UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

KURIAN DAVID, et al, Plaintiffs	*	CIVIL ACTION NO: 08-cv-01220
v.	*	SECTION "A" JUDGE ZAINEY
SIGNAL INTERNATIONAL, LLC, et al, Defendants	*	MAGISTRATE 3 MAG. JUDGE KNOWLES

REPLY BRIEF OF SIGNAL INTERNATIONAL
IN FURTHER OPPOSITION TO
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

MAY IT PLEASE THE COURT:

Even though this is a civil RICO suit, governed by a working presumption against certification, Plaintiffs declare this suit can be certified. Signal's violation, Plaintiffs say, of the relevant statutes was so self-evident, individual determinations are unnecessary. ***Cf. Gene*, *infra***, at 328. Not only has the Fifth Circuit warned courts against certifying RICO class actions, ***Allison*** nails the lid on the coffin of the motion for class certification by intuiting that the "plaintiffs' claims for money damages and the constitutional right of both parties to a jury trial, with all its substantive rights and procedural complications, ultimately render this case unsuitable for class certification . . ." ***See Allison*, *infra***, 151 F.3d at 407.

To nonetheless manufacture commonality, Plaintiffs propose to try a purely circumstantial case. This stratagem cannot prejudice Signal, however. To the contrary, as ***Allison*** emphasized, the Court ***must*** consider "the constitutional right of ***both*** parties . . . ." ***See id.*** (emphasis added).

Signal has a constitutional right to require the jury to decide all fact questions. ***See Allison***, ***infra***, 151 F.3d at 423 (parties have Seventh Amendment right to have jury determine all factual issues necessary to establish plaintiffs' claim). In this civil RICO suit alleging the commission of multiple criminal acts, the questions of fact are legion. As questions concerning what the plaintiffs felt or experienced multiply, so to do the reasons for wanting their testimony. ***Id.*** When an individual has allegedly been victimized by a crime, like one involving alleged fraud or alleged theft of labor, the victim will typically be most competent source of information as to what happened, or at least as to what he claims happened.[1] Individual issues therefore overwhelm common ones, whether the Plaintiffs want them to or not. Nor will Doc. #994-1's furious assault on the merits tempt Signal into engaging in an ultimately irrelevant argument over who is right in this case. Such a discussion overlooks fundamental certification law. ***See*** 5 Moore's Federal Practice, § 23.45[4] (Matthew Bender 3d ed.).[2] Assuming *arguendo* that the Plaintiffs launched their assault to persuade the Court that a purely circumstantial case will suffice, Signal has nonetheless shown that this contention is without merit because Signal has a constitutional right to have the jury determine all factual issues necessary to establish plaintiffs' claims, ***Allison***, ***infra***, at 423, and the great number of different claims further serve to multiply the presence of individual questions. ***See Gene***, ***infra***, at 325. Signal is nonetheless concerned that its silence regarding the merits may be misconstrued. Because the Court should be made certain of how genuine the dispute between the parties is as to the true facts in this case, at the end of this brief, to prove to this Court that Doc. # 994-1 is actually unreliable, Signal will dissecting one legal error and one factual error.

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[1] ***See*** Fed.R.Civ. Proc. 602 (West Pamph. 2010), 1972 Advisory Committee Notes (Federal Rules reflect common law insistence on most reliable sources of information). ***See also Gene***, ***infra***, at 328 (when individual inquiries are necessary "to sort out [what] was consented to and wh[at] was not," action defies certification). ***See also Amchem***, ***infra***, 521 U.S. at 625, 117 S. Ct. at 2250 (common issues not expected to predominate in mass tort cases).

[2] "The general rule, however, is that on a motion for class certification, a court may not . . . consider the likelihood of success or failure on the merits." (Citation omitted).

I. A WORKING PRESUMPTION AGAINST CERTIFICATION:

Plaintiffs attempt to advance their fraud and Chapter 77 claims against an unyielding headwind, a "*working presumption against class certification* . . ." ***See Sandwich Chef, infra***, at 220 (emphasis added). ***See also Ladd, infra*** (Fifth Circuit disfavors certification in class actions predicated on RICO); ***Richard v. Hoechst Celanese Chemical Group, infra***, 208 F.R.D. at 584 ("it may not be possible to certify a class in a RICO action within the Fifth Circuit."); ***Gyarmathy & Assocs., Inc. v. TIG Ins. Co., infra***, 2003 U.S. Dist. LEXIS 12239 at *8 (same).

Analytically, with regard to the trafficking allegations, this case is identical to ***Gene*** for two, principal reasons.[3] First, as in ***Gene***, the overarching issues in this case with regard to the trafficking allegations are whether the plaintiffs labored consensually or were coerced. Signal has already demonstrated that with regard to questions in a civil RICO suit like whether the plaintiffs labored against their will in response to threats, the Federal Rules of Evidence prefer evidence from the plaintiffs themselves. Such questions therefore defy certification. ***Gene and Gene, LLC v. Biopay LLC***, 541 F.3d 318, 328 (5th Cir. 2008) (when individual inquiries are necessary "to sort out [what] was consented to and wh[at] was not," action defies certification).

Second, to validate the certification of a class action that innately resists certification, Plaintiffs seek, as the Plaintiffs in ***Gene*** did, to manufacture commonality by dispensing with individual determinations. The law, plaintiffs say, relieves them of the burden of testifying about their reliance. Plaintiffs maintain the trafficking laws "creat[ed] [an] objective 'serious harm' test [that] positions TVPA claims of forced labor and involuntary servitude claims as perfect for class treatment."[4]

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[3] Months ago, this Court indicated that it did not require a brief on the reasons why the fraud claims in this case resist certification. *See* Doc. #754, p. 3.

[4] *See* Doc. #994-1, p. 47. However, neither of the cases cited by plaintiffs in support of this proposition was a trafficking case or a case from this Circuit. One case alleged "consumer fraud" and the other one was apparently a

Gene instructs the Court to reject this erroneous argument.[5] "[P]laintiffs' claims for money damages and the constitutional right of both parties to a jury trial, with all its substantive rights and procedural complications, ultimately render this case unsuitable for class certification under Rule 23." ***See Allison v. CITGO Petroleum Corp.***, 151 F.3d 402, 407 (5th Cir. 1998). Among those difficult, procedural complications are Rules 601 and 602 of the Federal Rules of Evidence, which reflect the federal law's pronounced preference for the best available evidence.[6] On key issues such as whether the Plaintiffs received wages, were directly threatened and whether anyone sought to prevent them from living away from the premises they now allege were oppressive or from leaving the workplace, no evidence is more competent than the evidence the Plaintiffs can provide. ***Id.*** Thus, when Plaintiffs argue that this case can be tried on purely objective terms, they ignore the fundamental and immutable reality that Signal possesses ***constitutional*** rights the Court is not at liberty to ignore. ***Allison***, ***supra***. To the contrary, as the Supreme Court stressed in ***Amchem***, ***infra***, Rule 23 does not grant the Court a license to sacrifice Signal's constitutional rights to Rule 23(b)(3)'s convenience or expediency interests.[7]

In a civil jury case, moreover, when the Plaintiff is this desperate to avoid the stand, the Court can be sure that something is amiss and that the defendant will be equally adamant about the Plaintiff testifying. The Federal Rules of Evidence prove that Signal's insistence on

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securities case. Plaintiffs also refer to an amendment to the forced labor statute after this suit was filed. ***See*** Doc. #994-1, p. 47 n. 46. As discussed below in text, the changes to the relevant statutes are ***not*** retroactive.

[5] ***Cf. Gene***, ***supra***, at 329 ("Under the established facts of this case, we think [the defendant] has the more compelling argument . . . the determinative question of whether consent can be established via class-wide proof must, given the particular facts of this case, be answered in the negative.").

[6] ***See*** Fed.R.Evid. 602 (West Pamph. 2010), 1972 Advisory Committee Notes (noting bias in Federal Rules reflecting "common law insistence upon, 'the most reliable sources of information.'").

[7] ***See Amchem***, ***infra***, at 620, 117 S. Ct. at 2248("Courts are not free to amend a rule outside the process Congress ordered, a process properly tuned to the instruction that rules of procedure 'shall not abridge . . . any substantive right.'") ***Amchem*** was an attempt to streamline asbestos litigation, concededly a worthy goal. The Supreme Court nonetheless held an effort to use Rule 23 to globally settle current and future claims invalid for many reasons, one of which was a rejection of the theory that Rule 23 could be relaxed to facilitate the settlement. While plaintiffs do not say this expressly, the tone of their certification brief invites this Court to adopt a less demanding view of certification because the class consists of persons of "vulnerable immigration status." ***See*** Doc. #994-1, p. 2. ***Amchem*** counsels the Court not to bend towards such a plea for sympathy.

individual plaintiff testimony is amply supported by federal law. ***Cf.*** footnote 1, ***supra***. What ***Allison*** adds is that Signal's insistence on Plaintiff testimony concerning wages, reliance, threats, work history and countless other fact questions has a constitutional dimension. ***Allison***, ***supra***. Therefore, this case cannot be certified. ***Id.***

The balance of this brief addresses numerous flaws in Doc. #994-1. Among those many flaws are plaintiffs' erroneous interpretation of both ***United States v. Bradley*** and ***Shukla v. Sharma***, ***infra***.[8] ***See United States v. Bradley***, 390 F.3d 145, 153 (1st Cir. 2004), ***vacated and remanded***, ***Bradley v. United States***, 545 U.S. 1101 (2005).[9] In ***Bradley***, a criminal prosecution for forced labor, the court said that the test of undue pressure was an objective one, asking whether a reasonable person would have behaved as the victim did in the face of the defendants' threats. ***Shukla*** was a civil, forced labor case in which a Magistrate cited ***Bradley*** for its undue pressure statement. Doc. #994-1 argues that these cases are authority for the view that the test for undue pressure in this case is exclusively objective. Neither case said that and extrapolating from criminal cases to civil ones is always treacherous. For example, one of the reasons why the panel in ***Bradley*** emphasized the objective quality of the substantive inquiry in a forced labor case was because the ***Bradley*** defendants expressly complained that they were convicted on overly subjective grounds. ***See Bradley***, ***supra***, at 152.

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[8] ***Shukla*** was not a civil RICO case, nor was it a class action. In addition, as discussed below in text in more detail, ***Shukla*** helps Signal much more than it does the plaintiffs. In Doc. #994-1, plaintiffs allude to the fact that the 2008 amendments to the trafficking statutes, which became effective in late March of 2009, after this lawsuit was filed, basically codified ***Bradley***. ***See*** 18 U.S.C. § 1589(c)(2) (West Supp. 2010). Not only is the amended statute irrelevant to this case, the amendment's Legislative History concedes that the earlier version of the statute, the one applicable to this case, set forth a test that was subjective. Therefore, the "objective test" arguments of the plaintiffs lack merit.

[9] The United States Supreme Court vacated and remanded ***Bradley*** for reconsideration in light of the Supreme Court's ***Booker*** decision. ***Booker*** concerned the question of whether District Judges are authorized to decide fact questions that bear on sentencing. On remand, the First Circuit decided to return the matter to the trial court for reconsideration in light of ***Booker***.

In criminal cases, unlike civil ones, moreover, jurors are asked to objectively consider whether the government's claims relating to the state of mind of the victim are reasonable to further Sixth Amendment interests. ***See Duncan v. Louisiana***, 391 U.S. 145, 152, 88 S. Ct. 1444, 1448, 20 L. Ed.2d 491 (1968). Criminal jurors objectively assess the State's evidence in a criminal case to safeguard the liberties of all Americans. ***Id.*** This case, however, is a civil RICO case, a hybrid consisting of civil and criminal elements with different priorities, chief among them, RICO causation.[10] Because juries in civil cases serve some functions different from those served in criminal cases, this Court must be highly skeptical of the contention that the evidentiary standard in this case is ***exclusively*** objective, a contention obviously belied by ***Allison*** and by the Federal Rules of Evidence, among many, other laws and cases.[11]

In addition, because individual issues of reliance reverberate around this case so widely in the presence of so many fraud and coercion claims, RICO causation forbids concluding that class-wide proof is available to answer this case's key questions. ***See, e.g., Ladd, infra*** (in Fifth Circuit certification of RICO cases is not favored).[12]

The Federal Rules of Evidence incarnate the elemental principle that a record is only as good as the evidence in it. ***See*** footnote 1, ***supra***. Because the Rules demand a record with the best available evidence, individual issues predominate. ***Gene, supra***, at 329. Therefore, in this case, certification is impossible.

II. CERTIFICATION IS INAPPROPRIATE UNDER RULE 23(b)(3):

[10] ***See Hemi Group, LLC v. City of New York***, -- U.S. --, 130 S. Ct. 983, 175 L. Ed.2d 943, 952 (2010) (plaintiff alleging RICO violations must prove that violations "directly" led to plaintiff's injuries).

[11] ***See, e.g., Taylor v. Louisiana***, 419 U.S. 522, 530, 95 S. Ct. 692, 698 (1975) ("***The purpose of a jury is to guard against the exercise of arbitrary power*** – to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge.") (Emphasis added).

[12] ***Regents, infra***, 482 F.3d at 393 ("[r]eliance 'provides the requisite ***causal*** connection between a defendant's misrepresentation and a plaintiff's injury.'") (emphasis added). ***See also*** footnote 3, ***supra***.

At this time, the sole question presented by this case is whether class certification is appropriate under Rule 23(b)(3). When Rule 23(b)(3) certification is the issue, ***Amchem*** instructs the Court to give the case a "close," i.e., a searching, look. ***See Amchem, infra***, at 615, 117 S. Ct. at 2246. The present class action cannot survive such scrutiny.

First, Plaintiffs ignore the indescribable difficulty of certifying a civil RICO suit in this Circuit. ***See Sandwich Chef of Texas v. Reliance Nat. Indem. Ins. Co.***, 319 F.3d 205, 220 (5th Cir. 2003) (announcing "working presumption" against certification of civil RICO case presenting "pervasive" issues of reliance).[13]

Second, the Court has already noted that the mail and wire fraud claims in this case are characterized by issues of reliance. ***See*** Order and Reasons (Doc. #754), at p. 3. Third, trafficking claims, being intrinsically coercion claims,[14] present pervasive questions of reliance. So settled is it that coercion claims are reliance-based that settled law holds that they are impossible to certify, save for a narrow subcategory of coercion cases solely predicated on uniform, written agreements. ***See*** Doc. #997, p. 53 and n. 234. When this Court observed that the mail and wire fraud claims alleged individual reliance, this Court rejected the view that this case belongs to the uniform, written agreement subcategory. Therefore, the suggestion that this case is a perfect candidate for certification is devoid of merit.

