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

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JAMES R. LARSEN, CLERK
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7 Attorneys for Defendant Selective Employment
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9 UNITED STATES DISTRICT COURT
10 EASTERN DISTRICT OF WASHINGTON
11

12 OLIVIA MENDOZA and JUANA)
13 MENDIOLA, individually and on)
14)
15 Plaintiffs,)
16)
17 v.)
18)
19 ZIRKLE FRUIT CO., a Washington)
20 corporation, MATSON FRUIT)
21 COMPANY, a Washington corporation))
22 and SELECTIVE EMPLOYMENT)
23 AGENCY, INC., a Washington)
24 corporation,)
25)
26 Defendants.)
27)

NO. CY-00-3024-FVS
DEFENDANT SELECTIVE
EMPLOYMENT, INC.'S
REPLY TO PLAINTIFFS'
RESPONSE TO DEFENDANT
SELECTIVE EMPLOYMENT, INC.'S
MOTION TO DISMISS FOR
LACK OF SUBJECT MATTER
JURISDICTION

28
29 This memorandum is submitted by Selective Employment, Inc., ("Selective") in
30 reply to plaintiffs' memorandum in opposition to Selective's Motion to Dismiss the
31 plaintiffs' claim against Selective for lack of subject matter jurisdiction in this Court.
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DEFENDANT SELECTIVE EMPLOYMENT, INC.'S REPLY
TO PLAINTIFFS' RESPONSE TO DEFENDANT SELECTIVE
EMPLOYMENT, INC.'S MOTION TO DISMISS FOR
LACK OF SUBJECT MATTER JURISDICTION-1
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I. ARGUMENT

In responding to Selective's Motion to Dismiss, plaintiffs rely exclusively on the proposition that the jurisdiction they seek to have this Court assert is permitted under 28 U.S.C. § 1367. In so doing, plaintiffs completely ignore the thrust of Selective's argument, which is not based on a lack of Congressional authorization for pendent party jurisdiction, but rather on the premise that pendent party jurisdiction violates Article III of the U.S. Constitution. The Ninth Circuit has firmly and unequivocally held that pendent party jurisdiction does indeed violate Article III of the U.S. Constitution. See, Ayala v. United States, 550 F.2d 1196, 1199-1200 (9th Cir. 1977), cert. granted, 434 U.S. 814, 98 S.Ct. 50, 54 L.Ed.2d 70 (1977), cert. dismissed, 435 U.S. 982, 98 S.Ct. 1635, 56 L.Ed.2d 76 (1978). Despite the plaintiffs' wishes to the contrary, no simple act of Congress can permit what the U.S. Constitution prohibits.

A. Article III must be satisfied for proper pendent party jurisdiction.

As the United States Supreme Court has indicated, "(b)efore it can be concluded that (pendent party) jurisdiction exists, a federal court must satisfy itself not only that Article III permits it, but that Congress in the statutes conferring jurisdiction (in a particular case) has not expressly or by implication negated its existence." Aldinger

1 v. Howard, 427 U.S. 1, 18, 96 S.Ct. 2413, 49 L.Ed.2d 276 (1976). Under Aldinger,
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3 then, this Court's inquiry has two parts: (1) does Article III permit pendent party
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5 jurisdiction generally and (2) has Congress limited the permissible extent of such
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7 jurisdiction in a statute conferring jurisdiction in a particular case.

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9 The Ninth Circuit Court of Appeals has answered the first inquiry in the
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11 negative. As Selective argued in its initial memorandum, pendent party jurisdiction is
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13 disallowed in this Circuit not on grounds of "ferreted Congressional disinclination"
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15 towards pendent party jurisdiction, but on more fundamental grounds that exercise of
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17 such jurisdiction in federal courts violates Article III. Potter v. Rain Brook Feed
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19 Company, Inc., 530 F.Supp. 569, 572 (E.D. Cal. 1982) (citing Ayala, supra.). Thus,
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21 the second Aldinger inquiry, which plaintiffs address exclusively, is irrelevant here.

22 **B. Passage of 28 U.S.C. § 1367 does not change the condition that**
23 **Article III must be satisfied for proper pendent party jurisdiction.**

24 It is axiomatic in federal law that Congress cannot change the Constitution's
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26 parameters through passage of a statute, and 28 U.S.C. § 1367 is no exception to this
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28 general rule. See, e.g., Rivera v. Commonwealth of Massachusetts, 16 F.Supp.2d 84,
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30 85 (D.Mass. 1998) (stating that the "statutory grant (of authority provided in 28 U.S.C.
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32 § 1367) can (not) ... expand the jurisdictional boundaries set forth in Article III ... of
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34 the United States Constitution."). Thus, 28 U.S.C. § 1367, as an act of Congress, has
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1 no effect on whether pendent party jurisdiction is permitted by Article III or not. Elsaas
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3 v. County of Placer, 35 F.Supp.2d 757, 760 (E.D.Cal. 1999) (dismissing pendent party
4
5 there for lack of subject matter jurisdiction because “(n)o decision of the United States
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7 Court of Appeals for the Ninth Circuit or the United States Supreme Court has
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9 overruled Ayala’s rejection of pendent party jurisdiction on constitutional grounds, *nor*
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11 *does passage of § 1367 alter (Ayala’s holding” (emphasis added).*

