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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 DEFENDANT SELECTIVE EMPLOYMENT, INC'S MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR THE COURT TO TAKE SUPPLEMENTAL JURISDICTION **ORAL ARGUMENT REQUESTED**

In Mendoza v. Zirkle Fruit Co., 301 F.3d 1163 (9th Cir. 2002), the Ninth Circuit directed this Court "to determine ... whether ... the Gibbs standard permits the exercise of supplemental jurisdiction, and to exercise discretion over whether such

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jurisdiction would be appropriate in the context of this litigation." Id., at 1174-75. For the reasons that follow, this Court should decline supplemental jurisdiction over Count II.

I. FACTS

Plaintiffs sued Selective Employment, Inc. ("Selective"), in March, 2000. Selective was named defendant on the basis of an alleged conspiracy to violate the Immigration and Nationality Act. See Plaintiffs' Complaint, Count II, ¶¶ 57-62. Plaintiffs' First Amended Complaint alleges the same claim against Selective.

Plaintiffs' only claim against Selective is civil conspiracy, a tort actionable under the common law of Washington. See Plaintiffs' RICO Case Statement, ¶ (b).

Plaintiffs have acknowledged that this Court's exercise of jurisdiction over their civil conspiracy claim as pleaded against all defendants is a matter of discretion:

> This Court has subject matter jurisdiction over Count I under the federal question doctrine pursuant to 28 U.S.C. § 1331 and 18 U.S.C. § 1964(a). This Court may exercise supplemental jurisdiction over Count II pursuant to 28 U.S.C. § 1367(a).
>
> Plaintiffs' Complaint, ¶ 11; see also Plaintiff's Proposed First Amended Complaint, ¶ 12 (stating same) (emphasis added).

If it were the only defendant in this suit, Selective could not be sued by these Plaintiffs in federal court because the Court would have neither federal question nor

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diversity-based jurisdiction over Selective. Thus, Plaintiffs' Motion, as related to Selective, asks this Court both to take jurisdiction over a state law claim over which it has no original jurisdiction and to hale into federal court a defendant that could not be so haled but for Plaintiffs' naming other defendants and pleading another claim.

II. ARGUMENT

A. Standards for Review.

Analysis of the jurisdictional question here begins with the Gibbs standard. The Court in Carnegie-Mellon University v. Cohill, 484 U.S. 343, 348-49, 108 S.Ct. 614, 98 L.Ed.2d 720 (1988) described the Gibbs standard as follows:

> In Gibbs, the Court ... establish(ed) a new yardstick for deciding whether a federal court has jurisdiction over a state-law claim brought in a case that also involves a federal question. The Court stated that a federal court has jurisdiction over an entire action, including state-law claims, whenever the federal-law claims and state-law claims in the case "derive from a common nucleus of operative fact" and are "such that [a plaintiff] would ordinarily be expected to try them all in one judicial proceeding."

From Gibbs forward, the exercise of jurisdiction over claims having a "common nucleus of operative fact" has been a matter of discretion in the trial court:

> ... Gibbs drew a distinction between the power of a federal court to hear state-law claims and the discretionary exercise of that power. The Gibbs Court recognized that a federal court's determination of state-law claims could conflict with the principle of comity to the States and with the promotion of justice between the litigating parties. For this reason,

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> Gibbs emphasized that "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." Under Gibbs, a federal court should consider and weigh in each case, and at every stage of the litigation, the values of judicial economy, convenience, fairness, and comity in order to decide whether to exercise jurisdiction over a case brought in that court involving pendent state-law claims. When the balance of these factors indicates that a case properly belongs in state court, ... the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice.
>
> Id., 484 U.S. at 349-50.

The codification of pendent party jurisdictional principles into 28 U.S.C. § 1367 has not changed the fundamentally discretionary nature of this type of jurisdiction:

> The supplemental jurisdiction statute codifies (the Gibbs) principles. After establishing that supplemental jurisdiction encompasses "other claims" in the same case or controversy as a claim within the district courts' original jurisdiction, ..., the statute confirms the discretionary nature of supplemental jurisdiction by enumerating circumstances in which district court can refuse its exercise. ... Depending on a host of factors, then – including the circumstances of the particular case, the nature of the state law claims, the character of the governing state law, and the relationship between state and federal claims – district courts may decline to exercise jurisdiction over supplemental state law claims.
>
> City of Chicago v. International College of Surgeons, 522 U.S. 156, 173, 118 S.Ct. 523, 139 L.Ed.2d 525 (1997).

