04-13740-AA

NO. 04-13740-AA

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, and LORA SISSION, individually and on behalf of a class,

Plaintiffs-Appellees,

v.

MOHAWK INDUSTRIES, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ROME DIVISION

BRIEF OF APPELLANT MOHAWK INDUSTRIES, INC.

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1(a), Appellant Mohawk Industries, Inc., through undersigned counsel, states that there is no parent corporation or publicly held corporation that owns 10% or more of Mohawk Industries, Inc.'s stock. In compliance with Eleventh Circuit Rule 26.1-1, Mohawk Industries, Inc. hereby provides "a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to the party":

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(20) Honorable Harold L. Murphy, United States District Judge

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STATEMENT REGARDING ORAL ARGUMENT

Appellant Mohawk Industries, Inc. ("Mohawk") respectfully requests that this Court schedule oral argument in this matter. Oral argument is warranted because the question of whether Appellees have stated a cognizable claim under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*, involves issues of first impression in this Circuit with significant consequences. For instance, this Court has not addressed whether a company's hiring of its own employees may constitute participation in an enterprise through a pattern of racketeering activity. Nor has the Court addressed whether an alleged association of a company and its third party employment and recruiting agents can constitute a RICO enterprise. Indeed, the Seventh Circuit—the only other Circuit to have addressed these identical issues—held that RICO claims identical to those of Appellees failed as a matter of law. Accordingly, Mohawk believes that oral argument will be helpful to this Court's consideration and disposition of the important legal issues raised by this appeal.

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STATEMENT OF JURISDICTION

Appellant Mohawk Industries, Inc. ("Mohawk") appeals from the judgment of the United States District Court for the Northern District of Georgia (Murphy, J.) denying Mohawk's motion to dismiss Appellees' Complaint pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6). The District Court had jurisdiction over Appellees' Complaint under 28 U.S.C. § 1331 and the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*

This Court has jurisdiction to review the District Court's judgment of April 12, 2004, denying the dismissal of Appellees' Complaint pursuant to 28 U.S.C. § 1292. On May 27, 2004, the District Court amended its April 12, 2004 Order to permit Defendant to seek interlocutory review. Pursuant to 28 U.S.C. § 1292(b), on June 10, 2004, Mohawk timely filed a Petition for Permission to Appeal. On July 28, 2004, this Court granted that petition. Accordingly, this Court has jurisdiction to review the District Court's April 12, 2004 Order.

STATEMENT OF THE ISSUES

A. Whether Appellees' Complaint alleges the existence of and participation in an enterprise, as required by RICO, 18 U.S.C. § 1961, *et seq.*

B. Whether Appellees have standing to bring their RICO claims.

C. Whether Appellees state a claim under Georgia's RICO statute, O.C.G.A. § 16-14-1, *et seq.*

D. Whether Appellees state a claim for unjust enrichment under Georgia law.

STATEMENT OF THE CASE

A. Nature Of Case And Course Of Proceedings

On January 6, 2004, Appellees filed a putative class action on behalf of former and current hourly employees of Mohawk Industries in Georgia. Appellees alleged that Mohawk violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*, by hiring and harboring persons unauthorized to work in the United States and by knowingly accepting false identifications. Appellees claimed that this conduct resulted in the artificial suppression of wages that Mohawk paid to its legal employees.

On February 9, 2004, Mohawk moved to dismiss the Complaint, arguing, in part, that Appellees' claims did not allege participation in a RICO enterprise and advanced an impermissibly speculative wage suppression theory. The Court granted in part and denied in part Mohawk's motion by Order dated

April 12, 2004. On April 23, 2004, Mohawk filed a motion with the District Court requesting permission to appeal. On May 27, 2004, the Court granted Mohawk's motion. On June 10, 2004, Mohawk filed a petition for permission to appeal, which this Court granted by order dated July 28, 2004.[1]

B. Disposition Below

The District Court granted in part and denied in part Mohawk's motion to dismiss Appellees' Complaint. Specifically, the District Court held that "[Appellees] have sufficiently alleged that [Mohawk] participated in the affairs of a RICO enterprise as opposed to its own affairs, that a RICO enterprise exists distinct from [Mohawk], and that a common purpose and unified structure exists among the participants in the purported enterprise." R2,44, p.35-36 (April 12, 2004 Order). The District Court also held that Appellees adequately allege a proximately caused injury to their business or property. R2,44, p.36-37. In particular, the Court found that Appellees' allegation that "the presence of illegal workers in the labor pool adversely has affected [Appellees'] ability to command higher wage rates," stated an injury to business or property, even though Appellees agreed to work for the wages Mohawk paid them. R2,44, p.37. The District Court

[1] Once the District Court certifies an order for appeal under § 1292(b), and this Court grants leave to appeal, the entire order becomes subject to interlocutory appellate review. *See City of Jacksonville v. Dept. of Navy*, 348 F.3d 1307, 1310 (11th Cir. 2003).

also rejected Mohawk's argument that Appellees' damages theory was impermissibly speculative. R2,44, p.45.

In addition, the District Court permitted some of Appellees' Georgia law claims to proceed. Specifically, the Court held that Appellees stated a claim under Georgia RICO. R2,44, p.47-48. The Court concluded that Georgia law requires Appellees to prove that the Mohawk board of directors or an officer approved of the alleged wrongdoing. R2,44, p.48. Although Appellees failed to make such an allegation, the District Court excused the omission, concluding that "[Appellees] simply must set forth the necessary proof at trial." R2,44, p.48.

The District Court, however, dismissed Appellees' Georgia RICO claims based on violations of 8 U.S.C. § 1324, concluding that Georgia law does not include that provision in the definition of racketeering activity. *See* R2,44, p.49. Accordingly, Appellees' Georgia RICO claims rest solely on alleged document fraud violations of 18 U.S.C. § 1546.[2] Additionally, the Court denied Mohawk's Motion to Dismiss as to Appellees' claim of unjust enrichment based on their wage suppression theory.[3]

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[2] Section 1324 prohibits the bringing in, harboring, and hiring of unauthorized workers. Section 1546 prohibits the knowing acceptance of false identification documents.

