UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at WINCHESTER

BIRDA TROLLINGER, VIRGINIA BRAVO, KELLY KESSINGER, IDOYNIA MCCOY, REGINA LEE, PATRICIA MIMS, LORI WINDHAM and ALEXANDER HOWLETT, individually and on behalf of all others similarly situated Plaintiffs, v. TYSON FOODS, INC., JOHN TYSON, ARCHIBALD SCHAFFER III, RICHARD, BOND, KENNETH KIMBRO, GREG LEE, KAREN PERCIVAL, AHRAZUE WILT and TIM MCCOY, Defendants.	)	No. 4:02-CV-23 Chief Judge Curtis L. Collier

M E M O R A N D U M

Before the Court is a motion for judgment on the pleadings filed by Defendants Tyson Foods, Inc., John Tyson, Archibald Schaffer III, Richard Bond, Kenneth Kimbro, Greg Lee, Karen Percival, Ahrazue Wilt, and Tim McCoy (collectively, "Defendants")(Court File No. 162). Defendants submitted a brief in support of their motion (Court File No. 163), Plaintiffs Birda Trollinger, Virginia Bravo, Kelly Kessinger, Idoynia McCoy, Regina Lee, Patricia Mims, Lori Windham and Alexander Howlett ("Plaintiffs") filed a response (Court File No. 165), and Defendants filed a reply brief (Court File No. 166).

On August 14, 2006, the Court heard oral arguments on the motion. The motion was very ably argued by counsel for each side. At the conclusion of the arguments, based upon the briefs, the

oral arguments of counsel, and the applicable law, the Court **DENIED** Defendants' motion from the bench. While the Court orally explained the reasoning supporting its decision, the Court stated it would issue a written opinion that would provide further elaboration. This is that written opinion.

I. STANDARD OF REVIEW

A motion for judgment on the pleadings under Fed. R. Civ. P. 12(c) is governed by the same standard applicable to motions to dismiss under Rule 12(b)(6). *See Ziegler v. IBP Hog Market, Inc,* 249 F.3d 509, 511-12 (6th Cir. 2001). Accordingly, the Court must construe the complaint in the light most favorable to Plaintiffs, *Bloch v. Ri bar*, 156 F.3d 673, 677 (6th Cir.1998); *In re Unumprovident Corp. Securities Litigation*, 396 F.Supp.2d 858, 873 (E.D. Tenn. 2005); *State of Ohio ex rel. Fisher v. Louis Trauth Dairy, Inc.*, 856 F.Supp. 1229, 1232 (S.D.Ohio 1994), accept all of the complaint's factual allegations as true, *Bloch,* 156 F.3d at 677; *Broyde v. Gotham Tower, Inc,* 13 F.3d 994, 996 (6th Cir.1994); *In re Unumprovident*, 396 F.Supp. 2d at 873, and determine whether Plaintiffs undoubtedly can prove no set of facts in support of their claims that would entitle them to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957); *Ziegler,* 249 F.3d at 511-12; *Coffey v. Chattanooga-Hamilton County Hosp. Auth* ., 932 F.Supp. 1023, 1024 (E.D.Tenn.1996).

The Court may not grant such a motion to dismiss based upon a disbelief of a complaint's factual allegations. *Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995) (noting that courts should neither weigh evidence nor evaluate the credibility of witnesses); *Lawler v. Marshall*, 898 F.2d 1196, 1199 (6th Cir. 1990). The Court must liberally construe the complaint in favor of the party opposing the motion. *Miller*, 50 F.3d at 377. The complaint, however, must articulate more than

a bare assertion of legal conclusions. *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988). "[The] complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory." *Id.* (citations omitted).

In deciding a motion to dismiss, the question is "not whether [the] plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes,* 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974); see also *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511, 122 S.Ct. 992, 997, 152 L.Ed.2d 1 (2002).