Thus, the Ninth Circuit recognizes that a question of supplemental jurisdiction still involves considerations of economy, convenience, fairness and comity:

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> ... (W)e emphasize that actually exercising discretion and deciding whether to decline, ... , supplemental jurisdiction over state law claims when any factor in subdivision (c) is implicated is a responsibility that district courts are duty-bound to take seriously. ... While discretion to decline to exercise supplemental jurisdiction over state law claims is triggered by the presence of one of the conditions in § 1367(c), it is informed by the Gibbs values "of economy, convenience, fairness, and comity."
>
> Acri v. Varian Associates, Inc., 114 F.3d 999, 1001 (9th Cir. 1997).

B. This Court should decline to exercise supplemental jurisdiction over Count II as pleaded against Selective under 28 U.S.C. § 1367(c)(1) and (4).

28 U.S.C. 1367(c) provides:

> The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if –
>
> (1) the claim raises a novel or complex issue of State law,
>
> ...
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

1) Jurisdiction should be declined pursuant to 28 U.S.C. § 1367(c)(1).

Washington courts have not decided whether the violation of a federal penal statute providing no private civil right of action can support a claim for civil conspiracy. Thus, supplemental jurisdiction should be declined under 28 U.S.C. § 1367(c)(1).

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Unlike criminal conspiracy, adjudication of civil conspiracy claim does not depend on the conspiracy, but on damage flowing from conspirators' actions:

> In a criminal conspiracy, the conspiracy is the gist of the crime and the function of the overt act is to show that the agreeing or conspiring has progressed from the field of thought and talk into action. It completes the offense.
>
> In a civil conspiracy, the conspiracy itself is not the cause of action, without overt acts, because again it is the overt act which moves the conspiracy from the area of thought and conversation into action and causes the civil injury and resulting damage. Accordingly, the cases hold that the damage in a civil conspiracy flows from the overt acts and not from the conspiracy.

Hoffman v. Halden, 268 F.2d 280, 295 (9th Cir. 1959).

Washington follows this principle:

> While an action may lie for damages suffered by reason of torts committed pursuant to a conspiracy, the conspiracy itself, without any actionable wrongs being done thereunder, ordinarily cannot be made the subject of a civil action, and may be of no consequence except as bearing on the rules of evidence, the persons liable, or aggravation.

W.G. Platts, Inc., v. Platts, 73 Wn.2d 434, 438-39, 438 P.2d 867 (1968) (quoting 15A C.J.S. Conspiracy § 21, at 664 (1967)).

Here, Plaintiffs plead civil conspiracy on the basis of an alleged agreement to commit violations of the Immigration and Nationality Act ("INA"). The INA, however, provides no private right of action for damages. Lopez v. Arrowhead

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Ranches, 523 F.2d 924, 926 (9th Cir. 1975) (stating 8 U.S.C. § 1324 "is solely a penal provision and creates no private right of action"); see also Flores v. George Braun Packing Co., 482 F.2d 279, 279-80 (5th Cir. 1973) (finding no private right of action under INA provisions setting forth criminal penalties for harboring aliens) and Chavez v. Freshpict Foods, 456 F.2d 890- 893-94 (10th Cir. 1972) (reaching same conclusion).

District Courts regularly decline supplemental jurisdiction when presented with claims involving novel questions of state law. See, e.g., Bowers v. NCAA, 188 F.Supp.2d 473, 481 (D.N.J. 2002) (declining supplemental jurisdiction over state law claims involving novel questions of New Jersey law); Winn v. North American Philips Corp., 826 F.Supp. 1424, 1425-26 (S.D.Fla. 1993) (same with Florida law).

A recurring theme in these decisions is that novel questions of state law should be resolved by the state's courts. See, e.g., Powers v. CSX Transportation, Inc., 190 F.Supp.2d 1284, 1296 (S.D.Ala. 2002) (declining supplemental jurisdiction by stating that novel issues of state law "deserve resolution by an Alabama jurist"); Parkinson v. Anne Arundel Medical Center, Inc., 214 F.Supp. 511, 519-20 (D.Md. 2002) (declining supplemental jurisdiction by stating "novel questions of state tort law ... are better addressed by the Maryland courts"); McCullough v. Branch Banking and

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Trust Co., 844 F.Supp. 258, 260 (E.D.N.C. 1993) (declining supplemental jurisdiction because Plaintiffs' state law claims "present ... unsettled issues of North Carolina law which would be more appropriately resolved by a North Carolina court").

