No. _____

In The Supreme Court of the United States

CERVANTES ORCHARDS & VINEYARDS, LLC, CERVANTES NURSERIES, LLC, CERVANTES PACKING & STORAGE, LLC, MANCHEGO REAL, LLC, all Washington limited liability corporations; JOSE G. CERVANTES, individually and as his separate property; DEAN BROWNING WEBB and SCOTT ERIK STAFNE, as individuals,

Petitioners,

—*v.*—

DEERE & COMPANY, a corporation; DEERE CREDIT, INC., a corporation; JOHN DEERE CAPITAL CORPORATION, a corporation; JOHN DEERE FINANCIAL, a corporation, FKA FPC FINANCIAL; DEERE CREDIT SERVICES, INC., a corporation; AMERICAN WEST BANK, a corporation; T-16 MANAGEMENT CO, LTD., a Washington corporation; GARY JOHNSON, individually and upon behalf of their community property marital estate; LINDA JOHNSON, individually and upon behalf of their community property marital estate; ROBERT WYLES, individually and upon behalf of their community property marital estate; MICHELLE WYLES, individually and upon behalf of their community property marital estate; NW MANAGEMENT REALTY SERVICES, INC., a Washington corporation, AKA Northwest Farm Management Company; SKBHC HOLDINGS LLC, a Washington limited liability corporation,

Respondents/Defendants.

ON APPEAL FROM THE NINTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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Attorney for Applicants Cervantes Orchards and Vineyards LLC; Cervantes Nurseries LLC; Cervantes Packing & Storage LLC; Manchego Real LLC, Jose G. Cervantes and Dean Browning Webb

QUESTIONS PRESENTED

Pinkerton, *Salinas*, *Beck*, and mediate causation: Does the *Pinkerton* Doctrine, *Pinkerton v. United States*, 328 U.S. 640, 647, 66 S.Ct. 1180, 90 L. Ed. 1489 (1946), *Salinas v. United States*, 522 U.S. 52, 65 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997), *Beck v. Prupis*, 529 U.S. 494 (2000), and the concept of mediate causation apply to the imposition of *civil* RICO § 1962(d) co-conspiratorial liability in this case?

Should the Petitioners' allegations against RICO § 1962(d) co-conspirators be ascribed to the Deere Respondents RICO § 1962(d) co-conspirators predicated upon the allegations of the Second Amended Complaint?

When a court does not afford the sanctioned party the additional procedural protections required to impose punitive sanctions, is the court required to tailor the amount of the sanction to the harm directly caused by the sanctionable conduct, as is required for the imposition of compensatory sanctions?

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are as noted in the caption.

CORPORATE DISCLOSURE STATEMENT

Cervantes Orchards & Vineyards, LLC, a Washington limited liability corporation; Cervantes Nurseries, LLC, a Washington limited liability corporation; Cervantes Packing & Storage, LLC, a Washington limited liability corporation; and Manchego Real, LLC, a Washington limited liability corporation has no parent or subsidiary corporation. No publicly held company owns any of its stock.

LIST OF RELATED PROCEEDINGS

There are no related proceedings.

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OPINIONS BELOW

The opinions and orders of the United States Court of Appeals for the Ninth Circuit are unreported and reprinted in the appendix of this petition. The District Court's opinions and orders are unreported.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered separate opinions and judgments on 17 December 2017 (App. 7), 5 March 2018 (App. 5), 22 May 2019 (App. 2), and 5 July 2019 (App. 1). The Court has competent subject matter jurisdiction over this case, pursuant to 28 U.S.C. § 1254(1). Strictly complying with Rule 14, this Honorable Court, by and through the Honorable Elana Kagan, entered an order 3 October 2019, granting Petitioners' extension application to file the petition for writ of certiorari, extending the filing date to 2 December 2019.

CONSTITUTIONAL PROVISIONS , TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

Pertinent statutes and regulations are reproduced in Appendix.

STATEMENT OF THE CASE

The Racketeer Influenced and Corrupt Organizations Act of 1970, aka RICO (Title 18 U.S.C. § 1961, et.seq.) confers private attorneys' general authority upon civil litigants to prosecute treble damage relief actions arising from commission of specific statutorily identified federal and state offenses. Significant to litigants is RICO §1962(d), the conspiracy provision that proscribes contravention of the three RICO substantive statutory offenses codified by RICO §§1962(a), (b), and (c). The Cervantes who are Hispanic Americans, owned, operated, and managed several corporate affiliated entities, initiated an action against the Deere Respondents, e who engaged in activities that damaged the agricultural property and business interests of the Cervantes to enrich themselves. Cervantes' alleged the Deere Respondents conspired with non-affiliated corporate entities and individuals, namely NWFM, Wyles, T-16, Johnson, American West Bank, et.al, to accomplish this objective. The District Court ruled that the RICO conspiracy claim failed inasmuch as the Deere Respondents could not be held conspiratorially liable for the commission of underlying racketeering activities of non-affiliated entities and individuals, which is inconsistent with established RICO conspiracy judicial pronouncements under Pinkerton, Salinas, and Beck, notwithstanding the fact those non-affiliated Deere entities and

individuals were acting upon behalf of those Deere affiliated entities. The First Amended Complaint was summarily stricken and the court granted leave to file a Second Amended Complaint, imposing a 30 page restriction.

The Cervantes' filed the SAC in accordance with the District Court order entered 19 December 2014. See App. 83. The District Court entered orders in July, 2015. See App. 26 and App. 52. The District Court found that Cervantes sufficiently alleged a single form of racketeering activity notwithstanding summarily rejecting Deere's arguments the action was precluded and foreclosed by doctrines of res judicata and collateral estoppel. Cervantes' argued for an opportunity to further amend , however the District Court denied Cervantes leave to amend and file a Third Amended Complaint, even though they had ruled that one form of racketeering activity had satisfactorily been alleged.

Certiorari is warranted because the inconsistency reflected by the rulings of the various district and circuit courts which significantly contrasts with established judicial positions of some of the federal circuits which liberally construe and broadly interpret RICO § 1962(d) conspiracy in conformity with Pinkerton, Salinas, and Beck. Specifically, the decision of the Ninth Circuit and the District Court in this matter, is patently inconsistent with prevailing judicial positions of the First,

Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, and D.C. Circuits, and, most notably, patently inconsistent with other prevailing Ninth Circuit RICO § 1962(d) conspiracy law.

Regarding the question of sanctions, this petition does not involve the interpretation of statutory provisions, but rather the federally recognized "inherent authority" of a court to impose sanctions and the constitutional due process restraints upon such authority

Factual Background

Petitioners initiated this proceeding on September 2, 2014, filing a Complaint, advancing multiple claims for relief under RICO Title 18 U.S.C. §§ 1961, et.seq.), the Ku Klux Klan Act of 1871 ["KKK"] (Title 42 U.S.C. § 1981. et.seq.) and various Washington state law claims. The Complaint alleged the Respondents engaged in RICO predicate acts of federal extortion, federal bankruptcy fraud, federal mail fraud, and federal wire fraud.

Certain Respondents answered the complaint, FRCP 12(a), and certain Respondents moved for a more certain and definite statement, FRCP 12(e), and alternatively to strike, FRCP 12(f), based upon the 337 page length of the Complaint.

As a matter of right pursuant to FRCP 15(a)(2), Petitioners filed a First Amended Complaint (FAC) on October 17, 2014, comprised of 143 pages, of which only 66 pages constituted the civil RICO allegations. The FAC removed certain party Petitioners, and abandoned numerous claims for relief. Simultaneously, Petitioners filed the required RICO Case Statement, constituting 472 pages, (Local Rule 3.2 of the District Court(. The RICO Case Statement, requires the Petitioners to "state with detail and specificity" facts, and was admittedly lengthy, but was a separately filed document and could have been separately dismissed or modified by court order, on its own, without affecting the allegations presented in the 143 page FAC. Upon the filing of the FAC, it should have been noted that "an amended complaint supersedes the original, the latter being treated thereafter as non-existent." See Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure Section 1476 (3d ed. 2016).

Deere, AWB/SKBH, and NWFCS Respondents moved for a more certain and definite statement, FRCP 12(e), and alternatively to strike, FRCP 12(f), based solely upon the length of the First Amended Complaint, including the RICO Case Statement (472 pages). Deere and NWFCS Respondents also sought entry of an order restricting the filing of a Second Amended Complaint, (SAC) with RICO Case Statement, not to exceed 30 pages. AWB/SKBHC

Respondents answered the First Amended Complaint.

The District Court granted Deere Respondents motion to strike, entering an order on December 19, 2014, completely adopting the same coordinated request of multiple Respondents that any Second Amended Complaint would not exceed 30 pages, including the required RICO Case Statement. *See App. 78*. The District Court specifically chastised Petitioners' attorneys for filing excessively lengthy pleadings, expressly noting the Court's awareness of counsel's prior experience in the United States District Court for the Western District of Washington for engaging in such conduct and specifically indicated a willingness to consider a future sanction motion should counsel persist in such conduct.

Petitioners duly complied with the District Court Order, filing a SAC, which, including a RICO Case Statement, did not exceed thirty (30) pages, thereby abandoning a majority of Cervantes' claims and limiting their ability to fully adjudicate their issues.

On February 20, 2015, Deere's counsel served Petitioners' counsel by United States mails individually addressed envelopes containing a Rule 11 safe harbor letter accompanied with a proposed Rule 11 motion directed solely at "Petitioners' attorneys," a supporting declaration of counsel with eleven [11] specifically identified exhibits consisting

of prior entered court orders filed in federal bankruptcy court and Yakima County Superior Court proceedings involving disputes between Deere Credit, Inc., and certain Petitioners pertaining to the disposition of certain property interests. The gravamen of the Deere Rule 11 revolved exclusively upon the application of the doctrines of *res judicata* and *collateral estoppel* as the legal bases precluding the filing of the instant action, and that a reasonable investigation and review of those identified documents would have alerted Petitioners' counsel of the patent absence of a reasonable, good faith basis to initiate and pursue the action. Petitioners counsel responded to the Rule 11 safe harbor letter, explicitly taking issue with the foundation and the basis of that submission as both problematical and unreasonable.

Certain Respondents moved for entry of summary judgment pursuant to FRCP 56(a) (T-16/Johnson - 12 February 2015) (SKBHC - 23 June 2015), and certain Respondents moved for dismissal pursuant to FRCP 12(b)(6), (AWB/SKBHC - 16 January 16, 2015), (Wyles - 20 January 2015), (Deere Respondents - February 13, 2015). Petitioners opposed those motions.

The District Court entered an order on July 10, 2015, granting the Deere Respondents' FRCP 12(b)(6) dismissal motion, dismissing the Second Amended Complaint with prejudice and denying

leave to amend. The District Court rejected the Deere Respondents' principal argument that the doctrines of *res judicata* and *collateral estoppel* precluded Petitioners' initiation of the proceedings. The District Court did not find, despite the allegations that NWFM and T-16 "took their direction" from Deere, that Deere committed any predicate acts of extortion, bankruptcy fraud, or mail or wire fraud. The District Court did not find that it was pleaded with "sufficient specificity" how Deere Respondents would be liable for acts of NWFM or T-16.

The District Court entered an order, (App. 25), July 17, 2015 granting the Wyles and AWB/SKBHC FRCP 12(b)(6) dismissal motions, dismissing the Second Amended Complaint with prejudice and denying leave to amend. The District Court ruled federal RICO allegations were patently deficient inasmuch as the conduct committed did not constitute actionable extortion, mail fraud, or wire fraud. However, the District Court ruled Petitioners sufficiently alleged one predicate act of bankruptcy fraud (i.e., "racketeering activity"). However, the Judge found Petitioners had not sufficiently alleged a second predicate act (describing that there was not enough specificity as to when certain items of property were stolen (section 153 violations), and not enough specificity because certain Respondents were "lumped" together). Petitioners contend that the SAC adequately described subsequent racketeering acts

sufficient to support a "pattern of racketeering," and certainly there was specificity and particularity to find additional racketeering activity evident in the improperly stricken FAC. *(*App. 51*)*

The District Court entered an order 12 August 2015, granting the Deere sanction motion. (App. 20). The District Court subsequently entered an order 26 February 2016, granting the Wyles sanction motion. See App.15.

Petitioners timely filed their notice of appeal to the Ninth Circuit on August 14, 2015, and this appeal ensued.

The Ninth Circuit entered a Memorandum Decision 17 December 2017, affirming in part, reversing and remanding to the District Court, expressly finding error committed by the imposition of the entire amount of monetary sanctions requested upon Petitioners' counsel. The appellate court ruled the operative pleading subject to the sanctions was solely the Second Amended Complaint. See App. 7.

Petitioners' counsel, real parties of interest, petitioned the Ninth Circuit for rehearing and rehearing en banc. The Ninth Circuit denied the petitions, entered 5 March 2018. See App. 5.

Petitioners' counsel subsequently appealed to the Ninth Circuit the entry of the District Court order imposing the entire amount of monetary sanctions requested for the filing of the Second Amended

Complaint, absent an evidentiary hearing, which is contrary to the Supreme Court's directive enunciated and established in *Goodyear Tire & Rubber Co*. 581 U.S. ___, 137 S.Ct. 1178 (2017). See *Xue Lu v. United States*, 921 F.3d 850, 858 (9th Cir. 2019)(applying *Goodyear*, summarily rejecting District Court 'rubber stamping' request for entire fees requested by declaration, absent evidentiary hearing). The Ninth Circuit entered a Memorandum Decision 22 May 2019, affirming the District Court order. *See* App. 2. Petitioners then filed a petition for rehearing and rehearing *en banc* which was denied and entered 5 July 2019. See App. 1.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted inasmuch the *Pinkerton* Doctrine should be accorded judicially symmetrical interpretation and expansive application to RICO § 1962(d) conspiracy law consistent with the RICO Liberal Construction Clause. The decision below stands apart from well-established principles of RICO conspiracy law as evidenced by *Salinas* and *Beck*. The decision is patently inconsistent with decisions of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits, and the District of Columbia Circuit, and is patently inconsistent with prevailing Ninth Circuit authority.

The Decision Finding The Deere Entities Not Conspiratorially Liable Under RICO §1962(d) Is Judicially Inconsistent With *Pinkerton*, *Salinas*, and *Beck*

I. *The District Court Erred in Not Finding Deere Liable for Allegedly Fraudulent Acts of Non-Deere Petitioners When a Bankruptcy Court Order, and Expected Testimony, Would Show Deere's Liability for Acts of T-16 and NWFM*

First, the District Court affirmatively ruled that the Deere Respondents' arguments of *res judicata* and *collateral estoppel* failed and the Judge concluded that neither of the prior actions barred Petitioners' lawsuit against the Deere Petitioners. *Cervantes Orchards & Vineyards, LLC v. Deere & Co.*, 2015 U.S. Dist. LEXIS 93158; 2015 WL 4210978 (E.D. Wash, 10 July 2015).

As noted below, the *res judicata* argument by the Deere Respondents was the principal reason they were seeking Rule 11 sanctions, which sanctions the Court found and reflexively ordered with regard to the Deere Respondents based upon the view that one alleged predicate activity (alleged extortion) was frivolous.

Second, the District Court erred when it concluded there was insufficient allegations that

Deere was not liable for the actions of T-16 and NWFM, despite allegations presented that there was a bankruptcy court order that the liquidation agent (T-16) chosen by Deere was to "take its direction from DCI [Deere Credit Inc] or as otherwise directed by the Court." The District Court ruled:

> b. Bankruptcy Fraud
>
> The Court next determines whether Petitioners adequately have alleged predicate acts of bankruptcy fraud. Petitioners contend that the Deere Respondents were the principals of T-16 and NWFM, such that the Deere Respondents are responsible for those entities' alleged fraudulent acts, including the embezzlement of property. Petitioners also alleged that DCI, T-16, NWFM, Anderson, and Wyles committed bankruptcy fraud by seeking to conceal from the bankruptcy court a settlement agreement that would have revealed the true extent of the damage to a portion of the collateral property. Petitioners allege that the Deere Respondents committed predicate RICO acts of bankruptcy fraud in violation of 18 U.S.C. §§ 152 and 153. Section 152 prohibits, among other acts, knowingly and fraudulently concealing property of a bankruptcy estate and knowingly and fraudulently making a false declaration in or in relation to a bankruptcy case. 18 U.S.C. § 152(1), (3). Section 153 prohibits certain persons with

access to bankruptcy estate property or documents from knowingly and fraudulently appropriating or embezzling the estate's property. 18 U.S.C. § 153.

In support of the alleged bankruptcy fraud, Petitioners claimed that the Deere Respondents were liable for the alleged fraudulent acts of the liquidating agent, T-16, because that entity was ordered in the bankruptcy plan to "take its direction from DCI or as otherwise directed by the Court." T16, along with other Respondents, allegedly embezzled property from the bankruptcy estate, charged COV expenses for labor and equipment that were used on other property, and applied minimal labor and resources to the estate property. Petitioners further claim that the Deere Respondents are liable for the false sworn declaration that NWFM's co-owner, Mr. Anderson, allegedly filed in bankruptcy court. However, the District Court found that Petitioners did not assert sufficient facts to adequately plead that the Deere Respondents are liable for the alleged fraud perpetrated by T-16 or others. Although the bankruptcy plan provided that T-16 would take direction from DCI, Petitioners asserted no facts indicating that DCI or the other Deere Respondents would be liable for T-16's allegedly fraudulent acts. Nor did Petitioners provide factual assertions to support the contention that

> the Deere Respondents are liable for the allegedly false declaration. Rather, Petitioners' assertion of the Deere Respondents' vicarious liability is a legal conclusion, which is not entitled to an assumption of truth.
>
> Excluding Petitioners' conclusory statement that the Deere Respondents were liable for the actions of T-16 and NWFM, the Court found that Petitioners did not raise a plausible claim that the Deere Respondents committed any RICO predicate acts of bankruptcy fraud.

*2015 U.S. Dist. LEXIS 93158, *16.*

Thus, there was clearly an issue of fact, as buttressed by expected testimony of Respondents and other factual allegations that DCI was in fact directing the actions of T-16 (Johnson) and NWFM (Wyles), and in particular DCI counsel was directing the activities of these agents, which the Judge failed to recognize and/or ignored. Thus, there were sufficient allegations that Deere entities were knowingly participating in bankruptcy fraud and mail and wire fraud at this Rule 12(b)(6) stage of the proceedings.

Third, the District Court erred in its analysis when it found that *because* Petitioners had not stated a substantive RICO claim against Deere Respondents, the RICO conspiracy allegation fails as well:

> Petitioners were found to have failed to assert sufficient facts to claim that the Deere Respondents committed predicate RICO acts of wire or mail fraud. Even according to the asserted facts, there is no indication that the Deere Respondents were aware of the settlement agreement, which was between other parties. Although the record does not identify the "Cervantes Attorneys" with precision, they apparently are Bruce Johnston and Dale Foreman, who were dismissed voluntarily before Petitioners filed the Second Amended Complaint Nor, as discussed above in regard to bankruptcy fraud, have Petitioners pleaded with sufficient specificity how the Deere Respondents would be liable for acts committed by T-16.

In sum, Petitioners were determined to have failed to assert plausible RICO predicate acts to support a claim that the Deere Respondents violated 18 U.S.C. § 1962(c). The District Court found that because Petitioners did not state a substantive RICO claim against the Deere Respondents, their RICO conspiracy allegation under 18 U.S.C. § 1962(d) failed. See *Religious Tech. Ctr. v. Wollersheim*, 971 F.2d 364, 367 n.8 (9th Cir. 1992) ("Because we find that [plaintiff] has failed to allege the requisite substantive elements of RICO, the conspiracy cause of action cannot stand.").

