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. 3-06CV2322-N**
Plaintiffs,	§	
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 & COMPANY AND SWIFT BEEF COMPANY'S
MOTION TO DISMISS AND BRIEF IN SUPPORT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

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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	§	
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SWIFT & COMPANY AND SWIFT BEEF COMPANY'S
MOTION TO DISMISS AND BRIEF IN SUPPORT

Defendants Swift & Company and Swift Beef Company (collectively "**Swift**") hereby move to dismiss Plaintiffs' action under Rules 12(b)(1), 12(b)(6) and 12(b)(7).[1] Already on their second Complaint, Plaintiffs' RICO case suffers from numerous fatal defects, each providing independent grounds for dismissal. For example:

- Plaintiffs' claims are so intertwined with matters arising under the National Labor Relations Act that this case must be dismissed because it falls within the exclusive jurisdiction of the National Labor Relations Board ("**NLRB**").

[1] Swift also joins the Motion to Dismiss of co-defendants HM Capital Partners of Dallas, LLC and Hicks, Muse, Tate & Furst, Inc., (collectively "**HM Capital Defendants**") and incorporates herein by reference the grounds for dismissal and arguments in support thereof articulated in their motion and brief.

- Plaintiffs are unable to join all of the relevant unions, which are indispensable parties in this case, thereby subjecting Swift to multiple or inconsistent obligations if the case were to proceed in their absence.

- Plaintiffs' allegations fail to meet RICO's proximate cause standards, as articulated by the Supreme Court's opinion in *Anza v. Ideal Steele Supply Co.*, because the cause of the Plaintiffs' alleged harm (Swift's payment of lower wages) was not proximately caused by the alleged violation (deliberate and knowing violations of immigration laws).

- Plaintiffs' "enterprise" allegations fail to meet several RICO requirements, including the requirement that the enterprise exist separate and apart from the alleged pattern of racketeering activity, and that it has a purpose unrelated to the alleged racketeering activity.

- Plaintiffs' pleadings are overwhelmingly conclusory, with virtually no supporting facts, and thus fail to satisfy the minimum pleading requirements, particularly with respect to the fraud-based allegations.

Given the draconian penalties associated with the RICO statute, Plaintiffs should be required to strictly comply with their pleading obligations as mandated by the Fifth Circuit. Because they have fallen far short of those and other obligations, the Court should dismiss this action.

BACKGROUND

Plaintiffs contend that Swift and others knowingly violated federal immigration laws through an alleged scheme to hire illegal immigrants to work in Swift's eight meat-packing plants scattered throughout the country, all in an effort to unlawfully depress wages of all workers, thereby lowering labor costs.[2] The named Plaintiffs, all former workers previously employed at Swift's Cactus, Texas facility, seek to recover individually as well as on behalf of a putative class composed of all other persons legally authorized to be employed in the United States who have been employed at the Swift facilities as hourly wage earners between 2000 and 2006.[3] Based on their allegations, Plaintiffs and the putative class they purportedly represent seek to recover (1) an undetermined amount of actual damages; (2) treble damages under the RICO statute; and (3) exemplary damages of $23 million.[4]

[2] *See, e.g.*, Plaintiffs' First Amended Complaint, filed December 28, 2006 (hereafter "**Complaint**") ¶ 2.

[3] *See* Complaint ¶¶ 30, 71.

[4] *See* Complaint ¶ 82.

ARGUMENT & AUTHORITIES

I. THIS CASE SHOULD BE DISMISSED BECAUSE PLAINTIFFS' CLAIMS ARE SUBJECT TO THE PRIMARY JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD.

A. Rule 12(b)(1) governs this issue.

A challenge to subject matter jurisdiction premised on the primary jurisdiction of the NLRB is made pursuant to motion under Federal Rule of Civil Procedure 12(b)(1).[5] A case is properly dismissed for lack of subject matter jurisdiction where the court lacks the power to hear the case.[6] The burden of proof on a 12(b)(1) motion lies with the party asserting jurisdiction.[7] As with a 12(b)(6) motion, the Court will accept as true all well-pleaded allegations in the complaint; however, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss."[8] In adjudicating this motion, the Court may properly look beyond the jurisdictional allegations in the Complaint and view whatever evidence has been submitted to determine whether subject matter jurisdiction exists.[9]

B. Congress delegated authority over labor-related claims to the NLRB.

The National Labor Relations Act ("**NLRA**") reflects Congress's intent to entrust development of the nation's labor laws and policy to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience—the NLRB.[10] Through the NLRA, Congress deliberately placed "the responsibility for applying and developing this comprehensive legal system in the hands of [this] expert administrative body rather than the federalized judicial system."[11] Thus, the Supreme Court has held that the "States as well as the federal courts must defer to the exclusive

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[5] *See, e.g., Smith v. Bewlay*, No. 3:97-CV-1608 (JCH), 2000 WL 306950, at *1 (D. Conn. Jan. 26, 2000) (unpublished).

[6] *Home Builders Ass'n of Mississippi, Inc v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998).

[7] *Strain v. Harrelson Rubber Co.*, 742 F.2d 888, 889 (5th Cir. 1984).

[8] *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993).

[9] *Barrera-Montenegro v. U.S.*, 74 F.3d 657, 659 (5th Cir. 1996) (holding that 12(b)(1) dismissal can be granted based upon the complaint alone, the complaint supplemented by undisputed facts in the record, or the complaint supplemented by undisputed facts plus the court's resolution of disputed facts).

[10] *Building Trades Council (San Diego) v. Garmon*, 359 U.S. 236, 244-45 (1959); *Tamburello v. Comm-Tract Corp.*, 67 F.3d 973, 976 (1st Cir. 1995), *cert. denied*, 517 U.S. 1222 (1996).

[11] *Id.* at 45.

competence of the [NLRB]."[12] Courts are divested of subject matter jurisdiction where a claim—regardless how pleaded[13]—is premised on conduct arguably protected or prohibited by the NLRA.[14]

C. Plaintiffs' claims are based on conduct within the NLRB's exclusive jurisdiction.

Plaintiffs, a putative class comprised primarily of current and former union members,[15] claim Swift "engaged in a pattern of fraudulent and illegal conduct to defraud and artificially depress the labor market," which resulted in their receiving "substantially less in wages."[16] Plaintiffs' wages are, and have been, set through collective bargaining between their unions (local affiliates of the United Food and Commercial Workers' Union ("**UFCW**")) and Swift. Therefore, Plaintiffs cannot demonstrate, as required to state a RICO claim, that they were "injured . . . in business or in property" by the alleged racketeering activity without showing that the alleged unlawful conduct directly and proximately affected the collective bargaining process by which wages were set.[17] "Failure of an employer to bargain in good faith about terms and conditions of employment is not peripheral to the concerns of federal labor law; rather, it strikes at the heart of one of the basic concerns of that law. . . ."[18]

Similarly, Plaintiffs cannot prove damages in this case without reference to the bargaining process. If the fact finder did conclude that Swift impaired Plaintiffs' representatives' bargaining power, it would then be forced to determine what wage rate the parties would have agreed upon in the absence of the alleged scheme—a determination intrinsically intertwined with the bargaining process, as collective bargaining

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[12] *Garmon*, 359 U.S. at 244-45.

[13] *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 292 (1971)(noting "[i]t is the conduct being regulated, not the formal description of the governing legal standards, that is the proper focus of concern.").

[14] *Garmon*, 359 U.S. at 244-45.

[15] Plaintiffs' claims concern eight different facilities, scattered throughout the country, seven of which were unionized. *See* Appendix, Declaration of Douglas W. Schult ("Schult Decl.")). While Plaintiffs' Complaint fails to mention the existence of the unions, the Court may nevertheless consider these facts in connection with a Rule 12(b)(1) motion. *See Barrera-Montenegro*, 74 F.3d at 659 (in ruling on 12(b)(1) motion, court may examine evidence outside of pleadings).

[16] *See* Complaint ¶¶ 52, 75.

[17] *See* 18 U.S.C. § 1964(c); *see also* Section III, at 11-14, *infra*, discussing Plaintiffs' failure to meet RICO's proximate cause standards.

[18] *Serrano v. Jones & Laughlin Steel Co.*, 790 F.2d 1279, 1286 (6th Cir. 1986); *Kolentus v. Avco Corp.*, 798 F.2d 949, 961 (7th Cir. 1986) (noting that conduct during bargaining is "far more than a 'peripheral concern' under the NLRA").

agreements are the product of innumerable competing interests and compromises. To award damages, the tribunal hearing this case must estimate the outcome of a hypothetical bargaining process and set wage rates, retroactively as well as prospectively—all activities exclusively within the NLRB's purview.[19]

D. None of the exceptions to primary jurisdiction apply.

There are only three exceptions to the NLRB's primary jurisdiction.[20] The first exists where Congress explicitly creates such an exception, which has not occurred here.[21] The second, where the subject matter is "deeply rooted in local feeling and responsibility,"[22] is also inapplicable, as Plaintiffs' RICO claims are brought under federal law. The last exception, available only where the activity is "only a peripheral or collateral concern of the labor laws," likewise does not apply.[23] This exception originates from the Supreme Court holding that, despite the general rule of NLRB primary jurisdiction, "federal courts may decide labor law questions that emerge as collateral issues in suits brought under independent federal remedies."[24] Courts have grappled with whether particular RICO claims seek an "independent federal remedy;" some courts conclude that certain RICO claims are collateral, and thus exempt from NLRB primary jurisdiction, but only if the claim is resolvable without referring to labor laws or interpreting labor agreements.[25]

Labor issues are at the heart, not the periphery, of Plaintiffs' claims. First, the predicate acts alleged by Plaintiffs are violations of the Immigration and Naturalization Act's prohibition against smuggling,

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[19] *See Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete Co.*, 484 U.S. 539, 551-52 (1988) (noting that labor-related "remedies are problematic [for federal courts to administer] in cases in which there is a good-faith dispute over both the existence and the extent of the employer's liability").

[20] *Tamburello*, 67 F.3d at 973.

[21] *Id.* (citing *Vaca v. Sipes*, 386 U.S. 171, 179-80 (1967)). RICO specifies certain labor-related "racketeering" activities as RICO predicate acts: the limitation of payments and loans to labor organizations and the embezzlement from labor funds. 18 U.S.C. § 1961(1)(c); 29 U.S.C. § 186; 29 U.S.C. § 501(c). Therefore, courts have concluded that Congress intended for primary jurisdiction to apply where any other violations of the labor laws are alleged as RICO predicate acts. *Tamburello*, 67 F.3d at 977 (citing *Brennan v. Chestnut*, 973 F.2d 644, 646 (8th Cir. 1992)).

