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

Attorneys for Defendants Zirkle and Matson

Honorable Fred VanSickle

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

OLIVIA MENDOZA and JUANA MENDIOLA, individually and on behalf of all other 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 **REPLY MEMORANDUM SUPPORTING DEFENDANTS' MOTION TO DISMISS–RULE 12(b)(6)**

Defendants Zirkle Fruit Co. ("Zirkle") and Matson Fruit Co. ("Matson") submit this brief memorandum clarifying the reasons justifying dismissal of the plaintiffs' Complaint. Contrary to the plaintiffs' attempted distortion, the defendants are **not** arguing that plaintiffs must plead "reams of information about each and every illegal employee they have hired," before proceeding with a claim. (Plaintiffs' Response, p. 7). Rather, Zirkle and Matson have moved to dismiss the Complaint because:

1. The plaintiffs have not made **any** well-pled allegation that Zirkle or

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

Matson violated 8 U.S.C. § 1324(a)(3).

2. The plaintiffs' allegations fail to adequately plead fraud under Fed. R. Civ. Pro. 9(b); and cannot state necessary elements of RICO "mail fraud," as a matter of law.

3. The plaintiffs' own allegations and theory of their case demonstrate they do not have standing to pursue the claims they attempt to raise.

Certainly, Zirkle's and Matson's Motion To Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) requires the court to accept all well-pled allegations as true. *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 521 (9th Cir. 1994). Further, mindful of the plaintiffs' potential opportunity to amend their pleadings, within the limits of Fed. R. Civ. P. 11, Zirkle and Matson agree that each of the plaintiffs' various claims should be dismissed only if "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).

Although cited in Plaintiffs' Response, p.4, the plaintiffs fail to acknowledge the *Terracom* decision affirmed the dismissal of an action pursuant to Fed. R. Civ. P. 12(b)(6). Like the defendants in *Terracom*, Zirkle and Matson are seeking dismissal based on the interpretation of federal law – in this case, the Immigration and Nationality Act and the Racketeer Influenced and Corrupt Organizations Act (RICO). Assuming for purposes of this motion to dismiss that any and all facts potentially encompassed by plaintiffs' general allegations are true[1], the plaintiffs still have not adequately pled a violation of the law; nor do their allegations establish the requisite standing to pursue the purported RICO claims.

I. Plaintiffs Have Not Made Sufficient Allegations To State A Claim That 8 U.S.C. § 1324(a)(3) Was Violated.

Pleading a violation of 8 U.S.C. § 1324(a)(3) requires allegations that Zirkle and Matson hired unauthorized aliens with actual knowledge that at least 10 such

[1] If necessary, Zirkle and Matson will – after permitting discovery - present evidence establishing the factual inaccuracy of

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

individual aliens had "been **brought into** the United States in violation of [8 U.S.C. § 1324(a)]." 8 U.S.C. § 1324(a)(3)(B)(ii)(emphasis supplied). The remainder of subsection 1324(a) prohibits "bringing" an alien into the U.S. when such is done by another person who also knew the individuals were aliens, and either: (1) brought said individuals into the U.S. at a place other than a designated port of entry, or (2) had knowledge or acted with reckless disregard for the fact that the individuals did not have prior official authorization to enter the United States. See: 8 U.S.C. § 1324(a)(1)(A)(i) & 1324(a)(2).

The plaintiffs' Complaint contains numerous allegations that Zirkle and Matson knowingly hired unauthorized aliens, none of which are sufficient to state a claim for violation of 8 U.S.C. § 1324(a)(3).[2] Those allegations, without more, would merely establish violation of 8 U.S.C. § 1324a(a)(1)(A), which is not a RICO predicate act. Absent a well-pled allegation that Zirkle and Matson had actual knowledge about individuals being "**brought into**" the U.S. in violation of 8 U.S.C. § 1324(a), as set forth above, the Complaint is insufficient.