12 **C. Cases cited by plaintiffs do not change the necessary result here.**

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14 Plaintiffs attempt to avoid the effect of Ayala’s holding by citing to a relatively
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16 recent decision of this Court, Ziegler v. Ziegler, 28 F.Supp.2d 601 (E.D.Wa. 1998),
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18 wherein 28 U.S.C. § 1367 was purportedly “followed without reservation” and a Ninth
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20 Circuit case, Yanez v. United States, 989 F.2d 323, 326 n. 3 (9th Cir. 1993), in which
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22 the Ninth Circuit is deemed to have “acknowledged the application of the statute.”
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24 Neither of these cases change the necessary result here because neither of these cases
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26 overrules Ayala and declares pendent party jurisdiction constitutional in the Ninth
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28 Circuit.

29 Ziegler does not help plaintiffs for several reasons. First, the parties in that
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31 action failed to raise the issue of constitutionality. As a result, the Court never
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33 considered the Ayala precedent, and thus never addressed whether the extension of
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1 pendent party jurisdiction was constitutional. Further, pendent party jurisdiction *as to*
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3 *defendants* could not have been raised in that case because that case involved federal
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5 claims brought by one plaintiff and state claims brought by another plaintiff against a
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7 defendant properly before the Court on the first plaintiff's federal claims. Thus, Ziegler
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9 is factually distinguishable from the current case, wherein a plaintiff has hauled into
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11 federal court a defendant over which no independent basis for federal jurisdiction
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13 exists.

14 Yanez provides the plaintiffs with no more support. First, Yanez says nothing
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16 about the constitutionality of pendent party jurisdiction, but merely sets forth in dictum
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18 (in a footnote no less) that Congress has authorized its exercise in 28 U.S.C. § 1367.
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20 See Yanez, 989 F.2d at 326 n.3. Further, the Yanez court had no reason to address any
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22 aspect of pendent party jurisdiction, including the constitutionality thereof, because
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24 U.S.C. § 1367 had not been enacted as of the date the litigation at issue in Yanez had
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26 been commenced. Id. While the footnoted dictum is arguably confusing to the reader,
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28 it is clear that the Yanez court did not address, and certainly did not overrule, the clear
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30 holding in Ayala that pendent party jurisdiction violates the Constitution, regardless of
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32 what Congress may have to say about it.
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D. Without jurisdiction over Selective, this Court cannot “declare the law” as to Selective.

This Court’s lack of jurisdiction over Selective requires Selective’s dismissal from this action. As the Ninth Circuit, quoting Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), noted last year:

“Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. ...

Axness Intern., Ltd., v. Intercargo Ins. Co., 183 F.3d 935, 945 (9th Cir. 1999).

By the Axness standard, this Court’s only remaining act as to Selective is to announce the fact that subject matter jurisdiction does not exist as to the pendent party under the Ayala rule and dismiss Selective from this action on that ground.

II. CONCLUSIONS

The case plaintiffs need to produce to defeat this motion is not a case indicating that Congress permits jurisdiction over pendent parties, Yanez, 989 F.2d at 326 n.3, or a case in which a Court of this District, to which the issue of subject matter jurisdiction was not addressed, exercised jurisdiction over claims by a second plaintiff against a defendant properly before the Court. Ziegler, 28 F.Supp.2d at 618. Rather, the case plaintiffs need to produce to defeat this motion is a Ninth Circuit (or Supreme Court)

1 case that overrules Ayala and holds that pendent party jurisdiction no longer violates
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3 Article III of the U.S. Constitution.

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5 As the Elsaas case recognizes, no such case exists. All other Courts within the
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7 Ninth Circuit are therefore bound to dismiss pendent parties from federal court cases,
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9 because the extension of jurisdiction over such parties violates the U.S. Constitution.

10 DATED this 18th day of July, 2000.

11
12 VELIKANJE, MOORE & SHORE, P.S.
13 Attorneys for Defendant Selective
14 Employment, Inc.

15
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17 By: 

18 Brendan V. Monahan
19 WSBA No. 22315
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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 18th day of July, 2000, I caused to be faxed and sent regular mail, a copy of the document to which this is attached to the following:

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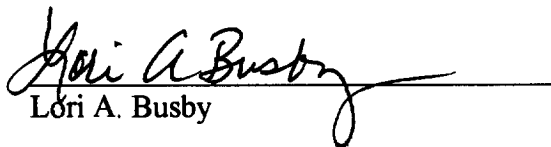
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and caused to be hand delivered this document to the following attorneys:

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Dated at Yakima, Washington this 18th day of July, 2000.


Lori A. Busby

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