ORIGINAL

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Honorable Fred Van Sickle

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT YAKIMA

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 CY 3024-FVS

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN RESPONSE TO NEW ISSUES RAISED IN DEFENDANTS' REPLY AND AT ORAL ARGUMENT

Plaintiffs, Olivia Mendoza and Juana Mendiola, submit this brief in response to issues raised for the first time in defendants' reply brief[1] and by the Court at oral argument. While plaintiffs believe that their Complaint sufficiently pleads injury to business and property and causation, if the Court disagrees plaintiffs respectfully request that any dismissal allow them leave to file an amended complaint which will allege causation and damages with greater specificity based upon consultation with their expert economist.

I. INTRODUCTION

In their reply brief defendants argued for the first time that: (a) plaintiffs' alleged injury, depressed wages, was not compensable as an injury to "business or property," which is required in order to confer standing under RICO, and (b) such an injury did not constitute a "concrete financial loss" as that term has been used by the Ninth Circuit Court of Appeals. At oral argument on the Motion before the Court on August 31, 2000, the Court asked counsel to comment on the *Commercial Cleaning* case. Because that case is unpublished, counsel had not outlined for the Court in writing the differences between that case and this case.

The Court indicated these arguments would be considered in deciding the Motion. Accordingly, plaintiffs submit this memorandum to respond to the Court's question about *Commercial Cleaning* and defendants' new arguments in writing. Plaintiffs believe that this memorandum and prior briefing amply demonstrate that the Complaint should be sustained as written. If the Court disagrees, however, and does dismiss the Complaint, plaintiffs request that the Court allow them leave to file

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[1] Defendants' reply brief was filed many weeks late. While plaintiffs did not object to the untimeliness of that brief, they believe they should have the chance to respond to the new arguments in writing.

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an amended complaint which will incorporate consultations with their expert economist and plead in greater specificity how plaintiffs' alleged injuries can be proven and calculated.

II. *COMMERCIAL CLEANING*[2] DOES NOT SUPPORT DEFENDANTS' POSITION ON STANDING AND CAUSATION HERE

At oral argument, the Court asked counsel how this case is different from the *Commercial Cleaning* case. While counsel attempted to answer the question at argument, counsel would like to briefly respond to this new authority in writing.[3]

The *Commercial Cleaning* case was dismissed primarily on standing grounds under *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992) – the same case upon which the defendants base their "standing" argument here. *Commercial Cleaning*, 2000 WL 545126. In holding that the plaintiffs in *Commercial Cleaning* had failed to allege "direct" injury within the meaning of *Holmes*, the court noted that the hiring of illegal immigrants at a reduced rate of pay was only the first step in a lengthy causation chain:

> The complaint alleges the following causation chain: defendant hires illegal immigrants at a reduced rate of pay; which also enables it to avoid paying federal and state taxes, workers' compensation insurance, and other costs for these employees; which enables it to make lower bids than the plaintiff and other competitors for office cleaning contracts; which results in it obtaining a larger market share of the cleaning business and ultimately prevents the plaintiff from obtaining more business.

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[2] *Commercial Cleaning Servs. v. Colin Service Sys., Inc.*, 2000 WL 545126 (D. Conn. Mar. 21, 2000).

[3] Plaintiffs did not cite the *Commercial Cleaning* opinion in their original brief because that decision is unpublished. A copy of that decision is provided together with this memorandum for the convenience of the Court and defendants.

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Commercial Cleaning, 2000 WL 545126 at *5. In other words, the *sole* step in the plaintiffs' proof here – that hiring illegal immigrants brings down wages – was but the first step in a lengthy chain of causation in *Commercial Cleaning*.

Under the circumstances, plaintiffs' injuries here are *far more direct* than the plaintiff-competitor's injuries were in *Commercial Cleaning*. Hence, *Commercial Cleaning* does not support defendants' position on standing here.[4]

III. LOST WAGES ARE A TYPE OF "BUSINESS OR PROPERTY" UNDER RICO[5]

For the first time in their reply brief (at page 8) and then again at oral argument, defendants argued that plaintiffs' alleged injuries are not injuries to business or property. Defendants are wrong.