In this regard, the plaintiffs have made a single cursory and vague allegation against each of the defendants, Zirkle and Matson. They allege Zirkle and Matson had knowledge certain unauthorized alien employees were "**either** smuggled into the U.S. and/**or harbored** once in the U.S." (Plaintiffs' Response, pp. 5-6)(emphasis added). The argument suggested by Plaintiffs' Response, at p. 5-6, is that Zirkle and Matson knew workers were unauthorized aliens. Therefore, under an erroneous interpretation of *United States v. Kim*, 193 F.3d 567 (2nd Cir. 1999), Zirkle and Matson's hiring the aliens constitutes "harboring." The plaintiffs' circular argument is completed by concluding Zirkle and Matson hired the aliens knowing they would be "harbored" as a

---

plaintiffs' allegations, in support of a motion for summary judgment.

[2] Plaintiffs' reliance on *United States v. Kim*, 193 F.3d 567 (2nd Cir. 1999), at p. 6 of Plaintiffs' Response, is erroneous. First, as explained below, an allegation that Zirkle or Matson had knowledge of "harboring" is insufficient to establish the employment of aliens violates 8 U.S.C. § 1324(a)(3). Second, the Court of Appeals did not state (as plaintiffs attempt to imply) that knowingly hiring an unauthorized alien, without more, constitutes "harboring." Rather, the *Kim* decision expressly requires proof the defendant engaged in conduct "to prevent government authorities from detecting [the alien's] unlawful presence" to establish "harboring." *Id.* at p. 574.

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

result of the hiring.

However, the allegation that defendants had knowledge about any aliens being "harbored once in the U.S." is insufficient to plead a violation of 8 U.S.C. § 1324(a)(3). As noted above, this statute requires knowledge that the subject aliens were "**brought into** the United States" in violation of the law. Thus, the law explicitly relied upon by plaintiffs is **not triggered by knowledge that an alien was "harbored"** once he or she was in the U.S. By enacting separate provisions, Congress drew a distinction between activities that constitute unlawfully bringing an alien into the U.S., and activities that constitute unlawfully harboring an alien.

As a penal statute, 8 U.S.C. § 1324(a) must be strictly construed. *United States v. Moreno*, 561 F.2d 1321, 1323 (9th Cir. 1977). The plaintiffs' assertion that Zirkle and Matson had, as an alternative, actual knowledge of "harboring" would erroneously expand the statutory prohibition.

If plaintiffs have standing to pursue RICO claims, they should be permitted to proceed only if they have a reasonable basis to allege Matson and/or Zirkle had actual knowledge that individual alien employees had been "brought into" the U.S. in violation of 8 U.S.C. § 1324(a), and amend their Complaint accordingly. Conversely, this action should not proceed based on plaintiffs' theory that Zirkle and Matson can be charged with knowledge that alien employees were "harbored," simply because they hired the employees; nor should this action proceed relying on any allegation by the plaintiffs about alien employees being "harbored once he or she was in the U.S."

II. Plaintiffs Have Not Adequately Pled RICO "Mail Fraud," And Cannot Establish Necessary Elements Of "Mail Fraud."

The Plaintiffs' Response (at p. 8, footnote 9; and p.11) concedes the pleading requirements of Fed. R. Civ. P. 9(b) governs their allegation of "mail fraud," and requires them to plead "the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations."

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

Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc., 806 F.2d 1393, 1401 (9th Cir. 1986). Further, the plaintiffs acknowledge they have failed to plead the time of the alleged mailings and the identities of the individuals who prepared and mailed the allegedly false I-9 documents. (See: Plaintiffs' Response, pp. 13-14).

Plaintiffs' own allegations also establishes the material content of the alleged I-9 Forms are false representations "that **particular employees** are authorized to be employed." (Plaintiffs' Response, p. 13) (emphasis added). But the plaintiffs do **not** plead the identities of **any** of the particular employees who were the subject of the allegedly false I-9 Forms.

Nevertheless, plaintiffs suggest they should be afforded an exception to these pleading requirements because (they argue) the information is uniquely within the defendants' possession. The contradiction in plaintiffs' arguments is readily apparent.

