Ryan M. Edgley
Kirk A. Ehlis
Halverson & Applegate, P.S.
P.O. Box 22730
Yakima, WA 98907-2715
Telephone: (509) 575 6611

Attorneys for Defendants Matson Fruit Company and Zirkle Fruit Co.

Walter G. Meyer
Meyer, Fluegge & Tenney, PS
230 South 2nd Street
Yakima, WA
Telephone: (509) 575-8500

Attorneys for Defendant Zirkle Fruit Co.

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MAY 31 2000

JAMES R. LARSEN, CLERK
DEPUTY
YAKIMA, WASHINGTON

Honorable Fred VanSickle

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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

Plaintiffs,

v.

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

Defendants.

NO. CY-00-3024-FVS

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS AND FOR A STAY OF DISCOVERY

TABLE OF CONTENTS

LAW OFFICES OF
HALVERSON & APPLEGATE, P.S.
311 North Fourth Street — P. O. Box 22730
YAKIMA, WASHINGTON 98907-2715
Phone 575-6611

TABLE OF AUTHORITIES

Cases

LAW OFFICES OF
HALVERSON & APPLEGATE, P.S.
311 North Fourth Street — P. O. Box 22730
YAKIMA, WASHINGTON 98907-2715
Phone 575-6611

Statutes

Other Authorities

Rules

LAW OFFICES OF
HALVERSON & APPLEGATE, P.S.
311 North Fourth Street — P. O. Box 22730
YAKIMA, WASHINGTON 98907-2715
Phone 575-6611

Defendants Zirkle Fruit Co. (hereinafter "Zirkle") and Matson Fruit Company (hereinafter "Matson") respectfully submit this memorandum in support of their motion to dismiss the complaint for failure to state a claim pursuant to Rule 12(b)(6), Rule 8 and Rule 9 (b) of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

Zirkle and Matson are closely held Washington corporations in the business of growing, packaging and selling fresh fruit of many varieties. Beginning in 1999, Zirkle began accepting temporary/seasonal employee referrals from co-defendant Selective Employment Agency, Inc. (hereinafter "Selective"). Matson accepted temporary/seasonal employee referrals from co-defendant Selective for less than one month beginning in mid-February, 2000. The plaintiffs allege, without having conducted adequate investigation required by Fed. R. Civ. P. 11(b) and Local Rule 3.2, that Selective "knowingly employs large numbers of illegal immigrants" pursuant to requests by, or agreements with, Zirkle and Matson. (Plaintiffs' RICO Case Statement, ¶ (f)(1)).[1]

Both Zirkle and Matson maintain employment eligibility verification forms (I-9 Forms) for the workers they hire and pay. These forms have been reviewed by the Immigration and Naturalization Service (INS) pursuant to 8 U.S.C. § 1324a(b)(3). Both Zirkle and Matson have been directed to terminate the employment of workers

1. The allegations of plaintiffs' Complaint (¶¶ 4 & 22) limit Zirkle's and Matson's alleged knowing employment of unauthorized aliens to that which allegedly occurred through "the essential role played by Selective...." In an attempt to bring the alleged "illegal immigrant hiring scheme" within the coverage of the Racketeer Influenced and Corrupt Organizations Act, it has been necessary for the plaintiffs to allege the scheme is perpetrated by "enterprises" consisting of Zirkle-Selective and Matson-Selective. (Complaint ¶ 4, Plaintiff's RICO Case Statement ¶ (f)(1)).

LAW OFFICES OF
HALVERSON & APPLEGATE, P.S.
311 NORTH FOURTH STREET — P. O. BOX 22730
YAKIMA, WASHINGTON 98907-2715
PHONE 575-6611

the INS has determined are not authorized to work. (Complaint ¶¶ 23-25).[2] Although plaintiffs have clearly had access to the records of the INS (*See*: Complaint ¶ 27), there is no allegation the INS has ever accused Matson or Zirkle – pursuant to their authority under 8 U.S.C. § 1324a(e)(1),(3) and (4) – of knowingly employing any unauthorized alien.

Plaintiffs purport to bring this action "on behalf of all persons legally authorized to be employed in the United States ("U.S.") who have been hired by defendants [Zirkle] and [Matson] as hourly wage earners and who were recruited or referred to Zirkle and Matson by Selective Employment Agency." (Compl. ¶ 1). However, the plaintiffs allege they have been employed **only by Zirkle**, and only during 1999. (Compl. ¶ 46). It is unclear on what basis plaintiffs claim to have standing to sue Matson Fruit Company as, by their own admission, they apparently have no affiliation with Matson Fruit Company.

The substance of the plaintiffs' complaint is their unsubstantiated allegation that Zirkle and Matson have "embarked on a scheme to employ workforces substantially comprised of undocumented immigrants who have no legal right to be employed in the U.S. (hereinafter the "Illegal Immigrant Hiring Scheme")." (Compl. ¶ 2). This "scheme" is alleged to violate the Racketeer Influenced and Corrupt Organizations Act (hereinafter "RICO"), 18 U.S.C. § 1961 *et seq.*, and Washington state

---

2. According to the plaintiffs' allegations, the workers hired through the "illegal immigrant hiring scheme" are actually employed and paid by Selective. (Plaintiffs' RICO Case Statement ¶ (f)(1)). However, the Complaint neither alleges that Zirkle or Matson maintain I-9 Forms for the workers hired and paid by Selective, nor that the INS has ever reviewed the I-9 Forms maintained by Selective for said employees. Thus, the plaintiffs have presented no information, nor even any allegations, regarding the number of unauthorized workers allegedly hired through the purported "scheme."