Virtually every court to consider the question has held that lost wages are compensable under 18 U.S.C. § 1964(c) as "business or property." *E.g., Rice v. Janovich*, 109 Wash. 2d 48, 61, 742 P.2d 1230, 1237 (1987), *en banc*,("Federal cases since *Sedima* have specifically held that lost wages may be recovered in civil RICO actions, and we follow that conclusion."); *Feminist Women's Health Center v. Roberts*,

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[4] As plaintiffs informed the Court at oral argument, plaintiffs in *Commerical Cleaning* are appealing that decision. As soon as the Second Circuit has ruled, plaintiffs will promptly provide copies of the decision to defendants and the Court. If competitors cannot bring a RICO claim for violations of § 274 (as the district court found in *Commercial Cleaning*) and employees cannot either (as defendants here contend), then an anomalous situation arises whereby Congress has *expressly* created a private right of action for violations of § 274, yet no one has standing to bring a claim.

[5] RICO confers standing to sue on a plaintiff "injured in his business or property..." 18 U.S.C. § 1964(c).

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1989 WL 56017 at *12 (W.D. Wash. 1989); *Libertad v. Welch*, 53 F.3d 428, 437 (1st Cir. 1995); *Hunt v. Weatherbee*, 626 F. Supp 1097, 1100 (D. Mass. 1986); *Rodonich v. House Wreckers Union, Local 95*, 627 F. Supp. 176, 180 (S.D.N.Y. 1985).

IV. LOST WAGES ARE "CONCRETE FINANCIAL LOSS"

Again for the first time in their reply, defendants contended plaintiffs claims "fail[] to show concrete financial loss." Reply at 9, lines 1-2 (internal quotation omitted). However, a close examination of this concept and how it has been applied by the Ninth Circuit indicates that it has no application to this case.

A. Plaintiffs' Claims Satisfy The Supreme Court's Test for Standing

The source of the "concrete financial loss" rule is the Supreme Court's analysis of Article III's "case or controversy" requirement, which is required in order to confer federal subject matter jurisdiction. The Supreme Court held: "To establish an Art. III case or controversy, a litigant first must clearly demonstrate that he has suffered an injury in fact. That injury, we have emphasized repeatedly, must be **concrete** in both a qualitative and temporal sense. The complainant must allege an injury to himself that is distinct and palpable... and the alleged harm must be actual or imminent, not conjectural or hypothetical."[6]

Under this standard, the Supreme Court has gone so far as to find standing for an environmental organization which alleged that the "adverse environmental impact" of a railroad rate increase would cause its members "to suffer economic, recreational and aesthetic harm." *Whitmore*, 495 U.S. at 159. Specifically, the environmental group claimed the rate increase, "would ... cause increased use of nonrecyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which resources might be taken from

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[6]*Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (emphasis added).

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the Washington area, and resulting in more refuse that might be discarded in national parks in the Washington area." *Id.* This highly speculative injury nevertheless survived a motion to dismiss for lack of standing. *Id.* In the instant case, plaintiffs' claims of depressed wages are not speculative at all. The complaint alleges their wages have been depressed as a result of defendants' illegal immigrant hiring scheme; thus the injury has occurred.[7]

B. Plaintiffs Satisfy the Ninth Circuit's Test for Standing/Concrete Financial Loss

Controlling Ninth Circuit cases on "financial loss" simply stand for the proposition that a plaintiff who has alleged an injury which has not manifested itself lacks standing to sue under RICO. In *Oscar v. University Students Co-Operative Ass'n*, 965 F.2d 783, 785 (9th Cir.), *cert. denied*, 506 U.S. 1020 (1992), the Court affirmed the dismissal of a RICO complaint in which plaintiff, who rented her apartment, claimed the value of the building in which she lived was depressed by her neighbors' drug

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[7] "Plaintiffs and members of the Class have been damaged by reason of defendants' RICO violations because they have been employed by Matson and Zirkle at wages which were depressed as a direct result of the Illegal Immigrant Hiring Scheme. Plaintiffs and members of the Class were the intended and direct victims of the defendants' RICO scheme and their injury, working at depressed wages, was both intended and foreseeable. As a direct result of this scheme defendants were able to profit." Complaint, ¶ 56. *See NOW v. Scheidler*, 510 U.S. 249, 256 (1994) ("[A]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.") (reversing dismissal of RICO claim for lack of standing).

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dealing, and further, that she had suffered "discomfort and annoyance." The Court held that as a tenant, plaintiff had not suffered a "tangible financial loss" from the alleged decrease in the property value, and also held that personal injuries did not satisfy § 1964(c)'s requirement that a RICO plaintiff suffer an injury to "business or property." *Id.* This precedent cannot apply to the instant case, alleging lost wages, which as indicated, *supra*, are compensable under RICO.[8] As for *Fleischhauer v. Feltner*, 879 F.2d 1290, 1299 (6th Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990), the Court there simply held that: "[r]ecovery for physical injury or mental suffering is not allowed under RICO because it is not an injury to business or property."