Cervantes Orchards & Vineyards, LLC v. Deere & Co., 2015 U.S. Dist. LEXIS 93158, at* 21; 2015 WL 4210978 (E.D. Wash, 10 July 2015*).*

The District Court cited to a 1992 case which has limited, if no viability, in view of the Supreme Court ruling in *Salinas v. United States*, 522 U.S. 52, 65 118 S. Ct. 469, 139 L. Ed. 2d 352 (1997). In *Salinas*, the Court held that a plaintiff is not required to allege or prove the actual completion of a single racketeering act by the defendant or any other member of the conspiracy because completion of an overt act is not an element of the offense.

Moreover, the Supreme Court in *Salinas* specifically held that there is no requirement that the defendant "himself omitted or agreed to commit the two predicate acts requisite for a substantive offense under section 1962(c)." The Court further stated that "[a] conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it *suffices* that he adopt the goal of furthering or facilitating the criminal endeavor." *Id.* at 65.

As a result of *Salinas*, four circuits have held there is no requirement to allege or prove the actual completion of a single racketeering act by the defendant or any other member of the conspiracy.

Salinas makes clear that section 1962(c) liability is not a prerequisite to section 1962(d) liability, and a recent district court decision reiterates this principle. Moreover, the Ninth Circuit is among those which have found that to meet the *Reves* "operation or management" test, a plaintiff need only plausibly allege that the defendant *agreed* to facilitate a scheme in which conspirators who are operators or managers would commit at least two acts in the furtherance of the affairs of the enterprise. See also *Pinkerton v. United States*, 328 U.S. 640, 647, 66 S.Ct. 1180, 90 L. Ed. 1489 (1946) (followed by *Salinas*); *United States v. Fernandez*, 388 F.3d 1199 (9th Cir. 2004), *United States v. Fiander*, 547 F.3d 1036 (9th Cir. 2008), and *Bryant v. Mattel, Inc.*, 2010 U.S. Dist. LEXIS 103851 (C.D. Calif., 2 August 2010*),* all expressly adopting and explicitly following *Smith v. Berg*, 247 F.3d 532 (3d Cir. 2001), *Salinas*, and *Pinkerton*.

Such compelling analysis is substantiated by and through the application of the concept of mediate causation. See *Susan W. Brenner, Civil Complicity: Using The Pinkerton Doctrine To Impose Vicarious Liability in Civil RICO Actions,* 81 Kentucky Law Journal 369, 384-387, 388 (1992-93)*;* See *Susan W. Brenner, Of Complicity and Enterprise Criminality: Applying Pinkerton Liability to RICO Actions,* 56 Mo. L. Review 931, 963-965 (1991)*; and,* See *Dean Browning Webb, Judicially Fusing The Pinkerton Doctrine To RICO Conspiracy Litigation Through*

The Concept of Mediate Causation, 97 Kentucky Law Journal 665, 679- 688 (2008-2009) .

Comprehending and recognizing that *Pinkerton* is not actually a rule of vicarious liability is significantly critical. Because the opinion includes agency terminology, this case has been construed as imposing vicarious liability. Rather than abrogating the personal act requirement, *Pinkerton* … holds one liable for the act of aligning … oneself with others for criminal purposes; having done so, each non acting member of the conspiracy is liable for crimes committed by other conspirators because the acts of alliance caused those crimes to be committed. This affiliative act is sufficient to satisfy the traditional causation requirements of criminal liability. Indeed, this act is certainly more blameworthy than the acts that suffice for imposing civil vicarious liability. The only element of criminal liability that is attenuated under *Pinkerton* … is causation, which is construed just as it is under general complicity doctrines. Neither the *Pinkerton* Doctrine nor complicity requires that one's wrongful act actually cause the commission of the crime for which one is held accountable.

Application of the concept of mediate causation avoids the difficult task of specifying the actual effect such acts had on another's conduct by making it possible to assume a causal effect sufficient to support liability. The result is the

imposition of criminal liability that comports with traditional requirements by including the element of demonstrable personal fault:

> "Mediate causation" denotes instances in which an individual's actions can be deemed to have exerted *some* causal effect upon another's conduct. It resolves the problem of attempting to identify the extent to which one person's acts *actually* affected another's conduct by making it possible, under certain circumstances, to *assume* a causal effect that is sufficient to support imposition of criminal liability. Under *Pinkerton*, an agreement to commit a crime or crimes is a prerequisite for liability. If such an agreement existed, anyone who joined it is liable for offenses other conspirators commit to advance the objectives of their agreement. The act of agreeing to the commission of certain crimes suffices; it is not necessary that one commit any affirmative act to advance the realization of the goals of the conspiracy. Complicity differs in two respects. First, one can "aid and abet" the commission of a crime without entering into an agreement to this effect. See *Iannelli v. United States, 420 U.S. 770 (1975).* Second, to incur aiding and abetting liability, it is not sufficient to associate oneself with a criminal venture; it is also necessary to commit an affirmative act that is intended to further the commission of a substantive offense.

> Still, *Pinkerton* recognizes affiliative liability where an individual is deemed to have committed a substantive offense even though that person was not present at its commission and did not physically consummate it.
>
> Both *Pinkerton* and rules of complicity accomplish this through a singular vehicle: they attribute causation for crimes that are physically perpetrated by another on the basis of a unique "bad act'—that of entering into a criminal affiliation. The premise of these doctrines is that the act of aligning oneself with others to pursue a criminal purpose has causal significance. The causal import of this act is an instance of "mediate causation."

Susan W. Brenner, Of Complicity and Enterprise Criminality: Applying Pinkerton Liability to RICO Actions, 56 MO. L. Rev. 931, 974-75, nn. 189-190 (1991).

"Mediate causation" or "mediate causality" significantly illuminates the underpinnings supporting the application of *Pinkerton* to RICO § 1962(d) conspiracy. The diversity of corporate and individual malefactors, mutually affiliated for purposes of destroying a plaintiff's interests in business and/or property, is the setting rationally justifying application of the *Pinkerton* Doctrine. The commonality of achieving that objective is self evident. As *Brenner* compellingly states:

> Human beings, however, unite to commit crimes far more often than they become another's instrumentality for doing so. It is this circumstance which the *Pinkerton* doctrine and rules of complicity address. Here, "causation by motivation" operates in a more refined form. The *Pinkerton* doctrine and rules of complicity both target the act of affiliating with another or others to achieve a criminal purpose on the premise that this act reinforces and/or exacerbates motivation that already exists on some level. Because it operates on a predisposition to engage in criminal conduct, the affiliative act at issue in these doctrines cannot be a "but for" cause of any criminal results. It can, however, be a "contributing cause" of crimes that result from such an affiliation.

Id.

"Mediate" is used here as an antonym of "immediate." *See, e.g.*, Websters's, *supra* note 132, at 1526 (mediate denotes "an intervening cause . . . not direct or immediate"). Outside this context, criminal law, like torts, insists that causal relationships be "immediate."

Brenner's treatment of *Pinkerton* in the context of examining affiliative liability is noteworthy for consideration by this Court in examining the doctrine's impact on *Salinas*:

> This act [affiliating with another for a criminal purpose] satisfies the criteria for imposing accountability under the traditional criminal law standard of personal liability: affiliating with another for criminal purposes is a voluntary act committed with a culpable mental state, or *mens rea*, that causes a prohibited social harm. (footnote omitted). In either of its guises, as *Pinkerton* liability or as complicitous liability, this act is clearly more culpable than the act that suffices for imposition of vicarious liability in civil law. . . . The only element of criminal liability that is attenuated under *Pinkerton* is causation, which receives the same treatment accorded it under the kindred doctrine of accomplice liability. Liability can attach under either form of affiliative liability without showing that the affiliative act actually caused commission of certain crimes. (footnote omitted). And because the affiliative act is a wrong in itself, liability can attach even though the target crime was not accomplished.

Id.

Substantiating application of *Pinkerton* to RICO § 1962(d) *civil* conspiracy are a series of Ninth Circuit published opinions supporting Petitioners' argument. *United States v. Martinez*, 657 F.3d 811 (9th Cir. 2011) (RICO §1962(d) convictions of Mexican Mafia members affirmed, citing *United States v. Fernandez*, 388 F.3d 1199 (9th Cir. 2004),

which adopted *Smith v. Berg*, 247 F.3d 532 (3rd Cir. 2001)); *United States v. Houston*, 648 F.3d 806, (9th Cir. 2011) (affirming RICO §§ 1962(c)-(d) convictions for commission of VICAR activities; *Pinkerton* jury instruction appropriate); *United States v. Bingham*, 653 F.3d 983 (9th Cir. 2011); (affirming RICO § 1962(d) conspiracy conviction of members of Aryan Brotherhood, applying *Pinkerton*); *United States v. Stinson*, 647 F.3d 1196 (9th Cir. 2011); *United States v. White*, 670 F.3d 1077, 1079 (9th Cir. 2012) (affirming RICO §§ 1962(c)-(d) convictions); and *United States v. Christensen*, 801 F.3d 970, 986 (9th Cir. 2015) (affirming RICO § 1962(d) convictions of white collar professionals).

Petitioners sufficiently alleged injury to their interests in business or property by reason of violation of RICO § 1962. The United States District Court for the Central District of California thoroughly and intimately analyzed the issues involving the appropriate assertion and pleading of RICO predicate offenses, RICO pattern of racketeering activity, and RICO § 1964(c) standing in a complex intellectual property infringement case. The District Court sustained the federal RICO claims in *Bryant v. Mattel*, 2010 U.S. Dist. LEXIS 103851 (C.D. Calif., 2 August 2010), finding the allegations sufficiently pleaded to satisfy claim pleading for purposes of FRCP 8(a), FRCP 9(b), and *Twombly/Iqbal*, and, critically significant in its

analysis, found *Skilling v. United States*, 130 S.Ct. 2896, 2928, 177 L. Ed. 2d 619 (2010), applicable in the *civil* federal RICO context to sustain the 'honest services' fraud predicated federal mail fraud and federal wire fraud RICO claims.

Bryant v. Mattel corroborates Petitioners' argument that by sustaining an injury to an intangible personal property right, the right to engage in business, can, in fact, produce a concrete financial or property loss recognized for RICO § 1964(c) standing purposes. This very argument is constructively analogous to injury to interests in business or property for purposes of sustaining RICO liability predicated upon contravention of the Hobbs Act 18 U.S. Code § 1951 .

The concrete financial and property loss causation argument supporting Petitioners is similarly analyzed in the RICO § 1962(d) conspiracy context in *Bryant v. Mattel*, 2010 U.S. Dist. LEXIS 103851 (C.D. Calif. 2 August 2010)(related case wherein *Pinkerton v. United States*, 328 U.S. 640 (1946), *Salinas v. United States*, 522 U.S. 52 (1997), *Beck v. Prupis*, 529 U.S. 494 (2000), and *Smith v. Berg*, 247 F.3d 532 (3d Cir. 2001), are cited and followed with approval in sustaining the finding of standing to assert RICO § 1962(d) counter claims in the context of complex intellectual property infringement and commercial misappropriation of

trade secrets litigation). The argument compellingly substantiates Petitioners' argument here and in connection with satisfying the RICO standing requisite for Hobbs Act conspiracy to extort RICO predicated claims:

> II. Violation of 18 U.S.C. § 1964(c) Based on Violation of § 1962(d) (RICO Conspiracy)
>
> The FAAC's second counterclaim alleges that "Larian, MGA HK, [MGA Mexico], Bryant, Machado, IGWT 826, [and] Omni 808" conspired to violate § 1962(c) and thereby violated § 1962(d). FAAC P 129.
>
> **A. Conspiracy**
>
> "[A] defendant is guilty of conspiracy to violate § 1962(c) if the evidence showed that she 'knowingly agree[d] to facilitate a scheme which includes the operation or management of a RICO enterprise.'" *United States v. Fernandez,* 388 F.3d 1199, 1230 (9th Cir. 2004) [*45] (quoting *Smith v. Berg,* 247 F.3d 532, 538 (3d Cir. 2001)). "A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense. The partners in the criminal plan must agree to pursue the same criminal objective and may divide up the work, yet each is responsible for the acts of each other." *Salinas v. United*

> *States,* 522 U.S. 52, 63-64, 118 S.Ct. 469, 139 L. Ed. 2d 352 (1997). A conspirator need not have "specific knowledge of or participation in each predicate act conducted by other members" of the conspiracy. *United States v. Yannotti,* 541 F.3d 112, 122 (2d Cir. 2008). "[I]t suffices that he adopt[ed] the goal of furthering or facilitating the criminal endeavor." *Salinas,* 522 U.S. at 65.
>
> Vicarious liability for a co-conspirators independently wrongful overt acts committed in furtherance of the RICO conspiracy is consistent with the long- standing principle that a conspirator should be held liable for the foreseeable consequences [*49] of the unlawful agreement, *i.e.*, overt acts in furtherance of the conspiracy. *See Pinkerton v. United States,* 328 U.S. 640, 647, 66 S.Ct. 1180, 90 L. Ed. 1489 (1946).

2010 U.S. Dist. LEXIS 103851 at ** 44-47, 48-49.

Bryant v. Mattel supports Petitioners' argument in finding satisfaction of the RICO § 1964(c) standing requisite. Petitioners' sufficiently alleged a concrete financial and property injury proximately caused by the commission of racketeering activity.

II. *Judicial Clarity and Universally Consistent Interpretation and Logical Application of Pinkerton, Salinas, and Beck Mandates Review*

The RICO § 1962(d) conspiracy claim was sufficiently alleged under *Salinas v. United States*, 522 U.S. 52, 63-64, 118 S.Ct. 469, 139 L. Ed. 2d 352 (1997). *Salinas* holds that Section 1962(d) makes it unlawful to conspire to violate any of the substantive RICO provisions. A defendant need not agree to individually perform acts amounting to a predicate RICO violation to be liable under § 1962(d). *Smith v. Berg*, 247 F.3d 532, 537 (3d Cir. 2001)(citing *Salinas v. United States*, 522 U.S. 52, 65 118 S. Ct. 469, 139 L.ED.2d 352 (1997)). Rather, *"*a defendant may be held liable for conspiracy to violate section 1962(c) if knowingly agrees to facilitate a scheme which includes the operation or management of a RICO enterprise.*"* *Id.* at 538. Where a defendant is alleged to have conspired with a RICO enterprise to violate § 1962(c) by providing it what would ordinarily be lawful professional services, *"*liability will arise only from services which were purposely and knowingly directed at facilitating a criminal pattern of racketeering activity.*"* *Id.* at 537, n.11. Traditional conspiracy law governs the application of § 1962(d). This holding finds its support *Pinkerton v. United States*, 324 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489 (1946).

This expansive "in furthering or facilitating" under *Salinas* is illustrated in *Kriss v. Bayrock Group LLC*, 2016 WL 7046816 (S.D.N.Y. 2 December 2016)(expressly finding that the pleading requisites governing RICO § 1962(d) conspiracy relief claims are less stringent than those for substantive RICO claims, the court relied upon *Salinas v. United States*, 522 U.S. 52, 65 (1997) to find sufficient agreement*, i.e.,* "In the civil context, a plaintiff must allege that the defendant 'knew about and agreed to facilitate the scheme.'" (quoting *Salinas*, 522 U.S. at 66). Importantly, the court found that the Third Amended Complaint contained factual allegations sufficient to plead that the Salomon Petitioners also knew about and agreed to facilitate the fraudulent scheme, and thus this extensive participation in the alleged scheme supports an inference that the Salomon Petitioners "adopt[ed] the goal of furthering or facilitating the criminal endeavor." *Baisch v. Gallina*, 346 F.3d 366, 376–77 (2d Cir. 2003) (quoting *Salinas*, 522 U.S. at 65). Although the Salomon Petitioners' alleged conduct did not satisfy the conduct element of a substantive RICO violation, as explained above, that does not foreclose liability under a RICO conspiracy claim, relying on *Salinas*, 522 U.S. at 64 ("A person, moreover, may be liable for conspiracy even though he was incapable of committing the substantive offense."). *id.*, at *18). "[A] defendant is guilty of conspiracy to violate §

1962(c) if the evidence showed that she 'knowingly agree[d] to facilitate a scheme which includes the operation or management of a RICO enterprise.'" *United States v. Fernandez,* 388 F.3d 1199, (9th Cir. 2004) [*45] (quoting *Smith v. Berg,* 247 F.3d 532, 538 (3d Cir. 2001)). "A conspiracy may exist even if a conspirator does not agree to commit or facilitate each and every part of the substantive offense. The partners in the criminal plan must agree to pursue the same criminal objective and may divide up the work, yet each is responsible for the acts of each other. *" Salinas v. United States,* 522 U.S. 52, 63-64, 118 S.Ct. 469, 139 L. Ed. 2d 352 (1997). A conspirator need not have "specific knowledge of or participation in each predicate act conducted by other members" of the conspiracy. *United States v. Yannotti,* 541 F.3d 112, 122 (2d Cir. 2008). "[I]t suffices that he adopt[ed] the goal of furthering or facilitating the criminal endeavor." *Salinas,* 522 U.S. at 65. *See also Kriss v. Bayrock Group LLC*, 2016 WL 7046816 (S.D.N.Y. 2 December 2016).

Deere adopted the goal of facilitating and furthering the criminal endeavour by virtue of the relationship Deere had with T-16, NWFM, and American West Bank who took direction from Deere. The underlying objective here was for Deere to benefit, knowing they could purchase the properties for fire sale prices, and Deere acquiescing and ratifying the actions of the latter entities that

depressed and reduced the value of Petitioners' properties by not properly managing those properties and protecting those properties so they could produce maximum crop output.

The Ninth Circuit decision of *Mai Ngoc Bui v. TonPhi Nguyen*, 712 Fed. Appx. 606 (9th Cir. 2017); 2017 WL 4653438 (9th Cir., October 17, 2017), supports the underlying analysis advanced within the petition. In *Bui*, the Court reversed and remanded with instructions to allow Bui another opportunity to amend her complaint, stating that civil RICO is a valid means of recovery for a plaintiff where the statutory requirements are met. *Bui*, *1, *citing Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 493-98 (1985) (civil RICO is to liberally construed). The district court in *Bui* only found one predicate act of wire fraud sufficiently alleged, while the plaintiff there had alleged multiple acts of fraud. The Court found however that the SAC sufficiently pleaded three instances of wire fraud. *Bui,* *2.

This decision is instructive as it illustrates the liberal construction of allowing leave to amend. *Bui,* *3, stating any denials of leaves to amend are "strictly reviewed in light of the strong policy permitting amendment."

Furthermore, this decision demonstrates that a district court can be reversed when, as asserted,

the court abuses its discretion by incorrectly determining (as a threshold issue) that the requisite number of predicate acts of fraud (only two) has not been sufficiently alleged. That is, the *Bui* Court reversed without the need to consider at this stage of the proceedings whether a "pattern of racketeering activity" will ultimately be adequately alleged. *Bui*, *3. *See Cervantes Orchards & Vineyards LLC v. American West Bank LLC,* 2015 WL 4429054, *7 (E.D. Wash, July 17, 2015) (Petitioners found to have alleged only one predicate act instead of the requisite two acts); *Cervantes Orchards & Vineyards et al. v. Deere & Company*, 2015 WL 4210978, *8 (E.D. Wash., July 10, 2015) (Deere not vicariously liable for alleged predicate activity of fraud by T-16 or others). This position is diametrically inapposite with, and patently incongruous to, prevailing Ninth Circuit judicial authority finding expansive application of RICO *respondeat superior* as affirmatively expressed by *Brady v. Dairy Fresh Products Co.*, 974 F.2d 1149 (9th Cir. 1992). See *Harmoni International Spice Inc. v. Hume*, 914 F.3d 648 (9th Cir. 2019).

