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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. 00-3024-FVS PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS AND FOR A STAY OF DISCOVERY (CLASS ACTION; DEMAND FOR JURY TRIAL)

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Plaintiffs, Olivia Mendoza and Juana Mendiola, individually and on behalf of all others similarly situated, (hereafter "plaintiffs"), submit the following brief in opposition to defendants' Motion to Dismiss and For A Stay of Discovery ("the Motion").[1]

I. INTRODUCTION

Plaintiffs have brought this proposed class action in order to compensate the victims of defendants' long-standing practice of employing work forces of illegal immigrant laborers at their apple growing and fruit packing facilities. These victims, employees of Matson Fruit Company ("Matson") and Zirkle Fruit Co. ("Zirkle") who are legally authorized to work in the U.S., are paid depressed wage rates because the two companies knowingly employ large numbers of illegal immigrants in order to bring down wages for all employees. The Complaint alleges this practice ("the illegal immigrant hiring scheme") violates the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, which was amended in 1996 to prohibit precisely this type of activity.[2] The Complaint further alleges a civil conspiracy claim under Washington common law in that Matson and Zirkle have conspired with defendant Selective Employment Agency, Inc. (Selective) to violate the Immigration and Nationality Act, and this conspiracy has caused the plaintiffs to suffer damages in the form of depressed wages.

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[1] All three defendants have joined in the Motion. However, plaintiffs' RICO claims are brought only against Matson and Zirkle, and not against Selective Employment Agency.

[2] On April 24, 1996, as part of Pub. L. 104-132 § 433, Congress amended RICO to make 8 U.S.C. § 1324(a)(3)(A) and related violations predicate offenses.

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The defendants make several arguments in support of their contention that the complaint is worthy of dismissal pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a cause of action. However, as none of these arguments is supported by any applicable authority, defendants' motion should be denied in its entirety.

First, the defendants claim that plaintiffs fail to adequately allege any predicate act under RICO. In support of this argument, the defendants argue that it is not enough for plaintiffs to allege that the defendants have knowingly employed and harbored more than the requisite number of illegal aliens to constitute the predicate act as set out in 8 U.S.C. § 1324(a)(3)(A). Rather, say the defendants, plaintiffs are required to name each and every unauthorized employee, and inform the Court as to where, when and how each alien entered the country. The defendants simply ignore that Rule 8 of the Fed. R. Civ. P. calls for notice pleading, and not the prolix they demand. Because courts are clear that Rule 8 applies to non-fraud RICO predicate acts, the defendants' argument cannot prevail. As for the allegations of mail fraud (in mailing false I-9 forms to the INS), the defendants are correct that the heightened standards of Rule 9 apply. Nonetheless, the Ninth Circuit has squarely held that allegations similar to those made by the plaintiffs are sufficient to satisfy Rule 9 where, as here, the detailed evidence of the fraud is in the exclusive possession and control of the corporate defendants.[3]

Second, the defendants claim that the plaintiffs lack standing to sue under RICO because they have failed to allege a "direct" injury as required by the United States Supreme Court in *Holmes*.[4] As the defendants ignore, however, the rule of *Holmes* only

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[3] As the plaintiffs also demonstrate, the 1-9 forms themselves are fully discoverable.

[4] *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992).

applies where the plaintiffs are *indirect* victims of a harm directly inflicted upon other parties. In such circumstances, where the plaintiffs' harm is wholly derivative of harm inflicted on others, the plaintiffs are said to be too "remote," and their harm too "indirect." In stark contrast, the plaintiffs here are the ***sole*** and ***direct*** victims of the defendants' successful effort to drive down wages through the illegal hiring scheme. Accordingly, *Holmes* cannot bar plaintiffs' suit here.

Third, the defendants assert that the plaintiffs' RICO claims are somehow preempted by the "comprehensive enforcement scheme" established by the Immigration Reform and Control Act ("IRCA.") This argument ignores the fact that, in making violations of immigration law RICO predicates, Congress explicitly authorized private civil actions for monetary damages such as that brought by plaintiffs here. Moreover, there is simply *no conflict* between the IRCA (which imposes certain requirements on employers) and plaintiffs' suit under RICO (which seeks to compensate the victims of the defendants' violations of immigration law).

Fourth, while the defendants concede that the plaintiffs have stated a claim for civil conspiracy under Washington State common law, they argue that the claim is preempted by the IRCA. However, the express preemption clause of the IRCA (which defines the full preemptive scope of the IRCA) preempts *only* criminal and civil laws that impose "sanctions," and says nothing about common law actions for *damages*. On its face, then, the IRCA does not preempt the plaintiffs' claim, and the defendants' motion should be denied.

Finally, in an effort to stall plaintiffs' progress in this case, the defendants have filed a separate motion to stay discovery. Incredibly, while courts require a strong showing of burden and/or extreme likelihood of success on the merits of a dispositive motion, the defendants proffer *no showing* whatsoever. Instead, defendants suggest that "privacy concerns" with respect to some information the plaintiffs may seek to discover justifies a *total* stay of discovery. Plaintiffs respectfully submit that any real privacy concerns can be addressed through a protective order, and that defendants have provided no basis for the relief they seek.

II. THE DEFENDANTS CANNOT MEET THEIR HEAVY BURDEN UNDER RULE 12(B)(6)

In moving to dismiss for failure to state a claim under Rule 12(b)(6), defendants bear a heavy burden. Such a motion can only be granted when the defendants establish "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Terracom v. Valley Nat'l Bank*, 49 F.3d 555, 558 (9th Cir. 1995). "It is axiomatic that 'the motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted.'" *Gilligan v. Jamco Development Corp.*, 108 F.3d 246, 249 (9th Cir. 1997). *See also* Wright & Miller, FEDERAL PRACTICE & PROCEDURE, Civil 2d § 1357 (1990). ("The court should be especially reluctant to dismiss on the basis of the pleadings when the asserted theory of liability is novel or extreme, since it is important that new legal theories be explored and assayed in the light of actual facts rather than a pleader's suppositions.") This is such a case. There is no reported decision concerning the employment of illegal immigrants as a RICO predicate act by any court in the Ninth Circuit, and defendants have provided no cognizable basis for preventing the plaintiffs from pressing their claims.

III. THE COMPLAINT SUFFICIENTLY ALLEGES THE NECESSARY ELEMENTS OF RICO PREDICATE ACTS

According to the defendants, the Complaint should be dismissed because the plaintiffs do not allege any predicate acts under RICO. In fact, the Complaint properly alleges all the elements of two different categories of predicate offenses against both Zirkle and Matson.

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A. Plaintiffs Allege Violations Of § 274 Of The Immigration and Nationality Act (8 U.S.C. § 1324(a)(3)(A))

In 1996, Congress made § 274 of the Immigration and Nationality Act (8 U.S.C. § 1324(a)(3)(A)) a RICO predicate offense.[5] Section 274 imposes criminal sanctions against :

> Any person who, during any 12-month period, knowingly hires for employment at least 10 individuals with actual knowledge that the individuals are aliens described in subparagraph (B).... [8 U.S.C. § 1324(a)(3)(A)]

In turn, subparagraph B states that "aliens" means one who:

> (1) is an unauthorized alien . . . and
>
> (2) has been brought into the United States in violation of [8 U.S.C. § 1324(a)].