[22] *Tamburello*, 67 F.3d at 977 (citing *Sears, Roebuck & Co. v. Carpenters*, 436 U.S. 180, 195 (1977)).

[23] *Id.* (citing *Vaca*, 386 U.S. at 179-80) .

[24] *Connell Construction Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 626 (1975).

[25] *See Tamburello*, 67 F.3d at 978-79 (where labor issues are entwined with RICO claim, NLRB has jurisdiction); *Talbot v. Robert Matthews Distributing Co.*, 961 F.2d 654, 662 (7th Cir. 1992); *McDonough v. Gencorp*, 750 F. Supp. 368, 369-71 (S.D. Ill. 1990).

transporting, harboring concealing, or employing aliens "for the purposes of financial gain."[26] Plaintiffs cannot demonstrate such a financial motive, nor can they prove causation or the requisite damage to their property, without detailed reference to the bargaining process. Finally, Plaintiffs seek to retroactively change the agreements governing their employment to what they purportedly "would have been" in the absence of the alleged scheme—a prospect hopelessly entangled with the collective bargaining process.

The issue of primary jurisdiction has been misunderstood by two circuits assessing RICO claims brought under similar facts. In *Baker v. IBP*, the Seventh Circuit acknowledged that the primary jurisdiction doctrine "applies . . . even in federal-question cases that include issues within the Labor Board's charge."[27] It then applied the collateral exception, stating "[w]hen the predicate offenses under RICO are federal crimes other than transgressions of the labor laws, no dispute falls within the Labor Board's primary jurisdiction."[28] However, the authority upon which the court relied in reaching this conclusion is distinguishable. *Palumbo* analyzed only the effect of *Garmon* on indictments charging criminal offenses, concluding that in the absence of any express congressional intent to insulate unfair labor practices from criminal liability, *criminal prosecutions* do not infringe upon or interfere with the NLRB's primary jurisdiction. The Seventh Circuit in *Palumbo*, however, did not "disturb . . . [decisions holding] that *Garmon* preempts a *civil* cause of action when the independent federal claim clearly involves a legitimate labor dispute."[29] Thus, in applying wholesale the *Palumbo* criminal analysis to a civil case, the result in *Baker v. IBP* was incorrect.

Likewise, the Sixth Circuit in *Trollinger v. Tyson Foods* agreed with the Seventh Circuit that "federal courts do not have jurisdiction over activity which is 'arguably subject to § 7 or § 8 of the

[26] 18 U.S.C. § 1961(F). This is the only RICO predicate offense requiring a plaintiff to demonstrate a specific motive.

[27] *Baker v. IBP, Inc.*, 357 F.3d 685, 688 (7th Cir. 2004).

[28] *Id.* at 689 (citing *United States v. Palumbo Bros., Inc.*, 145 F.3d 850, 861-63 (7th Cir. 1998)).

[29] *Palumbo Bros.*, 145 F.3d at 861-63. Indeed, the court went on to state that "RICO is not designed to protect the private rights of employees or unions . . . If an employee or a union attempts to disguise a legitimate labor dispute as a RICO claim, we recognize the potential conflict. . . . " *Id.* at 870-71.

[NLRA]'."[30] However, as with the *IBP* decision, which it cited with approval, the Sixth Circuit found the collateral exception applicable, emphasizing that "plaintiffs do not need to prove a violation of the NLRA in order to establish violations of the federal-law predicate upon which they rely."[31]

In reaching these incorrect results, both courts notably disregarded that the RICO predicate act alleged by the plaintiffs was smuggling or harboring aliens *for financial gain*. Proving that financial motive would necessarily require a showing that the defendants acted to gain unfair advantage in collective bargaining, because that is the exclusive mechanism for establishing wage rates and, thereby, achieving any financial gain. It follows that the plaintiffs' ability to establish the RICO predicate offense is enmeshed in the bargaining process. As importantly, the *IBP* and *Trollinger* courts ignored the critical issues of causation and damages, each of which requires close analysis of collective bargaining, a process fundamental to labor law and plainly within the exclusive jurisdiction of the NLRB. Without regard to the label applied to the predicate offense, Plaintiffs' wages in this case were determined by the bargaining process (an intervening event). Therefore, to demonstrate causation and injury, Plaintiffs must show that Swift's scheme detrimentally affected the bargaining position of their union representatives. Such a claim of unfair bargaining is clearly within the NLRB's purview, no matter what label is applied to the RICO predicate act.

Despite Plaintiffs' attempts to circumvent NLRB jurisdiction, it is plain that their claims cannot be resolved without reference to the labor laws and to the collective bargaining process. Hence, this action must be dismissed in favor of the NLRB's primary jurisdiction.

II. THIS CASE MUST ALSO BE DISMISSED BECAUSE PLAINTIFFS FAILED TO JOIN INDISPENSABLE PARTIES.

Alternatively, this action must be dismissed under Rule 12(b)(7) for failure to join a party under Rule 19, because the local unions designated as the putative class members' exclusive representatives are indispensable parties to this lawsuit. At seven of the eight Swift facilities at issue, wages are set by

[30] *Trollinger v. Tyson Foods*, 370 F.3d 602, 609 (6th Cir. 2004) (citing *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83 (1982)).

[31] *Id*. at 611.

bargaining between the company and the local union representing the employees at each facility.[32] The Unions are parties to the collective bargaining agreements governing these wages and thus have clear interests in this litigation, as does the International union to which these "locals" belong.[33] In failing to join the Unions, where the relief sought is to change collectively bargained wages (retroactively and prospectively), Plaintiffs cannot obtain complete relief.

A. The unions are necessary parties to this action.

In evaluating a Rule 12(b)(7) motion, the court should first determine if the absent parties are necessary to the lawsuit.[34] This assessment is guided by the "first joinder standard . . . prescribed in [Rule 19(a)], [which] is designed to protect those who already are parties to the litigation."[35] That provision requires a court to join an absent party "if feasible" where:

> (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the persons ability to protect the interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest.[36]

The gravamen of Plaintiffs' Complaint in this case is the adequacy of their wages—a topic on which the unions individually have negotiated and reached binding agreements with Swift—and hence each has an "interest relating to the subject of" this litigation. If the Court were to order Swift to pay back pay based upon what it calculates the wages "should have been," or raise the current wage rates, Swift's compliance with that order would directly contravene these collective bargaining agreements. Therefore, the disposition of this action in the unions' absence would subject Swift to "a substantial risk of incurring double, multiple, or otherwise inconsistent obligations."

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[32] *See* Schult Decl. at ¶¶ 3-14.

[33] *See id.*

[34] *HS Resources, Inc. v. Wingate*, 327 F.3d 432, 439 (5th Cir. 2003).

[35] 7 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRACTICE & PROCEDURE § 1604 (3d. ed. 2001).

[36] FED. R. CIV. P. 19(a); *see also HS Resources*, 327 F.3d at 439.

The issue of necessary joinder of employee representatives is not novel. For example, in one employee-brought class action concerning terms set forth in local collective bargaining agreements, the court ordered the plaintiffs' unions joined "to assure the court's remedy will be effective," and explained that "joinder is required in order to avoid leaving [the employer] subject to a substantial risk that its judgment obligations would be inconsistent with its obligations under the collective bargaining agreements."[37] Because Plaintiffs in this case challenge terms of their employment agreed upon by Swift and the unions, these unions must be parties to this litigation.[38]

B. The unions are indispensable parties not subject to this Court's jurisdiction, thus requiring dismissal of this action.

Even though the named Plaintiffs were employed only at Swift's Cactus, Texas facility,[39] they seek to represent a broad class of "themselves, and all other persons, legally authorized to be employed in the U.S., who have been employed at the Swift facilities as hourly wage earners."[40] Swift's other facilities are located in Nebraska, Utah, Colorado, Kentucky, Iowa, California, and Minnesota; with one exception, Utah, the employees at each facility are represented by a local union.[41] Of these, only the Texas local is subject to service and personal jurisdiction in this Court.[42]

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[37] *National Organization of Women v. Minnesota Mining & Mfg. Co*., 73 F.R.D. 467, 469 (D. Minn. 1977).

[38] *See Forsberg v. Pacific N.W. Bell Tel. Co*., 622 F. Supp. 1147, 1150 (D. Or. 1985) (ordering joinder of union where "plaintiffs challenges specific terms of employment contained in the collective bargaining agreement and appropriate relief may require revision of those terms. . ."); *Hodgson v. School Board, New Kensington-Arnold School Dist*., 56 F.R.D. 393, 395 (W.D. Pa. 1972) (noting where action "endemically involves the potential for altering and restructuring the compensation provisions of the collective bargaining agreement between the defendant and the proposed defendants . . . the purposes of Rule 19 would be best served by granting" the employer's motion to join the unions).

[39] *See* Schult Decl., at ¶ 6.

[40] *See* Complaint ¶ 30.

[41] *See* Schult Decl. at ¶¶ 3-14.

[42] While RICO makes a limited allowance for nationwide service of process if the "ends of justice" so require, such service is unlikely to be appropriate in this case. *See* 18 U.S.C. § 1965(d). The goal of the "ends of justice" provision was designed to allow all alleged co-conspirators before one court; Plaintiffs do not allege that the local unions were conspirators in this action. *See Butchers' Union Local No. 498 v. SDC Investment, Inc*., 788 F.2d 535, 539 (9th Cir. 1986).

Under Rule 19(b), if a person's joinder is infeasible for jurisdictional reasons, "the court shall determine whether in equity and in good conscience the action should proceed among the parties before it, or should be dismissed."[43] In its assessment, the Court should consider the following factors:

> (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties;
> (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided;
> (3) whether a judgment rendered in the person's absence will be adequate; and
> (4) whether the plaintiff will have an adequate remedy if the action is dismissed for misjoinder.[44]

These criteria are applied pragmatically, not mechanically, to balance the rights of all concerned.[45]

In *Baker v. IBP*, the Seventh Circuit dismissed a similar RICO action under 12(b)(7) for the failure to join the union, explaining that "[w]ithout the union as a party, the litigants could not settle this suit for higher hourly pay (or back pay) . . . nor could the judge order [the employer] to increase its rate of pay."[46] Just as in that case, judgment rendered here in the local unions' absence would prejudice Swift by exposing it to a court mandate that would conflict with its contractual obligations under the numerous collective bargaining agreements. This would likely result in breach-of-contract claims or unfair-labor-practice accusations by the local unions, which Swift would be forced to defend in each separate jurisdiction. Furthermore, the absent unions clearly have an interest in litigation seeking to essentially redo their collective bargaining. Not only would their rights under the present agreements be prejudiced, but on a more fundamental level, this case's outcome will affect the future bargaining positions of Swift and the unions, and possibly the employees' perception of the unions as well.