III. *The Cervantes Decision Is Adversely Challenged and Negatively Commented*

Petitioners duly note that the District Court Cervantes decision is negatively commented upon and critically questioned by other federal courts. The United States District Court for the District of New

Jersey entered an opinion and order in August, 2017, specifically addressing particular pleading issues raised by Petitioners challenging the sufficiency of federal RICO claims predicated upon federal mail fraud and federal wire fraud statutory contraventions, summarily jettisoned Cervantes' reasoning and decision relative to settlement agreement concealment fraud allegations. The decision of *In re Insurance Brokerage Antitrust Litigation*, 2017 WL 3642003 (D.N.J., August 23, 2017), denying Petitioners' motion to dismiss a civil RICO action, is significantly relative herein.

In *Cervantes Orchards & Vineyards, LLC, et.al., v. American West Bank*, et.al., 2015 WL 4429054, at *7 (E.D. Wash. July 17, 2015). the District Court did not find allegations regarding Petitioners' concealment of a Settlement Agreement adequately pleaded, stating, in part, that the existence of a confidentiality provision in the Settlement Agreement to show intent to conceal was not plausible because "settlement agreements commonly include confidentiality provisions." Cervantes, at *7. Petitioners in *In re Insurance* sought to rely on Cervantes to show that confidentiality agreements "are equally consistent with standard business practices and do not plausibly imply any scheme to defraud." *In re Insurance*, supra, 2017 WL 3642033, *8, ftn. 8:

The Court also rejects Petitioners' argument that the confidentiality agreements "are equally consistent with standard business practices and do not plausibly imply any scheme to defraud." (ECF No. 2788 at 6, hereafter, "Defs.' Reply Br."). The case Petitioners cite, *Cervantes Orchards & Vineyards, LLC v. Am. W. Bank*, held that a confidentiality provision in a settlement agreement did not, by itself, evince an intent to conceal the settlement agreement from a bankruptcy court because the district court could take "judicial notice of the fact that settlement agreements commonly include confidentiality provisions." See No. 1:14-cv-3125-RMP, 2015 WL 4429054, at *7 (E.D. Wash. July 17, 2015). Here, Petitioners plead both the existence of confidentiality agreements and the brokers' affirmative misrepresentations about their roles in the marketplace-misrepresentations that their clients may have questioned had the confidentiality agreements not kept the brokers from disclosing the extent of the commissions they received. See supra Part II.A.3. Moreover, at this stage, the Court has no basis to find that the confidentiality agreements in this case constitute "standard business practices" outside of the Lloyd's Market.

The *In re Insurance* court rejected this

> argument, stating that confidentiality agreements, there coupled with affirmative misrepresentations by brokers about their roles in marketplaces, were relevant in determining their intent to conceal, and such confidentiality agreements, in that case, did not constitute 'standard business practices." *In re Insurance*, supra, ftn. 8.

Similar to the confidentiality agreements in *In re Insurance*, the confidentiality provision in the subject Settlement Agreement, coupled with Cervantes's allegations to the court of mismanagement of properties by co-Respondents T-16 and NWFM (under the "direction" of DCI [Deere Credit, Inc.]), is entirely "plausible" and probative as to Respondents' intent to conceal the agreement from the bankruptcy court.

Accordingly, the critical assessment and negative commentary registered by another federal court of Cervantes in this particular context, relative to satisfying federal pleading requisites applicable to federal RICO litigation, rationally justifies granting the petition and entry of an appropriate order therein.

IV. *Pinkerton Rationally Justifies Expansive Application Under RICO §1962(d) Through Mediate Causation*

Under *Pinkerton*, an agreement to commit a crime or crimes is a prerequisite for liability. If such an agreement existed, anyone who joined it is liable for offenses other conspirators commit to advance the objectives of their agreement. The act of agreeing to the commission of certain crimes suffices; it is not necessary that one commit any affirmative act to advance the realization of the goals of the conspiracy. Complicity differs in two respects. First, one can "aid and abet" the commission of a crime without entering into an agreement to this effect. Second, to incur aiding and abetting liability, it is not sufficient to associate oneself with a criminal venture; it is also necessary to commit an affirmative act that is intended to further the commission of a substantive offense. Still, *Pinkerton* recognizes affiliative liability where an individual is deemed to have committed a substantive offense even though that person was not present at its commission and did not physically consummate it. Both *Pinkerton* and rules of complicity accomplish this through a singular vehicle: they attribute causation for crimes that are physically perpetrated by another on the basis of a unique "bad act' - that of entering into a criminal affiliation. The premise of these doctrines is that the act of aligning oneself with others to pursue a criminal purpose has causal significance. The causal import of this act is an instance of "mediate causation."

Ninth Circuit judicial authorities broadly construe RICO conspiracy law. See *United States v. Fernandez*, 388 F.3d 1199 (9th Cir. 2004)(adopting and following *Smith v. Berg*, 247 F.3d 532 (3rd Cir. 2001), expanding application of RICO conspiracy law). RICO conspiratorial liability could properly be ascribed and established under both *Pinkerton* and the concept of mediate causation.

Petitioner's RICO § 1962(d) legal arguments are furthermore substantiated and soundly corroborated by the reasoning of the United States Court of Appeals for the Third Circuit in *Smith v. Berg*, 247 F.3d 532 (3rd Cir. 2001). *Smith* is especially important here. Racial minorities and ethnic minorities, selectively targeted by corporate financial institutions acting in concert with real estate developers and brokers, were victimized by and through predatory mortgage lending practices, initiated a RICO § 1962(c)-(d) action seeking damage relief. Summarily denying defendants' FRCP 12(b)(6) dismissal motion, the resulting interlocutory appeal presented significantly critical issues of RICO conspiracy law. *Smith* liberally construed *Salinas v. United States*, 522 U.S. 52 (1997) and rules that *Reves v. Ernst & Youn*g, 507 U.S. 170 (1993) is inapplicable to RICO § 1962(d) claims. More importantly is the appellate court's affirmative expression that a RICO conspiracy claim can be maintained against a non-acting RICO co-conspirator where a plaintiff alleges that any one

RICO co-conspirator engaged in conduct that constitutes "racketeering activity" resulting in injury. The court found that the Supreme Court in *Beck v. Prupis*, 529 U.S. 494, 120 S. Ct. 1608, 146 L.Ed.2d 561 (2000), did not prohibit this particular pleading approach under RICO § 1962(d):

> This case presents two questions: First, in light of the Supreme Court's decision in *Salinas v. United States*, 522 U.S. 52, 118 S. Ct. 469 (1997), may liability under the federal Racketeer Influenced and Corrupt Organizations Act ("RICO") conspiracy statute codified at 18 U.S.C. § 1962(d) be limited to those who would, on successful completion of the scheme, have participated in the operation or management of a corrupt enterprise? Second, did the Supreme Court's more recent decision in *Beck v. Prupis*, 529 U.S. 494, 120 S. Ct. 1608, 146 L.Ed.2d 561 (2000), limit application of its holding in Salinas to criminal cases? Ruling against the Petitioners on both issues, we will affirm the Orders of the District Court for the Eastern District of Pennsylvania. In doing so, we hold that any reading of *United States v. Antar*, 53 F.3d 568 (3d Cir. 1995), to the effect that conspiracy liability under section 1962(d) extends only to those who have conspired personally to operate or manage the corrupt enterprise, or otherwise suggesting that conspiracy liability is limited to those also

> liable, on successful completion of the scheme, for a substantive violation under section 1962(c), is inconsistent with the broad application of general conspiracy law to section 1962(d) as set forth in *Salina*s.

247 F.3d at 534.

The Ninth Circuit recognized and applied *Smith v. Berg*, 247 F.3d 532 (3rd Cir. 2001)135 and affirmatively followed and with approval in *United States v. Fernandez*, 388 F.3d 1199 (9th Cir. 2004). *Fernandez*, one of six consolidated appeals involving federal RICO conspiracy and related RICO issues, affirmatively overruled the Ninth Circuit's earlier ruling in *Neibel v. Trans World Assurance Co*., 108 F.3d 1123 (9th Cir. 1997), addressing RICO § 1962(d), as inapposite and inconsistent with subsequent United States Supreme Court authorities construing that provision as expressed in *Salinas v. United State*s, 522 U.S. 52 (1997) and *Beck v. Prupis*, 529 U.S. 494 (2000).

More importantly, the Ninth Circuit recognized ***Neibe***l's legal reasoning rested upon an earlier Third Circuit decision, *United States v. Antar*, 53 F.3d 568, 581 (3rd Cir. 1995), and that Antar was overruled by a latter Third Circuit decision, *Smith v. Berg*, 247 F.3d 532 (3rd Cir. 2001), which squarely addressed RICO conspiracy law in light of *Salinas* **and** *Beck*. Affirming the RICO conspiracy convictions, the Ninth Circuit expressly repudiated

Neibel and announced recognition of *Smith v. Berg*, 247 F.3d 532 (3rd Cir. 2001):

> We now agree with the Third Circuit that the rationale underlying its distinction in *Antar*, and our holding in *Neibel*, is no longer valid after the Supreme Court's opinion in *Salinas*. Accordingly, this case presents a situation similar to *Miller v. Gammie*, in which we held that "where the reasoning or theory of our prior circuit authority is clearly irreconcilable with the reasoning or theory of intervening higher authority, a three-judge panel should consider itself bound by the later and controlling authority, and should reject the prior circuit opinion as having been effectively overruled." 335 F.3d 889, 893 (9th Cir. 2003) (en banc). We adopt the Third Circuit's *Smith* test, which retains *Reves*' operation or management test in its definition of the underlying substantive § 1962(c) violation, but removes any requirement that the defendant have actually conspired to operate or manage the enterprise herself. Under this test, a defendant is guilty of conspiracy to violate § 1962(c) if the evidence showed that she "knowingly agree[d] to facilitate a scheme which includes the operation or management of a RICO enterprise." ***Smith***, 247 F.3d at 538.

388 F.3d at 1229.

Accordingly, predicated upon the above analysis and argument, the District Court erred, and the panel did not consider, these significant legal arguments expressly addressing the RICO conspiracy law, *Pinkerton*, and the concept of mediate causation to serve as viable legal instrumentalities and effective vehicles to sustain the good faith based RICO conspiracy damage relief claim, the petition should be granted therein and entry of an appropriate order thereon.

The decision significantly conflicts with and is patently inconsistent with *Pinkerton*, *Salinas*, and *Beck*, as well as the established positions of the First Circuit, Second Circuit, Third Circuit, Fourth Circuit, Fifth Circuit, Sixth Circuit, Seventh Circuit, Eighth Circuit, Tenth Circuit, Eleventh Circuit and District of Columbia Circuit and conflicts with prevailing Ninth Circuit for purposes of Supreme Court Rule 10(a), (c). First Circuit: *United States v. Rodriguez-Torres*, 2019 US. App. LEXIS 28035 (1st Cir., 18 September 2019); *United States v. Cianci*, 378 F.3d 71 (1st Cir. 2004); Second Circuit: *United States v. Zichettello*, 208 F.3d 72 (2nd Cir. 2000) and *Chevron Corp. v. Donziger*, 833 F.3d 74 (2nd Cir. 2016); Third Circuit: *Smith v. Berg*, 247 F.3d 532 (3rd Cir. 2001); *In re Insurance Brokerage Antitrust Litigation*, 618 F.3d 300 (3rd Cir. 2010); *United States v. Fattah*, 914 F.3d 112 (3rd Cir. 2019); and, *United States v. Fattah*, 902 F.3d 197 (3rd Cir. 2018)

; Fourth Circuit: *United States v. Mouzone*, 687 F.3d 207 (4th Cir. 2012); Fifth Circuit: *Waste Management of Louisiana, LLC v. River Birch Incorporated*, 920 F.3d 958 (5th Cir. 2019); Sixth Circuit: *United States v. Ledbetter*, 929 F.3d 338 (6th Cir. 2019); Seventh Circuit: *United States v. Volpendesto*, 746 F.3d 273 (7th Cir. 2014) ;*United States v. Tello*, 687 F.3d 785 (7th Cir. 2012); and, *United States v. Schiro*, 679 F.3d 521 97th Cir. 2012); Eighth Circuit: *United States v. Henley*, 766 F.3d 893 (8th Cir. 2014); Tenth Circuit: *United States v. Cornelius*, 696 F.3d 1307 (10th Cir. 2012) and *United States v. Harris*, 695 F.3d 1125 (10th Cir. 2012); Eleventh Circuit: *United States v. Pipkins*, 378 F.3d 1281 (11th Cir. 2004), and; District of Columbia Circuit: *United States v. Wilson*, 605 F.3d 985 (D.C. Cir. 2010); *United States v. Moore*, 651 F.3d 397 (D.C. Cir. 2011). .

Critically significant, the decision directly conflicts with, and is patently inconsistent with, established Ninth Circuit authority construing *Pinkerton*, *Salinas*, and *Beck*. *See United States v. Fernandez*, 388 F.3d 1199 (9th Cir. 2004)(adopting and following *Smith v. Berg*, 247 F.3d 532 (3rd Cir. 2001)); *United States v. Fiander*, 547 F.3d 1036 (9th Cir. 2008); *United States v. Bingham*, 653 F.3d 983 (9th Cir. 2011); *United States v. Martinez*, 657 F.3d 811 (9th Cir. 2011); *United States v. Stinson*, 647 F.3d 1196 (9th Cir. 2011); *United States v. Houston*, 648 F.3d 806 (9th Cir. 2011); *United States v. Shryock*, 342 F.3d 948 (9th Cir. 2003); *United States*

v. White, 670 F.3d 1077 (9th Cir. 2012); *United States v. Christensen*, 828 F.3d 763, 776 (9th Cir. 2015); *United States v. Christensen*, 624 F. App'x 466, 473-74 (9th Cir. 2015); *United States v. Young*, 720 Fed.Appx. 846 (9th Cir. 2017); 2017 U.S. App. LEXIS 26858 (9th Cir., 27 December 2017); 2017 WL 6603511 (9th Cir., 27 December 2017); *United States v. Flores*, 725 Fed. Appx. 478 (9th Cir., 14 February 2018); *Harmoni International Spice, Inc., v. Hume*, 914 F.3d 648 (9th Cir. 2019); and, *Bui v. Nguyen*, 712 Fed. Appx. 606 (9th Cir. 2017). See *United States v. Collazo*, --- F.3d --- (9th Cir. 2019); 2019 U.S. App. LEXIS 28328 (9th Cir., 19 September 2019); 2019 WL 450892 (9th Cir., 19 September 2019)(*en banc* hearing ordered; appeal from jury convictions and sentences for *Pinkerton* Doctrine premised racketeering (RICO) conspiracy and conspiracy to distribute controlled substances; argument to be calendared the week of 13 January 2020, in Pasadena, California).

Judicial clarification is warranted to achieve judicial symmetry in this significant area of RICO jurisprudence. Accordingly, certiorari should be granted.

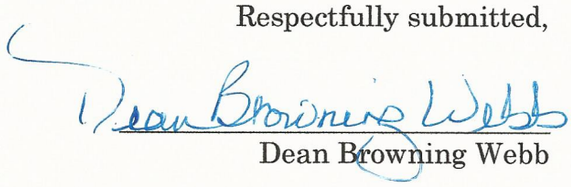
Certiorari is warranted inasmuch as judicial symmetry and rational justification belying expansive application and liberal interpretation of *Pinkerton*, *Salinas*, and *Beck* is both consonant and

consistent with the RICO Liberal Construction Clause.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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November 22, 2019

APPENDIX

TABLE OF CONTENTS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-35366

CERVANTES ORCHARDS & VINEYARDS, LLC, a Washington limited liability corporation; et al.,
Plaintiffs,
and
DEAN BROWNING WEBB; SCOTT ERIK STAFNE,
Appellants,
v.
DEERE CREDIT, INC., a corporation; etal.,
Defendants-Appellees.

On Appeal from the United States District Court
Eastern District of Washington at Yakima
District Court No. 1:14-cv-03215-RMP

Before: Michael Daly Hawkins, *Circuit Judge,* M. Margaret McKeown, *Circuit Judge* and Morgan B. Christen*, Circuit Judge*

Filed: July 5, 2019

ORDER

The panel votes to deny the petitions for rehearing. The full court has been advised of the petitions for rehearing and rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for panel rehearing and the petitions for rehearing en banc (Dkt. 45, 46) are denied.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-35366

CERVANTES ORCHARDS & VINEYARDS, LLC, a Washington limited liability corporation; et al.,
Plaintiffs,
and
DEAN BROWNING WEBB; SCOTT ERIK STAFNE,
Appellants,
v.
DEERE CREDIT, INC., a corporation; et al.,
Defendants-Appellees.

On Appeal from the United States District Court Eastern District of Washington at Yakima District Court No. 1:14-cv-03215-RMP

Before: Michael Daly Hawkins, *Circuit Judge,* M. Margaret McKeown, *Circuit Judge* and Morgan B. Christen*, Circuit Judge*

Filed: May 22, 2019

MEMORANDUM DISPOSITION [*]

Dean Browning Webb and Scott Erik Stafne, who represented the plaintiffs in the merits portion of the underlying lawsuit, appeal the district court's assessment of sanctions pursuant to Federal Rule of

Civil Procedure 11.[1] Because the parties are familiar with the facts, we do not recite them here. We have jurisdiction under 28 U.S.C. § 1291, and we review for abuse of discretion the district court's award of Rule 11 sanctions. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990).

We affirm.

In a previous appeal, we affirmed the district court's imposition of Rule 11 sanctions. Cervantes Orchards & Vineyards, LLC v. Deere & Co., 731 F. App'x 570, 573-74 (9th Cir. 2017). However, we vacated the attorney's fees award and remanded for "further explanation regarding the basis, amount, and reasonableness of the attorney's fees."

On remand, the district court fully explained the deterrent value of attorney's fees and how it calculated the amount. The court clarified that the plaintiffs had not prevailed on any issues of substance, so it declined to exclude any fees based on the plaintiffs' claimed success. Importantly, it reduced its prior award by carefully excluding fees incurred before the plaintiffs filed the offending pleading.

These determinations and calculations were well within the district court's discretion and amply explained. The attorneys' conduct warranted

[1] Besides this narrow issue, the issues Appellants raise on appeal are foreclosed.

deterrence even as to Webb, whose suspension from the practice of law lasts only eighteen months.[2] To ensure it awarded only the relevant, reasonable fees, the district court thoroughly parsed the fee submission.

We deny the request for attorney's fees on appeal (Dkt. 19).

AFFIRMED.

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[2] We grant the request for judicial notice of Webb's notice of suspension (Dkt. 8), the request for judicial notice of a sanctions award against Stafne Law Firm (Dkt. 18), and the motion to file a corrected answering brief (Dkt. 38).

*This publication is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-35675
No. 16-35220

CERVANTES ORCHARDS & VINEYARDS, LLC, a Washington limited liability corporation; et al.,
Plaintiffs-Appellants,

v.

DEERE & COMPANY, a corporation; et al.,
Defendants-Appellees.

CERVANTES ORCHARDS & VINEYARDS, LLC, a Washington limited liability corporation; et al.,
Plaintiffs-Appellants,

DEAN BROWNING WEBB and SCOTT ERIK STAFNE,
Appellants,

v.

DEERE & COMPANY, a corporation; et al.,
Defendants-Appellees.

On Appeal from the United States District Court
Eastern District of Washington at Yakima
District Court No. 1:14-cv-03215-RMP

Before: Michael Daly Hawkins, *Circuit Judge,* M. Margaret McKeown, *Circuit Judge* and Morgan B. Christen*, Circuit Judge*

Filed: March 5, 2018

ORDER

The panel votes to deny the Petition for Rehearing. The full court has been advised of the Petition for Rehearing and Rehearing En Banc and no judge has requested a vote on whether to rehear the matter En Banc. Fed. R. App. P. 35.

The Petition for Panel Rehearing and the Petition for Rehearing En Banc are DENIED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15-35675
No. 16-35220

CERVANTES ORCHARDS & VINEYARDS, LLC, a Washington limited liability corporation; et al.,
Plaintiffs-Appellants,

v.