8 U.S.C. § 1324(a)(3)(B). Finally, 8 U.S.C. § 1324(a) provides specific offenses where an unauthorized alien has either been (1) brought into the United States; (2) transported or moved in interstate commerce; (3) concealed, harbored or shielded from detection; or (4) encouraged or induced to enter the United States illegally.

Contrary to the defendants' argument, plaintiffs have plainly alleged that the defendants violated § 274. Indeed, the Complaint alleges Matson and Zirkle have been engaged in an "illegal immigrant hiring scheme" of knowingly employing illegal immigrant workers in each year since 1996. ¶¶ 20-32.[6] Specifically, plaintiffs allege Matson hired certain of 493 workers having false/fraudulent identification documents, "with actual knowledge that each person was an illegal immigrant (alien) who was not eligible to be employed in the U.S., and Matson also knew that each person was either

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[5] This section is codified at 8 U.S.C. § 1324(a)(3)(A) and is made a RICO predicate by 18 U.S.C. § 1961(1)(F).

[6] References preceded by "¶" are to plaintiffs' Complaint.

smuggled into the U.S. and/or harbored once he or she was in the U.S." ¶ 29. *See United States v. Kim*, 193 F.3d 567(2d Cir. 1999) (knowingly hiring unauthorized alien constitutes "harboring.") Plaintiffs further allege that Matson hired at least 50 of these 493 employees in each year since 1996, that the practice is ongoing, and that the company maintained a workforce "comprised of approximately 50% illegal immigrants" during the last three years. ¶ 29.

The INS has made similar findings against Zirkle. *Id.* The Complaint specifically alleges that Zirkle "has employed at least 50 illegal immigrants, with actual knowledge that each one was illegal and ineligible for employment, and with knowledge that each one was either smuggled into the U.S. or harbored once in the U.S." *Id.* at ¶ 32. These facts establish repeated violations of § 274 of the Immigration and Nationality Act, and RICO, by Matson and Zirkle. For purposes of this motion, the Court must take them as true. "On a motion to dismiss we are required to read the complaint charitably, to take all well-pleaded facts as true, and to assume that all general allegations embrace whatever specific facts might be necessary to support them." *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 521 (9th Cir. 1994), *cert. denied*, 515 U.S. 1173 (1995).

1. Plaintiffs Need Not Allege The Facts Demanded By Defendants

Disregarding the fundamental tenets of notice pleading, defendants move to dismiss the plaintiffs' § 274-based RICO claim under Fed. R. Civ. P. 8.[7] Contrary to

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[7] Although this circuit has not squarely addressed the issue, courts that have are in agreement that RICO cases are subject to Rule 8 pleading standards unless fraud is alleged, which invokes Fed. R. Civ. P. 9(b) as to those specific predicate acts. "[A]llegations of non-fraud based predicate acts [under RICO] need only . . . contain a 'short and plain statement' showing the pleader is entitled to relief." *Colony At*

the defendants' demand for reams of information about each and every illegal employee they have hired:

> Our system of notice pleading 'does not require a claimant to set out in detail the facts upon which he bases his claim.' Instead, all the Rules require is a short and plain statement of the claim, that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests . . . . Thus, these liberal pleading rules only require that the averments of the complaint sufficiently establish a basis for judgment against the defendant." [Citations omitted.]

Yamaguchi v. United States Dep't of the Air Force, 109 F.3d 1475, 1481 (9th Cir. 1997). Or, as another federal circuit court has cogently enunciated the philosophy of notice pleading, "[A] complaint is not required to allege all, or any, of the facts logically entailed by the claim . . . Litigants are entitled to discovery before being put to their proof, and treating the allegations of the complaint as a statement of the party's proof leads to windy complaints and defeats the function of Rule 8." *Bennett v. Schmidt*, 153 F.3d 516, 518-519 (7th Cir. 1998) (holding "I was turned down for a job because of my race," sufficient to state claim for discrimination).[8]

Moreover, courts have no authority to impose heightened pleading requirements beyond what Rule 8 requires. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) ("The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.")

Holbrook v. Strata G.C., Inc., 928 F. Supp. 1224, 1234 (E.D.N.Y. 1996). *See also McLaughlin v. Anderson*, 962 F.2d 187, 194 (2d Cir. 1992) (overruling a district court's holding that Rule 9(b) specificity was required for non-fraud predicates).

[8] The rule requires, in relevant part, "a short and plain statement of the claim showing that the pleader is entitled to relief . . ." Fed. R. Civ. P. 8(a)(1).

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Thus, to withstand the motion, the bulk of the Complaint must simply meet the Rule 8 notice standards.[9] RICO complaints are no exception to the Rule.

2. Defendants' Argument is Inconsistent with Rule 8

The defendants argue that the Complaint inadequately pleads violations of § 274 of the Immigration and Nationality Act. Defs. Br. at 7-11. Specifically, the defendants contend that the Complaint has not given "fair notice of the alleged facts on which plaintiffs' claims are based" because "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." *Id.* at 8, 10. The defendants cite no authority in support of their argument that Rule 8 requires that all, or any, of these facts be pled.[10]

In fact, as outlined above, the Complaint more than adequately puts the defendants on notice as to the substance and nature of plaintiffs' claim. Accordingly, plaintiffs need not plead the details the defendants seek surrounding the smuggling and/or harboring of the hundreds of illegal immigrants defendants are alleged to have employed since 1996. Were the plaintiffs to draft such an incredibly prolix complaint,

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[9] The Complaint's allegations of mail fraud (¶¶ 33-39), are subject to the heightened pleading requirements of Fed. R. Civ. P. 9(b), as will be examined below.

[10] In fact the position the defendants advocate, that plaintiffs must plead all of the facts underlying the complicated statutory predicate acts incorporated within RICO, is so extreme that only one federal circuit has ever had to address it. In *Rose v. Bartlett*, 871 F.2d 331, 355 (3d Cir. 1989) the court held, "It is the function of discovery to fill in the details, and of trial to establish fully each element of the cause of action."

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they would surely violate the express dictate of Rule 8, which requires "a short and concise statement of the facts."

Moreover, the plaintiffs have pleaded virtually all of the relevant facts that *any* plaintiff could possess about a clandestine illegal immigrant hiring scheme prior to discovery. Indeed, at this point, much of the relevant evidence is in the exclusive possession of defendants. Plaintiffs' counsel have conducted an investigation of the facts surrounding the illegal immigrant hiring scheme, particularly a Freedom of Information Act request on the Immigration and Naturalization Service (INS) for the agency's files detailing its law enforcement actions directed at Matson and Zirkle.[11] Therefore, in addition to violating the letter and spirit of Rule 8, the depth of fact pleading sought by the defendants would effectively preclude *all* plaintiffs from ever being able to pursue their claims in court. *See, e.g.*, *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993) (where information is uniquely within a defendant's possession, a plaintiff will "not be expected to have personal knowledge of the relevant facts.") As such an outcome is patently inconsistent with Rule 8, it is not surprising that the defendants fail to cite any authority to support their position.[12]

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[11] The INS denied counsels' initial Request, from which an appeal was successfully undertaken, resulting in the production of considerable documentation of the facts of the INS investigation of defendants, although not the depth of detail the motion argues must be pled.