Because Plaintiffs' claims are entirely wage-based, it is difficult to envision how the Court could tailor its judgment or relief to reduce or eliminate this prejudice. However, Plaintiffs have an adequate

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[43] *See Power Equities, Inc. v. Atlas Telecom Services-USA*, No. 3:06-CV-1892-G, 2007 WL 43843 (N.D. Tex. Jan. 5, 2007) (citing *HR Resources, Inc. v. Wingate*, 327 F.3d 432, 439 (5th Cir. 2003)).

[44] FED. R. CIV. P. 19(b).

[45] *Schutten v. Shell Oil Co.*, 421 F.2d 869, 873-74 (5th Cir. 1970).

[46] *Baker*, 357 F.3d at 691.

remedy if this action is dismissed. As previously set forth, Plaintiffs' claims are subject to the exclusive jurisdiction of the NLRB. If their claims here are dismissed, Plaintiffs may seek relief there, where all the union locals would be subject to jurisdiction.

Because (1) the unions are necessary and indispensable parties under Rule 19; (2) Swift will be subjected to multiple or inconsistent obligations if this case were to proceed without the unions; and (3) Plaintiffs can pursue fully their claims before the NLRB, equity demands dismissal of this action.

III. DISMISSAL UNDER RULE 12(b)(6) IS PROPER BECAUSE PLAINTIFFS' ALLEGATIONS DO NOT SATISFY RICO'S PROXIMATE CAUSE STANDARD.

To recover damages under the RICO Act, Plaintiffs must prove that they suffered an injury to their "business or property by reason of" a statutory violation.[47] Thus, to avoid a Rule 12(b)(6) dismissal,[48] Plaintiffs must allege the existence of a "direct relation between the injury asserted and the injurious conduct alleged."[49] These allegations must include specific facts; conclusory and generalized allegations are insufficient.[50] The courts should carefully scrutinize the alleged causal link to evaluate whether the "defendants' violation was not only a 'but for' cause of [the plaintiffs'] injury but was the *proximate cause* as well."[51] Indeed, "[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 plaintiffs' injuries."[52]

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[47] 18 U.S.C. § 1964(c).

[48] Rule 12(b)(6) authorizes dismissal of an action for "failure to state a claim upon which relief can be granted" if the plaintiff's complaint lacks "direct allegations on every material point necessary to sustain a recovery" or fails to "contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." FED. R. CIV. P. 12(b)(6); *Campbell v. San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995). Although a court is required to accept all well-pleaded facts as true, a court does not accept as true conclusory allegations, "unwarranted deductions of fact," or "legal conclusions masquerading as factual conclusions." *See, e.g.*, *Tuchman v. DSC Communications*, 14 F.3d 1061, 1067 (5th Cir. 1994). A claim must be dismissed if the claimant can prove no set of facts that would entitle it to relief. *Brown v. La. Office of Student Fin. Assistance*, No. 3:06-CV-0950-R, 2007 WL 496658 (N.D. Tex. Feb. 15, 2007) (Buchmeyer, J.) (unpublished) (citing *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995) and stating, "The court is not required to 'conjure up unpled allegations or construe elaborately arcane scripts to' save a complaint").

[49] *See, e.g.*, *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991, 1996 (2006); *Old Time Enterprises v. Int'l Coffee Corp.*, 862 F.2d 1213, 1219 (5th Cir. 1989).

[50] *Fernandez-Montez v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993).

[51] *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992); *accord Anza*, 126 S. Ct. at 1996-98.

[52] *Anza*, 126 S. Ct. at 1998.

Just last year, the United States Supreme Court emphasized RICO's proximate-cause requirement in *Anza v. Ideal Steel Supply Corp*. There, the plaintiff alleged that the defendant, a competing company, violated RICO by engaging in a pattern of mail and wire fraud by submitting fraudulent tax returns to the state taxing authorities. According to the plaintiff, the defendant intentionally failed to charge requisite sales taxes to cash-paying customers, which then allegedly allowed the defendant to drop its prices and gain market share at the plaintiff's expense.[53] The Court employed the analysis previously articulated in *Holmes v. Securities Investor Protection Corp.*, which requires a "direct relation between the injury asserted and the injurious conduct alleged."[54] Ultimately, the *Anza* Court concluded that the necessary causal link was missing, noting that the cause of the plaintiffs' alleged harm was a set of actions (offering lower prices) that was entirely distinct from the alleged RICO violation (defrauding state taxing authorities).[55]

In explaining its conclusion, the Supreme Court identified circumstances that emphasized the lack of the necessary causal connection. One such circumstance was the difficulty the trial court would have accurately ascertaining damages. The "less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiffs' damages attributable to the violation, as distinct from other independent factors."[56] If the case were allowed to go forward, the Court reasoned, the trial court would be faced with the difficult task of accurately ascertaining the plaintiff's damages, which would be measured by the lost sales resulting from the defendant's decreased prices for cash-paying customers. However, the Court noted, the defendant could have lowered its prices for many reasons unconnected with the alleged fraud, and likewise, the plaintiff's alleged lost sales could have resulted from factors wholly unrelated to the alleged fraud.[57] Thus, the trial court would be required to engage in a complex and difficult calculation in an attempt to determine: (1) what

[53] *Id.* at 1994-95.

[54] *Id.* at 1996 (citing *Holmes*, 503 U.S. at 268).

[55] *Id.* at 1997.

[56] *Id.* (citing *Holmes*, 503 U.S. at 269).

[57] *Id.*

portion of the defendant's price drop was actually attributable to the alleged pattern of racketeering activity; and (2) what portion of the plaintiff's lost sales was attributable to the relevant part of the defendant's price drop. Ultimately, the Court concluded that the RICO proximate-cause element was designed "to prevent such intricate, uncertain inquiries from overrunning RICO litigation."[58] Indeed, the complicated, speculative nature of the damage calculation illustrated precisely *why* the plaintiff's alleged injury was not the direct result of the alleged RICO violation.[59]

Applying *Anza's* strict proximate-cause requirements in this case, it becomes clear that the required direct relationship between the injury asserted and the alleged injurious conduct is simply lacking. Indeed, in many respects, this case is similar to *Anza*. As in *Anza*, the set of actions alleged to have caused the Plaintiffs' harm in this case – Swift paying lower wages – is entirely distinct from the alleged RICO violation – Swift's alleged knowing violations of federal immigration statutes. And, as in *Anza*, this Court would be required to engage in a difficult and speculative damage calculation if this case were to proceed, which would involve calculating the extent to which wholly unrelated factors may have proximately caused Plaintiffs' alleged injury. Specifically, the Court would be required to determine what proportion of the decrease in wages, if any, over the relevant time period could be attributed to Swift's alleged knowing violations of immigration laws, as opposed to other unrelated, independent factors.

Clearly, numerous forces affect wage rates in industries such as the meat-packing industry. The Court would need to consider and evaluate *all* of them to determine their effect, if any, on the Plaintiffs' wages. For example, the Court would be required to determine the effects of general fluctuations in the economy, particular economic issues related to each of the eight plant locations, the effect of the industry's trend towards mechanized processes and unskilled labor, industry-wide wage fluctuations caused by

[58] *Id.* at 1998.

[59] *Id.*

ordinary competitive activity, and the effect of collective bargaining.[60] Such a multi-faceted analysis is as complex (or even more so) than that described in *Anza*. Thus, the same danger—that the damages analysis would "overrun" the RICO case—also exists here.[61] Because Plaintiffs have failed to allege facts necessary to meet the Supreme Court's high proximate-causation standard, this case should be dismissed.

IV. PLAINTIFFS' RICO CLAIMS SHOULD ALSO BE DISMISSED UNDER RULE 12(b)(6) BECAUSE PLAINTIFFS HAVE NOT ADEQUATELY PLEADED A VIOLATION OF THE RICO ACT.

To survive a Rule 12(b)(6) motion to dismiss, Plaintiffs must at least allege the following:

> (1) that a "person" within the scope of the statute (2) has utilized a "pattern of racketeering activity" or the proceeds thereof (3) to infiltrate an interstate "enterprise" (4) by [violations of § 1962 subsections] (a) investing the income derived from the pattern of racketeering activity in the enterprise; (b) acquiring or maintaining an interest in the enterprise through the pattern of racketeering activity; (c) conducting the affairs of the enterprise through the pattern of racketeering activity; or (d) conspiring to commit any of the above acts.[62]

Each of these elements is a "term of art which carries its own inherent requirements of particularity."[63] Thus, "[u]nlike other claims, a RICO claim must be plead with specific facts, not mere conclusions, which establish the elements of a claim under the statute."[64] Plaintiffs are not entitled to submit a conclusory, barebones complaint that fails to provide fair notice of the facts on which they rely. The onus of asserting

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[60] *See, e.g.*, *Aguinaga v. United Food and Commercial Workers International Union*, 854 F. Supp. 757, 762-63 (D. Kan. 1994) ("The court has considered the evidence regarding trends in the meatpacking industry. The entire meatpacking industry experienced wage cuts during the damage period. Wage concessions would have occurred even absent [the defendant's] breach of contract."). Also, as noted in Section II, collective bargaining is the exclusive province of the NLRB.

[61] A further concern voiced by the *Anza* Court was the difficulty associated with the evaluation of "[RICO] claims brought by economic competitors." *See Anza*, 126 S. Ct. at 1998 (stating that the proximate cause requirement "has particular resonance when applied to claims brought by economic competitors. . . ."). While not industry competitors, Plaintiffs and Swift are nevertheless economic rivals, with one seeking to obtain higher compensation for less work while the other seeks more work for less compensation. This provides an additional basis for holding Plaintiffs to this strict proximate cause requirement.

[62] Hon. Jed S. Rakoff & Howard W. Goldstein, *RICO: Civil and Criminal Law and Strategy*, § 1.02 (2006); *see also Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 855 F.2d 241, 242 (5th Cir. 1988), *cert. denied*, 489 U.S. 1079 (1989); *Cadle Co. v. Schultz*, 779 F. Supp. 392, 396 (N.D. Tex. 1991).

