2022

Civil RICO Suits Against Harm-Causing Marijuana Operations: Momtazi Family, LLC v. Wagner as a Case Study

Richard Henry Seamon

Kassadie F. Dunham

CIVIL RICO SUITS AGAINST HARM-CAUSING MARIJUANA OPERATIONS: *MOMTAZI FAMILY, LLC V. WAGNER* AS A CASE STUDY

KASSADIE F. DUNHAM[†] & RICHARD H. SEAMON[††]

Hemp was legalized as a matter of federal law in the 2018 Farm Bill, but the use of cannabis for recreational and medicinal purposes remains a federal crime. This has not stopped an increasing number of states from legalizing recreational and medicinal cannabis as a matter of state law. Unless and until cannabis is legalized on a federal level, coordinated activity to produce and distribute it for recreational and medicinal use can constitute "racketeering activity" under the federal Racketeer Influenced and Corrupt Organizations Act ("RICO") and give rise to "civil RICO" lawsuits by private plaintiffs. This article examines one particular civil RICO lawsuit, Momtazi Family, LLC v. Wagner. *In this case, owners of a vineyard claimed business injury from a neighboring cannabis operation. Using* Momtazi *as a focal point, this note reviews what RICO is, the current case law around civil RICO claims involving cannabis, and how the determination of standing for a civil RICO claim in the Ninth Circuit is developing. It also explores the legal landscape for civil RICO claims brought by South Dakota property owners against nearby marijuana operations, which would be brought in the Eighth Circuit.*

I. INTRODUCTION

As the cannabis industry increases in South Dakota and elsewhere, more and more landowners are learning that marijuana operations can be bad neighbors.[1] Some of these landowners are suing the neighboring marijuana operations for the "dead skunk stench" they produce and other harms.[2] In several of these cases, the landowners have asserted civil claims under the federal Racketeering Influenced and Corrupt Organizations Act ("RICO").[3] Many of these "civil RICO" claims

† J.D., 2022, University of Idaho College of Law.

†† Margaret Schimke Distinguished Professor of Law, University of Idaho College of Law. The authors offer this article for the glory of the Lord Jesus Christ.

1. *See, e.g.*, Emilie Rusch, *Marijuana-Infused Neighbor Conflicts: Ways to Clear the Air*, DENVER POST (Oct. 2, 2016, 4:13 PM), https://www.denverpost.com/2014/04/11/marijuana-infused-neighbor-conflicts-ways-to-clear-the-air/ (relaying stories of personal and police investigation into marijuana odors in Denver).

2. Thomas Fuller, *'Dead Skunk' Stench From Marijuana Farms Outrages Californians*, N.Y. TIMES (Dec. 19, 2018), https://www.nytimes.com/2018/12/19/us/california-marijuana-stink.html.

3. Organized Crime Control Act of 1970, tit. IX, 84 Stat. 922, 941-948 (codified at 18 U.S.C. §§ 1961-1968).

are dismissed on the ground that the plaintiffs lack statutory standing.[4] But the recent case of *Momtazi Family, LLC v. Wagner* (*Momtazi*)[5] could signify a major change in how courts determine standing for these types of civil RICO claims in the future, in South Dakota, and elsewhere.[6]

In *Momtazi*, a family winery ("the Momtazis") asserted a civil RICO claim against a neighboring marijuana operation for harming their business and land.[7] The Momtazis' central factual allegation was that a customer cancelled an order for six tons of wine grapes because of a belief that the grapes were tainted by the smell of the nearby marijuana.[8] The defendants moved to dismiss, arguing that the Momtazis could not show that they had been "injured in [their] business or property by reason of a violation of" RICO, as required to establish civil liability under RICO.[9] The district court denied the motion to dismiss, distinguishing two prior cases in which plaintiffs had unsuccessfully asserted civil RICO claims against neighboring marijuana operations.[10] The Momtazis' provisional victory is significant within the cannabis industry because, unlike suits based on other legal theories, like nuisance, civil RICO suits can yield treble damages and attorneys' fees.[11]

This article provides a case study of *Momtazi* with the goal of identifying situations in which landowners, particularly including landowners in South Dakota, can successfully sue nearby marijuana operations for federal racketeering under RICO. The prospect of civil RICO liability will likely strike many readers as odd and perhaps even improper. After all, most states have "legalized" marijuana for medical or recreational uses,[12] and the federal executive branch is letting them do so.[13] One of the few remaining groups of people who are not "chill" with the liberalizing trend are the civil RICO claimants who have

4. *See infra* Part II.B (describing the complexity of statutory standing in civil RICO suits).

5. No. 3:19-CV-00476-BR, 2019 WL 4059178 (D. Or. Aug. 27, 2019).

6. *Id. See also* Elise Herron, *An Oregon Vineyard Sued a Neighboring Cannabis Farm for Racketeering. A Judge Says the Case Might Have Merit.*, WILLAMETTE WEEK (Portland, Or.) (Sept. 5, 2019, 3:43 PM), https://www.wweek.com/news/2019/09/05/an-oregon-vineyard-sued-a-neighboring-cannabis-farm-for-racketeering-a-judge-says-the-case-might-have-merit/ (noting that "[t]he outcome of the Momtazi's lawsuit could lay the groundwork for how similar cases are treated in court.").

7. *Momtazi*, 2019 WL 4059178, at *1.

8. *Id.*

9. *Id.* at *4 (quoting 18 U.S.C. § 1964(c) (2015 & Supp. 2021)).

10. *Id.* at *4-5 (discussing Ainsworth v. Owenby, 326 F. Supp. 3d 1111 (D. Or. 2018) and Shoultz v. Derrick, 369 F. Supp. 3d 1120 (D. Or. 2019)).

11. *See* 18 U.S.C.A. § 1964(c) (permitting treble damages and attorney's fees for any person injured in violation of § 1972). One prior commentator has concluded, "RICO will not be helpful to most property owners because they will be unable to prove that state-sanctioned marijuana operations proximately caused clear and definite (not speculative) injuries to their business or property." Marci J. Gracey, *Growing Pains: Using Racketeering Law to Protect Property Rights from State-Sanctioned Marijuana Operations*, 72 OKLA. L. REV. 441, 442 (2020) (internal quotation marks omitted). For reasons discussed in this article, we are more sanguine about civil RICO's utility in this context. *See infra* Part III.C (addressing the application of civil RICO to the *Momtazi* lawsuit).

12. As of May 2022, only four States—Idaho, Kansas, South Carolina, and Wyoming—still declare marijuana fully illegal. *Map of Marijuana Legality by State*, DISA GLOB. SOLS. (May 2022), https://disa.com/map-of-marijuana-legality-by-state.

13. *See infra* Part III.A (referencing the historical and current executive actions regarding illegalization of marijuana).

marijuana operations for neighbors. You might say they are the skunks at the picnic.[14]

Following this introduction comes four parts. Part II provides the background on RICO. Part III explores cases in which property owners have brought civil RICO suits against nearby marijuana operations, focusing on the *Momtazi* case. Part IV discusses the situation in South Dakota. Part V concludes the piece.[15]

II. BACKGROUND ON RICO

A. ORIGIN OF RICO AND ELEMENTS OF A CIVIL RICO ACTION

RICO was part of the Organized Crime Control Act of 1970.[16] "RICO was written broadly to allow federal authorities greater discretion to attack organized crime."[17] On one hand, RICO "is not designed to cover ordinary business disputes."[18] On the other hand, RICO is not limited to situations involving organized crime of the dramatic sort depicted in movies and television.[19] This section summarizes what conduct violates the RICO statute and what remedies are available for RICO violations.

As relevant to this article, RICO makes it "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 . . . ."[20] An "enterprise" can be an individual, a legal entity, like a

14. Despite our quip in the text, the legal status of marijuana is a serious one for many reasons, not the least of which is that its use can have severe health consequences, especially in the young. *See* NAT'L INST. ON DRUG ABUSE, *Marijuana DrugFacts* (Dec. 24, 2019), https://nida.nih.gov/publications/drugfacts/cannabis-marijuana.

15. In examining the viability of civil RICO claims against harm-causing marijuana operations, we necessarily focus on operations that violate federal law and are thereby vulnerable to federal racketeering charges. We note, in order to exclude from further discussion, operations involving "hemp," the growing and processing of which has become legal at the federal level because of the 2018 Farm Bill. Pub. L. No. 115-334, tit. XII, § 12619, 132 Stat. 5018 (2018) (excluding "hemp" from definition of "marijuana" in Controlled Substances Act). The bill defines "hemp" as containing no more than 0.3 percent of delta-9 tetrahydrocannabinol (THC), the psychoactive compound in cannabis that creates a "high." *Id.* (codified at 21 U.S.C. § 802(16)(B)). *See also id.* § 10113 (codified at 7 U.S.C. § 1639o). The 2018 Farm Bill confirms the Food and Drug Administration's continuing authority to regulate hemp. *Id.* § 10113, 132 Stat. 4914 (codified at 7 U.S.C. § 1639*r*(c)). *See generally* CONGRESSIONAL RESEARCH SERVICE, R45525, THE 2018 FARM BILL (P.L. 115-334): SUMMARY AND SIDE-BY-SIDE COMPARISON 24-29 (Feb. 22, 2019).

16. *E.g.*, United States v. Turkette, 452 U.S. 576, 576-78 (1981) (identifying RICO originating in Title 18 of the United States Code by the Organized Crime Control Act of 1970).

17. 2 ARKIN, BUSINESS CRIME § 24.01 (Matthew Bender 2020).

18. Van Cates, Court Walsh, Niall A. Paul & Dennis Wall, *Recent Developments in Business Litigation*, 55 TORT TRIAL & INS. PRAC. L.J. 193, 194 (2020).

19. Sedima, S.P.R.L. v. Imrex Co., Inc., 473 U.S. 479, 499 (1985) (observing that most civil RICO suits are not brought "against the archetypal, intimidating mobster"); Bennett v. Berg, 685 F.2d 1053, 1063 (8th Cir. 1982) (rejecting argument that civil RICO claims mist allege "the involvement of organized crime . . . .").

20. 18 U.S.C.A. § 1962(c) (2015 & Supp. 2021).

corporation, or "any union or group of individuals associated in fact although not a legal entity."[21] A "pattern of racketeering activity" means "at least two acts of racketeering activity . . . ."[22] "[R]acketeering activity," in turn, encompasses a wide range of crimes, including "the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States."[23] In sum, to establish a RICO violation, the plaintiff must adequately plead and prove "that the defendant engaged in (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity . . . ."[24]

Given RICO's goal of targeting organized crime, you might think that RICO is just a criminal law, but that is not the complete picture. RICO does prescribe stiff criminal penalties for violations, including life in prison and forfeiture of property associated with RICO violations.[25] But RICO also creates a private cause of action for "[a]ny person injured in his business or property by reason of a violation of [RICO] . . . ."[26] And RICO adds that the successful plaintiff, with exceptions not relevant here, "shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee . . . ."[27] These generous remedies reflect Congress's objective to turn private plaintiffs into "private attorneys general" who would "supplement Government efforts to deter and penalize . . . ." RICO violations.[28]

Congress's objective has been achieved—arguably to a fault—judging by the large number and variety of civil RICO lawsuits. For example, the yearly number of civil RICO lawsuits filed in the federal courts each year grew from somewhat over 600 in 2008 to more than 1,400 in 2018.[29] In the year ending March 31, 2020, they numbered more than 1,500.[30] One commentator contends that civil RICO has "run amok" in terms of its breadth:

> [Recently,] federal courts have upheld civil RICO complaints in vastly different contexts, including: misrepresentations by pharmaceutical companies, real estate fraud, misconduct in divorce and child custody proceedings, and Fourth Amendment violations by police officers. It is fair to say that, if someone were to survey recent civil RICO cases, she would be very surprised to

---

21. 18 U.S.C.A. § 1961(4) (2015 & Supp. 2021).
22. 18 U.S.C.A. § 1961(5).
23. 18 U.S.C.A. § 1961(1)(D).
24. Chaset v. Fleer/Skybox Int'l, LP, 300 F.3d 1083, 1086 (9th Cir. 2002).
25. *See* 18 U.S.C.A. § 1963(a) (2015 & Supp. 2021) (imposing penalties of fine or imprisonment of not more than twenty years for violations of 18 U.S.C.A. § 1962).
26. 18 U.S.C.A. § 1964(c).
27. *Id.*
28. Rotella v. Wood, 528 U.S. 549, 557 (2000).
29. TRAC Reports, *Anti-Racketeering Civil Suits Jump in 2018*, https://trac.syr.edu/tracreports/civil/535/ (last visited Jan. 12, 2022).
30. U.S. CTS., *Statistics and Reports, Table C-2—U.S. District Courts—Civil Federal Judicial Caseload Statistics* (Mar. 31, 2020), https://www.uscourts.gov/statistics/table/c-2/federal-judicial-caseload-statistics/2020/03/31.

