UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

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

ORIGINAL MEMORANDUM OF SIGNAL INTERNATIONAL IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

MAY IT PLEASE THE COURT:

Signal International, LLC ("Signal") opposes certification of this class action as to any claim in any form. In light of their recent withdrawal of certain class claims, plaintiffs seek to certify the following theories of liability: (1) RICO mail fraud; (2) RICO wire fraud; (3) RICO trafficking in persons; (4) RICO immigration document fraud; (5) RICO enticement into slavery; (6) RICO involuntary servitude; (7) RICO forced labor; (8) RICO unlawful document practices to further trafficking; and (9-10) civil rights violations in violation of § 1981 and § 1985.

None of these claims are amenable to certification. Most interestingly, plaintiffs fail to understand what District Courts within this District have acknowledged, "it may not be possible to certify a class in a RICO action within the Fifth Circuit." ***See 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); ***Gyarmathy & Assocs., Inc. v. TIG Ins. Co.***, 2003 U.S. Dist. LEXIS 12239, *8 (N.D.Tex. 2003) (quoting ***Richard*** for same principle). ***See also Allison v. CITGO Petroleum Corp.***, 151 F.3d

402, 407 (5th Cir. 1998) ("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 under Rule 23.").

In light of this Court's dismissal[1] of the plaintiffs' motion for class certification under Rule 23(b)(2), the sole, remaining basis for the possible certification of this action is Rule 23(b)(3), the most demanding basis possible for the certification of a class action. ***See Gene and Gene LLC v. BioPay LLC***, 541 F.3d 318, 325 (5th Cir. 2008) (district courts must conduct "rigorous analysis" of Rule 23 before certifying a class).

Gene instructs that "[t]he predominance inquiry" mandated by Rule 23(b)(3) "requires a court to consider 'how a trial on the merits would be conducted if a class were certified'" and that this "'entails identifying the substantive issues that will control the outcome . . . and then determining whether the issues are common to the class." ***See id.***, at 326.

Though "it is the party seeking certification" that bears the burden of carrying out this analysis, ***see id.***, at 325, Signal has an interest in persuading this Court that this burden cannot be satisfied. Signal begins by laying out the facts uncovered during the period for class-based discovery which prove that this suit cannot be certified in light of the "substantive issues that will control the outcome," ***see id.***, at 326.

I. FACTUAL BACKGROUND:

The Indian workers that arrived at Signal from October, 2006 through February, 2007 on H-2B visas came from different backgrounds and different parts of India, some were fitters and some were welders and within those crafts their skill sets varied tremendously. Most of the workers were originally recruited for companies other than Signal. The workers paid different amounts of money for, and had different understandings of, the immigration benefits they were

[1] ***See*** Rec. Doc. #926.

to receive.[2] It was over a year after the H-2B workers first arrived at Signal before Signal began to discover the truth about the recruitment of the Indian H-2B workers.[3]

In 1996, Michael Pol ("Pol") owned International Marine and Industrial Services ("IMI"), a labor supply company. Pol along with Sachin Dewan ('Dewan") and Malvern C. Burnett ("Burnett") recruited fitters and welders from India to come to work for IMI on H-2B visas[4] where they were contracted out to work at Avondale Shipyards.[5] One of the class representatives in this action, Kechuru Dhananjaya ("Dhananjaya"), worked at Avondale through IMI on an H-2B visa.[6]

In 2003, Burnett was approached by his client, Dr. Kurella Rao ("Rao"), about bringing shipyard workers from India to the United States.[7] Burnett advised Rao to petition for permanent residency (known as a "green card")[8] through Rao's company Indo-Ameri Soft, LLC ("IAS"). In January, 2004, Burnett and Rao traveled to India and the United Arab Emirates and along with

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[2] ***See*** 11/12/09 Pol, 274:7 – 20, Exhibit "A".

[3] ***See*** Deposition of Tracey A. Binion, 191:22 – 194:23, attached herein as Exhibit "B".

[4] An H-2B visa is a temporary non-immigrant employer sponsored visa. See 8 CFR §214.2(h)(1)(ii)(D). Beneficiaries of an H-2B visa must work for the employer petitioner and must return to their native country upon termination of the visa. ***See*** 8 CFR §214.2(h)(1)(i); 8 CFR §214.1(a)(3)(ii); ***See also*** fn. 248. H-2B visas are short term visas, initially no more than a year in duration, and even if extended, an H-2B beneficiary may not work more than 36 months in the United States before they must leave the United States. ***See*** 8 CFR § 214.2(h)(6)(ii)(B); 8 CFR §214.2(h)(6)(iii); 8 CRF § 214.2(h)(9)(iii)(B)(1); 8 CFR § 2(h)(13)(iv). **Note that the H-2B regulations were substantially revised in January, 2009 therefore, to understand the requirements of the H-2B visa at the time these events took place, one must look at the 2006 federal regulations.**

[5] ***See*** of the November 12, 2009 30(b)(6) deposition of Global Resources, Inc. given through its designated representative, Michael L. Pol, 28:3 - 6 and 40:24 – 44:24, attached herein as Exhibit "C" (hereinafter "11/12/09 Pol").

[6] ***See*** Deposition of Kechuru Dhananjaya, 17:7 – 26:22, attached as Exhibit "D" (Dhananjaya worked at Avondale Shipyards in New Orleans, LA from January 12, 1997 through September 13, 1997 on H-2B visa).

[7] ***See*** September 11, 2008 Deposition of Kurella Rao, 13:18 – 14:2, attached herein as Exhibit "E" (hereinafter "9//11/08 Rao").

[8] The employment based green card process is a three step process. The first step requires that an ETA 9089 ("PERM") be filed with the Department of Labor and certified. ***See*** 20 CFR § 656 *et seq.* The second step requires the filing of an I-140 with the United States Citizenship and Immigration Services. ***See*** 8 CFR §204.5(a) - (g). The third step differs depending on whether the beneficiary of the PERM and I-140 is in the United States or a foreign country when a green card becomes available for them in the quota. ***See*** 22 CFR §42.51. If the beneficiary is in a foreign country they process through the consulate and receive permanent resident status (or a "green card" as it is commonly known). ***See*** 22 CFR §42.32(c); 22 CFR §42.61 - 42.73. If the beneficiary is lawfully in the United States they file an I-485 (Application for Adjustment of Status). The approval of an I-485 results in the applicant receiving lawful permanent resident status. ***See*** 8 CFR §245.1(a).

