IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BLANCA VALENZUELA, MARGIE SALAZAR, JOSE E. SERRATO, JOSIE RENDON, CLARA TOVAR, CONSUELO ESPINO, MARIA AVILA, ERNESTINA NAVARRETTE, MARIA E. MUNOZ, AMANDA SALCIDO, CANDELARIO G. ORTEGA, MARIA ORTIZ, JOSE OLIVA, RAFAELA CHAVEZ, ELODIA ARROYO, SUSANA CARDIEL, GRACIE RIOS, AND LEONEL RUIZ, individually and on behalf of all others similarly situated,	§	**CIVIL ACTION NO. 3:06-cv-02322-N**
Plaintiffs	§	**ECF**
v.	§	
SWIFT BEEF COMPANY, INC. D/B/A SWIFT COMPANY, SWIFT & COMPANY, HICKS, MUSE, TATE & FURST, INC., HM CAPITAL PARTNERS OF DALLAS, LLC, and JOHN DOES I-V,	§	
Defendants	§	

SWIFT AND COMPANY AND SWIFT BEEF COMPANY'S
REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

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Defendants Swift and Company and Swift Beef Company (collectively, "Swift") submit this Reply in support of their Motion to Dismiss.

I. UNDER THE UNITED STATES SUPREME COURT'S RECENT DECISION IN *TWOMBLY*, PLAINTIFFS MUST ALLEGE FACTS SUFFICIENT TO STATE PLAUSIBLE CLAIMS.

Despite two attempts and a seventeen-page First Amended Complaint ("Complaint") consisting of 82 numbered paragraphs, Plaintiffs do not plead a viable RICO claim. Plaintiffs' Response to Swift's Motion to Dismiss ("Response") is premised upon the notion that the factually deficient Complaint is saved by a supposed "liberal notice pleading" standard under Fed. R. Civ. P. 8(a)(2). *See, e.g.*, Response at 13 (arguing that "Rule 8's liberal notice pleading requirements" save Plaintiffs' predicate act allegations), 14 n.8 (same). Significantly, Plaintiffs' Response fails to acknowledge or even cite *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955 (2007), decided by the United States Supreme Court after Swift's Motion was filed but several months before Plaintiffs' Response.

In *Twombly*, the Court reaffirmed that Rule 8(a) requires a "plain statement" of facts that "possess[es] enough heft to show that the pleader is entitled to relief." *Id.* at 1966 (alterations, quotations omitted). The Court held that "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of a cause of action's elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Id*. at 1964-65 (quotation, alteration, and citation omitted). In sum, *Twombly* requires Plaintiffs to allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 1974.

Twombly is particularly significant, because the Court disavowed the oft-quoted language of *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), that "a complaint should not be dismissed for

failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See Twombly*, 127 S.Ct. at 1968. The *Twombly* Court noted that, if taken literally, *Conley's* "no set of facts" test would impermissibly allow for the pleading of "a wholly conclusory statement of [a] claim," and that "after puzzling the profession for 50 years, this famous observation has earned its retirement." *Id.* at 1968, 1969. After *Twombly*, "the *Conley* rule is not 'the minimum standard of adequate pleading to govern a complaint's survival.'" *In re Katrina Canal Breaches Litigation*, No. 07-30119, 2007 WL 2200004, at *28 n.10 (5th Cir. Aug. 2, 2007) (quoting *Twombly*, 127 S. Ct. at 1968-69).

In *Twombly*, the Court recognized that requiring claimants to allege enough facts sufficient to state a plausible claim – as opposed to reciting legal elements that masquerade as factual allegations – is needed in order to protect defendants from potentially abusive and expensive discovery. "It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through careful case management, given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side." *Twombly*, 127 S.Ct. at 1967 (internal citations and quotation marks omitted).[1]

This warning rings especially true here. Like the Sherman Act claims at issue in *Twombly*, the availability of treble damages under RICO and the cost and burden of complex discovery give defendants pause when they consider the risks of litigating those claims, even when they are entirely without merit. Therefore, Plaintiffs' Complaint here must be scrutinized

[1] The Court continued, "And it is self-evident that the problem of discovery abuse cannot be solved by careful scrutiny of evidence at the summary judgment stage, much less lucid instructions to juries; the threat of discovery expense will push cost conscious defendants to settle even anemic cases before reaching those proceedings." *Twombly*, 127 S.Ct. at 1967 (internal quotation marks and citations omitted).

to ensure that it measures up to *Twombly's* mandate that it allege *enough facts* to state a plausible claim – and not simply recite legal elements that masquerade as factual allegations.[2]

Plaintiffs' Response avoids addressing *Twombly*, and with good reason. Much of the Response is devoted to arguments suggesting that Plaintiffs' purported claims should survive because plaintiffs in other unrelated litigation – relying on *Conley's* now-discredited "no set of facts" language – pleaded facts sufficient to survive dismissal. *See, e.g., Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277, 1282 n.2 (11th Cir. 2006) (citing *Conley*'s "no set of facts" language); *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 615 (6th Cir. 2004) (noting dismissal only if "no relief could be granted under any set of facts")[3]; *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1167-68 (9th Cir. 2002) (same); *Trollinger v. Tyson Foods, Inc.*, Case No. 4:02-cv-23, 2007 U.S. Dist. LEXIS 38882, at *4 (E.D. Tenn. May 29, 2007) (citing *Conley*); *Brewer v. Salyer*, Case No. 06-01324, 2007 U.S. Dist. LEXIS 36156, at *6 (E.D. Cal. May 17, 2007) (citing "no set of facts" clause).