> learn that organized crime was the primary target—or a major target at all—in its creation.[31]

The U.S. Supreme Court has "recognize[d] that, in its private civil version, RICO is evolving into something quite different from the original conception of its enactors."[32] The Court has attributed this evolution to (1) "Congress' self-consciously expansive language"; (2) its "overall approach" of designing RICO to encompass a broad range of federal and state criminal activity; and (3) "its express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes.'"[33]

B. "STATUTORY STANDING" TO BRING CIVIL RICO CLAIMS

As discussed above, RICO extends a private cause of action to anyone "injured in his business or property by reason of a violation of . . . ." RICO.[34] A plaintiff who shows that he or she has suffered the statutorily required injury to "business or property" and that the injury occurred "by reason of a violation of" RICO is said to have "statutory standing" or "RICO standing."[35] The term "standing" is misleading here because it is used to refer to the elements of the civil RICO cause of action, whereas "standing" in its true sense refers to a jurisdictional restriction on the powers of the federal courts.[36] In any event, the U.S. Supreme Court and lower federal courts have construed civil RICO's requirements of (1) an injury to business or property and (2) a causal connection between the injury and a RICO violation to put meaningful restrictions on civil RICO lawsuits. As discussed in part III of this article, those restrictions have defeated some civil RICO claims against marijuana operations.[37]

---

31. John K. Cornwell, *RICO Run Amok*, 71 SMU L. REV. 1017, 1019 (2018).

32. Sedima, S.P.R.L. v. Imrex, 473 U.S. 479, 500 (1985).

33. *Id.* at 498 (quoting Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (1970)). *See also, e.g.*, Haroco, Inc. v. Am. Nat'l Bank & Trust Co. of Chi., 747 F.2d 384, 398-99 (7th Cir. 1984) (stating that RICO's breadth is the result of the "deliberate policy choices on the part of Congress").

34. 18 U.S.C.A. § 1964(c).

35. *E.g.*, Safe Sts. All. v. Hickenlooper, 859 F.3d 865, 881, 887 (10th Cir. 2017); *see also Sedima, S.P.R.L.*, 473 U.S. at 496 (addressing that "[t]he plaintiff only has standing [under RICO] if, and can only recover to the extent that, he has been injured in his business or property by the conduct constituting the violation.").

36. *See Safe Sts. All.*, 859 F.3d at 887 (identifying that "what we once called 'Rico standing' or 'statutory standing' we now properly characterize as the usual pleading-stage inquiry: whether the plaintiff has plausibly pled a cause of action under RICO."); *see also* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118, 125-28 (2014) (distinguishing requirements for Article III standing from those for stating a cause of action under Lanham Act).

37. *See infra* Part III (providing examples and analysis of restrictions that defeated civil RICO claims against marijuana).

1. Injury "to [B]usiness or [P]roperty"[38]

The Ninth Circuit, tasked with hearing the *Momtazi* case, interpreted RICO to put two restrictions on plaintiffs with respect to the statutory injury requirement. First, consistent with the text of the statute and U.S. Supreme Court dicta, the Ninth Circuit held that plaintiffs cannot recover for *personal* injury, as distinguished from injury to their business or property.[39] Second, despite a lack of textual support in the statute, the Ninth Circuit has held that the plaintiff must show "concrete financial loss."[40]

The Ninth Circuit applied both restrictions in its en banc decision in *Oscar v. University Students Co-Operative Ass'n*.[41] The en banc Ninth Circuit again addressed the "concrete financial loss" requirement in *Diaz v. Gates*.[42] Both cases figure prominently in several of the civil RICO suits against marijuana operations.

The plaintiff in *Oscar*, Ruth Oscar, rented an apartment close to a residential building called Barrington Hall, which was owned by the defendant, University Students Co-Operative Association.[43] Ms. Oscar claimed that Barrington Hall was a drug den:

> At least nineteen different individuals within the co-operative sold drugs there, and drug sales have allegedly been going on at Barrington for over twenty years. . . . [A]ccording to the complaint, defendants posted lookouts on neighboring property, and dumped the bodies of persons suffering from drug overdoses on their neighbors' land. The conspiracy was also responsible, we are told, for "filth, risk of disease, and noise"; for "violence, throwing of garbage on property, urinating on cars [and] vandalism"; and for numerous other crimes, misdemeanors, nuisances, and annoyances.[44]

Ms. Oscar alleged that these conditions caused a (1) "decrease in the value of her property" and (2) loss in her "use and enjoyment of [her] property."[45]

The Ninth Circuit held that the alleged decrease in property value did not "entail a financial loss" to Oscar and was therefore not cognizable in a civil RICO

---

38. 18 U.S.C.A. 1964(c).

39. *E.g.*, Ove v. Gwinn, 264 F.3d 817, 825 (9th Cir. 2001); *see also, e.g.*, RJR Nabisco, Inc. v. European Cmty., 579 U.S. 325, 350 (2016) (stating that Congress "cabin[ed] RICO's private cause of action to particular kinds of injury–excluding, for example, personal injuries . . . .").

40. *E.g.*, Fireman's Fund Ins. Co. v. Stites, 258 F.3d 1016, 1021 (9th Cir. 2001) (noting the plaintiff must show it had suffered a concrete financial loss by producing documentation of the damages in order to prevail in the RICO action).

41. 965 F.2d 783 (9th Cir. 1992) (en banc).

42. 420 F.3d 897 (9th Cir. 2005) (en banc).

43. *Oscar*, 965 F.2d at 784. There were actually two plaintiffs in *Oscar*, Ruth Oscar and Charles Spinosa. *Id.* at 784. The Ninth Circuit initially refers to them collectively as "Oscar," *id.*, and, presumably because Mr. Spinosa had moved out of his apartment by the time of the court's opinion, the court sometimes uses the singular pronoun "her" to refer to Oscar later in its opinion, *e.g.*, *id.* at 785.

44. *Id.* at 784.

45. *Id.* at 785-86.

claim.[46] The court first distinguished Ms. Oscar's situation, as a renter, from that of a property owner, stating, "[a]lthough one might measure an owner's loss by the diminution in fair market value, the same cannot be said for a renter."[47] Indeed, the court reasoned, if the value of the rental property decreased, the rent charged to Ms. Oscar might decrease as well, thereby giving her an economic benefit.[48] The court added that it would be a different matter "if [Ms. Oscar] had an interest she could sublet and the racketeering enterprise reduced the rent she could charge to sublet her apartment."[49] But Ms. Oscar could not show that she had a right to sublet or had attempted to exercise any such right.[50] And even if she could make those showings, she would also have to show that the nearby racketeering activity depressed the rental value of her apartment below the existing, artificially low level imposed on the property by Berkeley's rent-control ordinance.[51] In short, the Ninth Circuit concluded that her financial loss was, at most, abstract, rather than "concrete."[52]

The Ninth Circuit also held that Ms. Oscar's loss of "the use and enjoyment of her leasehold interest" was not cognizable in a civil RICO suit.[53] The court explained that this was "a perfectly cognizable claim for nuisance under California law," but it was a personal injury, and "personal injuries are not actionable under RICO."[54]

Because *Oscar* was a suit against nearby drug activities, it has obvious relevance to *Momtazi* and other cases in which property owners assert civil RICO claims against marijuana operations. Indeed, we will see that *Oscar* has been discussed by later courts in several such cases.[55] This is true even though the Ninth Circuit seemingly relaxed the "concrete financial loss" requirement in its later en banc decision in *Diaz v. Gates*, a decision that also has relevance for *Momtazi* and similar cases.[56]

In *Diaz*, the plaintiff David Diaz alleged that he had been falsely arrested and imprisoned by the Los Angeles Police Department and, as a result, lost his job, other employment opportunities, and wages.[57] The en banc court held that Mr. Diaz had sufficiently alleged "an injury to 'business or property' within the

46. *Id.*
47. *Id.* at 786-87.
48. *Id.* at 787.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.* at 785.
53. *Id.* at 787.
54. *Id.*
55. *See* Safe Sts. All. v. Hickenlooper, 859 F.3d 865, 888 (10th Cir. 2017); Underwood v. 1450 SE Orient, LLC (*Underwood I*), No. 3:18-cv-1366-JR, 2020 WL 9889191, at *3 (D. Or. Mar. 5, 2020); Scholtz v. Derrick, 369 F. Supp. 3d 1120, 1127-28 (D. Or. 2019); Bokaie v. Green Earth Coffee LLC, No. 18-cv-05244-JST, 2018 WL 6813212, at *3, *5 n.2, *5–6 (N.D. Cal. Dec. 27, 2018); Ainsworth v. Owenby, 326 F. Supp. 3d 1111, 1121–26 (D. Or. 2018).
56. Diaz v. Gates, 420 F.3d 897, 899 (9th Cir. 2005) (en banc). The court concluded that this entitlement was a "property interest" injury to which is "sufficient to provide standing under RICO." *Id.*
57. *Id.* at 898.

meaning of RICO."[58] The court determined that California law creates a "legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes."[59] The court derived this entitlement from California law recognizing the torts of "intentional interference with contract and interference with prospective business relations."[60] The Ninth Circuit concluded that the interest protected by these state torts was a "property interest," and proof of injury to it is "sufficient to provide standing under RICO."[61]

2. Injury "by reason of" a RICO violation[62]

The U.S. Supreme Court has held that, to show injury "by reason of" a RICO violation, the plaintiff must show that the RICO violation proximately caused the injury.[63] "Proximate cause for RICO purposes," the Court has said, "should be evaluated in light of its common-law foundations; proximate cause thus requires some direct relation between the injury asserted and the injurious conduct alleged."[64]

The Court's decision in *Hemi Group, LLC v. City of New York*[65] illustrates how the proximate cause requirement can limit civil RICO liability.[66] New York City alleged that the Hemi Group sold cigarettes online to City residents without collecting and submitting to New York State the federally required customer information that would facilitate the City's collection of use taxes from City residents who bought cigarettes from Hemi Group.[67] The City asserted that Hemi Group's interstate sale of cigarettes and failure to submit customer information violated the federal mail and wire fraud statutes and therefore constituted "racketeering activities."[68] Those activities, the City alleged, caused it to lose "tens if not hundreds of millions of dollars a year in cigarette excise tax revenue."[69]

The Court held that the City could not "satisfy the causation requirement."[70] The Court explained that the City's theory of causation was "far too indirect":

---

58. *Id.*
59. *Id.* at 899 (quoting Mendoza v. Zirkle Fruit Co., 301 F.3d 1163, 1168 n.4 (9th Cir. 2002)).
60. *Id.* at 900.
61. *Id.* at 899.
62. 18 U.S.C.A. § 1964(c).
63. *E.g.*, Hemi Grp., LLC v. City of New York, 559 U.S. 1, 9 (2010) (finding the connection between the alleged conspiracy and the injury was "too remote"); Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 457 (2006) (concluding the plaintiff could not maintain his claim for lack of proximate cause); Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 265-68 (1992) (discussing the reason for requiring a showing of proximate cause when alleging a RICO violation).
64. *Hemi Grp., LLC*, 559 U.S. at 9.
65. *Id.*
66. *Id.* at 1.
67. *Id.* at 5-6.
68. *Id.* at 6-7.
69. *Id.* at 6 (internal quotation marks omitted).
70. *Id.* at 8.

> Here, the conduct directly responsible for the City's harm was the customers' failure to pay their taxes. And the conduct constituting the alleged fraud was Hemi's failure to file [federally required customer] reports. Thus, . . . the conduct directly causing the harm was distinct from the conduct giving rise to the fraud.[71]

The Court added, "[p]ut simply, Hemi's obligation was to file the [customer] reports with the State, not the City, and the City's harm was directly caused by the customers, not Hemi."[72]

The Court ended its opinion in *Hemi Group* by emphasizing the need for "a direct causal connection between the predicate wrong and the harm."[73] The Court based this need partly on "the fact that the liability [in civil RICO actions] comes with treble damages and attorney's fees attached."[74] This parting shot could be read as a signal to lower courts to apply the proximate cause requirement strictly, in light of the substantial liability for which civil RICO provides.[75]

III. THE USE OF CIVIL RICO IN SUITS BY PROPERTY OWNERS AGAINST NEIGHBORING MARIJUANA OPERATIONS

The U.S. Supreme Court has acknowledged "[t]he 'extraordinary' uses to which civil RICO has been put," attributing them "primarily" to "the breadth of the predicate offenses, in particular the inclusion of wire, mail, and securities fraud."[76] If it is unlikely that Congress intended civil RICO to include all manner of wire, mail, and securities fraud, the application of civil RICO to claims involving cannabis seems even more unlikely. Even so, and despite the increasing public acceptance of recreational and medical uses of marijuana, most conduct involving marijuana remains a federal crime, and it can form the basis for civil RICO lawsuits.[77] This section explores those suits, giving particular attention to the most recent such suit, *Momtazi*.[78]

---

71. *Id.* at 11.

