No. 19-50638

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RUBEN MOLINA-ARANDA; JOSE EDUARDO MARTINEZ-VELA, JUAN GERARDO LOPEZ-QUESADA,

Plaintiffs—Appellants

v.

BLACK MAGIC ENTERPRISES, L.L.C. doing business as JMPAL TRUCKING; CARMEN RAMIREZ; JESSIE RAMIREZ, III,

Defendants—Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
7:16-cv-00376, HON. ROBERT JUNELL

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RUBEN MOLINA-ARANDA; JOSE EDUARDO MARTINEZ-VELA, JUAN GERARDO LOPEZ-QUESADA,

Plaintiffs—Appellants

v.

BLACK MAGIC ENTERPRISES, L.L.C. doing business as JMPAL TRUCKING; CARMEN RAMIREZ; JESSIE R. RAMIREZ, III,

Defendants—Appellees.

Counsel of Record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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STATEMENT REGARDING ORAL ARGUMENT

Appellees believe that the judgment below can be affirmed on the basis of the district court's opinion without argument. The relatively sparse record and discrete legal issues lend themselves to submission (especially in the context of the COVID-19 pandemic). Having said that, counsel is fully prepared to participate in oral argument, telephonically, by video, by written questions, or in person, consistent with this Court's order appointing him to represent Appellees in this case *pro bono.*

TABLE OF CONTENTS

Page

CERTIFICATE OF INTERESTED PERSONS ii

STATEMENT REGARDING ORAL ARGUMENT iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE ISSUES 2

INTRODUCTION 3

STATEMENT OF THE CASE 6

SUMMARY OF THE ARGUMENT 11

ARGUMENT 13

- I. Standard of Review. 13
- II. The amended complaint fails to adequately plead a RICO claim. 14
  - A. Legal background of civil claims under RICO. 14
  - B. Plaintiffs did not and cannot plead proximate cause. 16
  - C. Plaintiffs failed to sufficiently allege RICO claims even putting aside the question of proximate cause. 24
- III. The complaint fails to plead an FLSA claim......................... 28
  - A. The Complaint fails to plead an FLSA claim because it does not (and cannot) allege that plaintiffs engaged in “commerce.” 28

B. Plaintiffs also failed to plead the other requirements of an FLSA claim. 32

IV. The district court correctly denied leave to replead. 34

V. The Court correctly dismissed the state law claims. 37

CONCLUSION 37

CERTIFICATE OF SERVICE.. 38

CERTIFICATE OF COMPLIANCE 39

TABLE OF AUTHORITIES

Page

Cases

Abraham v. Singh,
480 F.3d 351 (5th Cir. 2007) 16

Aldenz v. Aurora Bank, FSB,
641 Fed. App'x 359 (5th Cir. 2016) 36

Allstate Ins. Co. v. Plambeck,
802 F.3d 665 (5th Cir. 2015) 21

Anza v. Ideal Steel Supply Corp.,
547 U.S. 451 (2006) 18, 23

Armendariz v. Chowaiki,
683 Fed. App'x 338 (5th Cir. 2017) 13

Armour & Co. v. Wantock,
323 U.S. 126 (1944) 29

Assoc. Gen. Contractors of California, Inc. v. California State Council of Carpenters,
459 U.S. 519 (1983) 20

Beaulieu v. Vermont,
No. 10-32, 2010 WL 3632460 (D. Vt. 2010) 33

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 13

Brewster v. Dretke,
587 F.3d 764 (5th Cir. 2009) 36

Bridge v. Phoenix Bond & Indem. Co.,
553 U.S. 639 (2008) 23, 24

Brooks v. Blue Cross and Blue Shield of Fla., Inc.,
116 F.3d 1364 (11th Cir. 1997) 24

Brynane v. Bank of New York Mellon,
866 F.3d 351 (5th Cir. 2017) 34

David v. Signal Intern., L.L.C.,
No. 08-1220, 2012 WL 10759668 (E.D. La. 2012) 17

Delta Truck & Tractor, Inc. v. J.I. Case Co.,
855 F.2d 241 (5th Cir. 1988) 27

England v. Adm'rs of the Tulane Educ. Fund,
No. 16-3184, 2016 WL 3902595 (E.D. La. 2016) 32

Evans v. City of Chicago,
434 F.3d 916 (7th Cir. 2006) 22

Filgueira v. U.S. Bank Nat. Ass'n,
734 F.3d 420 (5th Cir. 2013) 36

Garcia v. Green Leaf Lawn Maintenance,
H-11-2036, 2012 WL 5966647 (S.D.T.X. 2012) 31

H.J. Inc. v. Northwestern Bell Telephone Co.,
492 U.S. 229 (1989) 15, 16

Haraco, Inc. v. Am. Nat'l Bank & Tr. Co. of Chi.,
747 F.2d 384 (7th Cir. 1984) 15

Hemi Group, LLC v. City of New York,
559 U.S. 1 (2010) 16, 17, 20, 21

Hines v. Alldredge,
783 F.3d 197 (5th Cir. 2015) 13

Holmes v. Securities Investor Protection Corp.,
503 U.S. 257 (1992) 16

Johnson v. Heckmann Water Resources, Inc.,
758 F.3d 627 (5th Cir. 2014) 32

LDC v. Phillips,
401 F.3d 638 (5th Cir. 2005) 24

Malvino v. Delluniversita,
840 F.3d 223 (5th Cir. 2016) 27, 28

Martin v. Bedell,
955 F.2d 1029 (5th Cir. 1992) 28

Matter of Life Partners Holdings, Inc.,
926 F.3d 103 (5th Cir. 2019) 13

McKinney v. Irving ISD,
309 F.3d 308 (5th Cir. 2002) 35

Mell v. GNC Corp.,
2010 WL 4668966 (W.D. Pa. 2010) 33

Miranda v. Ponce Fed. Bank,
948 F.2d 41 (1st Cir. 1991) 14, 15

Mitchell v. H.B. Zachry Co.,
362 U.S. 310 (1960) 29

North Cypress Medical Center Operating Co., Ltd. v. Aetna Life Insurance Co.,
898 F.3d 461 (5th Cir. 2018) 34