Whether a complaint filed in another lawsuit in another court contains sufficient facts, as analyzed under a now discredited standard, has no bearing on the adequacy of Plaintiffs' allegations here. Indeed, Plaintiffs' lawsuit must stand or fall on the sufficiency of the

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[2] The mere allegation of racketeering activity casts aspersion on the defendant's reputation and standing in the community and exposes the defendant to the prospect of invasive, extensive discovery that disrupts normal operations. *See PMC, Inc. v. Ferro Corp.*, 131 F.R.D. 184, 187 (C.D. Cal. 1990) ("The need to reasonably limit the scope of discovery is acute for claims brought under the RICO statute."). Here, Plaintiffs have alleged acts involving eight different Swift facilities. *See* Complaint, ¶ 1. Coordinating discovery among all eight facilities, on Plaintiffs' hope that additional factual allegations might be discovered (*see* Response at 17 n.11), represents an inappropriate and unnecessary undertaking. *See Fred A. Smith Lumber Co. v. Edidin*, 845 F.2d 750, 754 (7th Cir.1988).

[3] The "any set of facts" language quoted in *Trollinger* comes from *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 514 (2002), which itself borrows from *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). *Hishon's* use of the language relies directly on *Conley*. *Id.* While the *Twombly* Court cited affirmatively to *Swierkiewicz* and did not overrule it (127 S.Ct. at 1969), to the extent *Swierkiewicz, Hishon, Trollinger* or any other decision bases its pleading standard on *Conley's* "no set of facts" clause, that standard has been repudiated by *Twombly*. *E.g., Walker v. Woodford*, No. 05cv1705, 2007 WL 2406893, at *2 (S.D. Cal. Aug. 19, 2007) (noting "the Supreme Court abrogated this ['no set of facts'] holding of *Conley*, and by implication, the same standard as articulated in *Swierkiewicz*.").

Complaint's allegations. As discussed below, when analyzed under *Twombly*, Plaintiffs' Complaint does not contain "enough facts to state a claim to relief that is plausible on its face," and must be dismissed. *Twombly*, 127 S. Ct. at 1974.[4]

II. PLAINTIFFS HAVE FAILED TO ALLEGE SUFFICIENT FACTS TO STATE PLAUSIBLE RICO PREDICATE ACTS.

As a threshold requirement to survive dismissal, Plaintiffs' Complaint must adequately allege that Swift engaged in a prohibited pattern of RICO "predicate acts." Swift's Motion at 15; Motion to Dismiss filed by Defendants HM Capital Partners of Dallas, LLC and Hicks, Muse, Tate & Furst, Inc. ("HM Defendants' Motion"), at 7-12.[5] As discussed below, Plaintiffs' Complaint fails to allege sufficient facts to state any plausible RICO predicate acts.

A. Plaintiffs have abandoned their RICO claims relying on fraud-based predicate acts, which should therefore be dismissed with prejudice.

Paragraphs 52-55 of the Complaint allege that Swift engaged in various fraud-based RICO predicate acts. Plaintiffs have now abandoned those allegations. Response at 11 n.5 ("Plaintiffs are not asserting fraud as a predicate act at this time. . . ."). Plaintiffs' claims premised on fraud-based RICO predicate acts should therefore be dismissed with prejudice.[6]

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[4] Throughout their Response, Plaintiffs reference various criminal indictments, newspaper articles, and other documents set forth in their Appendix. In considering a motion to dismiss under Rule 12(b)(6), this Court can consider documents "where the complaint refers to the documents and they are central to the claim." *Kane Enterprises v. MacGregor(USA) Inc.*, 322 F.2d 371, 374 (5th Cir. 2003). Because none of the documents set forth in Plaintiffs' Appendix are mentioned in the Complaint, however, those documents are irrelevant to Swift's Motion and cannot save the legally deficient allegations actually asserted in the Complaint. *Ferrer v. Chevron Corp.*, 484 F.3d 776, 782 (5th Cir. 2007) (holding that "a [Rule] 12(b)(6) inquiry focuses on the allegations in the pleadings, not whether a plaintiff actually has sufficient evidence to succeed on the merits.").

[5] Swift incorporated by reference into its Motion (at 1 n.1) all of the grounds for dismissal and supporting arguments set forth in the HM Defendants' Motion.