II. RELEVANT FACTS AND PROCEDURAL HISTORY

According to Plaintiffs' Second Amended Complaint, Plaintiffs are individuals employed by Tyson at some point who are "legally authorized to be employed in the United States" (Court File No. 115, Plaintiffs Second Amended Complaint, ¶ 1). Plaintiffs contend Tyson developed a "conspiracy among its top management" to depress the wages paid to its employees by "knowingly hiring a workforce substantially comprised of undocumented illegal immigrants for the express purpose of depressing wages" (*id.* at ¶ 2). Plaintiffs call this alleged conspiracy the "Illegal Immigrant Hiring Scheme" (*id.*). Specifically, Plaintiffs allege Defendants "knowingly hired more than 10 unauthorized, illegal immigrants" in violation of 8 U.S.C. § 1324(a)(3)(A) and Defendants "violated 8 U.S.C. § 1324(a)(1)(A)(iii) by 'harboring' unauthorized, illegal immigrants with knowledge or reckless disregard that each entered the U.S. illegally"[1] (*id.* at ¶¶ 36, 37). As a result

[1]Plaintiffs allege the following of Defendants' actions constitute "harboring:" Defendants' employment of each illegal immigrant; Defendants' warning illegal immigrant employees of possible raids and Defendants' providing illegal immigrant employees with housing. (Court File No. 115 at ¶ 37).

of the Illegal Imigrant Hiring Scheme, Plaintiffs claim they have been proximately damaged by the depression of their wages "below what they would have been in a labor market consisting only of legal workers" (*id.* at ¶¶ 45, 60).

A previous 12(b)(6) motion filed by the Defendants was granted in July 2002. The Court[2] dismissed Plaintiffs' claims because they rested on an attenuated theory of causation that amounted to "sheer speculation." *Trollinger v. Tyson Foods, Inc*, 214 F. Supp. 2d 840, 841 (E.D. Tenn. 2002). Given the number of factors which influence the Plaintiffs' labor rates, the Court concluded the allegations did not constitute a direct injury under the Supreme Court's decision in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258 (1992). *Id.* Plaintiffs appealed that decision to the United States Court of Appeals for the Sixth Circuit (the "Sixth Circuit").

On appeal, the Sixth Circuit decided the Court erred in dismissing the case and in the Court's interpretation of *Holmes*. First, the panel concluded the complaint sufficiently alleges a direct injury. *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 615 (6th Cir. 2004) ("*Tyson I*") ("[t]he complaint alleges that Tyson directly employed the four plaintiffs, that Tyson directly paid them and that Tyson directly injured plaintiffs by paying them less than they otherwise would have paid them but for Tyson's illegal-immigrant-hiring-scheme"). After discussing Defendants' argument that the labor union determined Plaintiffs' wages, the Sixth Circuit noted Defendants conceded on appeal "that plaintiffs need not show that Tyson's conduct was the sole cause of their injury in order to establish proximate cause; they need show only that the conduct was a substantial cause." *Id.* at 620. The Sixth Circuit's opinion noted "[w]hile Tyson's proximate-cause argument may well carry the day at the summary-judgment stage, it requires more assistance than the complaint alone provides."

[2]The Honorable R. Allan Edgar decided the previous motion to dismiss.

Id. at 619. Therefore, the Sixth Circuit reversed the Court's dismissal and remanded the case to the Court[3] for further proceedings.[4]

The decision in *Tyson I* constitutes the law of the case. The law-of-the-case doctrine and the mandate rule precludes reconsideration of issues decided at an earlier stage of the case. *See United States v. Moored*, 38 F.3d 1419, 1421-22 (6th Cir. 1994) (under the law-of-the-case doctrine, a district court is precluded from revisiting an issue that was expressly or impliedly decided by an appellate court). The power of the Court to reach a result inconsistent with a prior decision reached in the same case is "to be exercised very sparingly, and only under extraordinary conditions." *Craft v. United States,* 233 F.3d 358, 363-64 (6th Cir. 2000) (citing *General Am. Life Ins. Co. v. Anderson*, 156 F.2d 615, 619 (6th Cir. 1946).

