NO. 01-35276

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

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)

BRIEF OF APPELLEE SELECTIVE EMPLOYMENT

J. Jay Carroll
Brendan V. Monahan
VELIKANJE, MOORE & SHORE, P.S.
405 East Lincoln Avenue
P.O. Box 22550
Yakima, WA 98907
(509) 248-6030

CORPORATE DISCLOSURE STATEMENT

In compliance with FRAP 26.1, Selective Employment, Inc., states:

1) Selective Employment, Inc., is a nongovernmental corporate party to this proceeding before this Court of Appeals;

2) Selective Employment, Inc., has no parent corporations;

3) No publicly held company owns ten percent (10%) or more of Selective Employment, Inc.'s stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND COURT RULES

I. STATEMENT OF JURISDICTION

Pursuant to Circuit Rule 28-2.2 and FRAP 28(b), Defendant-Appellee Selective Employment, Inc. (hereinafter "Selective"), offers the following statement of jurisdiction.

The Complaint filed by Plaintiffs-Appellants Mendoza, et al. ("Plaintiffs"), references two independent causes of action, identified as Counts I and II. In Count I, Plaintiffs attempted to plead a cause of action under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq ("RICO"). In Count II, Plaintiffs allege that all defendants, including Selective, committed the Washington common law tort of "civil conspiracy".

Selective does not dispute that RICO violations alleged in Court I, if properly pled, would have provided subject matter jurisdiction in the District Court.

Selective does dispute, however, that the District Court had the subject matter jurisdiction to consider Count II, which is the only count asserted against Selective. The absence of subject matter jurisdiction is of course the reason the Plaintiffs' complaint was dismissed in the first place, and is the subject of Plaintiffs' appeal.

As argued in greater detail below, while 28 USC § 1367 may confer subject matter jurisdiction in the District Court as to the civil conspiracy claim made against the RICO Defendants, it does not confer subject matter jurisdiction over the state

claim made against Selective. The District Courts lack subject matter jurisdiction over state law claims brought against pendent parties in this Circuit under, among other decisions, this Court's opinion in Ayala v. United States, *infra*.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Did the District Court err in finding that it lacked subject matter jurisdiction over Selective where Selective was a pendent party in the proceeding before it and where this Circuit has consistently held that district courts lack subject matter jurisdiction over claims made against pendent parties because exercise of such jurisdiction violates Article III of the U.S. Constitution?

B. Did the District Court err in dismissing the state law claims made against Selective where the District Court dismissed the federal claims against the RICO Defendants and where the law of this Circuit is that exercise of supplemental jurisdiction is inappropriate in cases where the claims supporting federal jurisdiction are dismissed prior to trial?

III. STATEMENT OF THE CASE

A. Selective's Posture Before This Court

Plaintiffs haled Selective into federal court on a state law claim. Selective joined the RICO Defendants in moving for dismissal of the federal cause of action brought against them pursuant to Fed.R.Civ.P. 12(b)(6), and also moved for dismissal of the state law claim brought against it for lack of subject matter jurisdiction.

The District Court correctly dismissed this case from federal court. First, the District Court determined that Plaintiffs had failed to state a claim upon which relief could be granted as to the federal cause of action brought against the RICO Defendants and ordered that federal cause of action dismissed pursuant to Fed.R.Civ.P. 12(b)(6). Having determined that the federal cause of action should be dismissed, the District Court remanded the state law claim to state court.

The District Court also noted that it would not have jurisdiction over Selective if Plaintiffs' RICO claims were permitted to remain in federal court. In making this decision, the District Court relied on law of this Circuit that prohibits the adjudication of state law claims against parties with respect to whom no independent federal jurisdiction exists as a violation of Article III of the federal Constitution. Though moving for reconsideration of the District Court's decision as to their federal cause of action, Plaintiffs did not ask that Court to revisit its decision as to the jurisdiction

of District Courts over pendent parties such as Selective. As such, Plaintiffs have taken no action with respect to that portion of the District Court's decision since September, 2000.

B. Procedure and Disposition Below

Plaintiffs sued Selective and the RICO defendants in March, 2000. Plaintiffs' Complaint attempted to state a claim under RICO as against the RICO defendants only. Plaintiffs alleged civil conspiracy against Selective and the RICO defendants.