[6] Although Plaintiffs offer to "remove" their fraud-based allegations from the Complaint without prejudice (Response at 11 n.5), they provide no factual basis for asserting any fraud claims against Swift. Having already amended their Complaint once, and having had an opportunity to respond to Swift's motion to dismiss, Plaintiffs should now have their fraud-based predicate acts dismissed with prejudice. *See Price v. Pinnacle Brands, Inc.*, 138 F.3d 602, 607-08 (5th Cir. 1998) (affirming dismissal of RICO claims with prejudice where plaintiffs had failed to plead sufficient facts in their complaint, RICO case statement, and brief in response to defendant's motion to dismiss); *North Bridge Assoc., Inc. v. Boldt*, 274 F.3d 38, 44 (1st Cir. 2001) (affirming dismissal with prejudice of fraud-based RICO claims).

B. Plaintiffs have failed to allege sufficient facts to state plausible predicate acts under the Immigration and Nationality Act.

1. Plaintiffs have not adequately pleaded a "harboring" predicate act.

RICO's list of possible predicate offenses includes certain acts made criminal by the Immigration and Nationality Act ("INA"). The only INA section Plaintiffs specifically mention in their Complaint is 8 U.S.C. § 1324(a)(1)(A)(iii), which prohibits "harboring" of illegal immigrants. Complaint, ¶ 46. Plaintiffs' "harboring" allegations consist of two conclusory sentences: "The Swift Defendants' employment of such illegal immigrants constitutes harboring. Moreover, the Swift Defendants' aid and help of these illegal immigrants to obtain fake immigration documents also constitutes harboring." *Id.* These "harboring" allegations are insufficient as a matter of law.

Notably, Plaintiffs' Response fails to address the legal elements required by the INA to establish "harboring." Under 8 U.S.C. § 1324(a)(1)(A)(iii), "harboring" requires proof that the defendant: (1) knows or recklessly disregards the fact that an alien is illegally in the United States; and (2) "conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation." Contrary to Plaintiffs' allegations, the mere employment of undocumented illegal immigrants does *not* constitute "harboring" under the INA. *See* HM Defendants' Motion at 9-10 (discussing cases). After the motions to dismiss were filed in this case, the trial court in *Brewer*, 2007 U.S. Dist. LEXIS 36156, at *23-31, reached the same conclusion.

In *Brewer*, as here, plaintiff alleged that defendant had committed RICO predicate acts by having his company employ illegal aliens, thereby "harboring" them in violation of 8 U.S.C. § 1324(a)(1)(A)(iii). *Brewer*, 2007 U.S. Dist. LEXIS 36156 at *6-8. After reviewing relevant case law, the court concluded that "*employment* is distinct from *harboring* and allegations in a

complaint that a defendant employs undocumented aliens are insufficient to also allege harboring of undocumented aliens under *§ 1324(a)(1)(A)(iii).*" *Id.* at *27 (emphasis supplied by the court). In dismissing plaintiff's RICO claim based on a violation of 8 U.S.C. § 1324(a)(1)(A)(iii), the trial court held that "[p]laintiff's attempt to leverage [defendant's] alleged employment of undocumented aliens into a harboring violation is unavailing." *Id.* at *31.

Although Plaintiffs cite *Brewer* in their Response and attempt to rely upon it in support of other arguments, they fail to address *Brewer*'s holding that mere employment of undocumented illegal immigrants does not constitute "harboring" under the INA. Instead, Plaintiffs mistakenly rely on *Mohawk*, *Mendoza*, and *Trollinger*, 2007 U.S. Dist. LEXIS 38882, at *8-9. In each of those cases, however, the plaintiffs specifically alleged that the defendants had not only employed undocumented illegal immigrants but also housed or otherwise harbored them. *Trollinger*, 2007 U.S. Dist. LEXIS 38882, at *8 (alleging that defendant provided "cheap housing units" to the illegal aliens it hired); *see Mohawk*, 465 F.3d at 1281-82; *Mendoza*, 301 F.3d at 1166. As in *Brewer*, 2007 U.S. Dist. LEXIS 36156, at *8, Plaintiffs' Complaint here contains no such allegations. Accordingly, this Court should dismiss Plaintiff's RICO claim based on a violation of the "harboring" section of the INA, 8 U.S.C. § 1324(a)(1)(A)(iii).

2. Plaintiffs have not adequately pleaded a "hiring" predicate act.

Plaintiffs concede that the "harboring" section of the INA is the only provision of the statute specifically identified in their Complaint. Response at 14 n.8. While Plaintiffs assert that they can amend their Complaint to add a reference to the "hiring" section of the INA, 8 U.S.C. § 1324(a)(3)(A), they have not filed a motion to amend as required by Fed. R. Civ. P. 15. Accordingly, the Court should not consider any RICO predicate acts based on 8 U.S.C. § 1324(a)(3)(A). Even if the Court were to do so, Plaintiffs have not adequately pleaded a "hiring" predicate act.