Pruell v. Caritas Christi,
No. 09-11466, 2010 WL 3789318 (D. Mass. 2010) 33

Ramirez Group, L.L.C. v. HISD,
786 F.3d 400 (5th Cir. 2015) 21, 22

Slay's Restoration L.L.C. v. Wright National Flood Insurance Company,
884 F.3d 489 (4th Cir. 2018) 20

Snow Ingredients, Inc. v. SnoWizard, Inc.,
833 F.3d 512 (5th Cir. 2016) 15

Sobrinio v. Medical Center Visitor's Lodge, Inc.,
474 F.3d 828 (5th Cir. 2007) 29, 30

Southland Securities Corp. v. INSpire Ins. Solutions, Inc.,
365 F.3d 353 (5th Cir. 2004) 24

Stanley v. Sawh,
2016 WL 561177 (S.D. Tex. 2016) 30

Stripling v. Jordan Production Co., LLC,
234 F.3d 863 (5th Cir. 2000)...36

Tabas v. Tabas,
47 F.3d 1280 (3d Cir. 1995) 28

Torres v. S.G.E. Management, L.L.C.,
838 F.3d 629 (5th Cir. 2016) (en banc...21

Waste Management of Louisiana, L.L.C. v. River Birch, Inc.,
920 F.3d 958 (5th Cir. 2019)..14, 16

Whitaker v. City of Houston, Tex.,
963 F.2d 831 (5th Cir. 1992)...34

Whitlock v. That Toe Co., LLC,
2015 WL 1914606 (N.D. Tex. 2015) 32

Williams v. Henagan,
595 F.3d 610 (5th Cir. 2010)..29, 31

Statutes

18 U.S.C. § 1962..15, 16

18 U.S.C. § 1964(c)...16

28 U.S.C. § 1367(c)...37

29 U.S.C. § 207(a)(1)...28

Rules

Federal Rule of Civil Procedure 9(b) 9, 13

JURISDICTIONAL STATEMENT

Appellees agree with Appellants that this Court has appellate jurisdiction over this appeal, and that the federal courts have subject matter jurisdiction over this case.

STATEMENT OF THE ISSUES

1. Can Plaintiffs plead proximate cause for a RICO claim where they have not pleaded—and could not plead—that they were directly injured by Defendants' alleged acts of fraud?

2. Does a Complaint that contains no specific details of which of two individual Defendants allegedly committed acts of fraud satisfy Rule 9(b), as required to allege a claim under RICO?

3. Does a plaintiff who alleges only that he drives within Texas for an enterprise that allegedly provides services in Texas engage in "commerce" as required to be covered under the FLSA?

4. Can a plaintiff who does not allege the specific amounts of overtime worked or compensation lost, or improper deductions made, lost allege a sufficient claim under the FLSA?

5. Did the district court abuse its discretion in denying Plaintiffs' motion for leave to amend their complaint, even though (a) no valid request to amend was included in response to Defendants' motion to dismiss and (b) Plaintiffs only formally sought to amend their complaint more than five weeks after the case had already been dismissed?

INTRODUCTION

Plaintiffs' RICO case turns on their allegation that Defendants Jessie and Carmen Ramirez committed visa fraud.[1] They allegedly certified in two visa applications for H-2B guest-workers that they were recruiting foreigners for physical labor. In fact, they needed higher skilled truck drivers. Plaintiffs supposedly did this because the United States would not have approved guest visas for truck drivers, since plenty of Americans would have accepted that job. Plaintiffs, who are Mexican citizens, allege that they were injured by these lies because they should have been hired at the prevailing rate for truck drivers in the United States, around $20 per hour, but in fact were paid like laborers, around $12 an hour (or perhaps even less). The Ramirezes defrauded the United States several times in service of a RICO enterprise; Plaintiffs got less money than they should have; ergo, they have a RICO claim.

This claim contains a fatal flaw: no proximate cause. Plaintiffs are not the *victims* of the Ramirezes' alleged visa fraud, they are the unintended *beneficiaries* of it. Had the Ramirezes not committed frauds,

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[1] Plaintiffs are right that Black Magic is no longer a party to this litigation, having had its debts discharged in bankruptcy. ROA.292.

Plaintiffs would have never been given visas. Far from getting $20 an hour, they would have gotten nothing.

Who, then, was "directly" injured by the fraud, in the way that the Supreme Court demands? The answer is in the Complaint itself: the United States was allegedly defrauded, to be sure, and Black Magic's competitors injured. Perhaps even other H-2B applicants could sue because they were denied the chance to get a visa. But Plaintiffs were not. This is not to say that the behavior alleged is good, or that one should not have sympathy for Plaintiffs' alleged exploitation. But their RICO claims, which must be premised on a causal link between the racketeering activity (i.e., the visa fraud) and their damages (i.e., lower than prevailing wages) do not hold water.

Their FLSA claims fail for a similarly fundamental reason. The FLSA does not cover *all* workers in the United States, but only some kinds of employers and employees. For one thing, it is limited to individuals and businesses that operate in interstate commerce. As this Court has held, a person who drives guests only inside Texas, even at the behest of out-of-state visitors, is not covered by the FLSA, nor is a prisoner who works at a fair, or cuts grass, or helps operate a bouncy

house business. Plaintiffs too worked in Texas for a business that, according to the Complaint, operates in Texas. There are simply no facts in the Amended Complaint that suggest any serious link to interstate commerce in the way this Court has required.

These two insights entirely resolve this case. The two federal claims were correctly dismissed, while the district court was well-within its discretion to dismiss the remaining state court claims. To be sure, there are other grounds on which the Ramirezes can prevail. But this Court need not reach them if it agrees on the two foundational points above.