The RICO defendants moved to dismiss Plaintiffs' Complaint against them under Fed.R.Civ.P. 12(b)(6). Selective joined the RICO defendants' 12(b)(6) Motion, and also moved for its dismissal here pursuant to Fed.R.Civ.P. 12(b)(1) on the basis that the District Court lacked subject matter jurisdiction over the state law claim alleged in Count II of Plaintiffs' Complaint, at least as that claim related to Selective.

Argument on the RICO Defendants' 12(b)(6) Motion, as joined by Selective, and Selective's 12(b)(1) Motion was heard by The Honorable Fred Van Sickle in the United States District Court for the Eastern District of Washington on August 31, 2000. By Order entered September 27, 2000, Judge Van Sickle granted the RICO Defendants' Motion to Dismiss, indicating, in so doing, that the District Court would lack jurisdiction over Selective if Plaintiffs' cause remained in federal court.

Plaintiffs moved for reconsideration of the District Court's dismissal of the RICO claim by Motion filed October 11, 2000. Plaintiffs' Motion for Reconsideration made no mention of the District Court's determination that it would be obliged to dismiss Selective if Plaintiffs' cause of action was allowed to proceed in federal court. Plaintiffs' motion was denied by Order filed February 14, 2001. A Notice of Appeal was filed on March 15, 2001, identifying the Orders appealed from as "the Order Granting Defendants' Motion to Dismiss ... dated September 27, 2000 and the Order Denying Reconsideration dated February 14, 2001".

IV. STATEMENT OF FACTS

The District Court dismissed the federal cause of action that Plaintiff attempted to plead here under Fed.R.Civ.P. 12(b)(6) and the state law claim, as to Selective, under Fed.R.Civ.P. 12(b)(1). It is noted that reviews of dismissals pursuant to Fed.R.Civ.P. 12(b)(6) and 12(b)(1) are limited to the contents of the Complaint.

Beyond the "facts" alleged in the Complaint, the only fact relevant to Selective's argument here is that Plaintiffs pleaded a state law claim against Selective, (see, ER 0013), and continuously acknowledged throughout these proceedings that only a state law claim would be asserted against Selective. (See ER 0110-0111).

V. SUMMARY OF ARGUMENT

Selective contends that the District Court did not err in determining that it would lack subject matter jurisdiction over the claim made against Selective as it is the law of this Circuit that exercise of pendent party jurisdiction violates Article III of the federal Constitution. Also, Selective contends that, even if pendent party jurisdiction were permissible, the District Court would not have erred in declining to exercise that jurisdiction after deciding to dismiss the federal RICO claim pursuant to Fed.R.Civ.P. 12(b)(6).

VI. ARGUMENT

A. The District Court did not err in determining that it would lack jurisdiction over Selective if this case remained in federal court.

1) Standard of Review

The District Court's determination that it would lack jurisdiction over Selective if Plaintiffs' case remained in federal court was based on Selective's 12(b)(1) Motion. In reviewing motions to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), this court accepts as true the allegations of the complaint. U.S. ex rel. Lujan v. Hughes Aircraft Co., 243 F.3d 1181, 1189 (9th Cir. 2001) (citing Miranda v. Reno, 238 F.3d 1156, 1157 n. 1 (9th Cir. 2001)). Rulings on 12(b)(1) Motions are reviewed

de novo. Virgin v. County of San Luis Obispo, 201 F.3d 1141, 1142 (9th Cir. 2000) (citing Crist v. Leippe, 138 F.3d 801, 803 (9th Cir. 1998)).

2) The District Court correctly perceived that federal courts are courts of limited subject matter jurisdiction wherein the exercise of jurisdiction is permissible only if consistent with law.

In assessing the District Court's determination as to its jurisdiction over Selective, it is important to note that federal courts are courts of limited jurisdiction. As such, federal courts may only exercise subject matter jurisdiction as permitted by law. See, e.g., Elsaas v. County of Placer, 35 F.Supp.2d 757, 759 (E.D.Cal. 1999). Thus, even where parties are willing to stipulate to such jurisdiction, see Washington Local v. International Brotherhood of Boilermakers, 621 F.2d 1032, 1033 (9th Cir. 1980), federal courts must consider their jurisdiction over the subject matter presented by a particular case. Demery v. Kupperman, 735 F.2d 1139, 1149 n. 8 (9th Cir.), *cert. denied*, 469 U.S. 1127, 105 S.Ct. 810, 83 L.Ed.2d 803 (1985).