Plaintiffs struggle to avoid the abyss of Rule 23(b)(3) denial by pleading for a presumption of reliance. ***Cf. In re: Mastercard Int'l Inc. Internet Gambling Litigation***, 132 F.

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[13] ***See also Regents, infra***, 482 F.3d at 393 (reliance and causation are equivalent concepts because reliance furnishes means for proving representation-caused injury); ***Richard v. Hoechst Celanese Chemical Group***, 208 F.R.D. 575, 584 (E.D.Tex. 2002), ***aff'd***, 355 F.3d 345 (5th Cir. 2003) ("it may not be possible to certify a class in a RICO action within the Fifth Circuit."); ***Gyarmathy & Assocs., Inc. v. TIG Ins. Co.***, 2003 U.S. Dist. LEXIS 12239, *8 (N.D.Tex. 2003) (same); ***Ladd v. Equicredit Corp. of America***, 2001 U.S. Dist. LEXIS 14422, *13 (E.D.La. Sept. 6, 2001) (Clement, J.) ("EquiCredit next urges the Court to dismiss the RICO claim Ladd has brought in his representative capacity. In recent years, such claims have fallen into disfavor with the Fifth Circuit.").

[14] ***See United States v. Peterson***, 627 F. Supp.2d 1359, 1371 (M.D.Ga. 2008) ("Nevertheless, a close reading of subsection (3) [of § 1589], and an analysis of the overall statutory scheme demonstrates that coercion is a requirement.").

Supp.2d 468, 496 (E.D.La. 2001) (Duval, J.) ("Although reliance is not an element of statutory mail fraud or statutory wire fraud, the [Fifth Circuit] held that reliance on predicate . . . fraud is necessary in order to establish proximate causation."). In this case, entertaining such an unwarranted presumption would be a recipe for disaster. ***See Regents of the Univ. of Calif. v. Credit Suisse First Boston***, 482 F.3d 372 (5th Cir. 2007), ***cert. denied*** (reversing MDL judge in Enron securities litigation for erroneously presuming reliance); ***see also Sandwich Chef, supra*** (reversing district court for misapplying presumption of reliance).

As for the centerpiece of the Plaintiffs' certification argument, the assertion that individual determinations are unnecessary because the standard of proof in this case is exclusively objective, this contention rests on numerous errors, including a fundamental misapprehension of the differences between civil RICO cases and criminal proceedings. ***Cf. Duncan, supra***. ***See also Beck v. Prupis***, 529 U.S. 494, 501 n. 6, 120 S. Ct. 1608, 1614 n. 6, 146 L. Ed.2d 561 (2000) (civil RICO cases challenge federal courts to consider "the meaning of a civil cause of action for private injury by reason of such a [RICO] violation . . .").

So desperate, finally, are the plaintiffs to prove this suit amenable to certification, they ultimately prove themselves inadequate class representatives. This action therefore does not even survive Rule 23(a) scrutiny. Signal discusses this issue below.

III. THIS SUIT'S RICO CHARACTER PRECLUDES ITS CERTIFICATION:

No feature of this litigation precludes its certification more certainly than its RICO character. ***Cf. Sandwich Chef of Texas v. Reliance Nat. Indem. Ins. Co.***, 319 F.3d 205, 218 (5th Cir. 2003) ("Causation is one issue to be tried in the present [RICO] case."). This Court has already commented on how pervasive the issues of individual reliance are with regard to the

fraud claims,[15] ***see*** Doc. #754, p. 3, and Signal has shown that the trafficking claims similarly present pervasive questions of reliance.[16] Coercion is the "use of express or implied threats of violence or reprisal or other intimidating behavior that puts person in immediate fear of consequences in order to compel that person to act against his will."[17] Whether the "threat" is expressed by word or deed, the fact-finder must still examine the "victim's" individual, personal reaction to what was represented . . . to determine whether the representation was genuinely coercive.[18] In summary, a coercion claim asks whether the "victim" conformed his behavior to the threat, which would prove that he relied on it, ***see Regents*, *supra***, 482 F.3d at 393 ("'[r]eliance'" furnishes "'the requisite ***causal*** connection between a defendant's []representation and a plaintiff's injury.'") (emphasis added). ***See also Sandwich Chef*, *supra***, at 218 ("For a []representation to cause an injury, there must be reliance.").

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[15] The Court is deciding whether plaintiffs will receive leave to amend the scope of the RICO fraud claims. ***See, e.g.***, Doc. #1045. This motion practice, however, will only bear on the number of RICO claims at issue in this case. The cross-motions will not alter the fact that all RICO theories, regardless of their label, are precluded with regard to certification by RICO causation. ***See Sandwich Chef*, *supra***. Signal maintains that RICO causation precludes certification no matter what the exact theory of civil, RICO liability is. ***See Hemi Group*, *supra***.

[16] ***See United States v. Peterson***, 627 F. Supp.2d at 1371 (". . . a close reading of subsection (3) [of § 1589], and an analysis of the overall statutory scheme demonstrates that coercion is a requirement."). ***See also*** 18 U.S.C. § 1589 (West Supp. 2006)At the time of the filing of this suit, the forced labor statute provided as follows: "Whoever knowingly provides or obtains the labor or services of a person – (1) by threats of serious harm to, or physical restraint against, that person or other person; (2) by means of any scheme, plan or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or (3) by means of the abuse or threatened abuse of the law or the legal process, shall be fined . . . or imprisoned not more than 20 years . . ." , 18 U.S.C. § 1589 (West Supp. 2006).

[17] ***See*** http://dictionary.reference.com/browse/coercion. ***Cf.*** (http://dictionary.reference.com/browse/threat (threat is "***expression of*** an intention to injure another.") According to the same, online source, the non-technical definition of "threat" is "***a declaration of*** an intention or determination to inflict punishment, injury, etc., in retaliation for, or conditionally upon, some action or course; menace: *He confessed under the threat of imprisonment.*"

[18] The Legislative History of the 2008 legislation amending the trafficking laws discussed below in more detail observes that when § 1589 was enacted in 2000, Congress recognized that "[t]he term 'serious harm" refer[red] to a broad array of harms, including both physical and nonphysical, ***and [was] intended to be subjectively construed*** in determining whether a particular type or certain degree of harm ***or coercion*** is sufficient to overcome a particular victim's will." ***See*** 154 Cong. Rec. H 10888, LEXSEE 154 Cong. Rec. H 10888. Moreover, as Signal discussed so extensively in Doc. #997, the original Legislative History of the TVPA emphasized the inquiry's individualized quality. ***See*** Doc. #997 n. 53 n. 233 (psychological component of forced labor statute mandates inquiry into "individual circumstances of victims" illuminating whether alleged coercion was sufficient to obtain victim's involuntary labor given his individual background).

When issues of reliance are this pervasive, it is presumed that certification is inappropriate. ***See Sandwich Chef*, *supra***, at 219. In a class action, reliance multiplies the need for individual, reliance determinations, a factor that precludes certification. ***See id.***, at 219 (when theory of RICO liability causes reliance to be pervasive there is presumption against certification). Therefore, this case cannot be certified.

A. <u>Plaintiffs Avoid RICO Causation by Relying on Opinions of Other Circuits</u>:

Signal is therefore not surprised that Plaintiffs run away from RICO causation. The one time they do address it, they do so incompetently. ***See*** Doc. #994-1, p. 58 n. 54. Desperate to avoid the sinkhole of RICO causation, however, plaintiffs finally resort to the strategy of promoting the opinions of circuits that do not share the Fifth Circuit's deeply skeptical view of RICO certification. ***Cf. Ladd v. Equicredit*, *supra***, at *13 ("In recent years, [RICO class action] claims have fallen into disfavor with the Fifth Circuit."). Plaintiffs promote an Eleventh Circuit opinion because it remarked that "claims under RICO . . . are ***often*** susceptible to common proof . . ." ***See Williams v. Mohawk Indus.***, 568 F.3d 1350, 1365 (11th Cir. 2009). (Emphasis added).

Clearly, the Fifth Circuit and the Eleventh Circuit view the suitability, for class certification purposes, of RICO suits, differently. ***Cf. In re: Mastercard Int'l Inc. Internet Gambling Litigation*, *supra***, 132 F. Supp.2d at 496.[19] Since the views of other circuits on these questions are not germane to the present case, plaintiffs waste the Court's time when they burden it with cases like ***Williams*. *See Ladd*, *supra***.

[19] "Thus, even if plaintiffs adequately plead a violation of the federal mail or wire fraud statutes, as RICO plaintiffs, they are required to plead an additional element not necessary under the statutes as codified. ***Although reliance is not an element of statutory mail fraud or statutory wire fraud, the [Fifth Circuit] held that reliance on predicate mail or wire fraud is necessary in order to establish proximate causation. Therefore, plaintiffs 'face[] an additional hurdle'*** and must show that they relied upon the alleged fraudulent practices of the defendants." (Emphasis added). Moreover, in ***Castano***, the Fifth Circuit unequivocally held that a "fraud class action cannot be certified when individual reliance will be an issue." ***Castano v. American Tobacco Co.***, 84 F.3d 734, 745 (5th Cir. La. 1996) (citing ***Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc.***, 482 F.2d 880 (5th Cir. 1973) (referencing Advisory committee's notes to Rule 23(b)(3)).

B. Plaintiffs Also Misconstrue RICO Proximate Cause Analysis:

As indicated earlier, plaintiffs attempt to dispose of the RICO causation problem in a footnote. ***See*** Doc. #994-1, pp. 58-59 n. 54. To dispose of proximate causation, in footnote 54, plaintiffs refer to ***Hemi*** and allege, parenthetically, "Defendants' fraud on federal government resulted in Plaintiffs' payments to defendants." The scope of the error in this statement is great and easy to grasp. The United States did not charge the Plaintiffs tens of thousands of dollars for H-2B visas. Someone else did. No one has even made the allegation that the United States was responsible for the issue of recruitment fees. Therefore, just as "the City's claim suffer[ed]," in ***Hemi***, "from the same [proximate cause] defect as the claim in *Anza*," so too does the claim here. ***See Hemi Group***, ***supra***, at 130 S. Ct. at 990. According to plaintiffs, "[t]he conduct constituting the alleged fraud" was Signal's deliberately filing false documents with the United States to defraud it into issuing H-2B visas for the benefit of the class. Again, such an allegation presents the classic specter of a causally defective civil RICO suit, because "the link between the fraud alleged and [the] injury suffered [is too] 'attenuated . . .'" ***Id.*** This is so because "the cause of [the plaintiffs' alleged] harm was 'a set of actions (i.e., [charging significant sums for access to H-2B visas]) entirely distinct from the alleged RICO violation (defrauding the [United States].)'" ***Id.*** "The alleged violation therefore [did not] 'le[a]d directly to the plaintiff[s'] injuries,' and [plaintiffs] accordingly fail[] to meet RICO's 'requirement of a direct causal connection' between the predicate offense and the alleged harm." ***Id.***

Therefore, even if the Court were to allow the class to allege what they refer to as a ***Bridge*** claim, which in this case is a claim that fraud was practiced on the federal government, since the fraud did not, in this case, directly result in plaintiffs' payments, the claim is causally invalid and should be dismissed. ***Id.*** However, even if the Court deems the claim triable,

causation is obviously an important question of fact. ***See Hemi Group*, *supra***, at 130 S. Ct. at 990; ***Allison*, *supra***. Therefore, this suit is impervious to certification. ***Id.***

IV. PRESUMING RELIANCE IS A FORMULA FOR CATASTROPHE:

To avoid dismissal, plaintiffs beseech the Court to presume reliance, which is equivalent to presuming injury. ***See*** Doc. #994-1, p. 60 n. 55. ***See also Regents*, *supra*** (reliance is causation). Doing so would be disastrous. ***Regents*** warns against it, as does ***Sandwich Chef***. ***See Regents*, *supra***, at 393-94; ***Sandwich Chef*, *supra***, 319 F.3d at 211 (trial court erred as matter of law when it "eliminate[ed], on substantive grounds, plaintiff-specific issues of reliance and causation . . .").

To nonetheless justify a presumption of reliance, Plaintiffs attempt to analogize this case to one involving securities. In certain kinds of securities cases, courts can presume reliance. ***See Regents*, *supra***. To make this argument work, plaintiffs write of a "market," in India, "for foreign visas," and refer to it as if it were a securities market. Plaintiffs write: "At trial, plaintiffs ***plan*** to introduce expert testimony showing that, ***in the Indian market*** for foreign visas no visa candidate would have paid five lakh rupees without the expectation of permanent residency, obviating the need for testimony on individual reliance. From this and similar testimony and evidence, Plaintiffs will ask the jury ***to infer*** that a worker's participation in . . . recruitment – shown by his travel on an H-2B visa procured by those Defendants – is proof of his reliance on their promises of green cards. This market approach to establishing fraud has been permitted by multiple district courts in the Fifth Circuit." ***See*** Doc. #994-1, p. 60.

Plaintiffs reluctantly acknowledge that their analogy to securities cases is tenuous. ***See id.*** at p. 60 n. 55. They nonetheless try to salvage the argument by contending that "the equities" justify it. Plaintiffs state: ". . . Signal and the other Defendants treated the Indian migrant workers

as a class and should not now be able to argue, now that they have been called out on ***their bad behavior***, that these are individual claims relying on individualized proof." ***Id***. (emphasis added). Such an argument is both unsupported and contradicted by ***Regents*** and ***Sandwich Chef***, which admonish the Court not to misapply the law of reliance.

A. Plaintiffs' Phantom "Expert":

Significantly more fatuous is the quality of the argument based on a nonexistent expert, which makes a mockery of the plaintiffs' formidable, certification burden. ***Cf***. ***Gene***, ***supra***, at 325. The idea that a burden as formidable as the one the Plaintiffs face can be satisfied by a promise to call on an expert in the future to "introduce expert testimony showing that, in the Indian market for foreign visas no visa candidate would have paid five lakh rupees without the expectation of permanent residency, obviating the need for testimony on individual reliance," is risible. The reason this is so is because the Court has an affirmative obligation to "rigorously" assess the Plaintiffs' evidence to determine whether it satisfies Rule 23(b)(3). ***Id.*** This entire argument therefore mocks the Court's duty because it deprives the Court of anything to review. ***Id***. It ignores the fact, for example, that the Plaintiffs faced the burden of proving to the Court that the testimony of their phantom expert would be admissible. ***See*** Fed.R.Evid. 702. The Court has not even been given a deposition to look at; nor, for that matter, was an expert ever disclosed to Signal, so that it could depose him or her. Because Doc. #994-1 makes no effort to comply with Fed.R.Evid. 702, the requisite foundation is as opaque as the nonexistent expert. The reliance argument is accordingly ridiculous. The Court can also imagine how ferociously Signal would attack the admissibility of such testimony on ***Daubert*** grounds.