Dewan recruited 162 workers, including class representative Kechuru Dhananjaya,[9] for green cards in the United States ("IAS candidates").[10] Although the amount the workers paid for the green card varied, it averaged about $15,000, and was to be paid in three installments. The IAS candidates were told they would receive their green card in approximately 18 months.[11] However, the process took longer than the promised 18 months.[12] In January, 2006, the first step of the process was complete and Rao went to India and collected the second installment,[13] even though he knew that IAS was no longer viable and thus not in a position to file for the second step of the process for the IAS candidates.[14]

In 2004, while Dewan was recruiting IAS candidates, he contacted Pol who had formed Global Resources, Inc ("Global"), a labor recruitment service[15] to see if he had any customers who would be interested in sponsoring shipyard workers from India for permanent residency.[16] Thereafter, Burnett, Pol and Dewan entered into a written partnership to recruit Indian workers for permanent residency.[17] In furtherance of their business arrangement, Dewan, Pol and Burnett began recruiting shipyard workers for J&M Associates Inc. of Mississippi ("J&M candidates") and Intercoastal Repair Service, LLC ("Zito candidates").[18] Dewan, Pol and Burnett processed

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[9] ***See*** Deposition of Kechuru Dhananjaya, 89:21 – 92:4, attached herein as Exhibit "F" (hereinafter "Dhananjaya").
[10] ***See*** Question No. 1 and Response of Malvern C. Burnett, Gulf Coast Immigration Law Center, L.L.C. and Law Offices of Malvern C. Burnett, a Professional Law Corporation ("APLC") to Defendant Signal International L.L.C.'s Notice of Rule 30(b)(6) Deposition, attached herein as Exhibit "G".
[11] ***See*** Deposition Exhibit Rao #5, attached herein as Exhibit "H" which was given to candidates in January, 2004 and states under "Terms and Conditions For Program", "Duration for Completion of Process: 18 months".
[12] ***See*** Deposition Exhibits Rao #7 and Rao #12, attached herein as Exhibits "I" and "J" respectively, which are documents presented to the Rao candidates explaining the delays in the process.
[13] ***See*** Deposition Exhibit Rao #4, attached herein as Exhibit "K" which is a document sent to IAS candidates after approval of their PERM application.
[14] ***See*** September 17, 2009 Deposition of Kurella Rao, 170:12 – 171:22, attached hereto as Exhibit "L" (hereinafter "9-17-09 Rao ").
[15] ***See*** 11/12/09 Pol, 66:24 – 68:11, Exhibit "M".
[16] ***See*** 11/12/09 Pol, 62:9 – 63:17, Exhibit "N".
[17] ***See*** Depo Ex #455, "Multilateral Business Agreement" attached herein as Exhibit "O".
[18] Intercoastal Repair Services, LLC is a wholly owned subsidiary of Zito Companies, LLC. ***See*** February 3, 2010 30(b)(6) Deposition of Zito Companies, LLC given through its designated representative, Nicky J. Bergeron, 10:15 – 22, attached herein as Exhibit "P". (Note: Throughout emails and documents referenced in this submission any reference to Zito is a reference to Intercoastal Repair Services, LLC.)

applications for 236 J&M candidates and 89 Zito candidates.[19] Among the J&M candidates was Plaintiff Andrews I. Padaveettiyl ("Padaveettiyl").[20] The J&M and Zito candidates were told they would receive their green cards in 18 to 24 months,[21] however, 24 months later they had not received their green cards. In early 2006, the J&M and Zito candidates were finally notified that the first step of the process had been completed.[22] Although Dewan and Burnett met with J&M and Zito candidates and collected their money, Burnett did not move forward with the second part of the process which was the filing of the I-140 petitions.[23]

In the Spring of 2006, Pol approached Signal[24] management, for the first time, about the possibility of providing foreign shipyard workers to supplement Signal's workforce.[25] Pol recognized that Signal was in a unique position. Signal had a substantial amount of work post-hurricanes Katrina and Rita because of the damage to rigs in the Gulf of Mexico. Yet Signal was also experiencing a labor shortage because of the lack of housing around its shipyards due to the devastation from those hurricanes.

After being approached by Pol, Signal vetted the proposal by speaking with contacts at Avondale about its experience in 1996 with Burnett, Dewan and Pol through IMI.[26] Thereafter, Signal entered into an agreement with Global wherein shipyard workers would be provided to it

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[19] ***See*** Questions No. 2 and 3 and Responses of Malvern C. Burnett, Gulf Coast Immigration Law Center, L.L.C. and Law Offices of Malvern C. Burnett, a Professional Law Corporation ("APLC") to Defendant Signal International L.L.C.'s Notice of Rule 30(b)(6) Deposition, attached herein as Exhibit "Q".

[20] ***See*** Declaration of Andrews I. Padaveettiyl, Depo Ex #277, page 2 paragraph 16, Exhibit "R".

[21] ***See*** Depo Ex Pol #5, attached herein as Exhibit "S" which states under "Process Details:" "Total Process Time: 18 months maximum up to 24 months".

[22] ***See*** Depo Ex #530, attached herein as Exhibit "T" which was sent to candidates after approval of their PERM application.

[23] ***See*** January 12, 2010 Deposition of Malvern C. Burnett, 603:21 – 604:8, attached herein as Exhibit "U".

[24] In 2003 Signal International, LLC ("Signal"), a marine and fabrication company was established with its home office in Pascagoula, Mississippi and an additional shipyard in Orange, Texas. Signal is in the business of providing offshore drilling rig overhaul, repair, upgrade and conversion. Signal also offers services to the general marine and heavy fabrication markets.

[25] ***See*** 11/12/09 Pol, 192:14 – 193:17, Exhibit "V".

