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FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JUN 27 2000

JAMES R. LARSEN, CLERK  
DEPUTY  
YAKIMA, WASHINGTON

Attorneys for Defendant Selective Employment

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

OLIVIA MENDOZA and JUANA )  
MENDIOLA, individually and on )  
behalf of all other similarly situated, )

NO. CY-00-3024-FVS

Plaintiffs, )

DEFENDANT SELECTIVE  
EMPLOYMENT, INC'S  
MEMORANDUM IN SUPPORT OF  
MOTION TO DISMISS FOR LACK OF  
SUBJECT MATTER JURISDICTION

v. )

ZIRKLE FRUIT CO., a Washington )  
corporation, MATSON FRUIT )  
COMPANY, a Washington corporation) )  
and SELECTIVE EMPLOYMENT )  
AGENCY, INC., a Washington )  
corporation, )

Defendants. )

This memorandum is submitted by defendant Selective Employment, Inc.,  
("Selective") in support of its motion to dismiss the civil conspiracy claim that the  
plaintiffs have asserted against Selective. The basis of the motion is that Selective is

DEFENDANT SELECTIVE EMPLOYMENT, INC'S  
MEMORANDUM IN SUPPORT OF MOTION TO  
DISMISS FOR LACK OF SUBJECT MATTER  
JURISDICTION-1  
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1 a "pendent party" to this litigation, and the exercise of supplemental jurisdiction over  
2 pendent parties ("pendent party jurisdiction") violates Article III of the U.S.  
3 Constitution.  
4  
5

## 6 I. FACTS

7  
8 Selective was sued by plaintiffs in March, 2000. The sole claim against  
9 Selective was that it had engaged in "civil conspiracy" under Washington's common  
10 law (*see Plaintiffs' Complaint, Count II, ¶¶ 57-62*). In addition to Selective  
11 Employment, Inc., plaintiffs' suit named Zirkle Fruit Company ("Zirkle") and Matson  
12 Fruit Company ("Matson") as defendants. The plaintiffs have asserted that both Zirkle  
13 and Matson engaged in a various patterns of racketeering activity that constituted  
14 violations of the federal Racketeer Influenced and Corrupt Organizations Act (RICO),  
15 18 U.S.C. § 1961 *et seq* (*see Plaintiffs' Complaint, Count I, ¶¶ 48-56*).  
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23 In the pleadings that have been submitted to this Court, the Plaintiffs have  
24 expressly and repeatedly stated that the RICO claims are being asserted against Zirkle  
25 and Matson only, and that the only claim being asserted against Selective is the  
26 Washington common law claim of civil conspiracy (*see Plaintiffs' RICO Case*  
27 *Statement, ¶ (b); Plaintiffs' Response To Defendants' Motion to Dismiss, pg. 1, note*  
28 *1*).  
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DEFENDANT SELECTIVE EMPLOYMENT, INC'S  
MEMORANDUM IN SUPPORT OF MOTION TO  
DISMISS FOR LACK OF SUBJECT MATTER  
JURISDICTION-2  
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1 1149 n. 8 (9th Cir.), cert. denied, 469 U.S. 1127, 105 S.Ct. 810, 83 L.Ed.2d 803  
2  
3 (1985).

4 The Federal Courts of the United States have original jurisdiction over a variety  
5 of matters, including but not limited to cases involving federal questions, bankruptcy  
6 matters, or cases where there is diversity of citizenship. See, e.g., 28 U.S.C. § 1331,  
7  
8 *et seq.* In this case, however, it is uncontested that the Court lacks original jurisdiction  
9  
10 over the Plaintiffs' State law claims against Selective.  
11  
12

13  
14 When a Court lacks original jurisdiction over a particular claim or a particular  
15 party, it may, in certain circumstances, exercise supplemental jurisdiction over "claims  
16 that involve the joinder or intervention of additional parties". 28 U.S.C. §1367. Elsaas  
17  
18 v. County of Placer, 35 F.Supp.2d 757, 759 (E.D.Cal. 1999).  
19  
20