Also, the prejudice to Signal is enormous. For all of these reasons, Plaintiffs plainly fail to discharge their daunting burden under Rule 23(b)(3). ***See Gene***, ***supra***, at 325 (burden on

party seeking certification under Rule 23(b)(3) so demanding that Court must "'rigorous[ly] analy[ze] . . . Rule 23 prerequisites before certifying a class.'") (citation omitted). Therefore, the notion that the plaintiffs have established a sound basis for presuming reliance is without merit, as is the idea that the Court can therefore easily certify this case. With, again, disastrous results, the district courts in ***Regents*** and ***Sandwich Chef*** encountered the same trap in those cases.

B. The Cases on Which Plaintiffs Rely to Presume Reliance are Inapposite:

Signal will now address the companion argument made by the plaintiffs with regard to presuming reliance. They claim that the jurisprudence supports such a presumption. The fact is that the cases the plaintiffs cite to justify a presumption of reliance only serve to show that the theory is as invalid as the plaintiffs' phantom-expert-based fraud-on-the-market theory. The idea that one can apply class action directions developed for securities and antitrust cases to fraud and trafficking cases is certainly unsupported, and the authority that does exist is to the contrary.[20] ***Newby***, for example, was reversed by ***Regents***.[21]

Indeed, ***Regents*** was a warning bell, one warning the Court not to listen to arguments like the arguments made by the plaintiffs in this case. ***Regents*** expressed sympathy for the district court, given its supervision of the multidistrict litigation concerning Enron securities. ***Regents*** nevertheless reversed the district court for misapplying the relevant, reliance law. Said the Court: "In summary, the . . . presumption of class wide reliance cannot apply here . . . . [T]he district court, albeit with the best of intentions, ***misapplied the*** fraud-on-the-market ***presumption***; the

[20] ***See Amchem Products, Inc. v. Windsor***, 521 U.S. 591, 625, 117 S. Ct. 2231, 2250, 138 L. Ed.2d 689 (1997) (Advisory Committee believed predominance would be "readily met ***in certain cases*** alleging consumer or securities fraud or violations of the antitrust laws.") (Emphasis added). The authors of Rule 23 expressly indicated that they expected mass tort cases to defy certification. ***See id.***, at 625, 117 S. Ct. at 2250. Signal has noted many times in the past that this case has the appearance of a mass tort action because it seeks compensatory, treble and punitive damages. ***See Allison, supra***. Therefore, this case likewise should be presumed to defy certification. The analogy to antitrust and securities cases lacks merit. ***Id.***

[21] ***See Newby v. Enron Corp.***, 236 F.R.D. 313 (S.D.Tex. 2006), ***reversed, remanded and stay denied by Regents v. Credit Suisse First Boston (USA), Inc.***, 2007 U.S. App. LEXIS 6396 (5th Cir. Tex., Mar. 19, 2007).

facts alleged do not constitute misrepresentations on which an efficient market may be presumed to rely . . . . [O]ur analysis of reliance disposes of this appeal." ***See Regents, supra***, at 393-94 (emphasis added). Since there is accordingly no authority for presuming reliance under this case's facts,[22] and since the plaintiffs do not, under settled class certification law, improve their posture by speculating about what a nonexistent expert would say if he was allowed to testify, *cf.* ***Gene, supra***, at 325-26, this Court cannot facilitate certification this way, not in the face of ***Regents*** and ***Sandwich Chef***. ***See also Amchem, supra***, at 625, 117 S. Ct. 2250.[23] Shamelessly, plaintiffs nonetheless allege that there is significant jurisprudential authority for presuming reliance in this case. ***See*** Doc. #994-1, p. 60. The cases cited as authority for this view are ***Clower***, ***Newby***, ***Choice, Inc.***, ***Mays***, and ***In re: Catfish Antitrust Litig. Id.*** None of these cases are in any way apposite.

Clower v. Wells Fargo, 259 F.R.D. 253 (E.D. Tex 2009), for example, was ***vacated*** by ***Clower v. Wells Fargo Bank***, N.A., 381 Fed. Appx. 450 (5th Cir. Tex. 2010) and as of this writing, appears uncertified. ***See Clower v. Wells Fargo***, 2010 U.S. Dist. LEXIS 138795, *4 (E.D.Tex. Oct. 18, 2010) (Everingham, M.J.), ***adopted by and motion denied***, 2011 U.S. Dist. LEXIS 802 (E.D.Tex. Jan. 5, 2011) (Ward, J.). Moreover, ***Clower*** was not a RICO action but

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[22] Plaintiffs acknowledge that the Court is being asked to extrapolate presumed reliance from dissimilar cases. ***See*** Doc. #994-1, p. 60 n. 55. ***Amchem***, ***Regents*** and ***Sandwich Chef*** warn the Court to tread carefully.

[23] As ***Amchem*** notes, the authors of Rule 23 expected that predominance would be problematic in mass tort cases like the present one and would always be so unless the casualty involved a single event like a plane crash. Signal has shown that the present suit has the characteristics of a mass tort case because the plaintiffs seek compensatory damages for alleged RICO injuries, treble damages, punitive damages and costs of litigation, including attorney's fees. ***See*** FAC, ¶ Prayer for Relief; ***Allison, supra***. In addition, the docket sheet reflects that this cause will be tried to a jury. ***Id.*** Therefore, ***Allison's*** warning that constitutional and procedural issues will complicate certification is highly relevant. ***Id.*** Indeed, in ***Amchem***, the Supreme Court observed that the Advisory Committee crafted Rule 23(b)(3) to safeguard individuals who "'would [otherwise] be without effective strength to bring their opponents into court at all.'" ***Amchem, supra***, at 617, 117 S. Ct. at 2246. Plaintiffs do not pretend to be such individuals. To the contrary, they concede that they are ready to vindicate their own rights if need be. ***See*** Doc. #994-1, p. 43 (". . . it is reasonable to expect that these putative class members would file individual actions should class treatment be denied.").

rather a suit by trust beneficiaries against a trustee bank under state fraud theories unconnected to the suit before the Court.

As noted earlier, ***see*** footnote 21, ***supra***, ***Newby v. Enron Corp.***, 236 F.R.D. 313 (S.D. Tex. 2006) was reversed by ***Regents. Choice Inc. v. Graham***, 2005 U.S. Dist. LEXIS 11585 (E.D. La. June 3, 2005) was a non-RICO, trademark infringement case that ***only sought injunctive relief***. Further, though the case was ultimately certified, it was ***only*** certified under Rule 23(b)(2), not Rule 23(b)(3).[24]

As for ***Mays v. National Bank of Commerce***, 1998 U.S. Dist. LEXIS 20698 (N.D. Miss. Nov. 19, 1998), which was a RICO case, it had nothing to do with fraud-on-the-market, reliance, presuming reliance or anything of the sort. ***Mays*** was expressly certified on the basis of the narrow exception to the general principle that coercion cases cannot be certified. ***Cf.*** Doc. #997, p. 53 n. 234. ***Mays*** concerned "force-placed collateral protection insurance." The allegation was that the defendant Bank and its Insurers colluded to charge "exorbitant premiums," without authorization, on car loans financed, via written agreement, by defendant Bank. The proposed class definition illustrated how the case resulted from a decision by a District Judge to certify the action on the basis of the recognized exception for uniform, written agreements, ***see id.***, at *6-*10, a ground deeply distinguishable from the present case. This Court has noted previously that the present case alleges individual issues of reliance, not coercion caused by a uniform, written agreement. ***See*** Doc. #754, p. 3. Thus, ***Mays*** is not apposite, nor was the result "appealed," which is telling. Finally, Plaintiffs cite an antitrust case involving the catfish business, ***In re: Catfish Antitrust Litig.***, 826 F. Supp. 1019, 1039 (N.D. Miss. 1993). Plaintiffs offer pages 1040 to 1042 of ***Catfish*** as authority for a purely objective approach to the evidence in this case, one that would obviate the need for individual determinations. ***See*** Doc. #994-1, pp. 60-61.

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[24] This Court has already denied the motion for certification under Rule 23(b)(2). ***See*** Doc. #926.

Such an argument invites the Court to ignore ***Sandwich Chef*, *Regents*** and other cases, cases like ***Ladd*, *In re Ford Motor Co. Bronco II Prod. Liab. Litig.***, 177 F.R.D. 360, 374 (E.D. La. 1997) ("[T]he theory of presumptive reliance has generally been limited to the securities market where the courts can presume 'a nearly perfect market in information.'") and ***Castano v. American Tobacco Co.***, 84 F.3d 734, 745 (5th Cir. La. 1996) (a "fraud class action cannot be certified when individual reliance will be an issue.") (***citing Simon v. Merrill Lynch, Pierce, Fenner & Smith, Inc.***, 482 F.2d 880 (5th Cir. 1973) (referencing Advisory Committee's notes to Rule 23(b)(3)). Signal is confident that this Court will conclude that Signal's cases are considerably more relevant to the task confronting the Court than are the cases cited by Plaintiffs and that this Court will therefore reject the groundless motion to presume reliance.[25]

V. INVOLUNTARY SERVITUDE MEANS *KOZMINSKI* WHICH DEFIES CERTIFICATION:

Plaintiffs strive to manufacture commonality by arguing that the trafficking allegations create an objective test that perfectly adapts the forced labor and involuntary servitude claims to certification. Intellectually, this is the thrust of Doc. #994-1. The contention is devoid of merit, however. To show that this is so, Signal will begin by analyzing the involuntary servitude portion of the Plaintiffs' argument to show that ***Kozminski*** destroys the myth of its merit. Indeed, ***Kozminski*** shows how the non-forced labor claims are impervious to certification, as is the § 1589 claim, though for different reasons.[26] This is so because the slavery statute has Thirteenth Amendment origins identical to those of § 1584. As Signal shows momentarily, the same questions of compulsion and of opportunity to escape are equally applicable to both charges.

[25] *Cf.* ***Gene*, *supra***, at 325 (court must conduct rigorous examination of Rule 23 prerequisites before certifying class).

[26] Congress enacted § 1589, at the Supreme Court's invitation, to enable persons to argue that their involuntary labor was induced by psychological coercion. However, as Signal demonstrated in Doc. #997 and does again here, Congress ***itself*** has twice acknowledged that it intends § 1589 to be construed in ways that courts would doubtless agree predominates individual issues. Therefore, like the Thirteenth Amendment statutes, § 1589 defies certification.

Kozminski's analysis therefore dictates that the slavery cause of action is just as impervious to certification as is the involuntary servitude statute. ***U.S. v. Kozminski***, 487 U.S. 931, 944, 108 S. Ct. 2751, 2760, 101 L. Ed.2d 788 (1988). Therefore, the slavery and involuntary servitude claims defy certification. The derivative, trafficking and document claims similarly defy certification whenever predicated on claims of slavery or involuntary servitude.[27] In narrow terms, ***Kozminski*** construed the involuntary servitude statute and one other statute not germane to this discussion. ***See id.***, at 952, 108 S. Ct. at 2765. ***Kozminski*** held "that, for purposes of criminal prosecution . . . the term 'involuntary servitude' necessarily means a condition of servitude in which the victim is ***forced*** to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process." ***See id.*** (Emphasis added). Thus, ***Kozminski*** held that the claimant must prove compulsion, which is equivalent to coercion. ***Id.*** Involuntary servitude therefore similarly precludes certification. ***See*** Doc. #997, p. 53 and n. 234. ***Kozminski*** also held one's ability to escape the workplace, however painful, dispositive of involuntary servitude,[28] and the Fifth Circuit echoed that sentiment in ***Channer v. Hall.***[29] Therefore, because the Plaintiffs in the present action pursue involuntary servitude and analytically identical slavery claims with related document and trafficking allegations, this action

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[27] Since trafficking by definition occurs "for labor or services in violation" of Chapter 77, if the underlying claims defy certification, obviously, the trafficking claim defies it as well. ***See*** 18 U.S.C. § 1590 (West Supp. 2006). The statute similarly proscribing document fraud to carry out a Chapter 77 violation, § 1592, similarly breaks down from a certification perspective because the underlying, Chapter 77 claim cannot be certified. ***See id.***, at § 1592.

[28] ***See id.***, at 950, 108 S. Ct. at 2763 (". . . ***we agree*** with Judge Friendly's observation that '[an alleged victim of involuntary servitude cannot complain of] a threat which seriously affects his future welfare, but as to which he still has a choice, however painful.'") (Citation omitted).

[29] ***Channer v. Hall***, 112 F.3d 214, 217-18 (5th Cir. 1997) ("'When the employee has a choice, even though it is a painful one, there is no involuntary servitude.'"). In ***Channer, supra***, at 218, the Fifth Circuit also observed: "We did not cite *Kozminski* in *Watson*. Instead, *Watson's* definition of involuntary servitude relied on two pre-*Kozminski* cases which held that psychological ***and*** private-sector ***economic coercion did not*** constitute involuntary servitude. *See* Flood v. Kuhn, 316 F. Supp. 271, 281 (S.D.N.Y.1970), *aff'd*, 443 F.2d 264 (2d Cir.1971), *aff'd on other grounds*, 407 U.S. 258, 92 S. Ct. 2099, 32 L. Ed. 2d 728 (1972); United States v. Shackney, 333 F.2d 475, 486 (2d Cir.1964). These cases are consistent with *Kozminski*.") (Italics in original).

is rife with individual determinations that preclude its certification. ***Gene***, ***supra***, at 326 ("we conclude that Gene's proposed class does not satisfy the predominance requirement . . .").

The question of opportunity to escape is plainly one of fact, precluding the certification of both involuntary servitude and slavery. In addition, the fact testimony set forth in Doc. #997 shows that Signal has elicited relevant evidence on this issue from each class member, and not just about freedom to "escape the workplace;" also freedom to live away from allegedly profoundly oppressive conditions. Doc. #994 is therefore deeply mistaken when it suggests that involuntary servitude is a "perfect" claim for Rule 23(b)(3). ***See*** footnote 31, ***infra***.

Obviously, however, ***Kozminski*** also held that involuntary servitude can result from legal coercion. The fact that it can highlights additional reasons for concluding that involuntary servitude cannot be certified. Many if not most of the class members admit that no one threatened them directly. Threat communication is an individual issue profoundly precluding certification. ***Gene***, ***supra***, at 326.

Signal concedes that the question of what constitutes a threat of legal coercion is a dispute of massive proportion between Signal and the class. What is not debatable, however, under Fed.R.Evid. 601 and 602, is that no one is more competent to testify about the content of the alleged "threat" and about the circumstances surrounding its publication than the "threat's" recipient. Since the Federal Rules of Evidence prefer information from "'the most reliable sources,'"[30] this case cannot be certified as to this theory, owing to the predominance of individual issues. ***See Gene***, ***supra***, at 326.