STATEMENT OF THE CASE

Facts. This is an FLSA and RICO case brought by three Mexican citizens who worked for Black Magic L.L.C. under the H-2B guest-worker program. The legal background in Plaintiffs' brief about H-2B visas is an accurate description of the program and the related regulations—the details do not need to be repeated here. (Br. at 4). (Appellants' Opening Brief is referred to as "Br."). The facts below are based on the Amended Complaint, not the proposed Second Amended Complaint which the district court did not permit Plaintiffs to file.

Plaintiffs allege that Defendants are in the trucking business, hauling water, waste, raw materials, and other equipment to oil-rig sites "throughout west Texas." ROA.74. Apart from a passing reference to interstate highways, ROA.74, ¶ 17, and to the notion that "by driving heavy trucks" and fueling those vehicles Plaintiffs had engaged in "commerce," ROA.82, ¶ 56, there is no factual allegation in the Complaint that Plaintiffs did any work outside Texas or in connection with interstate goods.

Defendants allegedly needed more truckers for this work. ROA.74. Instead of hiring U.S. truck drivers, Defendants allegedly wanted to

hire Mexican drivers whom they could pay less. ROA.75. In order to accomplish this, Defendants allegedly filed false ETA-9142B forms with the Department of Labor on two occasions—once on February 22, 2015, ROA.75, ¶ 23, and once on January 15, 2016, ROA.78, ¶ 32. These forms stated that Black Magic was seeking workers to perform "tasks involving physical labor at construction sites," ROA.78, ¶32(a), not truck drivers. These are the only two allegedly false visa applications mentioned in the complaint.

The Complaint alleges that Appellees paid Plaintiffs $12, when in fact they would have made $20 an hour if they had been paid like skilled truck drivers. ROA.80-81. These lower wages, the Complaint alleges, were the "direct, proximate, intended, and foreseeable result" of Black Magic's RICO violations. ROA.89, ¶ 109. Yet, the Complaint alleges that Defendants' behavior placed Black Magic "at an unfair competitive advantage over their U.S. business competitors who obeyed the law and paid prevailing wages." ROA.71.

The Complaint also makes allegations under the FLSA. In particular, Plaintiffs allege that they worked overtime but were only paid regular wages for those hours. Plaintiffs did not, however, specify

exactly how much they worked, but only that they were caused to "work in excess of 40 hours per week" every week,[2] and that they "regularly worked between 55 and 80 hours per week." ROA.85, ¶ 80. In addition, Plaintiffs alleged that they were not reimbursed for various pre-employment expenses, *see e.g.,* ROA.85 ¶ 79, and suffered other improper deductions from their wages. *See, e.g.,* ROA.85-86.

In addition to their two federal claims, Plaintiffs asserted two state law claims through supplemental jurisdiction. ROA.90-91. These were for breach of contract and quantum meruit.

Procedural history. Defendants moved to dismiss. ROA.58. In response to the motion, Plaintiffs filed their First Amended Complaint, which purported to address the pleading deficiencies identified in Defendants' motion. ROA.71. Defendants filed a second motion to dismiss. ROA.101. Plaintiffs' response engaged on the merits, and stated in only one sentence in the conclusion that they sought to amend their complaint again. ROA.120.

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[2] Apparently, this allegation is not true, because in the Second Amended Complaint, Plaintiffs changes this allegation to say that "[w]ith the exception of Plaintiff Lopez-Quesada's and Plaintiff Molina's first week, in all other weeks … Defendants caused Plaintiffs to work in excess of 40 hours per week." ROA.243, ¶ 94. While of course a plaintiff's allegations are taken as true, this discrepancy underscores the fact that the Amended Complaint's allegations were and are lacking.

The district court granted Defendants' motion to dismiss Plaintiffs' complaint. ROA.160. With respect to the RICO claims, first, the district court held that Plaintiffs had failed to adequately allege, under the heightened standard for fraud claims under Federal Rule of Civil Procedure 9(b), "how, when, and where the mail or wire fraud occurred and who committed the purported fraudulent activity in each instance." ROA.165. Instead, Plaintiffs had impermissibly lumped together all the Defendants into one group. Second, the district court held that plaintiffs had failed to sufficiently alleged proximate cause. As the Court explained, in a RICO case the plaintiff must show how the RICO violation led directly to the plaintiff's injuries. ROA.166. But here, Plaintiffs did not "specifically plead the injury that they contend was proximately caused by Ramirez Defendants' alleged RICO violation." ROA.166.

The district court also dismissed the FLSA claims. First, the court held that plaintiffs were not covered by the FLSA. ROA.167. This was because the Complaint did not plead that plaintiffs were personally engaged in interstate commerce, ROA.168, nor did it plead that Defendants' business involved sufficient interstate commerce (or

"handled" goods in interstate commerce) to trigger the FLSA in that way. ROA.169. The district court also held that Plaintiffs' claims failed because they did not sufficiently plead a violation of FLSA. In particular, the district court faulted Plaintiffs' failure to plead "how much compensation and overtime pay" they were due. ROA.171. This was independently fatal to Plaintiffs' claims.

Plaintiffs then filed a motion for reconsideration with a proposed second amended Complaint. ROA.174. The district court later denied Plaintiffs' motion for leave to file that Complaint. ROA.259. The district court explained that Plaintiffs' motion for leave was untimely. ROA.261. As the district court stated, Plaintiffs offered no explanation for why "they did not present the matters in the proposed Second Amended Complaint before the Court dismissed the case." ROA.261. Plaintiffs thereafter filed this appeal. ROA.296.

SUMMARY OF THE ARGUMENT

The Complaint was properly dismissed. On the RICO claim, the Complaint was flawed in two important respects. First, Plaintiffs cannot allege proximate cause. Proximate cause for RICO requires a *direct* link between the wrongful acts and the Plaintiffs' damages. In other words, Plaintiffs must allege that because Defendants lied to the United States Government to get them guest work visas, they suffered monetary harm. But to state that causal link is to show it cannot support a claim. In fact, it was the fraud itself that gave Plaintiffs the opportunity to travel to the United States and work. Without the fraud, they would have earned nothing.