Likewise, in *In re American Honda Motor Co. Dealership Realtors Litig.*, 941 F. Supp. 528, 540 (D. Md. 1996), the district court concluded that the Ninth Circuit's "concrete financial loss rule" merely requires a plaintiff to allege a "tangible financial injury." In that case, the plaintiffs were car dealers who brought RICO claims seeking "lost past profits" for sales of vehicles they should have received but did not as a result of a bribery scheme perpetrated by other Honda dealers. In deciding the defendants' motion to dismiss, the Court held that the alleged injuries would be sufficient under the Ninth Circuit's "concrete financial loss" rule. *Id.*

V. EXPERT TESTIMONY IS OFTEN USED TO HELP ESTABLISH CAUSATION AND DAMAGES IN RICO AND ANTITRUST CASES

Defendants contended at oral argument that the Complaint is worthy of dismissal because the alleged wage depression could have been caused by factors other

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[8] The holding in *Oscar* followed the Ninth Circuit's similar decision in *Berg v. First State Ins. Co.*, 915 F.2d 460, 464 (9th Cir. 1990), in which the Court held that "compensation for the stress of having been without insurance" was not compensable under RICO. *Oscar*, 965 F.2d at 811.

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than the illegal immigrant hiring scheme, and colorfully expressed their belief that expert testimony could not be used to help establish damages. The Court also expressed concern as to how damages could be proven in this case. Accordingly, plaintiffs will briefly discuss this issue that was not raised prior to oral argument.

In considering how causation and damages will be proven in this case, it is helpful to examine antitrust law on which RICO was "modeled." *Holmes*, 503 U.S. 258. The law is settled that antitrust "[p]laintiffs need not prove that the antitrust violation was the sole cause of their injury, but only that it was a material cause." *Sullivan v. National Football League*, 34 F.3d 1091, 1103 (1st Cir. 1994), *reh'g denied, amended sub nom.*, 1994 U.S. App. Lexis 38393 (1st Cir. 1994), *cert. denied*, 513 U.S. 1190 (1995). *See also, William Inglis & Sons Baking Co. v. Continental Baking Co.*, 942 F.2d 1332, 1339 (9th Cir. 1991), *amended on other grounds*, 981 F.2d 1023 (9th Cir. 1992) ("In order to establish liability...[plaintiff] was required to prove the existence of some causal connection between defendant's wrongful act and some loss of anticipated revenue."). Once plaintiffs establish the *fact* of injury (by showing that the wrongful act has *some* causal connection with the plaintiffs' damages), courts relax the evidentiary standards for proving the *amount* of damages. *Syufy Enterprises v. American Multicinema, Inc.*, 793 F.2d 990, 1003 (9th Cir. 1986) ("Proof of the amount of damages is governed by a less stringent standard of proof than is the fact of injury."), *cert. denied*, 479 U.S. 1034 (1987).

While cases arising under RICO similarly involve lost wages and other economic damages which may be inherently difficult to quantify, such difficulty of proof is typically not considered to be grounds for dismissal. Accordingly, courts have allowed plaintiffs to proceed with RICO cases in which causation and damage analysis requires expert testimony so long as the defendants' RICO violations are a "substantial factor" in causing the plaintiffs' injuries. *E.g., Hecht v. Commerce Clearing House, Inc.*, 897

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F.2d 21, 23-24 (2nd Cir. 1990) ("the RICO pattern or acts proximately cause a plaintiffs injury if they are a substantial factor in the sequence of responsible causation, and if the injury is reasonably foreseeable or anticipated as a natural consequence"). The Complaint's allegations easily establish that defendants' Illegal Immigrant Hiring scheme was a substantial factor in causing injury to the plaintiffs. Accordingly, plaintiffs should be permitted to prove causation, and the amount of their damages, through expert testimony

VI. CONCLUSION

For the reasons stated above as well as those stated in prior briefing and at oral argument, plaintiffs request that the Court deny the defendants' motion to dismiss. In the event that the Court does dismiss plaintiffs' complaint, however, plaintiffs respectfully request that the Court grant them leave to amend their Complaint to make their causation and damage allegations more detailed.

DATED this 8th Day of September, 2000.

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DECLARATION OF SERVICE

I, Carrie Scheafer, 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 September 8, 2000, I caused an original and one copy of the following document to be hand delivered to the Clerk of the District Court, Eastern District of Washington, West 920 Riverside Ave., Room 840, U.S. District Courthouse, Spokane, WA., 99201:

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

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN RESPONSE TO NEW ISSUES RAISED IN DEFENDANTS' REPLY AND AT ORAL ARGUMENT (Declaration of Service attached)

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Executed on September 8, 2000, in Seattle, Washington.