The plaintiffs themselves allege the I-9 Forms were mailed to the INS as part of a "scheme," and are supposedly in the possession of the INS. Moreover, the plaintiffs represent to the court that **they** have obtained, from the INS, information about the defendants allegedly mailing I-9 Forms to the INS to facilitate the hiring of unauthorized workers. (See: Plaintiffs' Response, p. 18, footnote 17)[3]. Thus, according to the plaintiffs' own allegations and representations to the court, the information about alleged mailings is not uniquely in the defendants' possession, and such information has in fact been provided to the plaintiffs.[4]

---

[3] The defendants have made their own Freedom of Information Act requests to the INS for copies of all information provided to the plaintiffs. The information received by plaintiffs from the INS did inform the plaintiffs about the only time that one of the defendants mailed I-9 Forms to the INS, as well as the identity (author of cover letter) of the individual who placed the documents in the mail. However, pleading that specific information would establish the mailing was actually in response to an I-9 audit by the INS, was not done at a time that would facilitate hiring any workers and was not intended to deceive the INS (because the very purpose of the audit was for the INS to check the accuracy of the documents). Plaintiffs' failure to plead this specific information, which they obtained prior to filing this action, demonstrates their realization that the mailing of I-9 Forms pursuant to an I-9 audit does not facilitate the hiring of any workers, was not intended to deceive the INS, and does not support an allegation of "mail fraud." .

[4] The court should also note the plaintiffs' apparent admission that they were denied access to the actual I-9 Forms by the INS. (See Plaintiffs' Response at pp. 13-14). According to the plaintiffs' allegations, the mailed I-9 Forms are in the possession of the INS, to whom the plaintiffs have submitted a Freedom of Information Act request. However, despite the

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

But despite having allegedly received this information through their pre-filing investigation, the plaintiffs still fail to plead the time of the alleged mailings, the specific content (ie. the identities of the "particular employees" who were hired using false documents), or the identity of any person who participated in preparing the alleged mailings. This pleading is insufficient, warranting dismissal pursuant to Fed. R. Civ. P. 9(b).

Additionally, mailing inaccurate I-9 Forms to the INS cannot constitute "mail fraud," and therefore cannot constitute a RICO predicate act, as a matter of law. First, the INS maintains a Central Index System, and has the information necessary to confirm the employment authorization of each alien for whom an I-9 Form is submitted. See: *Villegas-Valenzuela v. Immigration and Naturalization Service*, 103 F.3d 805 (9th Cir. 1996). And, in fact, the INS is expected to make such confirmations when those forms are received. See: Prepared response of the Department of Justice, quoted in 1986 U.S. Code Cong. And Adm. News, p. 5665.

In there response, the plaintiffs do not articulate how the mailing of I-9 Forms to the INS, when there is no obligation to do so in conjunction with hiring employees, could possibly be intended to deceive the INS. Instead, the plaintiffs' rely on cases dealing with the mailing of fraudulent tax returns that are, again, easily distinguished. Taxpayers are required to submit tax returns, and the IRS does not have the ability to investigate or confirm the accuracy of all tax returns. Conversely, employers are **not** required to submit I-9 Forms to the INS whenever they hire employees, and the INS does have the information, without having to conduct an audit or investigation, to confirm the authenticity of each alien's work authorization

---

plaintiffs' argument that they have a right to access and use the I-9 Forms, those documents were not provided to plaintiffs.

Furthermore, the cases cited by plaintiffs for the proposition that taxpayers can be compelled to provide discovery of their tax returns are easily distinguished. In those cases, discovery of information pertaining to the taxpayer is obtained from the taxpayer himself, who is a party to the litigation. Here, the employees about whom the I-9 Forms pertain, are not parties to this litigation. Congress designated that employers, not an agency such as the IRS, would be the repository of the completed I-9 Forms. 8 U.S.C. § 1324a(b)(3). And while the I-9 Forms are maintained in the possession of employers, they cannot be used for purposes other than the enforcement of the Immigration and Nationality Act and certain criminal statutes inapplicable to this case. 8 U.S.C. § 1324a(b)(5).

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

documents.