Indeed, in Doc. #997, Signal demonstrated that Justices Stevens, Blackmun, Marshall and Brennan share the view that the issues presented by these claims ***are*** more highly individualized

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[30] ***See*** Fed.R.Evid. 602 (West Pamph. 2010), 1972 Advisory Committee Notes (Rule 602 bias favoring testimony from persons who personally witnessed events is manifestation of "common law insistence upon, 'the most reliable sources of information.'") (Citation omitted).

jury questions.[31] Therefore, ***Kozminski*** is a potent symbol of just how impossible it is to certify the claims for slavery, involuntary servitude and unlawful document conduct and/or trafficking therefrom. Only one claim remains to be analyzed, the anti-***Kozminski*** claim, the forced labor claim under 18 U.S.C. § 1589 - as it existed at the time of the events in this case.

VI. A CLASS ACTION CANNOT BE PREDICATED ON FORCED LABOR:

To build their featherweight, "objective test" argument, Plaintiffs rely principally on two cases. ***See*** Doc. #994-1, pp. 46-47. One is ***Bradley*, *supra*,** and the other is the non-RICO, civil case arising, allegedly, from forced labor, ***Shukla v. Sharma***, 2009 U.S. Dist. LEXIS 90044, *4-*5 (E.D.N.Y. Aug. 21, 2009).[32]

Plaintiffs promote a myth when they insist these cases establish a standard of proof that is exclusively objective.

The Magistrate in ***Shukla*** cited ***Bradley*** needlessly for the principle that the test for undue pressure was an objective one, ***see Shukla*, *supra***, at *35, since the allegedly objective quality of the test did not at all enter into her analysis of the appropriateness of summary judgment, which is the only thing she was considering. To the contrary, she concluded that summary judgment was not warranted because a jury might find the Plaintiff's emotional forced labor claim credible. She ultimately wrote:

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[31] ***See Kozminski*, *supra***, at 970, 108 S. Ct. at 2774 (Stevens, J., concurring (for himself and Blackmun, J.)) ("in determining whether the victims servitude was 'involuntary,' ***I would allow <u>the jury</u>*** to consider ***the 'totality of the circumstances'*** just as we do when it is necessary to decide whether a custodial statement is voluntary or involuntary, . . .") (Emphasis added). ***See also Kozminski*, *supra***, at 960, 108 S. Ct. at 2769 (Brennan, J., concurring (for himself and Marshall, J.)) ("The difficulty with the Government's [psychological coercion] test is that although nonphysical forms of private coercion can indeed be as traumatic as physical force, their coercive impact ***is more highly individualized*** than that of physical and legal threats.") (Emphasis added).

[32] The Magistrate in ***Shukla*** summarized Shukla's allegations as follows: "Plaintiff alleges that defendants tricked him into leaving India to come to the United States and once plaintiff was here, defendants subjected him to exploitative work conditions through psychological and emotional abuse in violation of the forced labor and trafficking provisions of the Victims of Trafficking and Violence Protection Act of 2000, 18 U.S.C. § 1595. In addition, plaintiff alleges violations of the Fair Labor Standards Act, 28 U.S.C. § 216(b), and New York State wage and hour laws, based on defendants' alleged failure to pay plaintiff minimum wages and overtime." ***Id.***

> . . . ***plaintiff has testified that*** he was so afraid of the defendants that he could not reveal to the other congregants or to his family how he was being treated. ***If the jury credits his testimony*** that he was shown videos of September 11, 2001 and told that he would be mistreated if defendants revealed to authorities his undocumented status, the jury ***may*** find that this was sufficient psychological coercion, coupled with the taking of his passport, his lack of command of the English language, and the threats made by defendants to constitute a violation of the TVPA.

See Shukla, at *41-2 (emphasis added and footnotes omitted).

Thus, the Magistrate did not think Plaintiff testimony unnecessary. To the contrary, she thought the Plaintiff might well lose his forced labor case unless he testified about it credibly. ***Id.*** Thus, the Magistrate in ***Shukla*** did not intimate that forced labor claims are perfect candidates for class certification, which was not, of course, a question she was called upon to decide. Rather, the Magistrate indicated that she felt that the Plaintiff in such a case might possibly be hard pressed to win it without testifying in support of the claim credibly. This illustrates the fact that individual issues predominate, which is the opposite of what the Plaintiffs want this Court to conclude. The Magistrate in ***Shukla*** further recognized the value of credible, claimant testimony when she alluded, in her opinion, to ***United States v. Marcus***, calling it "one of the few recorded TVPA prosecutions," and observing, "[t]he evidence presented at trial to establish that the defendant had coerced the victim into forced labor included ***not only the victim's testimony about the serious physical and sexual abuse the defendant imposed on her, but also her testimony about threats*** that the defendant made of sending sexually explicit videotapes to her father ***and killing her godson***." ***See Shukla, supra***, at *35-6 (emphasis added). This is a passage obviously underscoring the value of individual, claimant testimony; and the Magistrate further supported Signal's position when she added, "[a]ccordingly, when that the resolution of the plaintiff's claims ***depends on an assessment of the credibility of the various parties***, it is

respectfully recommended that summary judgment be denied on these remaining claims in the Complaint." ***See Shukla*, *supra***, at *42. Since credibility has never been in more dispute than it is here, and since ***Allison*** has therefore seldom been more relevant, ***Shukla*** actually ***supports*** Signal's position.

In context, what the ***Bradley*** Court did was articulate an objective test, in accordance with settled criminal law norms, ***see Taylor*, *supra***, to assure the defendants that they were fairly convicted. The defendants had expressly complained that their conviction was "overly subjective . . . ." ***See Bradley*, *supra***, 390 F.3d at 152. The panel replied that the district court had charged the jury along objective lines, which indicated that the conviction was not too subjective. ***See id.*** at 152-53. The panel emphasized that they were guarding against a conviction that depended on "hidden" factors of which the defendants were unaware, like a "hidden emotional flaw or weakness . . . ." ***See id.***, at 153. ***Bradley*** neither said nor implied that the First Circuit feels that a Chapter 77-oriented, RICO class action obviates the need for individual determinations. ***Bradley*** actually indicated the opposite by referring to questions of an individual nature such as whether the victim was paid a salary and whether "the defendants placed [the victim] 'in such fear or circumstances that [the victim] did not reasonably believe he could leave.'" ***See Bradley*, *supra***, at 153-54. Therefore, ultimately, ***Bradley*** underscores the predominance of individual questions. ***Id.***

VII. THE 2008 LEGISLATION DOES NOT APPLY RETROACTIVELY TO THIS CASE:

Plaintiffs, who bear the burden of persuasion, ***see Gene*, *supra***, at 325, fail to discharge it when they identify the wrong law. By citing it on two occasions, Plaintiffs imply that they think their motion is governed by the William Wilberforce Trafficking Victims Protection Act of 2008 ("Act"). The Act does not apply to this case. ***See*** footnote 33, ***infra***.

The present suit was filed more than a year before the Act became effective. The Act took effect on approximately March 23, 2009.[33] This suit was filed on March 7, 2008. That was more than a year before the Act took effect. Therefore, the Act has no bearing on this case.[34] Nevertheless, Plaintiffs refer to the Act on pages 47 and 48 of Doc. #994-1, in footnotes 46 and 48. In this brief, Signal unfortunately lacks the space to destroy these footnotes. Furthermore, Signal refuses to be dragged into a lengthy discussion of the Act's nonretroactivity. In light of ***Gene***, retroactivity is the Plaintiffs' responsibility, not Signal's.[35]

Signal is confident that the Court will not allow itself to be erroneously influenced by *ex post facto* laws. Applying the new, more liberal definition of legal coercion to this case, moreover, would be grossly unfair and violate "[e]lementary considerations of fairness . . . ," not to mention constitutional principles concerning the notice required from ***criminal*** statutes.[36]

A. Congress Believes that Forced Labor Gives Rise to a Subjective Test:

[33] The date of enactment was December 23, 2008. Therefore, the Act became effective in late March, 2009. ***See*** P.L. 110-457, Title IV, § 407, 122 Stat. 5091 ("Effective Date; Applicability") ("This title, and the amendments made by this title, shall take effect 180 days after the date of the enactment of this Act."). ***See also id.***, at 122 Stat. 5044.

[34] ***Cf. Rogers v. Tennessee***, 532 U.S. 451, 121 S. Ct. 1693, 149 L. Ed.2d 697 (2001) (discussing differences between limitations imposed on lawmaker by *ex post facto* clause and retroactivity analysis applicable to judicial decisions under due process clause, recognizing that limitations on lawmaker under *ex post facto* clause are stricter than those on common law court); ***Landgraf v. USI Film Products***, 511 U.S. 244, 265, 114 S. Ct. 1483, 1497, 128 L. Ed.2d 229 (1994) (". . . ***the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older then our Republic.***") (Emphasis added); ***Castellanos-Contreras v. Decatur Hotels LLC***, 622 F.3d 393, 401 (5th Cir. 2010) (presumption of law is that changes to law do not apply retroactively); ***S & D Trading Academy, LLC v. AAFIS Inc.***, 336 Fed. Appx. 443, 451 (5th Cir. 2009) (when case implicates federal statute enacted after suit's events, court's "***first*** task is to determine whether Congress has expressly prescribed the statute's proper reach," for if statute does not so indicate, court "must determine whether the new statute would have retroactive effect . . ."). Doc. # 997 proves that the definition of legal coercion in the forced labor statute as amended is far more liberal than it was before the Act. Similarly, as amended, the forced labor statute's definition of serious harm is far broader than it was before the amendment. Under the law cited in this footnote, these changes are therefore not retroactive. The changes are substantive.

[35] ***See Gene, supra***, at 325; ***see also*** 21 La. Civ. L. Treat. (Louisiana Lawyering), § 14.4(C)(2)(a) (Thomson West 2007) ("Or, as the *Restatement* puts it: '[T]he advocate's role is to present the client's cause ***within the framework of the law***, which requires common terms of legal reference with the court and opposing counsel.'") (Emphasis added).

[36] ***See Landgraf, supra***, at 265, 114 S. Ct. at 1497 ("Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law ***that existed when the conduct took place*** has timeless and universal appeal." (emphasis added and footnote omitted).

Congress believes, in addition, that the original forced labor test was subjective. The Legislative History of the William Wilberforce Trafficking Victims Protection Act of 2008 ("Act") proves that Signal is correct on this point of law. ***See id.***, at 154 Cong. Rec. H 10888, LEXSEE 154 Cong. Rec. H 10888. Therefore, this case defies certification.[37]

Rep. Berman, one of the Act's managers in the House, in discussing the Act's amendment with regard to "serious harm," stressed that Congress had intended the "serious harm" component of the original version of § 1589 to be construed "***subjectively***," thereby emphasizing the individual quality of the relevant inquiry. ***See id.***, at *10904, § 222. He observed, "[t]he term 'serious harm" refers to a broad array of harms, including both physical and nonphysical, ***and is intended to be subjectively construed*** in determining whether a particular type or certain degree of harm or coercion is sufficient to overcome a particular victim's will." ***See id.*** (Emphasis added).

In sum, even the History of the 2008 legislation proves the validity of Signal's analysis. Therefore, the substantive issues that will control the outcome prove that the predominant issues with regard to forced labor are too individualized for certification.

VIII. WHAT PLAINTIFFS CLAIM IS LEGAL COERCION IS NOT:

With regard to the legal coercion section of Doc. #994-1, there are two issues to consider.[38] The first is whether Doc. #994-1's argument concerning legal coercion is even legally tenable. ***See In re: Andrew Mounce***, 390 B.R. 233, 241 (W.D.Tex. 2008) (motion for class certification cannot be granted as to invalid legal theory). The second issue concerns whether the claims are amenable to certification even if they are tenable.

[37] *Cf.* footnote 18, ***supra*** (Legislative History of TVPA stated that psychological coercion relied on inquiry into "individual circumstances of victims" illuminating whether alleged coercion was sufficient to obtain victim's involuntary labor in light of "victim's" individual background).

[38] ***See*** Doc. #994-1, pp. 30-35, 48-49.

Signal begins with the question of viability. 18 U.S.C. § 1589(3) (West 2006) concerns the ***crime*** of forced labor induced by "the abuse or threatened abuse of the law or the legal process." It is a criminal statute and must be construed strictly, as all Chapter 77 statutes must be.[39] Plaintiffs' arguments are legally insufficient under this language because legal coercion only exists if the alleged victim is threatened with imprisonment or worse, as Signal demonstrated in Doc. #997 and further demonstrates in this brief. ***See, e.g., United States v. Djoumessi***, 538 F.3d 547, 552 (6th Cir. 2008) ("'[T]he evidence ***must*** establish that the victim reasonably believed that she was left with no alternative to continued servitude that was not the equivalent of imprisonment or worse.'");[40] ***United States v. Farrell***, 563 F.3d 364, 73 (8th Cir. 2009) (defendant threatened to have immigration authorities "arrest the workers;" defendants exploited workers' fears that they would be "imprisoned by immigration authorities" if they left their employment "early"); ***United States v. Alzanki***, 54 F.3d 994, 1004-05 & n.10 (1st Cir. 1995) (in prosecution under § 1584, defendant threatened worker with imprisonment or worse, i.e., that American police would ***shoot*** worker if she left employment location alone).

The Complaint in the present case ("FAC") never alleged imprisonment or worse; neither does Doc. #994-1. On the contrary, according to Doc. #994-1, the threat of legal coercion in this case was "work in silence or face deportation and financial ruin." ***Doc.*** #994-1, p. 49. As noted

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[39] ***See H.J. Inc. v. Northwestern Bell Telephone Co.***, 492 U.S. 229, 255, 109 S. Ct. 2893, 2909, 106 L. Ed.2d 195 (1989) (Scalia, J., concurring) (". . . RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal laws . . .") ***citing FCC, infra***; ***FCC v. American Broadcasting Co.***, 347 U.S. 284, 296, 74 S. Ct. 593, 600, 98 L. Ed. 699 (1954) ("There cannot be one construction [for civil cases] and another for [criminal cases]. If we should give [the statute] the broad construction urged by the Commission, the same construction would likewise apply in criminal cases. We do not believe this construction can be sustained. . . . [I]t would do violence to the well-established principle ***that penal statutes are to be construed strictly***.") (Emphasis added).