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COMMERCIAL CLEANING SERVICES, L.L.C., Plaintiff,
v.
COLIN SERVICE SYSTEMS, INC., Defendant.

No. Civ.A. 3:99CV109(CF.

United States District Court, D. Connecticut.

March 21, 2000.

Howard Foster, Johnson & Bell, Ltd., Chicago, Illinois, Jacek I. Smigelski, Timothy P. Mills, Smigelski & Mills, New Britain, Connecticut, for plaintiff.

James Sicilian, Mario R. Borelli, Day Berry & Howard, Cityplace, Hartford, Connecticut, C. William Phillips, Aaron R. Marcu, Covington & Burling, New York, New York, for defendant.

RULING ON THE DEFENDANT'S MOTION TO DISMISS

DRONEY, J.

Introduction

*1 The one count putative class action complaint in this case seeks damages for violation of the Racketeering Influenced Corrupt Organizations Act (hereinafter "RICO"), codified at 18 U.S.C. § 1961, et seq. The complaint alleges that the defendant, which is in the business of cleaning office buildings, has engaged in a pattern of racketeering activity by "hiring hundreds of illegal immigrants at low wages in order to give it an unfair advantage over its competitors." The complaint also alleges that this activity harms the plaintiff and other businesses which compete with the defendant for office cleaning service accounts because it underbid its competitors. Pending is the defendant's motion to dismiss [Document # 11].

Background [FN1]

FN1. For the purpose of deciding the motion to dismiss, the facts alleged in the complaint are deemed to be true. See Discussion § I, infra.

According to the complaint, the defendant is engaged in the "highly competitive" business of providing office cleaning services. The plaintiff is one of the defendant's business competitors. It is also alleged that the defendant knowingly hires "illegal and/or undocumented workers and pays them wages that are significantly below the industry standard" and employs "illegal aliens" after the termination of their work authorization periods. According to the complaint, these practices enable the defendant to underbid its competitors, including the plaintiff. The complaint also alleges that the defendant was sued by the U.S. Immigration & Naturalization Service ("INS") for this conduct and in 1996 paid a substantial fine to the INS to resolve that enforcement action. The complaint also alleges the existence of a racketeering enterprise comprised of the defendant and "temporary and permanent employment placement services, labor contractors, employment recruiters, newspapers (where it advertises for laborers) and various immigrant networks that assist fellow immigrants in obtaining employment, housing and illegal work permits." [FN2]

FN2. Other than the defendant, the complaint does not specifically identify any of the alleged members of the enterprise. The plaintiff, in the complaint, requests time to conduct discovery concerning the identities of the members.

The complaint alleges that the defendant's hiring practices constitute a violation of Section 274 of the Immigration and Nationality Act ("INA"), codified as 8 U.S.C. § 1324(a)(3)(A) [FN3] which provides: "Any person who, during any twelve month period, knowingly hires for employment at least 10 individuals with actual knowledge that the individuals are aliens .... shall be fined under Title 18, or imprisoned for not more than 5 years or both." The complaint accurately alleges that 8 U.S.C. § 1324(a) is a predicate act within the meaning of RICO, 18 U.S.C. § 1961(1)(F). The complaint purports to allege a pattern of racketeering activity by stating that the defendant has participated in the affairs of the enterprise through over 100 acts of violation of 8 U.S.C. § 1324(a) in every 12 month period since that provision became a RICO predicate offense. [FN4]

FN3. In the complaint the plaintiff has cited to a violation of 8 U.S.C. § 1324(a)(1)(B)(3)(A), but no such statutory provision exists. The language quoted in the complaint and set forth above is contained in 8 U.S.C. § 1324(a)(3)(A). Accordingly, it is assumed that is the section which the plaintiff has alleged as the RICO predicate offense.

FN4. On April 24, 1996, as part of the Antiterrorism and Effective Death Penalty Act of 1996, Pub L. 104-132 § 433 amended RICO to make 8 U.S.C. Section 1324 and related violations RICO predicate

offenses.

The defendant has moved to dismiss the complaint for a variety of reasons. The Court concludes that dismissal of the complaint is warranted because (1) the plaintiff does not have standing to bring this action and, as a separate basis for dismissal, (2) the plaintiff has failed to comply with this Court's Standing Order in Civil RICO cases. For these reasons, the defendant's motion is GRANTED.