[26] ***See*** Deposition of Signal International, LLC through its authorized representative Ronald Wayne Schnoor, 240:20 – 241:6, attached herein as Exhibit "W".

from India on an H-2B or I-140 "Permanent Residence" process.[27] Pol told Signal that the Indian workers would pay approximately two to three thousand dollars to obtain their visa to come to work for Signal.[28] Signal began preparing for the arrival of the Indian H-2B workers including building housing facilities in both Pascagoula, Mississippi and Orange, Texas in which the workers would live due to the lack of housing following the hurricanes.

At the same time, a storm of a different kind was brewing in India, one of which Signal had no knowledge. As Burnett, Pol and Dewan began recruiting in India and the UAE for shipyard workers for Signal, the IAS, J&M and Zito candidates who had been waiting for over two years for their green cards became quite aggressive with Burnett and Dewan. They wanted to be sent to Signal on H-2B visas rather than wait in India for their green cards through IAS, J&M and Zito.[29] Although Burnett, Dewan and Pol had intended to use new candidates for Signal it became necessary for them to offer the opportunity to go to Signal to the IAS, J&M and Zito candidates.[30]

Ultimately, nearly half of the Indian workers whom Burnett, Dewan and Pol provided to Signal were IAS, J&M or Zito candidates.[31] In addition, some of the workers sent to Signal were recruited to work at Knights Marine (another client of Global) and at the last minute were told by

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[27] ***See*** Depo Ex #537, Global Resources, Inc and Signal International, Inc. Skilled Worker Recruitment Agreement, attached herein as Exhibit "X".

[28] ***See*** Deposition of William Daniel Bingle, 23:2 – 23, attached herein as Exhibit "Y".

[29] ***See*** Depo Ex #482, email of Malvern Burnett, Sachin Dewan and Michael Pol of October 10 – 14, 2006, attached herein as Exhibit "Z" where Burnett writes "I experienced firsthand the venting of frustration by IAS (and J&M) candidates and outright aggression towards Sachin during my recent trip to India and Dubai". ***See also*** Deposition of Dewan Consultants Pvt. Ltd. given through its designated representative, Sachin Dewan, 631:15 – 633:22, attached herein as Exhibit "AA" (hereinafter "Dewan").

[30] ***See*** Depo Ex's #482 and #483, Emails of Burnett and Dewan, attached herein as Exhibits "BB" and "CC" respectively. ***See also***, Dewan, 679:17 - 21 and 641:22 – 642:6 and February 18, 2010 30(b)(6) Deposition of Global Resources, Inc. through its authorize representative Michael L. Pol, 483:24 – 485:10, attached herein as Exhibits "DD", "EE" and "FF" respectively.

[31] ***See*** Questions No. 4 and 5 and Responses of Malvern C. Burnett, Gulf Coast Immigration Law Center, L.L.C. and Law Offices of Malvern C. Burnett, a Professional Law Corporation ("APLC") to Defendant Signal International L.L.C.'s Notice of Rule 30(b)(6) Deposition, attached herein as Exhibit "GG".

Dewan that they would be working at Signal instead of Knights Marine.[32] Further, for those workers who were not IAS, J&M or Zito candidates, the cost of the H-2B visa went up after the first set of H-2B visas were approved by the consulate.[33] All of this was done without Signal's knowledge or consent.[34]

II. INTRODUCTION TO LEGAL ARGUMENT:

The sole question presented by plaintiffs' motion for class certification is whether one or more of the claims in this action are amenable to certification under Rule 23(b)(3). ***Cf.*** Doc. # 926. When the foregoing facts are examined through the prism of the substantive legal issues that will determine how a trial in this action will be conducted, it becomes apparent that none of the theories the plaintiffs seek to certify can be tried representatively because individual issues predominate. ***Gene***, ***supra***, at 326. ***See also Mims***, ***supra***, at 303 (merits must be considered to extent they effect whether class issues predominate). ***Regents of the Univ. of Calif. v. Credit Suisse First Boston***, 482 F.3d 372, 380 (5th Cir. 2007) ("***Regents***"), ***cert. denied*** (". . . we may address arguments that implicate the merits of plaintiffs' cause of action ***insofar as the arguments also implicate the merits of the class certification decision***.") (Emphasis added).[35]

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[32] ***See*** 11/12/09 Pol, 188:21 – 191:15, Exhibit "HH" (some Indian workers signed contracts with Knights Marine but instead of refunding their money they were just swapped to another company). ***See also*** Dewan, 397:9 – 399:12, Exhibit "II" (Dewan originally recruited workers for Knights Marine but later told workers they would be going to Signal; some of the terms of employment changed at that time).

[33] ***See*** 11/12/09 Pol, 254:23 – 261:13, Exhibit "JJ".

[34] ***See*** Depo Ex #478, Email of Sachin Dewan of July 31, 2006, Exhibit "KK" where Dewan communicates to Burnett with a list of selected candidates for Signal and which contains as a heading to the email: **"This list is confidential, DO NOT forward this to Signal."** (emphasis in original)

[35] ***See In re: FEMA Trailer Formaldehyde Products Liability Litigation***, 72 Fed. R. Serv.3d 622, 2008 U.S. Dist. LEXIS 107688, *64 (E.D.La. Dec. 29, 2008) (Engelhardt, J.) (stating that claims could not be tried "representatively" in denying motion to certify class action). ***See also U.S. v. Kozminski***, 487 U.S. 931, 948, 108 S. Ct. 2751, 2763, 101 L. Ed.2d 788 (1988) (involuntary servitude claim requires proof of compulsion of services by use or threatened use of physical or legal coercion); ***Allison v. CITGO Petroleum Corp.***, ***supra***, 151 F.3d at 416 (suits for compensatory and punitive damages involve individualized proof, difficult to certify, because proof of injury implies proof of how "each class member was personally affected by the [defendant's wrongful] conduct."); ***Castano v. American Tobacco Co.***, ***supra*** ("mass accident" cases generally defy certification); ***Mims v. Stewart Title Guaranty Co.***, 590 F.3d 298, 307 (5th Cir. 2009) (reversing District Court's certification of Rule 23(b)(3) class action concerning Real Estate Settlement Procedure Act claims because governing law required "individual analysis . . ."); ***Samuel v. United Health Services***, 2010 U.S. Dist. LEXIS 67632 (E.D.La. June 4, 2010) (Fallon, J.) (refusing

The evidence is undisputed that the plaintiffs' RICO mail and wire fraud claims are founded on individual reliance. "Th[os]e pervasive [reliance] issues . . . in RICO fraud actions create a working presumption against class certification." ***See Sandwich Chef of Texas v. Reliance Nat. Indem. Ins. Co.***, 319 F.3d 205, 219 (5th Cir. 2003).