Pursuant to 8 U.S.C. § 1324(a)(3)(A), it is a federal crime to "knowingly hire for employment at least 10 individuals [during a twelve-month period] with actual knowledge that the individuals are aliens described in [§ 1324(a)(3)(B)]." Significantly, § 1324(a)(3)(B) limits the definition of an alien covered by § 1324(a)(3)(A) to a person (1) who is "unauthorized" as defined in 8 U.S.C. § 1324a(h)(3), and (2) who "has been brought into the United States in violation of [section 274 of the INA]." 8 U.S.C. § 1324(a)(3)(B).

Here, Plaintiffs have merely alleged that Swift knowingly hired "unauthorized" aliens. Response at 12-13 (summarizing Plaintiffs' allegations as to that issue). Those allegations by themselves are insufficient as a matter of law, because Plaintiffs have failed to allege facts showing that Swift also had "actual knowledge" regarding the second required element mandated by § 1324(a)(3)(B). *See* HM Defendants' Motion at 9. "To state a civil RICO claim on the basis of a violation of [§ 1324(a)(3)], the Plaintiffs must allege that [defendant] had knowledge of how the aliens had been brought into the United States and that they were brought into the United States in violation of [section 274 of the INA]." *Sys. Mgmt., Inc. v. Loiselle*, 91 F. Supp. 2d 401, 408 (D. Mass. 2000) (dismissing a RICO claim based on § 1324(a)(3)(A)); *see Zavala v. Wal-Mart Stores, Inc.*, 393 F. Supp. 2d 295, 309 (D.N.J. 2005) (reaching the same result and explaining that "Plaintiffs are required to allege something more than the fact that [defendant] hired aliens whom they knew to lack work authorization, in order to state a § 1324(a)(3)(A) predicate act.").

As in *Loiselle* and *Zavala*, Plaintiffs' failure to allege facts concerning Swift's actual knowledge of the "brought into the United States" requirements set forth in § 1324(a)(3)(B) is fatal to their "hiring" predicate act claim. In their Response, Plaintiffs do not discuss the decisions in *Loiselle* and *Zavala*. Instead, they again mistakenly rely on *Mohawk* and *Mendoza*.

Because neither of those cases addressed the "brought into the United States" requirements set forth in § 1324(a)(3)(B) and they were decided before *Twombly*, they are inapposite.[7] In light of *Loiselle* and *Zavala*, even if this Court decides to consider the issue, it should dismiss Plaintiff's RICO claim based on a violation of the "hiring" section of the INA, 8 U.S.C. § 1324(a)(3)(A).

III. PLAINTIFFS' ALLEGATIONS DO NOT SATISFY RICO'S PROXIMATE CAUSE STANDARD.

Because Plaintiffs have failed to allege sufficient facts to state plausible RICO predicate acts, their Complaint must be dismissed in its entirety for that reason alone. Even if Plaintiffs had adequately alleged a RICO predicate act, their Complaint must nonetheless be dismissed since the allegations do not satisfy RICO's proximate cause standard.

As detailed in Swift's Motion (at 12-13), the United States Supreme Court held last year that trial courts must scrutinize proximate causation at the pleading stage and evaluate carefully whether the alleged injury was proximately caused by the claimed RICO violations. *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 1997 (2006). Here, Plaintiffs' proximate cause allegations consist of a single sentence:

> Plaintiffs were proximately damaged as a direct result of the pattern of racketeering activity perpetrated by the Swift Defendants through each of these association-in-fact enterprises because this pattern of racketeering activity caused the wages paid at the Swift Facilities to be depressed below what they would have been in the labor market consisting of legal workers.

Complaint, ¶ 65. In arguing that these proximate cause allegations are sufficient, Plaintiffs cite *Mohawk*, *Mendoza*, *Trollinger*, and *Commercial Cleaning Serv., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 382-84 (2d Cir. 2001). Response at 8-10. However, the detailed proximate cause

[7] Unlike *Mohawk* and *Mendoza*, the trial courts in *Brewer* and *Trollinger* considered the "brought into the United States" requirements set forth in § 1324(a)(3)(B) in denying motions to dismiss claims based on "hiring" predicate acts. However, *Brewer* and *Trollinger* were decided before *Twombly*, and the plaintiffs' factual allegations in those cases were much more detailed than in this case. *See Brewer*, 2007 U.S. Dist. LEXIS 36156, at *3-5 (discussing factual allegations); *Trollinger*, 2007 U.S. Dist. LEXIS 38882, at *7-8 (same). Here, in contrast, Plaintiffs fail to allege facts concerning Swift's actual knowledge of the "brought into the United States" requirements.

allegations set forth in those cases demonstrate the opposite, *i.e.*, that Plaintiffs' conclusory allegations here are insufficient.