[12] Nor can defendants take any comfort from *Bach v. Mason*, 190 F.R.D. 567 (D. Idaho 1999) (Defs. Br. at 8). The complaint in *Bach* alleged, in relevant part, "All of said defendants, and each of them . . . having committed . . . multi-layers of illegal and corrupt activities and pursuits . . ." without specifying any specific predicate acts committed by any specific persons. *Id.* at 572. The Court found such allegations

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B. Plaintiffs Have Adequately Alleged Mail Fraud

1. Mailing Knowingly False I-9 Forms Constitutes a Scheme to Defraud

"To allege a violation of the mail fraud statute, it is necessary to show that (1) the defendants formed a scheme or artifice to defraud; (2) the defendants used . . . the United States mails in furtherance of the scheme; and (3) the defendants did so with the specific intent to deceive or defraud." *Rothman v. Vedder Park Management*, 912 F.2d 315, 316 (9th Cir. 1990). Citing *Rothman*, the defendants contend that the mailing of fraudulent I-9 forms to the INS "could not, as a matter of law, be considered 'reasonably calculated to deceive persons of ordinary prudence and comprehension' at the INS." Defs. Br. at 14-15. However, *Rothman* does not support this statement. In *Rothman*, the court held that a letter accompanying a lease and alleged to be inconsistent with a provision in the lease could not be deemed to be fraudulent where the inconsistency was subject to interpretation, and thus not necessarily inconsistent with the lease. *Id.* at 317. In contrast, the Complaint here leaves no room for interpretation, as it alleges that the I-9 forms are falsely attested as accurate by Matson and Zirkle. ¶ 35. Thus, *Rothman* does not support the position the defendants take, and no other authority is cited.

However, contrary to the defendants' position, the Second Circuit has held that the submission of a false I-9 form to the INS constitutes an "employment scheme" supporting a criminal conviction. *See Kim*, 193 F.3d at 575. *Kim* thus flatly rejects the defendants' argument that the submission of false I-9 forms is not an actionable

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"failed to state a [RICO] claim." *Id.* *Bach* has no application to the instant case, which is pled with considerable detail, specifying which defendant committed which predicate acts in as much specificity as could reasonably be expected of any plaintiff.

scheme. Defs. Br. at 14. Finally, the argument that the INS cannot be defrauded is refuted by mail fraud RICO cases involving other government agencies. For example, the Ninth Circuit has repeatedly held that the mailing of fraudulent tax returns to the IRS constitutes mail fraud, supporting a RICO conviction. *United States v. Busher*, 817 F.2d 1409, 1412 (9th Cir. 1987). If the defendants' reasoning had merit, such a conviction could not occur because the IRS, as the nation's tax enforcement agency, is the entity responsible for determining whether tax returns are valid, and would therefore be immunized from being defrauded. Therefore, plaintiffs have alleged facts supporting the mail fraud claim, and the motion must be denied.

2. Plaintiffs Meet The Requirements Of Rule 9

Fed. R. Civ. P. 9(b) provides that, "In all averments of fraud . . . the circumstances constituting fraud . . . shall be stated with particularity." Under Ninth Circuit precedent, this Rule requires plaintiffs to plead "the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation."[13] *Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th Cir. 1986) (general allegations of mail and wire fraud dismissed for failure to comply with Rule 9 where they "failed to mention any use of the mails or telephone.") *Id.* However, the Ninth Circuit also holds that Rule 9 "may be relaxed as to matters peculiarly within the opposing party's knowledge . . . Such 'an exception exists where, as in cases of corporate fraud, the plaintiffs cannot be expected to have

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[13] *Accord Fecht v. Price Co.*, 70 F.3d 1078, 1082 (9th Cir. 1995), *cert. denied*, 517 U.S. 1136 (1996); *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985) ("Rule 9(b) ensures that allegations of fraud are specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong").

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personal knowledge of the facts constituting the wrongdoing.'" *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987) (dismissal of RICO claim reversed where plaintiff lacked identity of corporate insiders who made fraudulent statements prior to discovery but other details were supplied); *accord Wegbreit v. Marley Orchards Corp.*, 793 F. Supp. 957, 961 (E.D. Wash. 1991) (allegation that securities offering "misrepresented the reasonableness of the financial forecasts which were included in the offering," without further detail, satisfied Rule 9(b)'s time, content and place requirements without any reference to specific acts or roles of corporate insiders).

Further, in complex commercial fraud cases involving detailed statutory requirements and a sophisticated alleged deception by a defendant, the defendant will not be permitted to hide behind Rule 9(b). A defendant cannot bury the fraud in hundreds or thousands of individual transactions, or disperse authority for the individual steps in a fraudulent scheme, and then charge that the plaintiff has failed to particularize the specific fraudulent transactions or culpable players. "The sufficiency of the pleading ... depends 'upon the nature of the case, the complexity or simplicity of the transaction or occurrence, the relationship of the parties and the determination of how much circumstantial detail is necessary to give notice to the adverse party <u>and enable him to prepare a responsive pleading</u>.'" *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 918 F. Supp. 1338, 1345 (E.D. Mo. 1996) (emphasis added).

Thus, in certain circumstances, the heightened standards of Rule 9(b) will be relaxed in evaluating allegations of fraud. As the Court recognized in *In re Hanford Nuclear Reservation Litig.*, 780 F. Supp. 1551, 1577 (E.D. Wash. 1991), "[w]hen the issues are complicated or the transactions cover a long period of time, courts tend to require less of the pleader." Further, where information is uniquely within a defendant's possession, a plaintiff will "not be expected to have personal knowledge of

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the relevant facts." *Neubronner v. Milken*, 6 F.3d 666, 672 (9th Cir. 1993). In these circumstances, a complaint must only set out facts from which a reasonable inference of fraud may be drawn, and if it does so it may plead matters uniquely within the defendant's knowledge merely on "information and belief." *Id.*[14]

The Complaint alleges the defendants have engaged in a scheme to mail fraudulent I-9 forms in order to effectuate the illegal immigrant hiring scheme ("The I-9 Mail Fraud Scheme"). ¶¶ 33-39. Plaintiffs allege that the defendants complete or cause Selective to complete I-9 forms which they know falsely represent that particular employees are authorized to be employed. (In particular, plaintiffs allege knowingly false representations in the defendants' attestations that particular job applicants are eligible to work in the U.S. ¶ 35.) Plaintiffs further allege that each mailing is undertaken "for the purpose of facilitating the hiring of an illegal immigrant." *Id.* at ¶ 37. Thus, the Complaint has satisfied place and content requirements of the Rule as set out in *Wool.*

The defendants ignore *Wool* and contend the Complaint "fail[s] entirely to allege the **time, place,** and **specific content** of the false representations, as well as the identities **of the parties** to these misrepresentations. [Plaintiffs'] excuse for this shortcoming is that they must conduct discovery." Defs. Br. at 13 (emphasis in original). In fact, the plaintiffs do plead the places and specific content of the misrepresentations but cannot plead the dates or identities of the persons at this time. Plaintiffs "excuse" for not doing so is in fact recognized by the Ninth Circuit, this Court and every other federal court as wholly legitimate. Plaintiffs simply cannot plead the time of each mailing as demanded by the defendants, because they do not yet have

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[14] *See also Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989); *Wool v. Tandem Computers Inc.*, 818 F.2d at 1439.

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access to the 1-9 forms. Similarly, the identities of the individuals who prepared and mailed the forms is not known, and need not be pled under the circumstances. Accordingly, the complaint satisfies the standards of Rule 9(b). *Wool v. Tandem Computers, Inc.*, 818 F.2d at 1439.