LAW OFFICES OF
HALVERSON & APPLEGATE, P.S.
311 North Fourth Street — P. O. Box 22730
YAKIMA, WASHINGTON 98907-2715
Phone 575-6611

law. (Compl. ¶ 2). The plaintiffs further allege that the purpose for conducting the "Illegal Immigrant Hiring Scheme" is to depress employee wages "below the levels they would otherwise be required to pay if they were unable to hire substantial numbers of illegal immigrants..." (Compl. ¶ 3).

In their effort to fabricate a class action lawsuit under the powerful - and potentially lucrative - RICO statute, plaintiffs present the court with an entirely uninformative, speculative, and conclusory set of allegations that are rife with unsubstantiated conspiracy theories, but no requisite factual contentions. The plaintiffs' allegations are deficient in the following manner:

1) They fail to adequately allege the elements of any predicate act under RICO;

2) They fail to allege a direct injury to plaintiffs' business or property, as is necessary for standing to pursue claims under RICO;

3) They propose to interfere with, and misuse in contravention of statute, the comprehensive enforcement scheme established by the Immigration Reform and Control Act, specifically 8 U.S.C. § § 1324a and 1324b;

4) The civil conspiracy allegation brought under the common law of the State of Washington is expressly preempted by 8 U.S.C. § 1324a(h)(2).

Because of these deficiencies, the plaintiffs' allegations do not warrant their intent to undertake a discovery fishing expedition (*See*: Complaint ¶¶ 14, 19, 25, 29, 32, 38 and 39, Plaintiffs' RICO Case Statement ¶¶ (e)(3) and (u)) at the expense of the defendants. By this motion, Zirkle and Matson ask the court to prevent this blatant misuse of the RICO statute. The Complaint should be dismissed because it fails to satisfy even the minimum pleading requirements of Civil Rules 8 and Fed. R. Civ. P. 9,

LAW OFFICES OF
HALVERSON & APPLEGATE, P.S.
311 NORTH FOURTH STREET — P. O. BOX 22730
YAKIMA, WASHINGTON 98907-2715
PHONE 575-6611

it does not satisfy this court's Local Rules for pleading a RICO case, and because it fails to state a claim under RICO or the common law of the State of Washington.

PLAINTIFFS' FACTUAL ALLEGATIONS

For purposes of this motion only, well-pleaded factual allegations in plaintiffs' complaint are accepted as true. *See, e.g., Oscar v. University Students Co-Operative Ass'n.*, 965 F.2d. 783, 785 (9th Cir. 1992). Purged of their unfounded and inflammatory hyperbole,[3] the plaintiffs' allegations include:

Plaintiffs Olivia Mendoza and Juana Mendiola were employed by Zirkle Fruit Company as laborers. (Compl. ¶ 7). Zirkle and Matson are both Washington corporations with their principal places of business in Yakima County, and both are in the business of operating fruit orchards and packing houses. (Compl. ¶¶ 2, 22). Like all other fruit businesses throughout Washington and the United States, Zirkle and Matson employ many "unskilled, low-wage laborers." (Compl. ¶ 21). Many of these workers are of Mexican descent. (Compl. ¶ 22). Additionally, as with any business in a free market economy, Zirkle and Matson are motivated to, and do keep labor costs as low as possible. *Id.*

Zirkle and Matson have entered into contractual agreements with Selective, a temporary employment agency, to provide workers. (Compl. ¶ 40). For a fee, Selective provides workers to Zirkle and Matson. *Id.* Although, these workers perform work for

---

3. The characterization of Selective as a "front company" (Complaint ¶ 4) infers an evil motive from nothing more than the use of a temporary help agency, which is a common practice in many industries. Additionally, the characterization of the INS effort to emphasize I-9 audits in the fruit packing industry as a "crackdown ... on apple growers" falsely implies that the apple growers were deemed culpable or penalized. In fact, the INS enforcement action was against workers using false documents (not the growers or employers), and resulted only in orders by the INS that workers be terminated. (Complaint ¶ 23).

LAW OFFICES OF
HALVERSON & APPLEGATE, P.S.
311 North Fourth Street — P. O. Box 22730
YAKIMA, WASHINGTON 98907-2715
Phone 575-6611

Zirkle and Matson, they are paid by Selective and Selective withholds the necessary taxes from the workers' paychecks. *Id.*

Plaintiffs allege that Matson and Zirkle, with an "essential role played by Selective," hire at least 50 unauthorized alien workers each year, with actual knowledge that each individual is an unauthorized alien and that each individual was smuggled into the U.S. by a third party. (Compl. ¶¶ 22, 29 and 32).[4]

Further, it is alleged that whenever Matson or Zirkle employs an unauthorized alien, they complete (or they direct Selective to complete, and Selective does complete) an I-9 employment eligibility verification form that is mailed to the INS. (Compl. ¶ 34). The I-9 Forms are allegedly completed and mailed with respect to workers who are known to be ineligible for employment. (Compl. ¶¶ 35 and 39). The mailing of allegedly false I-9 Forms to the INS is **erroneously** purported to further the "Illegal Immigrant Hiring Scheme," because "[t]hese forms are *required by federal law to be sent to the INS upon the hiring of each employee.*" (Plaintiff's RICO Case Statement ¶ (e)(3))(emphasis added)[5].

Finally, plaintiffs assume that unauthorized aliens "are willing to accept wages that are significantly lower than wages would be in a labor market comprised solely of

---

4. Despite plaintiffs' attempt to characterize Matson and Zirkle as having been subject to "crackdowns" by the INS, there is no allegation the INS ever accused either defendant of knowingly employing an unauthorized alien, pursuant to the agency's authority under 8 U.S.C. § 1324a(e)(1),(3) and (4).