72. *Id.*

73. *Id.* at 17-18.

74. *Id.* at 17.

75. *See* PAUL BATISTA, CIVIL RICO PRACTICE MANUAL § 2.06 (2021) ("*Hemi* is important because it is one of the few Supreme Court opinions which have limited, rather than expanded, the scope of liability under civil RICO."); *see also* Holmes v. Sec. Inv. Prot. Corp., 503 U.S. 258, 268 (1992) ("Here we use 'proximate cause' to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts. At bottom, the notion of proximate cause reflects ideas of what justice demands, or of what is administratively possible and convenient.") (some internal quotation marks omitted).

76. Sedima, S.P.R.L v. Imrex Co., Inc., 473 U.S. 479, 500 (1985).

77. Christopher Strunk, *Yes to Cannabis! Just Not in My Backyard: An Analysis of Odor-Based Claims in the Cannabis Industry*, 49 THE BRIEF 32, 35-36 (2020) [hereinafter *Yes to Cannabis*].

78. Momtazi Family, LLC v. Wagner (*Momtazi*), No. 3:19-cv-00476-BR, 2019 WL 4059178 (D. Or. Aug. 27, 2019). *See also* Harron, *supra* note 6 (reporting the federal lawsuit against the Wagners will proceed after a judge found the racketeering complaint has merit).

A. THE FEDERAL ILLEGALITY OF STATE "LEGALIZED" MARIJUANA OPERATIONS

Most people have, at best, a hazy understanding of marijuana's current legal status. To be clear, the production, distribution, and possession of marijuana are still federal crimes.[79] That is true even though most states have "legalized" recreational or medical marijuana, and the federal executive branch largely forebears prosecuting marijuana offenses that are "legal" under state law.[80]

Marijuana activity is criminalized by the Controlled Substances Act of 1970 ("CSA").[81] The CSA was part of "a comprehensive regime to combat the international and interstate traffic in illicit drugs."[82] Marijuana remains a Schedule I drug—one determined to have no approved medicinal use and a high likelihood of abuse—under the CSA.[83] The manufacture, distribution, and simple possession of Schedule I drugs are all criminal acts under the CSA, as they have been since 1970.[84] Under the U.S. Constitution's Supremacy Clause, the CSA generally preempts state laws purporting to legalize marijuana.[85]

The state legal landscape has changed significantly since 1970. In the 1990s, states began "legalizing" marijuana for medical use.[86] Starting in 2012, states began "legalizing" marijuana for all adults, not just medical patients.[87] Today, thirty-seven states and the District of Columbia allow marijuana for medical use, and eighteen states, as well as D.C., allow recreational marijuana use.[88]

While federal statutory law did not change during this wave of state "legalization," federal enforcement policies did. The changes in enforcement

---

79. *See infra* notes 81-85 and accompanying text.

80. *See infra* notes 81-85 and accompanying text.

81. Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as amended primarily at 21 U.S.C. §§ 801-904).

82. Gonzales v. Raich, 545 U.S. 1, 12 (2005).

83. 21 U.S.C.A. § 812(b)(1) & Sched. I, (c)(1) (2013 & Supp. 2021); *Gonzales*, 545 U.S. at 14. *See also* CTR. FOR THE STUDY OF FEDERALISM, *Marijuana* (2018) [hereinafter *Marijuana*], https://encyclopedia.federalism.org/index.php/Marijuana (explaining that Marijuana has been a Schedule I drug since 1970).

84. 21 U.S.C.A. §§ 841(a), 844(a) (2013 & Supp. 2021).

85. U.S. CONST. art. VI, § 2. Although states cannot authorize conduct that the CSA forbids, states remain free to decriminalize marijuana activity under state law; the federal government cannot compel them to maintain and enforce state laws forbidding marijuana. *See* TODD GARVEY, CONGRESSIONAL RESEARCH SERVICE, MEDICAL MARIJUANA: THE SUPREMACY CLAUSE, FEDERALISM, AND THE INTERPLAY BETWEEN STATE AND FEDERAL LAWS 6 (2012) (explaining that the anti-commandeering principle prevents federal government from compelling states to enact and enforce state laws to further federal policy). Some commentators go further. One of the most prominent such commentators argues that "state law is preempted only if it requires someone to violate" the CSA. Robert A. Mikos, *Preemption Under the Controlled Substances Act*, 16 J. HEALTH CARE L. & POL'Y 5, 8 (2013). *See generally* Symposium, *Marijuana Laws and Federalism*, 58 B.C. L. REV. 857 (2017) (introducing the inconsistency between state laws relaxing marijuana restrictions and federal law criminalizing it).

86. Sarah Trumble, *Timeline of State Marijuana Legalization Laws*, THIRD WAY (Apr. 19, 2017), https://www.thirdway.org/infographic/timeline-of-state-marijuana-legalization-laws.

87. *Marijuana*, *supra* note 83.

88. Nicholas Fandos, *Schumer Proposes Federal Decriminalization of Marijuana*, N.Y. TIMES (July 14, 2021), https://www.nytimes.com/2021/07/14/us/politics/marijuana-legalization-schumer.html?searchResultPosition=13.

policy began with the issuance of the Ogden Memorandum by the Obama Administration's U.S. Department of Justice (DOJ) in 2009.[89] The Ogden Memorandum stated the DOJ's policy was not to prosecute medical marijuana activity that complied with state law in the states that legalized it.[90] The Ogden Memorandum seemed to create a hands-off approach from Washington.[91] The Ogden Memorandum and later memoranda expressing (and expanding) the hands-off approach were repealed in 2018 during the Trump Administration.[92] The effect of the repeal is complicated by a spending rider enacted by Congress starting in 2014—known as the "Rohrabacher–Farr" or "Rohrabacher–Blumenauer" amendment—that prevents the U.S. Department of Justice from prosecuting individuals for acting in compliance with state medical marijuana laws.[93]

Despite these changes in federal enforcement policy, the CSA's prohibition on marijuana activity continues to limit the powers of the states to put their pro-marijuana policies into place.[94] Federally regulated banks generally are unwilling to deal with marijuana transactions and people in the marijuana business still risk losing their jobs or government benefits because of engaging in conduct that is criminal under federal law.[95] Additionally, marijuana businesses are still considered "racketeering activity" under civil RICO claims.[96] Although marijuana is legal in some states—including Oregon where marijuana was legalized in 1998 for medicinal use and in 2014 for recreational use—marijuana is still illegal under the CSA, and therefore any act conducted with a marijuana business may be a racketeering activity in violation of RICO.[97] So long as marijuana is illegal at a federal level, growing of marijuana is a "racketeering activity," allowing for a civil RICO claim to pose more danger to marijuana businesses, with its threat of treble damages and awards of attorney's fees, than posed by a regular nuisance claim.[98]

89. Memorandum from David W. Ogden, Deputy Attorney General, on Investigations and Prosecutions in States Authorizing the Medical Use of Marijuana (Oct. 19, 2009), https://www.justice.gov/archives/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states.

90. *Id.* (instructing selected U.S. Attorneys that they "should not focus federal resources in [their] States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.").

91. *Marijuana*, *supra* note 83.

92. Memorandum from Jefferson B. Sessions, III, Attorney General, for All United States Attorneys (Jan. 4, 2018), https://www.justice.gov/opa/press-release/file/1022196/download.

93. Michael McGrory, *Defending Cannabis Regulatory Enforcement Actions*, 62, DRI FOR THE DEF., No. 11, at 12-13 (Nov. 2020); *Marijuana*, *supra* note 83. *See also* H.Amdt. 748 to H.R. 4660, 113th Cong., 160 CONG. REC. 82, H4982 (2014) (providing the text of the spending rider).

94. *Marijuana*, *supra* note 83.

95. *Id.*

96. Strunk, *supra* note 77, at 35-36. *See also, e.g.*, Safe Sts. All. v. Hickenlooper, 859 F.3d 865, 882 (10th Cir. 2017) ("[C]ultivating marijuana for sale . . . [pursuant to an agreement among the defendants] is by definition racketeering activity.").

97. Van Cates, Court Walsh, Niall A. Paul & Dennis Wall, *Recent Developments in Business Litigation*, 55 TORT TRIAL & INS. PRAC. L.J. 193, 196 (2020). *See also* 18 U.S.C.A. § 1961(1) (defining racketeering activity).

98. Strunk, *supra* note 77, at 35-36.

B. PRE-*MOMTAZI* CIVIL RICO SUITS AGAINST MARIJUANA OPERATIONS

Private plaintiffs have brought civil RICO actions against state-legalized cannabis business owners in Colorado, California, and Oregon.[99] Many of these claims were backed by "moneyed anti-cannabis interests."[100] Often the suits prompted settlements, and, initially, some plaintiffs claimed early legal victories.[101] However, establishing an injury for RICO standing is often challenging and, according to some courts, requires more than the diminished use and enjoyment of land and a diminished fair market value.[102]

1. Colorado

In 2017, the Tenth Circuit held that landowners in Colorado could sue a licensed marijuana cultivation enterprise on an adjacent property in a civil RICO suit.[103] The three appeals discussed in *Safe Streets Alliance* arose from two cases concerning Amendment 64 of the Colorado Constitution, which repealed many of the state's criminal and civil prohibitions on "recreational marijuana," and created a regulatory regime designed to ensure licensed marijuana businesses and taxes and regulations on marijuana.[104] Two of the appeals to the Tenth Circuit came from *Safe Streets Alliance v. Alternative Holistic Healing, LLC*,[105] where Colorado landowners, along with an interest group, challenged the dismissal of their claims brought through the citizen suit provision of RICO.[106] The Tenth Circuit held that the landowners had plausibly alleged at least one RICO claim against each defendant and reversed the dismissal of those in part.[107]

The Colorado landowners in *Safe Streets Alliance* owned property in the "Meadows at Legacy Ranch," which is a development in Pueblo County, Colorado.[108] They did not live on their land, and the only known structures were two agricultural buildings; however, they did visit the property on weekends to ride horses, hike, and visit friends.[109] A recreational "marijuana grow" was operating just a few feet from the plaintiffs' property line.[110] The landowners alleged that the operation of the enterprise and the resultant noxious odors caused

99. Christopher D. Strunk & Mackenzie S. Schoonmaker, *How Green Is the "Green Rush"? Recognizing the Environmental Concerns Facing the Cannabis Industry*, 21 VT. J. ENV'T L. 506, 513 (2020) [hereinafter *How Green is the Green Rush*].

100. *Id.*

101. *Id.*

102. Underwood v. 1450 SE Orient, LLC (*Underwood II*), No. 3:18-cv-1366-JR, 2019 WL 2871097, at *2–4 (D. Or. June 14, 2019).

103. *How Green Is the Green Rush*, *supra* note 99, at 513.

104. Safe Sts. All. v. Hickenlooper, 859 F.3d 865, 876 (10th Cir. 2017).

105. *Id.*

106. *Id.*

107. *Id.* at 877.

108. *Id.* at 879.