Requests to require the detail demanded by defendants have routinely been rejected by courts in similar circumstances. In *O'Keefe,* 918 F. Supp. 1338, the plaintiff alleged that McDonnell Douglas had systematically mischarged labor hours by directing employees to charge their hours worked on other projects to the government contracts at issue. The defendant argued that the complaint did not sufficiently detail the particulars of the fraud, such as specific employees involved, specific hours mischarged, and the associated costs. The court concluded that a description of the allegedly manipulated accounting system satisfied Rule 9(b), and that detailed allegations of subsequent mechanical steps were not required: "With regard to allegations of claiming improperly billed labor costs, the Complaint [adequately] <u>outlines</u> how [McDonnell Douglas] accomplished the mischarging through its automated time accounting system and details to which government contracts the costs were wrongly charged." *Id.* at 1345. (Emphasis added.)

The court in *United States ex rel. Roby v. Boeing Co.*, 184 F.R.D. 107 (S.D. Ohio 1998), also expressly rejected the argument pressed by defendants here. In *Roby*, Boeing asserted that Rule 9(b) required the relator to explain how each of 130 claims for payment (submitted on Forms DD-250) was false by enumerating in the complaint the particular way in which the helicopter gears to which they related diverged from specifications. The court ruled that the complaint adequately detailed the various defects in the gears, that these defects tainted every one of Boeing's claims for payment, and that Rule 9(b) did not demand a particularized analysis of each claim for payment:

> We disagree that Boeing is only able to speculate as to which of the hundreds of Speco-manufactured gears presently in service is alleged to be nonconforming since the Government's Amended Complaint provides at Paragraph 141 that Boeing acted with the knowledge of falsity or reckless disregard for the truth with respect to every CH-47(D) helicopter it delivered to the United States under Forms DD-250.[15]

In *Roby*, the overall description of the fraud negated the need for an exhaustive enumeration of each specific fraudulent act. The same is true here.

Similarly, in *United States ex rel. Thompson v. Columbia/HCA Healthcare Corp.*, 20 F. Supp. 2d 1017,1049 (S.D. Tex. 1998), <u>the court specifically rejected the contention that the relator had to enumerate each false claim, holding that a description of the "nature of the fraudulent scheme" satisfies Rule 9(b) and ordering that discovery may proceed</u>:

> The Court also finds that the complaint has been pled with sufficient particularity to satisfy Rule 9(b). The basic framework, procedures, the nature of the fraudulent scheme, and the financial arrangements and inducements among the parties that give rise to the Relator's belief that fraud has occurred have been alleged with specificity; Plaintiffs are entitled to discovery before being required to list every false claim, its dates, the individuals responsible, and why each patient was not eligible for Medicare.

In a case of this complexity, specifying each illegal hire would require pleading not only incidental evidentiary details, but massive amounts of such details. Courts have made clear that pleading such evidence is not required by Rule 9(b). The Complaint fully describes the scheme, but it does not enumerate each illegal act as defendants demand. These evidentiary details are not required:

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[15] *Id.* at 110.

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> We decline to require that a complaint must allege specific shipments to specific customers at specific times with a specific dollar amount of improperly recognized revenue; "we cannot make Rule 9(b) carry more weight than it was meant to bear" .... Because "we do not test evidence at this stage," the complaint should go forward.

Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997).

A final reason that the specification defendants demand is not required by Rule 9(b) is that defendants' are in exclusive possession of most of the information, and there is no reason that plaintiffs would have access to it. As one court ruled in analogous circumstances:

> An exception to Rule 9(b)'s particularity requirement exists where the relevant facts lie exclusively within the knowledge and control of the opposing party. In such a case, pleading upon information and belief is permissible, but plaintiff must still plead a statement of facts upon which his belief is based. The court concludes that this is an appropriate case in which to apply the exception to Rule 9(b). Defendants do not contend that plaintiff has equal access to the documents he seeks .... Rather, they argue that plaintiff should be expected to allege the relevant facts based on memory. Plaintiff logically responds that he has not worked at OCS since February of 1993 and that he can hardly be expected to remember the exact dates of grant applications or reports. [Citations omitted.]

Wilkins ex rel. United States v. Ohio, 885 F. Supp. 1055, 1061 (S.D. Ohio 1995). This Court too should reject defendants' attempt to erect such an insurmountable pleading hurdle.

3. Plaintiffs Can Discover Defendant's 1-9 Forms

At various points in their brief, the defendants argue that 8 U.S.C. § 1324a(b)(5) bars plaintiffs from conducting discovery of defendant's 1-9 forms Defs. Br. at 13, 24.[16]

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[16] An I-9 form is defined by the Act as "the form used for purposes of § 274(b)(1)(A) . . ." Historical and Statutory Notes, 8 U.S.C. § 1324a(d)(4). The Act further provides, "A form designated by the Attorney General under this subsection [the I-9] and any

While the defendants' argument, even if correct, would not warrant dismissal of any of the plaintiffs' claims, the defendants are simply wrong. Accordingly, the defendants having raised the issue, the Court can and should rule that the 1-9 forms are discoverable.

The defendants cite no authority supporting their conclusion that the statutory provision at issue has any effect on discovery of I-9 forms in civil cases. In fact, federal courts have consistently held that similar statutory provisions, enacted for privacy considerations, apply only to the government (not the private parties who submit the forms), and in any event, do not bar the application of Fed. R. Civ. P. 26(b)(1), permitting discovery "regarding any matter, not privileged, which is relevant to the subject matter involved." Most significantly, the Supreme Court has ruled that:

> prohibitions against disclosure [of census data pursuant to federal statute] run only against the officials receiving such information and do not purport to generally clothe census information with secrecy . . . Indeed, when congress has intended like reports not to be subject to compulsory process it has said so.

St. Regis Paper Co. v. United States, 368 U.S. 208, 217-218 (1961), *reh'g denied*, 368 U.S. 972 (1962) (holding subpoena on Census Bureau could proceed for production despite statute designating the materials "confidential" and "prohibited from us[e] . . . for other than statistical purposes; and from making any publication thereof . . .") One district court in the Ninth Circuit, relying upon *St. Regis Paper Co.*, reached a similar conclusion as to federal tax returns. *Young v. United States*, 149 F.R.D. 199, 201 (S.D. Cal. 1993) (permitting discovery of defendants' tax returns in civil case). *See also*

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information contained in or appended to such form may not be used for purposes other than enforcement of this chapter . . ." There are no reported cases interpreting this section.

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Richards v. Stephens, 118 F.R.D. 338, 339 (S.D.N.Y. 1988) (argument that 26 U.S.C. §§ 6103 and 7213, providing for confidentiality of tax returns, prohibit courts from ordering production of them under Fed. R. Civ. P. 26 "borders on the frivolous, as tax law only regulates tax officials from using returns, but has no effect on Court's power over taxpayer to produce them.")

Since the statutory provision of the Act at issue does not purport to exempt I-9 forms from compulsory process, and Congress gave no other indication of such an intent, this Court should find that the I-9 forms are discoverable. Any other interpretation is unsupported by any authority.

Moreover, even if the Court did preclude or limit discovery of the I-9 forms, that would not warrant dismissal of the case under Rule 12(b)(6) for failure to state a cause of action. The I-9 forms are simply evidence plaintiffs will seek to discover. The illegal immigrant hiring scheme can be proven through other evidence. Even the I-9 mail fraud scheme could be proven without the actual production of the I-9 forms. Plaintiffs could obtain an admission that the forms were in fact mailed or establish the mailing through another form of discovery. Thus, dismissal of either scheme for failure to state a cause of action under RICO is improper.[17]

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[17] Although the defendants point out that 8 U.S.C. § 1324a does not require that I-9 forms be mailed to the INS, Defs. Br. at 14, they do not contest that they *have mailed* I-9 forms to the INS. Indeed, plaintiffs' allegations to this effect – based upon their pre-filing investigation – are dispositive of the defendants' arguments in this motion to dismiss.