5. Because this contention relies on an erroneous statement of the law, the failure to adequately allege "mail fraud" in furtherance of a scheme violating RICO can be addressed by motion under Fed. R. Civ. P. 12(b)(6), without consideration of additional facts. Further, this error highlights the plaintiffs' lack of knowledge about the actual application of the Immigration Reform and Control Act employment eligibility verification procedures. (See 8 U.S.C. § 1324a(b)(3).

LAW OFFICES OF
HALVERSON & APPLEGATE, P.S.
311 North Fourth Street — P. O. Box 22730
YAKIMA, WASHINGTON 98907-2715
Phone 575-6611

legally authorized workers." (Compl. ¶ 22).[6] Plaintiffs allege this payment of a lower wage to unauthorized aliens "depressed" the wage for which plaintiffs willingly agreed to work. (Compl. ¶¶ 46 and 47, Plaintiffs' RICO Case Statement ¶ (p)).

ARGUMENT

Initially, it is important for the court to distinguish between an alleged violation of the Immigration Reform and Control Act (IRCA) (8 U.S.C. § 1324a, et seq.), **which is not a RICO predicate act** under 18 U.S.C. § 1961(1)[7], and other separate but similarly (perhaps confusingly) numbered provisions of the Immigration and Nationality Act (specifically 8 U.S.C. § 1324). The plaintiffs argue there have been only two RICO predicate acts, including purported violations of the Immigration and Nationality Act, 8 U.S.C. § 1324. They do not argue that an alleged violation of the IRCA (8 U.S.C. § 1324a) is a RICO predicate act.

Nevertheless, the Complaint and Plaintiffs' RICO Case Statement allege facts arising exclusively out of: (1) Zirkle's and Matson's compliance with the IRCA prohibition against employing persons known to be unauthorized aliens; (2) Zirkle's and Matson's compliance with the IRCA obligation to inspect employment eligibility documents and complete I-9 Forms; and (2) the results and consequences of INS enforcement of IRCA. All issues arising under the IRCA. There are, however, no

---

6. This unsubstantiated assumption completely ignores the right, and actual practice, of unauthorized aliens to engage in union organizing and any other concerted activity for the betterment of wages and working conditions protected by the National Labor Relations Act. *See*: *Contreras v. Corinthian Vigor Insurance Brokerage*, 25 F.Supp.2d 1053 (N.D.CA 1998); *see also*: 1986 U.S. Code Cong. And Adm. News, page 5662.

7. Section 1961(1) of Title 18 U.S.C. defines "racketeering activity," for RICO predicate acts, to include "(F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens)...," but does not include violations of IRCA section 274A (prohibiting employment of persons known to be unauthorized aliens and requiring employers inspection of employment eligibility verification documents). 8 U.S.C. § 1324a(a) and (b).

LAW OFFICES OF
HALVERSON & APPLEGATE, P.S.
311 North Fourth Street — P. O. Box 22730
YAKIMA, WASHINGTON 98907-2715
Phone 575-6611

factual allegations that Zirkle or Matson violated 8 U.S.C. §1324(a)(3), which requires "actual knowledge" about **individual** unauthorized aliens being smuggled into the U.S.

The IRCA (8 U.S.C. § 1324a) prohibits "knowingly" employing unauthorized aliens (8 U.S.C. § 1324a(a)), and makes a "pattern or practice" of employing unauthorized aliens a misdemeanor punishable by imprisonment for up to six months. 8 U.S.C. § 1324a(f)(1). Standing alone, a "pattern or practice" of knowingly hiring or employing unauthorized aliens is not a RICO predicate act.

The provision of the Immigration and Nationality Act relied on by plaintiffs (8 U.S.C. § 1324(a)(3)(A) & (B)), prohibits hiring unauthorized aliens, with "actual knowledge that **the individuals**" were smuggled into the U.S. by a third person. *See*: 8 U.S.C. § 1324(a)(3)(B)(ii). Hence, to plead an indictable violation of the Immigration and Nationality Act, and therefore a RICO predicate act, the plaintiffs must allege facts showing: (1) which **individual** Zirkle and Matson employees were smuggled into the U.S. by third parties and, (2) more importantly, that Zirkle and Matson had "actual knowledge" of the smuggling with respect to those individuals. Not surprisingly, the allegations of plaintiffs' Complaint and Plaintiffs' RICO Case Statement conspicuously avoid discussion of this element of a *prima facie* case.

1. Plaintiffs Fail to Adequately Allege The Necessary Elements of Any RICO Predicate Act.

While Rule 8 (a) of the Federal Rules of Civil Procedure generally requires only a "short and plain statement showing that the pleader is entitled to relief," a

LAW OFFICES OF
HALVERSON & APPLEGATE, P.S.
311 North Fourth Street — P. O. Box 22730
YAKIMA, WASHINGTON 98907-2715
Phone 575-6611

defendant is still entitled to "fair notice of what the plaintiffs' claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). Notwithstanding the generally liberal standards of "notice pleading" under the federal rules, a complaint should be dismissed where it provides only unsupported conclusory allegations, which fail to give defendants fair notice of the alleged facts on which plaintiffs' claims are based. *Bach v. Mason*, 190 F.R.D. 567, 570 (1999).

Courts have been particularly vigilant in scrutinizing claims asserted under the civil RICO statute for compliance with these minimum requirements because "[c]ivil RICO is an unusually potent weapon – the litigation equivalent of a thermonuclear device." *Schmidt v. Fleet Bank*, 16 F. Supp.2d 340, 346 (S.D.N.Y. 1998) (citations and internal quotation marks omitted). "Because the mere assertion of a RICO claim . . . has an almost inevitable stigmatizing effect on those named as defendants, . . . courts should strive to flush out frivolous RICO allegations at an early stage of the litigation." *Id.* (citations and internal quotation marks omitted).