[40] ***Djoumessi*** was a prosecution for involuntary servitude. Djoumessi "threatened [the victim] ***with imprisonment***, telling her that ***she would go to jail*** if she contacted the police because he would tell the police that she had entered the country illegally." ***Id.*** (Emphasis added). ***Djoumessi*** and the other cases cited in text by Signal prove that Signal's lengthy analysis of this standard in Doc. # 997 was correct in the view of the First, Sixth and Eighth Circuits. ***Calimlim*** was anomalous. While the Seventh Circuit view eventually prevailed in the sense that it shaped the 2008 legislation that become effective in March of 2009, that fact can have no bearing on this case.

earlier, ***see*** footnote 29, ***supra***, in ***Channer***, the Fifth Circuit expressly observed that involuntary servitude cannot be predicated on ***economic*** coercion. While § 1589 has been amended to deal with the issue of "patrimonial" coercion, as this brief many times notes, the 2008 Act has no bearing on this civil RICO suit. In addition, if a United States District Court were to rule that economic strife is equivalent to imprisonment, it is predictable that later that day, news outlets would report that the courts of the United States had concluded that most of the adult population feels imprisoned, an absurd result that underscores the extent to which the claim of legal coercion in this case is devoid of merit. Though Plaintiffs cite cases they think are supportive of their position, the cases are not. ***Garcia***, for example, involved migrant workers who were told they would be locked up and then deported if they failed to do as they were instructed. ***See United States v. Garcia***, 2003 U.S. Dist. LEXIS 22088, *2 (W.D.N.Y. Dec. 2, 2003). Consequently, ***Garcia*** involved facts in the mainstream of legal coercion jurisprudence. Doc. #994-1 does not allege such facts. On the contrary, Doc. #994-1 is so far out of the mainstream, it alleges police were called to Signal ***to protect the class*** from being "imprisoned" by Signal. ***See*** Doc. #994-1, p. 32. Since the FAC does not allege (and cannot allege) that any Signal employee was arrested for threatening to or imprisoning a member of the class, the legal coercion claims of the Plaintiffs are insufficient as a matter of law and should be dismissed. ***See In re: Andrew Mounce***, ***supra***, 390 B.R. at 241.

Nor can the ***crime*** of legal coercion be predicated solely on what the alleged victim supposed. Principles of lenity, constitutional avoidance and due process prevent such an interpretation of the statute because, at all pertinent times, the plain language of § 1589(3) was that the United States barred "the abuse or threatened abuse of the law or the legal process." ***See*** 18 U.S.C. § 1589(3) (West 2006). Since no actual abuse of the law is even alleged in this case --

no one was served with process, only "threatened abuse . . ." is at issue. ***Id.*** As Signal demonstrated earlier, however, a threat is "an ***expression of*** an intention to injure another." ***See*** http://dictionary.reference.com/browse/threat (quoting Merriam-Webster Dictionary of Law) (emphasis added). This connotes direct, verbal communication,[41] and thus the statute itself indicates, from a plain language standpoint, that anything short of a direct threat is not the ***crime*** of legal coercion. ***See United States v. Bass***, 404 U.S. 336, 347, 92 S. Ct. 515, 522, 30 L. Ed.2d 488 (1971).[42] In addition, this is unquestionably the most lenient way to construe § 1589(3). Therefore, principles of lenity, constitutional avoidance and due process prevent a court from allowing the Plaintiffs to argue that they inferred the legal threat. ***Id.*** Nor can ***Kozminski*** be construed to permit the Plaintiffs to argue that they inferred the coercion. To the contrary, ***Kozminski*** applied the rule of lenity. ***See also*** Doc. #997, pp. 55-65. For all of these reasons, the claim of legal coercion should simply be dismissed. ***See In re: Andrew Mounce***, ***supra***, 390 B.R. at 241.

Turning to the second leg of Signal's argument, however, even if the Court has concluded that it will charge the jury as to "imprisonment or worse," clearly, imprisonment or worse is a fact question for the jury to resolve, further multiplying the number of individual issues. Therefore, Signal wins this argument. ***Allison***, ***supra***, 151 F.3d at 423 ("parties have a Seventh Amendment right to have a jury determine ***all*** factual issues necessary to establish the plaintiffs' . . . claim . . .").

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[41] According to the same, online source, the non-technical definition of "threat" is "***a declaration of*** an intention or determination to inflict punishment, injury, etc., in retaliation for, or conditionally upon, some action or course; menace: *He confessed under the threat of imprisonment.*" This again provides a plain language basis for drawing the conclusion that an inferred threat cannot satisfy § 1589(3).

[42] "'. . . ***[A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.***' . . . 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that ***Congress should have spoken in language that is clear and definite.***' . . . where there is ambiguity in a criminal statute, ***doubts are resolved in favor of the defendant.***" (Emphasis added).

The nature and content of an alleged threat are obviously questions of fact that are undoubtedly relevant under the substantive language of § 1589(3). ***Cf.*** Fed.R.Evid. 401 and 402. It is also indisputable that the person most seemingly competent to elaborate on the nature and content of an alleged threat is its recipient. ***Cf.*** Fed.R.Evid. 601 and 602. Therefore, individual issues abound with regard to legal coercion, precluding the claim's certification. ***Cf. Gene, supra***, at 326 (by identifying substantive law court assesses which issues will predominate).

A further reason for insisting that individual issues abound with regard to legal coercion is the distinct question of whether the class members would be testifying credibly if they claimed they were "threatened." ***Cf. Peterson, supra*** (plaintiff suing for legal coercion must prove "abuse"); ***Sandwich Chef, supra***, at 218 ("Knowledge of the truth defeats a claim of fraud because it eliminates the deceit as the 'but for' cause of the damages.") (Citations omitted). Credibility is a jury question. The workers understood that their work and demeanor could bear on their continued employment and hence their valid visa status. ***See*** Exhibit "A1", attached.[43] While the truth can be hurtful, it cannot, as a matter of law, be abusive. ***Sandwich Chef, supra***, at 218.

Signal recognizes that the subject here is legal coercion rather than fraud. ***Cf. id.*** Signal maintains, however, that the underlying logic of ***Sandwich Chef's*** causation analysis is equally

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[43] Plaintiff Khuttan testified: "But we don't have legal status [like American citizens do]. We have the visa for Signal. If we go out, we going to be deported to India. We going to [be] illegal, and we don't want to be illegal, and we have that much debt in India. We can't take that risk." ***See*** Exhibit "A1." On page 504 of Exh. A1, Khuttan also indicated that he understood the link between termination and status when he said, "they can terminate me . . ." ***See*** Depo. of Khuttan, 504:16-17. In addition, the visas themselves provided that individuals seeking employment in places other than those set out in the visas could be deported. This language further underscored the risk implicit in termination. These individuals were therefore not threatened by Signal. They understood their situation and their legal jeopardy perfectly. ***Critically, Khuttan indicated that all of the other workers also understood their situation.*** Immediately after discussing how he feared termination because it exposed him to deportation, he said other workers felt the same way. ***See id.***, 504:19-23. He knew this, he said, because he talked to them about it. ***Id. Cf.*** 8 U.S.C. § 1184(a) (West Supp. 2009) (providing that out-of-status individual "will depart from the United States."). Therefore, the individuals in question were not "threatened." A "threat" implies something abusive or coercive. As ***Sandwich Chef*** indicated, knowledge of the truth prevents speech that is true from appearing abusive. ***Cf. Sandwich Chef, supra***, at 218. In short, in this case, the legal coercion argument is contrived. Signal has a weighty, corresponding right to explore that issue testimonially with every class member, a self-evident truth that precludes certification.

valid with regard to Chapter 77. As indicated by footnote 43, the putative class knew of the jeopardy to which it was exposed not by Signal but ***by American law***. ***See*** 8 U.S.C. § 1184(a) (West 2006) (alien failing to maintain status ***will*** depart United States); Doc. #997, pp. 62-3, n. 248. The putative class well knew that termination implied deportation. No one can reasonably claim that the link between termination and status deprived Signal of its lawful right to speak to an at-will employee about his job performance. It is undisputed that the class signed employment agreements expressly providing that they were at will employees.[44] It is the law that the parties created for themselves that naturally entitled Signal to factors bearing on continued, at will employment with the putative class. Only American law – not Signal – freighted such a discussion with legal implications. ***Id***. Therefore, as in ***Sandwich Chef***, knowledge of the true state of the law defeats the claim of threatened abuse because such knowledge eliminates alleged dissembling about that same law as the "but for" cause of damage. ***Id***.

In addition, when used as a verb, abuse refers to making excessive or improper use of something. ***See*** Black's Law Dictionary 25 (West 4th ed.). That did not occur in this case because the law of at-will employment entitled Signal to discuss employment-related issues with the class and because American law – not Signal – freighted that discussion with legal implications. ***See*** 8 U.S.C. § 1184(a), ***supra***. However, even if the Court is unprepared to dismiss the legal coercion claim on purely legal grounds, the question of whether Signal threatened to "abuse" the law in the case of any class member is, at a minimum, a question of fact which compounds the number of individual issues. If the issue is triable, Signal has a right to demand that every class member provide testimony paralleling the Rule 9(b) catalog concerning the alleged coercion – the who, what, when, where and how of it, especially considering that so

[44] Samples of these employment agreements were provided to this Court as part of Signal's Doc. #997 package with authenticating affidavits.

many representatives concede that no one ever threatened them ***directly***. Under these circumstances, certification is impossible.

In summary, if the Court is committed to charging the jury as to legal coercion,[45] the question of whether "abuse" occurred is a significant question of fact precluding certification. ***See Allison***, ***supra***. ***Cf. Sandwich Chef***, ***supra***, 319 F.3d at 218 ("'A district court by definition abuses its discretion when it makes an error of law.'") (citation omitted).

IX. <u>RULE 23(a) DEFECTS</u>:

The prayer of the FAC and ¶ 317 of the FAC indicated that this was an action in which significant money damages were sought. Such cases defy certification. ***See Allison***, ***supra***. Plaintiffs struggle to minimize this massive impediment to certification by characterizing the present suit as a "refund-type" case indistinguishable from the other "refund-type" cases previously approved for certification by the Fifth Circuit. ***See*** Doc. #994-1, p. 69. However, the Complaint and the testimony to date contradict the claim that this is just another ordinary suit for a relatively trivial refund. Doc. # 994-1's refund claim is at odds, for example, with FAC ¶ 317. According to ¶ 317, the injury for which the entire class seeks recompense includes: the "exorbitant fees paid by Plaintiffs for green cards, visas and other immigration and recruitment related services;" (2) "interest on debts assumed by Plaintiffs to pay such fees"; (3) "losses of personal and real property incurred ***in reliance on*** Defendants' fraudulent acts"; (4) lost and unpaid wages"; (5) "lost employment opportunities"; and (6) "other pecuniary and/or losses to real or personal property." ***Id.***

[45] The Court must consider whether the question presented, the question of threatened "abuse," is solely one of law because only a Judge can decide whether what was said constituted an "abuse" of the law. An apt analogy would be to the principle that the existence of a legal duty is a question of law, whereas the question of breach is one of fact. The way such a claim would be tried is that the Court would first decide whether, if the words alleged were used, it would constitute an "abuse" of the law. Only if the Court decided that the words in question were actionable would a jury then be called upon to consider, as a factual matter, whether the alleged victim was, in fact, threatened with those words.

Doc. #994-1 is also at odds with the testimony of the class representatives concerning what they hoped to recover from this lawsuit by way of damages. In reality, six of the seven class representatives testified that they sought to recover damages different from those discussed on pages 69-70 of Doc. #994-1; those pages are also contradicted by the damages sought by Plaintiffs in the Complaint. ***Cf. McClain, infra.***

For example, Andrews Padaveettiyl testified that he seeks recovery of money damages compensating him for loss of work, loss of land, loss of time, loss of money, loss of a job, loss of family life, and loss of togetherness.[46] Khuttan testified, when asked what he seeks to recover in this lawsuit, that "they misguided us. They lied [to] us. They made us a wrong promises (sic)...all are because they have money in their pockets. They earned that money...by using us....So we want now to compensate us."[47] Thangamani, like Khuttan, provided blurring testimony concerning what he seeks to recover from this lawsuit. After repeatedly responding that he merely seeks "justice" and that anything further would have to be handled and discussed with his lawyer, Thangamani testified that he didn't think that he was hoping to recover monetary damages in this lawsuit. Thangamani later, however, testified that he sought monetary damages for the money he borrowed in India.[48]

Sulekha testified that he seeks to recover monetary damages from the defendants to compensate him for the boarding deductions he paid to Signal for the housing and food provided,[49] separation from his family, reimbursement of the costs associated to the selling of

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[46] ***See*** Padaveettiyl Vol I, 158:10 – 20, 160:7 – 11, 161:10 – 17, Exhibits "B1", "C1" and "D1" respectively.

[47] ***See*** Khuttan, 521:11 – 522:5, Exhibit "E1". Obviously, it is difficult to ascertain precisely what Khuttan seeks to recover from this lawsuit from his testimony. However, at the very least, this Court should conclude that Khuttan seeks to recover damages to compensate him for more than what Plaintiffs' counsel asserts in their Supplemental Memorandum (Doc. #994-1) and different than prayed for in the FAC.

[48] ***See*** Thangamani, 69:20 – 78:10, Exhibit "F1".

[49] Sulekha, like all other Plaintiffs, signed a Housing Agreement wherein he contracted to pay the boarding deductions. ***See*** Housing Agreements of Kandahasamy and Dhananjaya, SIGP0003368 Depo Ex #399 and SIGP0006011 Depo Ex #810, Exhibits "G1" and "H1" respectively, as well as deposition testimony_authenticating

family ornaments and jewelry, loss of labor, loss of his job in the Middle East as well as money to reimburse him because of "all the promises."[50] Plaintiff Kandahasamy testifies that he seeks recovery of recruitment fees paid by him in India plus his interest owed only.[51]

Plaintiff David testifies that he wants to recover the following from Signal as a result of his lawsuit: He wants a green card, the court to prevent injustice, the government to caution against certain arrangements and to change the entire H-2B program and parameters, reimbursement of the money he lost, reimbursement of money he spent to come to the United States, money for mental anguish he and his family suffered,[52] the defendants to be punished and required to pay more money and he wants the difference in purchase price of his brother-in-laws house at the time of sale and today where, according to David, the purchase price has increased six-fold.[53]

Even if Plaintiffs indeed maintain that they seek recovery of the interest owed on their loans, which they claim in the FAC and state in deposition, yet relinquish in Doc. #994-1, this Court should conclude that the individual nature of the claims, specifically the amount of the loans themselves and the interest associated with same, should preclude certification.

REDACTED **REDACTED**

[54]

same, Kandahasamy, 542:11 – 18 and Dhanajaya, 289:22 – 290:3, Exhibits "I1" and "J1", respectively. He didn't have to sign this agreement and could have left Signal before his employment began. ***See*** David 657:6 – 15, Exhibit "K1". Obviously, Signal should have the right to cross-examine Sulekha concerning his contractual obligations.