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Defendants-Appellees.

CERVANTES ORCHARDS & VINEYARDS, LLC, a Washington limited liability corporation; et al.,
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Appellants,

v.

DEERE & COMPANY, a corporation; et al.,
Defendants-Appellees.

On Appeal from the United States District Court
Eastern District of Washington at Yakima
District Court No. 1:14-cv-03215-RMP

Before: Michael Daly Hawkins, *Circuit Judge,* M. Margaret McKeown, *Circuit Judge* and Morgan B. Christen*, Circuit Judge*

Submitted: December 5,2017**
Filed: December 15, 2017

MEMORANDUM*

Cervantes Orchards and Vineyards, along with Cervantes Nurseries, Cervantes Packing & Storage, Manchego Real, Jose G. Cervantes, and Cynthia C. Cervantes, (collectively "Cervantes"),[1] appeals the district court's dismissal of its RICO and civil rights claims against Deere & Company, Deere Credit, John Deere Capital Corporation, John Deere Financial, FKA FPC Financial, and Deere Credit Services ("Deere"), American West Bank, T-16 Management Company ("T-16"), Gary and Linda Johnson ("the Johnsons"), Robert and Michelle Wyles ("the Wyles"), Northwest Management & Realty Services ("NWFM"), and SKBHC Holdings, (collectively "defendants"). Dean Webb and Scott Stafne appeal the district court's order sanctioning them under Federal Rule of Civil Procedure 11 and assessing attorney's fees. Because the parties are familiar with the facts, we do not recite them here. We have jurisdiction under 28 U.S.C. § 1291. We affirm in part, vacate in part, and remand to the district court for further findings.

1. Dismissal of RICO and civil rights claims

Cervantes argues that the district court erred in dismissing its claims of racketeering, extortion, and bankruptcy fraud in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"),

[1] For simplicity's sake, we refer to these collective entities in the singular as "Cervantes."

and for civil rights violations based on racial discrimination. See 18 U.S.C. §§ 1961, 1962; 42 U.S.C. §§ 1981, 1982, and 1985(3).

"We review de novo the district court's decision to grant [a] motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)." Manzarek v. St. Paul Fire & Marine Ins. Co., 519 F.3d 1025, 1030 (9th Cir. 2008). We review for abuse of discretion a district court's decision to dismiss with prejudice. Okwu v. McKim, 682 F.3d 841, 844 (9th Cir. 2012).

The district court did not err in dismissing Cervantes' extortion-based RICO claims. Cervantes failed to allege specific facts to support its extortion allegations. See Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). The defendants did not acquire Cervantes' property through fear, threatened force, or coercion, but foreclosed after Cervantes missed payment deadlines. See United Bhd. of Carpenters & Joiners of Am. v. Bldg. & Const. Trades Dep't, AFL-CIO, 770 F.3d 834, 838 (9th Cir. 2014) ("Courts must . . . differentiate between legitimate use of economic fear – hard bargaining – and wrongful use of such fear – extortion."). The defendants complied with a bankruptcy plan that Cervantes itself proposed, and provided forbearance opportunities to Cervantes before foreclosing. [2]

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[2] That the defendants informed Cervantes that it would face "immediate problems," if it did not pay its debts was not extortion but a demand for lawful payment of an overdue obligation. "Threats of economic harm made to obtain property from another, are not generally considered 'wrongful,'" as required to establish RICO liability, "where

Nor did the district court err in dismissing Cervantes' fraud-based RICO claims. RICO predicate fraud claims must satisfy the heightened pleading standards of Federal Rule of Civil Procedure 9(b). See Moore v. Kayport Package Exp, Inc., 885 F.2d 531, 541 (9th Cir. 1989). Cervantes failed to allege specific facts that would support its allegations that the defendants committed bankruptcy fraud. Cervantes claimed that defendant NWFM "filed a false sworn declaration in the bankruptcy proceeding," but Cervantes failed to specify the contents of the declaration, or explain in what way the declaration was false. Cervantes' implausible theory that the defendants conspired to conceal from the bankruptcy court a settlement agreement that would have revealed a plan to decrease the value of the defendants' own collateral was similarly unsupported by specifics.

The district court did not err in dismissing Cervantes' discrimination claims. Cervantes alleged "no facts supporting [its] conclusion that the [defendants'] actions were driven by discrimination." In "the face of [the defendants'] obvious explanations for their actions in attempting to collect payment from [Cervantes] for outstanding debts, [Cervantes] offered only conclusory allegations [of discrimination]."

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the alleged extortioner has a legitimate claim to the property obtained." Levitt v. Yelp! Inc., 765 F.3d 1123, 1130 (9th Cir. 2014) (citation and internal quotation marks omitted).

2. Judicial bias

Cervantes' claims of judicial bias are unavailing. Cervantes fails to offer evidence that the district judge's "impartiality might reasonably be questioned." Pau v. Yosemite Park and Curry Co., 928 F.2d 880, 884 (9th Cir. 1991). Cervantes also failed to move for disqualification below. See E & J Gallo Winery v. Gallo Cattle Co., 967 F.2d 1280, 1295 (9th Cir. 1992). Indeed, Cervantes appears to rely entirely on the judge's adverse rulings in claiming bias, and we have held that judicial rulings alone "almost never constitute valid basis for a bias or partiality motion." United States v. Hernandez, 109 F.3d 1450, 1454 (9th Cir. 1997) (citation omitted).

3. Rule 11 sanctions

We review for abuse of discretion the district court's decision to impose Rule 11 sanctions. Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990). Rule 11 prohibits attorneys from filing complaints for "any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation." Fed. R. Civ. P. 11(b)(1). "The district court is best acquainted with the local bar's litigation practices and thus best situated to determine when a sanction is warranted to serve Rule 11's goal of specific and general deterrence." Cooter, 496 U.S. at 404.

The district court did not abuse its discretion in ordering sanctions "to deter [Webb and Stafne] from again filing such a baseless lawsuit." Webb and

Stafne began this lawsuit in district court by filing a 337-page complaint asserting 60 claims for relief against over 30 defendants. Webb and Stafne filed nearly 1000 pages of complaint papers in total, including a 143-page First Amended Complaint accompanied by a 469-page RICO case statement. The district court described the original complaint as a "quagmire of wordy and repetitious verbiage."

Webb and Stafne's filings were "both baseless and made without a reasonable and competent inquiry." Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1362 (9th Cir. 1990) (en banc). Webb and Stafne have been litigating on behalf of Cervantes against the defendants for over a decade in the bankruptcy and district courts, and in this litigation have consistently failed to support their claims with specific facts. The defendants have spent "hundreds of thousands of dollars in legal fees" defending against Webb and Stafne's allegations. The Wyles and Deere defendants complied with Rule 11's safe harbor requirements. And the district court notified Webb and Stafne in December, 2014 that "they may be held liable for unreasonably and vexatiously multiplying the proceedings of this case."

Webb and Stafne subsequently asserted claims in their Second Amended Complaint that were plainly barred by applicable statutes of limitations.[3]

Webb and Stafne claim that the district court abused its discretion in limiting their Second Amended

[3] We deny the Wyles' request to sanction Webb and Stafne again on appeal.

Complaint to thirty pages, but fail to identify facts that they would have alleged to support their allegations had they been given more space.[4] Even in 30 pages, they should have been able to state the key predicate facts to support their RICO claims, and their prior prolix complaints lacked such facts. Webb and Stafne were warned repeatedly that they could face sanctions if they failed to allege specific facts to support their claims, and they failed to furnish such specifics in nearly 1000 pages of complaint papers.

4. Conduct beyond the Second Amended Complaint and amount of fees

We review for abuse of discretion the district court's decision to award attorney's fees as part of a Rule 11 sanction. Cooter, 496 U.S. at 405. "Generally, a district court's order on attorney's fees may be set aside if the court fails to state reasons for its decision." Mattel, Inc. v. Walking Mountain Prods., 353 F.3d 792, 815 (9th Cir. 2003). And "Rule 11 sanctions are limited to 'paper[s]' signed in violation of the rule. Conduct in depositions, discovery meetings of counsel, oral representations at hearings, and behavior in prior proceedings do not fall within the ambit of Rule 11." See Christian v. Mattel, Inc., 286 F.3d 1118, 1131 (9th Cir. 2002).

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[4] Webb and Stafne's argument that they were "not afforded due process before the imposition of sanctions . . . itself borders on the frivolous." Buster v. Greisen, 104 F.3d 1186, 1190 (9th Cir. 1997). Webb and Stafne received "notice that the court [was] considering sanctions and [had] an opportunity to be heard in opposition." Id. Due process required no more. Pan-Pacific and Low Ball Cable Television Co. v. Pacific Union Co., 987 F.2d 594, 597 (9th Cir. 1993).

Here, the district court failed to adequately explain its reasons for awarding $18,744.00 to the Wyles defendants, and $111,771.53 to the Deere defendants. The record does not illuminate why these amounts were appropriate; notably, the sanctions award includes fees incurred prior to the filing of the Second Amended Complaint, and incurred for issues on which Cervantes prevailed. Because the district court awarded fees that did not result from the Second Amended Complaint and did not explain why the sanction it awarded was "limited to what suffices to deter" frivolous filings in the future, Fed. R. Civ. P. 11(c)(4), we must vacate the district court's attorney's fees award. Id. We remand for further explanation regarding the basis, amount, and reasonableness of the attorney's fees.

AFFIRMED in part, VACATED in part, and REMANDED. Each party shall bear its own costs and fees on appeal.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. 1:14-CV-3125-RMP

CERVANTES ORCHARDS & VINEYARDS, LLC, a Washington limited liability corporation; CERVANTES NURSERIES, LLC, a Washington limited liability corporation; CERVANTES PACKING & STORAGE, LLC, a Washington limited liability corporation; MANCHEGO REAL, LLC, a Washington limited liability corporation; JOSE G. CERVANTES and CYNTHIA C. CERVANTES, individually, and upon behalf of their community property marital estate; *Plaintiffs*,

v.

DEERE & COMPANY, a corporation; DEERE CREDIT, INC., a corporation; JOHN DEERE CAPITAL CORPORATION, a corporation; JOHN DEERE FINANCIAL FSB, a corporation formerly known as FPC Financial; DEERE CREDIT SERVICES, INC., a corporation; AMERICAN WEST BANK, a corporation; SKBHC HOLDINGS, LLC, a Washington limited liability corporation; T-16 MANAGEMENT CO, LTD, a Washington corporation; GARY JOHNSON and LINDA JOHNSON, individually and upon behalf of their community property marital estate; NW MANAGEMENT REALTY SERVICES, INC, a Washington corporation also known as Northwest Farm Management Company; and ROBERT WYLES and MICHELLE WYLES, individually and upon behalf of their community property marital estate,

Defendants.

Before: ROSANNA MALOUF PETERSON
UnitedStates District Court Judge

Filed: February 26, 2016

ORDER GRANTING DEFENDANTS ROBERT AND MICHELLE WYLES' RULE 11 MOTION FOR REASONABLE ATTORNEY FEES AND COSTS

BEFORE THE COURT is Defendants Robert and Michelle Wyles' (Wyles Defendants) Rule 11 Motion for Reasonable Attorney Fees and Costs, ECF No. 142. The Court's prior orders discuss the facts of this case, which will not be repeated in detail here. See ECF Nos. 128, 132.

BACKGROUND

Plaintiffs constitute a farming group that grows crops including apples, pears, grapes, and cherries. See ECF No. 74 at 4. Plaintiffs asserted that multiple Defendants engaged in a broad scheme of misconduct involving racketeering, extortion, fraud, and civil rights violations. See id. at 17-24. The Court eventually dismissed all Defendants from this action, concluding that Plaintiffs had failed to state a claim in their Second Amended Complaint. See ECF Nos. 128, 132. After Plaintiffs filed the Second Amended Complaint, but prior to its dismissal, Wyles Defendants served Plaintiffs' attorneys with a request to dismiss the Wyles Defendants voluntarily because they argued that Plaintiffs' claims lacked any legitimate basis in law or fact. See ECF No. 143, Ex. B. When Plaintiffs failed to do so, the Wyles Defendants served Plaintiffs' counsel with notice

that the Wyles would seek sanctions pursuant to Federal Rule of Civil Procedure 11 if Plaintiffs did not file a motion to dismiss the Wyles within 21 days after service of the notice. See ECF No. 143, Ex. C.[1] Plaintiffs did not move to dismiss the Wyles voluntarily.

ANALYSIS

Federal Rule of Civil Procedure 11 provides that by presenting a pleading to a court, an attorney "certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances[,]" the pleading meets certain minimal standards. Fed. R. Civ. P. 11(b). Among other assurances, the attorney certifies that the "legal contentions are warranted by existing law or by a nonfrivolous argument" for changing the law, and that "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery . . . ." Fed. R. Civ. P. 11(b)(2), (3).

The failure to comply with Rule 11 is sanctionable. Fed. R. Civ. P. 11(c). After providing notice and the opportunity to respond, a "court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation."

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[1] Prior to filing this motion, Counsel for the Wyles Defendants served two more follow up letters to Plaintiffs' counsel. See ECF No. 143 Exs. D, E.

Fed. R. Civ. P. 11(c)(1). Pursuant to Rule 11's "safe harbor" provision, a party seeking Rule 11 sanctions must serve a motion for sanctions on the offending party and not file the motion "if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets." Fed. R. Civ. P. 11(c)(2).

As explained in the Order Granting Robert and Michelle Wyles' Motion to Dismiss, ECF No. 132,[2] some of Plaintiffs' key legal contentions in the Second Amended Complaint are not supported by existing law and this Court dismissed Plaintiffs' claims for failure to state a claim upon which relief could be granted. See ECF No. 132. For example, Plaintiffs alleged a pattern of racketeering activity under 18 U.S.C. § 1962(c), but only alleged one predicate RICO violation that potentially could be seen as plausible. See ECF No. 132 at 16-17. Additionally, even that one predicate offense did not involve the Wyles Defendants. See id. at 12-13.

The Wyles Defendants provided Plaintiffs with necessary notice of their intent to seek sanctions, but Plaintiffs failed to voluntarily dismiss their Second Amended Complaint that failed to meet the standards of Rule 11.

Pursuant to Rule 11, the Court finds that an award of the Wyles Defendants' reasonable attorney fees in defending against this action is an appropriate

[2] Additional motions were ruled upon in this Court Order and the case was administratively closed. See ECF No. 132.

sanction to deter Plaintiffs' counsel from filing such a baseless lawsuit in the future. Therefore, the Court will sanction Scott Stafne and Dean Browning Webb, attorneys at the law firm of Stafne & Trumbull, PLLC. See ECF No. 74 at 25-26.

Additionally, the Court has reviewed the Wyles' defense counsel's arguments regarding the alleged amount of attorney's fees, and finds it to be reasonable. The Court will enter Judgment in favor of Wyles Defendants in the amount of $18,744.00.

Accordingly, **IT IS HEREBY ORDERED**:

1. Defendants Robert and Michelle Wyles' Rule 11 Motion for Reasonable Attorney Fees and Costs, **ECF No. 142**, is **GRANTED**.

2. The Clerk of the Court is directed to enter judgment in favor of Robert Wyles and Michelle Wyles, and against attorneys Scott Stafne and Dean Browning Webb, jointly and severally, in the amount of $18,744.00.

The District Court Clerk is directed to enter this Order and provide copies of this Order and Judgment to counsel.

DATED this 26th day of February 2016.

/s/ Rosanna Malouf Peterson
ROSANNA MALOUF PETERSON
United States District Court Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF
WASHINGTON

No. 1:14-CV-3125-RMP

CERVANTES ORCHARDS & VINEYARDS, LLC, a Washington limited liability corporation; CERVANTES NURSERIES, LLC, a Washington limited liability corporation; CERVANTES PACKING & STORAGE, LLC, a Washington limited liability corporation; MANCHEGO REAL, LLC, a Washington limited liability corporation; JOSE G. CERVANTES and CYNTHIA C. CERVANTES, individually, and upon behalf of their community property marital estate;

Plaintiffs,

v.

DEERE & COMPANY, a corporation, et al.,

Defendants.

Before: ROSANNA MALOUF PETERSON,
Chief United States District Court Judge

Filed: August 12, 2015

ORDER GRANTING DEERE DEFENDANTS'
MOTION FOR SANCTIONS

Before the Court is the Deere Defendants' Motion for Sanctions, ECF No. 112.[1] The Court's prior orders discuss the facts of this case, which will not be repeated in detail here. See ECF Nos. 128, 132.

BACKGROUND

Plaintiffs constitute a farming group that grows crops including apples, pears, grapes, and cherries. ECF No. 74 at 4. Plaintiffs assert that multiple Defendants engaged in a broad scheme of misconduct involving racketeering, extortion, fraud, and civil rights violations. See ECF No. 74 at 17-24. The Court dismissed all Defendants from this action, concluding that Plaintiffs had failed to state a claim in their Second Amended Complaint. ECF Nos. 128, 132.

After Plaintiffs filed the Second Amended Complaint, the Deere Defendants served Plaintiffs' attorneys Scott Stafne, Brian Fisher, and Dean Browning Webb with notice that the Deere Defendants would seek sanctions against Plaintiffs' counsel and against Plaintiffs themselves pursuant to Federal Rule of Civil Procedure 11 if Plaintiffs did not file a motion to dismiss the Deere Defendants within 21 days after service of the notice. See ECF No. 119, Ex. 1. Plaintiffs did not move to dismiss the Deere

[1] The "Deere Defendants" are Deere & Company, Deere Credit, Inc., John Deere Capital Corporation, John Deere Financial, f.s.b. f/k/a FPC Financial, and Deere Credit Services, Inc.

Defendants voluntarily, and the Deere Defendants filed the pending motion. See ECF No. 112.

ANALYSIS

Federal Rule of Civil Procedure 11 provides that by presenting a pleading to a court, an attorney "certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances[,]" the pleading meets certain minimal standards. See Fed. R. Civ. P. 11(b). Among other assurances, the attorney certifies that "the legal contentions are warranted by existing law or by a nonfrivolous argument" for changing the law, and that "the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery . . . ." Fed. R. Civ. P. 11 (b)(2),(3).

The failure to comply with Rule 11 is sanctionable. Fed. R. Civ. P. 11(c). After providing notice and the opportunity to respond, a "court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation." Fed. R. Civ. P. 11(c)(1). Pursuant to Rule 11's "safe harbor" provision, a party seeking Rule 11 sanctions must serve a motion for sanctions on the offending party and not file the motion "if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets." Fed. R. Civ. P. 11(c)(2).

Here, it is undisputed that the Deere Defendants provided Plaintiffs with the necessary notice, and the Court finds that Plaintiffs' Second Amended Complaint fails to meet the requirements of Rule 11.

As explained in the Order Granting Motion to Dismiss Deere Defendants, some of Plaintiffs' key legal contentions in the Second Amended Complaint are not supported by existing law. See ECF No. 128. For example, Plaintiffs claimed that the Deere Defendants committed extortion by engaging in discriminatory lending practices and intentionally mismanaging Plaintiffs' property, which served as collateral for obligations owed to one of the Deere Defendants. ECF No. 74 at 19-20. However, the Deere Defendants' alleged acts did not fit in the context of extortion. See, e.g., ECF No. 128 at 15-16 ("Plaintiffs' theory in regard to mismanagement of the property makes no sense in the context of extortion. The property already was part of the bankruptcy estate, of which the Deere Defendants were creditors."). Similarly, all of Plaintiffs' lending discrimination claims are time barred, and Plaintiffs did not present a nonfrivolous reason to modify the law regarding the statutory bar. See ECF No. 128 at 22-24.