[63] *Elliott v. Foufas*, 867 F.2d 877, 880 (5th Cir. 1989).

[64] *Andrade v. Chojnacki*, 65 F. Supp. 2d 431, 450 (W.D. Tex. 1999) (dismissing RICO claims for failure to include "specific facts" in complaints).

clear and understandable allegations falls squarely on the plaintiff, who cannot avoid that obligation by filing a confusing complaint that requires the court or the defendant to piece together the allegations.[65]

A. Plaintiffs have not adequately pleaded the necessary predicate acts.

To avoid dismissal for failure to state a claim, a plaintiff must articulate how each defendant engaged in a prohibited pattern of racketeering activity or "predicate acts."[66] The RICO Act defines "racketeering activity" by reference to various state and federal offenses, "each of which subsumes additional constituent elements that the plaintiff must plead."[67] As demonstrated below, Plaintiffs failed to adequately plead the alleged predicate acts.

1. Plaintiffs have failed to adequately plead with particularity their fraud-based predicate acts as required by Federal Rule 9(b).

All of the Plaintiffs' predicate acts are, at their core, allegations of fraudulent behavior. In their Complaint, Plaintiffs allege the following:

- "The activity of the Defendants constitute [sic] an ***ongoing scheme to defraud*** those persons who had the legal right to work at The Swift Facilities, including the Plaintiffs." Complaint ¶ 51.
- "In furtherance of their scheme, the Defendants have knowingly, willfully, and unlawfully engaged in a pattern of ***fraudulent and illegal conduct to defraud*** and artificially depress the labor market, including repeated violation of [federal immigration law]." *Id.* ¶ 52.
- "Each separate violation of The Illegal Immigration Reform and Immigration Responsibility Act of 1996 in furtherance of the Defendants' ***fraud*** and scheme constitutes a racketeering activity. . . ." *Id.* ¶ 54.
- "The Defendants' ongoing and systematic efforts to ***defraud*** those individuals who had the legal right to work at The Swift Facilities, including Plaintiffs, pose a threat of ongoing and continuing illegal activity." *Id.* ¶ 55.

[65] *See, e.g.*, *Old Time Enterprises*, 862 F.2d at 1218 (dismissing RICO allegations and stating "[i]t is perhaps not impossible that a RICO claim may lie hidden or buried somewhere in [plaintiff's] complaints and the Standing Order case statement. [Plaintiff's] pleadings do not unequivocally negate such a possibility. However, they also do not state a RICO claim against defendants with sufficient intelligibility for a court or opposing party to understand whether a valid claim is alleged and if so what it is."). *See also* note 48 *supra*.

[66] *Cadle Co.*, 779 F. Supp. at 397 (citing *Elliott*, 867 F.2d at 882).

[67] *Id.* at 398.

- "Each separate ***use of the United States mails or interstate wire communications in furtherance of Defendants' fraud and scheme*** constitutes a racketeering activity under 18 U.S.C. 1961(1)(B)." *Id.* ¶ 53.

Because all of Plaintiffs' allegations are fundamentally grounded in fraud, "rule 9(b) applies and the predicate acts alleged must be plead with particularity."[68] Thus, Plaintiffs' fraud allegations must specifically refer to the "time, place, and contents of the false representations, as well as the identity of the person making the representation and what the person obtained thereby."[69] And, when pleading a claim for mail or wire fraud, Plaintiffs must specify the content of the alleged communications and how those communications advanced the alleged scheme to defraud the Plaintiffs.[70] Furthermore, since this is a class complaint, Plaintiffs must allege two racketeering acts that were part and parcel of the pattern of racketeering activity that indirectly affected *the entire class*.[71]

Here, Plaintiffs have failed to allege the time, place, or contents of *any* of the purported false representations, a flaw that is fatal to their action.[72] Moreover, Plaintiffs offer ***no*** factual support for their mail and wire-fraud allegations. Their Complaint does not identify any specific communications, let alone describe their contents or explain how those alleged communications purportedly "advanced the alleged scheme of the defendants" or affected all class plaintiffs.[73] Given these fatal deficiencies, the Court should dismiss Plaintiffs' RICO action.

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[68] *Walsh v. America's Tele-Network Corp.*, 195 F. Supp. 2d 840, 846 (E.D. Tex. 2002) (citing *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 177 (5th Cir. 1997)); FED. R. CIV. P. 9(b) ("In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.").

[69] *Tel-Phonic Servs., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1138 (5th Cir. 1992); *Skidmore Energy, Inc. v. KPMG*, No. 3:03-CV-2138-B, 2004 U.S. Dist. LEXIS 28396, at *7-8 (N.D. Tex. Dec. 28, 2004) (Boyle, J.) (unpublished).

[70] *Elliott*, 867 F.2d at 882; *Old Time Enterprises*, 862 F.2d at 1218; *Tel-Phonic Servs.*, 975 F.2d at 1138.

[71] *Alfaro v. E.F. Hutton & Co.*, 606 F. Supp. 1100, 1119 (E.D. Pa. 1985) (dismissing fraud-based RICO claims for failure to allege predicate acts with sufficient specificity).

[72] *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 179 (5th Cir. 1997).

[73] *See Elliott*, 867 F.2d at 882; *Alfaro*, 606 F. Supp. at 1119.

2. Plaintiffs have failed to plead reliance in connection with their fraud-related claims.

RICO cases based upon fraud require a showing of detrimental reliance by the plaintiff.[74] This requirement, the Fifth Circuit has determined, is consistent with the Supreme Court's admonition in *Holmes* that federal courts employ traditional notions of proximate cause when assessing the nexus between a plaintiff's injuries and the underlying RICO violation.[75] Moreover, proximate cause demands that each plaintiff rely upon the alleged misrepresentations.[76] But, despite this firmly established requirement, Plaintiffs in this case have asserted *no* allegations—indeed, not even a conclusory allegation—detailing *how* they purportedly relied upon Swift's allegedly fraudulent conduct. Accordingly, Plaintiffs' RICO claims, all of which are fraud-based, should be dismissed.

3. Plaintiffs have not adequately alleged violations of federal immigration laws.

Among the RICO Act's list of possible predicate offenses are certain acts indictable under the Immigration and Nationality Act ("**INA**").[77] Plaintiffs' RICO claims in this case are based on alleged violations of federal immigration laws, although the Complaint refers only generally to the Immigration Reform and Control Act and the INA. For example, Plaintiffs refer generally to "8 U.S.C. § 1324 *et seq.*, and its accompanying provisions," violations of "the immigration laws of the United States," "8 U.S.C. § 1342(a)(1)(A(iii)," and "§ 274 of the [INA]."[78] These references encompass numerous immigration laws, many of which do not qualify as RICO predicate acts. Moreover, Plaintiffs neither identify the specific

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[74] *Summit Properties, Inc. v. Hoechst Celanese Corp.*, 214 F.3d 556, 562 (5th Cir. 2000) (dismissing RICO claims where plaintiff failed to allege reliance in connection with fraud-based predicate acts); *Sherman v. Main Event, Inc.*, No. 3:02-CV-1314-G, 2003 U.S. Dist. LEXIS 1571, *16 (N.D. Tex. Feb. 3, 2003) (Fish, J.) (unpublished) (dismissing RICO claims for mail, wire, and bankruptcy fraud where plaintiff failed to allege reliance).

[75] *See, e.g.*, *Sandwich Chef of Texas, Inc. v. Reliance Nat'l Indemnity Ins. Co.*, 319 F.3d 205, 219 (5th Cir. 2003); *see also In re MasterCard International, Inc.*, 132 F. Supp. 2d 468, 496 (E.D. La. 2001) (finding that plaintiffs' failure to plead reliance prevented plaintiffs from relying on mail and wire fraud as RICO predicate acts), affirmed by *In re MasterCard International, Inc.*, 313 F.2d 257, 263 (5th Cir. 2002) (noting that district court's reliance analysis was "particularly compelling"). *See also* note 54 and accompanying text, *supra*.

[76] *Sandwich Chef of Texas*, 319 F.3d at 219.

[77] 18 U.S.C. § 1961(1)(F); 8 U.S.C. § 1324, *et. seq.*

[78] Complaint, ¶¶ 37, 45, 46, 48.

statutory provisions on which they rely, nor the specific acts of which they complain. They do not identify who was allegedly acting, what they did, when they did it, under whose supervision or request such acts were committed, or any other such details. Instead, Plaintiffs merely allege legal conclusions, apparently hoping to pass them off as factual allegations. This is insufficient and these claims should be dismissed.

B. Plaintiffs have failed to sufficiently plead a cognizable RICO enterprise.

Plaintiffs have failed to plead sufficient facts to support their conclusory enterprise allegations. But, even if they could provide the needed additional facts, their allegations would nevertheless fail to state a claim upon which relief could be granted as a matter of law.

1. Plaintiffs' enterprise allegations are far too vague and conclusory, and fail as a matter of law.

To avoid dismissal for failure to state a claim, a plaintiff must plead specific facts, not mere conclusions, to establish the existence of a RICO enterprise.[79] A plaintiff is required to state its allegations "with enough clarity to enable a court or opposing party to determine whether or not a claim is alleged."[80] The Complaint here clearly flunks this test. Plaintiffs' enterprise allegations are muddled, lack the necessary factual detail, and simply fail as a matter of law. First, Plaintiffs refer to the "Swift Facilities" enterprise,[81] which is defined as the eight different Swift plants scattered throughout the country.[82] However, inanimate objects cannot constitute a RICO enterprise. Thus, this allegation fails to state a claim.[83]

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[79] *See, e.g., Elliott*, 867 F.2d at 880; *Lovick v. Ritemoney, Ltd.*, 378 F.3d 433, 437 (5th Cir. 2004) (in determining a motion to dismiss, a court need not rely on "conclusional allegations or legal conclusions disguised as factual allegations."); *see also Murphy v. Grisaffi*, No. 3:04-CV-0134-B, 2005 U.S. Dist. LEXIS 3849 (N.D. Tex. March 14, 2005) (Boyle, J.) (unpublished) (unpublished) (dismissing RICO claims because of plaintiffs failure to identify specific facts, instead "relying solely on vague and conclusory allegations of interstate conduct."); *Skidmore Energy*, 2004 U.S. Dist. Lexis 28396 (N.D. Tex. 2004) (unpublished) (dismissing RICO claims, in part because there were "no factual allegations alleged which support the conclusions drawn by the Plaintiffs."). *See also* note 48 *supra*.