Consistent with these principles, and with "counsel's obligations under Fed. R. Civ. P. 11 to make a 'reasonable inquiry' prior to filing the complaint," this court has adopted Local Rule 3.2 to specifically regulate civil RICO cases. This Local Rule requires the plaintiffs to "state in detail and with specificity" the facts that support their RICO claims through some 42 different questions. The purpose of the RICO Case Statement is to assist the court in summarily dispensing of

LAW OFFICES OF
HALVERSON & APPLEGATE, P.S.
311 North Fourth Street – P. O. Box 22730
YAKIMA, WASHINGTON 98907-2715
Phone 575-6611

unwarranted RICO cases early in the proceedings, and to allow defendants to begin a defense immediately - due to the very serious nature of the allegations. Specifically, LR 3.2(e)(2) and (3) require plaintiffs to provide dates, identify participants and describe the facts surrounding the alleged predicate acts.

With these principles in mind, it is obvious the plaintiffs have not, and cannot plead or prove the necessary elements of the RICO predicate acts they are attempting to rely upon. Only two RICO predicate acts under 18 U.S.C. § 1961(1) are claimed by the plaintiffs: (1) violation of the Immigration and Nationality Act, section 274 (8 U.S.C. § 1324), related to smuggling or harboring certain aliens; and (2) violation of the mail fraud statute, 18 U.S.C. § 1341.

The argument that Zirkle and Matson violated the Immigration and Nationality Act (8 U.S.C. § 1324(a)(3)) fails because plaintiffs cannot describe any facts to show Zirkle or Matson had "actual knowledge" that individual employees were smuggled into the country by third persons. 8 U.S.C. § 1324(a)(3)(B)(ii).

Plaintiffs' contention that Zirkle and Matson have violated the mail fraud statute, 18 U.S.C. § 1341, fails because the mailing of I-9 Forms to the INS – fraudulent or otherwise – cannot facilitate the hiring of unauthorized aliens. Employers are not required by law to mail the forms to the INS. Even if employers did unnecessarily mail I-9's to the INS, the agency has the information necessary to determine the authenticity of any person's proof of employment eligibility.

LAW OFFICES OF
HALVERSON & APPLEGATE, P.S.
311 North Fourth Street – P. O. Box 22730
YAKIMA, WASHINGTON 98907-2715
Phone 575-6611

A. Failure to plead facts necessary to state a violation of the Immigration and Nationality Act.

The Immigration and Nationality Act prohibits hiring, during any twelve month period, ten or more unauthorized aliens "...with actual knowledge the individuals...[were] brought into the United States in violation of this subsection." 8 U.S.C. § 1324(a)(3)(A) and (B)(ii). Said subsection makes it illegal for any person to bring (smuggle) an alien into the U.S. at a place other than a designated port of entry, or to bring into the U.S. an alien who does not have prior authorization to enter.

The plaintiffs fail to allege when any Zirkle or Matson employees were smuggled into the U.S., where they were smuggled into the U.S., how they were smuggled into the U.S., by whom they were smuggled into the U.S., whether they had authorization to enter the U.S., or how Zirkle or Matson could have had "actual knowledge" of such smuggling. Thus, plaintiffs have failed to allege facts necessary to state a violation of 8 U.S.C. § 1324(a)(3).

Further, plaintiffs' anticipated argument that they will be able to investigate these issues through discovery is of no help. The defendants and the court have been given absolutely no notice of any facts on which this claimed RICO predicate act is alleged.

The Federal Rules of Civil Procedure, and LR 3.2 governing RICO cases, require that plaintiffs have some factual basis resulting from "reasonable inquiry" under Fed. R. Civ. P. 11 **before** initiating a RICO complaint and seeking to embark upon a discovery fishing expedition.

LAW OFFICES OF
HALVERSON & APPLEGATE, P.S.
311 North Fourth Street — P. O. Box 22730
YAKIMA, WASHINGTON 98907-2715
Phone 575-6611

Moreover, pursuant to restrictions imposed by the IRCA (discussed below), the only information that Zirkle or Matson have about their employees' citizenship and/or alien authorization status is contained in the I-9 Forms. This information is statutorily precluded from being used by the plaintiffs to pursue their RICO claims. Pursuant to 8 U.S.C. § 1324a(b)(5), the I-9 employment eligibility verification form, and any information contained in or appended to such form, may not be used for purposes other than enforcement of the immigration laws by the government and certain explicitly identified sections of Title 18 that **do not include RICO**. This statutory protection for information employees are compelled by the IRCA to produce precludes any discovery of I-9 Forms by the plaintiffs, thereby precluding any discovery about which employees were in the U.S illegally and, therefore, might have been smuggled into the U.S. in violation of 8 U.S.C. § 1324(a).

Thus, any argument by plaintiffs that discovery will permit them to plead facts sufficient to state a *prima facie* case, is incorrect. The allegation that Matson and Zirkle have committed criminal violations of Section 274 of the Immigration and Nationality Act should be dismissed, with prejudice, for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

B. Failure to adequately plead mail fraud violation of RICO.

The plaintiffs have also utterly failed to adequately allege a predicate act under the mail fraud statute, 18 U.S.C. §1341. In their Complaint, the plaintiffs allege that Zirkle and Matson have "engaged in another scheme in violation of RICO – "The I-9 Mail Fraud Scheme" – simultaneously with the Illegal Immigrant

LAW OFFICES OF
HALVERSON & APPLEGATE, P.S.
311 NORTH FOURTH STREET — P. O. BOX 22730
YAKIMA, WASHINGTON 98907-2715
PHONE 575-6611

Hiring Scheme, in order to effectuate the Illegal Immigrant Hiring Scheme." (Compl. ¶ 33). Plaintiffs allege, again without any factual support, that Zirkle and Matson individually, or through Selective, cause I-9 employment eligibility verification forms to be falsified and mailed to the INS to "effectuate" the Illegal Immigrant Hiring Scheme. (Plaintiffs' RICO Case Statement ¶ (e)(3)). Plaintiffs' Complaint also fails on this allegation for several reasons.