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IV. PLAINTIFFS HAVE STANDING TO SUE UNDER RICO

A. Because Plaintiffs Allege a "Direct" Injury, *Holmes* Supports Their Claim

The Supreme Court has applied common law "proximate causation" analysis to RICO claims. *See Holmes*, 503 U.S. at 268. Thus, in order to have standing to sue under RICO, the plaintiff must allege an injury proximately caused by a RICO violation; in *Holmes*, the Court held the plaintiff could not sue because it had not suffered a "direct" injury since its injuries were wholly derivative from injuries inflicted upon third parties. *Id.* at 276. In stark contrast, plaintiffs and the class here are the sole and direct victims of the defendants' illegal immigrant hiring scheme. Thus, *Holmes* fully supports plaintiffs' standing to sue under RICO.

Holmes concerned a suit brought by the SIPC, the not-for-profit entity obliged to satisfy securities purchasers' claims for account losses in the event their dealers could not satisfy the claims. *Id.* at 261-62. The SIPC sued defendant *Holmes* for securities fraud, which allegedly caused the collapse of two securities firms. *Id.* at 262. Because the firms' dealers were unable to cover the losses, the SIPC had to pay $13 million to the customers of the defrauded firms. *Id.* at 263. The SIPC sued *Holmes* for recoupment of this money. Thus, the SIPC's claim for damages arose because of the following attenuated sequence of events: (1) the defendant defrauded customers; (2) the customers thereupon lost their securities; (3) the customers' dealers could not cover the losses; therefore (4) the SIPC was contractually obligated to cover the losses. *Id.* Only then did the SIPC sue *Holmes* for alleged RICO violations. The Supreme Court concluded the SIPC was not "directly harmed" by the racketeering (securities fraud). It stated that the SIPC's harm was "purely contingent on the harm suffered by the broker-dealers . . . [t]he broker-dealers simply cannot pay their bills, and only that intervening insolvency connects the conspirators' acts to the losses suffered by the

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nonpurchasing customers and general creditors." *Id.* at 271. Thus, an intervening event, the insolvency of the securities brokership, broke the causal link between the plaintiffs injury and the defendant's conduct, so that the plaintiff was a "secondary victim." *Id.* By contrast, the causation alleged in the instant case is direct: Matson and Zirkle employ illegal immigrants for the purpose of depressing wage levels, and the scheme is successful. Plaintiffs' wages are depressed as a direct result of the scheme.

The crux of the Court's decision that the plaintiff in *Holmes* did not allege a direct injury was that it had not been the target of the RICO violations. These violations, securities fraud, were directed at investors in the securities which eventually became worthless. The plaintiff's "damages" arose from its obligation to cover the losses of the broker-dealers, who themselves were obligated to pay for their customers' securities losses (the actual targets of the RICO violations) by statute. Thus, the Court reasoned that the plaintiffs in *Holmes* were no different from other plaintiffs "who complained of harm flowing merely from the misfortunes visited upon a third person by the defendants' acts . . . ." *Id.* at 268.

In deciding *Holmes* the Court drew upon its antitrust law proximate causation analysis, particularly as enunciated in *Associated General Contractors, Inc. v. California State Council of Carpenters,* 459 U.S. 519 (1983). *Id.* at 270, n.15, 271.[18] That case held, in relevant part:

> [W]here the plaintiff sustains injury from the defendant's conduct to a third person, it is too remote, if the plaintiff sustains no other than a contract relation to such a third person, or is under contract obligation on his account, and the injury consists only in impairing the ability or inclination of such person to perform his part, or in increasing the

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[18] RICO was modeled, in part, on the Clayton Antitrust Act.

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plaintiff s expense or labor of fulfilling such contract . . . [*Id.* at 533, n.25 (emphasis added).]

This was precisely the plaintiff s situation in *Holmes*, and the reason the Court concluded its alleged injury was not directly caused by the RICO violations.

The facts of the instant case are entirely different. The plaintiffs are not alleging a contractual or statutory obligation to cover someone else's losses. They are the *only* victims of the illegal hiring scheme. They are alleging their own losses directly caused by the illegal immigrant hiring scheme. Accordingly, there is no third party which has more directly borne their damages, depressed wages, and is more appropriately situated to bring this suit. If plaintiffs cannot sue for their depressed wages, their claims will go unremedied.

B. The Defendants' Attempt to Apply *Holmes* Is Legally and Factually Erroneous

Nevertheless, the defendants argue that plaintiffs fail the "direct injury" test of *Holmes*. First, they argue, "there is no allegation the plaintiffs were paid less than other similarly situated workers in other similarly situated agricultural facilities. . ." Defs. Br. at 17. No authority is cited for this alleged pleading requirement. In fact, according to the Complaint, "Matson and Zirkle are conducting the Illegal Immigrant Hiring Scheme for the purpose of depressing employee wages below the levels they would otherwise be required to pay if they were unable to hire substantial numbers of illegal immigrants . . ." ¶¶ 3, 15(b). Once again, for the purposes of this motion the Court must assume these well-pled allegations are true. Therefore, the wage levels at "similarly situated agricultural facilities" are irrelevant to the plaintiffs' theory of recovery. If plaintiffs can prove at trial that their wages would be higher absent the illegal immigrant hiring scheme, they will be able to prevail. Thus, the motion must be denied as defendants have failed to meet their burden of proving plaintiffs cannot

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recover under any set of facts. *See, e.g., Fobbs v. Holy Cross Health Sys. Corp.*, 29 F.3d 1439, 1449 (9th Cir. 1994) (in evaluating the Complaint, "any doubts should be construed in favor of the pleader"), *cert. denied*, 513 U.S. 1127 (1995).

C. *Holmes*' Three-Part Analysis for "Indirect" Injury Further Demonstrates That Plaintiffs Have RICO Standing

The defendants seek to apply the three justifications for not permitting indirectly injured parties to recover, discussed in *Holmes*, to the instant case. *See* Defs. Br. at 18-19, *citing Holmes*, 503 U.S. at 269-70. As discussed above, this analysis simply does not apply because the plaintiffs' claims are direct and satisfy the proximate causation analysis enunciated in *Holmes*.

In any event, a consideration of the three justifications proffered by the *Holmes* court demonstrates that none of them apply to this case. One of the factors that justifies not compensating indirect victims is that "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." *Id.* at 269. Here, of course, there is *no* need to apportion damages and *no* risk of multiple recovery. The plaintiffs, and the plaintiffs alone, have suffered damages as a result of the illegal immigrant hiring scheme.

A second factor, addressed by the defendants (Defs. Br. at 19), is that "directly injured victims can generally be counted on to vindicate the law as private attorneys general . . . ." *Holmes*, 503 U.S. at 269-70, *citing Associated General Contractors*, 459 U.S. at 541-42. This rationale once again fully supports plaintiffs' standing here as there are no other "directly injured victims" to sue for plaintiffs' lost wages here. In this regard, the argument proffered by the defendants — that "the INS can be counted on to vindicate the law . . ." — demonstrates beyond any doubt that *Holmes* cannot bar plaintiffs' claims here. The INS has no claim for depressed wages; only individual workers possess such claims. Therefore, any claim of the INS stemming from the illegal immigrant hiring scheme would be to vindicate other rights and redress other losses, not those of the plaintiffs.