In addition, the prayer for compensatory and punitive damages gives this action the character of a mass tort action. Generally speaking, in the Fifth Circuit, mass tort actions cannot be certified. ***See Castano v. American Tobacco Co.***, 84 F.3d 734, 745 n. 19 (5th Cir. 1996). Lastly, Rule 23(b)(3)'s "exacting" burdens preclude the certification of the plaintiffs' ludicrous allegation that Signal trafficked the plaintiffs into the United States for the express purpose of turning them into slaves.

There are many reasons why the plaintiffs' trafficking or Chapter 77 claims cannot be certified. It is undisputed, for example, that the plaintiffs earned wages at Signal. In the Fifth Circuit, "[c]ompensation for service may cause consent . . ." ***See Channer v. Hall***, 112 F.3d 214, 218 n. 7 (5th Cir. 1997).[36] ***Gene*** indicates that certification is dubious when consent is a central issue in the litigation. ***Gene***, ***supra***, at 328-9 (when no class-wide proof is available on consent and only mini-trials can determine issue for each claimant certification is inappropriate).

The reasons why individual issues predominate in this litigation mirror those in ***Gene***:

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to certify class action concerning injuries and deaths of patients allegedly caused by Hurricane Katrina in light of predominance of individualized, patient issues); ***Braud v. Transport Services of Illinois***, 2009 U.S. Dist. LEXIS 66400, *46-53 (E.D.La. July 23, 2009) (Knowles, M.J.) (declining to certify Rule 23(b)(3) class action regarding accident in Gretna involving spill from overturned tractor-trailer discharging 46,500 pounds of monoethanolomine because individualized, "mental anguish claims" predominated, ***citing Steering Comm. v. Exxon Mobil Corp.***, 461 F.3d 598 (5th Cir. 2006)).

[36] As Signal noted in an earlier brief, ***Channer*** is a Fifth Circuit, involuntary servitude case filed by a prisoner who was forced by the State to work. It stresses the principle quoted in text, i.e., that compensation entitles a fact-finder to infer from wages, the "victim's" consent to labor. It also stresses, however, the ***Kozminski*** "will to quit" principle, i.e., "'that the awful machinery of the criminal law'" should ***not*** be "'brought into play whenever an employee asserts that his will to quit has been subdued by a threat which seriously affects his welfare but as to which he still has a choice, however painful.'" ***See id.***, at 217-18, citing ***Kozminski***, ***infra***, at 950, 108 S. Ct. at 2763. Such law highlights the many barriers to certification in this case arising from the predominance of individual issues concerning consent, which Gene indicates generally precludes certification, and the "totality of the circumstances" surrounding the threats that allegedly compelled the claimant to labor. ***See id.***, ***infra***, at 970, 108 S. Ct. at 2774.

trafficking claims are fundamentally about the consent to labor or the absence of such consent, which are two sides of the same coin. ***Gene***, ***supra***, at 328-29. ***See also Kozminski***, ***infra***, 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*** the jury 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). Signal's right to ***insist*** that every claimant take the stand to discuss the totality of the circumstances has deep roots, ***id.***, in Federal Rules of Evidence 601 and 402, the Seventh Amendment, the Fifth Amendment, and the case law, as ***Allison*** notably emphasizes. ***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). Therefore, this case cannot be tried representatively.

Plaintiffs further conceded they were free to leave the job they now shamelessly claim was equivalent to slavery. Their choice to leave underscores the predominance of individual issues. Signal has a profound interest in demanding that the jury resolve whether the claimant was, in every case, at liberty to leave the job. ***Cf. Channer***, ***supra***, 112 F.3d at 217-18 ("'When the employee has a choice, even though it is a painful one, there is no involuntary servitude.'"); ***United States v. Bradley***, 390 F.3d 145, 153-54 (1st Cir. 2004) (in forced labor case jury must be charged concerning whether victim could have left job and whether victim received wages); ***Alzanki***, ***infra***, 54 F.3d at 1004 (compulsion not established where there is alternative of leaving location where labor is provided even if choice to leave represents exceedingly bad alternative; compulsion only exists if victim reasonably believed his only alternative was imprisonment or worse).

Further underscoring the predominance of individual issues, particularly in light of

Allison, is the fact that each plaintiff was free to live off-site if they so chose. This fact undermines plaintiffs' allegations that they were forced to live in Signal's housing facility. Moreover, because the choice is particular to each of the individual plaintiffs, Signal has a right, in accordance with ***Allison***, to question each before the jury, which makes this issue inappropriate for class certification.

Another element this Court should consider regarding certification is that each plaintiff has his own circumstances and experiences that make him a unique, individual island. This is relevant to the forced labor statute. Congress warned when the statute was first passed in 2000 that the statute was "***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.***" ***See*** Legislative History, ***infra***.

Congress thus acknowledged that claims of psychological manipulation in forced labor cases depend on factors that are unique to each person claiming that his will was overcome by malevolent forces. Four Supreme Court justices, an impressive number, touched on exactly this insight in ***Kozminski***. ***Kozminski***, ***infra***, 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); ***see also id.***, ***infra***, at 970, 108 S. Ct. at 2774 (Stevens, J., concurring, (for himself and Blackmun, J.)) Predominant, individual differences therefore preclude certification of the forced labor claim.

III. INDIVIDUAL RELIANCE TESTIMONY:

On November 10th, 2010, at hearing, this Court urged "class counsel" to give thought to the truism that reliance-based claims cannot be certified. Plaintiffs were urged to reflect on the possibility that some "concessions" might be in order with regard to their claims.[37] Plaintiffs have relinquished their class claims for breach of contract, common law fraud and negligent misrepresentation, yet stubbornly refused to surrender their RICO fraud claims as well as class mail and wire fraud. This is puzzling because there is no authority for the certification of those claims in the Fifth Circuit. To the contrary, what authority there is, is to the opposite effect that mail and wire fraud cannot be certified when the claims are based on first-party reliance. ***See Sandwich Chef of Texas***, 319 F.3d at 219-20 (when individual findings of reliance form the basis of RICO liability and damage claims they preclude (b)(3) certification); ***see also*** footnote 226, ***infra***. The remaining fraud allegations are founded on first-party reliance and therefore cannot be tried representatively.