[3] The District Court granted Mohawk's Motion to Dismiss as to Appellees' claim of unjust enrichment regarding workers' compensation savings concluding that Appellees lacked standing because there was no relation between Appellees wages and lower workers' compensation costs. R2, 44, p.52.

STATEMENT OF FACTS

On January 6, 2004, Appellees filed a putative class action on behalf of former and current hourly employees of Mohawk, under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.* and under Georgia's RICO Act, O.C.G.A. § 16-14-1, *et seq.* and Georgia's common law unjust enrichment. They allege that their "wages have been depressed by Mohawk's employment and harboring of large numbers of illegal workers." R1,1, p.1(¶ 1) (Complaint).

Appellees allege that Mohawk, "the second largest carpet and rug manufacturer in the United States," violated federal immigration law by hiring and harboring employees who are not authorized to work in the United States and by knowingly accepting false identifications. *See* R1,1, pp.2,5(¶¶ 2, 14-16). Appellees allege five different RICO predicate acts.[4] Appellees assert that these alleged predicate acts constitute RICO violations because Mohawk and its hiring

[4] *See* R1,1, ¶ 59 ("Mohawk has violated [8 U.S.C. § 1324(a)(3)(A)] by employing more than 10 aliens per year each year for the last four years"); *id.* at ¶ 60 ("Mohawk has violated [the harboring provision, § 1324(a)(1)(A)(iii)] by (a) knowingly employing illegal aliens within its factories, warehouses and other facilities in Georgia and/or (b) taking steps to shield those illegal aliens from detection"); *id.* at ¶ 61 ("Mohawk has knowingly or recklessly encouraged [m]any undocumented aliens that are discovered to return to the United States and to their employment at Mohawk in violation of [8 U.S.C. § 1324(a)(1)(A)(iv)]"); *id.* ¶¶ 16-17, 63-64 [same](alleging that Mohawk accepted and used improper work authorization documents in connection with hiring employees [in violation of 18 U.S.C. § 1546(a)].

recruiters constitute a RICO enterprise. *See* R1,1, p.24-25(¶¶ 76, 77, 79) (alleging an "association-in-fact enterprise with third party employment agencies and other recruiters"). The only recruiter identified in the Complaint is Temporary Placement Services ("TPS"). R1,1, p.24(¶ 76).

Appellees seek a retroactive pay increase (in the form of treble damages) on the ground that their wages are and were "lower than they would [have] be[en] if Mohawk did not engage in this illegal conduct." R1,1, p.10(¶ 33). Finally, Appellees claim that Mohawk has been unjustly enriched, alleging that "cost savings permit Mohawk to earn larger profits than it would be able to earn if it did not employ and harbor illegal workers." *See* R1,1, p.32(¶ 109).

SUMMARY OF THE ARGUMENT

Appellees' RICO claims are insufficient as a matter of law. Indeed, the Seventh Circuit recently affirmed the dismissal of a materially identical complaint. In *Baker* v. *IBP, Inc.*, as here, a class of current and former employees alleged that defendant knowingly hired unauthorized workers and that such hiring resulted in depressed wages to authorized workers. 357 F.3d 685, 686-87 (7th Cir. 2004). The *Baker* court concluded that plaintiffs' contentions did not adequately allege the existence of and participation in a RICO enterprise because hiring only constitutes participation in the employer's own affairs and not those of a RICO enterprise. *See Baker*, 357 F.3d at 691.

As in *Baker*, Appellees' Complaint in this case fails to state a claim. First, Appellees fail to allege participation in a RICO enterprise. Under RICO, the defendant must be distinct from the alleged enterprise and the defendant must conduct the affairs of the enterprise—not just its own affairs—through a pattern of racketeering activity. *See Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985). Here, Appellees' alleged injury stems solely from Mohawk's hiring of its own employees. Such conduct is Mohawk's operation of itself, not an enterprise. In short, a corporation cannot be held liable under RICO for conducting routine business activity, like hiring. Appellees RICO claims also fail because a company combined with its recruiting agents performing an ordinary business function does not constitute a RICO enterprise. Lastly, the alleged enterprise is insufficient because it consists of members with divergent, not common, goals. *See United States* v. *Turkette*, 452 U.S. 576, 583 (1981).

Second, Appellees lack standing under RICO because they were not "injured in [their] business or property by reason of [the alleged conduct]." *See* 18 U.S.C. 1964(c). Simply put, the receipt of a bargained-for wage is not an injury to business or property. Moreover, Appellees lack standing because they are merely indirect victims of the alleged conduct. Additionally, Appellees' damages theory is too speculative to satisfy RICO's proximate cause requirements. This is so

because myriad factors influence wage rates and it is therefore impossible to ascertain what, if any, impact the alleged presence of unauthorized workers had on the wages of Mohawk's employees.

Third, Appellees' claims under Georgia RICO also fail because under Georgia law, a corporation cannot be vicariously liable where there is no showing that the board of directors or officers of the corporation authorized or recklessly tolerated the alleged predicate criminal acts. *See* O.C.G.A. § 16-2-22(a)(2) (2004). Appellees' Complaint fails to allege that any director or officer of Mohawk authorized the alleged conduct and accordingly Appellees Georgia RICO claim is deficient as a matter of law.

Fourth, all of Appellees' unjust enrichment claims should have been dismissed. Unjust enrichment is inapplicable where, as here, a company contracted to pay a particular wage and paid that wage pursuant to its contract.