Nor does the third *Holmes* rationale — that "the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation" — have any application here. While the defendants half-heartedly assert the existence of "other independent factors" that might impact the plaintiffs' wages, *see* Defs. Br. at 17, *none* of those alleged factors is a function of any "indirectness" in the plaintiffs' injuries. All the defendants have done is to (improperly) make unsubstantiated assertions of fact which, if supported by admissible evidence at trial, might contest the plaintiffs' allegations (which they will support with proof at the appropriate time) that the defendants' hiring of illegal immigrants has depressed their wages.

D. *Imagineering* Provides No Help To Defendants Here

The defendants cite one RICO case, *Imagineering, Inc. v. Kiewit Pacific Co.*, 976 F.2d 1303 (9th Cir. 1992) for the proposition that plaintiffs claims are barred by *Holmes*. *See* Defs. Br. at 19. But, as a careful analysis demonstrates, *Imagineering* is not on point.

The plaintiffs in *Imagineering* were subcontractors who alleged they would have been awarded contracts by general contractors on construction projects but for a scheme to circumvent a law requiring the awarding of certain public works projects to firms owned by minorities and women. The Ninth Circuit affirmed the dismissal of the RICO case on two grounds: *First,* the plaintiffs could not establish they would have received the subcontracts at issue because even if the contractor who successfully obtained the contract had been required to forego the contract, the contract would not

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necessarily have been awarded to the second lowest bidder (with whom they were aligned). *Id.* at 1311. Under the prevailing law, the contract would have been required to be rebid. *Id.* Additionally, the court found that even if plaintiffs had obtained the subcontracts at issue, there was "no guarantee [they] . . . would not be substituted during the pendency of the contract." *Id.* *Second*, the court concluded that under *Holmes*, plaintiffs' claims were barred because they were merely "indirect" victims of the racketeering. *Id.* However, the court reached this conclusion only after plaintiffs conceded they "were not the direct victims of defendants' unlawful activities." *Id.* It was undisputed that "the intervening inability of the prime contractors to secure the contracts . . . was the direct cause of plaintiffs' injuries." *Id.* at 1312. Thus, the plaintiffs' damages arose solely due to the damages visited upon a third party, precisely as in *Holmes*. By contrast, the Complaint does not allege any such scenario or injured third party. Therefore, *Imagineering* is simply not on point.

E. The National Labor Relations Act Has No Bearing On This Case

The defendants argue that the fact that the National Labor Relations Act (NLRA) applies to undocumented immigrants, conferring upon them the same rights as American citizens who are covered by the Act, including the right to unionize, defeats any claim brought on behalf of plaintiffs concerning wage levels. Defs. Br. at 18-19. Plaintiffs do not dispute that the NLRA applies to illegal immigrants. However, that fact has no bearing on the plaintiffs' claims that Matson and Zirkle are employing illegal immigrants in order to depress the wages of all their employees. Neither the NLRA nor the cases cited by the defendants outlaw the employment of undocumented immigrants or their payment of depressed wages. Therefore, the argument that the NLRA applies to undocumented immigrants is irrelevant. The defendants cite no authority providing otherwise.

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Finally, the related argument that the Complaint "rel[ies] 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 . . . [that] is too tenuous a basis for asserting proximate causation, considered in light of the legal right of unauthorized aliens to engage in union organizing . . ." Defs. Br. at 18, is simply inappropriate. As stated above, plaintiffs need not "substantiate" claims made in the Complaint. All well-pled facts must be taken as true. Thus, ¶ 22, alleging that, "Matson and Zirkle . . . knowingly hire workers of illegal status because the illegal workers are willing to accept wages that are significantly lower than wages would be in a labor market comprised solely of legally authorized workers," is not debatable or rebuttable. It must be taken as true for purposes of this motion. Therefore, the defendants' argument is not a ground for dismissal.

V. PLAINTIFFS' RICO CLAIMS ARE NOT PREEMPTED

Incredibly in light of the clear Congressional authorization of private suits under RICO, the defendants argue that there is no private right of action under RICO for violations of § 274 of the Act because the "comprehensive scheme" of the Immigration Reform and Control Act (IRCA)[19] has preempted any such claim for civil damages. Defs. Br. at 21-24. The defendants cite *Nieto-Santos v. Fletcher Farms*, 743 F.2d 638 (9th Cir. 1984)[20] as authority for this sweeping statement of law. However, that case, decided before the enactment of the IRCA, simply holds that the Immigration and Nationality Act does not create a private right of action for employment disputes. *Id.*

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[19] The IRCA is codified at 8 U.S.C. §1324a, as part of the Immigration and Nationalization Act.

[20] Defs.' Br. at 23.

at 641. Such cases, it holds, are matters of state law over which federal courts do not have subject matter jurisdiction.[21] Here, of course, the plaintiffs do not argue that the Immigration and Nationality Act creates a private right to bring a RICO action — that right of action is created by the RICO statute. *See* 18 U.S.C. § 1961(1)(F) (making violations of § 274 of the Immigration and Nationality Act predicate acts for RICO).

Characteristically, then, the defendants cite no authority to support their argument that "the attempt by plaintiffs to independently enforce the immigration laws through RICO should be deemed preempted by the IRCA." Defs. Br. at 24. Once again, the defendants ascribe an intent to Congress that is not to be found within the IRCA itself, and for which they cite no applicable authority. *Danielson v. Burnside-OTT Aviation Training Center, Inc.*, 941 F.2d 1220, 1227 (D.C. Cir. 1991),[22] holds that RICO does not create a private right of action when the underlying statute does not provide for one and is not among the statutes incorporated in RICO as predicate acts. This is distinguishable from the instant case in which § 274 of the Immigration and Nationality Act is a RICO predicate. Thus, if the Court were to adopt the defendants' argument, it would effectively repeal 18 U.S.C. § 1964 which confers a "private right of action" on parties who have been damaged by RICO violations.[23] "[RICO] . . . provides a private civil action to recover treble damages for injury 'by reason of a violation of' its substantive provisions. 18 U.S.C. § 1964(c)." *Sedima S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 481 (1985). "Congress . . . set out a far-reaching civil enforcement scheme, § 1964

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[21] The defendants cite other cases standing for the same proposition. Defs. Br. at 23.

[22] Defs. Br. at 24.

[23] Under 18 U.S.C. § 1964, "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor . . ."