For example, plaintiff Kurian David ("David") testified to his first-party reliance when he was asked the following during his deposition:

> Q: Would you agree with me that you relied on the representations made to you when you decided to enter into an agreement with and pay money to Malvern Burnett?
>
> A: Yes.

See Deposition of Kurian David, 256: 2 – 7, attached herein as Exhibit "MM" (hereinafter "David"). David further confirmed that he "relied" on the representations made to him by Defendants Pol and Dewan.[38]

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[37] ***See*** Transcript, pages 30 and 31, attached, as Exhibit "LL".

[38] Q:...Isn't it true Kurian, that when you made your decision to pay money to Sachin Dewan, you relied on the representations and promises made to you by Sachin Dewan? A: He trusted – I trusted. That's why gave money. Otherwise we won't give. ***See*** David, 254:13-20, Exhibit "NN". Q:...You made your decision to enter into an

Plaintiff Hemant Khuttan ("Khuttan") testified, concerning his signing of formal written agreements with Dewan, Pol and Burnett, that:

> A: We trusted on them and we signed a contract with them, and whatever money they asked us, we paid.
>
> Q: So you trusted what they told you?
>
> A: Yes.
>
> Q: You relied on what they told you?
>
> A: Yes.
>
> Q: And you acted on it - - right?
>
> A: Yes.

See Deposition of Hemant Khuttan, 207:17 – 208:7, attached herein as Exhibit "PP" (hereinafter "Khuttan"). Further testimony of Khuttan reiterates his reliance on the promises of others.[39]

Plaintiff Padaveettiyl testified:

> Q: Would you agree with me that all you relied on when you made the decision to pay the fees were the defendants' promises and representations to you?
>
> A: Yes.

See Padaveettiyl, Vol. I, 155:20 – 23, attached herein as Exhibit "RR". Padaveettiyl reiterated later that he relied on the promises made to him by Dewan, Pol and Burnett when deciding to travel to the United States.[40]

Plaintiff Palanyandi Thangamani ("Thangamani") confirms that he, like all other class representatives herein, relied on the promises of Pol, Dewan and Burnett in India when deciding whether to pay fees and travel to the United States.

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agreement with Michael Pol and Global Resources based on your reliance on the representations made to you, correct? A: First time, when signed, he believed – I believed. ***See*** David 256:17-24, Exhibit "OO".

[39] Q: And is it fair to say that...you relied on the promises they made you and you gave them money as a result of those promises? Right? A: Yes. ***See*** Khuttan, 209:2 – 12, Exhibit "QQ".

[40] ***See*** Padaveettiyl, Vol. I, 151:20 – 24, Exhibit "SS".

Q: But you promised and actually did pay them money based on what they were promising you, right?

A: Yes.

Q: And you made the decision to pay them the money and - - because of the promises that they were making to you right?

A: Yes.

Q: And that's all you based your decision on, were the promises being made to you about green cards and work opportunities, right?

A: The promises that it'll be a good job, you will have a nice place to stay and overtime will be paid for you. All these were the promises they gave us.

Q: And because of those promises, you made the decision to pay them the money to get those things?

A: Yes.

Q: And that's all you relied on, were those promises, and nothing else, right?

A: Yes.

See Deposition of Palanyandi Thangamani, 144:3 – 146:1, attached herein as Exhibit "TT" (hereinafter "Thangamani"). He further testifies that he relied on the promises of Pol, Dewan and Burnett because of his "full faith" in them.[41] In believing the promises made to him by others, Thangamani relied on those promises when he agreed to sign documents and formally bind himself.

Plaintiff Sony Sulekha ("Sulekha), when questioned about why he paid recruitment fees, testified:

Q: You made personal and family sacrifices to put the money together to start the green card process and that you did that because you relied on the promises that were made to you about green cards and employment.

[41] ***See*** Thangamani, 147:11-17, Exhibit "UU".

A: Yes.

Q: Isn't it true that that's all you relied on, were those promises that [Burnett, Dewan and/or Pol] made you about green cards and employment when you made those personal and family sacrifices to amss the funds necessary?

A: Yes.

See Deposition of Sony Sulekha, 108:4 – 20, attached herein as Exhibit "VV" (hereinafter "Sulekha").

Plaintiff Murugan Kandahasamy ("Kandahasamy") also testified that he paid recruiting fees because of promises made to him by defendants Dewan, Pol and Burnett. His reliance on those promises, he testifies, is why he ever paid the money.[42]

Finally, plaintiff Dhananjaya testified that he decided to travel to the United States on an H-2B visa because "Dewan promised [him] that Signal was going to do the processing for [his] green card and whatever else needed to be done....that the lawyer, Malvern Burnett, would work for [him]. That's why [he] was ready to come on an H2B visa."[43] Thus, plaintiff Dhananjaya relied on the promises made to him by Dewan when deciding to come to Signal on an H-2B visa.

Thus, each named plaintiff relied on potentially different promises, made to him by different combinations of people, made at different times, and for differing motivations. Each situation was particular to the individual, making this matter inappropriate for certification.

IV. TRAFFICKING AND FORCED LABOR:

A. Introduction:

Signal collectively refers to the plaintiffs' RICO trafficking in persons, RICO enticement into slavery, RICO involuntary servitude, RICO forced labor and RICO unlawful document practices to further trafficking claims as "Trafficking Claims." Signal addresses the RICO

[42] ***See*** Deposition of Murugan Kandahasamy, 649:3 – 650:11, attached herein as Exhibit "WW" (hereinafter "Kandahasamy"). ***See also*** Kandahasamy, 176:24 – 183:16, Exhibit "XX".
[43] ***See*** Dhananjaya, 344:12 – 19, attached herein as Exhibit "YY".

immigration document fraud claim at the end of this brief, showing that the claim cannot be certified.