Article III of the United States Constitution is the "fundamental limitation on the judicial power of the United States". Gonzales v. Gorsuch, 688 F.2d 1263, 1270 (9th Cir. 1982) (Wallace, Circuit Judge, concurring). The significance of Article III in defining the contours of permissible federal judicial powers was elucidated by the United States Supreme Court in Valley Forge Christian College v. Americans United

for Separation of Church and State, Inc., 454 U.S. 464, 476 102 S.Ct. 752, 70 L.Ed.2d 700 (1982), as follows:

> Article III, which is every bit as important in its circumscription of the judicial power of the United States as in its granting of that power, is not merely a troublesome hurdle to be overcome if possible so as to reach the "merits" of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the Framers of the Constitution at Philadelphia in 1787, a charter which created a general government, provided for the interaction between that government and the governments of the several States, and was later amended so as to either enhance or limit its authority with respect to both States and individuals.

The limitation on federal judicial power contained in Article III is significant here because the District Court had no original jurisdiction over Selective. Federal courts have original jurisdiction over a variety of matters, including claims arising under federal law. See U.S. CONST. art. III, § 2 (stating "(t)he judicial Power shall extend to all Cases ... arising under ... the Laws of the United States ...") and 28 U.S.C. § 1331 (providing that "(t)he district courts shall have original jurisdiction of all civil actions arising under the ... laws ... of the United States"). Here, however, Plaintiffs made no claim against Selective that conferred original jurisdiction upon the District Court before which this matter was brought.

Accordingly, the Court before which this matter was brought had jurisdiction over Selective only if "pendent jurisdiction" could be permissibly exercised here.

Courts have identified two distinct types of pendent jurisdiction. See, e.g., Potter v. Rain Brook Feed Company, Inc., 530 F.Supp. 569, 572 (E.D. Cal. 1982). First, exercise of "pendent claim" jurisdiction is required when a federal court adjudicates parallel state and federal claims against the same defendant. Id. "Pendent party" jurisdiction, on the other hand, involves both state and federal claims **and** the joinder of a party over which the federal court would lack jurisdiction, but for the presence of the party against whom the "anchor" claim is asserted. Id. (Emphasis added).

3) The District Court correctly identified Selective as a pendent party here and accordingly, found subject matter jurisdiction over Plaintiffs' claim against it lacking under controlling precedent.

Because Plaintiffs would have had no claim to jurisdiction in the District Court, but for the presence of the RICO Defendants, i.e., the parties against whom the "anchor" claim was asserted, Selective is a pendent party in the litigation brought by Plaintiffs. Situations involving pendent party jurisdiction raises issues relating to the subject matter jurisdiction of a Federal Court. See Elsaas, 35 F.Supp.2d at 759.

The District Court resolved the issues raised by Selective's presence before it by reference to Supreme Court and Ninth Circuit precedent. The District Court began its thoughtful and thorough analysis of law bearing on the issue presented here with Hymer v. Chai, 407 F.2d 136, 137 (9th Cir. 1969), a case in which the Ninth Circuit, by the District Court's reading, "refused to apply the broad ... test (set forth in United

Mine Workers v. Gibbs, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) (hereinafter "Gibbs")) and instead relied on the pre-Gibbs constitutional rule that jurisdiction exists only if the new claim involves the same parties." ER 0071.

Next, the District Court referenced Aldinger v. Howard, 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976), noting that, "the Supreme Court itself began to limit pendent party jurisdiction, but always for lack of statutory authority rather than on Constitutional grounds". ER 0071. In Aldinger, the Supreme Court set forth two (2) criteria that must be established before pendent party jurisdiction is permissible:

> "(b)efore it can be concluded that (pendent party) jurisdiction exists, a federal court must satisfy itself not only that Article III permits it, but that Congress in the statutes conferring jurisdiction (in a particular case) has not expressly or by implication negated its existence."
>
> Id., 427 U.S. at 18.

Finally, the District Court quoted at length from Ayala v. United States, 550 F.2d 1196, 1199-1200 (9th Cir. 1977), *cert. granted,* 434 U.S. 814, 98 S.Ct. 50, 54 L.Ed.2d 70 (1977), *cert. dismissed*, 435 U.S. 982, 98 S.Ct. 1635, 56 L.Ed.2d 76 (1978), which was recognized by the District Court as controlling precedent on the issue before it. In Ayala, this Court quoted Aldinger at length, noting, in particular, the "admonishment" that "even assuming no congressional disinclination to pendent party jurisdiction can be found under a given statute, there remains the constitutional

hurdle of the limited federal jurisdictional grant of Article III to be leaped". Ayala, 550 F.2d at 1199. Thus, pendent party jurisdiction was condemned by the Ayla Court not on grounds of "ferreted Congressional disinclination", but on more fundamental grounds that such jurisdiction violates Article III. Id.