First, and foremost, the plaintiffs have failed entirely to plead sufficient facts to satisfy the strict pleading requirements of Fed. R. Civ. P. 9 (b). Rule 9 (b) requires that "the circumstances constituting fraud...be stated with particularity." It is uniformly recognized that the rule requires "the identification of the circumstances constituting fraud so that the defendant can prepare an adequate answer from the allegations." *Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1400 (9th Cir. 1986). Further, this means that the pleader must state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations. *Id* at 1401. In *Schreiber*, allegations substantially similar to those made by the present plaintiffs were found insufficient to withstand a Rule 12(b)(6) motion due to the insufficiency of the pleadings under Rule 9.

To adequately allege a violation of the mail fraud statute, a plaintiff must show that: (1) the defendants formed a scheme or artifice to defraud; (2) the defendants used the United States mails or caused a use of the United States mails in furtherance of the scheme; and (3) the defendants did so with the specific intent

LAW OFFICES OF
HALVERSON & APPLEGATE, P.S.
311 North Fourth Street — P. O. Box 22730
YAKIMA, WASHINGTON 98907-2715
Phone 575-6611

to deceive or defraud. *Coronado v. Duncan*, Lexis 19025, pg. 5 (N. D. Cal. 1999), citing *Rothman v. Vedder Park Mgmt.*, 912 F.2d 315, 316 (9th Cir. 1990). The requirement of specific intent under the statute is satisfied by the existence of a scheme which was "reasonably calculated to deceive persons of ordinary prudence and comprehension," and this intention is shown by examining the scheme itself. *Id.*

Examining the alleged "mail fraud" scheme in this case, it is crystal clear that the plaintiffs have failed to allege a violation of the mail fraud statute with the particularity required by Rule 9 (b). The plaintiffs fail entirely to allege the **time, place**, and **specific content** of the false representations, as well as the **identities of the parties** to these misrepresentations. Their excuse for this shortcoming is that they must conduct discovery. However, they have given the court no idea of what times, places, content and/or parties that discovery may uncover.

Plaintiffs also fail to address the statutory directive that no I-9 Forms, nor information contained on I-9 Forms, may be used for any purpose other than enforcement of the IRCA by the government. Any attempted discovery intended by plaintiffs to investigate the content of I-9 Forms would be futile.

Moreover, other than their speculative and conclusory allegations, the plaintiffs have given the court no factual support to even infer that: (1) the defendants formed a scheme or artifice to defraud; (2) the defendants used the United States mails or caused a use of the United States mails in furtherance of the

LAW OFFICES OF
HALVERSON & APPLEGATE, P.S.
311 North Fourth Street — P. O. Box 22730
YAKIMA, WASHINGTON 98907-2715
Phone 575-6611

scheme; and, (3) the defendants did so with the specific intent to deceive or defraud. In fact, reality belies any such argument.

Specifically, the plaintiffs' erroneously contend that federal law requires employers to mail I-9 forms to the INS. (Plaintiffs' RICO Case Statement ¶ (e)(3)). To the contrary, the I-9 Forms are not mailed to the INS, but instead are retained by the party completing them. *See* 8 U.S.C § 1324a(b)(3). Even if the plaintiffs' contention were accurate, mailing the allegedly fraudulent I-9s to the INS would not "further the scheme," but instead would immediately halt it. The INS is the organization with the expertise and information to determine if I-9s are in fact valid.[8] In fact, Congress expected employers would be able to seek confirmation of the authenticity of alien identification documents from the INS – presumably without being accused of mail fraud. See: 1986 U.S. Code Cong. And Adm. News, page 5665. Hence, mailing a fraudulent I-9 to the INS would ensure that the "Illegal Immigrant Hiring Scheme" would be discovered, not perpetuated.

Congress, the Attorney General and the INS know about the existence of, and anticipate that employees will use false employment eligibility documents, which facially appear to be valid, to deceive employers. The mailing of I-9 Forms to the INS that identify the use of false employment eligibility documents could not, as a matter of law, be considered "reasonably calculated to deceive persons of

8. The INS maintains a Central Index System matching valid Alien Registration Numbers with the identity of the alien authorized to work. See: *Villegas-Valenzuela v. Immigration and Naturalization Service*, 103 F.3d 805 (9th Cir. 1996). Also, the INS has the ability, and does obtain verification from the Social Security Administration of the validity of any name matched with a Social Security Number that is used by any individual as proof of employment eligibility. 8 U.S.C. § 1373.

HALVERSON & APPLEGATE, P.S.
311 North Fourth Street — P. O. Box 22730
YAKIMA, WASHINGTON 98907-2715
Phone 575-6611

ordinary prudence and comprehension" at the INS. *Rothman v. Vedder Park Mgmt., supra* at 912 F.2d 316.

Thus, plaintiffs' "mail fraud" allegations also fail to state a claim under RICO, as a matter of law. Plaintiffs can allege no set of facts that would make mailing any I-9 Form to the INS actionable fraud.