[80] *Elliott*, 867 F.2d at 880-81 (affirming dismissal RICO claims where, *inter alia*, complaint did not identify how defendant acquired control of a named enterprise by means of racketeering activity and failed to treat each alleged violation of § 1962 separately).

[81] Complaint ¶ 68 (identifying the "Swift Facilities" as "an enterprise, pursuant to § 1961(4), affecting interstate commerce.").

[82] *Id.* ¶ 1.

[83] *Old Time Enterprises*, 862 F.2d at 1218 (stating that "inanimate objects, such as coffee, or intangible rights, such as contract rights, cannot possibly constitute a RICO 'enterprise,' which must be either an individual or a 'legal entity,' such as a corporation,

Plaintiffs' Complaint also refers to the so-called "Wrongful Documentation Enterprise," although this label is deceiving, since the allegations do not refer to a single enterprise, but instead to an unspecified number of enterprises. Specifically, the "Individual Defendants" and the "Swift Defendants" allegedly entered into an association-in-fact enterprise with each of the unidentified "Documentation Middlemen," all allegedly for the improper purpose of recruiting illegal immigrants as hourly employees to work at the "Swift Facilities" as part of the alleged scheme to lower labor costs.[84] These allegations, however, are conclusory and do not allege the necessary facts. For example, Plaintiffs fail to identify who qualifies as an "Individual Defendant," other than to state that they are co-conspirators," and the "co-conspirators" are "in management of the Swift Facilities or participated indirectly in such management."[85]

"Documentation Middlemen" is also generally undefined. Their identities and numbers are not disclosed, although, oddly enough, Plaintiffs purport to have sufficient information about each of them to make the conclusory allegation that they "maintained their own business operations and were not agents of the Swift Defendants and were paid a fee for their work performed."[86] Plaintiffs' allegations relating to the term "Swift Defendants", which is defined as the four entity defendants sued in this case, are also deficient.[87] Plaintiffs fail to distinguish among the four different entities or to attribute any specific acts to

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or an association of 'individuals.'"); *Elliott*, 867 F.2d at 881 ("An inanimate object such as an apartment cannot constitute a RICO enterprise.").

[84] Complaint ¶¶ 60-65.

[85] *Id.* ¶¶ 66-67.

[86] Complaint ¶ 61. Given the fact that Plaintiffs apparently do not know how many purported Documentation Middlemen exist, one must question how they could possibly have sufficient information to make detailed allegations concerning the structure of the business relationship each such middleman purportedly had with Swift. These circumstances strongly suggest that the allegations concerning the structure of the business relationship are just "legal conclusions disguised as a factual allegations," a form of allegation that the Court may not accept as true for purposes of a motion to dismiss. *See Lovick v. Ritemoney, Ltd.*, 378 F.3d 433, 437 (5th Cir. 2004). Moreover, the Fifth Circuit has noted the importance of an attorney's responsibility to conduct reasonable prefiling investigation, particularly in connection with RICO claims, and the failure to comply with those obligations can result in sanctions. *See, e.g., Chapman & Cole v. Itel Container Int'l*, 865 F.2d 676,685 (5th Cir. 1989).

[87] *Id.* ¶ 1.

any of them, thus leaving the collective group to guess at what each of their supposed roles might have been.[88]

Plaintiffs have provided virtually no facts concerning these alleged enterprises, how they operated, how decisions were made, what conduct beyond the alleged predicate acts they purportedly engaged in, how the operations of those organizations were carried out, or how they went about accomplishing their purported goals. Instead, Plaintiffs allege mere conclusions. For example, they allege that "The Individual Defendants and the Swift Defendants entered into various agreements with persons to help get fake immigration documentation. . . .", but they fail to state any facts about that purported agreement. When did the parties reach such an agreement? What were the terms of the agreement? Was it written or oral? What facts suggest that the agreement even exists? Who was involved? Where were the parties when the agreement arose? How long did it last? Has it concluded or is it ongoing? Similarly, Plaintiffs allege that all defendants knew that certain individuals were illegal immigrants.[89] Yet, Plaintiffs fail to come forward with any facts that would demonstrate that any defendant knew that any particular person was an illegal immigrant. Who were the illegal immigrants in question? What facts suggest that any defendant had actual knowledge of the individual's immigration status? In the absence of these or *any* other supporting facts, Plaintiffs' pleadings are simply insufficient.[90]

Given RICO's "draconian" penalties and the fact that the very pendency of a RICO suit can be stigmatizing and costly, Plaintiffs should be required to satisfy their pleading obligations.[91] As one court has

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[88] *See Jepson, Inc. v. Makita Corp.*, 34 F.3d 1321, 1328 (7th Cir. 1994) (RICO defendants are entitled to be fully apprised of the alleged roles each played in the purported scheme and plaintiffs are generally not entitled to treat multiple corporate defendants as a single entity).

[89] Complaint ¶ 60.

[90] Plaintiffs also allege the existence of an additional enterprise, which is identified as "The Swift Enterprise." Complaint ¶¶ 66-69. However, these allegations do not purport to involve Swift. Instead, the "Individual Defendants" are identified as the alleged wrongdoers – the RICO persons – who infiltrated this purported enterprise (which also does not include Swift) through the alleged pattern of racketeering activity. Because Swift is not alleged to be involved in this purported enterprise, these allegations cannot support any of the RICO claims asserted against Swift.

[91] *See Fitzgerald v. Chrysler Corp.*, 116 F.3d 225, 228 (7th Cir. 1997) (characterizing RICO's penalties as "draconian"); *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 44 (1st Cir. 1991) (characterizing RICO cases as "stigmatizing" and "costly").

stated, "it would be unjust if a RICO plaintiff could defeat a motion to dismiss simply by asserting an inequity attributable to a defendant's conduct and tacking on the self-serving conclusion that the conduct amounted to racketeering. Hence, to avert dismissal under Rule 12(b)(6), a civil RICO complaint must, *at a bare minimum*, state facts sufficient to portray (i) specific instances of racketeering activity within the reach of the RICO statute and (ii) a causal nexus between that activity and the harm alleged."[92] Plaintiffs have failed to meet even this "bare minimum" requirement. Therefore, this case should be dismissed.

2. Plaintiffs' enterprises lack continuity.

Because the RICO Act was enacted to address continuing threats of racketeering activities, the alleged RICO enterprises must meet certain "continuity" requirements.[93] Specifically, "[a]n association-in-fact enterprise (1) must have an existence separate and apart from the pattern of racketeering, (2) must be an ongoing organization and (3) its members must function as a continuing unit as shown by a hierarchical or consensual decision making structure."[94] These requirements limit the application of the RICO Act, and serve to prevent an overly-broad application to general commercial conduct that was never really the intended focus of the Act.[95]

Here, the purported "Wrongful Documentation Enterprises" fail to meet RICO's "continuity" requirement on all three levels.[96] First, nothing in the Complaint even remotely suggests that the alleged

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[92] *Miranda*, 948 F.2d at 44-45 (emphasis added) (affirming dismissal of RICO claims where the pleadings "though copious, [were] vague and inexplicit").

[93] *See, e.g., Delta Truck*, 855 F.2d at 242-43 ("The concept of continuity as a means of controlling the scope of RICO has also been incorporated into the enterprise element of section 1962.").

[94] *Id.* at 243; *see also, e.g., Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 427 (5th Cir. 1987) (citing *United States v. Turkette*, 452 U.S. 576, 101 S.Ct. 2524 (1981)); *Atkinson v. Anadarko Bank and Trust Co.*, 808 F.2d 438, 441 (5th Cir. 1987); *Old Time Enterprises*, 862 F.2d at 1217; *compare Crowe v. Henry*, 43 F.3d 198, 205 (5th Cir. 1995) (facts alleged reflected that the alleged RICO enterprise existed separate and apart from the pattern of racketeering, thus satisfying this element of the continuity requirement).

[95] *See, e.g., Delta Truck*, 855 F.2d at 242 (noting that RICO's sanctions were not intended to extend to fraudulent commercial transactions affecting interstate commerce and, thus, the principle of continuity limits the types of persons, patterns and enterprises that civil RICO actions may reach).

[96] Because the "Swift Facilities" enterprise allegations clearly fails to state a claim, Swift will not focus on any continuity or distinctness issues raised by those allegations. *See supra* notes 81-83 and accompanying text. Similarly, Swift will not discuss any continuity or distinctness issues posed by the "Swift Enterprise" allegations because those allegations do not pertain to Swift.

enterprises are ongoing organizations that maintain operations that are separate and apart from the alleged predicate acts. To the contrary, the allegations affirmatively assert that these enterprises were formed and exist solely for the purpose of committing the alleged predicate acts – *i.e.*, violations of federal immigration laws.[97] Second, there are no facts in the Complaint suggesting any of the enterprises are ongoing organizations, or that the various enterprises' members function as units. Lastly, there are no allegations of any hierarchical or consensual decision making structure. The absence of factual support for these key allegations is fatal, and thus, Plaintiffs have failed to meet the pleading standard for a cognizable enterprise.

3. Plaintiffs' enterprises also fail because the "RICO person" is not distinct from the "RICO enterprise."

To further restrict the application of the RICO Act to general commercial activity,[98] allegations made under 18 U.S.C. § 1962(c) must meet an additional "distinctness" requirement. Section 1962(c) prohibits "any person employed by or associated with any enterprise" from participating in or conducting the affairs of that enterprise through a pattern of racketeering activity.[99] Because one cannot logically be "employed by or associated with" oneself, § 1962(c) allegations must assert the existence of a RICO "person" (the alleged wrongdoer) who is separate and distinct from the alleged RICO "enterprise" (the entity

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See supra note 90. Those allegations, however, nevertheless fail to meet the continuity and/or distinctness requirements, and thus would also fail to state a claim on these separate bases.

[97] Complaint ¶ 60 ("The Individual Defendants and the Swift Defendants entered into various agreements with [the Documentation Middlemen] to help get fake immigration documentations for individuals who the Defendants knew were illegal immigrants . . . They entered into these agreements *in a specific and calculated manner in an attempt to further their Blind Eye Policy*.").

[98] *See Fitzgerald*, 116 F.3d at 226 (noting that the distinctness requirement fosters the appropriate application of the RICO Act: "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 of 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.").