Significantly, this Court, in Ayala, also provided clear guidance as to when, if ever, pendent party jurisdiction will be found other than constitutionally infirm in this Circuit. Concluding its discussion of Hymer, *supra.*, and Williams v. United States, 405 F.2d 951 (9th Cir. 1969), a second Ninth Circuit decision cited by the District Court in its discussion on this topic, ER 0071, the Ayala Court stated:

> In view of Aldinger's clear teaching that both constitutional power and lack of congressional disinclination are prerequisite to the exercise of pendent party jurisdiction, *and until the Supreme Court directly confronts the "subtle and complex question with far-reaching implications" posed by pendent party jurisdiction,* we reaffirm Williams and Hymer.

Ayala, 550 F.2d at 1200 (emphasis added).

Thus, the District Court's conclusion that "if (Plaintiff's) cause were to be maintained in federal court, the Court would lack jurisdiction of defendant Selective" was based on a case of this Court indicating not only that pendent party violates Article III of the United States Constitution, but indicating, as well, that this Court does not intend to change its position on this issue until the Supreme Court answers

"the ultimate question of constitutional power left unanswered ... in Moor v. County of Almeda ..." Id. Thus, the District Court here was in precisely the position from which the Court in Elsaas, *supra.*, stated, 35 F.Supp.2d at 760:

> Ayala clearly expressed the Ninth Circuit's view that Article III does not permit pendent party jurisdiction. No decision of the ... Ninth Circuit or the United States Supreme Court has overruled Ayala's rejection of pendent party jurisdiction on constitutional grounds, nor does passage of § 1367 alter the holding. Thus, Ayala remains the law on pendent party jurisdiction in the Ninth Circuit, and this court, being bound, may not exercise jurisdiction over plaintiffs' claims against (pendent parties).

Because the District Court here (which was in the same situation as the District Court in Elsaas), was merely applying the law of this Circuit, its ruling was not in error. Indeed, this Court has already passed upon the appropriateness of the District Court's action here in Carpenters Southern California Admin. Corp. v. D & L Camp Constr. Co., 738 F.2d 999 (9th Cir.1984). There, the plaintiff appealed a District Court's dismissal of a state law claim against a surety where no diversity of citizenship existed between plaintiff and the proposed surety defendant. The Carpenters court stated, 738 F.2d at 1000:

> Plaintiff contends that the district court should have exercised pendent jurisdiction over the claim against the surety. In refusing to exercise pendent party jurisdiction, however, the district court was applying a long line of case law of this circuit. They hold that under a theory of pendent jurisdiction, a state claim against a defendant may be added to a pending claim over which the court already has jurisdiction, but that

> pendent jurisdiction does not permit a new party to be added to a case absent an independent jurisdictional basis.
>
> (Numerous citations omitted).

Significantly, the Carpenters court also addressed a request similar to the request made by Plaintiffs here, i.e., that, notwithstanding the long line of Ninth Circuit cases compelling the action that the District Court took here, this Court "reconsider" its position on this appeal. In Carpenters, the plaintiffs' request was made in light of the Supreme Court's decision in Aldinger, *supra.*, and that Court responded as follows:

> Plaintiff asks us to reconsider this court's position in light of the Supreme Court's decision in Aldinger v. Howard. ... There the Court affirmed this court's denial of pendent party jurisdiction in Aldinger v. Howard, 513 F.2d 1257 (9th Cir. 1975), but indicated that as a matter of discretion, pendent party jurisdiction might be available in some cases where the federal statutory scheme might permit treating the entire proceeding as "one constitutional 'case'". ... This panel is precluded from such reconsideration in light of this court's repeated post-Aldinger reaffirmations of our refusal to permit pendent party jurisdiction in circumstances like this.
>
> Carpenters, 738 F.2d at 1000.

Selective recognizes that Plaintiffs' request that this Court "reconsider" its position as to the constitutionality of pendent party jurisdiction is based on a statute rather than a case decided by the Supreme Court. It is submitted, however, that such reconsideration is unwarranted in this case, both in light of the analysis below and in

light of the indication in Ayala, 550 F.2d at 1200, that this Court awaits a statement from the Supreme Court that directly confronts the question posed here before acting to upset a precedent of nearly twenty-five years' standing.