21 Because plaintiffs state no federal claim against Selective and no diversity of  
22 citizenship exists between plaintiffs and defendants here, the Court has no independent  
23 basis to exercise jurisdiction over Selective. Consequently, Selective is a "pendent  
24 party" to this litigation, and the issue of whether jurisdiction is proper becomes a  
25 question of "pendent jurisdiction". See Elsaas, 35 F.Supp.2d at 759; Potter v. Rain  
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27 Brook Feed Company, Inc., 530 F.Supp. 569, 572 (E.D. Cal. 1982).  
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35 DEFENDANT SELECTIVE EMPLOYMENT, INC'S  
MEMORANDUM IN SUPPORT OF MOTION TO  
DISMISS FOR LACK OF SUBJECT MATTER  
JURISDICTION-4  
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1 Courts have identified two distinct species of pendent jurisdiction. Potter v. Rain  
2  
3 Brook Feed Company, Inc., 530 F.Supp. at 572. On the one hand, "pendent claim"  
4 jurisdiction exists when a plaintiff raises parallel state and federal claims against the  
5 same defendant. Id. "Pendent party" jurisdiction, on the other hand, typically both  
6 involves a state claim appended to the action that provides the anchoring source of  
7 federal jurisdiction and requires for its resolution the joinder of another party over  
8 whom there is no independent basis of federal jurisdiction. Id.  
9

10 In the absence of "pendent party" jurisdiction, there is no subject matter  
11 jurisdiction over the party against whom the State claim is asserted. See, e.g., Elsaas,  
12 35 F.Supp.2d at 759; Ayala v. United States, 550 F.2d 1196, 1199-1200 (9th Cir.  
13 1977), cert. granted, 434 U.S. 814, 98 S.Ct. 50, 54 L.Ed.2d 70 (1977), cert. dismissed,  
14 435 U.S. 982, 98 S.Ct. 1635, 56 L.Ed.2d 76 (1978). Accordingly, the civil conspiracy  
15 claim (and thus the totality of all claims asserted) against Selective must be dismissed  
16 for want of subject matter jurisdiction unless this Court concludes that "pendent party"  
17 jurisdiction should be exercised in this matter.  
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28 As discussed more fully below, the Ninth Circuit has expressly and  
29 unequivocally prohibited the exercise of pendent party jurisdiction, and the plaintiffs'  
30 State law claim against Selective must therefore be dismissed.  
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35 DEFENDANT SELECTIVE EMPLOYMENT, INC'S  
MEMORANDUM IN SUPPORT OF MOTION TO  
DISMISS FOR LACK OF SUBJECT MATTER  
JURISDICTION-5  
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1 **B. In the Ninth Circuit, pendent party jurisdiction violates Article III of the**  
2 **United States Constitution, such that pendent parties must be dismissed.**

3  
4 The issue of whether to exercise pendent party jurisdiction is a generally a  
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6 “*subtle and complex question with far reaching implications*”. Moor v. County of  
7  
8 Alameda, 411 U.S. 693, 715, 93 S.Ct. 1785, 35 L.Ed.2d 596 (1973). Indeed, Federal  
9  
10 Courts may not exercise pendent party jurisdiction unless both Article III of the U.S.  
11  
12 Constitution and Congress authorize them to do. Aldinger v. Howard, 427 U.S. 1, 18  
13  
14 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976),

15 Although this issue has proved difficult for other circuits of appeal, the Ninth  
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17 Circuit has taken a strict approach to this issue, and has explicitly held that Article III  
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19 of the U.S. Constitution simply does not permit pendent party jurisdiction. Ayala, 550  
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21 F.2d at 1199-1200. While the Ayala mandate, on its face, may seem to conflict with  
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23 the two-step inquiry envisioned by the Aldinger decision, a close review of the two  
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25 decisions and their progeny reveals that the Ninth Circuit’s current prohibition against  
26  
27 pendent party jurisdiction actually has its roots in the Supreme Court’s Aldinger  
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29 decision.