In adjudicating Count II, this Court will have to determine whether Washington law allows damages on the basis of an alleged conspiracy to violate the INA although no private right of action exists under the INA. Plaintiffs' civil conspiracy claim presents a novel question of state law that should be resolved by Washington courts, and this Court should decline to exercise supplemental jurisdiction over Count II.

2) Jurisdiction should be declined pursuant to 28 U.S.C. § 1367(c)(4).

28 U.S.C. § 1367(c)(4) permits a Court to decline supplemental jurisdiction on the basis of "other compelling reasons". Several such reasons exist here.

First, pendent party jurisdiction may still present Constitutional problems, even after Mendoza. The Mendoza Court did not explicitly overrule Ayala or declare pendent party jurisdiction Constitutional. Nor did Mendoza decide that supplemental jurisdiction over Selective or the state law claim involving Selective was appropriate. Further, Mendoza says nothing about Williams v. United States, 405 F.2d 951, 954 (9th Cir. 1969) and Hymer v. Chai, 407 F.2d 136, 137-38 (9th Cir. 1969), the cases

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relied upon by Ayala in determining that pendent party jurisdiction offends the Constitution.

Rather, the Mendoza Court found that Ayala was "best read as flagging the necessity for caution due to the potential constitutional problems that might arise with an unduly broad exercise of pendent jurisdiction," Mendoza, 301 F.3d at 1173, and directed this Court to exercise its discretion in deciding the pendent jurisdiction question. Thus, it is apparently still the law of this Circuit that the object of pendent jurisdiction is "joinder of claims, not joinder of parties". Hymer, 407 F.2d at 137.

Selective raises this point to illustrate that exercise of jurisdiction over pendent party Selective, whether that jurisdiction is characterized as supplemental or pendent, raises a "subtle and complex question with far reaching implications". Moor v. County of Alameda, 411 U.S. 693, 715, 93 S.Ct. 1785, 35 L.Ed.2d 596 (1973). Because Mendoza does not clearly answer this question, it is suggested that the lack of clarity on this issue be considered as a basis for declining jurisdiction under § 1367(c)(4).

Consideration of this basis should occur in light of several other factors. First, the issue need not be addressed by this Court because Plaintiffs' entire case, including their RICO claim, can be brought in state court. Because Count II promises

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continuing jurisdictional issues in this Court, particularly if Plaintiffs' RICO claim is dismissed, see 28 U.S.C. § 1367(c)(3), supplemental jurisdiction should be declined.

Next, principles of comity weigh in favor of declining supplemental jurisdiction. District courts have declined to exercise supplemental jurisdiction when asked to predict what a state court would do with the question posed by a pendent claim. See, e.g., St. George v. Mak, 842 F.Supp. 625, 632 (D. Conn. 1993) ("abstaining" from the exercise of supplemental jurisdiction over state law claim where District Court's decision would be "at best, a prediction of subsequent state law developments"). Here, adjudication of Count II will require this Court to guess as to whether a conspiracy to violate the INA, if proved, is actionable under Washington law. As a matter of comity, this Court should defer on this issue by declining jurisdiction over Count II.

Finally, fairness considerations demand that jurisdiction be declined. Plaintiffs sued Selective in a questionably appropriate forum because Plaintiffs preferred that forum. Selective has spent thousands of dollars defending its right to have Plaintiffs' claims against it litigated in an appropriate forum. As a matter of fairness, Selective should not be subjected to the continuing jurisdictional controversy that prosecution

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of Count II promises in this Court. Rather, Count II should be dismissed from this suit.

III. CONCLUSION

For these reasons, Selective requests that Plaintiffs' Motion be denied.

Respectfully submitted this 21st day of January, 2003.

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CERTIFICATE OF SERVICE

I am Lori A. Busby. I hereby certify under penalty of perjury of the laws of the State of Washington that the following statements are true and correct.

I am one of the employees of the attorneys for the defendant Selective Employment in the above-entitled matter; that I am a citizen of the United States, a resident of Yakima County, Washington, over the age of twenty-one years, and not a party to said action. That on the 21st day of January, 2003, I caused to be deposited in the United States mail, postage prepaid, a copy of the document to which this is attached to the following:

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