STATEMENT OF THE STANDARD OF REVIEW

This Court reviews *de novo* a district court's denial of a motion to dismiss a claim for failure to state a claim under Fed. R. Civ. P. 12(b)(6). *See Jackson* v. *BellSouth Telecomms.*, 372 F.3d 1250, 1262 (11th Cir. 2004); *Honduras Aircraft Registry, Ltd.* v. *Gov't of Honduras*, 129 F.3d 543, 546 (11th Cir. 1997). "To survive a motion to dismiss, plaintiffs must do more than merely state legal conclusions; they are required to allege some specific factual bases for those

conclusions or face dismissal of their claims." *Jackson,* 372 F.3d at 1263. Although the complaint must be read liberally, the court may not make liberal inferences beyond what has actually been alleged. "[C]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." *Oxford Asset Mgmt., Ltd.* v. *Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002). "[W]hen, on the basis of a dispositive issue of law, no construction of the factual allegations [of a complaint] will support the cause of action," dismissal is appropriate. *Marshall County Bd. Of Educ.* v. *Marshall County Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993).

ARGUMENT

I. APPELLEES' FEDERAL RICO CLAIM FAILS AS A MATTER OF LAW.

To state a RICO claim under § 1962(c), Appellees must allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima,* 473 U.S. at 496; *see also* 18 U.S.C § 1962(c). This Court has unequivocally held that without proof of the existence of and participation in an enterprise, there can be no violation of RICO. *See Jackson*, 372 F.3d at 1264 ("Essential to any successful RICO claim are the basic requirements of establishing a RICO enterprise and a 'pattern of racketeering activity.'"). In addition, the RICO Act imposes a statutory limitation on who is entitled to file suit under the statute. *See* 18 U.S.C. § 1964(c). Specifically, § 1964(c) provides that only persons

"injured in [their] business or property by reason of [the alleged misconduct]" have standing to sue. Here, Appellees' claim fails because they cannot show as a matter of law that the alleged hiring constitutes participation in an enterprise's affairs or that they have suffered an injury to business or property as a result.

A. By Hiring Employees, Mohawk Only Participates In Its Own Affairs—Not Those Of A RICO Enterprise.

RICO "liability depends on showing that the defendants conducted or participated in the conduct of the '*enterprise's* affairs,' not just their *own* affairs." *Reves*, 507 U.S. at 185. Accordingly, unless there is an enterprise that is distinct from the defendant itself, there can be no RICO violation. *See Sedima*, 473 U.S. at 496-497; *Baker*, 357 F.3d at 692; *Fitzgerald* v. *Chrysler Corp.*, 116 F.3d 225, 227-228 (7th Cir. 1997).[5] The necessity of pleading the existence of and participation in the affairs of a RICO enterprise is not merely a technical requirement, but is fundamental to the purpose of RICO. "The central role of the concept of enterprise under RICO cannot be overstated. It is precisely the criminal infiltration and manipulation of organizational structures that created the problems which led to

[5] This is so even though the association may be informal. Appellees relied heavily on *United States* v. *Goldin Industries, Inc.*, 219 F.3d 1271 (11th Cir. 2000) below to argue that they have satisfied the RICO enterprise requirements because an enterprise need not possess an "ascertainable structure." *See* R2,37,6-7. That an association may be informal or indirect to satisfy the enterprise requirement does not eviscerate the requirement. Indeed, this Court, in *Goldin*, expressly acknowledges that "RICO forbids the imposition of liability where the enterprise is nothing more than a subdivision or a part of the person." *See Goldin*, 219 F.3d at 1276.

the passage of RICO." *United States* v. *Neapolitan*, 791 F.2d 489, 500 (7th Cir. 1986). Accordingly, the Circuit Courts that have addressed this question have found that a defendant (consisting of nothing more than itself and its employees and agents) involved in the operation of its routine business is not RICO enterprise. *See e.g., Dirt Hogs Inc.* v. *Natural Gas Pipeline Co.,* 210 F.3d 389, 2000 WL 368411 at *3 (10th Cir. April 10, 2000) (unpublished decision) ("Because the enterprise identified by plaintiff appears to be nothing more than another name for [defendant] and its agents, conducting the corporation's business, the complaint fails to describe an enterprise distinct from the defendant corporation."); *Fitzgerald*, 116 F.3d at 228 (7th Cir. 1997) ("[W]here a large, reputable manufacturer deals with its ... agents in the ordinary way, so that their role in the manufacturer's illegal acts is entirely incidental, differing not at all from what it would be if these agents were the employees of a totally integrated enterprise, the manufacturer plus its ... agents ... do not constitute an enterprise within the meaning of [RICO]."); *Riverwoods Chappaqua Corp.* v. *Marine Midland Bank*, 30 F.3d 339, 344 (2d Cir. 1994) ("[B]y alleging a RICO enterprise that consists merely of a corporate defendant associated with its own employees or agents carrying on the regular affairs of the defendant, the distinctness requirement many not be circumvented.").

Under this line of authority, Appellees' Complaint fails to allege a RICO enterprise. Specifically, Appellees' enterprise allegations merely state that Mohawk and its recruiting agents hired Mohawk employees. *See* R1,1, p.24(¶ 76) ("Mohawk has engaged ... in an association-in-fact enterprise with third party employment agencies and other recruiters, including Temporary Placement Services ("TPS"), that supply Mohawk with illegal workers."). The hiring of Mohawk employees, by Mohawk and its agents, is simply Mohawk carrying on its regular business affairs.

Indeed, the Seventh Circuit recently affirmed the dismissal of a complaint in a case materially identical to this one. Specifically, in *Baker*, as here, current and former employees filed a class action on behalf of hourly employees under RICO alleging that defendant knowingly hired unauthorized workers and that such hiring resulted in depressed wages to legal employees. *See Baker*, 357 F.3d at 687. In *Baker*, the district court dismissed plaintiffs' complaint because plaintiffs did not meet the enterprise requirements of RICO. *See Baker*, 357 F.3d at 692. The *Baker* court recognized that plaintiffs had merely alleged that defendant and its employment recruiters hired defendant's employees. The Court held that this was insufficient to state a claim under RICO:

> But how is [Defendant] conducting the affairs of an enterprise through a pattern of racketeering activity? The complaint alleges that the 'enterprise' is [Defendant] plus the persons and organizations who help it find aliens to

> hire.... [T]he complaint comes perilously close to alleging that [Defendant] plus its agents and employees is the 'enterprise,' a theory that won't fly.... The nub of the complaint is that [Defendant] operates *itself* unlawfully....Without a difference between the defendant and the 'enterprise' there can be no violation of RICO.