30 In Aldinger v. Howard, 427 U.S. 1, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976), the  
31  
32 Supreme Court identified two prerequisites of pendent party jurisdictional power in a

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35 DEFENDANT SELECTIVE EMPLOYMENT, INC’S  
MEMORANDUM IN SUPPORT OF MOTION TO  
DISMISS FOR LACK OF SUBJECT MATTER  
JURISDICTION-6  
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1 federal court, stating that “(b)efore it can be concluded that (pendent party) jurisdiction  
2 exists, a federal court must satisfy itself not only that Article III permits it, but that  
3 Congress in the statutes conferring jurisdiction (in a particular case) has not expressly  
4 or by implication negated its existence.” 427 U.S. at 18, 96 S.Ct. at 2422.  
5  
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8 The Ayala Court adopted the Aldinger rule verbatim, although its analysis was  
9 primarily focused on the Constitutional aspects of pendent party jurisdiction. See  
10 Ayala, 550 F.2d at 1199-1200. The Ayala court observed that the Supreme Court had  
11 left “*the ultimate question of constitutional power*” unanswered, and it thus endeavored  
12 to address the question itself. Ayala, 550 F.2d at 1200. The Ayala court ultimately  
13 elected to reaffirm two earlier Ninth Circuit cases, (Williams v. United States, 405 F.2d  
14 951, 954 (9<sup>th</sup> Cir. 1969) and Hymer v. Chai, 407 F.2d 136 (9<sup>th</sup> Cir. 1969) that had flatly  
15 rejected the concept of pendent party jurisdiction. Ayala, 550 F.2d at 1200.  
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23 Although subsequent District courts have wondered whether the Ayala decision  
24 might have been “deficient” in its analysis of this issue (see, e.g., Elsaas, 35 F.Supp.2d  
25 at 760), there has been no confusion regarding its conclusion that pendent party  
26 jurisdiction violates Article III of the U.S. Constitution, and its resulting ban on the  
27 exercise of pendent jurisdiction in the Ninth Circuit. Potter, 530 F.Supp. at 572 (citing  
28 Ayala, *supra.*).  
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34 DEFENDANT SELECTIVE EMPLOYMENT, INC’S  
35 MEMORANDUM IN SUPPORT OF MOTION TO  
DISMISS FOR LACK OF SUBJECT MATTER  
JURISDICTION-7  
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1 Thus, since Ayala was decided in 1977, the Ninth Circuit, see, e.g., Carpenters  
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3 Southern California Admin. Corp. v. D & L Camp Constr. Co., 738 F.2d 999, 1000 (9<sup>th</sup>  
4  
5 Cir. 1984) (upholding trial court's refusal to exercise pendent party jurisdiction by citing  
6  
7 to "a long line of cases of this circuit"); Yanez v. United States, 989 F.2d 323, 327 (9<sup>th</sup>  
8  
9 Cir. 1993), and trial courts in the Ninth Circuit, see, e.g., Potter, 530 F.Supp. at 571  
10 (recognizing Ninth Circuit's "rejection" of pendent party jurisdiction); Miletech v.  
11  
12 Raley's, 593 F.Supp. 124, 125 (D.Nev. 1984)(citing Ayala, supra., and holding that,  
13  
14 in light of Ayala, "courts in the Ninth Circuit must adhere to (the Ninth Circuit's)  
15  
16 constitutionally-based rule barring the adjudication of pendent party claims ); Elsaas,  
17  
18 35 F.Supp.2d at 760 (raising issue of subject matter jurisdiction sua sponte and  
19  
20 dismissing pendent party there because Ayala remains the law in this Circuit) have  
21  
22 consistently held that pendent party jurisdiction violates the federal Constitution.