In addition, Plaintiffs failed to plead facts that would support their claim that the Deere Defendants played a significant role in a complex and discriminatory enterprise that sought to deprive Plaintiffs and other Hispanic farmers of their property and business. Although Plaintiffs contended that the Deere Defendants were willing to lose large amounts of money to obtain Plaintiffs' property, they

"alleged no facts supporting their conclusion that the Deere Defendants' actions were driven by discrimination." ECF No. 128 at 24. In the face of the Deere Defendants' obvious explanations for their actions in attempting to collect payment from Plaintiffs for outstanding debts, Plaintiffs offered only conclusory allegations rather than asserting facts that reasonably would have evidentiary support after further investigation.

Pursuant to Rule 11, the Court finds that an award of the Deere Defendants' reasonable attorney fees in defending against this action is an appropriate sanction to deter Plaintiffs' counsel from again filing such a baseless lawsuit. Although the Court may sanction both counsel and parties themselves, the courts finds that it is those attorneys who signed the Second Amended Complaint who ultimately are responsible for certifying that it meets the requirements of Rule 11, and therefore the Court only will sanction Scott Stafne, Dean Browning Webb, and the law firm of Stafne & Trumbull, PLLC. See ECF No. 74 at 25-26.

The Court will award fees after reviewing itemized billing sheets, which the Deere Defendants shall submit.

Accordingly, ***IT IS HEREBY ORDERED***:

1. The Deere Defendants' Motion for Sanctions, **ECF No. 112**, is **GRANTED**.

2. On or before **August 26, 2015**, the Deere Defendants shall submit itemized billing sheets for claimed fees.

The District Court Clerk is directed to enter this Order and provide copies to counsel.

DATED this 12th day of August 2015.

/s/ Rosanna Malouf Peterson
ROSANNA MALOUF PETERSON
Chief United States District Court Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. 1:14-CV-3125-RMP

CERVANTES ORCHARDS & VINEYARDS, LLC, a Washington limited liability corporation; CERVANTES NURSERIES, LLC, a Washington limited liability corporation; CERVANTES PACKING & STORAGE, LLC, a Washington limited liability corporation; MANCHEGO REAL, LLC, a Washington limited liability corporation; JOSE G. CERVANTES and CYNTHIA C. CERVANTES, individually, and upon behalf of their community property marital estate; *Plaintiffs*,

v.

AMERICAN WEST BANK, a corporation; SKBHC HOLDINGS, LLC, a Washington limited liability corporation; T-16 MANAGEMENT CO, LTD, a Washington corporation; GARY JOHNSON and LINDA JOHNSON, individually and upon behalf of their community property marital estate; NW MANAGEMENT REALTY SERVICES, INC, a Washington corporation also known as Northwest Farm Management Company; and ROBERT WYLES and MICHELLE WYLES, individually and upon behalf of their community property marital estate,
Defendants.

Before: ROSANNA MALOUF PETERSON,
Chief United States District Court Judge

Filed: July 17, 2015

ORDER REGARDING MOTIONS TO DISMISS AND MOTIONS FOR SUMMARY JUDGMENT

Before the Court are motions to dismiss filed by Defendants AmericanWest Bank ("AmericanWest") and SKBHC Holdings, LLC ("SKBHC"), ECF No. 76, and by Defendants Robert and Michelle Wyles, ECF No. 79. Also before the Court are motions for summary judgment filed by Defendants T-16 Management Co., Ltd. ("T-16") and Gary and Linda Johnson, ECF No. 88, and by Defendant SKBHC Holdings, LLC, ECF No. 122. The Court has reviewed all of the documents filed in support of and in opposition to these motions, including Plaintiffs' supplemental authority, ECF No. 127.

BACKGROUND

Plaintiffs constitute a farming group that grows crops including apples, pears, grapes, and cherries. ECF No. 74 at 4. Plaintiffs assert that Defendants engaged in a broad scheme of misconduct involving racketeering, extortion, fraud, and civil rights violations. See ECF No. 74 at 17-24. Plaintiffs claim that the purpose of the scheme was to dispossess them of their property and business. See ECF No. 74 at 17-18.

Plaintiffs assert that in October 2009, AmericanWest, in its role in the scheme, refused to accept a credit application that Plaintiffs had filed. See ECF No. 74 at 14. AmericanWest also allegedly

refused applications for credit that were filed by similarly situated Hispanic farm owners, required excessive collateral to secure loans, and demanded immediate payment from Plaintiffs without a rational justification. ECF No. 74 at 14-15. SKBHC is alleged to have acted in concert and conspired with AmericanWest in regard to these practices, which Plaintiffs contend were predicated on racial and ethnic prejudice. ECF No. 74 at 15.

Plaintiffs claim that Defendants' alleged scheme forced Plaintiff Cervantes Orchards & Vineyards, LLC ("COV") to file for bankruptcy. See ECF No. 74 at 2. A plan was adopted in COV's bankruptcy, requiring COV to satisfy its debt to Deere Credit, Inc. ("DCI") by December 31, 2009. [1] ECF Nos. 74 at 5. COV failed to repay DCI fully by the deadline, and on January 8, 2010, DCI moved the bankruptcy court for an order appointing a liquidating agent pursuant to the terms of the bankruptcy plan. ECF No. 74 at 6-7. The bankruptcy court appointed T-16 as the liquidating agent and ordered COV to turn over all control of the orchards that constituted collateral for the debt owed to DCI. See ECF No. 74 at 7-8. Defendant Gary Johnson is a director of T-16. See ECF No. 74, Ex. 1 at 2.

Plaintiffs contend that COV turned over control of the orchards to T-16 on or before March 17, 2010. ECF No. 74 at 8. According to the Second Amended

[1] DCI, Deere & Company, John Deere Capital Corporation, John Deere Financial, f.s.b. f/k/a FPC Financial, and Deere Credit Services, Inc. (collectively, the "Deere Defendants"), were dismissed in a prior order. ECF No. 128.

Complaint, no farming activities or operations took place on the orchards for over a week after T-16 took over, despite Plaintiff Jose Cervantes's warnings that the orchards required frost protection. ECF No. 74 at 8. Plaintiffs assert that the failure to provide the necessary protection resulted in damage to the orchards. ECF No. 74 at 8.

With DCI's approval, T-16 hired Northwest Management and Realty Services, Inc., a.k.a Northwest Farm Management ("NWFM"), to manage the property. ECF No. 74 at 8. Mr. Wyles was a partial owner of NWFM. See ECF Nos. 74, Ex. 1 at 2; 95 at 2.

Plaintiffs claim that items of their personal property, smudge pots, were wrongfully transported from the orchards "by persons believed to be employed by NWFM" to farm land that Mr. Wyles owned and operated. ECF No. 74 at 9. Plaintiffs further contend that Scott Anderson, another associate of NWFM, filed a false declaration in bankruptcy court. See ECF No. 74 at 10. The false declaration allegedly convinced the bankruptcy court to prohibit Mr. Cervantes from entering the orchards, which in turn resulted in a number of injuries to Plaintiffs, including that workers and supplies were diverted from COV's land to other land managed by NWFM. See ECF No. 74 at 10-11.

Plaintiffs also assert that multiple Defendants sought to conceal from COV and from the bankruptcy court a settlement agreement that concerned damage to apples that a buyer had acquired at an apple orchard auction in June 2010. ECF No. 74 at 13. The

buyer, according to Plaintiffs' allegations, claimed that the apples were damaged because of the failure to use proper sprays. ECF No. 74 at 13. Plaintiffs assert that NWFM, T-16, Mr. Wyles, and Mr. Anderson were parties to the agreement. ECF No. 74 at 13. The settlement agreement included a confidentiality provision, which Plaintiffs contend was meant to conceal from the bankruptcy court and from Plaintiffs the sale of a particular block of property. ECF No. 74 at 13.

Plaintiffs further allege in the Second Amended Complaint that AmericanWest sold Plaintiffs' property "for greatly diminished prices[,]" ECF No. 74 at 3, which Plaintiffs argue were the result of the other Defendants' efforts to devalue the property, ECF No. 85 at 15.

In the first and second claims of the Second Amended Complaint, Plaintiffs allege that NWFM, T-16, Mr. Johnson, Mr. Wyles and AmericanWest violated provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO") found at 18 U.S.C. § 1962(c), (d). ECF No. 74 at 17, 21. Plaintiffs also claim that AmericanWest and SKBHC committed civil rights violations, which Plaintiffs pursue under 42 U.S.C. §§ 1981, 1982, 1985(3), and 1986. ECF No. 74 at 23-24.

ANALYSIS

As noted at the beginning of this Order, two motions to dismiss and two motions for summary judgment currently are pending in this matter. For the reasons discussed below, the Court finds that Plaintiffs have failed to state claims upon which relief can be

granted against all remaining Defendants. Thus, the Court reviews the Second Amended Complaint under the standard of a motion to dismiss.

Motion to Dismiss Standard

The Federal Rules of Civil Procedure allow for the dismissal of a complaint where the plaintiff fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss brought pursuant to this rule "tests the legal sufficiency of a claim." Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). The Supreme Court has offered the following method for assessing the sufficiency of a complaint: [A] court considering a motion to dismiss can choose to begin by

> [A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

To withstand dismissal, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929(2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. A plaintiff is not required to establish a probability of success on the merits; however, he or she must demonstrate "more than a sheer possibility that a defendant has acted unlawfully." Id. (citing Twombly, 550 U.S. at 556).

1. *Michelle Wyles and Linda Johnson*

As an initial matter, Plaintiffs do not appear to assert that Defendants Michelle Wyles or Linda Johnson committed any wrongdoing. In regard to Ms. Wyles, Plaintiffs admit that they included her in this action because Mr. Wyles's alleged misconduct was on behalf of the couple's community property. ECF No. 87 at 1 n.1. "Therefore, Michelle Wyles is included as a defendant for purposes . . . affecting relief only." ECF No. 87 at 1 n.1. Plaintiffs apparently named Ms. Johnson as a defendant for the same reason. See ECF No. 74 (Second Amended Complaint listing Ms. Johnson only in caption and introductory paragraph).

"Under Washington law a personal judgment against a married man is presumed to be against the community." United States v. Overman, 424 F.2d 1142, 1148 (9th Cir. 1970). Thus, a defendant's spouse need not be named in an action in order to

obtain a judgment against the marital community. See La Framboise v. Schmidt, 42 Wn.2d 198, 200, 254 P.2d 485 (1953).

Here, because Plaintiffs do not claim that Ms. Wyles or Ms. Johnson committed any misconduct, the Court finds that it is appropriate to dismiss them from this action on that basis.

2. *RICO*

Plaintiffs claim that NWFM, T-16, Mr. Johnson, Mr. Wyles and AmericanWest (collectively, "RICO Defendants") violated RICO provisions found at 18 U.S.C. § 1962(c), (d). ECF No. 74 at 17-22. Subsection (c) prohibits any person associated with an enterprise that conducts interstate commerce from participating in the enterprise's affairs through a "pattern of racketeering activity" or collection of unlawful debt. 18 U.S.C. § 1962(c). Subsection (d) proscribes the conspiracy to violate subsection (c). 18 U.S.C. § 1962(d).

"Racketeering activity" includes any act that is indictable under the Hobbs Act, 18 U.S.C. § 1951, and a number of specified acts that are "chargeable under State law and punishable by imprisonment for more than one year." 18 U.S.C. § 1961(1)(A), (B); see also United Bhd. of Carpenters & Joiners of Am. v. Bldg. & Constr. Trades Dep't, 770 F.3d 834, 837 (9th Cir. 2014). A plaintiff must allege at least two predicate racketeering acts to state a "pattern" of racketeering that would establish a RICO violation. 18 U.S.C. § 1961(5); Turner v. Cook, 362 F.3d 1219,

1229 (9th Cir. 2004). "A 'pattern' of racketeering activity also requires proof that the racketeering predicates are related and 'that they amount to or pose a threat of continued criminal activity.'" Turner, 362 F.3d at 1229 (quoting H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 239, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989)).

Here, Plaintiffs allege that some or all of the RICO Defendants committed extortion, bankruptcy fraud, and mail and wire fraud, all of which are predicate racketeering acts. See ECF No. 74 at 19-20; 18 U.S.C. § 1961(1) (identifying extortion, "any offense involving fraud connected with a [bankruptcy] case[,]" and mail and wire fraud as predicate RICO acts). The Court considers whether Plaintiffs sufficiently have pleaded any of the alleged RICO predicate acts.

a. *Extortion*

Plaintiffs allege that the RICO Defendants committed acts of extortion under the Hobbs Act and state law by conspiring to obtain and in fact obtaining Plaintiffs' real property "with Plaintiffs' consent, induced by the wrongful use of fear of economic harm . . . ." ECF No. 74 at 19-20.

The Hobbs Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. §

1951(b)(2).[2] "Fear," in this context, "can include fear of economic loss." United Bhd. of Carpenters, 770 F.3d at 838. However, because fear of economic loss also plays a lawful role in business transactions, courts must "differentiate between legitimate use of economic fear-hard bargaining-and wrongful use of such fear-extortion." Id. Although it can be difficult to distinguish hard bargaining from extortion, the Ninth Circuit has relied on a Supreme Court holding "that a defendant violates the Hobbs Act only 'where the obtaining of the property would itself be "wrongful" because the alleged extortionist has no lawful claim to that property.'" Id. (quoting United States v. Enmons, 410 U.S. 396, 400, 93 S. Ct. 1007, 35 L. Ed. 2d 379 (1973)).

The primary Defendants responsible for the alleged extortion were DCI and its related entities. As the Court found in a prior order, however, Plaintiffs failed to plead sufficiently that DCI or the related entities committed extortion. ECF No. 128 at 13-16. Plaintiffs failed to allege facts to support their claim that DCI used fear to induce Plaintiffs to enter into the original business relationship with DCI or that

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[2] Washington State law provides that "'[e]xtortion' means knowingly to obtain or attempt to obtain by threat property or services of the owner . . . ." RCW 9A.56.110. Although Plaintiffs listed both state and federal law in the section of the Second Amended Complaint regarding extortion, Plaintiffs discuss only the federal definition in their briefing and do not contend that federal and state extortion laws differ materially. See, e.g., ECF No. 87 at 10-12. Accordingly, the Court considers the federal definition of the term.

fear was a tool that DCI later employed when it allegedly attempted to obtain Plaintiffs' property in the course of bankruptcy.

Here, for the same reasons discussed in the order regarding DCI, Plaintiff's more tangential theory of extortion against the RICO Defendants who managed the orchards also lacks merit. Even assuming that these Defendants intentionally mismanaged the orchards, it is undisputed that T-16 and NWFM (and, in turn, Mr. Johnson and Mr. Wyles as officers of those entities) had lawful authority to operate the property because of the bankruptcy court's appointment order. In other words, the facts as alleged by Plaintiffs are inconsistent with the theory that these Defendants somehow used force or fear to coerce Plaintiffs to part with their property.

Plaintiffs' assertion that AmericanWest committed extortion also is pleaded insufficiently. Plaintiffs argue that AmericanWest participated in the enterprise so that it and DCI could sell the orchards to friends and customers for greatly reduced prices. ECF No. 85 at 15. Plaintiffs also aver that AmericanWest's allegedly discriminatory denial of Plaintiffs' credit applications and excessive collateral requirements support their allegation of extortion. ECF No. 85 at 15-16. However, Plaintiffs do not explain how AmericanWest allegedly used economic fear to induce Plaintiffs to give up their property or how AmericanWest's allegedly discriminatory lending practice would have such a result.

The Court finds that Plaintiffs have failed to state sufficient facts to support their theory that the RICO Defendants committed predicate acts of extortion.

b. *Fraud*

Plaintiffs also contend that the RICO Defendants committed predicate RICO acts of bankruptcy fraud in violation of 18 U.S.C. §§ 152 and 153. ECF No. 74 at 20. Section 152 prohibits, among other acts, knowingly and fraudulently concealing property of a bankruptcy estate and knowingly and fraudulently making a false declaration in or in relation to a bankruptcy case. 18 U.S.C. § 152(1),(3). Section 153 prohibits certain persons with access to bankruptcy estate property or documents from knowingly and fraudulently appropriating or embezzling the estate's property. 18 U.S.C. § 153. Section 153 applies to "one who has access to property or documents belonging to an estate by virtue of the person's participation in the administration of the estate[,]" such as the employee of a trustee or custodian. See 18 U.S.C. § 153(b).

Like other fraud claims, RICO predicate acts of fraud must meet the heightened pleading requirement found in Federal Rule of Civil Procedure 9(b). See, e.g., Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1400-01 (9th Cir. 1986). "Rule 9(b) requires that the pleader state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." Moore v. Kayport Package Exp., Inc., 885 F.2d 531, 541 (9th Cir. 1989). The

heightened pleading requirement "serves the federal rule's purpose by apprising the defendant or defendants of the nature of the claim and the acts or statements or failures to disclose relied upon by the plaintiff as constituting the fraud being charged against each of them." 5A Charles Alan Wright et al., Federal Practice and Procedure § 1297 (3d ed.). After carefully reviewing the Second Amended Complaint, the Court finds that all but one of Plaintiffs' alleged incidents of fraudulent conduct lack sufficient particularity. The Court considers below each of the alleged RICO predicate acts of fraud.

i. *T-16's Failure to Protect Orchards from Frost*

Plaintiffs claim that, for over a week after COV turned over control of the orchards to T-16, no farming activities took place "despite the fact that Plaintiff Jose Cervantes warned T-16 repeatedly of the need for frost protection." ECF No. 74 at 8.

Assuming the veracity of Plaintiffs' assertions, the Court finds that Plaintiffs allege facts that arguably support a RICO predicate act of bankruptcy fraud. Plaintiffs allege that T-16 purposefully failed to care for the property during the first week that it was in T-16's care, with the intention of lowering the property's value so that it could be acquired by other members of the alleged enterprise. See ECF No. 74 at 8-9, 11. In other words, Plaintiffs' description sufficiently alleges fraud because it is "accompanied by 'the who, what, when, where, and how' of the

misconduct charged." Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003) (quoting Cooper v. Pickett, 137 F.3d 616, 627 (9th Cir. 1997)) (internal quotation marks omitted).

Thus, Plaintiffs arguably have alleged one predicate RICO act.

ii. *Removal of Smudge Pots*

Plaintiffs further allege that "persons believed to be employed by NWFM" stole truckloads of smudge pots from the orchards and transported them to property owned by Mr. Wyles and Mr. Anderson. ECF No. 74 at 9.

Unlike the assertion that T-16 committed fraud by intentionally neglecting the orchards, Plaintiffs do not provide sufficient specificity regarding the allegation that NWFM stole smudge pots from COV. The Court notes that failing to identify the individuals who allegedly took the property is not alone a basis for concluding that Plaintiffs do not meet heightened pleading requirements. See Charles Alan Wright et al., supra, at § 1298 ("[Rule 9(b)] does not require absolute particularity or a recital of the evidence, especially when some matters are beyond the knowledge of the pleader and can only be developed through discovery."). However, Plaintiffs fail to plead when the smudge pots were stolen or what facts support their belief that NWFM employed the persons who took the property. The Court finds that such information is necessary to apprise the RICO Defendants of the claims brought against

them. Cf. Perkumpulan Investor Crisis Ctr. Dressel-WBG v. Regal Fin. Bancorp, Inc., 781 F. Supp. 2d 1098, 1112 (W.D. Wash. 2011) (RICO predicate act of wire fraud pleaded with sufficient particularity where plaintiffs pleaded date, amount, transferor, and recipient of allegedly fraudulent transfers).

iii. *False Declaration*

Plaintiffs also claim that the submission of a false declaration by NWFM's co-owner, Mr. Anderson, constitutes a predicate act. ECF No. 74 at 10. The Second Amended Complaint states that the declaration caused the bankruptcy court to prohibit Mr. Cervantes from entering the orchards. See ECF No. 74 at 10.