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. . ." *Id.* at 483. As the Supreme Court has noted in its most recent RICO case, "Both statutes [RICO and the Clayton Antitrust Act] share a common congressional objective of encouraging civil litigation . . . not merely to compensate victims but to turn them into prosecutors, 'private attorney's general,' dedicated to eliminating racketeering activity." *Rotella v. Wood*, ___ U.S. ___, 120 S. Ct. 1075, 1082, 145 L.Ed.2d 1047 (2000). Moreover, "[t]he courts are without authority to restrict the application of the [RICO] statute." *United States v. Turkette*, 452 U.S. 576, 587 (1981). Accordingly, this Court has no authority to do what the defendants propose: constrict or disregard RICO."[24]

Finally, the defendants' argument is contrary to established rules of statutory construction which favor the reconciliation of statutes having overlapping subject matter. Thus, the Ninth Circuit holds that, "[To] the extent that statutes can be

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[24] The defendants mistakenly rely on *McDonough v. Gencorp, Inc.*, 750 F. Supp. 368, 371 (S.D. Ill. 1990) in support of their RICO preemption argument. Defs. Br. at 24. In *Gencorp*, the plaintiff attempted to recast violations of the National Labor Relations Act, which the Supreme Court had held "preempts state and federal court jurisdiction to remedy conduct ... prohibited by the ACT," as mail fraud violations of RICO. *Id.* at 369-70 (citation omitted). Following the Supreme Court's lead, the district court dismissed those RICO allegations. However, the district court held that violations of § 186 of the NLRA, which is listed in RICO as a predicate act, could proceed under RICO. *Id.* at 370. *Gencorp* supports plaintiffs position. Since § 274 of the Immigration and Nationality Act is a RICO predicate, Congress obviously intended it to be used in that manner. Moreover, since the Supreme Court has never held that the IRCA preempts *statutory federal* claims of any sort, plaintiffs' mail fraud claim can also proceed.

harmonized, they should be . . ." *Hellon & Assoc., Inc. v. Phoenix Resort Corp.*, 958 F.2d 295, 297 (9th Cir. 1992). Moreover, in the event the IRCA actually were inconsistent with § 274 and RICO (which it is not, nor does the motion so contend), plaintiffs would still prevail because the enactment of § 274 and its incorporation into RICO post-date the IRCA. "[I]n case of an irreconcilable inconsistency between them [conflicting statutes] the later and more specific statute usually controls the earlier and more general one." *Id. See also Boudette v. Barnette*, 923 F.2d 754, 757 (9th Cir. 1991) ("When two statutes conflict the general rule is that the statute last in time prevails as the most recent expression of the legislature's will"). Therefore, the IRCA does not preempt or bar plaintiffs' RICO claims here.

VI. PLAINTIFFS STATE A VIABLE CLAIM FOR CIVIL CONSPIRACY

A. The Complaint Properly Pleads A Claim For Civil Conspiracy Under Washington Law

Contrary to defendants' contentions, there is no "novel question" as to whether the alleged concerted violation of immigration law constitutes a civil conspiracy under Washington law. As defendants neglect to inform this Court, civil conspiracy in Washington is broadly defined and clearly encompasses the conduct alleged in the Complaint. *See, e.g., Lewis Pacific Dairymen's Asso. v. Turner*, 50 Wash. 2d 762, 772, 314 P.2d 625 (1957) (*citing Harrington v. Richeson,* 40 Wash. 2d 557, 570, 245 P.2d 191 (1952)):

> A conspiracy is a combination of two or more persons to commit a criminal or unlawful act, or to commit a lawful act by criminal or unlawful means; or a combination of two or more persons by concerted action to accomplish an unlawful purpose, or some purpose not in itself unlawful by unlawful means. . . .
>
> To constitute a conspiracy the purpose to be effected by it must be unlawful in its nature or in the means to be employed for its accomplishment . . . .

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Accord, Deschamps v. Luther, 64 Wash. 2d 728, 393 P.2d 945 (1964); *Sterling Bus. Forms v. Thorpe,* 82 Wash. App. 446, 451, 918 P.2d 531, 533 (1996). Conspirators are jointly and severally liable for all the damages caused by the conspiracy both before and after their entry into the conspiracy. *Sterling*, 82 Wash. App. at 454; *Sears v. International Brotherhood of Teamsters*, C., S & H., 8 Wash. 2d 447, 452, 112 P.2d 850 (1941).

The plaintiff in a civil conspiracy case must prove the case by a preponderance of the evidence, and must establish the existence of the conspiracy by clear, cogent and convincing evidence. *Corbit v. J.I. Case Co.*, 70 Wash. 2d 522, 529, 424 P.2d 290 (1967). But that standard has no application on a motion to dismiss, where plaintiffs' allegations must be taken as true. Indeed, the "clear, cogent and convincing evidence" standard does not even apply on a motion for summary judgment, where the plaintiffs must come forward with factual support for their allegations. *Gerimonte v. Case,* 42 Wash. App. 611, 615, 712 P.2d 876, 879 (1986) ("while clear, cogent and convincing evidence is the proper standard of proof . . . at trial, 'it is not the proper standard to be applied to determinations regarding summary judgment motions.'").

Here, the plaintiffs have alleged that the defendants have conspired to commit unlawful acts. *See, e.g.,* ¶¶ 59, 61 (alleging conspiracy to violate the Immigration and Nationality Act). Defendants have done so in order to depress the wages of plaintiffs and the Class. ¶ 60, 62. Defendants' conspiracies have succeeded, and plaintiffs suffer from depressed wages as a result. *Id.* Accordingly, plaintiffs state a claim for civil conspiracy under well-established Washington law.

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B. Plaintiffs' Civil Conspiracy Claim Is Not Preempted By The IRCA

Recognizing that they have no grounds to dismiss plaintiffs' civil conspiracy claim under Washington law, the defendants assert that the claim is preempted by "the comprehensive federal agency enforcement scheme mandated by the IRCA." Def. Br. at 26. Alternatively, defendants assert, plaintiffs' civil conspiracy claim is preempted by the express preemption clause of the IRCA – *even though* on its face that clause preempts only State law ***sanctions,*** *not* common law claims for damages which are compensatory, not punitive. Because the IRCA contains an express preemption clause that does not apply to plaintiffs' claim, defendants' preemption arguments are doomed to failure.

1. Because The IRCA Contains An Express Preemption Clause, Any Arguments Based On "The Comprehensive Federal Scheme" Cannot Prevail

As the United States Supreme Court has made clear, when a federal statute includes an express preemption clause, that clause both defines and limits the preemptive reach of the statutory scheme at issue. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992):

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority," *Malone v. White Motor Corp.*, 435 U.S. [497], 505 [1978], "there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. *California Federal Savings & Loan Assn. v. Guerra*, 479 U.S. 272, 282, 93 L. Ed. 2d 613, 107 S. Ct. 683 (1987) (opinion of Marshall, J.). Such reasoning is a variant of the familiar principle of *expressio unius est exclusio alterius*: **Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.** [Emphasis added.]

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Here, as the defendants themselves point out, Congress *has* enacted an express preemption provision. *See* 8 U.S.C. §1324a(h)(2). Pursuant to the above principles, this section must be strictly and narrowly construed. Accordingly, there is neither need nor license for this Court to "infer congressional intent to pre-empt state laws from the substantive provisions" of the law. *Guerra,* 479 U.S. at 282. This Court should thus reject out of hand defendants' claim that the "comprehensive scheme" of the IRCA preempts state common law damage claims. Preemption is explicitly governed by the express preemption language of the IRCA.

2. Because Plaintiffs Bring A Civil Conspiracy Claim For Damages, And Not For Sanctions, 8 U.S.C. § 1324a(h)(2) Poses No Bar To Their Claim

Congress has expressly defined the preemptive reach of the IRCA as follows:

> Preemption. The provisions of this section preempt any **State or local law imposing civil or criminal sanctions** (other than through licensing and similar laws) upon those who employ, or recruit, or refer for a fee for employment, unauthorized aliens. [8 U.S.C. § 1342a(h)(2).]