109. *Id.*

110. *Id.*

harm by "interfer[ing] with their present use and enjoyment of the land and caus[ing] a diminution in its market value . . . ."[111]

The district court concluded that the plaintiffs had not pled a "plausible injury to their property that was proximately caused by the [defendants'] activities in violation of the CSA" and dismissed the RICO claims with prejudice.[112] The district court determined the plaintiffs had not provided factual support to quantify the diminution in property value and rejected the argument that the noxious odor from the defendants' enterprise permitted a reasonable interference with the property value.[113]

On appeal, the Tenth Circuit held that the direct injuries were sufficient for the landowners to proceed on their RICO claims.[114] The Tenth Circuit first determined that the landowners plausibly pled that the defendants violated RICO and continued to analyze whether the landowners plausibly pled injuries to their property caused by those violations.[115]

The Tenth Circuit determined that neither § 1964(c)'s text nor a ruling by the Supreme Court or the Tenth Circuit established the increased pleading standard set forth by the district court.[116] Instead, the Tenth Circuit found that a plaintiff does not need to submit evidence of a "concrete financial loss" in order to plausibly allege an injury to his property.[117]

The Tenth Circuit also found that the district court was incorrect in finding that the plaintiffs had not plausibly alleged injuries to their property rights.[118] The Tenth Circuit reasoned that "Congress meant to incorporate common-law principles when it adopted RICO," including the law of nuisance.[119] The plaintiffs' claims were only at the pleading stage, and they plausibly pled an injury to their property in the form of present interference with their use and enjoyment of land caused by the emission of foul odors.[120]

The Tenth Circuit ruled that only an eminently reasonable inference needs to be drawn to conclude that defendants' activities interfere with one's use and enjoyment of the property and diminish the value of the property.[121] The plaintiffs were not required to allege they attempted to sell or have the land appraised.[122] Instead, a common-sense analysis concludes that nuisances diminish the value of land.[123] The court also determined that it is reasonable to infer, at this stage in the litigation, that a potential buyer would be less willing to purchase land adjacent to

111. *Id.* at 880.
112. *Id.* at 881.
113. *Id.*
114. *Id.*
115. *Id.* at 885.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at 886 (quoting Beck v. Prupis, 529 U.S. 494, 504 (2000)).
120. *Id.*
121. *Id.* at 887.
122. *Id.*
123. *Id.*

"an openly operating criminal enterprise."[124] The Tenth Circuit determined that this was enough to show that the plaintiffs pled a "plausible diminution in the value of their property."[125] The court specified that their decision was merely the application of the standard enumerated by Congress in § 1964(c).[126]

2. *California*

The landowners in *Bokaie v. Green Earth Coffee*[127] owned homes in Sonoma County, California, near a marijuana operation.[128] Like the landowners in *Safe Streets*, these homeowners alleged that the operation (1) interfered with the use and enjoyment of their property and (2) diminished its market value.[129] The district court relied on *Oscar* to hold that the alleged interference with their use and enjoyment of the property was personal injury and, as such, not cognizable under RICO.[130] The court's analysis of the alleged diminution in property value turned on a particular factual development in the case and requires a bit more explanation.

The factual development was that the marijuana operation had been shut down by the County at the time of the court's decision.[131] The court held that California law limited the recovery of damages because the marijuana operation was a continuing nuisance.[132] The court quoted California case law holding that "a plaintiff in a *continuing* nuisance case may not recover diminution in value damages [because] the plaintiff would obtain a double recovery if she could recover for the depreciation in value and also have the cause of that depreciation removed."[133] The court's reasoning on this score is a bit murky. Apparently, though, the discontinuance of the defendants' marijuana operation prevented recovery for any current or future diminution in property value.[134]

If the marijuana operation had not ceased, the district court in *Bokaie* might have analyzed the homeowners' allegation of diminution in property value differently. The district court recognized that—under California law, as interpreted by the Ninth Circuit in *Diaz*—the homeowners had "legal entitlement to both current and prospective contractual relations."[135] Thus, they had a right

124. *Id.* at 888.
125. *Id.*
126. *Id.* at 887.
127. No. 18-CV-05244-JST, 2018 WL 6813212 (N.D. Cal. Dec. 27, 2018).
128. *Id.* at *1.
129. *Id.* at *2.
130. *Id.* at *5-6 (citing Oscar v. Univ. Students Co-Op. Ass'n, 965 F.2d 783, 787 (9th Cir. 1992) (en banc)).
131. *Id.* at *4.
132. *Id.* at *6.
133. *Id.* (quoting Gehr v. Baker Hughes Oil Field Operations, Inc., 81 Cal. Rptr. 3d 219, 225 (Ct. App. 2008)) (internal quotation marks and some brackets omitted).
134. *Id.* (noting that "[w]hile Plaintiffs have alleged a diminution in present market value of their homes, because the nuisance has been abated and the cause of the depreciation has been removed, Plaintiffs have not sufficiently pleaded an injury to property").
135. *Id.* (quoting Diaz v. Gates, 420 F.3d 897, 900 (9th Cir. 2005) (en banc)).

to contract with potential buyers of their homes "unhampered by schemes prohibited by the RICO predicate statutes."[136] Perhaps the court considered that right adequately vindicated by the discontinuance of the defendants' marijuana operation, at least in the absence of allegations by the homeowners that they had tried without success to sell their homes at market value.[137]

3. *Oregon*

In two opinions by the U.S. District Court for the District of Oregon issued before *Momtazi*, the court dismissed civil RICO claims because of the plaintiff property owners' failure to allege injury cognizable under RICO.

a. *Schoultz v. Derrick*

In *Shoultz v. Derrick*,[138] the district court granted a motion to dismiss the civil RICO claims by property owners who were living close to the defendants' recently created marijuana production facility.[139] The plaintiffs, who were retired senior citizens, were already living on a property where they had built a home, raised a family, and continued to live when the defendant purchased the property nearby and, along with several others, developed a marijuana production facility.[140]

The plaintiffs alleged that the defendants' marijuana operation harmed the use and enjoyment of their property.[141] The plaintiffs also alleged that their property was "more difficult to sell" and, as a result, had a diminished market value.[142] The defendants argued that the plaintiffs failed to establish RICO standing because they did not set forth adequate facts to establish an "association-in-fact enterprise" and their injuries were not compensable under RICO.[143]

An "enterprise" is defined as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[144] An "associated-in-fact enterprise" is established where these three elements are met: "(1) a common purpose, (2) an ongoing organization, and (3) a continuing unit."[145] Here, the court found that the plaintiffs made allegations that met these elements and stated a facially plausible claim of an enterprise.[146]

---

136. *Diaz*, 420 F.3d at 899.
137. *Bokaie*, 2018 WL 6813212, at *6.
138. 369 F. Supp. 3d 1120 (D. Or. 2019).
139. *Id.* at 1129.
140. *Id.* at 1123.
141. *Id.*
142. *Id.*
143. *Id.*
144. 18 U.S.C.A. § 1961.
145. *Shoultz*, 369 F. Supp. 3d at 1125 (citing United States v. Christensen, 828 F.3d 763, 780 (9th Cir. 2015)).
146. *Id.*

However, the court found that the plaintiffs failed to state a claim under civil RICO because their asserted injuries, the use and enjoyment of their property and the diminished market value, were not cognizable under RICO.[147] The court found support for this decision based on the Ninth Circuit's "repeated admonitions that 'concrete financial loss' is an indispensable element of a RICO claim."[148] Here, the plaintiffs failed to make good faith allegations that they currently have attempted or have a desire to convert their property into monetary value.[149]

The district court in *Shoultz* adopted the reasoning of a different district court judge in the next case.[150]

b. *Ainsworth v. Owenby*

Ainsworth v. Owenby[151] provides a detailed analysis of what the Ninth Circuit holds a plaintiff must show to plausibly allege a concrete financial loss stemming from diminished property value in a RICO case against a marijuana operation.[152] The plaintiffs, a group of residential property owners, filed a state-law nuisance claim and two RICO claims against the defendants, owners of the land on which the marijuana operation was assertedly maintained.[153] The court granted the defendants' motion to dismiss for failure to state a claim under RICO.[154]

The plaintiffs alleged that the odors, noise and traffic, and the existence of the marijuana operation made their properties worth materially less and harder to sell.[155] The defendants argued that plaintiffs had not suffered injuries of the type that can be compensated under RICO.[156]

The court interpreted Oregon law to distinguish between nuisance claims arising from "injury to property" and those arising from "personal injury."[157] While injury to property occurs where there is damage to the physical condition or "value" of the plaintiff's land, personal injury occurs when the defendant interferes with a plaintiff's "comfort and enjoyment" of property.[158] The court accordingly determined that the plaintiffs' injury to "use and enjoyment" was not an injury to property, but instead a "personal injury" and not sufficient to state a RICO claim.[159] The plaintiffs' purchase of a home security system was also not

147. *Id.*
148. *Id.* at 1128 (quoting Ainsworth v. Owenby, 326 F. Supp. 3d 1111, 1126 (D. Or. 2018)).
149. *Id.*
150. *Id.*
151. 326 F. Supp. 3d 1111.
152. *Shoultz*, 369 F. Supp. 3d at 1128; *Ainsworth*, 326 F. Supp. 3d at 1124.
153. *Ainsworth*, 326 F. Supp. 3d at 1116.
154. *Id.*
155. *Id.* at 1117.
156. *Id.* at 1123.
157. *Id.* at 1122.
158. *Id.*
159. *Id.*

enough to state a RICO claim because that purchase was "derivative of" their asserted emotional distress, which was a personal injury.[160]

The court held that an injury to property can take the form of a reduction in the fair market value of land, but the plaintiffs still must prove a concrete financial loss.[161] To prove a concrete financial loss, the court said, the plaintiff "must plausibly allege at least a present intent or desire to" sell.[162] The court determined that the plaintiffs failed to do so.[163] The court observed that the plaintiffs had only stated, in an abstract sense, that their lands were worth less and failed to make good faith allegations that they "attempted or currently desire to convert [their] interests into a pecuniary form."[164] What was required, the court said, was "that a plaintiff who has not alleged specific prior attempts to monetize a property interest must plausibly allege at least a present intent or desire to do so."[165]

The district court in *Ainsworth* distinguished the Tenth Circuit's decision in *Safe Streets Alliance*.[166] In both cases, the defendants "argued that the plaintiffs' diminished 'use and enjoyment' of their properties was a personal rather than a proprietary injury."[167] In rejecting that argument, the Tenth Circuit had "relied upon Colorado nuisance law."[168] Defendants, in that case, had "failed to cite any state 'authority suggesting that a landowner's complaints about a neighbor's recurrent emissions of foul odors are conceptually unmoored from the owner's property rights.'"[169] The district court in *Ainsworth* explained that, in apparent contrast to Colorado law, "Oregon law *does* draw a distinction between nuisance claims arising from personal and proprietary injuries," and the court classified plaintiffs' claimed loss of use and enjoyment as a personal injury, which made it uncompensable in a civil RICO suit.[170]

C. *MOMTAZI FAMILY, LLC V. WAGNER*

As discussed above, the district court for the District of Oregon has dismissed two civil RICO suits against neighboring marijuana operations. But the district court's recent decision in *Momtazi*[171] may change how civil RICO claims related to marijuana are analyzed by that district and in other courts.[172] In *Momtazi*, U.S.

160. *Id.* at 1124.
161. *Id.* (citing Chaset v. Fleer/Skybox Int'l, LP, 300 F.3d 1083, 1087 (9th Cir. 2002)).
162. *Id.* at 1125.
163. *Id.*
164. *Id.* at 1126.
165. *Id.* at 1125.
166. *Id.* at 1123.
167. *Id.*
168. *Id.*
169. *Id.* (quoting Safe Sts. All. v. Hickenlooper, 859 F.3d 865, 886 (10th Cir. 2017)).
170. *Id.*
171. *See generally* Momtazi Family, LLC v. Wagner (*Momtazi*), No. 3:19-cv-00476-BR, 2019 WL 4059178 (D. Or. Aug. 27, 2019) (denying the defendants' motion to dismiss, finding the plaintiff has a plausible claim for relief under RICO).
172. *Id.*

Senior District Judge Anna Brown has denied the defendants' motion to dismiss the lawsuit because a monetary loss had plausibly been alleged by the plaintiff.[173]

Momtazi Family, LLC, the plaintiff ("the Momtazis"), is a family-owned vineyard in Oregon wine country that alleged that the defendants' ("the Wagners") production and processing of marijuana on the neighboring property damaged the vineyard's property.[174] The Momtazis sued the Wagners, asserting a civil RICO claim.[175]

The Momtazis grow grapes on the property that are used by Maysara Winery, LLC ("Maysara Winery") to create prize-winning and other high-quality wines.[176] The Momtazis leased their property to Maysara Winery and the property was utilized as their principal place of business.[177] The Momtazis also sold their grapes to other wine producers.[178]

The Wagners bought the property next to the Momtazis vineyards to produce and process marijuana.[179] Yamhill Naturals LLC is an Oregon limited liability company with the Wagner property as its principal place of business.[180] The marijuana operation marketed its marijuana under Yamhill Naturals' brand name.[181] Additionally, Souring Hill, LLC managed the Wagner property for the purpose of marijuana production and processing.[182]

The Momtazis' repeat customer cancelled an order for six tons of wine grapes grown on the Momtazis' property because the customer believed that marijuana grown on the Wagner property had tainted the grapes.[183] This concern over contamination led to the Momtazis being unable to market and sell grapes grown on the portion of the property closest to the Wagners' property.[184]

But that failed sale was not the only harm that the Momtazis alleged. They also alleged that their fish-stocked reservoirs were affected by the large amounts of dirt that flowed downhill from the defendant's property and created a hazard to the fish and wildlife.[185] The reservoirs were part of their biodynamic operation, an important part of their property's operations.[186] Additionally, the Momtazis alleged that the Wagners or their agents trespassed onto the Momtazis'

173. *Id.* at *4-5.
174. First Amended Complaint at 1, *Momtazi*, 2019 WL 4059178.
175. *Id.*
176. *Id.* at 4.
177. *Id.*
178. *Id.*
179. *Id.* at 7.
180. *Id.*
181. *Id.*
182. *Id.* at 8.
183. *Id.* at 20.
184. *Id.*
185. Momtazi Family, LLC v. Wagner (*Momtazi*), No. 3:19-cv-00476-BR, 2019 WL 4059178, at *1 (D. Or. Aug. 27, 2019).
186. *Id.*

property.[187] The Momtazis claimed that the trespass led to the killing of a calf and amputation of a cow's tail.[188]

The legal question that needed answering was not whether marijuana odor actually had the ability to permeate the skin of wine grapes.[189] Instead, the Momtazis' argument rests on whether they suffered financial loss due to a cancelled order and decreased marketability of their grapes that would give them standing under RICO for an injury to their business or property.[190]

The Momtazis alleged that the Wagners' marijuana operation had "directly and materially diminished" the fair market value of the Momtazis' property.[191] The Momtazis alleged that the decreased marketability of the grapes grown on their property and the real property value of the vineyard was a direct result of the proximity of the marijuana operation to their property.[192] The Momtazis also alleged that this decrease in the fair market value could be observed in the decrease in the amount that can be charged for the rental of the property.[193] The Momtazis alleged that the Wagners violated the CSA by forming the marijuana operation to produce, process, and distribute marijuana.[194]

The Wagners filed a motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction and under Rule 12(b)(6) for failure to state a claim.[195] They argued that the Momtazis had failed to state facts sufficient to constitute a claim "alleging '(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.'"[196] Wagner also alleged that none of the defendants "ever produced,

187. *Id.*

188. *Id.*

189. *Id.* at *2. *See also* Mike Pomranz, *Can Marijuana Odor Taint Wine Grapes?*, FOOD & WINE (Sept. 10, 2019), https://www.foodandwine.com/wine/wine-grapes-marijuana-odor-lawsuit-oregon (discussing whether the Wagners' marijuana operation could actually cause the Momtazis' grapes to have hints of cannabis).