2. Plaintiffs Lack Standing To Pursue RICO.

To recover damages based on a violation of Section 1962(c), plaintiffs must show they were injured in their business or property "by reason of" an offense under Section 1962(c). *See* 18 U.S.C. § 1964(c). Put differently, the plaintiffs only have standing if, and can only recover to the extent that, they have been injured by the conduct constituting the violation. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985). This means that the plaintiffs must establish both "but for" and proximate causation. *See Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268, 112 S. Ct. 1311, 117 L. Ed. 2d 532 (1992).

Proximate causation, the Supreme Court explained in *Holmes* refers to "the judicial tools used to limit a person's responsibility for the consequences of that person's acts." *Id.* The concept of proximate causation thus reflects "'ideas of what justice demands, or of what is administratively possible and convenient.'" *Holmes*, 503 U.S. at 268 (citation omitted).

In general, a direct relationship must be shown between the injury asserted by the plaintiff and the injurious conduct alleged. *Stationary Eng'rs Local 39 Health and Welfare Trust Fund v. Philip Morris, Inc.*, Lexis 8302, pp. 10-11 (N.D.

LAW OFFICES OF
HALVERSON & APPLEGATE, P.S.
311 North Fourth Street — P. O. Box 22730
YAKIMA, WASHINGTON 98907-2715
Phone 575-6611

Cal. 1998). "Thus, a plaintiff who complained of harm flowing from the misfortunes visited upon a third person by the defendant's acts was generally said to stand too remote a distance to recover." *Holmes* at 268-69. In addition, speculative injuries do not serve to confer standing under RICO unless they become concrete and actual. *Imagineering, Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303, 1311 (9th Cir. 1992), cert. denied, 123 L. Ed. 2d 266, 113 S.Ct. 1644 (1993).

The law generally limits recovery under RICO claims to directly and concretely injured plaintiffs for several reasons:

> First, the less direct an injury is, the more difficult it becomes to ascertain the amount of the plaintiff's damages attributable to the violation, as distinct from other, independent factors . . . Second, . . recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries. . . . And, finally, the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely.

Holmes, 503 U.S. at 269-270.

"'A defendant who violates Section 1962 is not liable for treble damages to everyone he might have injured . . .'" *Sedima*, 473 U.S. at 196-97 (citation omitted). Indeed, RICO was intended to combat organized crime, not to provide a federal cause of action and treble damages to every tort plaintiff. *Oscar v. University Students Co-Operative Ass'n.*, 965 F.2d 783, 786 (9th Cir. 1992).

LAW OFFICES OF
HALVERSON & APPLEGATE, P.S.
311 North Fourth Street — P. O. Box 22730
YAKIMA, WASHINGTON 98907-2715
Phone 575-6611

The complaint itself makes abundantly clear the plaintiffs have not been directly injured by "the conduct constituting the violation" of RICO. *Sedima*, 473 U.S. at 496. The business operations of Zirkle and Matson "require unskilled, low-wage laborers" for manual labor tasks. (Compl. ¶ 21); jobs in which the plaintiffs have been employed. The Complaint alleges that Zirkle and Matson have been able to exploit unauthorized aliens, by paying them lower wages, and defraud the INS. The plaintiffs claim this conduct injured them by "depressing" the wages they agreed to and for which they were willing to work. (Compl. ¶¶ 46, 56).

However, there is no allegation the plaintiffs were paid less than other similarly situated workers in other similarly situated agricultural facilities, or that they were paid less than they would have been paid at some other job in any industry requiring their level of skill in the Yakima Valley. The plaintiffs do not stand in a position any different than any other "unskilled, low-wage laborer" employed in Central Washington during the relevant time period.

It would be difficult to ascertain the amount of the plaintiffs' damages attributable to the alleged RICO violation, as distinct from other independent factors such as the nature of the work, the market value of the employees' skills, the wage that the free market has determined, and whether additional labor costs could be passed on to the consumer. Thus, the first reason articulated by the Supreme Court in *Holmes*, at 503 U.S. 269-270, for denying standing based on indirect injuries, applies to this case.

LAW OFFICES OF
HALVERSON & APPLEGATE, P.S.
311 NORTH FOURTH STREET — P. O. BOX 22730
YAKIMA, WASHINGTON 98907-2715
PHONE 575-6611

Plaintiffs claim that they, and the class they represent, are legally authorized to work in the U.S., and that they were willing to work for the wage rate paid by Zirkle and Matson. The Complaint fails to explain how, or why, Zirkle or Matson would have been motivated to offer a wage rate higher than that which authorized workers were willing to accept. And the Complaint fails to allege that plaintiffs could earn a higher wage with their level of skills at any other fruit warehouse, fast food restaurant, supermarket, department store, or any other occupation in which they may be inclined to work. The court should conclude the plaintiffs have failed to adequately allege any causal connection, direct or otherwise, between the alleged RICO violations and their claimed injury.

Moreover, there is no need to grapple with these problems of ascertaining speculative damages because the INS can be counted on to vindicate the law. Thus, the third reason articulated in the *Holmes* decision, at 503 U.S. 269-270, for refusing to recognize RICO standing based on indirect injuries applies equally to this case.

Plaintiffs also rely on an unsubstantiated assumption/generalization that unauthorized aliens are willing to accept wages that are "significantly lower" than wages would be in a labor market comprised solely of legally authorized workers. This is too tenuous a basis for asserting proximate causation, considered in light of the legal right of unauthorized aliens to engage in union organizing and concerted activity for the purpose of the betterment of wages and working conditions. *Sure-Tan, Inc. v. NLRB,* 467 U.S. 883 (1984). See also: *NLRB v. Kolkka,* 170 F.3d 937

LAW OFFICES OF
HALVERSON & APPLEGATE, P.S.
311 North Fourth Street — P. O. Box 22730
YAKIMA, WASHINGTON 98907-2715
Phone 575-6611

(9th Cir.) 1999; *Contreras v. Corinthian Vigor Insurance Brokerage*, 25 F. Supp. 2d 1053 (N.D.CA 1998).