Only if one of three extraordinary conditions is present is the Court not bound by the law-of-the-case doctrine:

> It is clear that when a case has been remanded by an appellate court, the trial court is bound to "proceed in accordance with the mandate and law of the case as established by the appellate court." The "law of the case" doctrine precludes a court from "reconsideration of identical issues." "Issues decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition, constitute the law of the case."
>
> As we have held, however, this "law of the case" doctrine is "directed to a court's common sense" and is not an "inexorable command." We previously have stated three reasons to reconsider a ruling: (1) where substantially different evidence is raised on subsequent trial; (2) where a subsequent contrary view of the law is decided by the controlling authority; or (3) where a decision is clearly erroneous and

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[3]Subsequent to the Sixth Circuit's decision, the case was reassigned to the Honorable Curtis L. Collier, Chief United States District Judge.

[4]On June 24, 2005, Plaintiffs filed their Second Amended Complaint, adding several individual defendants but did not change Plaintiffs' theory of causation. (Court File No. 115 at ¶ 45).

would work a manifest injustice.

McKenzie v. BellSouth Telecommunications, Inc., 219 F.3d 508, 513 n.3 (6th Cir. 2000) (citing *Hanover Ins. Co. v. American Eng'g Co*, 105 F.3d 306, 312 (6th Cir.1997) (*quoting Petition of U.S. Steel Corp.*, 479 F.2d 489, 493 (6th Cir.1973)). In this case, neither party alleges there is new or different evidence. Further, neither party argues the Sixth Circuit's decision in *Tyson I* was clearly erroneous and would work a manifest injustice. Therefore, the only remaining question under the law of the case doctrine is whether there exists a subsequent contrary and controlling view of the case law relied upon by the Sixth Circuit in concluding the case should not be dismissed for lack of a proximate cause and direct injury on the pleadings.

On June 6, 2006, the Supreme Court issued a decision in *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006). Defendants argue the law of the case in *Tyson I* is no longer applicable in light of the *Anza* decision. Therefore, Defendants move the Court to ignore the law of the case and grant their motion for judgment on the pleadings in favor of Defendants. In response, Plaintiffs assert the *Anza* decision is not a contrary or controlling view of the law because *Anza* can be reconciled with *Tyson I*. For the reasons set forth below, the Court determines the Supreme Court's opinion in *Anza* does not provide a subsequent contrary view of the law decided by controlling authority.

III. DISCUSSION

A. Proximate Cause Requirement Post-*Anza*

In *Anza*, the Supreme Court held a merchant accusing its competitor of gaining an unfair competitive advantage (in the form of charging lower prices) by failing to charge cash customers

the state sales tax and concealing that practice from the state of New York did not allege a sufficiently direct injury from the fraud to state a claim under RICO. *Anza,* 126 S. Ct. 1991. In *Anza*, the predicate offense involved in the case wasthe mail fraud statute, 18 U.S.C. § 1341. The Supreme Court held the state, not the merchant, was the direct victim of the defendant's alleged fraud. *Id*. at 1997. In *Anza*, the Supreme Court stated "[w]hen a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries." *Id.* at 1998. Since the link between the alleged mail fraud to avoid the state's taxes and the plaintiff's competitive injury was too "attenuated," the plaintiff failed to satisfy RICO's proximate causation requirement. *Id.* at 1993.

Defendants' present motion to dismiss asserts the *Anza* decision is fatal to Plaintiffs' claims in three critical respects:

> First, the Supreme Court made it clear that plaintiffs only can recover for injuries that result *necessarily* from the alleged RICO predicate acts. Accordingly, if the injury alleged might have been caused by the RICO predicate acts - but might have been caused by other factors - the complaint does not state a claim under RICO. Second, the Court made it clear that RICO's direct injury requirement does more than exclude "derivative" or "passed-on" injuries. Some courts, including the Sixth Circuit on review in this case, had narrowly read the direct injury test this way. The Supreme Court explained that this was incorrect, clarifying that a RICO claim may fail the legal causation standard, "[n]otwithstanding the lack of any appreciable risk of duplicative recoveries." *Id.* at 1997. Third, *Anza* made it clear that courts should dispose of claims at the pleading stage - and not wait until summary judgment. The Supreme Court in *Anza* held that the claims in that case should have been dismissed for lack of proximate causation on a motion to dismiss.