23 Both appellate courts and trial courts in other circuits have, in turn, consistently  
24  
25 recognized the Ninth Circuit's position as to the constitutionality of pendent party  
26  
27 jurisdiction. See, e.g., Huffman v. Hains, 865 F.2d 920, 922 (7<sup>th</sup> Cir. 1989); Pearce v.  
28  
29 United States, 450 F.Supp. 613, 616 (D.Kan. 1978) (identifying the Ninth Circuit as  
30  
31 the one court that has "consistently rejected pendent party jurisdiction"); Kyriazi v.  
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33 Western Elec. Co., 476 F.Supp. 335, 336 (D.N.J. 1979); Campbell v. B.C. Christopher

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35 DEFENDANT SELECTIVE EMPLOYMENT, INC'S  
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DISMISS FOR LACK OF SUBJECT MATTER  
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1 Securities Co., 702 F.Supp. 775, 779 (W.D.Mo. 1988) (noting that Ninth Circuit has  
2  
3 “squarely rejected” concept that Aldinger permits pendent party jurisdiction).  
4

5 The Ninth Circuit’s law of pendent party jurisdiction is best summarized in the  
6  
7 most recent statement of such law, Elsaas, 35 F.Supp.2d at 760:

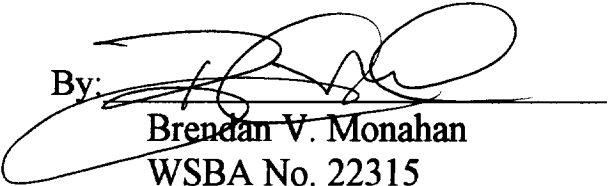
8 “Ayala clearly expressed the Ninth Circuit’s view that Article III does not permit  
9 pendent party jurisdiction. No decision of the United States Court of Appeals for  
10 the Ninth Circuit or the United States Supreme Court has overruled Ayala’s  
11 rejection of pendent party jurisdiction on constitutional grounds, nor does  
12 passage of § 1367 alter the holding. Thus, Ayala remains the law on pendent  
13 party jurisdiction in the Ninth Circuit, and this court, being bound, may not  
14 exercise jurisdiction over plaintiffs’ claims against the (pendant party there).”  
15

16 III. CONCLUSION

17  
18 Defendant Selective respectfully request that this Court follow the Elsaas court  
19 and dismiss Selective under the Ninth Circuit’s binding precedent regarding pendent  
20 party jurisdiction, Ayala.  
21

22  
23 DATED this 27<sup>th</sup> day of June, 2000.  
24

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26 Attorneys for Defendant Selective  
27 Employment, Inc.  
28

29  
30 By:   
31 Brendan V. Monahan  
32 WSBA No. 22315  
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DEFENDANT SELECTIVE EMPLOYMENT, INC’S  
MEMORANDUM IN SUPPORT OF MOTION TO  
DISMISS FOR LACK OF SUBJECT MATTER  
JURISDICTION-9  
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CERTIFICATE OF SERVICE

I am Lori A. Busby. I hereby certify under penalty of perjury of the laws of the State of Washington that the following statements are true and correct.

I am one of the employees of the attorneys for the defendant Selective Employment in the above-entitled matter; that I am a citizen of the United States, a resident of Yakima County, Washington, over the age of twenty-one years, and not a party to said action. That on the 27<sup>th</sup> day of June, 2000, I caused to be faxed and sent to via overnight mail, a copy of the document to which this is attached to the following:

Howard W. Foster, Esq.  
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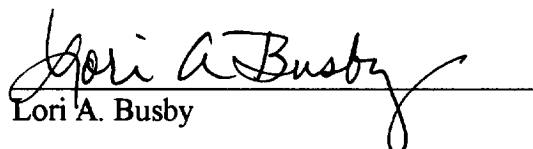
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and hand delivered to the following attorneys:

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Dated at Yakima, Washington this 27<sup>th</sup> day of June, 2000.

  
Lori A. Busby

DEFENDANT SELECTIVE EMPLOYMENT, INC'S  
MEMORANDUM IN SUPPORT OF MOTION TO  
DISMISS FOR LACK OF SUBJECT MATTER  
JURISDICTION-10  
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