190. *See Momtazi*, 2019 WL 4059178, at *2; *see also id.* at *6 ("The customer's concerns, whether valid or invalid, arose directly from the proximity of Defendants' marijuana-grow operation."). The issue of whether or not the Wagners' marijuana tainted the Momtazis' grapes apparently was at issue in a separate lawsuit filed in Oregon state court. *See* Associated Press, *Vineyards Lose Suit against Pot Operation*, YAMHILL CNTY.'S NEWS-REGISTER.COM (Oct. 23, 2020), https://newsregister.com/article?articleTitle=vineyards-lose-suit-against-pot-operation—1603483938—38498. That suit was brought against the Wagners by Maysara Winery and Smera Vineyards. *Id.* According to a media report, the judge in that case ruled after a trial that "there is insufficient proof at this time by a preponderance of the evidence that [the Wagners' marijuana operation] will damage plaintiffs' current or future agricultural products." *Id. See also* Larry Altman, *UC Davis Specialist Anita Oberholster Says Marijuana Odor Effect on Wine Grapes Should Be Studied*, INDEPENDENT (Nov. 3, 2021), https://www.independentnews.com/news/livermore_news/uc-davis-specialist-anita-oberholster-says-marijuana-odor-effect-on-wine-grapes-should-be-studied/article_60277538-3cb4-11ec-85f0-1b97ebc14294.html (quoting statement of University of California extension specialist that concern about effect of marijuana odor on wine grapes "is not based on total nonsense" and that, to the contrary, "scientifically, it is possible that there is a potential impact"); Tina Caputo, *How Cannabis Will Impact the Wine Trade*, SEVENFIFTYDAILY (Aug. 12, 2019), https://daily.sevenfifty.com/how-cannabis-will-impact-the-wine-trade/ (reporting that "the prospect of cross-contamination remains worrisome" to vintners).

191. First Amended Complaint, *supra* note 174, at 23.

192. *Id.*

193. *Id.*

194. *Id.* at 27-37.

195. Defendant's Motion to Dismiss at 6, *Momtazi*, 2019 WL 4059178.

196. *Id.* (quoting Imagineering Inc. v. Kiewit Pacific Co., 976 F.2d 1303, 1310 (9th Cir. 1992)).

processed, or distributed marijuana on the property for commercial purposes" and that the Momtazis were well aware of this.[197] The Wagners contended that the Momtazis' alleged injuries are not cognizable and are not sufficient for statutory standing under RICO.[198] The Wagners also argued that the Momtazis' diminished fair market value and rental value allegations were not concrete financial losses and were speculative because the Momtazis never alleged a desire to lease the property to anyone other than Maysara, another entity allegedly owned solely by the Momtazis.[199] Additionally, the Wagners highlighted that the Momtazis failed to offer an estimate of the fair market value or any sources or methodologies for determining the value.[200]

Further, the Wagners argued that the Momtazis failed to plead that the Wagners' alleged RICO violations proximately caused the Momtazis' injuries.[201] The Wagners argued that the cancellation of an order for wine grapes was not an injury for which they were responsible when the cancellation was based on "unfounded subjective beliefs."[202] The Wagners alleged that the "RICO violations are not the cause—proximate or otherwise—of any of the alleged RICO injuries."[203]

Here, the court made a ruling that may affect civil RICO claims in the future. The court denied the Wagners' motion to dismiss.[204] The court held that, at the pleading stage, the Momtazis had adequately pled standing under the U.S. Constitution and RICO.[205]

Under the Constitution, the plaintiff must show three elements: "(1) [the plaintiff] suffered an injury in fact (2) that is fairly traceable to the challenged conduct of the defendant and (3) that is likely to be redressed by a favorable judicial decision."[206] The court found that the allegations established injuries in fact that are concrete, particularized, and actual because the Momtazis can show that they own the neighboring property to the Wagners' property, they were unable to market their grapes, their reservoir was damaged, a calf was killed, and another cow was damaged.[207]

The court also found that the Momtazis had pled RICO standing.[208] To show standing under RICO, the "plaintiff must allege (1) he suffered 'harm to a specific business or property interest' and (2) the injury was 'a proximate result of the

197. *Id.*
198. *Id.* at 6-7.
199. *Id.* at 14.
200. *Id.* at 13.
201. *Id.* at 15-17.
202. *Id.* at 16.
203. *Id.* at 17.
204. Momtazi Family, LLC v. Wagner (*Momtazi*), No. 3:19-cv-00476-BR, 2019 WL 4059178, at *7 (D. Or. Aug. 27, 2019).
205. *Id.* at *4-6.
206. *Id.* at *3 (quoting Spokeo, Inc. v. Robins, 578 U.S. 330, 338 (2016)).
207. *Id.* at *4.
208. *Id.* at *4-6.

alleged racketeering activity.'"[209] When the plaintiff is trying to assert harm to property, the plaintiff must allege "(1) the injury is proprietary as opposed to 'personal' or 'emotional' and (2) the proprietary injury resulted in 'concrete financial loss.'"[210]

The court analyzed the prior holdings from *Ainsworth* and *Shoultz* "that mere allegations of diminished use or enjoyment of property or the costs of increased security measures as a result of a marijuana-grow operation on adjacent property do not constitute injury to property."[211] However, the court found an injury sufficient for RICO. Here, the Momtazis did allege more than a "mere allegation of diminished market value . . . ."[212]

The Momtazis alleged at least one customer cancelled its order and their property value and marketability of their grapes decreased.[213] Although the Momtazis did not allege specific monetary amounts of loss, the court found that discoverable evidence would allow the loss to be calculable in a pecuniary form.[214] The Momtazis alleged the loss of a sale of grapes and decreased rental value.[215] This loss was not based solely on the Momtazis' use and enjoyment of the property.[216] The court concluded that these allegations "establish 'injury to a property interest' that constitutes a 'concrete financial loss' sufficient for standing under RICO."[217]

Additionally, to prove direct or proximate causation, the plaintiff does not need to be a victim of the defendant's underlying crime but must allege that the injury was directly caused by the defendant's actions.[218] The court focused on three factors set out by the Ninth Circuit to evaluate proximate causation:

> (1) whether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general; (2) whether it will be difficult to ascertain the defendant's wrongful conduct; and (3) whether the courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries.[219]

Although none of these factors is dispositive, and this is not an exhaustive list, the controlling inquiry is "whether an injury is the 'direct' or 'indirect' result of the defendant's conduct."[220] The concerns of the customer who cancelled their

209. *Id.* at *4 (quoting Newcal Indus. v. Ikon Office Solution, 513 F.3d 1038, 1055 (9th Cir. 2008)).
210. *Id.* (citing Canyon Cnty. v. Syngenta Seeds, Inc., 519 F.3d 969, 975 (9th Cir. 2008)).
211. *Id.* (citing Ainsworth v. Owenby, 326 F. Supp. 3d 1111, 1123 (D. Or. 2018); Shoultz v. Derrick, 369 F. Supp. 3d 1120 (D. Or. 2019)).
212. *Id.* at *5.
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.* (citing Anza v. Ideal Steel Supply Corp., 547 U.S. 451, 461 (2006); Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 649-50 (2008)).
219. *Id.* at *6.
220. *Id.* (citing Canyon Cnty. v. Syngenta Seeds, Inc., 519 F.3d 969, 982 (9th Cir. 2008)).

grape order, whether valid or invalid, were caused directly by the Wagners' neighboring marijuana operation.[221] The court found that the Momtazis had standing because there was a direct link between the injuries and the alleged violations of RICO.[222]

The court found that the reasoning in *Ainsworth* was persuasive for the Momtazis' claim of RICO standing.[223] The fair market value of the Momtazi property, similar to that in *Ainsworth*, was "materially diminished" by the operation of the marijuana operation on the Wagners' property.[224] The decrease in the marketability of the grapes on the Momtazis' property was a direct result of the marijuana operation's location.[225] The rental income that the Momtazis could make through renting out their property was "materially less" than without the presence of the marijuana operation.[226] Therefore, the Momtazis had stated, "'a claim for relief [against Defendants] that is plausible on its face' under RICO."[227]

The district court denied the motion to dismiss in August 2019.[228] Discovery consumed the rest of 2019, all of 2020, and the first half of 2021.[229] The latest joint status report filed by the parties in May 2021 proposed a trial date in November 2021.[230]

IV. THE LEGAL LANDSCAPE FOR CIVIL RICO SUITS AGAINST MARIJUANA OPERATIONS IN SOUTH DAKOTA

South Dakota has recently legalized medical marijuana and seems poised to legalize recreational marijuana as well.[231] Accordingly, South Dakota residents could soon become familiar with a new type of land use in the form of marijuana growing and processing operations. Even with laws restricting the location of those operations, some adjacent property owners are likely to suffer harm from the operations, which could lead to lawsuits.[232] And, as discussed above, property

221. *Id.*
222. *Id.*
223. *Id.*
224. *Id.* at *7.
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.* at *1.
229. Docket Report, Momtazi Family, LLC v. Wagner (*Momtazi*), No. 3:19-cv-00476-BR, 2019 WL 4059178 (D. Or. Aug. 27, 2019) (downloaded from PACER Nov. 27, 2021).
230. May 21, 2021 Joint Status Report, Doc. No. 90, *Momtazi*, 2019 WL 4059178.
231. SDCL §§ 34-20G-1 to -95 (2015 & Supp. 2021); Thom v. Barnett, 2021 SD 65, ¶ 64, 967 N.W.2d 261, 282-83 (2021) (holding that voter-approved initiative legalizing marijuana violated South Dakota Constitution single-subject requirement).
232. South Dakota's medical-marijuana law authorizes local governments to restrict "the time, place, manner, and number of medical cannabis establishments in the locality." SDCL § 34-20G-58. In addition, the state law requires "medical cannabis establishment[s]" to be more than "one thousand feet of a public or private school." SDCL § 34-20G-55(b)(ii) (2021). These establishments must also comply with local zoning laws. SDCL § 34-20G-55(d).

owners have an incentive to assert civil RICO claims, when possible, because civil RICO claims can yield awards of treble damages and attorney's fees.[233]

We have examined the law in South Dakota and in the federal Eighth Circuit, where South Dakota is located,[234] and come to three conclusions about civil RICO claims by property owners against neighboring marijuana operations in South Dakota:

1. A civil RICO claim can succeed in a situation like *Momtazi*, where the operation directly causes physical injury to the plaintiff's property or to the plaintiff's business, such as loss of sales.
2. A civil RICO claim can also succeed when the owner of real property shows an intent to rent or sell the property, coupled with a diminished ability to do so, or a diminution in its rental or sale value, proximately caused by the marijuana operation.
3. In contrast, it is debatable whether the owner of property in South Dakota could successfully sue under civil RICO solely based on (a) diminution in the sale or rental value of the property or (b) impairment to the owner's use and enjoyment of the property.