Second, the plaintiffs cannot show a "specific intent to deceive or defraud" the INS, within the meaning of the "mail fraud" statute (18 U.S.C. § 1341). To state a claim for "mail fraud," the necessary "intent must be to obtain money or property from the one who is deceived." *United States v. Lew*, 875 F.2d 219, 221 (9th Cir. 1989). In *Lew*, the Court of Appeals reversed the convictions of an attorney who had allegedly committed "mail fraud" violating 18 U.S.C. § 1341 when he mailed false and inaccurate documents to the U.S. Department of Labor and to the INS, to obtain permanent resident alien status for foreign workers. The Court of Appeals reversed the convictions because there was no evidence Lew intended to obtain money or property from the Department of Labor, or from the INS. See also: *United States v. Mitchell*, 867 F.2d 1232, 1233 (9th Cir. 1989)(reversing "mail fraud" conviction because "although both indictments allege a scheme to obtain money and property, neither alleged a scheme to obtain them from the government body" which was deceived).

In this case, the plaintiffs cannot plead an allegation that Zirkle or Matson intended to obtain money or property from the INS; thereby requiring dismissal of their claim pursuant to Fed. R. Civ. P. 12(b)(6). See: *Monterey Plaza Hotel, Ltd. v. Local 483 of the Hotel and Restaurant Employees Union*, 215 F.3d 923 (9th Cir. 2000) (upholding Fed. R. Civ. P. 12(b)(6) dismissal of RICO claims alleging "mail fraud," because plaintiff failed to plead defendant's intent to obtain money or property from the one allegedly deceived).

The plaintiffs' reliance on the Second Circuit decision in *United States v. Kim*, 193 F.3d 567 (2nd Cir. 1999) is, again, erroneous. In *Kim*, the defendant was convicted of "knowingly harboring an illegal alien," **not** the RICO predicate act of "mail fraud." Thus, *Kim* provides no support for the plaintiffs' argument (See: Plaintiffs' Response, at pp. 10-11) that mailing false I-9 Forms can constitute an actionable RICO "employment scheme."

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

III. Plaintiffs Do Not Have Standing To Pursue RICO Claims.

To pursue a claim for damages under RICO, "the plaintiff only has standing if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." *Imagineering, Inc. v. Keiwit Pacific Co.*, 976 F.2d 1303, 1310 (9th Cir. 1992); quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495, 87 L.Ed.2d 346, 105 S.Ct. 3275 (1985). Moreover, a "showing of 'injury' requires proof of concrete financial loss," *Imagineering, supra* at p.1310, and "speculative" injuries are "not compensable under RICO." *Id.* at p. 1311.

In this case, the plaintiffs' do not claim their damages were caused by the alleged conduct constituting a violation of § 274(a)(3) of the Immigration and Nationality Act (8 U.S.C. § 1324(a)(3)), nor by the alleged conduct they argue constitutes RICO "mail fraud." Instead, the plaintiffs attempt to claim loss caused by a broader "illegal immigrant hiring scheme." Moreover, the plaintiffs agreed to work for the wages and benefits they were paid, and have not alleged "concrete financial loss," within the meaning of the *Imagineering* decision. Nor would their allegations, even if true, show that they were directly injured by the conduct attributed to the defendants.

The plaintiffs assertion of damage is premised on an allegation that the hiring of unauthorized aliens reduced the amount of wages Zirkle and Matson would otherwise have paid. The first error of this argument is the plaintiffs' continuing failure to acknowledge that the mere employment of unauthorized aliens does not violate RICO, and that plaintiffs "can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation." *Imagineering, supra* at p. 1310. The employment of unauthorized aliens who have crossed the border without assistance from others, or without the employer's knowledge of such assistance, is not a violation of RICO. The plaintiffs allege lower wages resulted from the employment of unauthorized workers, regardless of whether the workers were "smuggled" into the U.S. by a third party. Thus, the conduct that plaintiffs allege caused their damages is not limited to actions that would violate RICO.