4) The District Court correctly determined that 28 U.S.C. § 1367 and/or the authority offered by Plaintiffs in the District Court has no bearing on the issue of whether pendent party jurisdiction is regarded as constitutionally permissible in the Ninth Circuit.

Plaintiffs rely exclusively on the proposition that the jurisdiction they asked the District Court to assert is permitted under 28 U.S.C. § 1367. In so doing, Plaintiffs completely ignore not only the thrust of Selective's argument, but the content of this Court's decisions on the issue of pendent party jurisdiction, which are not based on a lack of Congressional authorization for pendent party jurisdiction, but rather on the premise that pendent party jurisdiction violates Article III of the U.S. Constitution.

It is axiomatic in federal law that Congress cannot change the Constitution's parameters through passage of a statute, and 28 U.S.C. § 1367 is no exception to this rule. See, e.g., Rivera v. Commonwealth of Massachusetts, 16 F.Supp.2d 84, 85 (D.Mass. 1998) (stating that the "statutory grant (of authority provided in 28 U.S.C. § 1367) can (not) ... expand the jurisdictional boundaries set forth in Article III ... of the United States Constitution."). Thus, 28 U.S.C. § 1367, as an act of Congress, has no effect on whether pendent party jurisdiction is permitted by Article III. See Elsaas,

35 F.Supp.2d at 760 (stating "(n)o decision of the United States Court of Appeals for the Ninth Circuit or the United States Supreme Court has overruled Ayala's rejection of pendent party jurisdiction on constitutional grounds, *nor does passage of § 1367 alter (Ayala's) holding*") (emphasis added). Given that this Court's objection to pendent party jurisdiction is founded on the Constitution and not any Congressional disinclination, Plaintiffs' reliance on 28 U.S.C. § 1367 is misplaced.

Plaintiffs attempted to avoid the force of this argument in the District Court by citing to a relatively recent decision of that Court Ziegler v. Ziegler, 28 F.Supp.2d 601 (E.D.Wa. 1998), and a case of this Court, Yanez v. United States, 989 F.2d 323 (9th Cir. 1993), in which the passage of 28 U.S.C. § 1367 is noted in a footnote. Neither of these cases, however, helps the Plaintiffs in any significant way as neither overrules Ayala and declares pendent party jurisdiction constitutional.

Beyond the fact that the Ziegler decision is not binding on this Court, that case does not help Plaintiffs for several reasons. First, the parties and the Court there failed to raise the issue of constitutionality, such that the Court did not address the issue before this Court. Further, pendent party jurisdiction *as to defendants* could not have been raised in that case because that case involved federal claims brought by one plaintiff and state claims brought by another plaintiff against a defendant properly before the Court on the first plaintiff's federal claims. Thus, Ziegler, which is, at best

a "pendent plaintiff" case, is factually distinguishable from the current case, wherein Plaintiffs has haled into federal court a defendant, Selective, over which no independent basis for federal jurisdiction exists.

Yanez provides Plaintiffs with no more support. First, Yanez says nothing about the constitutionality of pendent party jurisdiction, but merely states in a footnote that Congress has authorized its exercise in 28 U.S.C. § 1367. See Yanez, 989 F.2d at 326 n.3. Further, the Yanez court had no reason to address any aspect of pendent party jurisdiction, including the constitutionality thereof, because 28 U.S.C. § 1367 had not been enacted as of the date the litigation at issue in Yanez had been commenced. Id. Thus, the Yanez court neither addressed the issue before this Court, nor overruled the clear teaching of Ayala, which is that pendent party jurisdiction violates the Constitution, regardless of what Congress may have to say about it.

5) No new authority or theory advanced by Plaintiffs warrants a conclusion different from that reached by the District Court here.

On appeal, Plaintiffs have added a new case and a new theory upon which they request a reversal of the District Court's decision that it lacked jurisdiction over Selective. Neither the new case nor the new theory support any such action here.

