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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' REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION



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Plaintiffs, Olivia Mendoza and Juana Mendiola, individually and on behalf of all others similarly situated (plaintiffs), submit the following Reply brief in support of their Motion for Reconsideration ("Mtn.").[1]

## I. INTRODUCTION

Plaintiffs' motion to reconsider is premised upon five arguments: (1) plaintiffs have standing to sue for their lost wages under RICO; (2) the Court incorrectly refused to take as true facts alleging standing; (3) that there is no precedent for dismissal of a RICO case based upon lack of standing when the plaintiff has alleged an injury "directly" caused by a RICO predicate act; (4) the possibility that other causes contributed to plaintiffs' injury not preclude plaintiffs' standing to sue because plaintiffs have alleged that defendants' unlawful conduct was a substantial factor in causing their injury;[2] and (5) at a minimum, the Court should grant the plaintiffs leave

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[1] Plaintiffs' Motion to Reconsider, filed on October 11, 2000, was brought under Fed. R. Civ. P. 59(e). Plaintiffs contended that reconsideration of the dismissal was warranted on the ground that the Court committed "clear error" in dismissing the Complaint, and not allowing amendment, in light of the Court's express conclusion that plaintiffs have alleged "direct injury" under RICO.

[2] RICO confers standing on "[a]ny person injured in his business or property..." by a violation of the statute. 18 U.S.C. § 1964(c). As plaintiffs have indicated, this standing language was adopted by congress, verbatim, from the antitrust statutes. Mtn. at 13, n.10. When it enacted RICO, Congress "adopt[ed] the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." Beck v. Prubis, __ U.S. 494 __, 120 S. Ct 1608, 1613 (2000) (applying common law


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to file their proposed First Amended Complaint ("FAC"), which addresses the Court's concerns and demonstrates proximate cause and standing beyond dispute. Underlying all of plaintiffs' arguments are long-standing principles of damages law which courts have adopted in common law tort and contract cases as well as in federal antitrust litigation.[3] Under these legal principles, plaintiffs' allegations of causation and damages are easily sufficient to withstand defendants' motion to dismiss.

## II. DEFENDANTS CITE NO AUTHORITY SUPPORTING DISMISSAL

### A. The Complaint Alleges a "Concrete Loss"

Defendants cite Imagineering, Inc. v. Kiewit Pacific Co., 976 F.2d 1303 (9th Cir. 1992) for the proposition that plaintiffs' alleged injuries (depressed wages for past labor) is not a "concrete loss." Defs.' Response at 3-5.[4] However, Imagineering

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understanding of damages to RICO conspiracy even though such concepts were uncodified in the statute). Indeed, while the concepts of direct and indirect injury are not codified in the RICO statute, they have become the focus of this case.

[3] Defendants' failure to take issue with any of these authorities, or their application to the instant case, is startling.

[4] The Court's Order refers to the concept of "concrete loss." *See* Order at 19, line 15. ("A showing of 'injury' requires proof of a concrete loss.") However, the Court used the concept of "concreteness" in a manner that is inconsistent with the way the Ninth Circuit uses the term: "Here, as in Imagineering and Sheperd, the plaintiffs' main flaw is their inability to *concretely* establish the degree to which their wages have been affected by the defendants' alleged violations." Order at 21, lines 20-22 (emphasis added). Thus, the Court suggested that the requirement of "concreteness" means that defendants' misconduct must be the *sole* cause of the plaintiffs' injury. In


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requires nothing more than that the plaintiffs allege a past injury rather than one which has not yet occurred.[5] Accordingly, Imagineering does not control the outcome of this case.

### 1. *Sheperd* Does Not Alter the Meaning of "Concrete Loss"

The only other case defendants cite with respect to "concrete loss," Sheperd v. American Honda Motor Co., 822 F. Supp. 625, 632 (N.D. Cal. 1993) ("the Sheperd plaintiffs encountered only the *possibility* of diminished profits...") (emphasis added), simply follows Imagineering. It does not apply to the instant case. Moreover, even if Sheperd altered the "concrete loss" requirement as explicated in Imagineering, such an interpretation of the law would have no effect on this Court. "Only the Supreme Court or the Ninth Circuit *en banc* may overrule a [Ninth circuit] panel's decision." Alaska Trowel Trades Pension Fund v. Lopshire, 855 F. Supp. 1077, 1082 (D. Ala. 1994), *reversed on other grounds,* 103 F.3d 881 (9th Cir. 1996). *Accord*, Stairmaster

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Imagineering, however, the Ninth Circuit used the term "concrete loss" to justify the dismissal of the plaintiffs' claim when there was uncertainty as to whether the plaintiffs were damaged at all. "Although plaintiffs assert that if specified contracts had not gone to Kiewit those contracts would have been awarded to plaintiffs' prime contractors, that cannot be established." Imagineering, 976 F.2d at 1310. By contrast, plaintiffs in this case have *already suffered a wage loss*. Thus, the Ninth Circuit's "concrete loss" requirement has been satisfied.

[5] The Imagineering plaintiffs alleged the loss of profits they theorized would have been earned on subcontracts they further contended would have been awarded to them had the defendant general contractor not violated RICO to obtain its general contracts for public works construction projects. Imagineering, 976 F.2d at 1305-06.