Plaintiffs rely primarily on *Mohawk*. Response at 9-10. There, plaintiffs alleged RICO claims relating to a single manufacturing plant operated by a defendant in north Georgia. *Mohawk*, 465 F.3d at 1289. Plaintiffs' complaint in *Mohawk* therefore focused solely on "what is happening in the particular narrow labor market that [the defendant] dominates in north Georgia." *Id.* Based on plaintiffs' detailed allegations concerning defendant's control over the labor market in the area surrounding its plant, the Eleventh Circuit determined that plaintiffs' allegations were sufficient to satisfy RICO's proximate cause standard at the pleading stage. *Id.* at 1289-90.[8]

Unlike *Mohawk* and the other cases cited by Plaintiffs, where the allegations focused on a "particular narrow labor market," Plaintiffs assert RICO claims against Swift relating to its operations at eight separate facilities spread across the United States in Texas, Colorado, Nebraska, Utah, Iowa, Kentucky, Minnesota, and California. Complaint, ¶ 1. Also unlike *Mohawk* and the other cases, Plaintiffs fail to make any allegations regarding the nature of the "labor market" in any – much less all – of the locations where Swift has plants. Plaintiffs further fail to allege that Swift "dominates" any labor market such that it can control wages. *Mohawk*, 465 F.3d at 1289. Because Plaintiffs' allegations do not satisfy RICO's proximate cause standard, their Complaint must be dismissed. *See, e.g.*, *Old Time Enterprises, Inc. v. Int'l Coffee Corp.*, 862 F.2d 1213, 1219 (5th Cir. 1989).

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[8] *See Mendoza*, 301 F.3d at 1171 (holding that RICO proximate cause was satisfied at the pleading stage where plaintiffs alleged that defendants had "market power" since they "comprise a large percentage of the fruit orchards and packing houses in the area [of eastern Washington], and therefore affect wages throughout the labor market."); *Trollinger*, 370 F.3d at 619 (same result where plaintiffs alleged that defendant influenced the labor market in Shelbyville, Tennessee); *Commercial Cleaning*, 271 F.3d at 378-79 & 382-84 (same result where plaintiff alleged that defendant competed unfairly in the price-sensitive cleaning services industry in Hartford, Connecticut).

IV. PLAINTIFFS HAVE FAILED TO ALLEGE SUFFICIENT FACTS TO STATE PLAUSIBLE CLAIMS UNDER SECTIONS 1962(a), (b), (c), or (d).

Even if Plaintiffs had adequately alleged RICO predicate acts and the RICO proximate cause standard (which they have not), their Complaint must still be dismissed because Plaintiffs have failed to allege sufficient facts to state plausible claims as to other elements required under 18 U.S.C. §§ 1962(a), (b), (c), and (d).

A. Plaintiffs have failed to allege under Section 1962(a) that their injuries stem from Swift's use or investment of racketeering income.

As Plaintiffs admit in their Response (at 32), the Fifth Circuit has held that a Section 1962(a) RICO claim requires that the plaintiff's injury stem from the use or investment of racketeering income. *Abraham v. Singh*, 480 F.3d 351, 356-57 (5th Cir. 2007); *Parker & Parsley Petroleum Co. v. Dresser Indus.*, 972 F.2d 580, 584 (5th Cir. 1992). While Plaintiffs assert that Swift derived savings from lower payroll costs by hiring illegal immigrants (Complaint, ¶¶ 60, 69), they fail to allege that they were injured as a result of Swift's use or investment of those savings. *See* Swift's Motion at 30 & n.142. Plaintiffs' claim under Section 1962(a) must therefore be dismissed. *Abraham*, 480 F.3d at 356-57 (affirming dismissal of claim under 1962(a)); *Parker*, 972 F.2d at 584 (same).[9]

B. Plaintiffs have failed to allege under Section 1962(b) that Swift acquired an interest in or control of a RICO enterprise through racketeering activity or that they were injured by Swift's control of the enterprise.

To state a RICO claim under Section 1962(b), the Fifth Circuit has held that the plaintiff's injury must be "proximately caused by a RICO person gaining an interest in, or control of, the enterprise through a pattern of racketeering." *Abraham*, 480 F.3d at 357

[9] Plaintiffs tacitly admit that their Complaint is deficient under Section 1962(a) by offering to add more allegations. Response at 32 n.21. Even assuming that Plaintiffs could allege additional facts consistent with Fed. R. Civ. P. 11, they have not done so. As discussed in footnote 4 above, "a [Rule] 12(b)(6) inquiry focuses on the allegations in the pleadings, not whether a plaintiff actually has sufficient evidence to succeed on the merits." *Ferrer*, 484 F.3d at 782 (affirming dismissal).

(quotation and citation omitted). Thus, Plaintiffs must allege facts showing that (1) Swift's alleged racketeering activity led to its control over or acquisition of a RICO enterprise, and (2) Plaintiffs' alleged injury resulted from Swift's control or acquisition of that RICO enterprise. *Id.*; *see also Advocacy Org. for Patients and Providers v. Auto Club Ins. Assoc.*, 176 F.3d 315, 328-29 (6th Cir. 1999).