Baker, 357 F3d at 691-92. As in *Baker*, Appellees' allegations here begin and end with Mohawk's alleged unlawful hiring of unauthorized workers. This, however, is not a legally sufficient basis for a RICO claim.

The danger of sanctioning Appellees' broad RICO liability theory is apparent. Under Appellees' theory, any company engaged in conducting its own affairs through its employees and agents will be subject to RICO claims for treble damage liability. That is simply not the intent and purpose of RICO. Indeed, if successful, Appellees' theory would allow future plaintiffs to bring RICO claims simply by alleging that a company fraudulently manages itself or that its relationships with its business partners are fraudulent (and, for example, use mail or wire fraud as the RICO predicate acts). Small and large companies would become vulnerable to RICO claims attacking the manner in which they engage in routine business practices such as hiring. This would be a substantial departure from current law, which requires that to sufficiently allege a RICO enterprise, a plaintiff must allege that the enterprise is comprised of a corporation and a

separate, independent third party.[6]

Previous attempts to expand RICO in this fashion have been rejected. For example, in *Fitzgerald*, the Seventh Circuit concluded that a defendant manufacturer's agents, who participated in retail sales of automobiles with the defendant, did not meet the RICO enterprise requirement. *Fitzgerald*, 116 F.3d at 228. As Judge Posner explained:

> Read literally, RICO would encompass every fraud case against a corporation, provided only that a pattern of fraud and some use of the mails or telecommunications to further the fraud were shown; the corporation would be the RICO person and the corporation plus its employees the 'enterprise.' The courts have excluded this far-fetched possibility by holding that an employer and its employees cannot constitute a RICO enterprise.
>
> ....
>
> What we cannot imagine, and what we do not find any support for in appellate case law, is applying RICO to a free-standing corporation such as [Defendant] merely because [Defendant] does business through agents, as virtually every manufacturer does.

Fitzgerald, 116 F.3d at 226-27. Similarly, here, Appellees merely allege an enterprise consisting of a company and its recruiting agents. As such, their

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[6] Indeed, Appellees' Complaint seeks to expand RICO liability beyond previously recognized boundaries. In fact, "[t]he prototypical RICO case is one in which a person bent on criminal activity seizes control of a previously legitimate firm and uses the firm's resources, contacts, facilities, and appearance of legitimacy to perpetrate more, and less easily discovered, criminal acts that he could do in his own person, that is, without channeling his criminal activities through the enterprise that he has taken over." *Fitzgerald*, 116 F.3d at 227; *See also Turkette*, 452 U.S. 576, 591 (1981).

Complaint fails as a matter of law.

B. Appellees' Complaint Fails To Allege The Existence Of An Enterprise With A Unified Structure And Common Purpose.

To withstand dismissal, Appellees' Complaint must allege the existence of an enterprise with a common purpose and unified structure. *See, e.g., Turkette*, 452 U.S. at 583 (An association-in-fact enterprise is "a group of persons associated together for a common purpose of engaging in a course of conduct"). Participants in an alleged RICO enterprise consisting of an employer and its recruiters lack such a common purpose or unified structure.

Here, Appellees allege that "[t]he recruiters and Mohawk share the common purpose of obtaining illegal workers for employment by Mohawk." R1,1, p.25(¶ 77). The court in *Baker* rejected a similar allegation of common purpose. As the *Baker* court explained, the employer "wants to pay lower wages; the recruiters want to be paid more for services rendered (though [the employer] would like to pay them less).... These are divergent goals." *Baker*, 357 F.3d at 691. Because Mohawk and its recruiters have different goals and purposes, they cannot comprise a RICO enterprise as a matter of law. Accordingly, for this independent reason, Appellees' RICO claims are insufficient as a matter of law.

II. APPELLEES LACK STANDING BECAUSE THEY HAVE SUFFERED NO PROXIMATELY CAUSED INJURY TO BUSINESS OR PROPERTY.

Appellees' claim for a retroactive wage increase fails because

Mohawk's alleged hiring and harboring of unauthorized workers did not proximately cause an injury to their business or property. In order to sue for a violation of RICO, a plaintiff must allege that he has been "injured in his business or property by reason of a [RICO] violation." 18 U.S.C. § 1964(c); *see also Sedima,* 473 U.S. at 496 ("[P]laintiff only has standing if ... he has been injured in his business or property by the conduct constituting the violation."). Thus, causation of an injury is not only an element of Appellees' claim, but also a statutory prerequisite to standing under RICO.[7] To show injury "by reason of" a RICO violation, a RICO plaintiff must set forth allegations showing that the violation is the proximate cause of the injury to plaintiff's business or property. *See Green Leaf Nursery* v. *E.I. DuPont De Nemours & Co.*, 341 F.3d 1292, 1307 (11th Cir. 2003) ("In order for a pattern of racketeering activity to be a cognizable cause of civil RICO injury to a private plaintiff, one or more of the predicate acts must not only be the 'but for' cause ... but the proximate cause as well.").