[50] ***See*** Sulekha, 79:18 – 82:18, Exhibit "L1".

[51] ***See*** Kandahasamy, page 97:1 – 7, Exhibit "M1".

[52] He states there is no way to value said suffering.

[53] ***See*** David, 204:22 – 213:11, Exhibit "N1".

[54] ***See*** T Visa Affidavit of Kechuru Dhananjaya, page 3 – 4 paragraph 8, page 4 paragraph 9, page 7 paragraph 20, page 9 paragraph 27 and page 12 paragraph 39, Exhibits "O1", "P1", "Q1", "R1" and "S1" respectively; ***see also*** T Visa Affidavit of Kurian David, page 5 paragraph 16 – 17 , page 12 – 13 paragraph 38 Exhibit "T1" and "U1", respectively; ***see also*** T Visa Affidavit of Murugan Kandahasamy, pages 3 – 4 paragraph 11, page 6 paragraph 18, Exhibits "V1" and "W1", respectively; *see* T Visa Affidavit of Andrews I. Padaveettiyl, page 4 paragraph 13,

Further, even if this Court were to follow Plaintiffs' suggestion in Doc. # 994-1 that damages are limited in all cases to recruitment fees, boarding deductions and treble damages, which, again, contradicts Plaintiffs' prayer in the FAC and the actual testimony of the class representatives themselves, this Court should nonetheless conclude that the claims of all Plaintiffs are so very different and thus fail to satisfy the commonality requirement of Rule 23(a). This is so because it is undisputed that each class representative paid different recruiting fees and different amounts in boarding deductions.

REDACTED .[55] **REDACTED**

r .[56] .[57]

.[58] **REDACTED** .[59]

REDACTED .[60] [61]

Additionally, six of the seven class representatives never paid $1,050 each month for boarding deductions indicating yet again the differing damage claims of each Plaintiff.[62] The

Exhibit "X1"; *see also* T Visa Affidavit of Hemant Khuttan, page 2 paragraph 8, Exhibit "Y1"; *see also* T Visa Affidavit of Palanyandi Thangamani, page 3 paragraph 9, page 3 paragraph 11, page 4 paragraph 13, page 5 paragraph 15, Exhibits "Z1", "A2", "B2" and "C2", respectively; *see also* T Visa Affidavit of Sony Sulekha, page 4 paragraph 16, page 7 paragraph 28, page 7 paragraph 27, page 10 paragraph 37, Exhibit "D2", "E2", "F2" and "G2" respectively.

[55] ***See*** T Visa Affidavit of Kurian David, page 2 paragraph 7, Exhibit "H2".

[56] ***See*** T Visa Affidavit of Andrews I. Padaveettiyl, page 3 paragraph 9, Exhibit "I2".

[57] ***See*** T Visa Affidavit of Kechuru Dhananjaya, page 3 paragraph 7, Exhibit "J2".

[58] ***See*** T Visa Affidavit of Hemant Khuttan, page 1 paragraph 7, Exhibit "K2". Khuttan was told that he would have to pay entirely in cash and more than other applicants because he was a late applicant. *Id.*

[59] ***See*** T Visa Affidavit of Murugan Kandahasamy, page 2 paragraph 6, Exhibit "L2".

[60] ***See*** T Visa Affidavit of Palanyandi Thangamani, page 7 paragraph 21, Exhibit "M2".

[61] ***See*** T Visa Affidavit of Sony Sulekha, page 12 paragraph 46, Exhibit "N2".

[62] Plaintiffs allege in their Supplemental Memorandum in Support of Class Certification (Doc. # 994-1) that each class representative had $1,050 per month deducted from their wages as a boarding deduction. Although these deductions were made pursuant to a contract signed by each class representative, the Plaintiffs allege that this mandatory rent effectively compelled class members to remain in the housing facility against their will. As Signal has argued in its Opposition, being "*effectively compelled*" to stay somewhere does not equal the legal definition of compulsion. ***See*** Signal's Opposition, Doc. #997. ***In reality***, each class representative testifies that he was not only free to leave the facility and/or quit his job at Signal at any time, but that he could have lived outside the housing facility had he so chosen. ***See*** Signal's Opposition to Plaintiffs' Motion to Certify Class (Doc. #997).

documentary evidence, by way of Weekly Wage Breakdowns,[63] confirms what Signal has stated from the outset – that in order for a jury to consider the claims of the Plaintiffs, each Plaintiff must take the stand and support his claims that Signal compelled him to stay in the housing facility against his will. Or as Plaintiffs state – "***effectively compelled***" them to stay.

Dhananjaya, the entire time he worked at Signal, only paid $735 in boarding deductions.[64] From May 25, 2007 – July 1, 2007, Signal only charged Khuttan $140 in boarding deductions.[65] Other Weekly Wage Breakdowns confirm that in nearly all circumstances, the Plaintiffs did not pay $1,050 per month in boarding deductions while employed at Signal.[66]

A. CLASS REPRESENTATIVES SHOULD BE DEEMED INADEQUATE:

The fact that the Complaint and the testimony of the class representatives differ from Doc. #994-1 raises a profound issue of adequacy under Rule 23(a) under ***Amchem, supra***,[67] and ***McClain v. Lufkin Industries, Inc.***, 519 F.3d 264, 283 (5th Cir. 2008). In ***McClain***; the district court concluded "that the class representatives would be 'inadequate' if they dropped the class members' demand for compensatory and punitive damages . . . ." As the Court has seen, this case mirrors ***McClain*** in the sense that damage claims have also been dropped. The class representatives here, like those in ***McClain***, jettison damage claims in a transparent attempt to manufacture commonality where none exists. ***McClain*** holds that the strategy the plaintiffs adopted proves their Rule 23(a) inadequacy. ***Id.*** Therefore, certification is impossible.

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[63] The Weekly Wage Breakdowns provide a week-by-week breakdown of the wages paid to a given worker by Signal including a complete breakdown of all deductions applied to said wages, including, but not limited to, deductions for medical insurance, taxes and boarding.
[64] ***See*** KECHURU00011, Exhibit "O2".
[65] ***See*** KHUTTAN00022, Exhibit "P2"..
[66] ***See*** KURIAN000001(July 2007 - $455, August, 2007 - $875), Exhibit "Q2"; KANDAHASAMY00015(September, 2007 - $560), Exhibit "R2"; THANGAMANI00015(January, 2008 - $665), Exhibit "S2"; PADAVEETTIYL00012, Exhibit "T2"(January, 2008 - $560).
[67] ***Amchem, supra***, at 625, 117 S. Ct. at 2250 ("The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent.'").

X. PLAINTIFFS ARE MEN, THEY ARE NOT CHILDREN:

Plaintiffs write that the "distinctions [between them] will be no more than distractions," minor "details [that] hav[e] little to do with the core facts."[68] Therefore, certification will be, they claim, a breeze. As Signal demonstrated in Doc. #997, the truth is that the differences between the class representatives are far too significant to justify certification. The workers were relatively seasoned men, as Signal demonstrated in Doc. #997, with a fairly keen understanding of the world as it is; they were therefore far less vulnerable to psychological manipulation than the Plaintiffs would have this Court believe.

Congress has said repeatedly that the substantive, forced labor issues raised in this case were "***intended*** to be construed with respect to ***individual*** circumstances of victims that are relevant to determining whether a particular type or certain degree of harm or coercion is sufficient to maintain or obtain a victim's labor or services, including the age ***and background*** of the victims," as Signal stressed in Doc. #997 and has stressed again in this brief by quoting Rep. Berman with regard to the 2008 legislation.[69] ***See*** Doc. #997, p. 53 n. 233. ***Cf.*** Doc. # 994-1, at p. 2.[70]

Further pivotal to individual differences precluding certification is the plain language of § 1589, which reveals an interest in what the "victim" "believe[d]" would occur "if [he] did not perform . . . labor . . . ." ***See*** 18 U.S.C. § 1589(2) (West 2006).

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[68] ***See*** Doc. # 994-1, p. 2.

[69] ***See*** 154 Cong. Rec. H 10888, LEXSEE 154 Cong. Rec. H 10888 ("The term 'serious harm" refers to a broad array of harms, including both physical and nonphysical, ***and is intended to be subjectively construed*** in determining whether a particular type or certain degree of harm or coercion is sufficient to overcome a particular victim's will.")

[70] Plaintiffs allege: "Once [at Signal], Plaintiffs were subject to segregated housing, severe discrimination and adverse working and living conditions that, ***given their debts***, reasonable persons in their position would have felt compelled to endure." ***See id.***, at 3 ("Plaintiffs seek treatment as a class, not only because they satisfy the requirements of Rule 23 . . . but because that is precisely how Plaintiffs were treated by defendants – as a nameless and faceless class (albeit second class) of fungible migrant workers who could be misled and exploited . . ."

Contemplating the substantive law, ***see Gene*, *supra***, at 325, this Court must therefore acknowledge that Signal has a well-founded reason for wanting every member of the class to testify. For example, the questions presented by the Chapter 77 statutes are factual – the Fifth Circuit so held in ***Channer*** – and it is equally undeniable that the Fifth Circuit has said that "parties" have a constitutional right to require a jury to decide all questions of fact.[71]

A. <u>DIFFERING RECRUITMENT IN INDIA</u>:

On page 3 of Doc. #994-1, Plaintiffs argue that individual differences with regard to the events that transpired in India are too immaterial to preclude certification but that Signal will present those facts as "distractions" to deceive the Court into thinking that the claims defy certification. These contentions lack merit. To begin with, the true recruitment stories are full of hearsay. Despite their burden of proof, ***see Gene*, *supra***, at 325, Plaintiffs fail to address the hearsay issues. Be that as it may, ***Allison*** underscores Signal's constitutional right to demand that the jury decide the facts. Plaintiffs are less than honest with the Court when they assert that the differences between them are nothing more than immaterial "distractions." *Cf.* Doc. #994-1, p. 3.

i. <u>Kechuru Dhananjaya</u>:

Dhananjaya's story is uniquely personal to him, for example **REDACTED**

REDACTED [72] Dhananjaya, at that time, was working in Dubai.[73] When Dhananjaya read this advertisement, which made no reference whatsoever to Signal,[74] he was alone; he concluded that the advertisement meant that if he was "selected, [he] would get a green

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[71] ***Allison*, *supra***, 151 F.3d at 423 ("***parties have*** a Seventh Amendment right to have a jury determine ***all*** factual issues necessary to establish the plaintiffs' . . . claim . . .") (emphasis added). ***See also Channer v. Hall***, 112 F.3d 214, 218 n. 7 (5th Cir. 1997) ("[c]ompensation for service may cause consent . . .").
[72] ***See*** T Visa Affidavit of Kechuru Dhananjaya, page 2 paragraph 5, Exhibit "U2".
[73] ***See*** Dhananjaya, 62:2 – 18, Exhibit "V2".
[74] The advertisement was viewed in 2003 - Signal's labor need did not arise until 2006.

card, a permanent residency."[75] The advertisement listed contact information for Dewan.[76] It did not state the length of the application process or how long an applicant could expect to wait before receiving the promised green card.[77]

Following review of the advertisement, Dhananjaya took his resume to the Dewan office and held a telephone conversation with Disha, a Dewan employee.[78] Disha told Dhananjaya some particulars about the recruitment process, an upcoming meeting with Dewan, Rao and Burnett, for example, and about the money that Dhananjaya would need to pay to participate in the recruitment process. Following this conversation but prior to meeting with Dewan, Rao or Burnett in person concerning recruitment, Dhananjaya made the decision to participate in the program, and he therefore began to collect money for his first payment.[79]

REDACTED [80] **REDACTED** [81]

[82]

[83]

REDACTED

[84] **REDACTED**

REDACTED

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[75] *See* Dhananjaya, 63:1 – 8, Exhibit "W2".
[76] *See* Dhananjaya, 64:13 – 20, Exhibit "X2".
[77] *See* DAVID00001785, Depo Ex. #794, Exhibit "Y2".
[78] Disha later worked for Dewan Consultants as well.
[79] *See* Dhananjaya, 304:12 – 306:10, Exhibit "Z2" and Declaration of Kechuru Dhananjaya, KECHURU00021, Depo Ex # 807, page "A3" paragraphs 4 and 5, Exhibit "B3".
[80] Several years before Signal ever contracted with Michael Pol.
[81] *See* T visa Affidavit of Kechuru Dhananjaya, page 4, paragraph 10, Exhibit "C3".
[82] *See* T Visa Affidavit of Kechuru Dhananjaya page 4, paragraph 11, Exhibit "D3".
[83] *See* T Visa Affidavit of Kechuru Dhananjaya, page 5, paragraph 13, Exhibit "E3".
[84] *See* T Visa Affidavit of Kechuru Dhananjaya page 8 paragraph 23, Exhibit "F3".

REDACTED

See id. The point is that these messages were not delivered to Dhananjaya by Signal. Thus, this claim must fall under the § 1962(d) prong of RICO, rendering the claim uncertifiable.

REDACTED [85]

REDACTED

,[86]

REDACTED

REDACTED [87]

These facts are unique to this representative and are hardly distractions. To the contrary, they underscore the dispositive relevance of ***Allison*** from a certification standpoint.

ii. <u>Palanyandi Thangamani</u>:

Just so, whereas Dhananjaya was shown an advertisement in the *Gulf News* about a work opportunity abroad in December, 2003, it was in May of 2006 that Thangamani first saw an

[85] Dhananjaya knew as far back as 1997 that this was an impossibility. ***See*** Doc. #997, Sec IV.G.vii.
[86] ***See*** T Visa Affidavit of Kechuru Dhananjaya, page 10 paragraph 29, Exhibit "G3".
[87] ***Id.*** Signal detailed the remainder of Dhananjaya's unique circumstances surrounding his recruitment and eventual arrival at Signal in its original Opposition (Doc. #997). For the sake of brevity, Signal directs this Court to Sec VI.G.vii. of Doc #997 for a complete timeline.

advertisement concerning work opportunities abroad in a Tamil newspaper.[88] Cross-examined about the contents of this advertisement, Thangamani testified:

> A: [The advertisement I saw] was a small box in the Tamil paper and the Signal's name was there, and below, they had given wanted welders, fitters, and agent's name was given below the advertisement
>
> * * *
>
> Q: Can you explain to me why the advertisement you claim you saw in the Tamil paper in May of 2006 - - well, are you saying that the advertisement you claim you saw in the Tamil paper in May 2006 referred specifically to Signal International?
>
> A: Yes. Signal's name was there.
>
> Q: Can you - - if you can, and maybe you don't know - - explain - - let me back up. Did Mr. Salimon[89], who you referred to in Paragraph 4 [of your sworn Declaration] as who is Mr. Dewan's assistant, did he ever explain to you why the ad you claim you saw in the Tamil paper in May of 2006 referred to Signal International when that was before Signal had ever met Sachin Dewan? Do you know the answer to that question?
>
> A: ...Salimon spoke to us about the company and said they will give us a green card and everything will be - - will be - - the introduction of the company was given then.
>
> Q: I understand that. Now, this discussion with Salimon that you just told me about, when did that discussion occur?
>
> A: When I went for the interview, I met Salimon, and later on, when I went to give the advance money, I met Salimon again.