(Court File No. 163, pp. 1-2). Plaintiffs in their arguments take issue with Defendants' position and argue *Anza* is not inconsistent with *Tyson I*.

After closely examining the precise language in*Anza* the Court fails to find the text that says exactly what Defendants state above. In relation to Defendants' first point, the Court located the

following text from the Supreme Court's position in *Anza*:

> Section 1962(c) . . . for bids conducting or participating in the conduct of an enterprise's affairs through a pattern of racketeering activity. The Court has indicated the compensable injury flowing from a violation of that provision "necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise."

Id. at 1996. In short, the alleged predicate acts, sufficiently related to constitute a pattern, must cause a compensable injury. The complete quote from *Anza* on Defendants' second point states "[n]otwithstanding the lack of any appreciable risk of duplicative recoveries, which is another consideration relevant to the proximate-cause inquiry, . . . , these concerns help to illustrate why Ideal's alleged injury was not the direct result of a RICO violation." *Id.* at 1997. In other words, the risk of duplicative recoveries is one of the factors relevant to the proximate-cause inquiry but is not in and of itself dispositive on the inquiry.

Defendants are on firmer ground with respect to their third point. When the facts and circumstances indicate problems with proximate cause similar to those in *Anza*, the Court should dismiss the case at the pleading stage. *Anza* reasoned:

> The element of proximate causation recognized in *Holmes* is meant to prevent these types of intricate, uncertain inquiries from overrunning RICO litigation. It has particular resonance when applied to claims brought by economic competitors, which, if left unchecked, could blur the line between RICO and the antitrust laws.

Id. at 1998. Here, it is important to note the Court is not faced with the same concern of Plaintiffs' RICO claims overlapping with anti-trust laws (as was in *Anza*). Plaintiffs are not Defendants' economic competitors. While Defendants' reading of *Anza* is certainly plausible, it is not the only or even most plausible reading of *Anza*. The Court is unable to locate any post-*Anza* cases which support Defendant's argument in a case involving similar alleged predicate acts and resulting injury.

And Defendants have not supplied the Court with any post-*Anza* cases involving similar alleged predicate acts and resulting injury which support their argument.

After carefully examining the three reasons argued in support of Defendants' position *Anza* is contrary, controlling authority which would allow the Court to ignore the law of the case, the Court concludes they are not sufficient to convince the Court the law of the case should be ignored. Therefore, the Court finds *Anza* can be reconciled with the Sixth Circuit's opinion in *Tyson I*. As a result, the Court cannot and must not ignore the law of the case.

B. *Tyson I* and *Anza*'s Similar Proximate Cause Requirements

In their motion to dismiss, Defendants point to a causal weakness between the RICO predicate offenses and Plaintiffs' injury. In discussing the proximate cause limitations on claimants in a RICO case, the panel in *Tyson I* stated:

> while a RICO plaintiff and defendant may have a *direct* and not a *derivative* relationship, the causal link between the injury and the conduct may still be too weak to constitute proximate cause-because it is insubstantial, unforeseeable, speculative, or illogical, or because of intervening causes.. . . The point of all this is not just that the distinction between statutory standing and proximate cause exists, but that unbundling these distinct concepts has practical significance for RICO cases in general and for this case in particular. From a substantive standpoint, a RICO plaintiff who can show a direct injury may still lose the case if the injury does not satisfy other traditional requirements of proximate cause-that the wrongful conduct be a substantial and foreseeable cause and that the connection be logical and not speculative.

Id. at 614-15 (emphasis in original). The *Tyson I* panel further stated "a case with a derivative-injury problem is better suited to dismissal on the pleadings than a RICO case with a traditional proximate-cause problem (*e.g.*, a weak or insubstantial causal link, a lack of foreseeability, or a speculative or illogical theory of damages)." *Id.* at 615. *Tyson I* stated mere causal weaknesses, other than that of a passed-on injury, will "more often be fodder for a summary-judgment motion

under Rule 56 than a motion to dismiss under Rule 12(b)(6)." *Id.*

In *Anza*, Justice Kennedy discusses several policy considerations behind the directness requirement in a RICO case and calls the considerations "underlying premises." *Anza*, 126 S. Ct. at 1997. One such premise is the "difficulty that can arise when a court attempts to ascertain the damages cause by some remote action." *Id.* In discussing this difficulty, Justice Kennedy cited *Holmes*, "the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors." *Holmes*, 503 U.S. at 269. In *Tyson I*, Judge Sutton discussed three "administrative justifications" for the "directness requirement":