[99] 18 U.S.C. § 1962(c); *see also St. Paul Mercury Ins. Co.*, 224 F.3d 425, 445 (5th Cir. 2000). This distinctness requirement applies only to § 1962(c) allegations. It does not apply to other § 1962 claims. *See, e.g., In re Burzynski*, 989 F.2d 733, 743 (5th Cir. 1993).

or "association" through which the wrongdoer acts).[100] This requirement furthers RICO's overarching goal: to undermine organized crime's influence upon legitimate businesses.[101]

Here, there is a fatal lack of distinctness between the alleged RICO persons and the alleged RICO enterprise. First, Plaintiffs actually *state* that Swift is both a RICO person and a RICO enterprise – "The Swift Defendants, in their operation of the Swift Facilities, *in addition to being the enterprise* for the individual defendants detailed above, *are also RICO Defendants*."[102] With regard to the Wrongful Documentation Enterprises, Swift also simultaneously occupies the position of RICO person and RICO enterprise. As noted previously, the "Individual Defendants" and the "Swift Defendants" purportedly entered into an undetermined number of association-in-fact enterprises with each of the unidentified Documentation Middlemen.[103] However, all of these participants effectively fold into Swift. The Individual Defendants managed Swift's facilities or were employees or agents of Swift,[104] while the Documentation Middlemen engaged in everyday business functions by assisting with the recruiting and hiring of employees.[105] Because the Individual Defendants and Documentation Middlemen were performing normal functions at Swift's behest, they cannot be considered separate from Swift for purposes of this analysis.

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[100] *See, e.g., Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161 (2001) ("one must allege and prove the existence of two distinct entities: (1) a "person"; and (2) an "enterprise" that is not simply the same "person" referred to by a different name.").

[101] *See id.* at 165; *see also Turkette*, 452 U.S. at 592 ("the primary purpose of RICO is to cope with the infiltration of legitimate businesses. . . ."). Thus, for example, § 1962(c) would protect a coffee importer from infiltration by illegal drug smugglers. While the importer legitimately imports coffee, those smugglers nevertheless could use this legitimate operation to carry out illegal drug smuggling, thereby using the importer's legitimacy as a tool through which illegitimate operations are conducted. In such a scenario, § 1962(c) does not aim to prosecute the importing company – that is, the "enterprise" – in the conduct of its legitimate activities. Rather, RICO targets those culpable wrongdoers – the RICO "persons" – who have infiltrated and used the "enterprise" to commit illegal acts.

[102] Complaint ¶ 72. To clarify, a "RICO Defendant" is simply a reference to a "RICO Person." *See Cedric Kushner Promotions, Ltd.*, 533 U.S. at 160-61 (equating the defendant with the "RICO Person").

[103] *Id.* ¶¶ 60-65.

[104] *See* text accompanying notes 85, *supra*, and 115-16, *infra*.

[105] *See* Complaint ¶ 63 ("each relationship with the documentation middlemen formed and [sic] association-in-fact RICO enterprise, pursuant [sic] § 1961(4), with the purpose of recruiting hourly employees to the Swift Facilities"). The fact that Swift has been accused of conducting those operations in an allegedly illegal manner is immaterial for this analysis. *See, e.g., Baker v. IBP, Inc.*, 357 F.3d at 691 (granting motion to dismiss for failure to state a claim when plaintiffs alleged that defendant engaged in allegedly illegal hiring practices). *See also* notes 119-121, *infra*, and accompanying text for additional discussion of *Baker v. IBP, Inc*.

Plaintiffs attempt to create distinctness through their conclusory allegation that the Documentation Middlemen were not agents of the Swift Defendants because they "maintained their own business operations."[106] But similar allegations have been addressed and rejected by this and other circuits. Perhaps the most frequently cited case is *Brittingham v. Mobil Corporation*, where a RICO plaintiff sued, among others, Mobile Corporation ("Mobil"), its wholly-owned subsidiary, Mobil Oil Corporation ("Mobil Oil"), and Mobil Chemical Company ("Mobil Chemical"), an unincorporated division of Mobil Oil.[107] The RICO enterprise was alleged to be "the association in fact of Mobil and Mobil Chemical, the advertising agencies engaged by them . . . and other agencies which participated in the marketing" of certain products.[108] Ultimately, the district court rejected these allegations, noting that "a corporation always acts through its employees and agents, and found that accepting plaintiffs' contention would also be akin to reading the enterprise requirement out of the statute entirely, whenever a corporation defendant is involved."[109] The Third Circuit agreed, stating that

> a § 1962(c) enterprise must be more than an association of individuals or entities conducting the normal affairs of a defendant corporation. A corporation must always act through its employees and agents, and any corporate act will be accomplished through an "association" of these individuals or entities. Consequently, the [distinctness] rule would be eviscerated if a plaintiff could successfully plead that the enterprise consists of a defendant corporation in association with employees, agents, or affiliated entities acting on its behalf.[110]

Other courts have reached similar conclusions. For example, in *Fitzgerald v. Chrysler Corp.*, the Seventh Circuit rejected for lack of distinctness similar enterprise allegations concerning a corporation, its subsidiaries, and agents. [111] In doing so, Judge Posner stated, "[w]hat 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

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[106] Complaint ¶ 61; *see also* note 86, *supra*.

[107] *See Brittingham v. Mobil Corp.*, 943 F.2d 297, 299 (3rd Cir. 1991).

[108] *Id.* at 300.

[109] *Id.* at 301 (internal quotations omitted).

[110] *Id.*

[111] *See Fitzgerald*, 116 F.3d at 227.

Chrysler merely because Chrysler does business through agents, as virtually every manufacturer does."[112] The Second Circuit reached a similar result in another case, stating that a plaintiff could not circumvent the distinctness requirement "by 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 . . . ."[113] In *Atkinson v. Anadarko Bank & Trust Co.*, the Fifth Circuit concluded that a RICO enterprise comprised of the defendant bank, its holding company, and three employees failed the distinctness requirement because the purported enterprise was engaged in nothing more than the normal functions of the bank. Such an "enterprise," the court held, did not constitute an entity separate and apart from the bank itself.[114]

The allegations in this case are indistinguishable from those made in *Brittingham* and the other similar cases. Here, the purported participants in the alleged enterprises all fall under the Swift umbrella. The Individual Defendants are members of management of the Swift Facilities or persons who participated indirectly in management.[115] And, to the extent that "Individual Defendants" might refer to the five unnamed "John Doe" defendants, those persons are defined to be "officers, agents, managers, employees"

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[112] *Id.*

[113] *See Riverwoods Chappaqua Corp. v. Marine Midland Bank, N.A.*, 30 F.3d 339, 344-45 (2nd Cir. 1994) (affirming dismissal of RICO claims where alleged association-in-fact enterprise was nothing more than defendant bank's employees carrying out defendant's business); *see also, e.g.*, *Board of County Comm'rs v. Liberty Group*, 965 F.2d 879, 886 (10th Cir.), *cert. denied*, 506 U.S. 918 (1992) (reversing denial of JNOV to defendant corporation where alleged association-in-fact enterprise and its activities were nothing more than defendant corporation going about its ordinary business of dealing in securities by and through its officers and employees); *Odishelidze v. Aetna Life & Cas. Co.*, 853 F.2d 21, 23-24 (1st Cir. 1998) (*per curiam*) (affirming dismissal of RICO claims where plaintiff characterized the enterprise as defendant corporation and its subsidiaries and employees without specifically identifying a defendant distinct from the enterprise); *Official Publications, Inc. v. Kable News Co.*, 775 F. Supp. 631, 634-36 (S.D.N.Y. 1991) (affirming dismissal of § 1962(c) claim where complaint alleged an association of defendant corporation and its officers).

[114] *See, e.g.*, *Atkinson*, 808 F.2d at 441; *see also Old Time Enterprises*, 862 F.2d at 1217 (where employees of a corporation associate together to commit a pattern of predicate acts in the course of their employment or on behalf of the corporation, the employees in association with the corporation do not form an enterprise distinct from the corporation); *Parker & Parsley Petroleum Co. v. Dresser Ind.*, 972 F.2d 580, 583 (5th Cir. 1992) (dismissing a §1962(c) claim where, *inter alia*, the alleged association-in-fact enterprise comprised of an entity and its employees because the alleged enterprise was merely the defendant corporate entity functioning through its employees in the course of their employment); *see also Whelan v. Winchester Production Co.*, 319 F.3d 225, 230 (5th Cir. 2003) (affirming summary judgment dismissal of enterprise claim where enterprise consisted of defendant corporation, its officers and agents in defendant's ordinary course of business); *Khurana v. Innovative Health Care Sys.*, 130 F.2d 143, 155 (1997) (affirming dismissal where alleged association-in-fact was corporation defendants, officers and affiliated entities), *vacated on other grounds*, *Teel v. Khurana*, 525 U.S. 979 (1998).

[115] Complaint ¶ 67.

and persons affiliated with the Swift Defendants.[116] As such, they are indistinguishable from Swift. In that same vein, the alleged involvement of the HM Capital co-defendants' adds nothing to the mix, because they simply are alleged to have owned or managed the Swift Facilities.[117]

The unidentified Documentation Middlemen, defined to be persons recruiting prospective employees on behalf of Swift, also fold into Swift because they were acting at Swift's behest in connection with Swift's ordinary business activities. It is immaterial for purposes of the RICO Act whether these persons are formal employees, legally recognized "agents," or independent contractors, so long as the normal business function they fulfilled could just as easily been performed by someone, such as an employee, inside the organization.[118] This is precisely the type of claim—that Swift operated *itself* in an allegedly unlawful way—that runs afoul of RICO precedent. Indeed, recruiting and hiring workers is a normal function corporations accomplish in the regular course of business. And, even if Swift employed or contracted with such Documentation Middlemen, rather than creating a formal "agency" relationship, these persons were still acting on Swift's behalf, thereby destroying the enterprise/person distinctness necessary to allege a cognizable RICO enterprise under §1962(c).

In this respect, this case is indistinguishable from *Baker v. IBP, Inc.* There, the plaintiffs alleged that IBP, the RICO person, owned and operated a plant where IBP intentionally hired illegal aliens and engaged in other conduct in violation of immigration laws, all to suppress labor costs.[119] The court ultimately concluded that "[t]he nub of the complaint is that IBP operates *itself* unlawfully – it is IBP that supposedly

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[116] *Id.* ¶ 27.

[117] *Id.* ¶ 1.

[118] *See also Fitzgerald*, 116 F.3d at 226 ("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 Chrysler merely because Chrysler does business through agents, as virtually every manufacturer does. If Chrysler were even larger than it is and as a result had no agents, but only employees . . . it could not be made liable for warranty fraud under RICO. What possible difference, from the standpoint of preventing the type of abuse for which RICO was designed, can it make that Chrysler sells its products to the consumer through franchised dealers rather than through dealerships that it owns, or finances the purchases of its motor vehicles through trusts, or sells abroad through subsidiaries?").