A. THE *MOMTAZI* SITUATION ANALYZED UNDER EIGHTH CIRCUIT LAW

As we have seen, the biggest challenge faced by the plaintiffs in *Momtazi*, and other civil RICO plaintiffs suing neighboring marijuana operations, is proof of RICO standing. The Ninth Circuit has held that, to show RICO standing, the plaintiff must plead and prove "concrete financial loss."[235] As discussed below, the Eighth Circuit has ostensibly adopted the "concrete financial loss" requirement from the Ninth Circuit. The "concrete financial loss" requirement can be met in the Eighth Circuit, as in the Ninth, in a situation like *Momtazi*, in which the plaintiff suffers a direct physical injury to business *property*—such as the injury to Momtazi's fish ponds by dirt from the marijuana operation—and cancellation of business *contracts*—such as the cancellation of contracts for Momtazi's grapes.

The earliest Eighth Circuit case expressly articulating the "concrete financial loss" requirement is *Regions Bank v. J.R. Oil Co., LLC*.[236] That case arose when Regions Bank loaned $400,000 to J.R. Oil Company and the man who controlled J.R. Oil, Steven Jones. [237] In extending the loan, the bank relied on Mr. Jones' fraudulent statements about his and his company's assets.[238] In reality, there were no assets to secure the loan at the time Regions Bank made it. For complicated

233. 18 U.S.C.A. § 1964(c).

234. 28 U.S.C.A. § 41 (2019 & Supp. 2021).

235. Schoultz v. Derrick, 369 F. Supp. 3d 1120, 1127-1128 (D. Or. 2019); Ainsworth v. Owenby, 326 F. Supp. 3d 1111, 1121-1126 (D. Or. 2018)

236. 387 F.3d 721 (8th Cir. 2004).

237. *Id.* at 724.

238. *Id.*

reasons that are not relevant here, the fraudulent statements made by Jones *were not part of the pattern of racketeering activity* that Regions Bank alleged.[239] Instead, all of the alleged racketeering activity occurred *after* Regions Bank made the loan.[240] The Eighth Circuit held that Regions Bank's civil RICO claim failed because the alleged racketeering activity neither caused the bank to make the loan in the first place nor caused it to be unable to recover the loan proceeds.[241] In short, Regions Bank failed to show proximate causation. In what was therefore dicta, however, the Eighth Circuit in *Regions Bank* did quote Ninth Circuit case law to state that a civil RICO plaintiff must prove "concrete financial loss."[242]

Only one other published Eighth Circuit case has expressly articulated the "concrete financial loss" requirement, and in that case, too, the court's statement of the requirement was arguably dicta. That case is *Gomez v. Wells Fargo Bank, N.A.*[243] The Gomezes claimed that they paid inflated real-estate appraisal fees in real estate transactions financed by Wells Fargo Bank.[244] According to the Gomezes, they were led to pay these fees as a result of a pattern of racketeering by Wells Fargo and other defendants.[245] The Eighth Circuit affirmed the dismissal of the Gomezes' civil RICO claims.[246] It held that they were required, and had failed, to "plausibly allege a concrete financial loss caused by a RICO violation."[247] The court explained that "the Gomezes admit[ted] that they received appraisal services and paid market rates for those services" and "fail[ed] to articulate any defect in their appraisals."[248] In short, they got what they paid for and thus suffered *no* financial loss, "concrete" or otherwise. To restate the

239. *Id.* at 730.

240. *Id.*

241. *Id.*

242. *Id.* at 728 (quoting Steele v. Hosp. Corp. of Am., 36 F.3d 69, 70 (9th Cir. 1994)). Many other cases in the Eighth Circuit cite the Ninth Circuit's decision in *Steele v. Hospital Corp. of America* (along with *Regions Bank*), to support the "concrete financial loss" requirement. *E.g.*, Gomez v. Wells Fargo Bank, 676 F.3d 655, 660 (8th Cir. 2012) (finding the plaintiffs failed to allege a "concrete financial loss" to support their claim that a mortgagee had inflated appraisals fees in violation of RICO); EMC Nat'l Life Co. v. Emp. Benefit Sys., Inc., No. 4:10–cv–00143-JEG, 2011 WL 13229648, at *5 (S.D. Iowa Mar. 15, 2011) (quoting *Region Bank's* requirement of the plaintiff to show a "concrete financial loss"); Allstate Ins. Co. v. Linea Latina De Accidentes, Inc., 781 F. Supp. 2d 837, 845 (D. Minn. 2011) (finding the plaintiffs had alleged a "concrete financial loss"); Lakes Ent., Inc. v. Milberg, LLP, No. 09-677, 2010 WL 11646572, at *5 (D. Minn. Apr. 29, 2010) (finding the district court erred in holding the plaintiffs' settling of claims for a smaller percentage of their damages due to the defendant's fraudulent inducement did not constitute a "concrete financial loss"); Lipari v. Gen. Elec. Co., No. 07–0849–CV-W-FJG, 2008 WL 2977032, at *3 (W.D. Mo. July 30, 2008) (discussing the plaintiff's need to establish he suffered a "concrete substantial loss"); Dill v. Gen. Am. Life Ins. Co., No. 4:03cv00407 SWW, 2005 WL 8164478, at *5 (E.D. Ark. June 21, 2005) (quoting *Regions Bank*, 387 F.3d at 728) (stating, "[A] showing of injury requires proof of a concrete financial loss . . . .").

243. 676 F.3d 655.

244. *Id.* at 657.

245. *Id.* at 658-59.

246. *Id.* at 660-62.

247. *Id.* at 662. *See also id.* at 660 (quoting *Regions Bank*, 387 F.3d at 728) ("[A] showing of [RICO] injury requires proof of concrete financial loss . . . .").

248. *Id.* at 661.

point using RICO's text, they simply did not show they had been "injured in [their] business or property."[249]

Another Eighth Circuit case suggests that the "concrete financial loss" requirement might not be as demanding in the Eighth Circuit as it has been construed to be within the Ninth Circuit. In *Bieter Co. v. Blomquist*,[250] a commercial real estate developer alleged that the bribery of city officials led the City of Eagan to deny its application to develop a shopping center while granting the application of competing developers.[251] The denial of its application led it to lose "a committed anchor tenant" and "the capability to develop the property as it had intended."[252] Thus, the plaintiff's "property had not lost all value—but it has lost what likely would have been the most valuable use of its property."[253] The Eighth Circuit held that "such injury satisfies [RICO's] requirement of injury to 'business or property.'"[254] In so holding, the court rejected the defendants' argument that the plaintiff did not suffer "the sort of actual, concrete injury for which RICO was designed."[255] Although some courts in the Ninth Circuit have held that the mere loss in a property's value does not qualify as "concrete financial loss," *Bieter* suggests that this loss can qualify as such in the Eighth Circuit.

A useful example of a plaintiff who easily satisfied the "concrete loss requirement" in a federal district court case in the Eighth Circuit comes from *Tumey L.L.P. v. Mycroft AI, Inc.*[256] The plaintiffs in *Tumey* were an attorney and his law firm (collectively "the firm"), which had represented a company called Voice Tech Corporation in patent infringement claims and other disputes with the defendant, Mycroft AI.[257] The firm asserted that, to retaliate for their legal representation of Voice Tech, Mycroft had carried out continuing cyberattacks and hacking of the firm's computers and telecommunications equipment.[258] The firm claimed that this conduct violated various federal statutes, constituted a pattern of racketeering, and, most relevant here, had caused financial losses in the form of:

> employee time spent addressing and responding to hacking attacks, hiring a computer specialist to defend against such attacks, costs associated with increased security (both physical and virtual) at Plaintiffs' offices and home, the inability to access Plaintiffs' property (firm phone lines and email accounts) for the significant periods of time when functionality was entirely shut down due to the volume of cyberattacks, and business loss damage

249. 18 U.S.C.A. § 1964(c).
250. 987 F.2d 1319 (8th Cir. 1993).
251. *Id.* at 1321-26.
252. *Id.* at 1328.
253. *Id.* at 1329.
254. *Id.*
255. *Id.* at 1328-29.
256. No. 4:21-00113-CV-RK, 2021 WL 4806734 (W.D. Mo. Oct. 14, 2021).
257. *Id.* at *1.
258. *Id.*

> in the form of reputational injury, lost clients, and loss of potential business and business expectancy.[259]

The court had no trouble finding that these allegations satisfied the concrete financial loss requirement.[260]

The court's acceptance of the allegations of injury in *Tumey* as sufficient supports the sufficiency of the central allegations of injury in *Momtazi*. The plaintiffs in *Momtazi* allege that a customer cancelled an order for six tons of grapes grown on the plaintiffs' property because the customer believed the grapes were tainted by the smell of the adjacent marijuana.[261] This allegation amounts to a specific loss of business comparable to that generally alleged in *Tumey*.[262] The further allegation by the plaintiffs in *Momtazi* of the decreased marketability of their grapes parallels the loss of potential business and reputational injury alleged in *Tumey* and recognized as sufficient in *Diaz*.[263] The court determined that California law creates a "legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes."[264] Finally, the plaintiffs in *Momtazi* allege harm to business property, namely to the plaintiff's fish-stocked reservoirs "that form an essential part of Plaintiff's biodynamic operation."[265] This is analogous to the plaintiffs' allegation in *Tumey* that the defendants' hacking and cyberattacks impaired the functionality of their business equipment.[266] More generally, all of the allegations in *Momtazi* qualify as concrete financial loss, however hard it might be to quantify the amount of loss.[267]

Recognizing that wineries are less prevalent in South Dakota than in Washington State, we observe that many other businesses could be directly

---

259. *Id.* at *6.

260. *Id.*

261. Momtazi Family, LLC v. Wagner (*Momtazi*), No. 3:19-cv-00476-BR, 2019 WL 4059178, at *1 (D. Or. Aug. 27, 2019).

262. *Tumey*, 2021 WL 4806734, at *6. *See also* Raineri Constr., LLC v. Taylor, No. 4:12–CV–2297 (CEJ), 2014 WL 348632, at *2 (E.D. Mo. Jan. 31, 2014) (finding sufficient at motion to dismiss stage "that some of the defendants [associated with a labor union] took actions that adversely affected the business [of plaintiff construction company], such as interfering with its current customer relationships, interfering with business operations, and causing property damage.").

263. *See* Diaz v. Gates, 420 F.3d 897, 899 (9th Cir. 2005) (en banc) (quoting Mendoza v. Zirkle Fruit Co., 301 F.3d 1163, 1168 n.4 (9th Cir. 2002) (recognizing "legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes" as property interest protected by RICO). *Compare Momtazi*, 2019 WL 4059178, at *2, *4 (finding Plaintiff alleged injuries which were "concrete, particularized, and actual"), *with Tumey*, 2021 WL 4806734, at *6 (finding specific money damages in the form of "actual financial loss" was sufficient to establish standing).

264. *Diaz*, 420 F.3d at 899 (quoting *Mendoza*, 301 F.3d at 1168 n.4).

265. *Momtazi*, 2019 WL 4059178, at *1.

266. *Tumey*, 2021 WL 4806734, at *6. *See also Raineri Constr.*, 2014 WL 348632, at *2 (finding sufficient plaintiff's allegation of injury to business property, among other allegations).

267. *Cf.* ASI, Inc. v. Aquawood, No. 19-763, 2020 WL 5913578, at *2, *9-10 (D. Minn. Oct. 6, 2020) (holding that plaintiff satisfied concrete loss requirement by alleging that defendants' racketeering activity prevented him from collecting on civil judgment by hiding and transferring assets); EMC Nat'l Life Co. v. Emp. Benefits Sys., Inc., 827 F.Supp.2d 979, 982 (S.D. Iowa 2011) (holding that improper diversion of funds was sufficient to allege cognizable injury); Collins v. City of Pine Lawn, Mo., No. 4:15-cv-1231-AGF, 2016 WL 3220074, at *3 (E.D. Mo. June 10, 2016) (holding that termination of employment "is not an injury to business or property sufficient to support a RICO claim."); *see also* Geraci v. Women's All., Inc., 436 F. Supp. 2d 1022, 1039 (D.N.D. 2006) (holding that under North Dakota version of RICO statute, "out-of-pocket expenses are sufficient for a showing of damage to business or property.").

harmed by a neighboring marijuana operation.[268] The strong skunk-like smell of the operation—which "sometimes can't be completely mitigated"[269]—could prevent customers from patronizing an adjacent restaurant (especially for outdoor dining), a retail store that sold goods (such as clothing) whose value was impaired by absorbing the strong smell, or other businesses that promoted themselves as family-friendly.[270] Laws restricting the location of marijuana operations might avoid many, but not all, such conflicts. That is where civil RICO can come in handy.