See Thangamani, 197:18 – 201:3, Exhibit "J3".

Thangamani spoke to a representative of Dewan Consultants about working for Signal for the first time on May 30, 2006.[90] Thangamani made a trip from Trichy to Chennai to meet with

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[88] *See* Thangamani, 196:20 – 197:7, Exhibit "I3".
[89] Salimon was a representative of Sachin Dewan though he carried no formal job title with Dewan Consultants, had no contract with Dewan Consultants and was exclusively paid in cash for his services rendered. *See* Dewan, 45:10 – 47:5, Exhibit "V5".
[90] *See* Declaration of Palanyandi Thangamani, THANGAMANI0004, Depo Ex #275, page 2 parag 5, Exhibit "K3".

Dewan following conversations held with an unnamed friend who previously attended a seminar conducted by Salimon, Dewan's representative. Salimon represented to Thangamani that he, Salimon, was recruiting for Signal.[91]

[92] REDACTED

REDACTED [93]

[94]

[95]

REDACTED [96]

REDACTED [97] These facts prove once again that Thangamani's Indian recruitment story is both uniquely personal and a story that proves that the claimant spoke to no one who worked directly for Signal with regard to recruitment. Since that fact is supremely important to Signal for the reasons Signal has discussed at length with regard to § 1962(d), ***Allison*** speaks to the countless, procedural and substantive reasons why this claim cannot be certified.[98]

iii. <u>Murugan Kandahasamy</u>:

Kandahasamy's Indian recruitment story is similarly personal. While working, in 2004, in Dubai, a friend exposed him to an advertisement promoting a work opportunity in the United States.[99] Thereafter, friends traveled to meet with Dewan Consultants about the opportunity;

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[91] ***See*** Thangamani, 201:4 – 202:24, Exhibit "L3".
[92] ***See*** T Visa Affidavit of Palanyandi Thangamani, page 3 paragraph 8, Exhibit "M3".
[93] ***See Id.***
[94] ***See*** T Visa Affidavit of Palanyandi Thangamani, page 3 paragraph 9, Exhibit "N3".
[95] ***See*** T Visa Affidavit of Palanyandi Thangamani, page 3 paragraph 10, Exhibit "O3".
[96] ***See*** Offer of Employment Letter, BURNETT-CY-00919 Depo Ex #381, Exhibit "P3".
[97] ***See*** T Visa Affidavit of Palanyandi Thangamani, pages 3-4, paragraph 11, Exhibit "Q3".
[98] For completion of Thangamani recruitment timeline, *see* Doc. #997, Sec. IV.G.vi.
[99] ***See*** Kandahasamy, 325:18 – 326:7, Exhibit "R3".

Kandahasamy did not.[100] Kandahasamy testified to later learning of the session from his friends.[101] Only Kandahasamy, however, can testify to this specific matrix of recruitment facts.

Two years later, Kandahasamy again saw an advertisement mentioning employment opportunities in the United States, one listing Dewan Consultants as a contact.[102] Kandahasamy traveled to D'Silva Engineering to pursue the matter further.[103] Upon arrival, Salimon told Kandahasamy to take a written exam.[104] Thereafter, Sachin Dewan and Salimon told Kandahasamy that he had passed and that he was set to begin green card processing.[105]

Kandahasamy recalled that Salimon told him other things about the job opportunity on that date but he could not remember the details.[106] Though defendant Burnett also spoke to Kandahasamy at this time in English, Kandahasamy could not recall the substance of the exchange.[107] Finally, however, Salimon, not someone working directly for Signal, told Kandahasamy what he would need to pay fees to commence his processing to "emigrate" to the United States.[108]

When Kandahasamy spoke with Dewan on June 2, 2006, Kandahasamy had already discussed the matter with family and friends and even studied the opportunity on the Internet, and it was only after he so informed himself about what he was proposing to do that he decided to pay any fees at all.[109] ***Kandahasamy confirms that he did not feel forced to make this decision***.[110]

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[100] ***See*** Kandahasamy, 335:3 – 336:2, Exhibit "S3".
[101] ***See*** Kandahasamy, 335:6-8, Exhibit "T3".
[102] ***See*** Declaration of Murugan Kandahasamy, page 2 paragraph 5, KANDAHASAMY00004 Depo Ex #359, Exhibit "U3".
[103] ***See Id.*** at page 2 paragraph 6.
[104] ***See*** Kandahasamy, 364:3 – 9, Exhibit "V3".
[105] ***See*** Kandahasamy, 364:23 – 365:4, Exhibit "W3".
[106] ***See*** Kandahasamy, 365:24 – 25, Exhibit "X3".
[107] ***See*** Kandahasamy, 366:1-9, Exhibit "Y3".
[108] ***See*** Kandahasamy, 367:23 – 368:1, Exhibit "Z3".
[109] ***See*** Kandahasamy, 373:5 – 17, Exhibit "A4".
[110] ***See*** Kandahasamy, 373:23 – 374:1, Exhibit "B4".

Kandahasamy's journey is thus once again uniquely personal and highly relevant to the nature of the claim he can attempt against Signal. Thus, ***Allison*** again shows that this claim cannot be certified.

iv. Sony Sulekha:

Similarly, uniquely personal to the individual is Sulekha's story. His story commenced not in 2004 like the previous representative but in 2005. While working in the U.A.E., Sulekha saw an advertisement for employment opportunities in the United States.[111]

[112]

REDACTED **REDACTED**

[113]

In April, 2006, after Sulekha had returned to India from the U.A.E., he saw a ***different*** advertisement promoting work opportunities under H-2B visas.[114] The advertisement provided a contact name and number, one for "Salimon."[115] When he called, Sulekha learned that he would need to travel to Cochin to learn more about the opportunity.[116]

In May of 2006, Sulekha met, in Cochin, with only Salimon, Dewan and Pol. Sulekha met with no Signal employee.[117] This was the first time Sulekha heard the phrase Signal International.[118]

REDACTED

[111] ***See*** Sulekha, 128:21 – 129:12, Exhibit "C4".
[112] ***See*** T Visa Affidavit of Sony Sulekha, page 2 paragraph 6, Exhibit "D4".
[113] ***See Id.***
[114] ***See*** Sulekha, 129:17 – 131:8, Exhibit "E4". ***See also*** T Visa Affidavit of Sony Sulekha, page 2 paragraph 7, Exhibit "F4".
[115] ***See*** Sulekha, 131:20 – 132:22, Exhibit "G4".
[116] ***See*** Sulekha, 132:17 – 22, Exhibit "H4".
[117] ***See*** Sulekha, 135:23 – 136:9, Exhibit "I4".
[118] ***See*** Sulekha, 136:24 – 137:2, Exhibit "J4".

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[119] *See* T Visa Affidavit of Sony Sulekha, page 3, paragraph 9, Exhibit "K4".
[120] *See* T Visa Affidavit of Sony Sulekha, pages 4 and 5, paragraph 17, Exhibit "L4".
[121] *See* T Visa Affidavit of Sony Sulekha, page 6 paragraph 22, Exhibit "M4".
[122] *See Id.* Sulekha claims differently, the first time he saw the phrase "H-2B visa" was in an advertisement in April 2006. *See* DAVID00000752, Depo Ex #340 Exhibit "N4".
[123] *See* T Visa Affidavit of Sony Sulekha, page 6, paragraph 24 and page 7 paragraph 26, Exhibits "O4" and "P4" respectively.
[124] *See Id.*
[125] *See* T Visa *Id.*
[126] *Id.*
[127] *Id.*
[128] *See* T Visa Affidavit of Sony Sulekha, page 7 paragraph 27, Exhibit "Q4".

These circumstances again bear on the nature of the claimant's remedy, if any, against Signal, underscoring the force of Signal's certification-precluding argument. ***See Allison*, *supra*.**

v. <u>Andrews I. Padaveettiyl</u>:

Uniquely personal again is the Padaveettiyl story, for he never even saw an advertisement promoting work in the United States.[129] A friend told him about one; it was after that disclosure that Padaveettiyl then attended a meeting with Sachin Dewan, Manish Dewan and Veruna Dewan, as opposed to a direct employee of Signal.[130]

In this meeting, which occurred in 2004, Padaveettiyl had a personal conversation with Sachin and Manish Dewan; in it, he and a few of his friends were told that they would receive work permits in six (6) months and green cards within two (2) years.[131] Padaveettiyl was not told which company he would be working for.[132] After the meeting, and prior to ever finding out the name of his prospective employer, Padaveettiyl sold land to gather the money needed to participate in the recruitment program.[133] At this point, Padaveettiyl had not spoken to any Signal employee. Padaveettiyl made numerous phone calls and even traveled to the offices of Dewan Consultants, to meet face-to-face to enquire about the status of his application.[134] His inquiries were usually met with excuses, however, or by requests for greater patience.[135]

Finally, in October 2006, Dewan told Padaveettiyl to "forget about" his recruitment with J&M, to work instead for Signal on an H-2B visa.[136] Padaveettiyl then elected to participate in

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[129] ***See*** Padaveettiyl, Vol II, 38:8 – 10, Exhibit "R4".
[130] ***See*** Padaveettiyl, Vol II, 41:2 – 10, Exhibit "S4". Pol and Burnett were not present at this meeting and neither was a Signal employee as this meeting was well before Signal's need developed.
[131] ***See*** Padaveettiyl, Vol II, 44:2 – 18, Exhibit "T4"; ***See also*** Declaration of Andrews I. Padaveettiyl, PADAVEETTIYL00004 Depo Ex #277, page 1, paragraph 7, Exhibit "U4".
[132] ***See*** Padaveettiyl, Vol II, 45:25 – 46: 18, Exhibit "V4".
[133] ***See*** Padaveettiyl, Vol II, 49:3 – 9, Exhibit "W4".
[134] ***See*** Padaveettiyl, Vol II, 67:14 – 24, Exhibit "X4".
[135] ***See*** Padaveettiyl, Vol II, 69:20 – 70:13, Exhibit "Y4".
[136] ***See*** Padaveettiyl, Vol II, 60:22 – 61:7, Exhibit "Z4".

the H-2B visa program allegedly sponsored by Signal.[137] Therefore, Signal has ample reason, once again, to demand that this witness testify to his uniquely personal recruitment story in India to confine him to a remedy that is utterly devoid of merit. Therefore, with regard to certification, Signal's rights under ***Allison*** are truly dispositive.

vi. Hemant Khuttan:

In October, 2006, after seeing an advertisement in the *Hindustan Times* promoting a work opportunity in the United States for an unnamed company, Khuttan called Dewan Consultants about the opportunity.[138] The Dewan representative with whom Khuttan spoke, allegedly Dewan's receptionist, conveyed information to Khuttan concerning a meeting in Mumbai; next, Khuttan therefore traveled to Mumbai to learn about the opportunity.[139]

At Dewan's Mumbai office, a Dewan employee told Khuttan that he would be applying for a green card to work for Signal, which exposed Khuttan to the name of his prospective employer for the first time.[140]

REDACTED

"[141] Thereafter, Khuttan discussed the opportunity with his family.[142] Following this one and only meeting with a Dewan representative he never saw again, Khuttan paid 300,000 rupees to participate in the program.[143]

At the end of November, 2006, Khuttan attended a meeting with Sachin Dewan and Dewan's brother to discuss recruitment.[144] At this meeting, Dewan and Dewan's brother told

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[137] ***Id.***
[138] *See* Khuttan, 230:1 – 231:13, Exhibit "A5".
[139] *See* Khuttan, 231:13-23, Exhibit "B5". *See also* Khuttan, 231:24 – 232:9, Exhibit "C5". *See also* Khuttan, 236:2 – 5, Exhibit "D5".
[140] *See* Khuttan, 237:5 – 21, Exhibit "E5".
[141] *See* T Visa Affidavit of Hemant Khuttan page 1 paragraph 6, Exhibit "F5".
[142] *See* Khuttan, 240:7 – 20, Exhibit "G5".
[143] *See* Khuttan, 244:19 – 25, Exhibit "H5".
[144] *See* Khuttan, 254:21 – 256:24, Exhibit "I5".

Khuttan about his expected wages and that he would be required to pay a $35 per day boarding deduction if he chose to work for Signal.[145] Khuttan was not present at an earlier meeting with prospective workers conducted by Dewan, Pol and Burnett and therefore cannot state what was discussed with the workers at that earlier meeting.[146] These facts illustrate again that Signal's constitutional rights preclude certification. ***Id.***

vii. <u>Kurian David</u>:

REDACTED [147] Thereafter, David attended a seminar at a hotel ***in Abu Dhabi*** sponsored by Dewan Consultants.[148] Fifty people attended this seminar, including Indians, Bangladeshis and Pakistanis.[149] He arrived at the seminar after it commenced, and therefore cannot address what was said before he arrived.[150] However, he can say that Signal was not present.[15]

[152]

REDACTED

[53]

REDACTED [154]

Once again, Signal therefore has a significant interest in forcing David to testify regarding the

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[145] ***See*** Khuttan, 259:18 – 260:14, Exhibit "J5".
[146] ***See*** Khuttan 260:14 – 261:4, Exhibit "K5".
[147] ***See*** T Visa Affidavit of Kurian David, page 2 paragraph 5, Exhibit "L5".
[148] ***See*** David, 319:5 – 322:23, Exhibit "M5".
[149] ***See*** David, 323:18 – 23, Exhibit "N5".
[150] ***See*** David, 322:24 – 323:17, Exhibit "O5".
[151] ***See*** David, 324:22 – 325: 5, Exhibit "P5".
[152] ***See*** David, 330:19 – 21, Exhibit "Q5".
[153] ***See*** T Visa Affidavit of Kurian David, page 3 paragraph 8, Exhibit "R5".
[154] ***See Id.***

facts that underscore the nature of the narrow remedy, if any, available against Signal. ***Id.*** Certification is therefore precluded. ***Id.***

B. <u>Individual Expectations/Impressions Concerning Life at Signal</u>:

Finally, Signal has harvested copious testimony from class representatives contradicting allegations made by Plaintiffs in the FAC and in Doc. #994-1 concerning their expectations with regard to housing. This testimony precludes certification.

i. <u>Housing Facility</u>:

Plaintiffs make various assertions concerning promises allegedly made to them, in India, regarding housing and accommodations. ***Allison*** protects Signal's strong interest in requiring every class member to answer questions concerning the origins of their housing expectations. Indeed, Signal required every Plaintiff to sign a contract concerning housing, contracts that disclosed that the workers would be housed in bunkhouses and lawfully charged for their room and board. ***See*** footnote 50, ***supra***. It is undisputed that Signal only allowed workers who signed agreements to work for Signal. Signal's interest in harvesting testimony from class members on these issues is therefore massive, irrefutable and constitutionally protected. ***Cf. Estate of Degley v. Vega***, 797 S.W.2d 299, 304 (Tex. App.—Corpus Christi 1990), ***no writ*** ("a party who signs a contract is charged with notice of its contents as a matter of law."); ***Ballard v. Commercial Bank of DeKalb***, 991 So.2d 1201, 1206-07 (Miss. 2008) (to permit party to written contract to admit he signed it but deny it expresses his agreement or that he did not read it or understand it "would absolutely destroy the value of all contracts."); ***Continental Jewelry Co. v. Joseph***, 140 Miss. 582, 585, 105 So. 639 (1925) (person sued on signed, written contract who tries to disavow the contract based on reading English poorly must prove that his predicament was caused by

fraudulent representations made to him by other party, suggesting that individual issues predominate with regard to such an individual).