Second, the Complaint contains no specific allegations at all about the who, what, where, why, and when of the RICO claims. As the district court recognized, the Complaint does not sufficiently allege that either one of the Ramirezes committed any acts of fraud at all (separate from Black Magic). That fact alone requires dismissal of the RICO claims.

The Complaint's FLSA claims also fail. In order to bring a claim under the FLSA, the plaintiff must allege that the plaintiffs were

engaged in *interstate* "commerce" or that the business for which they worked was engaged in interstate commerce. Otherwise, the FLSA does not apply. The Complaint does not and cannot allege either of those things. Under closely analogous Fifth Circuit law, to the contrary, driving trucks within the state of Texas is not interstate commerce.

Finally, Plaintiffs assert that the district court abused its discretion by denying their motion for leave to amend their complaint a second time. But, as the district court observed, the motion was untimely, filed weeks after their complaint had already been dismissed. While leave to amend surely is freely given, at some point the judicial system's interest in finality should win out over further attempts to amend. In any event, none of the new allegations could make any difference to the arguments set forth above. Neither proximate cause nor a link to interstate commerce can properly be alleged.

ARGUMENT

I. Standard of Review.

An order granting a motion to dismiss is reviewed de novo, using the same standards as those used by the district court. *See Hines v. Alldredge*, 783 F.3d 197, 200-01 (5th Cir. 2015). The court accepts as true "factual matter" in a pleading, but not "legal conclusions." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). For RICO allegations, a plaintiff must satisfy the heightened pleading standards of Federal Rule of Civil Procedure 9(b). When this standard applies, the "complaint must contain factual allegations stating the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what [that person] obtained thereby." *Matter of Life Partners Holdings, Inc.*, 926 F.3d 103, 117 (5th Cir. 2019).

A decision to deny a motion to amend a complaint is reviewed for abuse of discretion, but where it is denied solely because the district court concludes amendment would be futile, the standard of review is de novo. *See Armendariz v. Chowaiki*, 683 Fed. App'x 338, 341 (5th Cir. 2017).

II. The amended complaint fails to adequately plead a RICO claim.

The district court correctly dismissed the RICO claims in the amended complaint for two reasons. First, Plaintiffs did not (and cannot) plead proximate cause. In fact, Plaintiffs cannot be said to have been injured by the fraud except in the barest but-for sense. Had Defendants not allegedly committed fraud, the result would *not* have been that Plaintiffs would have received the prevailing wage in Texas for truck drivers, but that they would have received no wages at all. They would not have been admitted into the United States. Second, Plaintiffs failed to allege the who, what, when, where, and why of the RICO allegations. The district court was correct to dismiss those claims on that basis alone.

A. Legal background of civil claims under RICO.

As Judge Oldham recently observed, "Civil RICO is an unusually potent weapon—the litigation equivalent of a thermonuclear device." *Waste Management of Louisiana, L.L.C. v. River Birch, Inc.*, 920 F.3d 958, 980 (5th Cir. 2019) (Oldham, J., dissenting), *citing Miranda v. Ponce Fed. Bank*, 948 F.2d 41, 44 (1st Cir. 1991). As he further observed, civil RICO's treble damages provision gives even "spurious

claims tantalizing *in terrorem* settlement value." *Id.*, *citing Haraco, Inc. v. Am. Nat'l Bank & Tr. Co. of Chi.*, 747 F.2d 384, 399 n. 16 (7th Cir. 1984) (cleaned up). Because of the statute's immense power, RICO claims should be scrutinized with care.

RICO makes it illegal for an individual to use the "proceeds of racketeering activity in a business that engages in interstate commerce." 18 U.S.C. § 1962; *Snow Ingredients, Inc. v. SnoWizard, Inc.*, 833 F.3d 512, 524 (5th Cir. 2016). To establish a civil RICO claim, a plaintiff must establish three common elements: (1) a person who engaged in (2) a pattern of racketeering activity, (3) connected to the acquisition, establishment, conduct, or control of an enterprise." *Id.* "A pattern of racketeering activity consists of two or more predicate criminal acts that are (1) related and (2) amount to or pose a thread of *continued* criminal activity." *Id.* (emphasis added).

This latter requirement is referred to as continuity. In *H.J. Inc. v. Northwestern Bell Telephone Co.,* 492 U.S. 229, 109 (1989), the Supreme Court held, "[c]ontinuity is both a closed–and open-ended concept, referring either to a closed period of repeated conduct, or past conduct that by its nature projects into the future with a threat of

repetition." *Id.* at 241. *See Abraham v. Singh*, 480 F.3d 351, 355 (5th Cir. 2007) (same).

B. Plaintiffs did not and cannot plead proximate cause.

RICO provides a private cause of action "for [a]ny person injured in his business or property *by reason of* a violation of section 1962 of this chapter." 18 U.S.C. § 1964(c) (emphasis added). *See Hemi Group, LLC v. City of New York*, 559 U.S. 1, 8 (2010) (describing proximate cause requirement for Civil RICO). The words "by reason of" mean that a plaintiff is required to show that a RICO predicate offense not only was the "but for" cause of his injury but was the "proximate cause" as well. *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 257, 268 (1992). Proximate cause requires "some direct relation between the injury asserted and the injurious conduct alleged." *Id.* The Supreme Court's cases "confirm" that the "general tendency of the law" is to "not go beyond the first step" in finding proximate cause. *Hemi Group*, 559 U.S. at 8.

