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

OCT 23 2000

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Attorneys for Defendants

Honorable Fred VanSickle

ORIGINAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

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

Plaintiffs,

vs.

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

RESPONSE TO MOTION FOR RECONSIDERATION - MATSON & ZIRKLE DEFENDANTS

Defendants Matson Fruit Co. (Matson) and Zirkle Fruit Co. (Zirkle) submit this response opposing the plaintiffs' Motion For Reconsideration. The plaintiffs have not articulated any basis for their motion, under Fed. R. Civ. P. 59. The court's analysis of the standing issue and dismissal, as set forth in the order entered September 27, 2000, is substantively correct; and the plaintiffs' Motion For Reconsideration relies on argument driven by mere semantics. Finally, contrary to the plaintiffs' arguments, Fed. R. Civ. P. 12(b)(6) does not require the court to simply accept at face value conclusory allegations that the plaintiffs have standing.

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I. PLAINTIFFS DO NOT ARTICULATE ANY BASIS FOR RECONSIDERATION.

Under Federal Rule of Civil Procedure 59(e), a motion to alter or amend judgment (i.e. for reconsideration) should be denied unless the court is presented with new evidence, is shown to have committed clear error, or there is an intervening change in controlling law. *School District No. 1J, Multnomah County v. AcandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). Such a motion is not a substitute for appeal, nor is it intended to be a second (or in this case third) chance for parties unhappy with the court's ruling to re-argue the issues. *Twentieth Century-Fox Film Corp. v. Dunnahoo*, 637 F.2d 1338, 1341 (9th Cir. 1981). If a party relies upon a new argument in a motion under Fed. R. Civ. P. 59(e), the party must explain why he or she failed to raise the argument prior to the entry of judgment. See: *Minnesota Mutual Life Ins. V. Ensly*, 174 F.3d 977, 987 (9th Cir. 1999).

The plaintiffs' arguments that they sufficiently alleged "concrete injury" and proximate cause of their alleged damages, so as to confer standing to sue under RICO, were previously addressed to the court in plaintiffs' 35 page responsive memorandum filed on or about June 14, 2000, in oral argument on August 31, 2000, and again in their eight page unauthorized Supplemental Memorandum filed on or about September 8, 2000. The plaintiffs' Motion For Reconsideration does not raise any new arguments, but merely takes issue with the court's rejection of the plaintiffs' conclusory assertions. Further, without addressing the substantive basis for the court's ruling, the plaintiffs have attempted through semantic gymnastics to convince the court that its decision is internally inconsistent.

In addition to being legally erroneous, the plaintiffs' arguments are insufficient justification for filing a Motion for Reconsideration under Fed. R. Civ. P. 59. The plaintiffs have already availed themselves an opportunity to re-argue their position by submission of the

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1 unauthorized Supplemental Memorandum, to which the defendants were compelled to undertake
2 the expense of a response. Thus, the plaintiffs' Motion For Reconsideration is not warranted
3 under the Federal Rules of Civil Procedure, and merely causes needless increase in the cost of
4 this litigation and the unnecessary expenditure of additional judicial resources in violation of
5 Fed. R. Civ. P. 11(b)(1).

6 **II. THE COURT'S DISMISSAL OF THE CASE IS SUBSTANTIVELY CORRECT.**

7 The court's well-reasoned decision relied on the development by the Supreme Court and
8 the Ninth Circuit Court of Appeals of a "remoteness" test for RICO standing, which blends
9 together the concepts of proximate cause and the requirement of a "concrete injury." (Order
10 Granting Motion To Dismiss, p. 16, lines 6-9). Nevertheless, both proximate cause and a
11 "concrete injury" are still required to confer RICO standing. See: *Imagineering v. Kiewit Pacific*
12 *Co.*, 976 F.2d 1303, 1310-11 (9th Cir. 1992). The "remoteness" test, however, can be used to
13 analyze both requirements, particularly the requirement of a "concrete injury." See: *Oregon*
14 *Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957, 963 (9th
15 Cir. 1999).