B. IMPAIRMENT OF ABILITY TO SELL OR RENT PROPERTY BECAUSE OF NEIGHBORING MARIJUANA OPERATION

A marijuana operation can drive down the value and marketability of nearby land.[271] For example, the operation's smell can make nearby land unattractive for residential use and certain business uses. In addition, nearby property owners may fear that the operation will attract crime to the area. The fear is reasonable, considering that those responsible for the operation are, after all, violating federal law themselves. As discussed in Section C below, it is unclear whether the mere diminution in the marketability of the property or in its rental or sale value—or for that matter, an increase in crime—suffices to meet the "concrete financial loss" required by the Eighth and Ninth Circuit to establish RICO standing.[272] But a property owner should be able to show standing by showing an intent to "monetize" his, her, or its property interest by renting or selling it and an inability to do so at its market value.[273]

This is the teaching of *Underwood v. 1450 SE Orient*.[274] Laura Underwood owned land next to a marijuana operation and asserted a civil RICO claim against

---

268. *But see South Dakota Wineries*, CATCH WINE, http://www.catchwine.com/wineries/south_dakota/ (last visited Nov. 20, 2021) (listing several wineries in South Dakota).

269. Fuller, *supra* note 2 (quoting co-founder of "a large marijuana business" in California).

270. *See* Kristen Wyatt, *New pot shops on the block not always so popular*, ASSOCIATED PRESS (Nov. 11, 2014), https://apnews.com/article/63769c06c80d437886946a47684001e1 (reporting on unsuccessful ballot measure in Manitou Springs restricting recreational marijuana stores "proposed by other business owners who complained a dispensary was harming the tourist town's family-friendly reputation.").

271. There seems to be little solid empirical evidence on whether and how the proximity of marijuana operations affects nearby land values, and what little there is suggests sometimes there may be a positive effect. *See* Steve Cook, *Do Marijuana Outlets Affect Local Home Values?*, HOMES.COM (Nov. 22, 2018), https://www.homes.com/blog/2018/11/marijuana-outlets-affect-local-home-values/; Arianna MacNeill, *Here's what experts are saying about marijuana legalization and property values*, REALESTATE BY BOSTON.COM & GLOBE.COM (Dec. 4, 2018), http://realestate.boston.com/news/2018/12/04/marijuana-legalization-and-property-values/. It is clear, however, that "[c]annabis odors are very recognizable and foment sometimes strong reactions from neighbors." *How Green Is the Green Rush*, *supra* note 99, at 515.

272. *See infra* Part IV.C.

273. Ainsworth v. Owenby, 326 F. Supp. 3d 1111, 1125 (D. Or. 2018) (dismissing civil RICO claim by plaintiff who merely alleged diminution in property value, stating that "a plaintiff who has not alleged specific prior attempts to monetize a property interest must plausibly allege at least a present intent or desire to do so.").

274. (*Underwood I*), No. 3:18-cv-1366-JR, 2020 WL 9889191, at *4 (D. Or. Mar. 5, 2020).

various defendants involved in the operation.[275] Ms. Underwood alleged that the defendants' racketeering activity injured her property "by diminishing its market value and making it more difficult to sell."[276] In support of that allegation, she further alleged that she had put the property up for sale and gotten no offers, despite decreasing the asking price below the asking price of comparable properties.[277] The district court held that this allegation was sufficient to establish concrete financial loss.[278] In doing so, it relied not only on *Oscar* but also on a prior case in which the same district court had said, "in order to plausibly allege a concrete financial loss in this case, Plaintiffs 'must make good faith allegations that they attempted or currently desire to convert those [property] interests into a pecuniary form.'"[279]

Although unpublished, the *Underwood* decision is significant for two reasons. First, the decision came after two prior district court cases, discussed above, ruling that property owners suing adjacent marijuana operations had failed adequately to allege concrete financial loss.[280] In both prior cases, the courts had relied on *Oscar*, among other precedent, to hold that allegation of a mere decrease in the market value of the property was not sufficient to establish concrete financial loss. Second, in *Underwood* itself, the district court dismissed an earlier version of Ms. Underwood's complaint for failing adequately to plead concrete financial loss.[281] The earlier version of Ms. Underwood's complaint had alleged a diminution in property value but not unsuccessful attempts to sell the property.[282] In dismissing that earlier complaint, the court granted leave to file an amended complaint in light of Ms. Underwood's allegation that she had, in the meantime, put her property up for sale.[283] Thus, her unsuccessful attempt to sell her property established the concrete financial loss that had been missing.

Underwood provides a path forward for people who own or rent a property near a marijuana operation that has impaired the value of the property or its rental value. They can establish the impairment by showing that they tried to sell or sublet the property and were either unsuccessful or obtained only sub-market offers due to the nearby marijuana operation.[284]

C. LOSS OF PROPERTY VALUE AND LOSS OF USE AND ENJOYMENT OF PROPERTY

275. *Id.* at *1.

276. *Id.* at *2.

277. *Id.*

278. *Id.* at *3.

279. *Id.* (quoting Scholtz v. Derrick, 369 F. Supp. 3d 1120, 1128 (D. Or. 2019), which itself was quoting Ainsworth v. Owenby, 326 F. Supp. 3d 1111, 1125 (D. Or. 2018)).

280. *Schoultz*, 369 F. Supp. 3d at 1127-28; *Ainsworth*, 326 F. Supp. 3d at 1121-26.

281. Underwood v. 1450 SE Orient, LLC (*Underwood II*), No. 3:18-cv-1366-JR, 2019 WL 2871097, at *5 (D. Or. June 14, 2019).

282. *Id.* at *3-4.

283. *Id.* at *5.

284. *Cf.* Messer v. City of Dickinson, 3 N.W.2d 241, 244-45 (N.D. 1942) (holding that plaintiff in nuisance action against city could recover for decrease in rental value of affected land); Johnson v. Drysdale, 285 N.W. 301, 304-05 (S.D. 1939) (affirming the trial court's finding that defendant's horse barn made it harder for plaintiff to find tenants for plaintiff's property).

It is unclear whether a property owner can state a viable civil RICO claim based solely on a marijuana operation's (1) diminution of the property's sale or rental value or (2) interference with the owner's use and enjoyment of the property. As discussed above, three opinions from the District of Oregon—*Schoultz*, *Ainsworth*, and the opinion dismissing a later successfully amended complaint in *Underwood*—have held that a mere diminution in property value does not constitute the "concrete financial loss" required to state a civil RICO claim in the Eighth and Ninth Circuit.[285] In addition, interference with the use and enjoyment of property has been found insufficient in two cases we have previously discussed—in *Oscar* as a matter of California law[286] and in *Ainsworth* as a matter of Oregon law[287]—on the ground that this type of injury is a personal injury, not an injury to property.

Despite the opinions in *Schoultz*, *Ainsworth*, and *Underwood*, a property owner in South Dakota (at least) can plausibly argue that a diminution in property value is cognizable in a civil RICO suit. The argument is threefold. First, as discussed above, the "concrete financial loss" requirement lacks deep roots in the Eighth Circuit and any footing whatsoever in the text of RICO.[288] Second, the en banc Ninth Circuit relaxed the "concrete financial loss" requirement in *Diaz* to the extent that a loss in property value suffices to state a civil RICO claim.[289] Third, the existence of a "property interest" for RICO purposes is governed by state law, and South Dakota nuisance law's provision of damages for mere diminution in property value establishes that such diminution represents injury to property.[290]

As to whether interference with the use and enjoyment of property is a personal injury or an injury to property, South Dakota law appears to classify it as the latter. This conclusion rests on (1) South Dakota law adopting the common law of nuisance as stated in the Restatement (Second) of Torts; (2) the Second Restatement's commentary on the law of nuisance; and (3) the measure of damages for nuisance under South Dakota law.

---

285. *Schoultz*, 369 F. Supp. 3d at 1127-28; *Ainsworth*, 326 F. Supp. 3d at 1126; *Underwood II*, 2019 WL 2871097, at *5.

286. Oscar v. Univ. Students Coop. Ass'n, 965 F.2d 783, 787 (9th Cir. 1992) (en banc). In one case the Eighth Circuit said that the decision in *Oscar* was not based on state property law. *See* Bieter Co. v. Blomquist, 987 F.2d 1319, 1329 n.7 (8th Cir. 1993) (determining that state law did not underlie *Oscar*'s holding about inadequacy of alleged interference with use and enjoyment, but instead that *Oscar* relied simply on analogy to personal injury in general). Despite the Eighth Circuit's view, the en banc Ninth Circuit later explicitly stated that "whether a particular interest amounts to property is quintessentially a question of state law" for RICO purposes. Diaz v. Gates, 420 F.3d 897, 899 (9th Cir. 2005) (en banc) (internal quotation marks and brackets omitted).

287. *Ainsworth*, 326 F. Supp. 3d at 1122 (holding that, under Oregon law, "[p]laintiffs' impaired use and enjoyment of their land is a non-compensable personal injury" and therefore not an injury to property for RICO purposes).

288. *See supra* notes 285-287 and accompanying text; *see also Oscar*, 965 F.2d at 788 (Kleinfeld, J., dissenting) (observing that "concrete financial loss" requirement has no basis in text of RICO and that "damages for injury to property are generally measured other than by realized financial loss.").

289. *See generally* Bokaie v. Green Earth Coffee L.L.C, No. 18-cv-05244-JST, 2018 WL 6813212 (N.D. Cal. Dec. 27, 2018) (relying on *Oscar* and *Diaz* to hold that, "[w]hether present or future, diminution in fair market value of one's home is injurious to a property interest, as required under RICO.").

290. Greer v. City of Lennox, 107 N.W.2d 337, 339 (S.D. 1961).

As an initial matter, the South Dakota law of nuisance is complicated by the fact that "a claim for nuisance may be brought under statutory or common law nuisance theories."[291] A South Dakota statute defines "nuisance" broadly but without specifically referring to injury to the use and enjoyment of land:

> **21-10-1. Acts and omissions constituting nuisances**
> A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either:
> (1) Annoys, injures, or endangers the comfort, repose, health, or safety of others;
> (2) Offends decency;
> (3) Unlawfully interferes with, obstructs, or tends to obstruct, or renders dangerous for passage, any lake or navigable river, bay, stream, canal, or basin, or any public park, square, sidewalk, street, or highway;
> (4) In any way renders other persons insecure in life, or in the use of property.[292]

In contrast, the South Dakota common law adopts the Restatement (Second) of Torts definition of nuisance, which does specifically refer to injury to the use and enjoyment of land:

> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either
> (a) intentional and unreasonable, or
> (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.[293]

The Restatement (Second) of Torts does not unequivocally address whether injury to the use or enjoyment of land is a personal injury or an injury to property. One provision, however, does strongly imply that this is an injury to property by stating, "[f]or a private nuisance there is liability only to those who have property rights and privileges in respect to the use and enjoyment of the land affected."[294] This suggests that "the use and enjoyment of . . . land" are "property rights and privileges."[295]

---

291. Atkinson v. City of Pierre, 2005 SD 114, ¶ 12, 706 N.W.2d 791, 795 (internal quotation marks and bracketed revision omitted). *See* Collins v. Barker, 2003 SD 100, ¶ 16, 668 N.W.2d 548, 553 (stating that plaintiff in that case could assert claim for nuisance "under statutory or common law nuisance theories.").

292. SDCL § 21-10-1 (2013 & Supp. 2021). *See also* SDCL § 21-10-5(1) (2013) (authorizing civil actions as remedy for nuisance).

293. *Atkinson*, 2005 SD 114, ¶ 13, 706 N.W.2d at 796 (quoting RESTATEMENT (SECOND) OF TORTS § 822 (AM. LAW INST. 1979)). *See also* Kuper v. Lincoln-Elec. Co., 557 N.W.2d 748, 761 (S.D. 1996) (stating that a nuisance involves a "condition which substantially invades and unreasonably interferes with another's use, possession, or enjoyment of property." (internal quotation marks omitted)).

294. RESTATEMENT (SECOND) OF TORTS § 821E (AM. LAW INST. 1979) ("Who Can Recover for Private Nuisance").

295. *Id.*

That suggestion is reinforced by two passages of Restatement commentary. One passage discusses the differences between injury to the use and enjoyment of land, on the one hand, and emotional distress, on the other hand:

> Th[e] interest in freedom from annoyance and discomfort in the use of land is to be distinguished from the interest in freedom from emotional distress. The latter is purely an interest of personality and receives limited legal protection, whereas the former is essentially an interest in the usability of land and, although it involves an element of personal tastes and sensibilities, it receives much greater legal protection.[296]

This passage treats emotional distress as a personal injury, unlike "an interest in the usability of land."[297] The second piece of commentary recognizes the similarity between the torts of nuisance and trespass, the latter of which is, of course, indisputably an injury to property:

> There may . . . be some overlapping of the causes of action for trespass and private nuisance. An invasion of the possession of land normally involves some degree of interference with its use and enjoyment and this is true particularly when some harm is inflicted upon the land itself. . . . Thus the flooding of the plaintiff's land, which is a trespass, is also a nuisance if it is repeated or of long duration . . . .[298]

Consistent with the sometimes overlapping nature of trespass and common law nuisance, plaintiffs in many South Dakota cases have asserted both types of claims.[299] Their overlapping nature strongly suggests that the loss of use and enjoyment of land that defines a nuisance is an injury to property.