Plaintiffs' claims here are exactly what the kind of "remote" harms the Supreme Court warned against in *Hemi Group* and *Holmes*. "The direct victim of this conduct" was the United States. *Id.* at 990. True, as

in *Hemi*, Plaintiffs here attempt to articulate their "own harms." *Id.* But the cause of these harms was "a set of actions … entirely distinct form the alleged RICO violation." *Id.*

In fact, if Defendants had not allegedly lied to the Department of Labor, and instead sought H-2B visas for truck drivers paying $20 an hour, the necessary implication of the Complaint is that those visas would not have been granted. *See, e,g.,* ROA.78, ¶ 31 ("DOL reviewed, and *in reliance on the materially false representations* .. certified Black Magic's temporary labor certification applications"); ROA.80 ¶ 41 (same, for 2016). Thus, Plaintiffs would have remained in Mexico, and not been paid anything by Black Magic. In that sense, this is very different than a case where Plaintiffs alleged, for example, that *they* paid "exorbitant fees" for the promise of a job and a green card in the United States. *See, e.g., David v. Signal Intern., L.L.C.*, No. 08-1220, 2012 WL 10759668, at *24 (E.D. La. 2012). Those facts may create a RICO claim. Here Plaintiffs paid nothing and indeed allege no kind of damages other than wages that they believe should have been higher.

Reading Appellants' brief illustrates the missing step: "defendants' lies," Plaintiffs' say, "directly furthered the scheme (to

fraudulently obtain H-2B visas) that directly injured plaintiffs (in the form of a lower prevailing wage).” (Br. at 30). But the scheme *helped* Plaintiffs, however unintentionally. They were “lawfully admitted to the United States on temporary work visas.” ROA.72. What allegedly hurt Plaintiffs was not Black Magic’s visa fraud scheme, but Black Magic’s alleged failure to pay the prevailing wages for truck drivers in Texas. That failure was not directly caused by the immigration fraud, it was caused by Black Magic’s later decision to in fact underpay Plaintiffs.

Under the Complaint’s allegations, there is *no* scenario where the H-2B visas would have been granted *and* Plaintiffs would have been paid the prevailing rate for truck drivers. So who was actually hurt by the Defendants’ alleged frauds? Plaintiffs’ complaint tells us. Any damages from the RICO claims, if they exist, was suffered by Defendants’ “U.S. business competitors who obeyed the law and paid prevailing wages” and by the United States itself. ROA.71; ROA.226. Those “immediate victims of an alleged RICO violation can be expected to vindicate the laws by pursuing their own claims.” *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 460 (2006).

None of this leaves Plaintiffs without remedies. They may have FLSA claims (as discussed below). They may have state-law quantum meruit or breach of contract claims that can be vindicated in state courts. But RICO is a special statute with tremendous consequences. It requires a direct link between the racketeering activity and the harm. And there is no such link here.

At times, Plaintiffs' brief appears to suggest that the harm caused to them was not only a lower prevailing wage, but "Defendants' violation of the employment terms stated in their DOL applications …" (Br. at 11). This argument is, at its base, inconsistent with their Complaint. As that document makes clear, Plaintiffs' RICO causation allegation related to "the difference between the amounts paid by Defendants to Plaintiffs for work performed and the prevailing wage rate for actual work performed by Plaintiffs…." ROA.89-90. The fact that this argument was caveated with "but not limited to" should make no difference. Moreover, the argument is no better than the argument Plaintiffs started with. There is no direct proximate cause connection between the certifications on a visa form and less than full wages.

Again, had the Ramirezes told the truth on the form, Plaintiffs would have been paid nothing, because no visas would have issued.

Plaintiffs array a number of theories for why they have plausibly alleged proximate cause. First, they rely heavily on the idea that they are "foreseeable" victims of Defendants' fraud. (Br. at 29-30.) Perhaps, but the Supreme Court *rejected* foreseeability as the touchstone of RICO proximate cause in *Hemi Group*. "The concepts of direct relationship and foreseeability are of course two of the many shapes [proximate cause] took at common law … in the RICO context, the focus is on the directness of the relationship between the conduct and the harm." 559 U.S. at 11. "In sum, rather than incorporating the concept of foreseeability or traceability of an injury to conduct, RICO causation requires a proximity of statutory violation and injury such that the injury is sequentially the direct result…." *Slay's Restoration L.L.C. v. Wright National Flood Insurance Company*, 884 F.3d 489, 494 (4th Cir. 2018), *citing Assoc. Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 534 (1983). The one thing that is sure is that there is no *direct* line between the visa fraud and Plaintiffs' lower wages.

The Fifth Circuit cases Plaintiffs cite say nothing different. In *Allstate Ins. Co. v. Plambeck*, 802 F.3d 665, 676 (5th Cir. 2015), for instance, the Court was addressing whether "reliance is necessary" in cases predicated on "mail or wire fraud." Similarly, the appeal in *Torres v. S.G.E. Management, L.L.C.*, 838 F.3d 629, 638 (5th Cir. 2016) (en banc) was "doom[ed]" by the fact that fraud-based RICO claims "do not require proof of first-party reliance." *Id.* at 639. None of those cases are in tension with the Supreme Court's clear commands in *Hemi Group* and *General Contractors.*

Plaintiffs say that a party's "loss of a legal entitlement" is enough to allege a proximate cause. (Br. at 26). That is, they were entitled to $20 an hour by law, through Black Magic's representations in their visa applications, but they didn't get it This argument conflates the question of what kind of injury is enough to trigger RICO (i.e., is the injury alleged an injury to business or property?) with the question of proximate cause (i.e., was that injury, whatever it is, directly related to the RICO claim?). Both of the Circuit cases Plaintiffs cite are about that antecedent question. Thus, in *Ramirez Group, L.L.C. v. HISD*, 786 F.3d 400 (5th Cir. 2015), the question was whether losing contracts to which

the plaintiff was not legally entitled could support standing. That is, is that even an injury? This Court said yes, because the plaintiffs *in fact* lost those assignments and therefore suffered financial harm. *Id.* at 409-410. The same issue predominated in *Evans v. City of Chicago*, 434 F.3d 916, n. 26 (7th Cir. 2006), where the court of appeals held that losing a job because of emotional distress caused by RICO activity did not create standing. The question was not proximate cause, but whether the alleged injury was covered by RICO. That question is *not* at issue here. Of course the loss of money is compensable under RICO. The problem is that Defendants' alleged visa fraud did not directly cause that harm.