The contents of the declaration, however, are not alleged. This does not comply with Rule 9(b)'s heightened pleading requirements. See Edwards v. Marin Park, Inc., 356 F.3d 1058, 1066 (9th Cir. 2004) (dismissing RICO claim because although plaintiff named the parties involved and alleged the time and place that purportedly fraudulent legal notices were delivered, complaint failed to allege notices' specific contents, and plaintiff failed to attach notices to her complaint or to any other filing).

iv. *Various Damage to Orchards*

Plaintiffs allege additionally that "T-16, NWFM, Anderson, and Wyles, aided and abetted by Deere Credit, Inc.[,]" embezzled property from the bankruptcy estate, charged COV expenses for labor

and equipment that were used on other property, and applied minimal labor and resources to the estate property. See ECF No. 74 at 10-11.

However, "Rule 9(b) does not allow a complaint to merely lump multiple defendants together but 'require[s] plaintiffs to differentiate their allegations when suing more than one defendant . . . and inform each defendant separately of the allegations surrounding his alleged participation in the fraud." Swartz v. KPMG LLP, 476 F.3d 756, 764-65 (9th Cir. 2007) (quoting Haskin v. R.J. Reynolds Tobacco Co., 995 F. Supp. 1437, 1439 (M.D. Fla. 1998)).

The Court finds that Plaintiffs impermissibly alleged that multiple RICO Defendants committed a variety of predicate acts. Without specification of which defendants committed which allegedly fraudulent acts, the RICO Defendants are not able to defend themselves properly. See Destfino v. Reiswig, 630 F.3d 952, 958-59 (9th Cir. 2011) (affirming dismissal because plaintiff failed to allege which defendants were accused of each fraudulent statement or act). It seems that rather than investigating these alleged acts before filing suit, Plaintiffs have elected to wait until later in the progress of this case to attribute acts to specific RICO Defendants. Such a strategy is not allowed under Rule 9(b). See Charles Alan Wright et al., supra, at § 1296 ("[A] heightened pleading requirement imparts a note of seriousness and encourages a greater degree of pre-institution investigation by the plaintiff.")

v. *Concealment of Settlement Agreement*

Plaintiffs also claim that "Deere Credit, Inc., NWFM, Anderson, Wyles, and T-16" committed bankruptcy fraud by seeking to conceal from the bankruptcy court a settlement agreement that would have revealed the sale of the property as well as the true extent of the damage to the collateral property. See ECF Nos. 74 at 13; 87 at 13.

Again, similar to the allegations of damage to the orchards, Plaintiffs incorrectly lump the RICO Defendants together instead of specifying how each defendant contributed to the alleged fraud.

Additionally, to the extent that Plaintiffs rely on the existence of a confidentiality provision in the alleged settlement agreement to assert that the named defendants intended to conceal the agreement from the bankruptcy court, the proposition is not plausible. The Court takes judicial notice of the fact that settlement agreements commonly include confidentiality provisions.[3]

In sum, Plaintiffs have alleged at most one predicate RICO act of fraud, which is insufficient to plead a substantive RICO violation under 18 U.S.C. § 1962(c). See 18 U.S.C. § 1961(5) "'pattern of racketeering activity' requires at least two acts of

[3] Plaintiffs' mail and wire fraud claims apparently are based on the same substantive factual assertions as the alleged bankruptcy fraud. See ECF No. 74 at 20; see also, e.g., ECF No. 87 at 13 (". . . Plaintiffs will seek to offer proof that mailings and/or wirings were made to demand a copy of the [settlement] agreement"). The mail and wire fraud claims fail for the same reasons discussed above in regard to the alleged bankruptcy fraud.

racketeering activity").[4] Because Plaintiffs have not stated a substantive RICO claim, their RICO conspiracy claim fails as well. See Religious Tech. Ctr. v. Wollersheim, 971 F.2d 364, 367 n.8 (9th Cir. 1992) ("Because we find that [plaintiff] has failed to allege the requisite substantive elements of RICO, the conspiracy cause of action cannot stand.").[5]

3. *Lending Discrimination*

Plaintiffs contend that AmericanWest and SKBHC violated Plaintiffs' civil rights. ECF No. 74 at 23-24. AmericanWest and SKBHC argue that these claims should be dismissed because they are barred by statutes of limitations. ECF No. 76 at 2. Plaintiffs assert discrimination claims pursuant to 42 U.S.C. §§ 1981, 1982, 1985(3), and 1986. ECF No. 74 at 22-23. The parties do not dispute that a four-year statute of limitations governs Plaintiffs' claim brought under § 1981. See Jones v. R.R.

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[4] Moreover, as discussed below, the Court finds that the Second Amended Complaint as a whole lacks plausibility.

[5] In opposition to the Wyles' motion to dismiss, Plaintiffs refer to their allegation that NWFM lacked necessary farm labor licensing and that T-16 and DCI were aware of that fact. ECF No. 87 at 5. Plaintiffs contend that this supports the "'conduct' element of the civil racketeering claim" against Mr. Wyles, who was a partial owner of NWFM. See ECF No. 87 at 5. However, it is unclear whether Plaintiffs assert that NWFM's alleged failure to obtain proper licensing and T-16's knowledge of that fact constitute fraud or some other predicate act. Plaintiffs have not pleaded sufficient facts for the Court to discern how this alleged conduct could constitute racketeering.

Donnelley & Sons Co., 541 U.S. 369, 383-85, 124 S. Ct. 1836, 158 L. Ed. 2d 645 (2004) (discussing 28 U.S.C. § 1658).[6]

Washington's three-year statute of limitations for personal injury actions, RCW 4.16.080(2), governs claims brought pursuant to 42 U.S.C. § 1985(3). See

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[6] Section 1658's four-year statute of limitations applies to actions brought under federal statutes that were enacted after December 1, 1990. Jones, 541 U.S. at 371. In Jones, the Court explained that § 1658 applies to claims that were made possible by an amendment to § 1981 that occurred after December 1, 1990. Id. at 383. Racial harassment in employment is an example of a § 1981 claim that was not possible under the pre-1990 version of the section. See id. Some § 1981 claims, however, instead remain subject to the most analogous statute of limitations under state law. See, e.g., Lukovsky v. City & County of San Francisco, 535 F.3d 1044, 1048 n.2 (9th Cir. 2008) (applying forum state's statute of limitations to failure-to-hire claim, which was cognizable under pre-1990 version of § 1981). The applicable statute of limitations under Washington State law would be the three year limitation for a lawsuit alleging personal injury, RCW 4.16.080(2). See Beauregard v. Lewis Cnty., Wash., No. C05-5738-RJB, 2006 U.S. Dist. LEXIS 73840, 2006 WL 2924612, at *8 (W.D. Wash. Oct. 10, 2006) (citing Taylor v. Regents of Univ. of Cal., 993 F.2d 710, 711-12 (9th Cir. 1993)). The parties do not address whether Plaintiffs' § 1981 claim would have been cognizable under the pre-1990 version of the law. However, because the parties do not dispute that the federal four-year statute of limitations applies and because the issue does not affect the Court's decision, the Court assumes, for purposes of this motion, that the longer statute of limitations is applicable.

Taylor v. Regents of Univ. of Cal., 993 F.2d 710, 711 (9th Cir. 1993) (per curiam) (applying California's analogous statute of limitations). The same rule controls § 1982 claims. See Mitchell v. Sung, 816 F. Supp. 597, 600 (N.D. Cal. 1993) ("Because section 1982 does not have a statute of limitations, courts apply the applicable state statute of limitations."). A one-year statute of limitations applies to claims under § 1986. 42 U.S.C. § 1986.

Although the relevant state statute of limitations applies to some of Plaintiffs' civil rights claims, federal law determines when a civil rights claim accrues. See Olsen v. Idaho State Bd. of Med., 363 F.3d 916, 926 (9th Cir. 2004) (citing Morales v. City of Los Angeles, 214 F.3d 1151, 1153-54 (9th Cir. 2000)). Federal law provides that "a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." Two Rivers v. Lewis, 174 F.3d 987, 991 (9th Cir. 1999). Accrual begins on the date on which a plaintiff becomes aware of an adverse action, not when a plaintiff suspects that a legal wrong has been committed. Lukovsky v. City & County of San Francisco, 535 F.3d 1044, 1049-50 (9th Cir. 2008).

Here, AmericanWest and SKBHC assert that the only discriminatory act that they allegedly committed was denying Plaintiffs' credit application in October 2009. ECF No. 76 at 3; see also ECF No. 74 at 14. Plaintiffs did not file their original complaint until more than four years later, on September 2, 2014. See ECF No. 1. In response, Plaintiffs argue that they are no less injured today "because they know if they applied for credit it would

be declined as a result of defendants' ongoing practices." ECF No. 85 at 6. In other words, Plaintiffs contend that they have raised "allegations of continuing discriminatory lending[,]" referring to Havens Realty Corp. v. Coleman, 455 U.S. 363, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982). See ECF No. 85 at 7.

In Havens Realty, the Court considered an alleged continuing violation of the Fair Housing Act. 455 U.S. at 380. All of the incidents of alleged misconduct against one plaintiff in Havens Realty were time-barred, but another plaintiff alleged that a Fair Housing Act violation occurred within the 180-day time limit. Id. at 380. The Court held "that where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice." See id. at 380-81 (footnote omitted). In other words, "because [one] incident fell within the limitations period, none of the claims was barred." See id. at 380.

Here, unlike in Havens Realty, Plaintiffs refer to no incidents of alleged misconduct that occurred within four years of the date on which they filed their original complaint. Thus, Plaintiffs cannot rely on a theory of continuing discrimination to circumvent the applicable statutes of limitation, which bar their civil rights claims.

In sum, the Court finds that Plaintiffs have failed to state an actionable claim that AmericanWest or SKBHC violated their civil rights.

4. *Plausibility*

Having explained in detail why Plaintiffs' allegations in the Second Amended Complaint fails to state a claim, the Court finds that it is necessary also to note an alternative and troubling basis for dismissing this action.

Although Plaintiffs assert that Defendants were motivated by racial and ethnic animosity to deprive Plaintiffs of their land and livelihood, a serious contention, the factual allegations supporting such an egregious goal are surprisingly paltry. The most direct allegation concerning discrimination was brought against former Defendant Northwest Farm Credit Services, whose employee allegedly responded to Mr. Cervantes's inquiry about the denial of a loan application with the statement: "You people don't pay." See ECF No. 74 at 16. However, Northwest Farm Credit Services was not included in Plaintiffs' RICO claims. See ECF No. 74 at 17, 21.

Against the RICO Defendants, Plaintiffs offer only conclusory statements that prejudice guided their actions. See, e.g., ECF No. 74 at 5 ("[T]his enterprise worked together to exact excessive terms and conditions upon the Plaintiffs and other Hispanic farming operators by failing to release collateral demanded to secure repayment of loans and credit lines . . . ."), 19 ("[T]he course of conduct engaged in

by said RICO defendants was designed to deprive Plaintiffs and similarly situated farming operators and owners who are of Hispanic origin of their interests in business and/or property.").

The Court does not imply that allegations of racial discrimination are necessary for Plaintiffs to bring a RICO action. However, in the absence of factual allegations to support Plaintiffs' claims of discriminatory intent, or any other basis for believing that Defendants' actions were the result of a coordinated attempt to obtain Plaintiffs' property and business, Plaintiffs' RICO claim simply is implausible. The Court repeats the reasoning adopted in its order dismissing the Deere Defendants, who appear to be the principal actors in Plaintiffs' alleged RICO enterprise:

> In response to this lawsuit, the Deere Defendants have proffered that after COV failed to repay its debt in accordance with the bankruptcy plan, the Deere Defendants sought appointment of a liquidating agent, which the bankruptcy court approved. "As between that 'obvious alternative explanation' for [the Deere Defendants' actions] and the purposeful, invidious discrimination [that Plaintiffs ask the Court] to infer, discrimination is not a plausible conclusion."

ECF No. 128 at 24 (quoting Iqbal, 556 U.S. at 682 (internal citation omitted)).

While the complex RICO scheme asserted in Plaintiffs' Second Amended Complaint is of course possible, it is not plausible. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 557). The Court finds that Plaintiffs' allegation of a broad, discriminatory scheme is implausible.

5. *Dismissal with Prejudice*

Leave to amend a complaint should be granted freely when justice so requires. Fed. R. Civ. P. 15(a). However, "liberality in granting leave to amend is subject to several limitations." Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989) (citing DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987)). "Leave need not be granted where the amendment of the complaint would cause the opposing party undue prejudice, is sought in bad faith, constitutes an exercise in futility, or creates undue delay." Id. Additionally, "[t]he district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint." Id.

Plaintiffs' original complaint spanned 337 pages, divided into 737 paragraphs. ECF No. 1. The First Amended Complaint, comprising 143 pages, was accompanied by a 469-page RICO Case Statement. ECF Nos. 29, 29-1. In addition to their unusual

length, Plaintiffs' first two pleadings were difficult to comprehend.

The Court ordered Plaintiffs to file a Second Amended Complaint, with a set page limit. ECF No. 72. The Second Amended Complaint presented a clearer picture of Plaintiffs' claims. However, after significant expenditure of resources by the Court and, presumably, by Defendants, the Court has determined that those claims fail as a matter of law.

For the reasons discussed throughout this Order, the Court finds that allowing Plaintiffs to amend their claims would be futile and would cause undue prejudice to Defendants. The Court dismisses Plaintiffs' Second Amended Complaint with prejudice.

6. *Attorney Fees*

The Wyles request attorney fees and costs for the expense of defending against this lawsuit. ECF No. 79 at 12. "[The Court's] basic point of reference when considering the award of attorney's fees is the bedrock principle known as the American Rule: Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 252-253, 130 S. Ct. 2149, 176 L. Ed. 2d 998 (2010) (internal quotation marks omitted).

The Wyles' request for attorney fees and costs is unaccompanied by any reference to the applicable authority for imposing such a sanction. The Court denies the Wyles' request at this time, but the Court

will entertain motions for sanctions that include a discussion of relevant authority.

Accordingly, **IT IS HEREBY ORDERED**:

1. Defendants AmericanWest Bank and SKBHC Holdings LLC's Motion to Dismiss, ECF No. 76, is **GRANTED**.
2. Defendants Robert and Michelle Wyles's Motion to Dismiss, ECF No. 79, is **GRANTED**.
3. The Second Amended Complaint is **DISMISSED WITH PREJUDICE**.
4. Defendants T-16 Management Co., Ltd., and Gary and Linda Johnson's Motion for Summary Judgment, ECF No. 88, is **DENIED AS MOOT**.
5. Defendant SKBHC Holdings LLC's Motion for Summary Judgment, ECF No. 122, is **DENIED AS MOOT**.

Any motion for attorney fees shall be filed **within 30 days** of the date of this Order, even though the Court will instruct the Clerk's Office to close the case administratively.

The District Court Clerk is directed to enter this Order, provide copies to counsel, enter judgment accordingly, and **CLOSE** this case.

DATED this 17th day of July 2015.

/s/ Rosanna Malouf Peterson
ROSANNA MALOUF PETERSON
Chief United States District Court Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. 1:14-CV-3125-RMP

CERVANTES ORCHARDS & VINEYARDS, LLC, a Washington limited liability corporation; CERVANTES NURSERIES, LLC, a Washington limited liability corporation; CERVANTES PACKING & STORAGE, LLC, a Washington limited liability corporation; MANCHEGO REAL, LLC, a Washington limited liability corporation; JOSE G. CERVANTES and CYNTHIA C. CERVANTES, individually, and upon behalf of their community property marital estate; *Plaintiffs*,

v.

AMERICAN WEST BANK, a corporation; SKBHC HOLDINGS, LLC, a Washington limited liability corporation; T-16 MANAGEMENT CO, LTD, a Washington corporation; GARY JOHNSON and LINDA JOHNSON, individually and upon behalf of their community property marital estate; NW MANAGEMENT REALTY SERVICES, INC, a Washington corporation also known as Northwest Farm Management Company; and ROBERT WYLES and MICHELLE WYLES, individually and upon behalf of their community property marital estate,

Defendants.

Before: ROSANNA MALOUF PETERSON,
Chief United States District Court Judge
Filed: July 10, 2015

ORDER GRANTING MOTION TO DISMISS
DEERE DEFENDANTS

Before the Court is the Deere Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint, ECF No. 91.[1] The Court has reviewed the record and the parties' arguments.

BACKGROUND

Plaintiffs constitute a farming group that grows crops including apples, pears, grapes, and cherries. ECF No. 74 at 4. Plaintiffs assert that multiple defendants engaged in a broad scheme of misconduct involving racketeering, extortion, fraud, and civil rights violations. See ECF No. 74 at 17-24.

In 2003, Deere Credit, Inc. ("DCI") loaned money to Plaintiffs. See ECF No. 92, Ex. A at 3 (First

[1] The "Deere Defendants" are Deere & Company, Deere Credit, Inc., John Deere Capital Corporation, John Deere Financial, f.s.b. f/k/a FPC Financial, and Deere Credit Services, Inc

Amended Order Confirming Chapter 11 Plan). [2]

Plaintiffs defaulted on their obligations to DCI, and eventually Plaintiff Cervantes Orchards & Vineyards, LLC ("COV") filed for bankruptcy. See ECF Nos. 74 at 2; 92, Ex. A at 1. A bankruptcy plan was adopted, which required COV to satisfy the debt to DCI by December 31, 2009. ECF Nos. 74 at 5; 92, Ex. A at 7. Plaintiffs allege that adverse economic conditions prevented them from meeting the payment deadline. ECF No. 74 at 6.

Plaintiffs assert that DCI "demanded a high rate of interest of 9.75% and an aggressive principal reduction during the term explicitly mandated within the plan of reorganization," between April 2007 and December 31, 2009. ECF No. 74 at 5. Jose Cervantes, COV's principal owner, proposed that DCI restructure financing for the debt so that COV could maintain its operations. ECF No. 74 at 6. Even though Mr. Cervantes informed DCI that he and the

[2] Where appropriate, the Court refers to background information found in documents that were provided by the parties that are referred to in the Second Amended Complaint and to which no party objects. See Sams v. Yahoo! Inc., 713 F.3d 1175, 1179 (9th Cir. 2013) (when deciding a motion to dismiss, court may "consider documents that were not physically attached to the complaint where the documents' authenticity is not contested, and the plaintiff's complaint necessarily relies on them").

Cervantes Farming Group had substantial equity in their real property to support repayment of the debt, DCI refused to refinance the debt. ECF No. 74 at 6. COV alleges that it paid all interest due and reduced the amount of principal owed. ECF No. 74 at 6. As of December 31, 2009, Plaintiffs' debt to DCI was reduced from $4,941,876.77 to $4,339,378.27. ECF Nos. 74 at 5; 92, Ex. A at 4.

On January 8, 2010, DCI moved the bankruptcy court for an order appointing a liquidating agent pursuant to the terms of the bankruptcy plan. ECF No. 74 at 6-7. DCI represented to the bankruptcy court that T-16 Management Company, Ltd. ("T-16"), an auction firm, was well qualified for the position.

ECF No. 74 at 7. Plaintiffs claim that DCI failed to search for any other potential liquidating agents. ECF No. 74 at 7. Plaintiffs further "allege that counsel of record representing Deere Credit, Inc., Roger Bailey, Esq., of Bailey and Busey, PLLC, also represented the interests of T-16 because T- 16 had served and acted under the direction and control of Deere Credit, T-16's principal." ECF No. 74 at 7. The bankruptcy court appointed T-16 as the liquidating agent and ordered COV to turn over all control of the orchards that constituted collateral for the debt owed to DCI. See ECF No. 74 at 7-8.

Plaintiffs allege that T-16 failed to care properly for the real property. After Plaintiffs turned over the property on March 17, 2010, Plaintiffs assert that no farming activities took place for over a week, despite Mr. Cervantes's warnings that it was necessary to protect the crops against the frost. ECF No. 74 at 8.