This conclusion is reinforced by South Dakota law on the measure of damages. Under that law, "[w]hen the nuisance is temporary the ordinary measure of damages is the loss of rental or use value of the premises for the duration of the nuisance. When permanent, it is the permanent diminution in value of the property."[300] Moreover, as at common law, South Dakota law allows additional recovery for:

> the value of any personal discomfort or inconvenience which the plaintiff has suffered, or of any injury to health or other personal injury sustained by the plaintiff, or by members of his family so far as they affect his own enjoyment of the premises, as well as

296. RESTATEMENT (SECOND) OF TORTS § 821D, cmt. b (AM. LAW INST. 1979) ("Interest in use and enjoyment of land").

297. *Id.*

298. *Id.* § 821D, cmt. e (1979) ("Both trespass and nuisance").

299. *E.g.*, Kuper v. Lincoln-Union Elec., 557 N.W.2d 748 (S.D. 1996) (involving a suit by dairy farmers against rural electrical co-operative alleging trespass and nuisance for damage caused by stray voltage).

300. Greer v. City of Lennox, 107 N.W.2d 337, 339 (S.D. 1961).

> any reasonable expenses which he has incurred on account of the nuisance.[301]

This additional measure of damages reflects that personal injuries may accompany an injury to the land's value.

D. SUMMARY

In sum, it remains to be seen whether a South Dakota property owner can base a civil RICO claim solely on the grounds that a nearby marijuana operation diminishes the value of the land and interferes with the use and enjoyment of the property. The property owner will stand a better chance of success by showing that a good faith effort to sell or rent the property has not yielded market-level offers or that the defendant operation has caused damage to property or the loss of business.

V. CONCLUSION: THE FUTURE OUTLOOK

Marijuana is likely moving towards legalization at a federal level. However, the court system may see more suits under civil RICO unless or until that happens. If nothing else, the smell of marijuana makes it a poor neighbor for nearby homes and certain businesses. Under certain circumstances, neighboring landowners will be able to bring civil RICO actions against them that will stand up in court, as has been true so far in *Momtazi*.[302]

A report by New Frontier Data predicts that full legalization of marijuana in all fifty states would create more than 654,000 jobs, and legalization could lead to a federal tax revenue estimated at $105.6 billion.[303] States that have already legalized marijuana have seen job creation and increased revenue.[304] During the coronavirus pandemic, several states, including California, Michigan, Oregon, and Pennsylvania, declared cannabis dispensaries as "essential businesses" and allowed sales to continue.[305] Oregon's marijuana sales hit a new record high of $110.5 million in April 2021, which represents a 23.5% increase since April 2020.[306]

---

301. *Id.* (internal quotation marks omitted). *See also* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 89, at 637-40 (5th ed. 1984).

302. *See generally* Momtazi Family, LLC v. Wagner (*Momtazi*), No. 3:19-cv-00476-BR, 2019 WL 4059178 (D. Or. Aug. 27, 2019) (denying the defendants' motion to dismiss, finding the plaintiff has a plausible claim for relief under RICO).

303. Bertie Song, *Cannabis Taxes Could Generate $106 Billion, Create 1 Million Jobs by 2025*, NEW FRONTIER DATA (Mar. 13, 2018), https://newfrontierdata.com/cannabis-insights/cannabis-taxes-generate-106-billion-create-1-million-jobs-2025/.

304. Maritza Perez, Olugbega Ajilore & Ed Chung, *Using Marijuana Revenue to Create Jobs*, CAP (May 20, 2019), https://americanprogress.org/article/using-marijuana-revenue-create-jobs/ (reporting increased revenues in Colorado and Washington State).

305. *Yes to Cannabis*, *supra* note 77, at 33.

306. Guy Tauer, *Oregon's Marijuana Industry and Employment Trends*, STATE OF OR. EMP. DEP'T (June 9, 2021), https://www.qualityinfo.org/-/oregon-s-marijuana-industry-and-employment-trends.

The marijuana industry has massively expanded as more states legalize cannabis, and the market shows no signs of slowing.[307] The hemp industry is legal under the 2018 Farm Bill and therefore protected by the Right-to-Farm Act.[308] The cannabis industry is in the position to grow rapidly as more states are legalizing both medicinal and recreational use, opening new markets.[309] In fact, the market value of the cannabis industry is projected to reach thirty billion dollars annually by 2025.[310] Experts predict that the U.S. cannabis industry will deliver as many as 340,000 full-time jobs and make nearly an eighty billion dollar economic impact.[311] In February 2019, the United Nations global health agency—World Health Organization (WHO)—recommended that the whole world reschedule cannabis after analyzing "epidemiological, pharmacological, chemistry, toxicology, and therapeutic impacts."[312] In 2020 alone, five more states—Arizona, Mississippi, Montana, New Jersey, and South Dakota—included cannabis-legalization measures on their election ballots.[313]

Several bills for cannabis reform have been introduced at the federal level.[314] The Marijuana Freedom and Opportunity Act would allow for states to decide how to regulate marijuana and effectively decriminalize marijuana by removal from the controlled substances list.[315] The Strengthening the Tenth Amendment Through Entrusting States Act ("STATES Act"), instead of altering the scheduling of cannabis under federal law, would prevent the federal government from interfering with state-legalized cannabis operations.[316] The Marijuana Opportunity Reinvestment and Expungement Act ("MORE Act") "would legalize marijuana at the federal level, expunge prior cannabis convictions, create opportunities for those impacted by the War on Drugs, and protect immigrants working in the legal cannabis industry."[317] The Marijuana Justice Act would legalize marijuana federally while also incentivizing states to address the harms of prohibition through creating funds to invest in communities and creating remedies for mass incarceration.[318]

Under the Biden Administration, we may continue to see changes in the laws surrounding cannabis. President Joe Biden was part of the original war-on-drugs

307. *Industry Overview*, MEDICAL MARIJUANA, INC., https://www.medicalmarijuanainc.com/marijuana-industry-overview/ (last visited Jan. 1, 2021).

308. *Id.*

309. Adam Uzialko, *Cannabis Industry Growth Potential for 2022*, BUS. NEWS DAILY (Dec. 21, 2021), https://www.businessnewsdaily.com/15812-cannabis-industry-business-growth.html.

310. *Id.*

311. *Industry Overview*, *supra* note 307.

312. *Id.*

313. Uzialko, *supra* note 309.

314. *Industry Overview*, *supra* note 307.

315. *Id. See also* S. 1552, 116th Cong. (2019) (describing the bill and its intended effect).

316. *Industry Overview*, *supra* note 307. *See also* S. 1028, 116th Cong. (2019) (describing the bill and its intended effect).

317. *Industry Overview*, *supra* note 307. *See also* H.R. 3884, 116th Cong. (2020) (describing the bill and its intended effect).

318. *Industry Overview*, *supra* note 307. *See also* S. 597, 116th Cong. (2019) (describing the bill and its intended effect).

supporters.[319] While in the Senate, he pushed for "tough on crime" legislation, including the Comprehensive Narcotics Control Act in 1986 and the Violent Crime Control and Law Enforcement Act in 1993, "a pre-cursor to the 1994 Crime Bill."[320] Biden now supports giving states the "power to regulate the emerging legal industry without continually worrying about capricious federal actions."[321] However, Biden does not support de-scheduling marijuana or the full legalization of cannabis that would be caused by passing the MORE Act.[322] Instead, he may push for marijuana to be moved to Schedule II of the CSA as a drug with only a "high potential for abuse," similar to morphine, codeine, and fentanyl.[323] Biden backs the decriminalization of possession, legalization of medicinal cannabis, a modest rescheduling of marijuana, expungement of past criminal records, and allowing states to set their policies without federal intervention.[324] Although Biden may not push for the decriminalization of marijuana, we will likely see changes that may lead to states having more control over whether to legalize marijuana. This may lead to more states legalizing marijuana and further increasing the cannabis industry.

The continued growth of the cannabis industry may lead to changes for other agricultural industries, including the wine industry. Although the argument in *Momtazi* is that wine grapes are tainted by the nearby cannabis grow, the plaintiff did not need to prove that these claims were accurate, only that the customer's concerns were plausible and tied to the defendant's racketeering activity.[325] With the continued growth of the cannabis industry, other industries, including the wine industry, may be required to make adjustments in order to keep their seasonal workers and to keep making a profit.[326] After hemp became legal under the 2018 Farm Bill, some wineries found that diversifying to include growing both hemp and wine grapes prevented a drastic loss of seasonal workers from the wine industry.[327] This type of diversification within the wine industry may allow for keeping a full-time crew and for paying higher rates to workers than wine-only producers are able to.[328]

Not only has the increase in the cannabis industry increased the pay rates of seasonal workers and changed the way that wine producers must operate, but the

319. Gabrielle Gurley, *Biden at the Cannabis Crossroads*, AM. PROSPECT (Nov. 23, 2020), https://prospect.org/day-one-agenda/biden-at-the-cannabis-crossroads/.

320. Whitt Steineker, *President-Elect Joe Biden and the Future of Cannabis Policy in America*, JDSUPRA (Dec. 28, 2020), https://www.jdsupra.com/legalnews/president-elect-joe-biden-and-the-11931/.

321. Gurley, *supra* note 319.

322. *Id.*

323. *Id.*

324. Kyle Jaeger, *Biden Taps Marijuana Legalization Supporter to Lead Democratic National Committee*, MARIJUANA MOMENT (Jan. 18, 2021), https://www.marijuanamoment.net/biden-taps-marijuana-legalization-supporter-to-lead-democratic-national-committee/.

325. Momtazi Family, LLC, v. Wagner (*Momtazi*), No. 3:19-cv-00476-BR, 2019 WL 4059178, at *7 (D. Or. Aug. 27, 2019).

326. Caputo, *supra* note 190.

327. *Id.*

328. *Id.*

cost of real estate has also significantly increased.[329] Marijuana businesses are able to afford to pay more in cash for real estate than wineries or other manufacturing businesses, according to the executive director of the Colorado Wine Industry Development Board, Doug Caskey.[330] Although some vintners are also worried about cross-contamination, like in *Momtazi*, so far, no studies have measured the effects of cannabis fields on nearby vineyards.[331] However, some vintners have found that even when their wine grapes are growing within twenty feet of hemp, they are still able to make the same wine, despite the smell of the cannabis.[332] In addition, wine consumption may likely decrease in the coming years with the increase in the legalization of cannabis as consumer preferences change.[333]

Despite the possibility of reform, marijuana-related activity currently falls under "racketeering activity" because it is illegal at the federal level.[334] With the growth of the cannabis industry and the uncertainty in its effects on the surrounding lands and produce, the establishment of clear rules regarding the court's ability to hear civil RICO claims for adjacent landowners is important. The cases of *Shoultz* and *Momtazi* help to establish direction on how civil RICO claims may be alleged against marijuana growers by adjacent landowners.[335] The decision of the court in *Momtazi* that the complaint has merit may "lay the groundwork" for the treatment of civil RICO claims.[336] Despite the Ninth Circuit Court's decision in prior cases that a concrete financial loss is needed and that a concrete financial loss requires more than the loss of enjoyment of the property but a compensable loss of market value,[337] *Momtazi* establishes that if the rental value of the property has decreased or a loss of a sale of produce from the land, even due to a possible misconception, is enough to establish the basis of a civil RICO claim.[338]

329. *Id.*
330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.*
334. *See Yes to Cannabis*, *supra* note 77, at 35-36; *see also* Safe Sts. All. v. Hicklenlooper, 859 F.3d 865, 882 (10th Cir. 2017) ("[C]ultivating marijuana for sale . . . [pursuant to an agreement among the defendants] is by definition racketeering activity.").
335. Van Cates, et al., *Recent Developments in Business Litigation*, 55 TORT TRIAL & INS. PRAC. L.J. 193, 196-98 (2020) (citing Schoultz v. Derrick, 369 F. Supp. 3d 1120, 1129 (D. Or. 2019); Momtazi Family, LLC, v. Wagner (*Momtazi*), No. 3:19-cv-00476-BR, 2019 WL 4059178 (D. Or. Aug. 27, 2019)).
336. Harron, *supra* note 78.
337. *Schoultz*, 369 F.Supp.3d at 1127-28.
338. *Momtazi*, 2019 WL 4059178, at *7.