The new case advanced by Plaintiffs as supportive of their position is Irwin v. Mascott, 96 F.Supp.2d 968 (N.D. Cal. 1999). There, a District Court addressed, in

the context of class action where the representative plaintiffs had claims based on federal law, a challenge to the exercise of supplemental jurisdiction over the claims of potential class members who lacked federal causes of action. Id., at 975. The court ruled, on the basis of two District Court Orders entered in separate matters during 1992, that it could exercise supplemental jurisdiction over the claims of the pendent plaintiff class members, whether or not those pendent plaintiffs had federal claims or not. Id. Thus, Irwin helps Plaintiffs no more that Ziegler does, as neither case (a) resulted in a decision that is, in any way, binding on this Court; (b) addressed the constitutionality of pendent party jurisdiction; or (c) involved a pendent defendant before a United States District Court to defend a state law claim alone.

The new theory advanced by Plaintiffs appears to be the District Court found 28 U.S.C. § 1367, rather than pendent party jurisdiction, to be unconstitutional. Of course, Selective neither made such an argument nor maintained such a position, and the District Court made no such finding. Rather, Selective's position, with which the District Court agreed, that pendent party jurisdiction is held by this Court to be unconstitutional, and the statute asserted by Plaintiffs, as an act of Congress, cannot erase that constitutional infirmity, irrespective of its constitutionality. See Gonzales, 688 F.2d at 1270 (Wallace, Circuit Judge, concurring) (stating "(c)learly, Congress

cannot by statute vest the federal courts with jurisdiction to hear lawsuits that ... are ... not within the limited jurisdiction which Article III grants the federal courts").

Selective submits that 28 U.S.C. § 1367 represents an attempt by Congress to expand the scope of pendent jurisdiction to the full extent permitted by Article III. Selective recognizes the power of Congress to expand and/or contract the scope of pendent jurisdiction to the fullest extent permitted by Article III or to some lesser extent. What is critical here, however, is that Congress cannot expand the scope of such jurisdiction beyond the fullest extent permitted by Article III, and it is the long-standing position of this Court that the jurisdiction Plaintiffs would have the District Court exercise over Selective is beyond that fullest extent permitted by Article III. It is requested, therefore, that the District Court be affirmed on this point.

B. Even the exercise of subject matter jurisdiction over the claim Plaintiffs brought against Selective had been proper here, the District Court would not have abused its discretion in dismissing Plaintiffs' state law claims under 28 U.S.C. § 1367(c), after dismissing Plaintiffs' federal claims on a defendant's 12(b)(6) Motion.

It is believed that the District Court found that Selective would have to be dismissed from this action for lack of subject matter jurisdiction and that the District Court's ruling on this issue was correct. It is contended briefly that dismissal of the

state law claim, and Selective with it, would have been warranted under 28 U.S.C. § 1367(c) even if the exercise of jurisdiction over Selective were permissible.

1) Standards of Review

Assuming that power to hear pendent state law claims exists, Herman Family Revocable Trust v. Teddy Bear, — F.3d —, 2001 WL 649897, *4 (9th Cir. 2001) (stating that a "court may exercise ... supplemental jurisdiction ... only if it has the "'power to hear state law claims'"), a district court's exercise of pendent jurisdiction over state law claims is a matter of discretion. Mackey v. Pioneer Nat'l Bank, 867 F.2d 520, 523 (9th Cir.1989). A District Court's refusal to exercise supplemental jurisdiction is reviewed for an abuse of discretion. San Pedro Hotel Co., Inc., v. City of Los Angeles, 159 F.3d 470, 478 (9th Cir. 1998) (citing Inland Empire Chapter of Associated Gen. Contractors v. Dear, 77 F.3d 296, 299 (9th Cir. 1996)).

2) Dismissal of the State Law Claim, and, therefore, Selective, would not have been an abuse of discretion.

Assuming it had power to exercise such jurisdiction in the first place, a court may decline to exercise supplemental jurisdiction if (1) the state law claim raises a novel or complex issue of state law; (2) the state law claim substantially predominates over the claim over which the district court has original jurisdiction; (3) the U.S. district court has dismissed all claims over which it has original jurisdiction; (4) in

exceptional circumstances, there are other compelling reasons for declining jurisdiction. 28 U.S.C. § 1367(c); Executive Software v. United States Dist. Court, 24 F.3d 1545, 1546 (9th Cir. 1994) (stating that power conferred under 28 U.S.C. § 1367(a) may, be declined for the reasons set forth in § 1367(c)).