Finally, Plaintiffs assert that standing is available because "[n]o more immediate victim is better situated to sue." (Br. at 30.) As noted above, this is incorrect. The people who would be the proper victims of the H-2B fraud are Black Magic's competitors or the United States Government itself. Indeed, maybe even those who were deprived the opportunity to get an H-2B visa because Black Magic took them might have a claim. But Plaintiffs here are the unwilling *beneficiaries* of the alleged fraud, not the victims. And if one of the reasons for seeking the

best plaintiff is to make the case as "straightforward" as possible, *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451, 460 (2006), Plaintiffs' case here is hopelessly complex.

Attempting to create a damages model for Plaintiffs lays bare the problem. Plaintiffs say that their RICO damages would be the amount they should have been paid as truck drivers in the United States minus the amount they were paid. Not so. In fact, any damages model would need to take into account the likelihood these plaintiffs could *ever* have been paid American-level wages. Even assuming an expert could be found to calculate the potential damages, this is exactly the kind of speculative and complex damages model that the Supreme Court and this Court have held betrays the failure of proximate cause. Both the Government and competitors have much more direct injuries here.

Finally, Plaintiffs assert that there is proximate cause because "the lies directly furthered the scheme that directly injured the plaintiffs." (Br. at 30). But the case on which that argument is based, *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008) concerned only whether first-party reliance is a requirement under RICO. In holding that it was not, the Supreme Court noted that the injury must

nonetheless "result *directly* from the defendant's fraudulent misrepresentation to a third party." *Id.* at 653. The injuries here did not result directly from any fraud.

C. Plaintiffs failed to sufficiently allege RICO claims even putting aside the question of proximate cause.

The Complaint fails because Plaintiffs have not alleged proximate cause. In addition, the Complaint fails for the more mundane reason that Plaintiffs have not alleged the who, what, where, and why of the RICO allegations sufficiently to satisfy Rule 9(b). As the district court explained, the Complaint includes nothing but the most general allegations about the individual defendants. But when the alleged fraud involves multiple defendants, Rule 9(b) requires that the plaintiff plead sufficient facts to "inform each defendant of the nature of its alleged participation in the fraud." *Brooks v. Blue Cross and Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1381 (11th Cir. 1997). In the securities fraud context, for example, this Court held that those alleging "securities fraud against multiple defendants must distinguish among those they sue and enlighten *each defendant* as to his or her particular part in the alleged fraud." *R2 Invest. LDC v. Phillips*, 401 F.3d 638, 644 (5th Cir. 2005), *citing Southland Securities Corp. v. INSpire Ins. Solutions, Inc.*,

365 F.3d 353, 365 (5th Cir. 2004) ("Significantly, this court has never adopted the 'group pleading' doctrine, even before the PSLRA").

There are almost no details in either the Amended Complaint or even the proposed Second Amended Complaint that describe anything that either Carmen or Jessie Ramirez did specifically. To the contrary, the RICO allegations against the Ramirezes lump them together as a monolithic group, A few examples (all the emphases of the word "defendants" are added) illustrate the point:

- In 2015, *Defendants* Jessie and Carmen Ramirez ("Defendants Ramirez") acted on behalf of Defendant Black Magic, authorized and submitted [an immigration form]… *Defendants* presented this document to the federal government." ROA.75, ¶23.

- *Defendants* Ramirez devised a scheme intending to defraud the government by presenting [an immigration form] to the DOL seeking foreign "construction laborers" for their business while intending to employ the foreign workers as truck drivers. ROA.77, ¶ 27.

- The following year *Defendants* Ramirez, acting on behalf of Defendant Black Magic, reviewed and authorized the submission of Form ETA-9142B … to the DOL in order to procedure H-2B visas, ROA.78, ¶ 32. (emphasis added);

- *Defendants* Ramirez transmitted these temporary labor certification application materials knowing that Black Magic would not pay the prevailing wage … ROA.80, at 39 (emphasis added);

Jessie and Carmen Ramirez are mentioned individually in four paragraphs of the relevant sections of the Amended Complaint (that is, the sections alleging visa fraud). These are Paragraphs 24 and 25 (with respect to the February 22, 2015 Form ETA-9142B) and 34 and 35 (with respect to the January 16, 2016 Form ETA-9142B). But reviewing the paragraphs of the Complaint to which those refer, Paragraphs 23 and 32, it is apparent that this too is just more group pleading. In both of those paragraphs the Ramirezes are referred to collectively. ROA.75, 78. Those passing mentions of either Ramirez cannot save Plaintiff's group pleading. It is worth noting that the Second Amended Complaint (even if it were properly filed) is no better in this regard, except that instead of referring to the "Defendants Ramirez" it calls them "Defendants Carmen and Jessie Ramirez." *See, e.g.,* ROA.234, ¶ 40.

If the Court believes that Jessie or Carmen Ramirez were alleged to have undertaken *any* particular acts, the Complaint still cannot meet 9(b)'s individuality requirements. Each prong of the test for a RICO claim must be pleaded against each individual defendant. But here, the bare allegations that supposedly satisfy the continuity requirement are pleaded against all of the Defendants as a group. *See, e.g.,* ROA.75, ¶ 18

("Upon information and belief, starting in 2015 and continuing to the future, *Defendants* sought to bring foreign workers into the U.S. under the H-2B visa program at the lowest wage possible."); ROA.75, ¶ 18 ("Defendants Ramirez committed these acts and participated in the affairs of the enterprise willfully and knowingly … *Their* conduct, by its nature, is likely to continue into the future and is a continuing unit."). ROA.89, ¶ 108

At *best*, the specific allegations against either Jessie or Carmen Ramirez constitute isolated instances of fraud. And yet, this Court has warned that the "continuous threat requirement may not be satisfied if no more is pled than that person has engaged in a limited number of predicate racketeering acts." *Delta Truck & Tractor, Inc. v. J.I. Case Co.*, 855 F.2d 241, 243 (5th Cir. 1988) (dismissing claims because "the pleadings do not assert that the corporate defendants posed a continuous threat as RICO persons"). Nor could these claims against the individual defendants relating to the February 2015 and January 2016 applications reach the level of predicate acts that "extend over a substantial period of time" that has been found to satisfy the closed-end continuity test. *See Malvino v. Delluniversita*, 840 F.3d 223, 232 (5th

Cir. 2016). The specific allegations here stretch for less than 12 months, but "[c]onduct lasting no more than twelve months [does] not meet the standard for closed-ended continuity." *Tabas v. Tabas*, 47 F.3d 1280, 1294 (3d Cir. 1995), *quoted approvingly* in *Malvino*, 840 F.3d at 232.