16 Here, the court determined the plaintiffs' allegations cannot establish a "concrete injury,"
17 as is required for RICO standing. (Order Granting Motion To Dismiss, pp. 19-23). The court
18 specifically noted "[a] showing of 'injury' **requires proof of a concrete loss**. [citation omitted]
19 'Speculative' injuries are insufficient to confer RICO standing." (*Id.* at p. 19, lines 15-
20 17)(emphasis added). "Here, as in *Imagineering* and *Shepard*, the plaintiffs' main flaw is their
21 inability to **concretely** establish the degree to which their wages have been affected by the
22 defendants' alleged violations." (*Id.* at p. 21, lines 20-23)(emphasis added).
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The court's conclusion that the plaintiffs' allegations fail to adequately allege a "concrete injury" are not substantively challenged by the plaintiffs' Motion For Reconsideration. Nor do plaintiffs cite a single case that could be deemed to overrule the requirement of a "concrete injury." In addition, under the correct analysis of controlling law, the remoteness and speculative nature of plaintiffs' alleged damages precludes a determination that the defendants' alleged acts were a proximate cause of said damages.

A. No "Concrete Injury" To Business Or Property.

The plaintiffs' Motion For Reconsideration does not specifically address the court's conclusion that plaintiffs have failed to allege a "concrete" financial injury.[1] Rather, as the plaintiffs have previously done with defendants' arguments, they attempt to re-characterize the court's conclusion and then suggest it is wrong. Thus, the plaintiffs do not address the well-established requirement of "concrete injury," and instead raise a vague argument that the court is "mistaken in its suggestion that stricter rules apply to cases seeking treble damages." (Motion For Reconsideration, p. 13, lines 6-7).

More important, the plaintiffs' suggestion that no citation to 9th Circuit authority supports the rejection of plaintiffs' speculative damages as a basis for standing, in this case as well as the similar decision in *Shepard v. American Honda Motor Corp.*, 822 F. Supp. 625 (N.D. Cal. 1993) (Motion For Reconsideration, footnote no. 11), is a grotesquely erroneous statement.

In *Shepard*, the court was specifically dealing with the requirement that RICO standing requires allegations sufficient to show a "concrete" financial injury, and expressly analyzed, analogized and relied upon the 9th Circuit precedent established by the *Imagineering* decision.

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[1] Nor do the plaintiffs address the court's recognition that the *Imagineering* decision can be construed to "require proof that a plaintiff actually paid money as a result of the racketeering activity in order to have standing to bring a RICO claim." (Order Granting Motion To Dismiss, p. 20, footnote no. 7). This requirement also mandates dismissal of the plaintiffs' claims.

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Shepard, supra at 822 F. Supp. 628-630. For the plaintiffs to suggest that the court's requirement in *Shepard* that there be allegations establishing "concrete" injury, and that the denial of standing based on speculative injuries was done without citation to 9th Circuit authority, is absurd. The court in Shepard made several references and/or comparisons to the *Imagineering* decision.

Likewise, in this case, the court correctly applied the same 9th Circuit authority (*Imagineering, supra*) in concluding the plaintiffs lacked standing because their alleged damages are too speculative to satisfy the requirement of "concrete" injury. The court stated:

> "A wide range of factors determines the wage for orchard laborers in the Yakima Valley. Plaintiffs have argued that they will be able to show, through expert testimony and statistical and demographic modeling, what the relevant labor market would look like absent the hiring of undocumented workers. However, such evidence would not be sufficient to remove plaintiffs' damage claim from the realm of sheer speculation. (Order Granting Motion To Dismiss, p. 22, lines 1-8).

Among the factors noted by the court, upon which any such alleged damages would depend, is whether the plaintiffs individually or as a class would have been hired at a higher rate. In *Imagineering*, the Court of Appeals relied on the prime contractors' legal right to use businesses other than plaintiffs to hold plaintiffs' alleged damages were too speculative. Similarly, the legal right of Matson, Zirkle and all other employers to set different wage rates for individual employees demonstrates the speculative nature of the plaintiffs' allegation that they, individually, would each have received higher wages in a market comprised exclusively of authorized workers.