In their Response (at 33), Plaintiffs quote from five paragraphs of the Complaint in arguing that they have adequately alleged a claim under Section 1962(b). However, those paragraphs of the Complaint "simply parrot the language" of Section 1962(b) and allege that Swift associated with other alleged members of the enterprise "*in order to* engage in the pattern of racketeering activity [*e.g.*, hiring illegal aliens to depress wages], not that they acquired their interests in or control of the enterprise *through* the racketeering activity." *Auto Club*, 176 F.3d at 329 (emphasis supplied by the court). Plaintiffs' claim under Section 1962(b) must be dismissed for this reason alone. *Id.* (affirming dismissal of claim under 1962(b)).

Furthermore, Plaintiffs do not allege that they were injured by Swift's purported control of the enterprise. Rather, Plaintiffs allege that they were injured by Swift's purported manipulation and control of an undefined labor market (Complaint, ¶ 65), which is not an enterprise. Plaintiffs' claim under 1962(b) must therefore be dismissed for this additional reason. *Abraham*, 480 F.3d at 356-57; *Auto Club*, 176 F.3d at 329-31.

C. Plaintiffs have failed to allege sufficient facts to state a plausible claim under Section 1962(c) showing a cognizable RICO enterprise separate and apart from the alleged pattern of racketeering.

Section 1962(c) makes it unlawful "for any person employed by or associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). Swift's Motion (at 18-28) and the HM Defendants' Motion (at 17-21) address a variety of reasons why Plaintiffs' "enterprise" and other

allegations relating to Section 1962(c) are legally deficient, only one of which warrants further discussion in this Reply.

In order to avoid dismissal, Plaintiffs "must plead facts which establish that the [RICO] association exists for purposes other than simply to commit predicate acts." *Elliott v. Foufas*, 867 F.2d 877, 881 (5th Cir. 1989). In their Response (at 20), Plaintiffs summarize the allegations they contend show that the "Wrongful Documentation Enterprise" and the "Swift Enterprise" existed apart from the pattern of racketeering activity. However, those allegations establish that both alleged enterprises were merely an association between defendants and the "documentation middlemen," all of whom purportedly conspired "to violate federal immigration laws" and "to carry out the illegal hiring scheme." Response at 20. By Plaintiffs' own admission, the association-in-fact enterprises alleged in the Complaint exist for the purpose of committing predicate acts, *i.e.*, violating federal immigration laws. Because Plaintiffs have alleged associations indistinct from the pattern of racketeering activity, their claim under Section 1962(c) must be dismissed. *See Elliott*, 867 F.2d at 881 (affirming dismissal of RICO claim where plaintiff failed to allege that "the association existed for any purpose other than to commit the predicate offenses").

D. Plaintiffs have failed to state a conspiracy claim under Section 1962(d).

Because Plaintiffs have failed to plead adequately any violations of Sections 1962(a), (b), or (c), the conspiracy allegations under Section 1962(d) fail to state a claim and must be dismissed. *Nolen v. Nucentrix Broadband Networks*, 293 F.3d 926, 930 (5th Cir. 2002).

V. PLAINTIFFS' CLAIMS ARE PREEMPTED BY THE EXCLUSIVE JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD.

It is undisputed that state and federal courts are divested of subject matter jurisdiction where a claim – regardless of how pleaded – is premised upon conduct arguably protected or

prohibited by the National Labor Relations Act over which the National Labor Relations Board ("NLRB") has exclusive jurisdiction. *Building Trades Council v. Garmon*, 359 U.S. 236, 244-45 (1959). In their Response (at 3), Plaintiffs correctly note that in cases commenced pursuant to other federal statutes, federal courts may resolve collateral labor law issues. *Connell Const. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 626 (1974). Plaintiffs also correctly note that based on this premise, the courts in *Trollinger*, 370 F.3d at 610-12, and *Baker*, 357 F.3d at 689-90, held that certain RICO claims were not preempted by the NLRA. As the court in *Baker* noted, however, "*Garmon* and its successors are principally about the relation between state and federal policy, but the doctrine applies even in federal-question cases that include issues within the Labor Board's charge." *Id.* at 688. Here, in an effort to avoid NLRB preemption, Plaintiffs attempt to assert claims similar to those in *Trollinger* and *Baker*. This Court must decide whether the labor issue in the instant case is collateral (as Plaintiffs contend), or whether it is a central issue in the case such that the NLRB has exclusive jurisdiction (as Swift contends).

Plaintiffs' argument that the labor issue is collateral fails for two reasons. First, because Plaintiffs have a labor organization as their "exclusive" representative, Swift cannot lawfully make any unilateral change in wages. *NLRB v. Katz*, 369 U.S. 736, 742-43 (1962). If Swift attempts to do so (as Plaintiffs alleges Swift did by controlling an undefined labor pool), then the NLRB has exclusive jurisdiction to address that issue.