III. The complaint fails to plead an FLSA claim.

The FLSA claim also fails, just as the district court held. This is for two main reasons. First, Plaintiffs cannot allege that Black Magic was engaged in the kind of interstate commerce that triggers the FLSA. To the contrary, this case is closely analogous to a Fifth Circuit case where the defendant was found to have engaged only in local activities and thus fell outside the FLSA.

Second, Plaintiffs failed to allege sufficient facts to set out their damages. That too dooms their claims under Fifth Circuit law.

A. The Complaint fails to plead an FLSA claim because it does not (and cannot) allege that plaintiffs engaged in "commerce."

To establish FLSA coverage, the plaintiff must allege that either he was personally engaged in commerce or the production of goods for commerce, or that he was employed by an enterprise engaged in commerce or the production of goods for commerce. 29 U.S.C. § 207(a)(1); *Martin v. Bedell*, 955 F.2d 1029, 1032 (5th Cir. 1992).

“[W]hether one is *in commerce* is obviously more exacting than the test of whether [the plaintiff's] occupation is necessary to production for commerce.” *Armour & Co. v. Wantock*, 323 U.S. 126, 131 (1944). Thus, to decide whether an employee is covered, this Court applies a “practical test.” *Sobrinio v. Medical Center Visitor's Lodge, Inc.*, 474 F.3d 828, 829 (5th Cir. 2007). The test is whether “the work is so directly and vitally related to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it, rather than isolated local activity.” *Mitchell v. H.B. Zachry Co.*, 362 U.S. 310, 324 (1960).

Although Plaintiffs' brief focuses on a number of extra-circuit and district court cases, Br. at 36-37, it does not cite either of the two controlling cases from this Court. First, in *Sobrinio*, 474 F.3d at 829, this Court held that an employee who “acted as a janitor, security guard, and a *driver* for the motel's guests” was not engaged in FLSA commerce. *Id.* at 829. This was so even though the plaintiff transported out-of-state patrons around Houston in connection with medical treatments at the Houston Medical Center (a famous medical campus that certainly is engaged in interstate commerce) *Id.* And in *Williams v.*

Henagan, 595 F.3d 610 (5th Cir. 2010), this Court held that a prisoner who was required to "work 20 hours a day during the city's railroad festival," cook "barbecued chicken continuously for over 26 hours at various local fundraisers," and set up and supervise a "space jump" (or bouncy house) rental was not engaged in interstate commerce. *See also Stanley v. Sawh*, 2016 WL 561177, at *3-4 (S.D. Tex. 2016) (*citing Sobrinio* for the proposition that performing oil changes and changing tires on automobiles that would go on interstate highways did not trigger FLSA).

The only interstate commerce allegations Plaintiffs can point to are their claims that "they and other employees drove trucks" which themselves had been moved in or produced for commerce. (Br. at 34); ROA.81-82. Plaintiffs also assert that these trucks were driven on "interstate highways," ROA.74 (though not actually driven interstate). And in their brief they point to the idea that the trucks were fueled with interstate gas. (Br. at 15).

But if those bare allegations were sufficient, then *Sobrinio* and *Henagan* would have come out the opposite way. In *Sobrinio*, the plaintiff drove a car "that had previously been moved in or produced for

commerce (fueled with gasoline also moved in or produced for commerce," just as Plaintiffs allege here. (Br. at 35). But that was not enough for this Court. Nor was the fact that he worked at a hotel and drove people who came from outside Houston to treatments at the Texas Medical Center. And in *Henagan*, as Judge Gray Miller pointed out in a later case, the plaintiff "undoubtedly used tools and gasoline that had traveled in interstate commerce when he moved lawns." *Garcia v. Green Leaf Lawn Maintenance*, H-11-2036, 2012 WL 5966647, at *3 (S.D.T.X. 2012), *citing Henagan*, 595 F.3d at 621. But again, this Court held that the interstate commerce prong of the FLSA had not been triggered.

The Complaint in this case fails under *Sobrinio* and *Henagan* with respect to the FLSA. The proposed second amended complaint would have fared no better. Listing the VIN numbers and the trucks and the out-of-state cities of manufacture, Br. at 46, does not vitiate *Sobrinio* or *Henagan*. The district court's dismissal should be affirmed, and the Court need not consider any of the other questions.

B. Plaintiffs also failed to plead the other requirements of an FLSA claim.

Under the FLSA, a plaintiff must plead the "amount of overtime compensation due." *Johnson v. Heckmann Water Resources, Inc.*, 758 F.3d 627, 639 (5th Cir. 2014). This means that a plaintiff must make some effort to quantify the amount of lost wages. Similarly, if a plaintiff seeks to argue that Defendants have made "unreasonable deductions" from paychecks such that the plaintiff's weekly wages fall below applicable minimum and overtime wages, they must do more than simply say so. *Whitlock v. That Toe Co., LLC*, 2015 WL 1914606, at *2-3 (N.D. Tex. 2015); *England v. Adm'rs of the Tulane Educ. Fund*, No. 16-3184, 2016 WL 3902595, at *3 (E.D. La. 2016) (dismissing complaint because p[laintiff did not "allege how much Defendant still owes" and because "Plaintiff does not allege the approximate hours he worked in each work week.") The way to have correctly alleged these claims was to have, for example, referenced their time sheets or some other indicia of the amounts of overtime.