A factual ingredient in the trafficking cases are alleged threats of deportation. For example, FAC ¶ 266 alleges: "Defendant Signal . . . ***threatened Plaintiffs*** and other class members ***with deportation*** and deceived ***Plaintiffs*** . . . about the terms of their visas in a manner that constitutes an abuse of the legal process under . . . § 1589(3)." Half of the plaintiffs ***surmised*** that they were in deportation jeopardy from stories they heard from others. As a threat of deportation must, as a matter of law, be direct, legal questions abound with regard to whether rumored threats of deportation violate § 1589(3) or the other Chapter 77 statutes. ***Cf. In re: Andrew Mounce***, 390 B.R. 233, 241 (W.D.Tex. 2008) (motion for class certification cannot be granted as to legal theory that is not recognized by applicable state or federal law).

However, even if indirect threats are unlawful, individual issues predominate in every single case. The questions are too numerous to explore in detail in this brief but certainly include how the threat was transmitted and what its content was. Therefore, the claim that the plaintiffs were collectively damaged by threats of deportation that violated 18 U.S.C. § 1589(3) cannot be certified.

B. <u>Testimony Concerning Alleged Deportation Threats</u>:

Plaintiff Sulekha is one of the plaintiffs who testified that he only ***heard*** another defendant say that Signal would deport anyone who "stood against the company."[44] Plaintiff Kandahasamy, an H-2B worker in Orange, Texas testified that ***a friend*** reported to him ***on the phone*** that Signal employees in Pascagoula, Mississippi detained three Indian H-2B workers

[44] ***See*** Declaration of Sony Sulekha, Depo Ex #274, page 4 paragraph 21, attached as Exhibit "ZZ".

who were threatened with deportation for complaining about the conditions at Signal.[45] This report, the plaintiff says, made him fear that Signal would either harm him physically or deport him.[46] He alleges that he was "very scared."[47] He does not claim that anyone threatened him directly. Plaintiff Khuttan similarly concedes that he was not threatened with deportation.[48] He claims that he was ***told*** that he would be terminated or his salary docked if he was not more productive.[49] Plaintiff Dhananjaya also conceded not being directly threatened by Signal.[50] He simply claims that others ***told him*** about threats of deportation.[51]

Plaintiff David testifies that Signal told him that he would be deported if he "created problems."[52] David also testifies to anxiety about deportation given the debt he incurred to immigrate to the United States.[53] Signal, in accordance with ***Allison***, has a constitutional right to require David to repeat his claim to the jury so that the jury can weigh its veracity, which is a matter that underscores the predominance of individual issues. Plaintiff Thangamani likewise testifies that a Signal employee said that he was told that Signal would send him home if he broke Signal's rules.[54] Plaintiff Pattaveettiyl testifies that Signal told him that he would be sent back if his work was not up to Signal's standards.[55] Whether this was said, however, and if it was, whether it constituted a threat to abuse the law is a question for the jury to decide. Therefore, individual issues predominate with regard to legal coercion or abuse. In light of these facts, the legal coercion claim cannot be certified. Under a plain language interpretation of the

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[45] ***See*** Declaration of Murugan Kandahasamy, Depo Ex #359, page 7 paragraphs 48 and 49, attached as Exhibit "AAA".
[46] ***See Id.***
[47] ***See Id.***
[48] ***See*** Khuttan, 351:9-16, Exhibit "BBB".
[49] ***See*** Declaration of Hemant Khuttan, Depo Ex #295, page 5 paragraph 26, attached as Exhibit "CCC".
[50] ***See*** Dhananjaya, 283:11 – 16, Exhibit "DDD".
[51] ***See*** Declaration of Kechuru Dhananjaya, Depo Ex #807, page 5 paragraph 27, attached as Exhibit "EEE".
[52] ***See*** David, 229:15 – 230:24, Exhibit "FFF".
[53] ***See Id.***
[54] ***See*** Declaration of Palanyandi Thangamani, Depo Ex #275, page 5 paragraph 28, attached as Exhibit "GGG".
[55] ***See*** Declaration of Andrews Padaveettiyl, Depo Ex #277, page 5 paragraph 39, attached as Exhibit "HHH".

statutes proscribing a threat to abuse the law, the jury has to determine whether the author of the threat consciously mischaracterized the law in order to knowingly steal nonconsensual labor from the person at whom the unlawful threat was directed.

Though plaintiffs testified concerning what they consider to be threats of deportation by Signal, ***nowhere***, whether in the Original Complaint, First or Second Amended Complaints, the RICO Statement, in deposition, in Declaration, by affidavit or in their T Visa Applications, is the allegation ever made, by any of the class representatives, that the plaintiffs were threatened by Signal with imprisonment, confinement, arrest or restraint by the State. Absent this threat of imprisonment, confinement, arrest or restraint, and critically, absent a threat that this restraint would be effectuated by the State, Plaintiffs' claims cannot be certified as a matter of law. Plaintiffs carry the burden of proving the elements of their claims, including §1589, and proving that the requirements of Rule 23 are met when seeking certification of a class. Considering that plaintiffs never allege threats by Signal of confinement or restraint, as accomplished by the State, in any pleadings or sworn testimony, the issue of certification should be decided in Signal's favor and the claims themselves should be dismissed.

C. <u>Testimony Concerning Wages</u>:

Each class representative received wages from Signal for his hours worked on the yard, as well as overtime, safety bonuses and rig bonuses, consistent with his signed Employment Agreement with Signal. In the Fifth Circuit, the fact-finder may infer that payment of wages means the worker consented to labor. ***See Channer v. Hall*** 112 F3d 214, 217 – 218 (5th Cir. 1997). As ***Gene*** emphasizes, when consent is a central issue in the litigation, as is the case here, certification is improper. ***See Gene, supra,*** at 328 – 9. This underscores that individual issues predominate and that Signal has the right to question each plaintiff about the money he earned at

Signal to assist the jury in determining that he freely consented to labor.