[119] *See Baker*, 357 F.3d at 686-87.

hires, harbors, and pays the unlawful workers, for the purpose of reducing its payroll. IBP does not manage or operate some other enterprise by violating [federal immigration laws]. . . ."[120] The plaintiffs attempted to create a cognizable association-in-fact enterprise by adding others persons or entities who, like the Documentation Middlemen in this case, allegedly helped find illegal aliens to hire. However, while those persons or entities might be legally separate entities from IBP, they were nevertheless acting at IBP's behest in conducting the normal operations of IBP. They were therefore not considered separate from IBP for purposes of the distinctness analysis. Consequently, the court held that "[w]ithout a difference between the defendant [IBP, Inc.] and the 'enterprise' there can be no violation of RICO."[121]

4. Plaintiffs cannot circumvent the distinctness requirement through *respondeat superior* allegations.

Plaintiffs cannot circumvent the enterprise/person distinctness requirement by merely alleging that Swift is vicariously liable for its employees' and agents' participation in an association-in-fact enterprise.[122] To hold otherwise, would be inconsistent with RICO policy and would open the door for all legal enterprises to be found liable under RICO if their employees or agents were involved in perpetrating predicate acts through or against them.[123]

Here, Plaintiffs allege that each Defendant "is liable to Plaintiffs as a principal in the scheme" and each "is additionally liable to Plaintiffs for any and all acts of its employees or agents under the doctrine of *respondeat superior* and principles of agency."[124] Plaintiffs clearly include this catch-all allegation as a back-door attempt to hold Swift responsible as a RICO person under § 1962(c) while simultaneously

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[120] *Id.* at 691 (emphasis in original).

[121] *Id.* at 692.

[122] *See, e.g., Landry v. Airline Pilots Association International*, 901 F.2d 404, 425 (5th Cir. 1990) (a finding that if defendant could be held vicariously liable for the acts of its agent, even though it could not be a RICO person, it would be contrary to Congress's intent); *Miranda*, 948 F.2d at 45 (rejecting plaintiff's attempt to invoke vicarious liability theories in connection with § 1962(c)); *Brittingham*, 943 F.2d at 300 (same).

[123] *Landry*, 901 F.2d at 425; *see also Schofield v. First Commodity Corp.*, 793 F.2d 28, 32-35 (1st Cir. 1986) (affirming dismissal of § 1962(c) claims because to hold defendant corporation liable for the acts of its agents via *respondeat superior* would conflict with Congress's intent).

[124] Complaint ¶ 51.

claiming their status as a RICO enterprise. This strategy is impermissible, as Plaintiffs have again ignored the requirement that the RICO person and the RICO enterprise be separate and distinct.

5. Plaintiffs have failed to allege facts sufficient to show that Swift conducted the affairs of the alleged enterprises.

To meet this statutory requirement, Plaintiffs must also show that Swift conducted the affairs of the Wrongful Documentation Enterprises,[125] a requirement that Plaintiffs have failed to satisfy. According to the Complaint, the purported goal of each Wrongful Documentation Enterprise was the recruitment of hourly wage employees to work at the Swift Facilities at reduced wages.[126] Plaintiffs allege no specific facts that would reflect that Swift participated in the *operation* or *management* of those enterprises. Instead, the only specific allegation concerning these enterprises is that Swift "participated in the affairs of each of these association-in-fact enterprises by paying for services for workers that it knew to be illegal immigrant labor."[127] Other than the unremarkable allegation that Swift paid its employees, the Complaint lacks any facts demonstrating that Swift *conducted* or *managed* the affairs of those enterprises. Again, the lack of such allegations is fatal.[128]

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[125] *See Cash Today of Texas, Inc. v. Greenberg*, No. 4:01-CV-794-A, 2003 U.S. Dist. LEXIS 80, *6 (N.D. Tex. Jan. 6, 2003) (McBryde, J.) (unpublished) (citing *Reves v. Ernst & Young*, 507 U.S. 170, 185 (1993), for the proposition that to conduct or participate in the conduct of an enterprise's affairs, one must participate in the operation or management of the enterprise itself).

[126] *See* Complaint ¶ 63.

[127] *Id.; see also* Complaint ¶¶ 38, 44, 45, 51, 59 and 64 for other generalized allegations that could generously be read as "conduct" of one or more defendants, but all of these allegations are far too conclusory and lack factual support.

[128] *Reves*, 507 U.S. at 185 ("to conduct or participate . . . in the conduct of such enterprise's affairs . . . one must participate in the *operation* or *management* of the enterprise itself") (emphasis added); *see also Goren v. New Vision Int'l, Inc.*, 156 F.3d 721, 727 (7th Cir. 1998) ("Mere participation in the activities of the enterprise is insufficient; the defendant must participate in the operation or management of the enterprise."); *Baker v. IBP, Inc.* 357 F.3d at 691-92 (holding that similar allegations did not reflect that the defendant simply managed or operated itself, rather than some other distinct enterprise).

C. Plaintiffs have failed to adequately plead violations of § 1962(a), (b) and (d).

A RICO plaintiff must allege that the defendant utilized a pattern of racketeering activity to infiltrate an enterprise through one of four prohibited activities listed in § 1962.[129] Although Plaintiffs mention all four subsections in their Complaint, Plaintiffs fail to adequately plead violations of those provisions.[130]

1. Plaintiffs failed to adequately plead that they were injured "by reason of" a violation of § 1962(a).

Section 1962(a) prohibits any person who has received income from a pattern of racketeering activity from investing that income in a RICO enterprise.[131] This provision is primarily directed at halting the investment of racketeering proceeds, including the practice of money laundering. To recover under §1962(a), plaintiffs must demonstrate that their injuries were proximately caused by a violation of this provision—that is, there must be a nexus between the claimed violation and the plaintiff's injury.[132] Accordingly, a §1962(a) violation occurs not when the defendant engages in the predicate acts, but only when the defendant receives *income* from the pattern of racketeering activity *and* uses that income to operate the enterprise, thereby causing plaintiff's injury.[133]

A plaintiff's failure to clearly allege that income derived from a pattern of racketeering activity was invested or used to operate the RICO enterprise is fatal to a § 1962(a) claim.[134] In *Burzynski*, for example, allegations that "the defendants intended in part to finance part of their overall scheme with the funds of the very practitioners they sought to discredit" were deemed insufficient to state a § 1962(a) claim.[135] While

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[129] *See Cadle Co.*, 779 F. Supp. at 396; 18 U.S.C. 1962(a) – (d); *see also* Hon. Jed S. Rakoff & Howard W. Goldstein, *RICO: Civil and Criminal Law and Strategy* § 1.02 (2006).

[130] The deficiencies associated with Plaintiffs' 1962(c) allegations are addressed in Section IV.B., *supra* at 18-28, which pertains to the RICO enterprise allegations. As such, § 1962(c) is not addressed again in this section.

[131] 18 U.S.C. § 1962(a); *In re Burzynski*, 989 F.2d at 744; *St. Paul Mercury Ins. Co.*, 224 F.3d at 441.

[132] *Old Time Enterprises.*, 862 F.2d at 1219; *see also Brittingham*, 943 F.2d at 303 (requiring that the *use* or *investment* of racketeering income was a "substantial factor" in causing the alleged injury).

[133] *Burzynski*, 989 F.2d at 744.

[134] *Old Time Enterprises*, 862 F.2d at 1219.

[135] *Burzynski*, 989 F.2d at 744, n.3.

achieving those stated objectives might have enhanced defendants' income in a "remote and speculative fashion," the Fifth Circuit concluded that plaintiffs did not allege a scheme to finance the enterprise with the *earnings* from their alleged racketeering activity.[136] In contrast, in *Crowe v. Henry*, the plaintiff provided sufficient facts to support a § 1962(a) claim.[137] There, the plaintiff alleged that the defendant had fraudulently taken funds owned, plaintiff invested those funds into the enterprise to reduce the indebtedness on land that defendants allegedly took from the plaintiff through a pattern of racketeering activity.[138]

In this case, Plaintiffs fail to state a claim under §1962(a). The Complaint only briefly refers to §1962(a) in a single paragraph, summarily alleging that Plaintiffs have been damaged "as a direct and proximate cause of the racketeering activity of . . . the Defendants" through violations of §1962(a), (b) & (c).[139] This single reference, however, does not allege that Swift *used* or *invested* any *proceeds* of an enterprise in a way that injured Plaintiffs. At best, the Complaint could be generously interpreted as alleging that Swift benefited through the *savings* Swift realized by allegedly paying lower wages to the Plaintiffs.[140] These allegations, however, do not rise to the level of factual detail reflected in *Crowe*, where specific, identifiable funds were derived from the racketeering activity and invested into the enterprise to the plaintiff's detriment. Rather, as in *Burzynski*, Plaintiffs have failed to point to any specific funds received from a pattern of racketeering activity. Moreover, even assuming that *savings* qualifies as "income," Plaintiffs have failed to explain how those savings were used to operate an alleged enterprise to Plaintiffs' detriment.[141] Thus, this § 1962(a) claim should be dismissed.[142]

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[136] *Id.* at 744.

[137] *Crowe*, 43 F.3d at 205.

[138] *Id.*

[139] *See* Complaint ¶ 76.

[140] *See* Complaint ¶ 75 ("The Defendants paid the Plaintiffs . . . substantially less in wages than they would have had to pay them" otherwise.).

[141] *See Crowe*, 43 F.3d at 205.

[142] Even assuming Swift's alleged savings purportedly generated by the RICO scheme could be considered "income," these allegations would still fail because allegations that racketeering income has been reinvested in a defendant corporation are insufficient to state a §1962(a) claim. *See Moore v. Reliance Standard Life Ins. Co.*, No. 98-4610, 1999 U.S. Dist. LEXIS 6699,

2. Plaintiffs have not adequately alleged a claim under 1962(b) for acquiring or maintaining an interest in or control of an enterprise.