Second, Swift has a duty to bargain in good faith with the exclusive representative of its employees on mandatory subjects of bargaining such as wages, hours and other terms and conditions of employment. *NLRB v. Borg-Warner Corp., Wooster Div.*, 356 U.S. 342, 349 (1958). The NLRB has "the primary duty of marking out the scope of the statutory language and

the duty to bargain." *Ford Motor Co. v. NLRB*, 441 U.S. 488, 500 n.12 (1979). If Swift has bargained in bad faith by creating a false or misleading labor market (as Plaintiffs' Complaint effectively contends), then the NLRB has exclusive jurisdiction to resolve any issue concerning the propriety of the wage rates.

For these reasons and the reasons set forth in Swift's Motion (at 4-7), the labor law issue is not collateral, but rather is a central issue in the case. Plaintiffs' claims are therefore preempted by the NLRB's exclusive jurisdiction.[10]

VI. PLAINTIFFS HAVE FAILED TO JOIN INDISPENSABLE PARTIES.

A. Plaintiffs' Wage Claims Subject Swift to Possible Union Challenge, Necessitating Joinder of the Unions in this Action.

Plaintiffs do not seriously dispute that, at its core, this is a suit concerning the adequacy of the wages Swift has paid to its employees. Nor do Plaintiffs dispute that Swift would be exposed to lawsuits by the unions if it attempted to set wages without their involvement. Instead of countering these basic facts, Plaintiffs construct a straw man argument predicated on *Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir. 2004). Plaintiffs contend that Swift's indispensable party argument rests solely on *Baker*, which they view as having been rejected by the Sixth and Eleventh Circuits. Response at 5. In reality, neither case cited by Plaintiffs reached the fundamental issue addressed in *Baker* or established a formal holding contrary to the *Baker* court.

In *Baker*, the court observed that the only financial relief available if illegal alien/depressed wage claims are borne out is back pay and/or an increased wage. *Baker*, 357 F.3d at 691. As currently pleaded, both of these remedies would require Swift to set a wage

[10] The NLRB has on several occasions asserted jurisdiction over the issue of the interplay of the National Labor Relations Act and the Immigration Reform and Control Act. *See Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1980); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002); *Concrete Form Walls, Inc.*, 346 NLRB No. 80 (2006).

absent the employees' exclusive wage bargaining representatives – the unions. To protect Swift from the considerable risk it would face from the unions if it were forced to re-set wages, it is essential, and required pursuant to Fed. R. Civ. P. 19(a), that the unions be joined as parties to this action.

Trollinger does not seriously challenge the *Baker* court's analysis. *See* Response at 6.[11] While *Trollinger*, in *dicta*, criticized "*Baker*'s suggestion" that employees must involve unions in suits concerning wages, Plaintiffs simplify and distort the true import of the *Trollinger* court's comments. 370 F.3d at 621. According to *Trollinger*, individual employees may sue employers without "involving" the unions. *Id.* at 617, 621. This is neither remarkable nor the point of Swift's indispensable party argument. There is a critical distinction between individual employees seeking to validate individual rights granted them under the collective bargaining agreement, and individual parties like Plaintiffs seeking to challenge the collective rights secured for all of an employer's workers. *Cf. Anderson v. AT&T Corp.*, 147 F.3d 467, 474 (6th Cir. 1998) ("By definition, all rights under a 'collective bargaining agreement' belong to the collective whole. But where, as here, those rights are specific wage and pension guarantees applicable to specific, identifiable employees, they may be asserted by those individual employees as third-party beneficiaries of the agreement.") (cited by *Trollinger*). In fact, every case cited by *Trollinger* for the proposition that an individual employee may sue his or her employer without involving the union concerned a suit brought by an employee in his or her

[11] Plaintiffs take exception to Swift's supposed failure to "apprise" the Court of the *Trollinger* or *Mohawk* treatment of the indispensable party argument. Resp. at 5. Review of both cases reveals, however, that there is nothing to "apprise." The *Trollinger* court's treatment of the indispensable party argument is, at best, *dicta*. *Trollinger*, 370 F.3d at 621 ("Tyson did not argue in the district court, in its appellate brief or at oral argument that the union is an indispensable party to this lawsuit. . . . To the extent Tyson is relying on *Baker* to suggest that the union is not only a necessary party, but also the party that may pursue these RICO claims, that issue also has not yet been properly joined by the parties."). More troubling, the implication that the *Mohawk* court addressed and rejected *Baker*'s indispensable party holding is disingenuous. *Mohawk* only cited *Baker* to discuss the Seventh Circuit's finding that the "enterprise" alleged by plaintiffs did not have a common purpose. 465 F.3d at 1285. The *Mohawk* court offered no opinion on the Seventh Circuit's conclusion that the unions were indispensable parties.

individual capacity. *Id.* at 617.[12] Accordingly, *Trollinger* provides no answer to the *Baker* court's analysis.

For the foregoing reasons and those set forth in Swift's Motion (at 8-11), this Court should follow the *Baker* court's analysis and hold that the local unions are indispensable parties.