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

The second flaw in plaintiffs' argument is the failure to show "concrete financial loss." Although the plaintiffs in *Imagineering* alleged they would have received specifically identified business that had been obtained by Kiewit through alleged illegal conduct, the Ninth Circuit Court of Appeals did not accept that conclusory assertion. Instead the Court of Appeals took notice of the involved third party's legal right to rebid the project and held, as a matter of law, that reliance on an assumption the contracts would have been awarded to contractors with whom plaintiffs were aligned precluded showing "concrete financial loss." *Imagineering, supra* at pp. 1310-1311. Additionally, the Court of Appeals reasoned that even if plaintiffs had obtained the subcontracts at issue, there was "no guarantee [they] ... would not be substituted during the pendancy of the contract." *Id.* at p. 1311.

It is important to note the decision in *Imagineering* affirmed the dismissal of RICO claims pursuant to Fed. R. Civ. P. 12(b)(6). The court refused to accept the plaintiffs' conclusory allegation that their alleged injuries were compensable under RICO, and instead analyzed the substance of the plaintiffs' theory of damages. *Id.* at p. 1310 ("...that characterization must be challenged on several bases.") The court held: "Although plaintiffs assert that if specified contracts had not gone to Kiewit those contracts would have been awarded to the plaintiffs' prime contractors, that cannot be established." *Id.*

Here, the plaintiffs assert that Zirkle and/or Matson hiring unauthorized aliens depressed employee wages below the level Zirkle and Matson would have otherwise been required to pay, to employ an adequate work force. However, the amount of wage Zirkle and Matson are required to pay, to employ an adequate work force, depends on the amount paid by competitors for "unskilled, low-wage laborers"[5] in the relevant geographic market. Thus, contrary to plaintiffs' argument, the wage levels at "similarly situated agricultural facilities" are not "irrelevant." There is no guarantee the alleged unauthorized aliens would not be substituted, at the same wage rate, by

[5] Plaintiffs' Complaint, ¶ 21.

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

workers with similar skill levels from throughout the Yakima Valley. Compare: *Imagineering, supra* at p. 1311 ("...no guarantee that the WBE or MBE subcontractor chosen would not be substituted...").

More importantly, the plaintiffs and the class they purport to represent willingly accepted employment for the level of wage Zirkle and Matson paid to them. This would seem to preclude proof of "concrete financial loss," absent some allegation that Zirkle and Matson subjected the plaintiffs to coercion or fraud preventing them from earning wage levels that would have otherwise been available in the relevant market.

Also, the willingness of the plaintiffs, who are legally authorized workers, to work for the wage rates paid by Zirkle and Matson refutes the plaintiffs' conclusory assumption that unauthorized aliens employed by Zirkle and Matson were compelled to work for wages lower than the amount necessary to obtain authorized workers. (Plaintiffs' Complaint, ¶ 22). That assumption is additionally refuted by the law – specifically the National Labor Relations Act, which the plaintiffs concede grants unauthorized aliens a protected right to engage in concerted activity for the betterment of their wages. (Plaintiffs' Response, p. 24). As in *Imagineering, supra* at p. 1310-1311, the court is **not** required to accept at face value the plaintiffs' assertions they have suffered injury, when such assertions cannot be reconciled with the law establishing the rights of third parties.

The plaintiffs' argument that they were directly harmed is also erroneous. As noted above, their theory of damages assumes an intervening inability of alien workers to seek and obtain higher wages, and further assumes that Matson and Zirkle have exploited those aliens by employing them at wages lower than the market rate. Accordingly, the plaintiffs' claim is based on Zirkle and/or Matson's alleged conduct directed at third parties. There is no direct relationship between Zirkle's or Matson's alleged employment of unauthorized aliens, and the wage rates for which the plaintiffs willingly agreed to work. Rather, there are many intervening causes, not the least of which is the availability of other workers in the relevant market.

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

IV. CONCLUSION

For the reasons set forth above, and by the defendants' initial Memorandum Supporting the Motion To Dismiss, the plaintiffs' Complaint should be dismissed with prejudice.

Respectfully submitted this 15th day of August, 2000.

Ryan M. Edgley (WSBA # 16171)
Halverson & Applegate, P.S.
Attorneys for Defendants Zirkle & Matson

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