Discussion

I. Rule 12(b)(6) Standard

*2 In deciding a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), a court must construe in favor of the pleader any well-pleaded allegations in the complaint. Finnegan v. Campeau Corp., 915 F.2d 824, 826 (2d Cir.1990); see also In Re Hunter Environmental Services, Inc., 921 F.Supp. 914, 917 (D.Conn.1996). The issue on a motion to dismiss is not whether the nonmoving party will prevail, but whether he is entitled to offer evidence to support his claims. United States v. Yale New Haven Hosp., 727 F.Supp. 784, 786 (D.Conn.1990) (citing Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)). However, "[A] motion to dismiss must be granted if the pleadings fail to adequately allege the elements of the claim on which the plaintiff's theory of liability rest." Stern v. General Electric co., 924 F.2d 472, 476 (2d Cir.1991). A court may dismiss the complaint only where "it appears beyond doubt that the pleader can prove no set of facts in support of the claim which would entitle him to relief." Yale New Haven Hosp., 727 F.Supp. at 786 (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). "In determining the adequacy of a claim under Rule 12(b)(6), consideration is limited to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken." Allen v. Westpoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir.1991).

II. Section 1962 Generally

The RICO statute recognizes a private civil cause of action for those individuals or entities whose property or business interests have been injured by the activities of a racketeering enterprise. 18 U.S.C. § 1964(c). See also Medgar Evers House Tenants Association v. Medgar Evers Houses Associates, L.P., 25 F.Supp.2d 116, 120 (E.D.N.Y.1998) (citing 18 U.S.C. § 1962(a)-(d)), aff'd sub nom, Abbott v. Medgar Evers Houses Associates, L.P., 201 F.3d 430 (2d Cir.1999), petition for cert. filed, (U.S. Feb. 14. 2000) (No. 99-1367). A RICO claim requires that the defendant used funds derived from a pattern of racketeering activity to invest in an enterprise, acquired control of an enterprise through a pattern of racketeering activity, or conducted the affairs of an enterprise through a pattern of racketeering activity, or conspired to do any of those activities. See 18 U.S.C. § 1962(a)-(d). See also Medgar Evers Houses Tenants Association, 25 F.Supp.2d at 120.

A pattern of racketeering activity requires, inter alia, at least two predicate acts of racketeering activity. See 18 U.S.C. § 1961(5). See also Medgar Evers Houses Tenants Association, 25 F.Supp.2d at 120. Certain criminal acts and violations of federal law are defined as "racketeering activity" in 18 U.S.C. § 1961(1). As mentioned above, Section 1961(1)(F) provides that a violation of Section 274 of the INA (relating to bringing in or harboring certain aliens, as codified at 8 U.S.C. § 1324) constitutes a predicate offense under RICO.

*3 The plaintiff alleges the predicate offenses in this action as multiple violations of 8 U.S.C. § 1324(a)(3). In order to allege a violation of 8 U.S.C. § 1324(a)(3), the plaintiff must allege that the defendant: (1) knowingly hired at least 10 individuals during any twelve month period of time whom it knew (2) were unauthorized aliens and (3) had been brought into, transported within, concealed within, or encouraged to enter this country, as described in § 1324(a) See 8 U.S.C. § 1324(a)(3). [FN5]

FN5. Section 1324(a) makes it unlawful to (1) bring or attempt to bring an alien into the United States at any place other than a designated port of entry; or (2) transport, move, or attempt to transport or move such alien within the United States knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States illegally; or (3) conceal, harbor, or shield from detection, or attempt to conceal, harbor, or shield from detection, an alien in any place, knowing or recklessly disregarding the fact that the alien has come to, entered, or remains in the United States illegally; or (4) encourage or induce an alien to come to, enter, or reside in the United States, knowing or in recklessly disregarding the fact that such action by the alien is unlawful; or (5) conspire in or aid and abet the commission of any of these acts. See 8 U.S.C. § 1324(a)(1).

III. RICO Standing

A. Generally

A threshold consideration is whether the plaintiff has standing to bring the RICO cause of action. In order to have standing, the plaintiff must satisfy three pleading requirements: (1) a violation of section 1962; (2) injury to business or property; and (3) causation of the injury by the violation. First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 767 (2d Cir.1994) (citing Hecht v. Commerce Clearing House, Inc., 897 F.2d 21, 23 (2d Cir.1990)). With respect to the causation requirement, a RICO plaintiff lacks standing absent a direct relationship between the injury alleged and the predicate RICO offense. See First Nationwide Bank, 27 F.3d at 769. Put differently, the defendant's alleged RICO violation must be the "but-for" or cause-in-fact of plaintiff's injury, as well as the legal or proximate cause. Holmes v. Securities Investor Protection Corp., 503 U.S. 258, 268, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992); Laborers Local 17 Health and Welfare Benefit Fund v. Phillip Morris, Inc., 191 F.3d 229, 234 (2d Cir.1999); Standardbred Owners Ass'n v. Roosevelt Raceway Assocs., 985 F.2d 102, 104 (2d Cir.1993)); Hecht, 897 F.2d at 23. [FN6] Failure to adequately allege that the defendant's RICO predicate acts proximately caused plaintiff's injury is a defect of pleading and is ground for dismissal at the pleading stage. See First Nationwide, 27 F.3d at 769.