With DCI's approval, T-16 hired Northwest Management and Realty Services, Inc., a.k.a Northwest Farm Management ("NWFM") to manage the property. ECF No. 74 at 8. Plaintiffs allege that NWFM in turn contracted with workers who lacked proper farm labor contractor licensing. ECF No. 74 at 8. Furthermore, Plaintiffs claim that both T-16 and DCI knew that NWFM lacked a statutorily required farm labor contractor license. ECF No. 74 at 8.

According to Plaintiffs, persons believed to be NWFM employees removed personal property from the orchards. ECF No. 74 at 9. Specifically, the persons allegedly took truckloads of smudge pots to land owned by Defendants Robert and Michelle Wyles and former defendant Scott Anderson.[3] ECF No. 74 at 9. If the smudge pots had been kept on Plaintiffs'

[3] In its Complaint for Violations of Court Order and Damages, COV asserted that "[t]he persons principally associated with, and who control, NWFM are Scott J. Anderson ('Anderson') and Rob Wyles ('Wyles')." ECF No. 92, Ex. E at 2. Mr. Anderson passed away, and his estate was not listed as a defendant in the Second Amended Complaint. See ECF Nos. 74 at 1; 100, Ex. 3 at 4.

property, Plaintiffs claim that they could have been used to protect the crops from frost damage. ECF No. 74 at 9.

Plaintiffs assert that the refusal to maintain the real property was a direct result of the concerted efforts of multiple defendants, including DCI. ECF No. 74 at Plaintiffs claim that the intent of these defendants was to obtain Plaintiffs' business and property. ECF No. 74 at 9.

As a result of T-16's conduct, COV moved the bankruptcy court to remove the firm as the liquidating agent. ECF No. 74 at 9. In response, Mr. Anderson filed a declaration, which Plaintiffs assert is fraudulent. ECF No. 74 at 10. Plaintiffs claim that because of the fraudulent declaration, Mr. Cervantes was prohibited from entering the real property. ECF No. 74 at 10. Plaintiffs allege that DCI, by aiding and abetting other defendants: caused COV's laborers to work on other orchards that NWFM managed; charged COV for the time and expense of using equipment on other NWFM property; charged COV for labor and supplies that NWFM used; and threatened and retaliated against COV labor contractors hired by COV if those contractors refused to cooperate with NWFM. See ECF No. 74 at 10-11.

Plaintiffs contend that these actions were intended to reduce the value of the real property so that it

"could be sold by Deere and American West Bank to customers and friendly parties at greatly diminished prices." ECF No. 74 at 11. By the time that the property was sold in 2010 and 2011, Plaintiffs allege that the mismanagement had rendered it virtually worthless. ECF No. 74 at 11.

The Deere Defendants' alleged misconduct continued after the sale of the property. Plaintiffs assert that DCI sought to conceal from COV and the bankruptcy court a settlement agreement that concerned the sale of damaged apples. ECF No. 74 at 13. The settlement agreement included a confidentiality provision, which Plaintiffs contend was meant to conceal the sale of a particular block of property. ECF No. 74 at 13. Also, Plaintiffs claim that on August 17, 2011, Robert Thompson, a representative from John Deere Financial, Inc., called Mr. Cervantes, threatening him with "immediate problems" if he did not resolve his dispute with DCI. ECF No. 74 at 14.

Furthermore, Plaintiffs contend that DCI discriminated against Plaintiffs in its lending practices by requiring them and other Hispanic farm owners to provide a disproportionately large amount of capital to secure corporate and personal loans. ECF No. 74 at 15. DCI also allegedly refused requests from Plaintiffs and other Hispanic farm owners to extend or modify the terms of debt repayment. ECF No. 74 at 15.

The parties have pursued previous legal actions related to these incidents. On November 16, 2009, DCI filed a complaint in state court against Plaintiffs other than COV ("non-COV Plaintiffs"), for breach of a forbearance agreement and for judgment and foreclosure of mortgages and security interests ("Foreclosure Action"). ECF No. 92, Ex. B. Also, on May 31, 2012, COV filed an amended adversary complaint against NWFM, Mr. Anderson, Mr. Wyles, and T-16 in its bankruptcy case, alleging that the defendants had committed acts including fraud, misrepresentation, conversion, unjust enrichment, tortuous interference with reasonable business expectancy, breach of fiduciary trust, and gross negligence. ECF No. 100, Ex. 2.

Here, Plaintiffs claim that the Deere Defendants violated multiple provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Together with other defendants, Plaintiffs allege that the Deere Defendants constituted a continuing criminal enterprise that engaged in and conspired to engage in racketeering, extortion, and fraud. ECF No. 74 at 17-22. Plaintiffs further assert violations of federal civil rights statutes. ECF No. 74 at 22-23.

ANALYSIS

The Deere Defendants move to dismiss the case, contending that Plaintiffs' RICO theory is

implausible, that Plaintiffs' claims are barred by the doctrine of res judicata, and that Plaintiffs have failed to allege sufficient facts to support any of the predicate acts that supposedly support their RICO theory. Furthermore, the Deere Defendants assert that Plaintiffs' lending discrimination claims are time barred.

Motion to Dismiss Standard

The Federal Rules of Civil Procedure allow for the dismissal of a complaint where the plaintiff fails to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A motion to dismiss brought pursuant to this rule "tests the legal sufficiency of a claim." Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). The Supreme Court has offered the following method for assessing the sufficiency of a complaint:

> [A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Ashcroft v. Iqbal, 556 U.S. 662, 679, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

To withstand dismissal, a complaint must contain "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678. A plaintiff is not required to establish a probability of success on the merits; however, he or she must demonstrate "more than a sheer possibility that a defendant has acted unlawfully." Id. (citing Twombly, 550 U.S. at 556).

1. *Res Judicata*

The Deere Defendants argue that *res judicata* precludes COV's claims against them because COV alleged the same claims against the same parties in its adversary complaint, which the bankruptcy court dismissed with prejudice. ECF No. 91 at 10-12. According to the Deere Defendants, the non-COV Plaintiffs also raised similar issues as affirmative defenses or counterclaims in the state court Foreclosure Action. ECF No. 91 at 7.

Res judicata bars the litigation of claims in a later action that were raised or could have been raised in a prior action. Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 713 (9th Cir. 2001). "The doctrine is applicable whenever there is '(1) an identity of claims, (2) a final judgment on the merits, and (3) identity or privity between parties.'" Id. (quoting Western Radio Servs. Co. v. Glickman, 123 F.3d 1189, 1192 (9th Cir. 1997)).

The Deere Defendants contend that the judgments entered in the adversary proceeding and in the Foreclosure Action preclude the current lawsuit under the doctrine of res judicata. See ECF No. 91 at 10-12. However, for the reasons discussed below, the Court concludes that neither of the prior actions bars Plaintiffs' lawsuit against the Deere Defendants.

In regard to the adversary proceeding, the parties to that action are not identical to or in privity with the current litigants. "'Privity'—for the purposes of applying the doctrine of res judicata—is a legal conclusion 'designating a person so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved.'" In re Schimmels, 127 F.3d 875, 881 (9th Cir. 1997) (quoting Southwest Airlines Co. v. Texas Int'l Airlines, Inc., 546 F.2d 84, 94 (5th Cir.), cert. denied, 434 U.S. 832, 98 S. Ct. 117, 54 L. Ed. 2d 93 (1977)).

The Deere Defendants assert that DCI is the only entity among them that allegedly committed the actionable conduct and that DCI "is the same party that was named in the Adversary action . . . ." ECF No. 91 at 12. Although DCI was named in the original adversary complaint that COV filed, none of the Deere Defendants were included in the first amended adversary complaint, which was the complaint that resulted in a judgment. See ECF No. 100, Ex. 2. Also, it does not appear that any of the defendants listed in the first amended adversary complaint, NWFM, Mr. Anderson, Mr. Wyles, or T-16, qualify as being in privity with the Deere Defendants. Thus, the Deere Defendants have failed to establish that the resolution of the adversary action precludes the current lawsuit under the doctrine of *res judicata*.

The Deere Defendants also have failed to show that the Foreclosure Action bars the current lawsuit because the actions lack an identity of claims. "The central criterion in determining whether there is an identity of claims between the first and second adjudications is 'whether the two suits arise out of the same transactional nucleus of facts.'" Frank v. United Airlines, Inc., 216 F.3d 845, 851 (9th Cir. 2000) (quoting Costantini v. Trans World Airlines, 681 F.2d 1199, 1201-02 (9th Cir. 1982)). In the

Foreclosure Action, the non-COV Plaintiffs asserted against DRI affirmative defenses related to racial discrimination and improper loan administration. ECF No. 92, Ex. I at 7-11.

Although some of the facts underlying the affirmative defenses asserted in the Foreclosure Action arise from the same facts alleged in this matter, the current claims also are based on events that occurred after thenon-COV Plaintiffs had filed their answer in the Foreclosure Action. For example, the answer in the Foreclosure Action, dated December 24, 2009, predates DCI's motion to appoint T-16 as the liquidating agent, which is a fact that Plaintiffs allege in support of their theory of bankruptcy fraud. See ECF Nos. 74 at 6-7; 92, Ex. I at 12. The current allegation that DCI was aware that NWFM lacked the necessary farm labor contractor license also could not have been raised in the non-COV Plaintiffs' answer in the Foreclosure Action because T-16 had not yet been appointed and, therefore, had not hired NWFM. See ECF No. 74 at 8.

The Court finds that the claims in the current lawsuit are not identical with those in the Foreclosure Action, nor could they have been raised at the time of the prior action. Thus, the disposition of the Foreclosure Action does not preclude Plaintiffs' current claims. The Deere Defendants have failed to

establish that Plaintiffs' current claims are barred by *res judicata*.

2. *RICO violations*

The Deere Defendants also argue that Plaintiffs failed to state a claim for RICO violations. ECF No. 91 at 13-19. RICO's private right of action provides in relevant part that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . ." 18 U.S.C. § 1964(c).

Plaintiffs allege that the Deere Defendants violated provisions of the RICO Act found in 18 U.S.C. §§ 1962(c) and (d). ECF No. 74 at 17-22. Subsection (c) prohibits any person associated with an enterprise that conducts interstate commerce from participating in the enterprise's affairs through a "pattern of racketeering activity" or collection of unlawful debt. 18 U.S.C. § 1962(c). Subsection (d) proscribes the conspiracy to violate subsection (c). 18 U.S.C. § 1962(d).

"Racketeering activity" includes any act that is indictable under the Hobbs Act, 18 U.S.C. § 1951, and a number of specified acts that are "chargeable

under State law and punishable by imprisonment for more than one year." 18 U.S.C. § 1961(1)(A), (B); see also United Bhd. of Carpenters & Joiners of Am. v. Bldg. & Constr. Trades Dep't, AFL-CIO, 770 F.3d 834, 837 (9th Cir. 2014). A plaintiff must allege at least two predicate racketeering acts to state a "pattern" of racketeering that would establish a violation of the RICO Act. 18 U.S.C. § 1961(5); Turner v. Cook, 362 F.3d 1219, 1229 (9th Cir. 2004). "A 'pattern' of racketeering activity also requires proof that the racketeering predicates are related and 'that they amount to or pose a threat of continued criminal activity.'" Turner, 362 F.3d at 1229 (quoting H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 239, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989)).

Here, Plaintiffs allege that the Deere Defendants committed extortion, bankruptcy fraud, and mail and wire fraud, all of which are predicate racketeering acts. See ECF No. 74 at 19-20; 18 U.S.C. § 1961(1) (identifying extortion, "any offense involving fraud connected with a [bankruptcy] case[,]" and mail and wire fraud as predicate RICO acts). The Deere Defendants argue that Plaintiffs have failed to plead plausible claims for any of these predicate acts.

a. *Extortion*

Plaintiffs allege that Defendants committed acts of extortion under the Hobbs Act and state law by conspiring to obtain and in fact obtaining Plaintiffs' real property "with Plaintiffs' consent, induced by the wrongful use of fear of economic harm . . . ." ECF No. 74 at 19-20.

The Hobbs Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2).[4] "Fear," in this context, "can include fear of economic loss." United Bhd. of Carpenters, 770 F.3d at 838. However, because fear of economic loss also plays a lawful role in business transactions, courts must "differentiate between legitimate use of economic fear-hard bargaining-and wrongful use of such fear-extortion." Id. Although it can be difficult to distinguish hard bargaining from extortion, the Ninth Circuit has relied on a Supreme Court holding "that a defendant violates

[4] Washington State law provides that "'[e]xtortion' means knowingly to obtain or attempt to obtain by threat property or services of the owner . . . ." RCW 9A.56.110. Although Plaintiffs listed both state and federal law in the section of the Second Amended Complaint regarding extortion, the parties discuss only the federal definition in their briefing and do not contend that federal and state extortion laws differ materially. See ECF Nos. 91 at 15-17; 98 at 13-14. Accordingly, the Court considers the federal definition of the term.

the Hobbs Act only 'where the obtaining of the property would itself be "wrongful" because the alleged extortionist has no lawful claim to that property.'" Id. (quoting United States v. Enmons, 410 U.S. 396, 400, 93 S. Ct. 1007, 35 L. Ed. 2d 379 (1973)).[5]

Here, Plaintiffs allege that the Deere Defendants committed predicate RICO acts of extortion by engaging in discriminatory lending practices, mismanaging the collateral properties, and threatening "to resolve the dispute between Plaintiffs and DCI or face immediate problems . . . ." ECF No. 98 at 14. According to Plaintiffs, their business relationship with the Deere Defendants was never a negotiation; rather, Plaintiffs claim that the Deere Defendants imposed excessive lending conditions on Plaintiffs and refused to allow them to refinance their obligations. ECF No. 98 at 13.

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[5] Plaintiffs incorrectly proffer that a "'[l]awful claim' has no place when the context of the alleged extortion is outside the realm of labor disputes." See ECF No. 98 at 15. While the Ninth Circuit has not extended the lawful-claim defense as to violence beyond the context of labor disputes, United States v. Daane, 475 F.3d 1114, 1119 (9th Cir. 2007), the defense generally may be raised as to non-violent hard bargaining tactics used in instances other than labor disputes, see, e.g., Levitt v. Yelp! Inc., 765 F.3d 1123, 1133 (9th Cir. 2014) (considering whether online review company was required by law to publish positive reviews for business).

The Court finds that Plaintiffs have not alleged sufficient facts to support a claim that the Deere Defendants committed predicate acts of extortion. Plaintiffs may lack the business acumen of the Deere Defendants, but they do not allege facts to support the proposition that any fear, economic or otherwise, induced them to enter into the initial business relationship with the Deere Defendants. Nor do Plaintiffs assert any reason why the Deere Defendants were required to restructure the financing of COV's debt after COV had filed for bankruptcy and defaulted on its obligation to repay DCI under the terms of the bankruptcy plan. Although the Deere Defendants could have chosen to alter repayment to terms more favorable to COV, Plaintiffs have alleged no circumstances indicating that it was an act of extortion for the Deere Defendants to decline to do so. This conduct does not rise to the level even of hard bargaining; the bargain already had been struck, and the Deere Defendants were not obliged to revisit it.

Plaintiffs also have failed to state plausibly how the alleged mismanagement of the collateral property constitutes a predicate act of extortion. Plaintiffs' theory in regard to mismanagement of the property makes no sense in the context of extortion. The property already was part of the bankruptcy estate, of which the Deere Defendants were creditors. Thus,

it is unclear how the use of fear or force would assist the Deere Defendants in obtaining Plaintiffs' property.

Finally, Plaintiffs have not alleged sufficient facts to claim that Robert Thompson's threat of "immediate problems" constituted a predicate act of extortion.

Although the statement may have threatened an unlawful consequence if Plaintiffs failed to resolve their dispute with DCI, "immediate problems" just as likely may have referred to the onerous, but lawful, burden of litigation. The alleged threat is too vague for the Court to attach any improper meaning to it. See Iqbal, 556 U.S. at 678 ("Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'") (quoting Twombly, 550 U.S. at 557) (internal quotation marks omitted).

In sum, the Court finds that Plaintiffs have failed to allege any predicate acts of extortion in support of their RICO claims against the Deere Defendants.

b. *Bankruptcy Fraud*

The Court next determines whether Plaintiffs adequately have alleged predicate acts of bankruptcy fraud. Plaintiffs contend that the Deere Defendants

were the principals of T-16 and NWFM, such that the Deere Defendants are responsible for those entities' alleged fraudulent acts, including the embezzlement of property. ECF No. 98 at 12. Plaintiffs also allege that DCI, T-16, NWFM, Anderson, and Wyles committed bankruptcy fraud by seeking to conceal from the bankruptcy court a settlement agreement that would have revealed the true extent of the damage to a portion of the collateral property. ECF No. 98 at 12.

Plaintiffs allege that the Deere Defendants committed predicate RICO acts of bankruptcy fraud in violation of 18 U.S.C. §§ 152 and 153. ECF No. 74 at 20. Section 152 prohibits, among other acts, knowingly and fraudulently concealing property of a bankruptcy estate and knowingly and fraudulently making a false declaration in or in relation to a bankruptcy case. 18 U.S.C. § 152(1), (3). Section 153 prohibits certain persons with access to bankruptcy estate property or documents from knowingly and fraudulently appropriating or embezzling the estate's property. 18 U.S.C. § 153.

In support of the alleged bankruptcy fraud, Plaintiffs claim that the Deere Defendants are liable for the alleged fraudulent acts of the liquidating agent, T-16, because that entity was ordered in the bankruptcy plan to "take its direction from DCI or as otherwise directed by the Court." See ECF Nos. 98 at

12; 92, Ex. A at 8. T-16, along with other Defendants, allegedly embezzled property from the bankruptcy estate, charged COV expenses for labor and equipment that were used on other property, and applied minimal labor and resources to the estate property. ECF No. 74 at 11-12. Plaintiffs further claim that the Deere Defendants are liable for the false sworn declaration that NWFM's co-owner, Mr. Anderson, allegedly filed in bankruptcy court. ECF No. 98 at 12.

However, Plaintiffs have not asserted sufficient facts to adequately plead that the Deere Defendants are liable for the alleged fraud perpetrated by T-16 or others. Although the bankruptcy plan provided that T-16 would take direction from DCI, Plaintiffs have asserted no facts indicating that DCI or the other Deere Defendants would be liable for T-16's allegedly fraudulent acts. Nor do Plaintiffs provide factual assertions to support the contention that the Deere Defendants are liable for the allegedly false declaration. Rather, Plaintiffs' assertion of the Deere Defendants' vicarious liability is a legal conclusion, which is not entitled to an assumption of truth. See Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 683 (9th Cir. 2009) ("Plaintiffs' general statement that Wal-Mart exercised control over their day-to-day employment is a conclusion, not a factual allegation stated with any specificity. We need not accept

Plaintiffs' unwarranted conclusion in reviewing a motion to dismiss.").

Excluding Plaintiffs' conclusory statement that the Deere Defendants are liable for the actions of T-16 and NWFM, the Court finds that Plaintiffs have not raised a plausible claim that the Deere Defendants committed any RICO predicate acts of bankruptcy fraud.

c. *Mail and Wire Fraud*

Plaintiffs also allege that the Deere Defendants committed mail and wire fraud. ECF No. 74 at 20-21. To allege mail fraud in violation of 18 U.S.C. § 1341, "it is necessary to show that (1) the defendants formed a scheme or artifice to defraud; (2) the defendants used the United States mails or caused a use of the United States mails in furtherance of the scheme; and (3) the defendants did so with the specific intent to deceive or defraud." Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1399-400 (9th Cir. 1986). Wire fraud, in violation of 18 U.S.C. § 1343, "consists of (1) the formation of a scheme or artifice to defraud (2) use of the United States wires or causing a use of the United States wires in furtherance of the scheme; and (3) specific intent to deceive or defraud." Id. at 1400.