> (1) the "difficult[y]" in "ascertain[ing] the amount of a[n] [indirect] plaintiff's damages attributable to the violation, as distinct from other, independent factors"; (2) the "complicated rules" courts would be forced to adopt to "apportion[ ] damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries"; and (3) the existence of a "directly injured victim[ ]" who "can generally be counted on to vindicate the law" and serve the laws' "general interest in deterring injurious conduct."

Trollinger, 370 F.3d at 613 (citing *Holmes*, 503 U.S. at 269). The terms used by the Sixth Circuit in *Tyson I* and the terms used by United States Supreme Court in *Anza* are different, but the underlying meaning is the same.

C. Complaint Sufficiently Alleges a RICO Predicate Act and Resulting Injury

In 1996, Congress added to the list of prohibited RICO activities: "any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens) . . . if the act indictable under such section of the Act was committed for the purpose of financial gain." 18 U.S.C. § 1961(1)(F). In other cases throughout the country, plaintiffs invoking this predicate act have alleged employers have brought illegal immigrants into the country to work

to drive down wages for the legal workers. Bringing in illegal immigrants to lower the company's wage expense would equate to committing the act "for the purpose of financial gain" under RICO.

The Court points out Congress had some purpose in adding 18 U.S.C. § 1961(1)(F) to the list of prohibited RICO activities. As the Court discussed with counsel during the August 14, 2006 hearing on this motion, one obvious purpose of RICO was to allow persons injured by the enumerated predicate acts to sue offenders. *Rotella v. Wood*, 528 U.S. 549, 557 ("[t]he object of civil RICO is not merely to compensate victims but to turn them into prosecutors, private attorneys general dedicated to eliminating racketeering activity"). In examining the RICO predicate offenses alleged in the complaint, the question becomes who is injured by the employment of illegal alien employees. In this case, it seems obvious workers displaced or who have received lower wages are persons injured by the RICO predicate offenses alleged in the second amended complaint. Counsel for Defendants was unable to point to any other more logical group that would be harmed economically than legal workers displaced by illegal aliens.

When ruling on a motion to dismiss, the Court must construe the complaint in the light most favorable to Plaintiffs, accept all of the complaint's factual allegations as true, and determine whether Plaintiffs undoubtedly can prove no set of facts in support of their claims that would entitle them to relief. *Ziegler*, 249 F.3d at 511-12. The Court notes the second amended complaint still alleges

> Tyson engaged in a scheme to depress the wages paid to its hourly employees by knowingly hiring undocumented illegal immigrants who were willing to work for wages well below those paid in labor markets composed of only United States citizens. Assisting Tyson in this scheme was a network of recruiters and temporary employment agencies that would transport the illegal workers to the United States, obtain housing for them and provide them with false identification documents. As a result of the scheme, the complaint alleges, over half of the workers at 15 of Tyson's facilities are illegal immigrants, allowing Tyson to pay its legal employees

> wages substantially below the wage level paid by other employers of unskilled labor in the areas surrounding the 15 facilities. Plaintiffs seek injunctive relief along with treble damages.

Trollinger, 370 F.3d at 606-07. Clearly, the second amended complaint alleges two RICO predicate offenses and a logical connection between the predicate offenses and resulting harm to Plaintiffs.

IV. CONCLUSION

For the reasons stated at the hearing on the oral arguments in this case, and the reasons stated above, the Court **DENIED** the motion for a judgment on the pleadings filed by Defendants Tyson Foods, Inc., John Tyson, Archibald Schaffer III, Richard Bond, Kenneth Kimbro, Greg Lee, Karen Percival, Ahrazue Wilt, and Tim McCoy (Court File No. 162).

/s/
CURTIS L. COLLIER
CHIEF UNITED STATES DISTRICT JUDGE