In addition to the reasons that the court relied upon to hold the plaintiffs' allegations in this case fail to establish a "concrete injury," the court should also conclude that plaintiffs allegations, as a matter of law, do not allege an **injury** to "business or property" within the meaning of RICO. Although, the court has already noted the *Imagineering* decision, *supra*, can

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1 be read to require an allegation that plaintiff actually paid money as a result of the racketeering
2 activity. (Order Granting Motion To Dismiss, p. 20, footnote no. 7), this court may still need to
3 address whether the facts in this case demonstrate an "injury" within the meaning of RICO. In
4 *Danielson v. Burnside-Ott Aviation Training Center, Inc.*, 941 F.2d 1220, 1229 (D.C. Cir. 1991),
5 the Court of Appeals expressed serious doubt that plaintiffs were injured in their "business or
6 property," when they alleged payment of lower wages as a result of alleged RICO violations. In
7 dismissing the case for failure to state a claim, the court stated:

8 "While the employees may have been entitled to higher paying job classifications than they received under the defendants' employment schemes, each employee in fact
9 received precisely the compensation bargained for in return for the agreed work." *Id.*

10 In this case, the plaintiffs received the precise compensation for which they agreed to work at
11 Zirkle. Although wages are a business or property **interest**, the plaintiffs receipt of a wage rate
12 for which they willingly agreed to work is not an **injury**. *Cf. Dumas v. Major League Baseball*
13 *Properties, Inc.*, 104 F.Supp.2d 1220 (S.D. Cal. 2000).

14 None of the cases cited by the plaintiffs for the proposition that "lost wages" may be
15 recovered in civil RICO actions (Motion For Reconsideration, p. 3, lines 6-14) considered a case
16 of "depressed" wages for which the plaintiff had willingly agreed to work. In the portion of the
17 *Imagineering* decision discussed *supra*, the Court of Appeals was obviously concerned that the
18 term "injury" required (at least) an alleged violation of some legal or contractual business or
19 property right. In this case, the plaintiffs had no contractual right to higher wages, and their only
20 legal right was to receive minimum wage, which they do not allege was violated. Thus, no
21 "injury" within the meaning of RICO has been alleged.

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1 **B. No Proximate Cause.**

2 Although the court did not conclude the plaintiffs' allegations were sufficient to establish
3 proximate cause, the court did conclude that plaintiffs had sufficiently alleged they were "direct
4 victims" of the alleged hiring scheme (Order Granting Motion To Dismiss, p. 18, lines 17-19).[2]
5 However, a "direct relationship" is "**not the 'sole requirement'** of RICO" proximate causation.
6 *Oregon Laborers*, *supra* at 185 F.3d 963 (emphasis added). See also, *Holmes v. Securities*
7 *Investor Protection Corp.*, 503 U.S. 258, 269, 112 S. Ct. 1311 (1992)(Holding that, as with the
8 Clayton Act, "directness of relationship is not the sole requirement of" proximate causation.)

9 Moreover, the court has recognized "'the [direct injury] rule has more to do with
10 problems of proof than foreseeability.'" (Order Granting Motion To Dismiss, p.21, lines 23-26;
11 quoting from *Imagineering*, *supra* at 976 F.2d 1312). Accordingly, the plaintiffs allegation that
12 the purpose of the alleged hiring scheme was to depress wages does not establish a "direct
13 injury," as that concept is used in this context, if the degree to which the alleged damages were
14 caused by defendants' alleged conduct cannot be established. In this case, the court properly
15 recognized an inability by plaintiffs to establish a "direct injury," as that term is used in this
16 context. (Order Granting Motion To Dismiss, p. 21, lines 20-26).