Dhananjaya testified that he received the prevailing wage of $18 per hour, as did all other similarly qualified welders, for his work performed and that number was never reduced as long as he worked for Signal.[56] In the 15 months that Padaveettiyl worked for Signal, he grossed over $78,000 for an average of over $5,200 per month.[57] Even when Kandahasamy's job requirements changed to scaffolding work, he maintained his hourly rate of $18 - $20 per hour.[58]

In 2007, David grossed $50,176.16.[59] David admits that this amount was a "great deal more" than the amount he received while working in the UAE as a supervising foreman.[60] Khuttan earned nearly $50,000 for little more than a year of work.[61] So too did Thangamani in 2007.[62]

Confirming that he, like everyone else, received pay for his hours freely worked, Sulekha testified as follows:

> Q: When you started Signal, how much did you make an hour?
>
> A: Eighteen dollars. That is the agreement.
>
> Q: And you earned overtime, how much would you be paid?
>
> A: I think its one and a quarter or one and a half.
>
> Q: Okay. Would you agree that the money you made at Signal was much more than you had made in India?
>
> A: Yes.
>
> Q: Would you agree with me that the money you were making weekly at Signal was much more than the money you were making in the UAE?

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[56] ***See*** Dhananjaya, 281:17 – 282:3, Exhibit "III".
[57] ***See*** Padaveettiyl, Volume III, 85:12 – 86:16 and 87:7 – 17, Exhibits "JJJ" and "KKK".
[58] ***See*** Kandahasamy, 151:3 – 20, Exhibit "LLL". (Note: Murugan worked for Signal for 11 months in 2007)
[59] ***See*** David, 562:5 – 12, Exhibit "MMM".
[60] ***See*** David, 563:17 – 564:4, Exhibit "NNN".
[61] ***See*** Khuttan, 163:7 – 15, Exhibit "OOO".
[62] ***See*** Thangamani, 415:14 – 416:5, Exhibit "PPP".

A: Around that.

Q: You're saying that it's the same as you were making in the UAE?

A: The one week he make here and the one month I make in UAE, its around the same.

Q: So, if you compare one week of Signal wages, it equals four weeks of UAE wages?

A: Yes.

Q: And so, you would agree that you were paid much more at Signal than you were paid in the UAE.

A: What I'm getting here monthly, yes.

See Sulekha, 333:1 – 334:20, Exhibit "QQQ". Sulekha further confirms that he received a wage rate increase while at Signal which was granted to all similar craftsmen.

Q: Sony, in fact, in the short time you were there, you received a raise, didn't you?

A: Common, they raised the salary, not me alone.

See Sulekha, 280:3 – 11, Exhibit "RRR". Not only did Plaintiffs receive wages for their work provided to Signal, their claims that their wages dipped below the "prevailing wage" lack merit.

Plaintiffs erroneously assert that Signal's failure to reimburse plaintiffs for expenses associated with point-of-hire travel, visa, recruitment and housing expenses were "willful violations" of the Fair Labor Standards Act (" FLSA"). ***See*** FAC par. 362 and 363. The Fifth Circuit concluded, as a matter of law, that point-of-hire travel, visa and recruitment fees and expenses are ***not*** reimbursable to an H-2B employee. ***See Castellanos-Contreras v. Decatur Hotels, LLC,*** 622 F.3d 393, 25,29 (5th Cir. 2010). The failure to reimburse for these fees is not a wage violation as alleged.

Additionally, Signal entered into contracts with the H-2B workers upon their arrival at

Signal.[63] The Housing Agreement specifically addresses the fees to be paid for housing, food and transportation. An employer may claim a "credit", or charge "rent", for the reasonable cost of furnishing an employee with lodging. ***See*** 29 C.F.R. Sec. 531.3 & 531.30 If the lodging provided to an employee is customarily furnished by the employer (or other employers in the same or similar trade), if it is accepted voluntarily by the employee, and it is furnished primarily to benefit the employee, the employer will then be allowed to claim the "credit". ***Id.*** The housing facilities clearly benefited the H-2B workers in this case as there was no other housing available in either Orange or Pascagoula due to the hurricanes.[64] Often, in the marine industry, on-site housing is provided by the employer. Finally, all workers signed the Housing Agreements, thus voluntarily accepting the living accommodations provided to them.[65]

D. Testimony Concerning Freedom to Leave Signal:

Plaintiffs testified that they were paid wages for their work freely provided to Signal. They all further testified that they knew they could quit at any time and in fact did, and were free to leave the housing facility whenever they pleased.[66] This freedom to quit at any time, like the wages discussed previously, emphasize that in this case, individual issues predominate. Each plaintiff should be required to take the stand and testify to a jury concerning his ability to quit his employment with Signal as "when the employee has a choice, even though it is a painful one,

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[63] ***See*** Affidavits of Tracey A. Binion and Susan Matte authenticating the contracts, attached hereto as Exhibits "SSS" and "TTT". Moreover, Khuttan stated that he was told in India, by Burnett and Pol, that $35 per day would be deducted for food and housing. ***See*** Declaration of Khuttan, page 3 paragraph 11, Exhibit "CCC".

[64] ***See Marshall v. Truman Arnold Dist. Co*** , 640 F.2d 906, 909 (8th Cir. 1981)(While company gained some incidental benefit from worker living on premises, primary benefit was to worker).

[65] A workers' signature on the employment agreement provides sufficient evidence that he accepted the residence voluntarily. ***See Brock v. Carrion , LTD*** 332 F.Supp.2d 1320 (E.D. Ca. 2004); ***See also Donovan v. Miller Prop., Inc.*** *547* F.Supp.785, 789 (D.C. La. 1982), aff'd by 711 F.2d 49 (5th Cir. 1983).

[66] Though several of the class representatives allege that Dewan and his associates confiscated passports from the workers during recruitment in order to procure payment of fees, no class representative alleges that Signal ever confiscated passports from the workers. Plaintiffs maintained possession of their passports the entire time they were in the United States and employed by Signal. As Plaintiff Kurian David confirms, after Dewan returned his passport, Kurian maintained uninterrupted possession of his passport from that point forward. ***See*** David, 469:15 – 22, Exhibit "UUU".

there is no involuntary servitude." ***See Channer, supra***, 112 F.3d 217 – 8.