FN6. The district court in Medgar Evers Houses Associates examined the impact of the Supreme Court's decision in Holmes on RICO causation case law in the Second Circuit. See Id., 25 F.Supp.2d at 122-124.

B. The Holmes Direct Relation Requirement for RICO Standing

As indicated, one of the requirements under the U.S. Supreme Court's decision in Holmes is that the RICO predicate acts be the proximate cause of the injury complained of by the plaintiff. Holmes described this proximate cause requirement as requiring a "direct relation between the injury asserted and the injurious conduct alleged." In re American Express Co. Shareholder Litig., 39 F.3d 395, 399 (2d Cir.1994) (citing Holmes, 503 U.S. at 268). This "direct relation" requirement precludes recovery by a party who simply complains of injury "which flows from the misfortunes visited upon a third person by the defendant's acts". Id. The Holmes Court "concluded that in the civil RICO context, justice demands that a plaintiff demonstrate a direct relationship between the injury asserted and the RICO violation." Medgar Evers House Tenants Association v. Medgar Evers Houses Associates, L.P., 25 F.Supp.2d 116, 121 (E.D.N.Y.1998).

*4 The Supreme Court in Holmes gave three reasons for the direct relation requirement. "First, the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors." Holmes, 503 U.S. at 269 (citation omitted); see also Medgar Evers Houses Associates, 25 F.Supp.2d at 121. Second, extending the private RICO claim to indirectly injured parties would result in courts having to formulate complicated rules apportioning damages among the different levels of injured parties in order to avoid the risk of multiple recoveries. See Holmes, 503 U.S. at 269 (citations omitted); see also Medgar Evers Houses Associates, 25 F.Supp.2d at 121. Finally, there is no need to address these complex issues, because the directly-injured party can bring the action and that generally serves the deterrent purpose of the private civil action. See Holmes, 503 U.S. at 269- 70 (citation omitted); see also Medgar Evers Houses Associates, 25 F.Supp.2d at 121.

A number of district courts have applied the "direct relation" test in dismissing RICO causes of action where the plaintiff bases the claim on an illegal course of conduct by a defendant designed to avoid compliance with federal law, which results in an injury to the plaintiff. For example, in Medgar Evers Houses Associates, supra, the tenants of a New York City housing project brought a RICO claim against the owners of the project and the U.S. Department of Housing and Urban Development ("HUD"). [FN7] The tenants claimed that the owners had made a series of false and misleading statements to HUD concerning the upkeep and condition of the housing project. The tenants claimed that HUD was misled about the condition of the housing project. As a result, the owners continued to receive rent subsidy payments and were not compelled by HUD to improve the project. The district court, however, concluded that the plaintiffs did not have standing to bring a RICO cause of action against the owners of the housing project based on the false statements to HUD and dismissed the complaint. The district court found the following important: (1) none of the statements were made to the plaintiffs, but to HUD; (2) the fact finder would be required to determine whether the complained-of conditions were the result of the false

statements or were the result of other factors (such as the defendant's poor management of the housing project); and, (3) the court need not resolve these questions because HUD could deter the fraudulent activities. Id. 121-122.

> FN7. HUD was only named as a nominal defendant from which no relief was sought. See Medgar Evers Houses Associates, 25 F.Supp.2d at 119.

Similarly, in Barr Laboratories, Inc. v. Quantum Pharmics, Inc., 827 F.Supp. 111 (S.D.N.Y.1993), the plaintiff drug manufacturer brought an action against one of its competitors when it learned it had filed false applications with the Food and Drug Administration ("FDA"). The plaintiff alleged that the defendant filed these applications to obtain FDA approval to market certain drugs. The plaintiff claimed that the defendant violated RICO by committing predicate acts of mail and wire fraud when it submitted the false applications to the FDA. The plaintiff sought damages to compensate it for the sales lost by virtue of the defendant marketing the fraudulently-approved drugs. The district court dismissed the RICO claim, reasoning that the plaintiff's losses were too remote because they did not stem directly from the false applications filed with the FDA. Barr Laboratories, Inc., 827 F.Supp. at 116. The district court concluded that the losses depended upon the intervening actions by the FDA and the competitor's customers; the FDA had the discretion to issue the drug approval and the competitor's customers could choose whether they wished to purchase the drugs or those of another competitor. Id. Thus, the plaintiff's claim of injury was "indirect." Id.