Additionally, a plaintiff must show a "'*direct relation* between the injury asserted and the injurious conduct alleged,'" that is, "the alleged conduct

[7] There is some confusion as to how to characterize challenges to RICO standing. *See, e.g.*, *Moore* v. *PaineWebber, Inc.*, 189 F.3d 165, 169 n.3 (2d Cir. 1999) (noting that a similar challenge should be treated as a motion under Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction). This Court has not yet spoken to the issue, and Mohawk accordingly moved below under both Fed. R. Civ. P. 12(b)(1) and 12(b)(6). The district court chose to evaluate this issue under 12(b)(6). *See* R2,44,12 n.2.

was 'aimed primarily' at a third party." *See Green Leaf Nursery*, 341 F.3d at 1307 (quoting *Bivens Gardens Office Bldg., Inc.* v. *Barnett Banks of Fla., Inc.*, 140 F.3d 898, 906 (11th Cir. 1998)) (emphasis added) (holding that a party whose alleged injuries result from "the misfortunes visited upon a third person by the defendant's acts lack standing to pursue a claim under RICO). Put simply, "'the test for RICO standing is whether the alleged injury was directly caused by the RICO violation, not whether such harm was reasonably foreseeable.'" *See Green Leaf Nursery*, 341 F.3d at 1308 (quoting *Bivens*, 140 F.3d at 908. In this case, Appellees' damages theory fails as a matter of law because (1) payment of a bargained-for wage does not constitute an injury to "business or property;" (2) Appellees' damages theory is impermissibly speculative; and (3) Appellees are, at most, indirect victims of Mohawk's alleged immigration law violations.

A. Appellees Have Suffered No Injury To "Business Or Property."

Appellees accepted employment at an agreed-upon wage rate. They do not allege that Mohawk failed to pay them that rate. Instead, they seek a retroactive wage increase comprised of the difference between the wages they actually received and the wages that they assert they would have received in a labor market that did not include the unauthorized workers that Mohawk allegedly added to the labor market. R1,1, p.10 (¶ 33). They seek this additional compensation even though Appellees received the precise wages they bargained

for with Mohawk.

Appellees' claim for a retroactive wage increase fails under RICO because they have not suffered an injury to their business or property. Instead, they received the full "benefit of their bargain." *Dumas* v. *Major League Baseball Props., Inc.*, 104 F. Supp. 2d 1220, 1222 (S.D. Calif. 2000). And, the case law is clear that an employee is entitled to bargained-for wages, but not to more. *See, e.g., Price* v. *Pinnacle Brands, Inc.*, 138 F.3d 602, 606-07 (5th Cir. 1998) (holding that the plaintiffs had failed to allege any injury to "business or property" because "plaintiffs do not allege that they received something different than precisely what they bargained for.").[8] Accordingly, because Plaintiffs received the full benefit of their bargain, they lack standing to bring a RICO claim.

Appellees also lack standing because their interest in the higher wages they could have hypothetically obtained is too abstract, intangible, and speculative to constitute an interest in "business or property." *See* 18 U.S.C. § 1964(c). RICO requires a plaintiff to provide "proof of concrete financial loss." *See Chaset* v.

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[8] *See also Turnquist* v. *Elliott*, 706 F.2d 809, 812 (7th Cir. 1983) (finding that plaintiff lacked a property interest in wages that defendant had not agreed to pay because "[n]o one every promised to pay [plaintiff] the prevailing rate or suggested that he should be paid at that rate."). *Danielsen* v. *Burnside-Ott Aviation Training Ctr.*, 941 F.2d 1220, 1229 (D.C. Cir. 1991) (expressing doubt about whether plaintiffs' claim—that the misclassification of their work and wage rate entitled them to higher wages—was an interest in "business or property" because "each employee in fact received precisely the compensation bargained for in return for the agreed work.").

Fleer/Skybox Int'l, 300 F.3d 1083, 1087 (9th Cir. 2002); *see also Bd. of Regents of State Colls.* v. *Roth*, 408 U.S. 564, 577 (1972) (stating that "[t]o have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it ... more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."); *Doug Grant, Inc.* v. *Greate Bay Casino Corp.*, 3 F. Supp. 2d 518, 534 (D.N.J. 1998) (stating that "[a] lost opportunity to obtain a financial benefit is too speculative to constitute an injury to business or property under RICO."). Here, Appellees' mere desire for a wage higher than the one they agreed to accept and in fact received is not a tangible interest in "business or property" within the meaning of RICO. Thus, because Appellees have not adequately alleged an injury to their "business or property," they lack standing to bring a RICO claim.

B. Appellees' Damages Theory Is Impermissibly Speculative.

Appellees' causation theory also fails because it is too speculative to meet the demands of proximate causation. *See In re Taxable Mun. Bond Sec. Litig.*, 51 F.3d 518, 523 (5th Cir. 1995). In short, speculative damages are not compensable under RICO. *Id.* "The less direct an injury is, the more difficult it becomes to ascertain [what] amount of a plaintiff's damages [are] attributable to the [RICO] violation, as distinct from other, independent factors." *Holmes* v. *Sec. Investor Prot. Corp.*, 503 U.S. 258, 269 (1992).

Appellees allege that "Mohawk's employment and harboring of large numbers of illegal workers has enabled Mohawk to depress wages and thereby to pay all of its hourly employees, including legally employed workers ..., wages that are lower than they would be if Mohawk did not engage in this illegal conduct." R1,1, p.10 (¶ 33). These allegations are insufficient as a matter of law because the alleged hiring of unauthorized workers and their effect on wages is inherently uncertain and impossible to measure. A wage rate indisputably depends upon many factors, including the demand for labor in the relevant market, the supply of qualified laborers, the profitability of the employers and the industry as a whole, and the state of the local, regional, national and international economies, to name a few relevant variables. At bottom, here, it will simply be impossible to approximate the extent to which Appellees' wages were depressed (if at all) by Mohawk's alleged immigration law violations as opposed to the numerous other factors affecting the relevant labor market(s) or Appellees' individual employment decisions and skills.[9]

Indeed, Judge Posner in the *Baker* decision discussed the flawed nature of plaintiffs' causation theory, which is identical to Appellees' theory:

[9] Moreover, Appellees' contention that they would command a higher wage absent the presence of unauthorized workers is not a foregone conclusion. Mohawk would not necessarily pay a higher wage. One practical consequence of a rising tide of wages, is that Mohawk may simply abandon the market and take its business elsewhere (*e.g.*, offshore).