B. The Court Would Not Have Jurisdiction Over Out-of-State Local Unions.

Plaintiffs also argue that, even if the local unions are indispensable parties, they can be joined in this case pursuant to 18 U.S.C. § 1965(d), which Plaintiffs mischaracterize as an unlimited RICO nationwide service of process provision. Response at 6-7. Plaintiffs' conclusory statement concerning Section 1965(d) omits any reference to the considerable disagreement concerning its meaning. *See Cory v. Aztec Steel Bldg., Inc.*, 468 F.3d 1226, 1229-32 (10th Cir. 2006) (noting disagreement among the federal circuits over RICO's nationwide service of process provision, but concluding that "we join the Second, Seventh, and Ninth Circuits and hold that subsection (b) of Section 1965, rather than subsection (d), gives RICO its nationwide jurisdictional reach."). Thus, Section 1965(d) applies only where Sections 1965(a) and (b), read together, do not.[13] *Id.*; *see Hawkins v. Upjohn Co.*, 890 F. Supp. 601, 606 (E.D. Tex. 1994).[14]

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[12] While the plaintiff in *Vaca v. Sipes*, 386 U.S. 171 (1967), sought to bring his suit as a class action, there is no indication any class was ever certified.

[13] In relevant part, the statute reads:

> (a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.
> (b) In any action under section 1964 of this chapter in any district court of the United States in which it is shown that the ends of justice require that other parties residing in any other district be brought before the court, the court may cause such parties to be summoned, and process for that purpose may be served in any judicial district of the United States . . . .
> * * *
> (d) All other process in any action or proceeding under this chapter may be served on any person in any judicial district in which such person resides, is found, has an agent, or transacts his affairs.

[14] The court in *Hawkins* held that Section 1965(d) merely authorizes nationwide service of "other" process. "It does not establish nationwide service of process for personal jurisdiction purposes." *Hawkins*, 890 F. Supp. at 606 n.8;

Here, it is undisputed that under Section 1965(a), jurisdiction exists over the local union representing employees at the Swift facility in Cactus, Texas. This then implicates Section 1965(b), which provides for nationwide service of process when the court has jurisdiction over a single defendant, no other forum would have venue over all defendants, and the "ends of justice" are served. 18 U.S.C. § 1965(b). Contrary to Plaintiffs' argument, Section 1965(d) cannot be read in isolation from subsections (a) and (b). Where, as here, subsections (a) and (b) can be applied to the particular facts of a case to determine whether there is nationwide service of process, those statutory provisions control. *Cory*, 468 F.3d at 1230-32; *Hawkins*, 890 F. Supp. at 606.

Turning to Section 1965(b), Plaintiffs have not suggested why the "ends of justice" would be met by haling local unions into a foreign forum with which they have no contacts. In fact, the "ends of justice" are not served by requiring parties to defend litigation in foreign jurisdictions in which they do not conduct business. *See Cory*, 468 F.3d at 1230 ("Congress expressed a preference that defendants not be unnecessarily haled into unexpected forums."). While Plaintiffs suggest that eight separate lawsuits would be too burdensome, *see* Response at 7, their claims are related to the alleged reduction in wages in eight different communities where Swift operates its plants. Each facility has its own collective bargaining agreement or wage-setting structure. *See* Decl. of D. Schult at ¶¶ 5–14. Attempting to litigate in a single forum issues relating to wages at individual Swift facilities spread across the United States, each of which is represented by a separate local union based on factors specific to the local community, would not serve the "ends of justice." Accordingly, this action must be dismissed, since the local

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see also Cory, 468 F.3d at 1230 (recognizing that "subsection (d)'s reference to 'all other process' must mean process different than a summons or government subpoena, both of which are dealt with in previous sections.").

unions are indispensable parties and cannot be served under RICO's applicable nationwide service of process provision.[15]

VII. CONCLUSION

For the foregoing reasons, Swift requests that its Motion to Dismiss be granted and that Plaintiffs' federal claims, as well as their supplemental state law claims, be dismissed. Alternatively, Swift requests that Plaintiffs be required to submit a more definite statement of their claims, including the completion of a comprehensive RICO case statement.

[15] Plaintiffs contend in a footnote that the question of whether the Court properly has jurisdiction over the individual local unions is irrelevant because the Court has jurisdiction over the international unions. Response at 8 n.1. According to Plaintiffs, the international unions can override the locals on wage issues so the locals are not necessary parties. *Id.* First, the deposition testimony Plaintiffs cite in support of this argument does not state that the international unions are free to override the local unions on issues involving wages. In the testimony from Mr. Schult that Plaintiffs cite, he merely answered affirmatively when asked, "Would wages be an issue where the international union might be more involved." *See* Dep. of Douglas Schult at 96:3 - 97:2, Pls' App. at 355-57 (emphasis added). Further, even if the international unions could in certain instances override the locals on wage issues, it does not mean that the local unions have no rights with respect to wage setting at their specific facility. Swift is relying on Fed. R. Civ. P. 19(a) to protect it from future inconsistent obligations if the local unions sued to protect their rights as the exclusive bargaining agents for Swift's employees. Simply adding the international unions as parties, without adding the local unions, does not protect Swift from this risk.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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