> Federal Rule of Civil Procedure 9(b) requires that fraud be pleaded with particularity. "[T]he pleader must state the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentation." Id. at 1401.

Plaintiffs claim that the Deere Defendants violated the mail and wire fraud statutes in their scheme to defraud Plaintiffs of their property by concealing the settlement agreement from Plaintiffs and concealing the relationship between "the Deere Entities, NWFM, T-16 and the Cervantes Attorneys[,]" among other acts.[6] ECF No. 74 at 20. The alleged fraud involved the use of emails and mailings about bankruptcy court filings. ECF No. 74 at 20-21.

Plaintiffs have failed to assert sufficient facts to claim that the Deere Defendants committed predicate RICO acts of wire or mail fraud. Even according to the asserted facts, there is no indication that the Deere Defendants were aware of the settlement agreement, which was between other parties. See ECF No. 74 at 13-14. Nor, as discussed above in regard to bankruptcy fraud, have Plaintiffs pleaded with sufficient specificity how the Deere

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[6] Although the record does not identify the "Cervantes Attorneys" with precision, they apparently are Bruce Johnston and Dale Foreman, ECF No. 99 at 9, who were dismissed voluntarily before Plaintiffs filed the Second Amended Complaint, see ECF No. 27.

Defendants would be liable for acts committed by T-16.

In sum, Plaintiffs have failed to assert plausible RICO predicate acts to support a claim that the Deere Defendants violated 18 U.S.C. § 1962(c). Because Plaintiffs have not stated a substantive RICO claim against the Deere Defendants, their RICO conspiracy allegation under 18 U.S.C. § 1962(d) fails as to these defendants as well. See Religious Tech. Ctr. v. Wollersheim, 971 F.2d 364, 367 n.8 (9th Cir. 1992) ("Because we find that [plaintiff] has failed to allege the requisite substantive elements of RICO, the conspiracy cause of action cannot stand.").

1. *Lending Discrimination*

The Deere Defendants argue that Plaintiffs' discrimination claims should be dismissed because they are barred by res judicata, statutes of limitations, and waiver. ECF No. 91 at 19-21. The Court finds that Plaintiffs' discrimination claims are precluded by the applicable statutes of limitations and therefore does not consider the Deere Defendants' remaining arguments.

Plaintiffs assert discrimination claims pursuant to 42 U.S.C. §§ 1981, 1982, 1985(3), and 1986. ECF No. 74 at 22-23. The parties do not dispute that a four-

year statute of limitations governs Plaintiffs' claim brought under § 1981. See Jones v. R.R. Donnelley & Sons Co., 541 U.S. 369, 383-85, 124 S. Ct. 1836, 158 L. Ed. 2d 645 (2004) (discussing 28 U.S.C. § 1658).[7]

Washington's three-year statute of limitations for personal injury actions, RCW 4.16.080(2), governs

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[7] Section 1658's four-year statute of limitations applies to actions brought under federal statutes that were enacted after December 1, 1990. Jones, 541 U.S. at 371. In Jones, the Court explained that § 1658 applies to claims that were made possible by an amendment to § 1981 that occurred after December 1, 1990. Id. at 383. Racial harassment in employment is an example of a § 1981 claim that was not possible under the pre-1990 version of the section. See id. Some § 1981 claims, however, instead remain subject to the most analogous statute of limitations under state law. See, e.g., Lukovsky v. City & Cnty. of San Francisco, 535 F.3d 1044, 1048 n.2 (9th Cir. 2008) (applying forum state's statute of limitations to failure-to-hire claim, which was cognizable under pre-1990 version of § 1981). The applicable statute of limitations under Washington State law would be the three year limitation for a lawsuit alleging personal injury, RCW 4.16.080(2). See Beauregard v. Lewis Cnty., Wash., No. C05- 5738RJB, 2006 U.S. Dist. LEXIS 73840, 2006 WL 2924612, at *8 (W.D. Wash. Oct. 10, 2006) (citing Taylor v. Regents of Univ. of Cal., 993 F.2d 710, 711-12 (9th Cir. 1993)). The parties do not address whether Plaintiffs' § 1981 claim would have been cognizable under the pre-1990 version of the law. However, because the parties do not dispute that the federal four-year statute of limitations applies and because the issue does not affect the Court's decision, the Court assumes, for purposes of this motion, that the longer statute of limitations is applicable.

claims brought pursuant to 42 U.S.C. § 1985(3). See Taylor v. Regents of Univ. of Cal., 993 F.2d 710, 711 (9th Cir. 1993) (per curiam) (applying California's analogous statute of limitations). The same rule controls § 1982 claims. See Mitchell v. Sung, 816 F. Supp. 597, 600 (N.D. Cal. 1993) ("Because section 1982 does not have a statute of limitations, courts apply the applicable state statute of limitations."). A one-year statute of limitations applies to claims under § 1986. 42 U.S.C. § 1986.

Although the relevant state statute of limitations applies to some of Plaintiffs' civil rights claims, federal law determines when a civil rights claim accrues. See Olsen v. Idaho State Bd. of Med., 363 F.3d 916, 926 (9th Cir. 2004) (citing Morales v. City of Los Angeles, 214 F.3d 1151, 1153-54 (9th Cir. 2000)). Federal law provides that "a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." TwoRivers v. Lewis, 174 F.3d 987, 991 (9th Cir. 1999). Accrual begins on the date on which a plaintiff becomes aware of an adverse action, not when a plaintiff suspects that a legal wrong has been committed. Lukovsky v. City & Cnty. of San Francisco, 535 F.3d 1044, 1049-50 (9th Cir. 2008).

Here, the Deere Defendants argue that Plaintiffs' claims under all of the applicable statutes of limitations are barred. ECF No. 91 at 19-20.

According to the Deere Defendants, the last allegedly discriminatory act occurred on January 8, 2010, when the Deere Defendants refused to renegotiate the repayment terms under the bankruptcy plan. ECF No. 91 at 20 (citing ECF No. 74 at 6-7).

Plaintiffs did not file their original complaint until more than four years later, on September 2, 2014. See ECF No. 1. In response, Plaintiffs do not refer to a later act but instead contend that the alleged misconduct constitutes "'continuing violations' under § 1981 for purposes of the statute of limitations." ECF No. 98 at 20.

The Supreme Court considered an alleged continuing violation of the Fair Housing Act in Havens Realty Corp. v. Coleman, 455 U.S. 363, 380, 102 S. Ct. 1114, 71 L. Ed. 2d 214 (1982). All of the incidents of alleged misconduct against one plaintiff in Havens Realty were time-barred, but another plaintiff alleged that a Fair Housing Act violation occurred within the 180-day time limit. Id. at 380. The Court held "that where a plaintiff, pursuant to the Fair Housing Act, challenges not just one incident of conduct violative of the Act, but an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within 180 days of the last asserted occurrence of that practice." See id. at 380-81 (footnote omitted). In other words, "because [one]

incident fell within the limitations period, none of the claims was barred." See id. at 380.

As Plaintiffs recognize, a continuing violation theory under § 1981 also requires that at least one discriminatory act occur within the filing period. ECF No. 98 at 20 (citing Phillips v. Heydt, 197 F. Supp. 2d 207 (E.D. Pa. 2002)). However, Plaintiffs refer to no misconduct that allegedly occurred within the filing period. Instead, they broadly claim that Plaintiffs' experiences with the Deere Defendants reflect "a steady steam [sic] and continuum properly characterized as discriminatory conduct based upon racial affiliation and ethnic identity." ECF No. 98 at 20. This conclusory allegation is insufficient to allege that any discriminatory acts occurred within the filing period for a § 1981 claim.

Accordingly, the Court concludes that Plaintiffs' lending discrimination claims are barred by the applicable statutes of limitations.

4. *Plausibility*

After considering in detail the separate claims in Plaintiffs' Second Amended Complaint, the Court finds that it is appropriate to address a more fundamental flaw in the theory of the case against the Deere Defendants. Plaintiffs allege that the Deere Defendants were significant actors in a

scheme, driven by racial and ethnic animus, to deprive Plaintiffs and other Hispani farmers of their land. The Deere Defendants allegedly were willing even to lose large amounts of money simply to ensure that Plaintiffs no longer would possess their land.

However, Plaintiffs have alleged no facts supporting their conclusion that the Deere Defendants' actions were driven by discrimination. In response to this lawsuit, the Deere Defendants have proffered that after COV failed to repay its debt in accordance with the bankruptcy plan, the Deere Defendants sought appointment of a liquidating agent, which the bankruptcy court approved. "As between that 'obvious alternative explanation' for [the Deere Defendants' actions] and the purposeful, invidious discrimination [that Plaintiffs ask the Court] to infer, discrimination is not a plausible conclusion." See Iqbal, 556 U.S. at 682 (internal citation omitted). Despite Plaintiffs' claims that T-16 mismanaged the property, it simply is not plausible under the asserted facts in the Second Amended Complaint that the Deere Defendants engaged in a discriminatory scheme of which T-16 allegedly played a role.

5. *Dismissal with Prejudice*

Leave to amend a complaint should be granted freely when justice so requires. Fed. R. Civ. P. 15(a).

However, "liberality in granting leave to amend is subject to several limitations." Ascon Properties, Inc. v. Mobil Oil Co., 866 F.2d 1149, 1160 (9th Cir. 1989) (citing DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir. 1987)). "Leave need not be granted where the amendment of the complaint would cause the opposing party undue prejudice, is sought in bad faith, constitutes an exercise in futility, or creates undue delay." Id. Additionally, "[t]he district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint." Id.

The Court dismisses Plaintiffs' claims against the Deere Defendants with prejudice. For the reasons discussed above, the Court finds that allowing Plaintiffs to amend their claims against the Deere Defendants again would be futile and subject these defendants to undue prejudice.

Accordingly, **IT IS HEREBY ORDERED**:

1. The Deere Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint, ECF No. 91, is **GRANTED**. The Court will issue a separate order regarding the Deere Defendants' Motion for Sanctions, ECF No. 112.

2. The Deere Defendants are **DISMISSED WITH PREJUDICE**.

The District Court Clerk is directed to enter this Order and provide copies to counsel.

DATED this 10th day of July 2015.

/s/ Rosanna Malouf Peterson
ROSANNA MALOUF PETERSON
Chief United States District Court Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

No. 1:14-CV-3125-RMP

CERVANTES ORCHARDS & VINEYARDS, LLC, a Washington limited liability corporation; CERVANTES NURSERIES, LLC, a Washington limited liability corporation; CERVANTES PACKING & STORAGE, LLC, a Washington limited liability corporation; MANCHEGO REAL, LLC, a Washington limited liability corporation; JOSE G. CERVANTES and CYNTHIA C. CERVANTES, individually, and upon behalf of their community property marital estate;

Plaintiffs,

v.

DEERE & COMPANY, a corporation; DEERE CREDIT, INC., a corporation; JOHN DEERE CAPITAL CORPORATION, a corporation; JOHN DEERE FINANCIAL FSB, a corporation formerly known as FPC Financial; DEERE CREDIT SERVICES, INC., a corporation; NORTHWEST FARM CREDIT SERVICES, a corporation; AMERICAN WEST BANK, a corporation; SKBHC HOLDINGS, LLC, a Washington limited liability corporation; T-16 MANAGEMENT CO, LTD, a Washington corporation; GARY JOHNSON and LINDA JOHNSON, individually and upon behalf of their community property marital estate; NW MANAGEMENT REALTY SERVICES, INC, a Washington corporation also known as Northwest Farm Management Company; ROBERT WYLES and

MICHELLE WYLES, individually and upon behalf of their community property marital estate; BOOKER AUCTION COMPANY, a corporation; GARY W. EAST; LAW OFFICE OF GARY W. EAST; HPC LOAN SERVICER, LLC, a Delaware limited liability company; ESTATE OF SCOTT J. ANDERSON; ROOTABAGA ENTERPRISES, INC, a company d/b/a CF Fresh; KEVIN GAY and JANE DOE GAY, individually and upon behalf of their community property marital estate; ACL FARMS, INC, a Washington corporation; K&K ORCHARDS; and MERLE BOOKER,

Defendants.

Before: ROSANNA MALOUF PETERSON,
Chief United States District Court Judge

Filed: December 19, 2014

ORDER STRIKING COMPLAINT AND AMENDED COMPLAINT

Before the Court are two Motions to Strike Complaint and for More Definite Statement. ECF Nos. 11, 15. Also before the Court is a motion to join the two pending motions to strike Plaintiffs' initial Complaint. ECF No. 23. Plaintiffs filed an Amended Complaint, ECF No. 29, which some defendants also have moved to strike, ECF No. 33. The Court has reviewed the motions, the complaints, and all other relevant filings. The Court is fully informed.

Plaintiffs claim that Defendants violated the Racketeer Influenced and Corrupt Organizations Act

(RICO), the Ku Klux Klan Act of 1871, and the Washington Consumer Protection Act, among other federal and state laws. ECF Nos. 1 at 1-2; 29 at 1-2.

Multiple Defendants filed or joined motions to strike the Complaint and for an order directing Plaintiffs to file a new complaint of no more than 30 pages. See, e.g., ECF No. 11 at 10. "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests . . . .'" Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47,78S. Ct. 99, 2 L. Ed. 2d 80 (1957)) (alteration in original). A party may move for a more definite statement if a pleading "is so vague or ambiguous that the party cannot reasonably prepare a response." Fed. R. Civ. P. 12(e).

Both the Complaint and the Amended Complaint are extremely long. The initial Complaint spans 337 pages,divided into 737 numbered paragraphs. ECF No. 1. Plaintiffs' Amended Complaint is somewhat shorter, comprising 143 pages and 430 numbered paragraphs, but Plaintiffs also attached a 469-page RICO Case Statement. ECF Nos. 29, 29-1.

More significant than the length of Plaintiffs' pleadings is the fact that both the Complaint and the Amended Complaint are difficult to comprehend. It appears that Plaintiffs assert that Defendants engaged in a scheme to obtain the property of Plaintiffs and of other Hispanic farm owners. See

ECF No. 29 at 8-9. However, the basis of Plaintiffs' allegations is lost in a quagmire of wordy and repetitious verbiage. See, e.g., ECF No. 29 at 22 (alleging "that defendants orchestrated, originated, formulated, implemented, and executed such criminal conduct with the intent and for the purpose of engendering, inciting, instigating, and fomenting racially motivated internecine"). Moreover, in the Amended Complaint, Plaintiffs assert claims against multiple defendants whom the Court had dismissed without prejudice from this case just eleven days earlier, at Plaintiffs' request. Compare ECF No. 29 at 98 with ECF No. 27 at 3-4.

Plaintiffs' RICO statement is even longer and more difficult to understand. For example, a single footnote in the document spans four pages, reciting the full text and comments to the Federal Rule of Civil Procedure that governs rules by district courts. ECF No. 29-1 at 4-7, n.3. Although the Local Rules provide that parties asserting RICO claims may file case statements, LR 3.2, Plaintiffs' RICO statement further muddles their theories of recovery and demonstrates the necessity of a page limit on Plaintiffs' RICO statement.

Plaintiffs' Complaint and the Amended Complaint violate Federal Rule 8(a)'s requirement that a pleading contain a short and plain statement of the claim. No party reasonably could respond to Plaintiffs' pleadings. Because the Court concludes that the Amended Complaint fails to meet the pleading standards, the Court does not consider Defendants' argument that the Amended Complaint

should be stricken because it was not filed with leave of the Court or consent of the parties.

The Court is aware that Plaintiffs' counsel have been chastised for filing similarly excessive pleadings in the Western District of Washington. See ECF No. 12. Counsel are on notice that they may be held liable for unreasonably and vexatiously multiplying the proceedings of this case. See Salstrom v. Citicorp Credit Services, Inc., 74 F.3d 183 (9th Cir. 1996). A court may impose sanctions as follows:

> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927; see also Salstrom, 74 F.3d at 185.
Accordingly, **IT IS HEREBY ORDERED**:
1. Defendant American West's Motion for Joinder, **ECF No. 23**, is **GRANTED**.

2. The Motions to Strike Complaint and for More Definite Statement, **ECF Nos. 11 and 15**, are **GRANTED**.

3. The Motion to Strike Amended Complaint, ECF No. 33, is **DENIED AS MOOT**.

4. Plaintiffs' Complaint, ECF No. 1, and Amended Complaint, ECF No. 29, are STRICKEN. Plaintiffs may file a Second Amended Complaint of no more than 30 pages, including any RICO case statement allowed pursuant to LR 3.2.

5. The Second Amended Complaint must be filed on or before **January 5, 2015**.

6. Failure to timely file an amended complaint or failure to comply with the requirements of this Order shall constitute grounds for sanctions, which may include monetary sanctions and/or the striking of some or all of Plaintiffs' claims. Such relief may be imposed by the Court *sua sponte*, or may be heard on shortened time, at the Court's discretion.

The District Court Clerk is directed to enter this Order and provide copies to counsel.

DATED this 19th day of December 2014.

/s/ Rosanna Malouf Peterson
ROSANNA MALOUF PETERSON
Chief United States District Court Judge

18 U.S. Code § 152. Concealment of assets; false oaths and claims, bribery.

A person who--

(1) knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or, in connection with a case under title 11, from creditors or the United States Trustee, any property belonging to the estate of a debtor;

(2) knowingly and fraudulently makes a false oath or account in or in relation to any case under title 11;

(3) knowingly and fraudulently makes a false declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, in or in relation to any case under title 11;

(4) knowingly and fraudulently presents any false claim for proof against the estate of a debtor, or uses any such claim in any case under title 11, in a personal capacity or as or through an agent, proxy, or attorney;

(5) knowingly and fraudulently receives any material amount of property from a debtor after the filing of a case under title 11, with intent to defeat the provisions of title 11;

(6) knowingly and fraudulently gives, offers, receives, or attempts to obtain any money or

property, remuneration, compensation, reward, advantage, or promise thereof for acting or forbearing to act in any case under title 11;

(7) in a personal capacity or as an agent or officer of any person or corporation, in contemplation of a case under title 11 by or against the person or any other person or corporation, or with intent to defeat the provisions of title 11, knowingly and fraudulently transfers or conceals any of his property or the property of such other person or corporation;

(8) after the filing of a case under title 11 or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor; or

(9) after the filing of a case under title 11, knowingly and fraudulently withholds from a custodian, trustee, marshal, or other officer of the court or a United States Trustee entitled to its possession, any recorded information (including books, documents, records, and papers) relating to the property or financial affairs of a debtor,

shall be fined under this title, imprisoned not more than 5 years, or both.

18 U.S. Code § 153. Embezzlement against estate.

a) Offense. A person described in subsection (b) who knowingly and fraudulently appropriates to the person's own use, embezzles, spends, or transfers any property or secretes or destroys any document belonging to the estate of a debtor shall be fined under this title, imprisoned not more than 5 years, or both.

(b) Person to whom section applies. A person described in this subsection is one who has access to property or documents belonging to an estate by virtue of the person's participation in the administration of the estate as a trustee, custodian, marshal, attorney, or other officer of the court or as an agent, employee, or other person engaged by such an officer to perform a service with respect to the estate.

18 U.S. Code § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or

invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate o foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S. Code § 1951. Interference with commerce by threats or violence.

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined under this title or imprisoned not more than twenty years, or both.

(b) As used in this section (1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. (3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point

in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

18 U.S. Code § 1964. Civil Remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such

restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d)A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

28 U.S.CODE § 1254(1) Courts of Appeals; certiorari; certified questions

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

42 U.S.CODE § 1981. Equal Rights Under the Law

(a) STATEMENT OF EQUAL RIGHTS

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) "MAKE AND ENFORCE CONTRACTS" DEFINED

For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) PROTECTION AGAINST IMPAIRMENT

The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.