> An increased supply of labor logically affects, not just the wages at [the employer's] plant, but wages throughout the region (if not the country). Workers can change employers (leaving [the employer] for higher pay elsewhere), and this process should cause equilibration throughout the labor market. Yet plaintiffs' theory is not that too many aliens depress wages around [employer plant]; it is that [the employer] pays lower wages than some competitors, and *that* effect would be very hard to attribute to particular violations of 8 U.S.C. § 1324(a)(3)(A). Suppose that plaintiffs believed that [their employer] has violated the Fair Labor Standards Act by failing to calculate other workers overtime premium; could plaintiffs obtain damages from [the employer] even though it had paid *them* all that the FLSA requires?

Baker, 357 F.3d at 692.[10]

Moreover, Appellees' theory of causation misunderstands the nature of labor markets. For example, Mohawk is not the only employer in Georgia. If Mohawk were, in fact, paying "depressed wages" to its employees, Plaintiffs—who are legal workers—could (and presumably would) seek jobs with other employers who are not suppressing wages. Yet Plaintiffs allege that Mohawk still attracts a workforce of "approximately 31,780 persons," while only "hundreds"

[10] Recently, the Sixth Circuit permitted a wage suppression theory of damages to survive a motion to dismiss. *See Trollinger* v. *Tyson Foods, Inc.*, 370 F.3d 602 (6th Cir. 2004). The Court, however, expressed doubt about plaintiffs ability ultimately to prevail on the proximate cause issue. *Trollinger*, 370 F.3d at 619 ("Tyson may be right--but we cannot say so at this preliminary stage in the proceeding."). The Sixth Circuit, however, did not address the RICO enterprise issues raised by this appeal. Indeed, the Court specifically noted that the issues remained open on remand.

may be illegal. R1,1, pp.2,19-20(¶¶ 2, 61). Such a causation theory is nonsensical. It is contrary to logic and fundamental economics to suggest that a single employer can suppress wages in a competitive market. *See Baker*, 357 F.3d at 692 (plaintiffs' theory is "that [the employer] pays lower wages than some competitors, and *that* effect would be very hard to attribute to particular violations of 8 U.S.C. § 1324(a)(3)(A)"). "To survive a motion to dismiss, a claim must make economic and factual sense." *Lerma* v. *Univision Communications, Inc.*, 52 F. Supp. 2d 1011, 1025 (E.D. Wisc. 1999) (citing *Car Carriers, Inc.* v. *Ford Motor Co.*, 745 F.2d 1101, 1110 (7th Cir. 1984)). Plaintiffs' RICO claims simply do not.

Finally, Plaintiffs have failed to allege how four of the five predicate offenses—the harboring of illegal aliens, the inducing of illegal aliens to enter the United States, and the use and acceptance of false identification documents (R1,1, p.19-21(¶¶ 61-64))—could have separately caused, let alone proximately caused, wage suppression.[11] These predicate acts may (or may not) facilitate the

[11] Moreover, the heightened pleading requirement of Rule 9(b) of the Federal Rules of Civil Procedure should apply to these predicate acts (an issue that this Court has not yet addressed). *See Taylor* v. *Bear Stearns & Co.*, 572 F. Supp. 667, 682 (N.D. Ga. 1983) ("It seems, however, to this court ... that there are many sound reasons for requiring that, like fraud, [RICO] must be pled with particularity."). In any event, it is well settled that Rule 9(b) applies to RICO predicate acts sounding in fraud. *See, e.g., Brooks* v. *Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1380 (11th Cir. 1997); *Duracell Inc.* v. *SW Consultants, Inc.*, 126 F.R.D. 571, 574 (N.D. Ga. 1989). Thus, at a minimum, Rule 9(b) should apply to the alleged violations of Section 1546, which prohibits the acceptance of *fraudulent* documents. This is clearly a fraud-based predicate act. *See Napier* v.

employment of illegal workers, but they do not independently increase the labor supply, and thus cannot proximately cause any wage suppression. Accordingly, Plaintiffs lack standing to bring a RICO claim based on these predicate acts. In sum, Appellees' causation theory is starkly implausible and purely speculative and cannot withstand a motion to dismiss.[12]

C. Appellees Are At Most Indirect Victims Of The Alleged RICO Violations.

Appellees are also not the direct victims of Mohawk's alleged conduct, as required to establish RICO standing. *See Holmes*, 503 U.S. at 268; *Bivens Gardens*, 140 F.3d at 906. In *Holmes*, the Supreme Court made clear that one aspect of proximate cause is "a demand for some direct relation between the

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Bruce, No. 02 C 8319, 2004 WL 1194747, at *4 n. 6 (N.D. Ill. May 27, 2004) (identifying 18 U.S.C § 1546 as a criminal *fraud* statute).

[12] The District Court's reliance on *Mendoza* v. *Zirkle Fruit Co.* is misplaced. 301 F.3d 1163, 1171 (9th Cir. 2002). In that case, the Ninth Circuit reversed the district court's dismissal of the complaint, but the Ninth's Circuit's conclusion turned on plaintiffs' allegation "that the growers *singularly have the ability to define wages in this labor market, akin to monopsony or oligopsony power.*" *Mendoza*, 301 F.3d at 1171 (emphasis added). Further, plaintiffs alleged that defendants "comprise a large percentage of the fruit orchards and packing houses in the area, and therefore affect wages throughout the labor market." Thus, the decision in *Mendoza* turned on the allegation of market power and the defendants' ability to influence the relevant labor market. Here, by contrast, no allegation of market power could be made, because Appellees have not alleged and could not credibly assert that Mohawk possesses such market power in the Georgia employment markets. Accordingly, the district court incorrectly relied on *Mendoza* and should have concluded that Appellees' damages theory is impermissibly speculative.

injury asserted and the injurious conduct alleged." *Holmes*, 503 U.S. at 268. "Thus, a plaintiff who complain[s] of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts [is] generally said to stand at too remote a distance to recover." *Id.* at 268-69 (citing 1 J. Sutherland, Law of Damages 55-56 (1882)); *see also, e.g., Bivens Gardens*, 140 F.3d 898 (harm to corporation does not give shareholders RICO standing).