17 The failure of plaintiffs' allegations to establish proximate cause is demonstrated by the
18 error in their bald assertion that if Matson and Zirkle hired only legally documented workers they
19 would have to pay a higher wage to the plaintiffs. (Motion For Reconsideration, p. 12, lines 1-

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[2] Although a "direct relationship" is **one** element of the proximate cause inquiry, the plaintiffs have exaggerated the Supreme Court's use of this term to argue that a "direct relationship is synonymous with proximate cause," and the court's conclusion that plaintiffs are alleged "direct victims" in this case therefore establishes proximate causation. (Motion For Reconsideration, p. 8). This argument is merely semantic gymnastics. Substantively, if the remoteness of plaintiffs' alleged damages precludes proximate cause, dismissal is appropriate. If "direct relationship" is synonymous with proximate cause, which it clearly isn't, the substantive lack of proximate cause might warrant the court's amendment of the decision to state plaintiffs are not "direct victims."

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3). As explained below, the court is not required to accept this conclusory allegation at face value, and may analyze whether the alleged actions of defendants could indeed be found a proximate cause of plaintiffs' allegedly depressed wages.

The error of plaintiffs' conclusory assertion is demonstrated by plaintiffs' admission they were willing to work for the wage rate paid to them. The court recognized Matson and Zirkle are not required to pay the same rate of wages to all workers within a particular class, and whether higher wages might have been paid to plaintiffs would depend upon the qualifications of each worker. Thus, whether the individual plaintiffs would have been paid higher wages depends upon numerous potential factors, and is too speculative and remote to have been proximately caused by Matson's and Zirkle's alleged actions. This is similar, if not identical, to the Court of Appeals' recognition that the plaintiffs were not guaranteed work on identified projects in *Imagineering*, *supra*. In fact, as in *Imagineering*, there is no guarantee that plaintiffs would have been employed at all, if Matson and Zirkle were compelled to pay a higher wage.

But most important is the error in plaintiffs' unsupported assumption that the actions of Matson and Zirkle were a proximate cause of the existence of unauthorized aliens in the relevant labor market. First, the plaintiffs proximate cause argument fails to focus on the alleged predicate act. The alleged injury must be proximately caused by the RICO predicate act, and as has been repeatedly pointed out in this case, the mere hiring of an unauthorized alien is not a RICO predicate act.

Second, the plaintiffs do not allege, and cannot allege, that fewer workers would have been available in the relevant labor market if Matson and Zirkle had somehow found a way to identify all unauthorized aliens using forged documents. Another primary factor in determining the wages of the plaintiffs' class of worker in the relevant labor market, is the general availability

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of authorized and unauthorized laborers in the relevant geographic area. The plaintiffs do not suggest how the alleged predicate acts of Matson or Zirkle affected the number of such laborers in the area, nor to what degree.

Finally, a substantial portion of the Motion For Reconsideration is dedicated to arguing the speculative nature of plaintiffs' alleged damages does not warrant dismissal, if the defendants' alleged conduct was a factor in the alleged depression of plaintiffs' wages. (See: Motion For Reconsideration, pp. 9-14). They argue that if defendants have committed some wrong, they should not "benefit" from difficulties of proof and the speculative nature of damages. However, every authority plaintiffs cite for this argument predates the Supreme Court's 1992 decision in *Holmes, supra*, which specifically addresses the issue of proximate cause under RICO. Further, this argument by plaintiffs is in direct contravention of the primary rule of law forming the basis for the decision in *Holmes*:

> "Here we use 'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. At bottom, the notion of proximate cause reflects 'ideas of what justice demands, or of what is administratively possible and convenient.'" *Holmes*, *supra* at 503 U.S. 268.

Defendants are not required to defend against allegations their conduct caused some harm, when that alleged harm is too remote or speculative.

In this case, the depression of wages alleged by plaintiffs depends primarily on "the wage rates paid by other orchardists and similar employers, the general availability of laborers, documented and undocumented, in the Yakima Valley, the profitability of the defendants' businesses, the qualifications of each plaintiff, whether the plaintiffs individually or as a class would have been hired at a higher rate, and other factors." (Order Granting Motion To Dismiss, p. 22, lines 12-19). The plaintiffs do not deny that these are the primary factors influencing the

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wage rate paid to plaintiffs. Rather, they simply make the conclusory allegation that defendants' conduct may have been a substantial factor in the depression of the wage rate.

They, however, cannot even allege that all workers would have received a higher wage, without regard for their qualifications.[3] Which again demonstrates that the occurrence of any injury is uncertain and speculative.