The defect in plaintiffs' claim is much like that in *Imagineering, Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303 (9th Cir. 1992), cert. denied, 123 L. Ed. 2d 266, 113 S.Ct. 1644 (1993). In *Imagineering*, a plaintiff class of minority and woman owned business enterprises ("MWBEs") asserted a civil RICO claim against Kiewit, a prime contractor, alleging that Kiewit engaged in a "conduit scheme" to evade federal and state regulations requiring prime contractors to employ MWBEs on public works contracts. The plaintiffs contended that they were the MWBE subcontractor for the complying contractor with the lowest bid on at least one project improperly awarded to Kiewit. Alleging that they "lost the profits that they would have earned on these projects but for Kiewit's unlawful use of the conduit scheme" the plaintiffs sought relief under RICO, based on the predicate crime of mail fraud. *Id* at 1306.

Invoking the Supreme Court's determination that RICO requires a "direct relation" between the predicate crime and the asserted injury, *see Holmes*, 503 U.S. at 268, the Ninth Circuit Court of Appeals affirmed the dismissal of the plaintiffs' complaint for failure to state a claim. *See Imagineering* at 1312. Although the Court assumed for purposes of argument that the plaintiffs could establish "but for" causation, it found it much more difficult to "take the next step" and find a direct relationship between Kiewit's conduit scheme and the plaintiffs' failure to earn certain profits on the subcontracts. *Id.* The Court found that "direct harm," if there

LAW OFFICES OF
HALVERSON & APPLEGATE, P.S.
311 North Fourth Street — P. O. Box 22730
YAKIMA, WASHINGTON 98907-2715
Phone 575-6611

was any "direct harm," ran not to the plaintiffs, but to the prime contractors who lost out on the projects to Kiewit. *Id.* Since it was the "intervening inability" of the prime contractors to secure the contracts that was the direct cause of the plaintiffs' injuries, under *Holmes* the MWBE plaintiffs lacked the direct relationship necessary to show that Kiewit proximately caused their injuries. *Id.*

Plaintiffs' claim here is just as indirect. Plaintiffs have accused Zirkle and Matson of hiring undocumented alien workers in violation of the federal immigration laws. Like *Imagineering* the plaintiffs assert that defendants (i) defied their obligations under federal law in order to enhance their ability to run profitable businesses, (ii) negotiated at arms length, and (iii) thereby improved their standing in a competitive marketplace. The "injury" alleged by plaintiffs, like the "injury" suffered by the *Imagineering* plaintiffs, was necessarily contingent on numerous intervening factors, including: (1) Zirkle's and Matson's ability to find undocumented alien workers who would allegedly accept less than the market wage, (2) their ability to avoid detection for violating the immigration laws, (3) their ability to retain sufficient workers, including the plaintiffs, willing to work at allegedly "depressed wages", (4) market factors dictating the wage rate that was fair and equitable for unskilled manual labor, and (5) perhaps more significant, independent market factors dictating the profitability of growing and selling fresh fruit. This inescapable myriad of contingencies that separates Zirkle's and Matson's alleged hiring of undocumented workers from an employee's entirely voluntary decision regarding whom to work for and what wage to accept, powerfully

LAW OFFICES OF
HALVERSON & APPLEGATE, P.S.
311 North Fourth Street — P. O. Box 22730
YAKIMA, WASHINGTON 98907-2715
Phone 575-6611

demonstrates that there is no "direct relation" between the alleged predicate acts and the injury alleged.

It was arms-length negotiating that produced the wage rate for which plaintiffs and other legally authorized workers were employed by Zirkle and Matson. The plaintiffs' purported injury is simply too indirect and attenuated to proceed. Because the racketeering predicates alleged in the complaint could not have directly caused the injury alleged by plaintiffs, the Complaint should be dismissed for failure to state a claim. Moreover, because this deficiency cannot be cured by amendment of the complaint, plaintiffs should not be granted leave to amend their complaint. *Bonnano v. Thomas*, 309 F. 2d 320, 322 (9th Cir. 1962). To allow the plaintiffs to further speculate on their injuries would simply condone the type of speculation RICO disdains. *Ocsar v. University Students Co-Operative Ass'n.*, 965 F. 2d 783, 787 (9th Cir. 1992).

3. Plaintiffs' Claims Are Prohibited By The Comprehensive Enforcement Scheme Within The Immigration Reform and Control Act.

In addition to prohibiting the employment of persons known to be unauthorized aliens, the IRCA also requires that employees provide, and employers document inspection of, papers evidencing the employee's eligibility for employment in the U.S. *See*: 8 U.S.C. § 1324a(b). Regarding the employment of aliens and an employer's obligation to attempt to verify workers' employment eligibility, the IRCA creates a comprehensive scheme for enforcement by the federal government. Said enforcement scheme requires the provision of notice to employers (8 U.S.C. § 1324a(e)(3)), an opportunity for a hearing before the imposition of any penalty (*Id.*), administrative

LAW OFFICES OF
HALVERSON & APPLEGATE, P.S.
311 North Fourth Street — P. O. Box 22730
YAKIMA, WASHINGTON 98907-2715
Phone 575-6611

appellate review, and judicial review by a federal Court of Appeals. 8 U.S.C. § 1324a(e)(7) & (8).