Here, Plaintiffs are not the first victims of Mohawk's alleged illegal hiring. Instead, the direct victims, if any, are, as Appellee's own Complaint acknowledges, the unauthorized workers themselves because they are less likely to have the bargaining power to command equal wages and equal treatment with respect to such matters as workers' compensation. *See* R1,1, pp.10-11 (¶¶ 31, 36).

Indeed, the Appellees are no more direct victims of the alleged conduct than any other worker in the labor pool employed by any other employer. Plaintiffs allege that Mohawk added to the supply of workers in the market. R1,1, p.11(¶ 35). An increase in the labor pool would (if it were to have any effect at all) affect wages throughout the relevant labor market. Thus, all authorized workers in the labor market would be affected (if at all) equally by such conduct. In short, on Appellees' allegations, they have suffered no greater injury than any other hourly worker in Georgia. This is not a direct injury.

In sum, allowing Appellees' damages theory to proceed would place

this Circuit in conflict with (1) the Seventh Circuit's view in *Baker* that violations of the immigration laws cannot cause illegal wage depression and (2) the Ninth Circuit's decision in *Mendoza* that market power is essential to establish a direct relation between illegal hiring and wages paid to legal workers.

III. APPELLEES' GEORGIA RICO CLAIMS FAIL AS A MATTER OF LAW.

A. Appellees Failed To Allege Facts Sufficient To Establish That Mohawk Is Liable.[13]

Appellees' Georgia RICO claims against Mohawk fail because Mohawk cannot be liable for the alleged actions. In Georgia, a corporation itself is not capable of committing a crime. Specifically, in *Byrne* v. *Nezhat*, 261 F.3d 1075 (11th Cir. 2001), a medical patient brought a Georgia RICO civil claim against Northside Hospital and other defendants. The district court dismissed the action "on the ground that [the corporation] was not capable of committing a crime." *Id.* at 1105. This Court upheld the dismissal holding that:

> Under Georgia law, a corporation *qua* corporation, cannot be held to answer for a crime, and therefore could not violate the Georgia RICO statute. This is not to say that a corporation may disregard the law with impunity. If a crime has been committed, the agents of the corporation who are responsible are subject to prosecution.

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[13] If this Court decides that Appellee's federal RICO claims should have been dismissed, this Court may wish to remand the remaining state law claims (Georgia RICO and unjust enrichment, *see* Sections III and IV) to the District Court for a determination as to whether it should exercise supplemental jurisdiction over those claims. *See* 28 U.S.C. § 1367(c).

Byrne, 261 F.3d at 1105 (citations omitted).

As such, a corporation can only be held civilly liable under Georgia RICO under the laws of criminal vicarious liability. *See* O.C.G.A. § 16-14-2(b).[14] Vicarious liability, however, only attaches in certain narrowly defined situations. *See* O.C.G.A. § 16-2-22. First, a corporation can be vicariously liable if the statute defining the crime "clearly indicates a legislative purpose to impose liability" on corporations. O.C.G.A. § 16-2-22(a)(1). The Georgia Court of Appeals, however, has foreclosed that path to recovery under Georgia RICO. *See Clark* v. *Security Life Ins. Co.*, 270 Ga. 165, 168 n.11 (1998) ("A corporation may also face prosecution under O.C.G.A. § 16-2-22(a)(1) for a crime if the statute defining the crime clearly indicates a legislative purpose to impose liability on a corporation. RICO, however, is not such a statute.").

Second, a corporation can be vicariously liable for the crimes of its employees if "the crime is authorized, requested, commanded, performed, or recklessly tolerated by the board of directors or by a managerial official who is acting within the scope of his employment on behalf of the corporation."

[14] *See also Clark* v. *Security Life Ins. Co.*, 270 Ga. 165, 168 (1998) ("Because [Georgia] RICO is directed to organized criminal elements, we conclude that it is more appropriate to assess vicarious liability under it in accordance with liability for criminal acts.").

O.C.G.A. § 16-2-22(a)(2) (2004).[15] Thus, Appellees must show that Mohawk's board of directors or officers approved the alleged predicate acts. Appellees, however, have not alleged and cannot show such approval.[16] Accordingly, the Complaint cannot withstand a motion to dismiss. *See Byrne*, 261 F.3d at 1105 (upholding dismissal of RICO claim where "complaint neither alleges nor mentions which [Mohawk] agent was responsible for [Mohawk's] violation of the Georgia RICO statute"). [17]

The District Court, however, held that Appellees need not make allegations required to show their entitlement to relief. R2,44, p.48. Instead, the District Court relied on *State* v. *Military Circle Pet Ctr.*, 257 Ga. 388 (1987), to conclude that the vicarious liability requirements of O.C.G.A. § 16-2-22 are issues of proof to be established at trial. R2,44, p.48-49. *Military Circle*, however, deals with state law criminal indictment notice issues—not federal civil pleading requirements:

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[15] Managerial officials are defined by statute to include "an officer of the corporation or any other agent who has a position of comparable authority for the formulation of corporate policy or the supervision of subordinate employees" O.C.G.A. § 16-2-22(b)(2) (2004). "Not every corporate agent is a 'managerial official,' only 'top' management is intended to be covered." *Military Circle Pet Ctr.* v. *State*, 181 Ga. App. 657, 660 (1987), *rev'd on other grounds*, 257 Ga. 388 (Ga. 1987).

[16] Instead, Appellees make vague allegations about the conduct and statements of unnamed and unidentified "supervisors." R1,1, ¶¶ 20, 21, 28, 31.

[17] This failure is fatal to the Complaint under Fed. R. Civ. P. 8.

> We agree with the state that it was not required to allege the provisions of O.C.G.A. § 16-2-22 in the accusations in question ... Although the state must prove the applicable provisions of the foregoing code sections at trial against a criminal defendant, it is not necessary that the state allege these provisions in the accusation. O.C.G.A. § 17-7-71(c), and the standards of due process, govern the requirements of the indictment, and these requirements were satisfied in the accusations in question.