Khuttam testified that Sachin Dewan told him that his accommodations in the United States would be "good." Khuttan ***assumed*** that "good" meant that he would be living in apartments with no more than four (4) people in a room.[155] Yet, when Padaveettiyl was told by Dewan that the accommodations would be "good" he testified that good, to him, meant "a place to stay."[156] Padaveettiyl was told about this "place to stay" in 2004, nearly two years before any contract between Signal and Global was signed. Obviously, Dewan could not have been describing an accommodation with Signal.

Thangamani, like Padaveettiyl, was also told that the accommodations would be "good." Padaveettiyl was informed of this, however, not by Dewan but by Salimon at an engineering institute in India.[157] **REDACTED** [158]

Further, some Plaintiffs went as far as to say that they were provided examples of the housing they would see by non-Signal employees. In his T-visa application, Sulekha said:

REDACTED

...

See T Visa Affidavit of Sony Sulekha, page 3, paragraph 12, Exhibit "X5" (emphasis added).

Kurian David testified that in May, 2006, he was given a brochure and shown a video of the housing facility at Signal.[159]

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[155] ***See*** Khuttan 329:23 – 330:12 and 336:1 – 8, Exhibits "S5" & "T5" respectively.
[156] ***See*** Padaveettiyl Vol II, 64:10 – 22, Exhibit "U5".
[157] Salimon was a representative of Sachin Dewan though he carried no formal job title with Dewan Consultants, had no contract with Dewan Consultants and was exclusively paid in cash for his services rendered. ***See*** Dewan, 45:10 – 47:5, Exhibit "V5".
[158] ***See*** T Visa Affidavit of Palanyandi Thangamani, page 4 paragraph 12, Exhibit "W5".
[159] ***See*** David, 331:12 – 333:2, Exhibit "Y5".

Signal has an obvious right to cross-examine the class concerning the things they claim they saw concerning Signal's accommodations. ***Cf. Allison*, *supra***. The question of what the class actually saw is a classic one of fact. ***Id.*** Attached to this brief is an affidavit from a competent, Signal witness stating that the company website never showed photographs of this kind.[160] Further, it is undisputed that Signal did not even begin ***preparations*** for construction of the Housing Facility until August, 2006.[161] This highlights Signal's ***Allison***-protected, credibility interest in requiring every class member to testify. Certification is therefore devoid of merit. ***Id.***

ii. <u>Plaintiffs Satisfied at Signal</u>:

Housing Facility issues are merely one example of how grossly and erroneously the plaintiffs oversimplify the facts to facilitate certification. Throughout Doc. # 994-1, Plaintiffs paint a broad picture of the allegedly, coercive circumstances that allegedly surrounded their employment. However, plaintiffs impeach themselves extensively on these very issues, as Signal demonstrated in Doc. #997. This quintessential conflict concerning the facts underscores Signal's constitutionally protected right to require every class member to testify concerning his version of the truth.

Thangamani denied complaining about his job assignments or work conditions, for example.[162] Kandahasamy said he was ***so happy*** at Signal, he would have been content to continue working for it if he had received a green card.[163] Indeed, after the filing of this suit, ***Kandahasamy contacted Signal to inquire about returning to the company.***[164]

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[160] ***See*** Affidavit of Tracey Binion, April 19, 2011, attached herein as Exhibit "Z5".
[161] ***See*** Weekly Update of John Sanders, August 11, 2006, SIGE019260, Exhibit "A6".
[162] ***See*** Thangamani 399:9 – 401:25, Exhibit "B6".
[163] ***See*** Kandahasamy, 403:25 – 404:13, Exhibit "C6".
[164] ***See*** Affidavit of James Anthony, April 20, 2011, Attached herein as Exhibit "D6".

Khuttan testified that neither he nor any other H-2B worker was forced to work at Signal against his will. Khuttan left Signal's employ when he wanted to, without incident.[165]

Finally, Padaveettiyl testified that Signal did "nothing wrong" when it lowered Padaveettiyl's work load to 30-40 hours per week because he understood that this sort of thing happens when there is less work around the yard.[166] Padaveettiyl also testified:

> Q. ***You also mention, in Paragraph 35 [of your sworn Declaration], "Signal only provided transportation to us to go to Wal-Mart." Let me finish. "They would not take us anywhere else, even to go out to eat." Now, that's not true is it?***
>
> A. ***That is not true.***

See Padaveettiyl, Vol II, 114:14 – 21, Exhibit "G6" (emphasis added).

Allison's relevance to this case is accordingly undeniable. The alleged "fragility" of the class members is a quintessential fact question, as is the question of the credibility of the class' allegations. Moreover, the statutes at issue undeniably multiply the individual, fact questions about the class' state of mind. This indisputably causes individual issues to predominate. ***See, e.g.***, footnote 43, ***supra***; ***see also Allison***, ***supra***; Doc. #997, pp. 25-43.

XI. THIS IS NOT THE TIME OR PLACE TO DISCUSS THE MERITS:

To manufacture grounds for certification, in Doc. #994-1, plaintiffs spin the facts shamelessly. ***Regents*** reminds everyone, however, that courts considering certification may only address arguments implicating the merits if the arguments implicate the merits of the class certification decision. ***See Regents***, ***supra***, 482 F.3d at 380. This therefore is not the time to plunge into a violent argument over what the facts truly are. ***Id***. ***See also*** footnote 42, ***supra***. To ensure that its silence is not misconstrued, however, Signal is compelled to briefly address the merits to invest the Court with certain knowledge that the merits are in immeasurable dispute, a

[165] ***See*** Khuttan, 419:15 – 422:4, Exhibit "E6".
[166] ***See*** Padaveettiyl, Vol II, 118:11 – 119:13, Exhibit "F6".

fact precluding certification. Signal will demonstrate this truth by dissecting Doc. #994-1 with regard to one legal and one factual error.

A. An Illustrative Legal Error in Doc. #994-1:

An example of a significant legal error in Doc. #994-1 concerns ***Does I v. The Gap, Inc.***, 2002 WL 1000073 (D.N.Mar.I. May 10, 2002). The parties have passionately argued about this case since this suit was filed.

Does was the sweatshop case from Saipan certified ***solely with regard to peonage*** to effect a settlement. In the present case, however, peonage is not alleged, whereas involuntary servitude is. On page 45 of Doc. #994-1, Plaintiffs write, in footnote 45: "[In Does], [t]he plaintiffs alleged, inter alia, that the defendants had violated the RICO statute by subjecting their employees to peonage and involuntary servitude." Similarly, on page 50 of Doc. # 994-1, plaintiffs, after citing ***Does***, state in a parenthetical that ***Does*** was an "involuntary servitude class action." That assertion is profoundly misleading.

Does was ***not*** an involuntary servitude ***class action***. Apparently, the Plaintiffs in ***Does*** recognized that ***Kozminski*** precluded the certification of the involuntary servitude claim because they ***dismissed it voluntarily with prejudice*** the same day the Court ordered the action certified and preliminarily approved for settlement. ***See id.***, 2002 WL 1000073 at *2 n. 2 ("The plaintiffs' allegations of involuntary servitude were dismissed ***with prejudice*** on this date," citing relevant Court order).

The Plaintiffs in ***Does initially*** alleged involuntary servitude, as the Plaintiffs in the present case do. However, it is also indisputably true that the Plaintiffs in ***Does*** abandoned the effort to certify claim when it proved unworkable. In contrast, Plaintiffs in the present case have not abandoned the claim. Not only is ***Does*** distinguishable, it contradicts the position for which it

is cited. Doc. # 994-1 fails to address this attribute of ***Does***. Document #994-1 misrepresents the thrust of the opinion. The question is - why?

B. <u>An Illustrative Factual Error in Doc. #994-1</u>:

In Doc. # 994-1, bullet point ¶ 2(c) on page 51 accuses Signal's COO, Mr. Schnoor, of "manipulating workers' desperation for the long promised green cards by using visas as 'leverage.'" (Citing Ex. 448).[167] The word "green card" ***never*** appears in the exhibit. Nor does anyone say that it is Signal's desire to use visas to frighten workers. The contrary is true. What Doc. #994-1 therefore does is "spin" Exhibit 448. Doc. #994-1 presents an ***argument*** as ***fact***, something Doc. #994-1 does incessantly.

Signal's counterargument would be that the exhibit proves only that Signal found some of its H-2B workers more skilled, more productive and more desirable than others. Of what workforce in the nation is that not true? Signal was presented with the same challenge all employers face: what does one do, as an employer, to improve the performance of more marginal employees? Exhibit 448 documents a two-day, e-mail conversation between Signal employees, one that occurred long before the Company finally received accurate advice concerning green cards, visas and many other immigration issues. Suffice it to say that a review of the exhibit will prove that the Plaintiffs ***editorialize*** about it. In the end, this is an argument about the meaning of evidence, which implicates ***Allison*** and the impossibility of certification. Therefore, this case should not be certified.

XII. <u>THE COURT CANNOT CERTIFY THE CLAIM THAT SIGNAL JOINED AN EXISTING CONSPIRACY</u>

Plaintiffs acknowledge that they do not claim that Signal was originally part of a mail and wire-fraud conspiracy. They do so on page 15 of Doc. #994-1. There, under the subheading,

[167] Signal has attached Exhibit 448 to this brief for the convenience of the Court.

"**E. Signal's Further Adoption of the Fraudulent Scheme**," Plaintiffs urge that a "watershed moment" in this case arrived in November of 2006 when "Signal[,] with its eyes wide open, ***and in concert with its co-defendants***, accepted hundreds more workers into the trap that defines this case." ***See id.***, p. 17 (emphasis added).

This reference to concerted action highlights the fact that what the Plaintiffs are alleging here is that Signal "adopted" a preexisting conspiracy. The merit of this argument is not now in issue, however. The question before the Court is rather certification, and either Plaintiffs overlooked the class certification law summarized in ***Gene*** or they decided not to bother with it, because Doc. #994-1 breaches Plaintiffs' duty to identify the substantive issues that would control the disposition of this particular theory of liability. ***See Gene***, ***supra***, at 326. Had Plaintiffs done what they were supposed to, they would have helped the Court "assess[] which issues will predominate . . ." ***Id.*** Under the circumstances, Signal will fill the breach to show the Court that individual issues prevent the certification of this theory of liability.

Beck v. Prupis, ***supra***, is unquestionably the governing precedent. ***See Beck***, ***supra***, at 501, 120 S. Ct. at 1614 n. 6. In a civil RICO suit alleging a conspiracy, the proof must conform to § 1962(d), the conspiracy subparagraph of the RICO statute. ***Id.*** In ***Beck***, the Court said that in civil RICO suits alleging conspiracy, federal courts must "turn[] to the common law of criminal conspiracy to define what constitutes a violation . . ." ***Id.*** The Court further said that the district court must then combine § 1962(d) with § 1964(c) to determine whether there is civil liability for the conspiracy. ***Id.*** The "obvious source" of authority for analyzing the second question, ***Beck*** said, "is the law of civil conspiracy." ***Id.***

Here, because it precludes certification, Signal confines itself to the common law of criminal conspiracy. Under the law of criminal conspiracy, "'[a]n express agreement is not

required; a tacit, mutual agreement with common purpose, design and understanding will suffice.'" ***See United States v. Farias***, 469 F.3d 393, 398 (5th Cir. 2006), and cases therein cited. ***The claimant, however, must still prove the elements of conspiracy. Id.*** Those elements are an agreement between two or more people to violate the law, proof that the defendant knew of the conspiracy and intended to join it, and proof that the defendant voluntarily participated in the conspiracy. ***Id. See also American Tobacco Co. v. United States***, 328 U.S. 781, 809, 66 S. Ct. 1125, 1139, 90 L. Ed. 1575 (1946) (to ascertain whether person's acts constituted joining existing conspiracy, fact-finder must consider "evidence of the action taken in concert by the parties" to determine whether they prove the requisite, conspiratorial intent).

This proves that the Plaintiffs' "watershed" argument defies certification. ***See Allison, supra***. Signal has an inviolable right to defend itself against this theory of liability by putting each class member on the stand to testify to foundational facts that basically prove that Signal cannot be liable. ***See*** Doc. #997, pp. 44-49 and n 227. ***See also Allison, supra***. Therefore, individual issues predominate with regard to the allegation that Signal adopted a preexisting conspiracy. ***Allison, supra***.

XII. CONCLUSION:

Signal vehemently disputes Plaintiffs' recitation of the "facts," a recitation that contains innumerable misstatements and unsupported allegations. Nevertheless, Signal will not waste the Court's time by arguing about currently irrelevant fact questions. Such an exercise would be unwarranted, even forbidden. ***See Regents, supra***, 482 F.3d at 380. Just so, Signal tailored its factual presentation to those that are specifically germane to the issue at hand, which is certification. ***Id.*** For all of the reasons stated in Signal's briefs, Plaintiffs have failed to overcome

their "far more demanding" burden to prove that this suit can be certified, ***cf. Gene, supra***, at 326. Signal therefore prays for Order denying Plaintiffs' Motion for Certification.

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2011, I electronically filed the foregoing Reply Brief with the Clerk of Court by using the CM/ECF system, which will send a notice of electronic filing to all CM/ECF participants. I further certify that I mailed the foregoing document and the notice of electronic filing by first-class mail to non-CM/ECF participants.

/s/ Erin Casey Hangartner