As the district court correctly held, Plaintiffs did not adequately allege the number of hours worked, the relevant time periods, and the amount of compensation due. To the contrary, the operative part of the

Complaint alleges only that Defendants worked "55-80 hours per week" and "made unreasonable deductions from Plaintiffs' paychecks for travel" and other expenses. (Br. at 38). But these general allegations are not enough to establish how much compensation for deductions and overtime pay they are due. As in *Mell v. GNC Corp.*, 2010 WL 4668966, at *8 (W.D. Pa. 2010), for example, Plaintiffs here were unable to provide an "approximation of the number of unpaid weekly overtime hours worked over the employment period." *Id., citing Beaulieu v. Vermont*, No. 10-32, 2010 WL 3632460 (D. Vt. 2010). *See also Pruell v. Caritas Christi*, No. 09-11466, 2010 WL 3789318, at *4 (D. Mass. 2010) (observing that "plaintiffs … cannot avoid their pleading obligations by arguing that that [defendant] has better access to information concerning hours worked or wages paid").

To be sure, Plaintiffs have found some cases where allegations that were, properly understood, insufficient to survive scrutiny under Rule 12(b)(6) were permitted to proceed. (Br. at 39, collecting cases). But this Court should take the opportunity in this case, if it must resolve the question, to hold that plaintiffs in FLSA cases must give the

Defendants some sense of how much is owed and for what in order to survive.

IV. The district court correctly denied leave to replead.

In the alternative, Plaintiffs assert that they should have been permitted to replead their claims. This argument should be rejected at the threshold. Plaintiffs concede in their own brief that the proposed amended complaint here was filed "five-and-a-half weeks after the dismissal order." (Br. at 3). District courts act within their discretion when they deny post-dismissal motions to amend, especially ones that are filed more than a month after the complaint is dismissed. *See Whitaker v. City of Houston, Tex.*, 963 F.2d 831, 837 (5th Cir. 1992) (affirming denial of motion to amend filed "almost thirty days" after the court granted defendants' motion to dismiss); *Brynane v. Bank of New York Mellon*, 866 F.3d 351, 362 (5th Cir. 2017) (affirming denial of post-dismissal leave to amend because of undue delay and the fact that plaintiff had already had a chance to rework their complaint).

The cases Plaintiffs cite are not to the contrary. Rather, they mainly concern motions to amend that were simply made untimely, not those made after dismissal. *See, e.g., North Cypress Medical Center*

Operating Co., Ltd. v. Aetna Life Insurance Co., 898 F.3d 461, 478 (5th Cir. 2018) (reversing denial of a party's "first attempt to amend" when there was not any obvious prejudice to the non-moving party).

Plaintiffs then quibble with the district court's characterization of the record that Plaintiffs had "numerous opportunities" to amend their complaint. (Br. at 42). But the district court was right. Plaintiffs amended once in response to the first motion to dismiss. They had another opportunity to amend in response to the second motion to dismiss, which they chose not to take. Nor did Plaintiffs ask the Court for the opportunity to replead in opposing the second motion. Plaintiffs' formulaic one-sentence request in opposition to the motion to dismiss, which failed even to explain what the new pleading would add (much less included a proposed amended complaint), does not remove it from this rubric. ROA.140 ("In the alternative, Plaintiffs request that the Court grant them leave to amend"). *See McKinney v. Irving ISD*, 309 F.3d 308, 315 (5th Cir. 2002) (affirming denial of leave to amend because plaintiff "failed to alert both the court and defendants to the substance of their proposed amendment"). This Court has affirmed dismissals when the plaintiff failed to ask to replead in opposing the

motion to dismiss—after all, plaintiffs here gave "no indication that [they] did not plead [their] best case in the complaint." *Aldenz v. Aurora Bank, FSB*, 641 Fed. App'x 359, 363 (5th Cir. 2016), *quoting Brewster v. Dretke*, 587 F.3d 764, 768 (5th Cir. 2009).

Plaintiffs try to apply the rubric for when a motion to amend is filed after the time-period for amendments*, see, e.g.,* Br. at 41, expired in a scheduling order, but that is a very different context. But even if those cases applied, the prejudice to Defendants here of reviving Plaintiffs' claims is clear. *See, e.g., Filgueira v. U.S. Bank Nat. Ass'n*, 734 F.3d 420, 423 (5th Cir. 2013) (denying amendment because granting it would "cause the Defendants great expense and extend the litigation needlessly").

In any event, the amendments cannot address the fundamental problems with Plaintiffs' claims, which is that they cannot establish proximate cause for the purposes of RICO and cannot plead the commerce prong of FLSA coverage. *See Stripling v. Jordan Production Co., LLC*, 234 F.3d 863, 873 (5th Cir. 2000) (within the district court's discretion to deny a motion to amend if it is futile).

V. The Court correctly dismissed the state law claims.

Finally, the district court declined to exercise supplemental jurisdiction over the various state-law claims brought against the Ramirezes. ROA.171. That decision, which is reviewed only for abuse of discretion, should not be disturbed if the Court agrees that the federal claims should be dismissed. If any federal claims are revived, likely the best solution would be to remand the question of supplemental jurisdiction to the district court to decide whether any of the reasons to decline jurisdiction set out in 28 U.S.C. § 1367(c) apply.

CONCLUSION

The decision below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2020, I electronically transmitted the attached Appellee's Brief to the Clerk of the Court of the United States Court of Appeals for the Fifth Circuit using the Court's ECF System, which sent a Notice of Electronic Filing to the attorneys of record who have consented in writing to accept this notice as service of this document by electronic means. I further certify that I have sent a copy of this document via United States First Class Mail, postage prepaid, to the attorneys of record.

/s/ Raffi Melkonian
Raffi Melkonian

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,988 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2003 in Century Schoolbook (Scalable) 14pt for text and Century Schoolbook (Scalable) 12pt for footnotes.

/s/ Raffi Melkonian
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