Military Circle, 257 Ga. at 389-90 (citations omitted). But, Fed. R. Civ. P. 8(a) requires a pleader to set forth "a short and plain statement of the claim showing that the pleader is entitled to relief." *See* Fed. R. Civ. P. 8(a). Here, because Appellees can neither prove nor even allege that a single board member or officer approved the alleged conduct, the Georgia RICO claim fails as a matter of law.

B. Appellees Cannot Establish Proximate Causation Under Georgia RICO.

Similar to federal RICO, Georgia RICO requires Appellees to show that they were "injured by reason of any violation of [Georgia] Code Section 16-14-4. . . " O.C.G.A. § 16-14-6(c). The "by reason of" language in the Georgia statute imposes the same proximate cause requirement of its federal counterpart. *Morast* v. *Lance*, 631 F. Supp. 474, 481 (N.D. Ga. 1986) (opinion of Murphy, J.) ("A party, indirectly injured by a RICO offense, does not have standing to bring a RICO claim."), *aff'd,* 807 F.2d 926 (11th Cir. 1987); *Maddox* v. *Southern Eng'g Co.*, 231 Ga. App. 802, 806 (1998) (proximate cause is an "essential element" of a

Georgia RICO claim); *Green Leaf Nursery*, 341 F.3d at 1307 (quoting *Cox* v. *Adm'r U.S. Steel & Carnegie*, 17 F.3d 1386, 1399) (11th Cir. 1994) (concluding that a predicate act is only "a proximate cause [of the RICO injury] if it is a substantial factor in the sequence of responsible causation."). Accordingly, Appellees must allege that they have suffered an injury that was proximately caused by a violation of the Georgia RICO statute. Appellees have failed to do so.

Moreover, as the District Court ruled, the only statutory violation that can constitute a predicate act under Georgia law is knowing acceptance of false identification documents in violation of 18 U.S.C. § 1546. To have standing, therefore, Appellees must claim that Mohawk's alleged acceptance and use of false identification documents proximately caused a reduction in their wages. Such a theory is even more speculative than Appellees' causation theory with respect to illegal hiring. Nowhere in the complaint is their injury directly tied to violations of 18 U.S.C. § 1546. Because they neglected to plead an "essential element" of their claim, it fails as a matter of law. *See Maddox*, 231 Ga. App. at 806.

IV. APPELLEES' UNJUST ENRICHMENT CLAIM FAILS AS A MATTER OF LAW.

Appellees have not stated a cognizable claim for unjust enrichment. An unjust enrichment claim is premised on the principle that a party cannot induce, accept, or encourage another to furnish or render an item or service of value to the party and avoid payment for that item or service. *See Hollifield* v. *Monte Vista*

Biblical Gardens, Inc., 251 Ga. App. 124, 130-31 (2001). It is well established that unjust enrichment only applies when there is no legal contract between the parties. "Unjust enrichment theory does not lie where there is an express contract." *Pryor* v. *CCEC, Inc.*, 257 Ga. App. 450, 452 (2002).[18]

Moreover, unjust enrichment is inapplicable where payment has been made for the benefit conferred. *See Crossland Inv. Co.* v. *Rhodes*, 274 F. Supp. 2d 1302, 1312 (N.D. Fla. 2003) ("More fundamentally, deciding how much [plaintiff] should be paid for the work it did is not a job for the court after the fact. It was a job for the parties in advance. They made the contracts they made and now must live with them.").[19] Here, Mohawk agreed to pay a bargained-for wage to

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[18] *See also Kwickie/Flash Foods, Inc.* v. *Lakeside Petroleum, Inc.*, 246 Ga. App. 729, 730 (2000) (same); *Cochran* v. *Ogletree*, 244 Ga. App. 537 (2000) (same); *Zampatti* v. *Tradebank Int'l. Franchising Corp.*, 235 Ga. App. 333, 340 (1998) (same).

[19] *See also N.G.L Travel Assocs.* v. *Celebrity Cruises, Inc.*, 764 So. 2d 672, 675 (Fla. Dist. Ct. App. 2000) ("[Plaintiff] failed to demonstrate that the [defendant] retained a benefit [and] failed to demonstrate how the port charges [were] inflated [by defendant] ... there is no dispute that [plaintiff] knew precisely what commission rate it would earn per cruise booking [and that it] agreed to accept that amount as payment for the service provided. [Plaintiff] received exactly what it bargained for. Unjust enrichment 'cannot exist where payment has been made for the benefit conferred.'"); *WTSP-TV, Inc.* v. *Number One Realty Center, Inc.*, 490 So. 2d 1273,1274 (Fla. Dist. Ct. App. 1986) (citation omitted) ("[U]njust enrichment ... is not applicable to a dispute of this kind. Plaintiff received the full measure of its bargain with [defendant], i.e., its property was sold and the commission was earned."). Although these cases arise in Florida, the elements of unjust enrichment are the same as those in Georgia: (1) plaintiff conferred a benefit on the defendant, who has knowledge of the benefit; (2) the defendant accepts and retains the conferred benefit; and (3) under the circumstances it would

Appellees, which Appellees accepted and Mohawk paid. Appellees have received the wages they bargained for. Thus, they have no claim for unjust enrichment.

V. CONCLUSION.

For the foregoing reasons, the portions of the district court's order denying dismissal of Appellees' Complaint should be reversed with instructions to dismiss Appellees' Complaint with prejudice.

Respectfully submitted,

ATTORNEYS FOR APPELLANT

By: R. Carl Cannon
R. Carl Cannon

Dated: September 7, 2004.

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be inequitable for the defendant to retain the benefit without paying for it. *See N.G.L. Travel Assocs.*, 764 So. 2d at 675 n.5; *Hollifield*, 251 Ga. App. at 130.

CERTIFICATE OF SERVICE

This is to certify that I have this day served the Appellees with the foregoing by having a copy of same deposited in the United States Mail in an envelope, with sufficient First Class postage affixed thereon, properly addressed to their counsel of record as follows:

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This 7th day of September 2004.

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