Here, the District Court, if it had the power Plaintiffs seek to confer upon it over the Constitutional objection of this Court probably would been obliged to dismiss the state law claim after dismissing the RICO claim under either 28 U.S.C. § 1367(b) or (c). This Court has stated that "when, as here, the court dismisses the federal claim leaving only state claims for resolution, the court should decline jurisdiction over the state claims and dismiss them without prejudice." Les Shockley Racing, Inc., v. National Hot Rod Association, 884 F.2d 504, 509 (9th Cir., 1989) (*citing* Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 108 S.Ct. 614, 618-19, 98 L.Ed.2d 720 (1988)). Indeed, this Court has found that "proper exercise" of discretion requires dismissal state law claims in these situations. Wren v. Sletten Const. Co., 654 F.2d 529, 536 (9th Cir.1981) (stating "when the state issues ... predominate and all federal claims are dismissed before trial, the proper exercise of discretion requires dismissal of the state claim."); See Gini v. Las Vegas Metro. Police Dept., 40 F.3d 1041, 1046 (9th Cir.1994) (stating "(i)n the usual case in which

federal-law claims are eliminated before trial, the balance of factors ... will point toward declining to exercise jurisdiction over the remaining state law claims.").

VII. CONCLUSION

In acting on Plaintiffs' state law claim against Selective, the District Court here did exactly what a District Court must do confronted with a claim over which it lacks of subject matter jurisdiction - it ruled that it could not adjudicate the claim. It is requested therefore that the District Court be affirmed.

DATED this 30TH day of JULY, 2001.

VELIKANJE, MOORE & SHORE, P.S.
Attorneys for Defendant Selective Employment, Inc.

By: _____
J. Jay Carroll
WSBA No. 17424

STATEMENT OF RELATED CASES

In compliance with Circuit Rule 28-2.6, the attorneys for defendant Selective state that they are unaware of any related case pending before this Court.

DATED this 30TH day of July, 2001.

VELIKANJE, MOORE & SHORE, P.S.
Attorneys for Defendant Selective
Employment, Inc.

By: _____
J. Jay Carroll, WSBA No. 17424
405 E. Lincoln Ave.
P.O. Box 22550
Yakima, WA 98907
(509) 248-6030
FAX (509) 453-6880

CERTIFICATE OF COMPLIANCE

Pursuant to the Ninth Circuit Rule 32(a)(7)(B)(i), I certify that the brief of appellee Selective Employment 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, and certificate of compliance is 4,827.

DATED: July 30TH, 2001.

VELIKANJE, MOORE & SHORE, P.S.

By: _____
J. Jay Carroll
WSBA No. 17424
405 East Lincoln Avenue
P.O. Box 22550
Yakima, WA 98907
(509) 248-6030

Attorneys for Defendant-Appellee
Selective Employment

PROOF OF SERVICE

The undersigned certifies as follows:

I am LORI A. BUSBY, an employee of Velikanje, Moore & Shore, P.S., attorneys for appellants in the above entitled case; I am a citizen of the United States, a resident of Yakima County, Washington, over the age of 21 years, and not a party to said action. I further certify that on the 30th day of July, 2001, I mailed by UPS Overnight Mail, the original and 15 copies of Brief of Appellee Selective Employment to be sent to:

Office of the Clerk
U.S. Court of Appeals
95 Seventh Street
San Francisco, CA 94103-1526

Additionally on the 30th day of July, 2001, I caused two copies of Brief of Appellee Selective Employment to be served on the following counsel for appellants and appellees in the manner indicated:

Steve W. Berman — VIA UPS OVERNIGHT MAIL
Andrew M. Volk
HAGENS, BERMAN, LLP
1301 Fifth Avenue, Suite 2900
Seattle, Washington 98101

Howard W. Foster — VIA UPS OVERNIGHT MAIL
JOHNSON & BELL, LTD
55 East Monroe, Suite 4100
Chicago, Illinois 60603

Sheryl Gordon McCloud
1301 Fifth Avenue, Suite 3401
Seattle, Washington 98101-2605

VIA UPS OVERNIGHT MAIL

Irwin Schwartz
710 Cherry Street
Seattle, Washington 98104

VIA UPS OVERNIGHT MAIL

Terry C. Schmalz
Halverson & Applegate
P.O. Box 22730
Yakima, WA 98907-2715

VIA HAND DELIVERY

Walter G. Meyer
Meyer, Fluegge & Tenney, P.S.
230 South Second Street
P.O. Box 22680
Yakima, WA 98907

VIA HAND DELIVERY

I certify that the foregoing is true and correct.

DATED this 30th day of July, 2001, at Yakima, Washington.

LORI A. BUSBY