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Sports/Medical Prods. v. Pacific Fitness Corp., 916 F. Supp. 1049, 1056 (W.D. Wash. 1996) ("This court, however, is not bound by the decision of another district court..."); Abbs v. Sullivan, 963 F.2d 918, 924 (7th Cir. 1992) ("the unappealed holdings of district judges have no precedential weight that is, no significance as authority").

### 2. Plaintiffs Have Satisfied the "Concrete Loss" Requirement as Defined By the Ninth Circuit

Plaintiffs have satisfied the Ninth Circuit's "concrete loss" requirement because they have alleged a present, actual loss (in the form of reduced wages). Plaintiffs therefore respectfully request that this Court reconsider its reliance on Sheperd for the conclusion that a claim potentially involving multiple causes of injury is "intolerable" under RICO (as a treble damage statute). Order at 22, lines 22-26. As plaintiffs have detailed, the law makes every indulgence in favor of plaintiffs at the motion to dismiss stage, particularly in relaxing the burden of proving damages. *See* Mtn. at 9-14. The plaintiffs' authorities establish that damages caused by multiple parties are nonetheless actionable. In this respect Judge Lynch's unappealed opinion in Sheperd was clearly erroneous, and should not be followed by this Court.

## B. Plaintiffs Have Standing to Sue Under RICO For Lost Wages

Plaintiffs cite many RICO cases holding that lost wages are compensable under RICO as "business or property." Mtn. at 3. Defendants ignore them and cite only Danielsen v. Burnside-Ott Aviation Training Center, Inc., 941 F.2d 1220, 1229 (D.C. Cir. 1991) for the proposition that employees who accept a particular wage somehow "waive" their right to later sue under RICO. Danielsen holds no such thing. It simply holds that the plaintiffs in that case lacked standing to sue under RICO because their


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wage structure was expressly preempted by another federal statute. Accordingly, Danielsen has no application to the instant case.[6]

### C. Plaintiffs Allege Proximate Causation

Plaintiffs cite Oregon Laborers, 185 F.3d at 963, for authority that "direct injury" is "its central element[]" in RICO proximate causation. Mtn. at 7-8. Defendants respond by asserting that the willingness of plaintiffs to be employed by defendants (which is not alleged in the complaint) precludes the existence of proximate causation. Defs. Response at. 8-9. Defendants cite no authority for this assertion. Defendants' inability to cite any authority by any court in which a RICO plaintiff has been denied standing to sue after a court has expressly concluded the plaintiff states a "direct" injury forcefully demonstrates that their argument has no legal merit.

### D. The Court Should Grant Plaintiffs Leave To File Their Proposed First Amended Complaint

As plaintiffs also pointed out, the Ninth Circuit is clear that the better practice is to allow leave to amend when a dismissal is granted pursuant to Fed. R. Civ. P. 12(b)(6). *Doe v. United States of America*, 58 F.3d 494, 496-97 (9th Cir. 1995). The

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[6] In Arizona Civ. Liberties Union v. Dunham, 88 F. Supp. 2d 1066, 1080 (D. Ariz. 1999) Judge Silver held that the question of whether "[a] claim of standing based on an injury resulting, in part, from a plaintiff's own conduct is somewhat troubling... because standing ..., [] is then partially within the plaintiff's control." Judge silver also identified this a an "issue of first impression." *Id.* While the Court initially dismissed the case, following a motion for reconsideration, reversed itself, and held the plaintiff had standing. *See* 2000 WL 1253251 (D. Ariz. 2000).



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defendants do not dispute this proposition. More tellingly still, the defendants *do not even address* the new allegations in the FAC. Defendants' tacit admission that the new allegations are sufficient to make out causation is further reason why the plaintiffs' motion should be granted.

## III. CONCLUSION

For the reasons stated above as well as those stated in the plaintiffs' opening brief, plaintiffs respectfully request that the Court reconsider and vacate its order granting defendants' Fed. R. Civ. P. 12(b)(6) motion to dismiss plaintiffs' complaint and allow plaintiffs to file the First Amended Complaint attached to the Motion to Reconsider.

DATED October 27, 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 October 27, 2000, I caused an original and one copy of the following document to be sent via UPS overnight mail for filing with the Clerk of the District Court, Eastern District of Washington, West 920 Riverside Ave., Room 840, U.S. District Courthouse, Spokane, WA., 99201 on October 30, 2000:

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

PLAINTIFFS' REPLY TO MOTION FOR RECONSIDERATION
(Declaration of Service attached)

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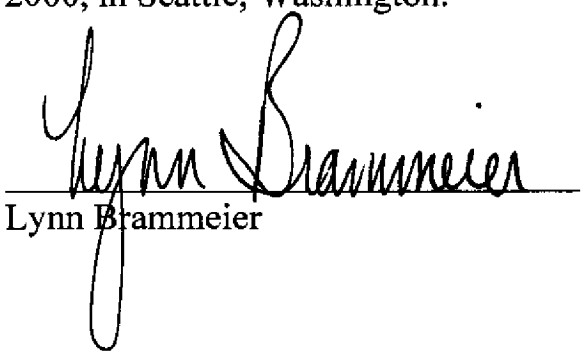

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