*5 Finally, in Kingston Square Tenants Association v. Tuskegee Gardens, Ltd., 792 F.Supp. 1566 (S.D.Fla.1992), the plaintiff tenant association brought a RICO cause of action against the owners and managers of its housing complex. Like in Medgar Evers Houses Associates, the association alleged that the defendants had violated RICO by submitting multiple false applications for HUD funds in which they stated that the units in the complex were in a good condition. The HUD funds were then used for purposes other than the repair and maintenance of the complex and, as a result, the complex fell into a state of disrepair. The district court reasoned that HUD, not the association members, was the target of the defendants' illegal conduct and the association members only suffered indirectly from the conduct. As such, the district court concluded HUD was the proper party to seek relief. See Id., 792 F.Supp. at 1578.

C. The Instant Case

In the instant case, the plaintiff has not alleged facts sufficient to establish its standing to bring an action based on the claimed RICO violations. The injury it alleges--lost revenue--does not bear a direct relation to the predicate acts by the defendants. As in Holmes, Medgar Evers Houses Associates, Barr Laboratories, Inc., and Kingston Square Tenants Association, the complaint in the instant case fails to sufficiently allege the required causation.

The complaint alleges that the defendant has committed predicate offenses of multiple violations of 8 U.S.C. § 1324(a) through the operation of the illegal immigrant hiring scheme. The complaint alleges the following causation chain: defendant hires illegal immigrants at a reduced rate of pay; which also enables it to avoid paying federal and state taxes, workers' compensation insurance, and other costs for these employees; which enable it to make lower bids than the plaintiff and other competitors for office cleaning contracts; which results in it obtaining a larger market share of the cleaning business and ultimately prevents the plaintiff from obtaining more business.

Assuming the allegations are true, the commission of the predicate offenses by the defendant does not directly injure the plaintiff. Rather, the predicate offenses are aimed at avoiding compliance with the immigration laws and detection of those activities by the INS. Additionally, the fact finder would be required to determine whether the plaintiff obtained a reduced market share of the office cleaning contracts because of the alleged "illegal immigrant hiring scheme" or because of other factors, such as: (1) the comparative quality of the services provided by the plaintiff and the defendant; (2) the comparative business reputations of the plaintiff and the defendant; (3) the fluctuations in the demand for such services; and, (4) a myriad of other reasons for selecting one cleaning company over another. It would also be extremely difficult to determine whether the plaintiff lost business opportunities or whether another office cleaning business was harmed. In other words, even if the defendant should not have received the contract, in many instances it would be speculative to choose which competitor the potential customer would have selected. Additionally, assuming the fact finder could make these difficult determinations, the calculation of

damages directly attributable to the illegal immigrant hiring scheme would be daunting, if not impossible.

*6 Finally, as recognized in Holmes, Medgar Evers Houses Associates, Barr Laboratories, Inc., and Kingston Square Tenants Association, if the defendant is violating the INA, it is the INS which bears the primary responsibility to deter those activities. This conclusion is consistent with other decisions which hold that there is no recognized private cause of action under the INA and the civil and criminal enforcement of the provisions of the statute is appropriately left to the INS. See Nieto-Santos v. Fletcher Farms, 743 F.2d 638, 641 (9th Cir.1984) (no private right of action under the INA); Lopez v. Arrowhead Ranches, 523 F.2d 924, 926 (9th Cir.1975) (8 U.S.C. § 1324 is a penal provision and creates no private right of action); Flores v. George Braun Packing Co. Div. of Leonard & Harral Packing Co., 482 F.2d 279, 280 (5th Cir.1973)(per curiam) (holding that various provisions of the INA, including 8 U.S.C. § 1324, did not create a private right of action against employers who hired illegal aliens); Chavez v. Freshpict Foods, Inc., 456 F.2d 890, 893-894 (10th Cir.1972), cert. denied, 409 U.S. 1112 (1973) (same); Mate v. Richard Dattner Architects, 972 F.Supp. 738, 742 (S.D.N.Y.1997) (citizen "has no standing to assert a claim under the INA because the statute does not create a private right of action to redress a violation that results when an employer submits false information or illegally hires an alien when domestic workers are available"); Collyard v. Washington Capitals, 477 F.Supp. 1247, 1254 (D.Minn.1979) (INA does not create a private right of action); Dowling v. United States, 476 F.Supp. 1018, 1020-1021 (D.Mass.1979) (same); see also 8 U.S.C. § 1329 ("The district courts of the United States shall have jurisdiction of all causes, civil and criminal, brought by the United States that arise under the provisions of this subchapter.") [FN8] The INA does not explicitly provide for a private right of action nor does it impliedly create a private right of action. See United States v. Richard Dattner Architects, 972 F.Supp. 738, 742-743 (S.D.N.Y.1997).