While prohibiting the knowing employment of unauthorized aliens and requiring employers to engage in inspection of employment eligibility documents, the IRCA also provided for two collateral (but equally important) principles. The IRCA prohibits discrimination based on national origin or citizenship status (8 U.S.C. § 1324b), and acknowledges that employers cannot be expected to become experts at recognizing false or forged employment eligibility documents.[9] Consequently, the IRCA directs that:

(1) employers are **only** to determine that employment eligibility documents reasonably appear on their face to be genuine (8 U.S.C. § 1324a(b)(1)(A)), and

(2) prohibits employers from requesting additional or different documents once an employee has presented any facially valid document. 8 U.S.C. § 1324b(a)(6).

These provisions were specifically intended to preclude the need for employers to be "unduly concerned" about the validity of documents employees present to establish eligibility for employment. See: 1986 U.S. Code Cong. And Adm. News, page 5666. Thus, the IRCA carefully prescribes what employers and their representatives can, and cannot do regarding the employment authorization status of employees and prospective employees.

---

9. In enacting the IRCA, the House Judiciary Committee explicitly stated: "It is not expected that employers ascertain the legitimacy of documents presented during the verification process." Further, the Committee quoted with approval the following statement from the INS: "We will direct such employers not to make critical judgments of the authenticity of documents...." 1986 U.S. Code Cong. And Adm. News, page 5665.

LAW OFFICES OF
HALVERSON & APPLEGATE, P.S.
311 North Fourth Street — P. O. Box 22730
YAKIMA, WASHINGTON 98907-2715
Phone 575-6611

Plaintiffs' lawsuit is a wrongful attempt to create a private cause of action based on Zirkle's and Matson's efforts to comply with IRCA's complicated statutory scheme. Previous efforts to assert similar private causes of action for employers' alleged violation of immigration laws have been uniformly rejected. *Nieto-Santos v. Fletcher Farms*, 743 F.2d 638 (9th Cir. 1984)(no private right of action under the Immigration and Nationality Act); *Lopez v. Arrowhead Ranches*, 523 F.2d 924 (9th Cir. 1975)(same); *U.S. v. Richard Dattner Architects*, 972 F.Supp.738 (S.D.N.Y. 1997).

The plaintiffs' allegations directly challenge Zirkle's and Matson's efforts to verify their employees' employment eligibility under the IRCA. Allowing plaintiffs to proceed with their claims would upset the balance Congress intended to achieve between requiring employer efforts to verify employees' work eligibility, while precluding any need for cautious employers to discriminate against prospective employees whose appearance or language skills indicate possibly foreign national origin. The intent of Congress to protect this balance is clearly demonstrated, in part, by the explicit restriction imposed on use of the I-9 employment eligibility verification forms, or of any information contained in or appended to such forms. *See*: 8 U.S.C. § 1324a(b)(5).

The I-9 Forms retained by Zirkle and Matson cannot be used for any purpose other than the federal government's enforcement of the Immigration and Nationality Act, the IRCA or specified criminal statutes **that do not include RICO.** *Id.* Accordingly, the plaintiffs' suggestion that they intend to conduct discovery of I-9

LAW OFFICES OF
HALVERSON & APPLEGATE, P.S.
311 North Fourth Street — P. O. Box 22730
YAKIMA, WASHINGTON 98907-2715
Phone 575-6611

Forms, or information contained in I-9 Forms[10] would violate federal law, and cannot be allowed.

This court should soundly reject the plaintiffs' basic presumption that they may, independent of the INS, investigate the work authorization status of Zirkle's and Matson's employees. The IRCA creates carefully defined employer obligations **and employee rights and protections**, and a comprehensive scheme for enforcement by agencies of the federal government. Consequently, the attempt by plaintiffs to independently enforce the immigration laws through RICO should be deemed preempted by the IRCA. *Cf. Danielson v. Burnside-Ott Aviation Training Center, Inc.*, 941 F.2d 1220, 1228 (D.C. Cir. 1991)(detailed enforcement scheme of Service Contract Act preempts area of prevailing wage law, to exclude RICO claims); citing *Miscellaneous Service Workers v. Philco-Ford Corp.*, 661 F.2d 776 (9th Cir. 1981); see also: *McDonough v. Genecorp, Inc.*, 750 F. Supp. 368 (S.D. Ill. 1990)(National Labor Relations Act preempts RICO mail and/or wire fraud claims based on conduct arguably protected or prohibited by NLRA).

Plaintiffs' Complaint should be dismissed, with prejudice, to avoid interference with the dual purposes of the IRCA, and to uphold the explicit protection Congress afforded to the information that employees are required by the IRCA to provide to their employers.

---

10. Plaintiffs explicitly propose to attempt conducting such discovery in their Complaint at ¶ 38, and in Plaintiffs' RICO Case Statement at ¶ (u)(2).

LAW OFFICES OF
HALVERSON & APPLEGATE, P.S.
311 North Fourth Street — P. O. Box 22730
YAKIMA, WASHINGTON 98907-2715
Phone 575-6611

factors usually warrant a courts decision to decline exercising supplemental jurisdiction over remaining state law claims).

CONCLUSION

For the reasons set forth above, Zirkle Fruit Company's and Matson Fruit Company's motion to dismiss the complaint should be granted.

Respectfully submitted this 31st day of May, 2000.

RYAN M. EDGLEY WSBA#16171
KIRK A. EHLIS WSBA#22908
Halverson & Applegate, P.S.
Attorneys for Defendants Matson Fruit Company and Zirkle Fruit Company

WALTER G. MEYER (WSBA#1099)
Meyer, Fluegge & Tenney, P.S.
Co-counsel for Defendant Zirkle Fruit Company

LAW OFFICES OF
HALVERSON & APPLEGATE, P.S.
311 North Fourth Street — P. O. Box 22730
YAKIMA, WASHINGTON 98907-2715
Phone 575-6611