C. The Court Is Not Required To Adopt Conclusory Allegations Of Standing.

The plaintiffs erroneously place heavy reliance on an argument that "[t]he Court is required to assume the truth of the complaint's allegations of standing." (Motion For Reconsideration, p. 3, lines 17-19). The plaintiffs' error is two-fold. First, the court **has** accepted as true the plaintiffs' properly pled factual allegations. And, second, the court is not required to accept plaintiffs' conclusory assertion that these alleged facts adequately confer standing under RICO.

The plaintiffs' factual allegation is that their wages were lower than they would have been in a labor market comprised only of authorized workers. (Complaint ¶22, proposed First Amended Complaint ¶43). At this point in the proceedings, the court has accepted this allegation as true. However, having accepted this allegation as true, the court may conclude that it precludes standing because of the remoteness of the alleged damages.

In *Imagineering*, supra at 976 F.2d 1310, the Ninth Circuit Court of Appeals specifically stated:

> "Although plaintiffs characterize their injury as one compensable under RICO, that characterization must be challenged on several bases. ... Although plaintiffs assert that if

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[3] The plaintiffs quote a portion of the court's basis for concluding their alleged damages are too remote and speculative on p. 4 of the Motion For Reconsideration. However, the plaintiffs omit from that quotation the court's conclusion that it is speculative whether the plaintiffs individually or as a class would have been hired at a higher wage rate. The plaintiffs do not dispute that conclusion, nor challenge it in any other fashion.

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specified contracts had not gone to Kiewit those contracts would have been awarded to plaintiffs' prime contractors, **that cannot be established**." (emphasis supplied).

Although well-pled factual allegations must be accepted as true, the court is not required to accept conclusory assertions or legal arguments regarding standing.[4]

The allegations of the plaintiffs in this case, that their wages were lower than they would be in a labor market comprised exclusively of authorized workers, admit the effect on their wages of the relevant labor market. It admits the affect of the availability of other laborers, the qualifications of the plaintiffs relative to other laborers, the right of employers to pay different wage rates to individual employees, and the wage rate paid by competitors for similarly skilled labor in other industries. The plaintiffs were able to accept work in other industries, but did not do so. The effect on the plaintiffs' wages caused by the alleged conduct of Matson and Zirkle is too dependent on the myriad of other factors acknowledged by the court and is, therefore, too remote and speculative to establish proximate cause. These admissions by the plaintiff are the proper basis for the court's conclusion that the alleged damages are too remote and speculative to confer standing.

Amendment of the complaint would not cure these deficiencies, and the court should therefore dismiss the complaint without allowing the proposed amendment. *Allwaste, Inc. v. Hecht, 65 F.3d 1523, 1530* (9th Cir. 1995); see also: *Sheperd v. American Honda Motor Co., Inc., supra* at 822 F. Supp. 631.

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[4] The plaintiffs' erroneous reliance on the decision of the District of Columbia district court, in *SEIU Health & Welfare Fund v. Philip Morris, Inc.*, 83 F.Supp.2d 70, 87 (D.D.C. 1999), for the proposition that a court must simply accept conclusory assertions of standing (See: Motion For Reconsideration, p. 5, lines 8-16) is also noteworthy. The Ninth Circuit Court of Appeals reached an exactly contrary result, and affirmed a Rule 12(b)(6) Motion To Dismiss, in *Oregon Laborers-Employers Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957 (9th Cir. 1999).

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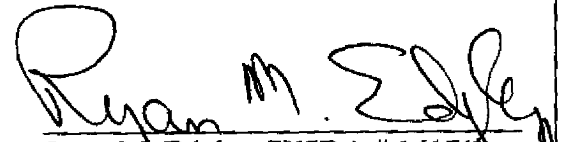
III. CONCLUSION

For the reasons stated herein, and for the reasons set forth in the previous submissions of Zirkle and Matson supporting the Motion To Dismiss, the plaintiffs' Motion For Reconsideration should be denied.

DATED this 23rd day of October, 2000.



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