While no reported decision has construed this language, the statute, on its face, preempts *only* laws "imposing civil or criminal sanctions," and hence does *not* preempt common law *damage* claims. *See, e.g., Cippollone,* 505 U.S. at 524 (when Congress enacts an express preemption clause, "each phrase within that clause limits the universe" of laws preempted by that statute.)[25]

The plain meaning of "sanction" does not include common law damage actions:

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[25] While the *Cipollone* Court held that "state law prohibitions" included at least some common law damage claims, 505 U.S. at 522-23, the preemption clause at issue in *Cipollone* did *not* include the qualifying language "imposing sanctions" that Congress chose to include as a limitation to the preemptive reach of the IRCA.

> **Sanction**. That part of a law which is designed to secure enforcement by imposing a penalty for its violation or offering a reward for its observance. For example, Fed. R. Civ. P. 37 provides for sanctions for failure to comply with discovery orders. *See also* **Contempt**.[26]

The meaning of "sanction" is universally understood as referring to legislatively (or sometimes judicially) created penalties for not complying with statutory law. Perhaps most familiarly, Rule 11 of the Fed. R. Civ. P. provides for "sanctions" against attorneys for failing to abide by the strictures of that rule. As defined in Rule 11:

> **Nature of Sanction; Limitations**. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation. [*Id.*]

Likewise, the United State Supreme Court frequently speaks of "civil sanctions" in the double jeopardy context; these reference make clear that "civil sanctions" are statutory penalties. *See, e.g., United States v. Halper*, 490 U.S. 435, 436 (1989) (referring to statutory penalties as "civil sanctions."); *see also Austin v. United States*, 509 U.S. 602 (1993) (same).

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[26] BLACK'S LAW DICTIONARY (5TH ED. 1979) at 1203. The United States Supreme Court has repeatedly admonished courts to apply the plain, commonly understood meaning of statutory language. *See, e.g., Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199 n.19-20 (1976) (relying on dictionary meaning of "device"); *see also Addison v. Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 617-18 (1944).

Finally, the Ninth Circuit has also recognized the distinction between "sanctions" and legal "requirements" such as might be imposed by statute or common law:

> State waste disposal standards, permits, and reporting duties clearly are "requirements" for the purpose of § 6961. Criminal sanctions, however, are not a "requirement" of state law within the meaning of § 6961, but rather the means by which the standards, permits, and reporting duties are enforced. Section 6961 plainly waives immunity to sanctions imposed to enforce injunctive relief, but this only makes more conspicuous its failure to waive immunity to criminal sanctions.

California v. Walters, 751 F.2d 977, 978 (9th Cir. 1984).

Because the preemptive scope of the IRCA is expressly limited to laws imposing sanctions, the defendants' preemption argument is without merit.

VII. DEFENDANTS PROVIDE NO PROPER BASIS FOR STAYING DISCOVERY

The mere pendency of a motion to dismiss is not a reason to stay discovery. As one court has noted:

> Had the Federal Rules contemplated that a motion to dismiss under Fed.R.Civ.Pro. 12(b)(6) would stay discovery, the Rules would contain a provision to that effect.

Gray v. First Winthrop Corp., 133 F.R.D. 39, 40 (N.D. Cal. 1990). *See also Cohn v. Taco Bell Corp.,* 147 F.R.D. 154, 161-62 (N.D. Ill. 1993). Accordingly, an applicant for a stay of discovery pending the resolution of a motion to dismiss "carries the heavy burden of making a 'strong showing' why discovery should be denied." *Gray*, 133 F.R.D. at 40. Courts require a "particular and specific" demonstration of need, as distinguished from conclusory statements, in order to establish a strong showing for a stay. *Id., see also Twin City Fire Ins. Co. v. Employers Ins. of Wausau,* 124 F.R.D. 652 (D. Nev. 1989); *Kiblen v. Retail Credit Co.*, 76 F.R.D. 402, 404 (E.D. Wash. 1977). A showing that

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discovery may cause some inconvenience and expense is not sufficient – even if the defendants attempt to make such a showing. *Twin City Fire Ins. Co.*, 124 F.R.D. at 653.

Courts will not stay discovery even if the pending motion to dismiss is "apparently meritorious." *Twin City Fire Ins. Co.*, 124 F.R.D. at 653; *see also Gray*, 133 F.R.D. at 40. Rather, the standard is far stricter. A district court must be convinced that the plaintiff will be unable to state a claim for relief. *E.g.*, *Twin City Fire Ins. Co.*, 124 F.R.D. at 653 (citing *Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981), *cert. denied*, 455 U.S. 942 (1982); *B.R.S. Land Investors v. United States*, 596 F.2d 353 (9th Cir. 1979)). Thus, a request for a stay should be denied where the success of the motion to dismiss is speculative. *Cohn v. Taco Bell Corp.*, 147 F.R.D. at 162; *United States v. Board of Educ.*, 636 F. Supp. 1046, 1047 (N.D. Ill. 1986).

Here, defendants have made *no effort* to meet the strict standards for staying discovery and their motion must therefore be denied.

A. Defendants Have Failed to Satisfy Their Burden of Demonstrating They Are Entitled to a Stay

1. Defendants Have Made No Showing That Discovery Would Be Unduly Burdensome

Defendants have not made any effort to demonstrate that discovery would be unduly burdensome. Indeed, *the defendants have not even received any discovery requests from the plaintiffs.* Accordingly, this Court cannot consider any claim of burden defendants might proffer in their reply brief.

2. Defendants' Alleged Privacy Concerns Can Provide No Basis For Staying Discovery

Defendants' sole proffered reason for staying discovery is that "[D]iscovery would relate to sensitive/confidential information about employees' national origin, there [sic] social security numbers and information contained in I-9 Forms that are protected

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from disclosure by federal law." Mtn. to Stay Discovery at 2. This reason, even if credited, is insufficient.

As an initial matter, plaintiffs have already demonstrated that I-9 Forms are fully discoverable. *See supra* at 17-19. Thus, even if the I-9 Forms were the only discovery plaintiffs planned to seek, defendants' motion should be denied.

Moreover, plaintiffs' discovery will certainly not be limited to I-9 Forms. Once that discovery is propounded, any legitimate privacy or confidentiality concerns can be addressed through a protective order. Not surprisingly, defendants have cited no case denying *all* discovery on the grounds that *some* potentially discoverable information might be confidential or sensitive.

3. Defendants Have Not Demonstrated That Their Motion Will Dispose Of The Entire Case

The Court should not consider granting the stay motion unless it is *convinced* that the defendants' motion will dispose of *the entire case*. *E.g.*, *Twin City Fire Ins. Co.*, 124 F.R.D. at 653. As this brief demonstrates, the defendants are unlikely to succeed in dismissing *any part* of this case. Even if the Court disagrees, it should still deny the stay motion if it believes that *any part* of the case may survive.

VIII. CONCLUSION

In conclusion, defendants' Fed. R. Civ. P. 12(b)(6) Motion to dismiss and stay discovery must be denied.

DATED this 13th day of June, 2000.

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DECLARATION OF SERVICE

I, Lynn Brammeier, declare under penalty of perjury under the laws of the State of Washington 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 13, 2000, I caused an original and one copy of the following document to be sent to the Clerk of the District Court, Eastern District of Washington, West 920 Riverside Ave., Room 840, U.S. District Courthouse, Spokane, WA., 99201, via United Parcel Service overnight mail for filing on June 14, 2000:

I also caused a copy of the following document to be served on counsel of record in the manner indicated below:

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS AND FOR A STAY OF DISCOVERY

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