, § 310(a), 104 Stat. 5113.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Application of section. Act Dec. 1, 1990, P.L. 101-650, Title III, § 310(c), 104 Stat. 5114, provides: "The amendments made by this section [adding this section] shall apply to civil actions commenced on or after the date of the enactment of this Act.".

No. 01-35276

(DIST. CT. NO. CV-00-03024-FLVS)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OLIVIA MENDOZA, individually and on behalf of all others similarly situated, et al.,

Appellants,

v.

ZIRKLE FRUIT CO., a Washington corporation,

Respondent.

ON APPEAL FROM THE DECISION OF
THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON
(Honorable Fred L. Van Sickle)

PROOF OF SERVICE

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

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

On June 28, 2001, I caused an original and fifteen copies of **APPELLANT'S BRIEF** and an original and five copies of the **EXCERPTS OF RECORD** to be sent to the Clerk of the Ninth Circuit Court of Appeals, 95 Seventh Street, San Francisco, California, via UPS Overnight Delivery for filing on June 29, 2001.

In addition, on June 28, 2001, I caused two copies of **APPELLANT'S BRIEF** and one copy of the **EXCERPT OF RECORD** to be served on the following counsel for defendants in the manner indicated:

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Executed on June 28, 2001, in Seattle, Washington.

Lynn Brammeier