Section 1962(b) makes it unlawful for a person to acquire or maintain an interest in or control of an enterprise through a pattern of racketeering activity.[143] Like § 1962(a), a violation of § 1962(b) does not stem from merely committing the RICO predicate acts. Rather, a defendant violates this section by *acquiring* or *maintaining* an interest in or control of an enterprise *as a result of* racketeering.[144] Thus, to state a claim under § 1962(b), Plaintiffs must allege facts demonstrating 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.[145]

In *Auto Club Ins. Assoc.*, for example, the plaintiffs' § 1962(b) claims were dismissed for failing to meet these requirements.[146] There, the plaintiffs failed to allege *how* the defendants purportedly acquired or maintained an interest in or control of the enterprise.[147] Indeed, they simply parroted the language of § 1962(b), stating that defendants "associated together to maintain . . . an interest in and/or control of an enterprise which was engaged in a pattern of racketeering activity."[148] This language, the court concluded, merely complained that the defendants associated together to *engage in the racketeering activity*, not that they acquired their interests *to control the enterprise* through the racketeering activity. Moreover, plaintiffs failed to allege that they were injured *by reason of* the defendants' acquisition or maintenance of an interest

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at *8-9 (E.D. Penn. May 10, 1999) (unpublished) (dismissing § 1962(a) claim and rejecting plaintiff's attempt to equate "savings" with "income").

[143] 18 U.S.C. § 1962(b); *Burzynski*, 989 F.2d at 741; *Crowe*, 43 F.3d at 203.

[144] *See Abraham v. Singh*, 480 F.3d 351, 357 (5th Cir. 2007) (requiring a nexus between § 1962(b) violation and injury suffered); *Advocacy Org. For Patents and Providers v. Auto Club Ins. Assoc.*, 176 F.3d 315, 328 (6th Cir. 1999); *Lightening Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1190 (3rd Cir. 1993).

[145] *Abraham*, 2007 U.S. App. LEXIS at *12; *Wagh v. Metris Direct, Inc.*, 348 F.3d 1102, 1111 (9th Cir. 2003).

[146] *Auto Club Ins. Assoc.*, 176 F.3d at 329-31.

[147] *Id.* at 329.

[148] *Id.*

in or control of the enterprise. Ultimately, plaintiffs merely alleged an injury resulting from the racketeering activity itself,[149] and thus, they failed to allege facts sufficient to state a claim.[150]

In this case, Plaintiffs have failed to plead facts sufficient to support a violation of § 1962(b). As in *Auto Club*, Plaintiffs here offer only the following conclusory statement, largely parroting the statutory language: "By manipulating and controlling the labor market, the Defendants have acquired or maintained an interest in, or control of, an enterprise affecting interstate commerce through their pattern of racketeering activity in violation of 18 U.S.C. § 1962(b)."[151] Plaintiffs do not explain what enterprises Swift allegedly controlled or how Swift purportedly acquired or maintained an interest in or control of any enterprise. To the contrary, just like *Auto Club*, Plaintiffs merely allege that the Swift associated with other alleged members of the enterprise to engage in the racketeering activity itself (*e.g.*, hiring illegal aliens to depress wages).[152] 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 *the labor market*, which is not an enterprise.[153] Thus, Plaintiffs have failed to state a claim under 1962(b).

3. Plaintiffs have not adequately alleged a conspiracy claim under § 1962(d).

A claim under § 1962(d) necessarily relies upon a properly pleaded claim brought under subsections (a), (b), or (c).[154] Because Plaintiffs have failed to adequately plead violations of those other subsections,

[149] *Id.* at 330.

[150] *Id.* at 331.

[151] Complaint ¶ 58.

[152] *Id.* ¶¶ 56, 63-65.

[153] *Id.* ¶ 65.

[154] 18 U.S.C. § 1962(d).

the § 1962(d) conspiracy allegations fails to state a claim.[155] Moreover, Plaintiffs' conspiracy allegations are conclusory and lack supporting factual details.[156] As a result, this claim too should be dismissed.

D. Plaintiffs have failed to adequately plead a pattern of racketeering activity.

Plaintiffs have also failed to plead facts sufficient to show a "pattern of racketeering activity," an element comprised of (1) the predicate acts and (2) a pattern of such acts.[157] To properly allege a "pattern" of predicate acts, Plaintiffs must plead both that the acts are related to each other *and* that those acts either constitute or threaten long-term criminal activity, thereby reflecting "continuity."[158] Establishing continuity in this context requires facts sufficient to show that the predicate acts "amount to or threaten continuous racketeering activity."[159] Such continuity may refer "either to a closed period of repeated conduct or to past conduct that by its nature projects into the future with a threat of repetition."[160]

Here, Plaintiffs apparently contend that the pattern is open-ended.[161] Thus, Plaintiffs must demonstrate a "reasonable prospect of continuity [of the acts] over an open-ended period yet to come."[162] However, Plaintiffs rely solely on conclusory statements at various points in the Complaint, stating that a

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[155] *Nolen v. Nucentrix Broadband Networks*, 293 F.3d 926, 930 (5th Cir. 2002) (affirming dismissal of § 1962(d) claim where plaintiff did not adequately plead § 1962(a) and (c) claims).

[156] *See Lovick*, 378 F.3d 437 (holding that courts need not rely on "conclusional allegations or legal conclusions disguised as factual allegations" in considering a motion to dismiss); *see also Crowe*, 43 F.3d at 206 (dismissing § 1962(d) claim because plaintiff's allegations were conclusory and failed to allege adequate supporting facts).

[157] *See Burzynski*, 989 F.2d at 741-42 (citing *Delta Truck*, 855 F.2d at 242-43).

[158] *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989). When used in discussion of predicate acts, the term "continuity" has a meaning that differs from the "continuity" requirement imposed on RICO enterprises, even though the label is the same. *See supra* IV.B.2., at 21-22.

[159] *In re Burzynski*, 989 F.2d at 742-43 (finding no continuity where the acts complained of had ended and, thus, did not threaten long-term criminal activity).

[160] *Id.* (quoting *H.J., Inc.*, 492 U.S. at 241).

[161] Complaint ¶ 55 (making the conclusory allegation that "Defendants' ongoing and systematic efforts to defraud . . . pose a threat of ongoing and continuing illegal activity.").

[162] *Feinstein v. Resolution Trust Corp.*, 942 F.2d 34, 45 (1st Cir. 1991); *see also Word of Faith World Outreach Ctr. Church v. Sawyer*, 90 F.3d 118, 122 (5th Cir. 1996) (an open period of conduct requires the establishment of a threat of continued racketeering activity) (citing *H.J., Inc.*, 492 U.S. at 242).

pattern of various wrongful acts exists.[163] There is virtually no temporal detail to reflect when any acts were committed (or where, or by whom), only that the acts purportedly are "ongoing."[164] The Honorable Jane Boyle recently rejected as too vague a similar conclusory claim that others would be defrauded in the future because the plaintiffs in that case provided "no specifics or details," noting that the "allegations are so vague that their RICO claims appear to be speculative, rather than founded on known facts."[165] Even construed generously, Plaintiffs' allegations here do not reflect a "reasonable prospect" of continuing predicate acts. Thus, Plaintiffs have failed to state a claim upon which relief may be granted.

V. THE COURT SHOULD NOT EXERCISE SUPPLEMENTAL JURISDICTION OVER PLAINTIFFS' STATE-LAW CLAIMS.

Because the Court should dismiss Plaintiffs' federal claims, the Court should also dismiss any remaining state law claims.[166] When the federal claims are eliminated at an early stage of a case, a district court has a "powerful reason to choose not to continue to exercise jurisdiction" over any pendent state claims.[167] According to the Fifth Circuit, "[o]ur general rule is to dismiss state claims when the federal claims to which they are pendent are dismissed."[168] Thus, Swift respectfully requests that, because all federal claims should be dismissed, the Court should also dismiss any state-law claims.

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[163] Plaintiffs refer, in turn, to a "pattern and practice of violating the Immigration Reform and Control Act and the Immigration and Nationality Act;" a "pattern of fraudulent and illegal conduct to defraud and artificially depress the labor market;" a pattern of "defraud[ing] those individuals who had the legal right to work at The Swift Facilities;" a pattern of "knowingly employing and harboring illegal immigrants;" and a pattern of "the ongoing employment of thousands of illegal immigrants." Complaint ¶¶ 38, 55, 64, and 67. They fail to identify with any specificity, however, *any* facts reflecting the specific conduct that purportedly comprise this "pattern."

[164] Complaint ¶ 67.

[165] *See Murphy v. Grisaffi*, No. 3:04-CV-0134-B, 2005 U.S. Dist. LEXIS 3849 (N.D. Tex. Mar. 14, 2005) (Boyle, J.) (unpublished).

[166] *See* Complaint ¶¶ 77-82 (alleging what appears to be a state-law claim for civil conspiracy).

[167] *See, e.g., Parker & Parsley Petroleum Co.*, 972 F.2d at 585 (holding that district court abused its discretion in retaining jurisdiction over state law claims after it had dismissed federal RICO claims) (internal quotations omitted).

[168] *Id.*

VI. IN THE ALTERNATIVE, PLAINTIFFS SHOULD BE REQUIRED TO SUBMIT MORE DEFINITE STATEMENTS OF THEIR CLAIMS.

In the alternative, Swift requests, pursuant to Rule 12(e), that the Court order Plaintiffs to submit a RICO case statement specifying the facts upon which they will rely, and the specific predicate acts and RICO violations they will seek to prove against each defendant.[169] Ordering such a case statement, which is a "well-established" tool in the Fifth Circuit, is appropriate at the motion-to-dismiss stage.[170]

CONCLUSION

For the foregoing reasons, Swift respectfully requests that the Court grant its motion to dismiss and dismiss Plaintiffs' action in full. Alternatively, Swift requests that Plaintiffs be required to plead specifically and fully all elements of their claims. Swift further seeks such other and further relief to which it may be entitled.

Respectfully submitted,

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[169] *Marriott Bros. v. Gage*, 911 F.2d 1105, 1107 (5th Cir. 1990) (affirming district court's RICO-case-statement order, noting that "[t]he propriety of a district court's requirement of a case statement to summarize the nature of RICO claims is . . . well-established in this circuit").

[170] *Id.; see also, e.g., Larrew v. Barnes*, No. 3-02-CV-1585-D, 2002 WL 32130462, *1 (N.D. Tex. Sept. 17, 2002) (Fitzwater, J.) (unpublished); *Escamilla v. City of Dallas*, No. 3-03-CV-0848-D, 2003 WL 22724760 (N.D. Tex. Nov. 18, 2003) (Kaplan, J.) (unpublished) ; *see also Old Time Enterprises*, 862 F.2d at 1217; *Elliott*, 867 F.2d at 880.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing document to be forwarded to the following counsel of record on this 30th day of April, 2007, as follows:

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