FN8. The term "this subchapter" is a reference to subchapter II of Title 8 which includes sections 1151 through 1378.

For these reasons, the Court concludes that the plaintiff lacks standing to bring this action. Accordingly, the motion to dismiss is granted on that basis.

IV. Non-Compliance with the Standing Order in Civil RICO Cases

The Standing Order in Civil RICO cases for the United States District Court for the District of Connecticut ("the Standing Order") provides "In all civil actions where the complaint contains a cause of action pursuant to 18 U.S.C. Sections 1961-1968 the plaintiff shall file a RICO Case Statement ("the statement") within twenty (20) days of filing the complaint." The Standing Order requires that the plaintiff provide the Court and the defendant with a statement setting forth particular information about the nature and elements of its claimed RICO violation. A RICO case statement is designed to be read together with the complaint and to supplement the allegations contained in the complaint. See e.g. McLaughlin v. Anderson, 962 F.2d 187, 189 (2d Cir.1992). In the instant case, the RICO case statement filed by the plaintiff merely recounts the general allegations contained in the complaint.

*7 The statement in the instant case is insufficiently detailed in several important areas. A few examples: the plaintiff fails to identify of the alleged wrongdoers, other than the defendant; it fails to set forth the alleged misconduct of each alleged wrongdoer; it fails to set forth the identity of the alleged victims and the manner in which each victim was allegedly injured (instead, the plaintiff generally responds to this provision by stating: "As stated in paragraphs 6, 11 and 12 of the complaint, the victims are Colin's competitors throughout the nation"); it fails to explain how each individual victim was injured (instead, it merely refers back to the general allegations of the complaint); and, it fails to set forth the names of the individuals, partnerships, corporations, associations, and other legal entities which allegedly constitute the RICO enterprise (the plaintiff provides the following response to that provision of the Standing Order: "The association-in-fact enterprise, as alleged in paragraph 30 of the complaint, is a group of labor contractors, placement services, employment recruiters and immigrant networks that actively assist Colin in locating and employing illegal immigrants.").

Although the Court is reluctant to dismiss a RICO case because of a plaintiff's mere failure to comply with all aspects of the Standing Order, in the instant case the Court concludes that the plaintiff's degree of failure to comply with the Standing Order warrants dismissal. The purpose of the Standing Order--to give to the defendant the basic factual information which

underlies the RICO claim--is so grievously violated here to warrant dismissal of the complaint on that basis as well.

Conclusion

The defendant's Motion to Dismiss [Document # 11] is GRANTED. The Court recognizes that when a motion to dismiss is granted, it may grant leave to amend the complaint. See Hayden v. County of Nassau, 180 F.3d 42, 53 (2d Cir.1999) (citing Ronzani v. Sanofi S.A., 899 F.2d 195, 198 (2d Cir.1990)). However, "where it appears that granting leave to amend is unlikely to be productive, it is not an abuse of discretion to deny leave to amend." Yerdon v. Henry, 91 F.3d 370, 378 (2d Cir.1996) (citing Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); see also Hayden, 180 F.3d at 53-54 (citing Pani v. Empire Blue Cross Blue Shield, 152 F.3d 67, 76 (2d Cir.1998), cert. denied, 525 U.S. 1103, 119 S.Ct. 868, 142 L.Ed.2d 770 (1999). In a RICO case, upon granting a motion to dismiss leave to amend may be denied where it appears that the plaintiff lacks standing to bring the action. See Manson v., Stacescu, 11 F.3d 1127, 1133 (2d Cir.1993), cert. denied, 513 U.S. 915, 115 S.Ct. 292, 130 L.Ed.2d 206 (1994).

In the instant case, one of the bases for granting the defendant's motion to dismiss is the Court's conclusion that the plaintiff does not have standing to bring this action. A review of the plaintiff's complaint, RICO case statement and the papers filed in opposition to the motion fails to reveal any factual matters which, if plead in an amended complaint, would cure that deficiency.

*8 Accordingly, the complaint is dismissed and the Clerk is ordered to close this case.

END OF DOCUMENT