Kandahasamy testified that when Signal wished to transfer him from Orange, Texas to Pascagoula, Mississippi to do scaffolding work, he simply left Signal's employ without issue.[67] Kandahsamy further testified that he was never prevented from leaving the housing facility whenever he so desired.[68] Padaveettiyl admits that though it would have been a difficult choice, he had the "freedom" to quit Signal's employ at any time.[69] Padaveettiyl, like Kandahasamy, was never prevented from leaving the housing facility when he wanted, testifying as follows:

> Q: You could leave whenever you want day or night without any problems, period, correct?
>
> A: That's correct.
>
> Q: That's correct?
>
> A: That's correct.

See Padaveettiyl, Vol II, 113:22 – 114:2, Exhibit "YYY". David stated the same conclusion as Padaveettiyl – though the decision would have been difficult, David could quit and return to India "at any time."[70]

When questioned about the "at will employment" language in the employment contracts all plaintiffs signed upon commencement of their time at Signal, Khuttan participated in the following sworn exchange:

> A: This is the relationship between me and the employer.
>
> Q: Meaning Signal?
>
> A: Yeah.
>
> Q: Okay.

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[67] ***See*** Kandahasamy, 186:15 – 187:9, Exhibit "VVV".
[68] ***See*** Kandahasamy, 217:3 – 11, Exhibit "WWW".
[69] ***See*** Padaveettiyl, Vol. I, 176:24 – 177:13, Exhibit "XXX".
[70] ***See*** David, 263:4 – 16, Exhibit "ZZZ".

A: My employment will continue on my wish. Whether it is me or my employer can terminate me.

Q: At any time right?

A: At any time. Right.

Q: In fact, you exercised your rights underneath that and quit and left Signal, didn't you?

A: Yes.

Q: Nobody prevented you from quitting and walking out the gate, right?

A: Yes.

Q: Yes - - yes, meaning I'm right or, yes, meaning somebody prevented you?

A: No. No. No. You right. Nobody forced me to do this.

Q: All right. Thank you. Thanks for clarifying that.

A: I did it with my own will.

Q: Did it with your own free will, said you didn't want to be here anymore, and nobody tried to stop you?

A: No.

Q: Correct?

A: Yes.

See Khuttan, 216:7 – 217:14, Exhibit "AAAA". Dhananjaya, like Khuttan, quit Signal without incident.[71] As did Thangamani in March 2008.[72] Even Sulekha confirmed that he could have chosen to quit Signal and return to India if he so wanted.[73]

The class representatives further confirmed in deposition that they traveled and took vacations while working for Signal. David conceded that while working for Signal in Orange, he

[71] ***See*** Dhananjaya, 286:5 – 287:4, Exhibit "BBBB".
[72] ***See*** Thangamani, 122:6 – 9, Exhibit "CCCC".
[73] ***See*** Sulekha, 266:24 – 267:10, Exhibit "DDDD".

traveled to Chicago, Pascagoula and Houston.[74] David confirms that he returned to Signal after travels because he took a "leave of absence...[he] didn't quit his job."[75] Padaveettiyl traveled home to India for vacation subsequently returning to Signal at the conclusion of his allotted leave. Padaveettiyl also went sightseeing with some of his co-workers in Orlando, Florida driving there in the new Toyota Highlander Padaveettiyl purchased while working for Signal.[76]

Kandahasamy lists Morgan City, Houston and Beaumont as cities to which he traveled while working for Signal in Orange.[77] Kandahasamy also went to the beach at least once, likely in Galveston, while working for Signal.[78] Thangamani traveled to South Carolina and Louisiana while working for Signal in Pascagoula.[79] Sulekha also traveled to other cities while working for Signal.[80]

Khuttan testified that he, like Padaveettiyl, returned to India for about one and a half months while working for Signal.[81] While in India, Khuttan faxed a written request to Signal for an extension of his leave due to the poor medical condition of his father who later died while Khuttan was home in India.[82] Signal approved Khuttan's leave of absence extension request with "no problem."[83] Khuttan stayed in India for the funeral and was able to assist his family with arrangements.[84] Khuttan confirms that other H-2B workers requested and were granted

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[74] ***See*** David, 270:1 – 271:1, Exhibit "EEEE".
[75] ***See*** *Id.*, Exhibit "FFFF".
[76] ***See*** Padaveettiyl, Vol I, 171:2 – 172:13, Exhibit "GGGG".
[77] ***See*** Kandahasamy, 211:21 – 213:20, Exhibit "HHHH".
[78] ***See*** Kandahasamy, 213:21 – 214:7, Exhibit "IIII".
[79] ***See*** Thangamani, 444:18 – 445:1, Exhibit "JJJJ".
[80] ***See*** Sulekha, 262:15 – 263:24, Exhibit "KKKK".
[81] ***See*** Khuttan, 175:19 – 176:1, Exhibit "LLLL".
[82] ***See*** Khuttan, 176:2 – 24, Exhibit "MMMM"; ***See also*** Depo. Ex. #292, SIGP0036351, Exhibit "MMMMMMMMM".
[83] ***See*** Khuttan, 177:17 – 22, Exhibit "NNNN".
[84] ***See*** Khuttan, 176:22 – 24, Exhibit "OOOO".

leave from Signal to return to India for vacation and/or to visit family.[85]

E. Testimony Concerning Freedom to Live Away from Signal:

Indisputably, plaintiffs could have lived outside of the housing facility had they chosen to do so as long as they continued to pay the boarding deduction they agreed to pay. This undermines plaintiffs' allegations in their FAC that all plaintiffs were forced to live in the Housing Facility. In essence, this contradicts plaintiffs' theory that living in the housing facility assisted Signal in forcing the workers to labor against their will. Since plaintiffs were free to choose where they lived, they could in fact remove themselves from the situation they allege contributed to their vulnerabilities. Therefore, Signal has a strong interest in requiring that the jury hear this testimony in each individual's case contradicting plaintiffs' contention that the proposed class should be certified. ***Allison, supra,*** at 423. David concedes:

> If we wanted to live outside of the labor camp, Signal told us that we would still be charged the $35 per day for room and board...

See Declaration of Kurian David, Depo. Ex. #302, page 6 paragraph 30, Exhibit "QQQQ". Khuttan confirms the same notion – as long as plaintiffs continued to pay the boarding deductions, pursuant to their Housing Agreements with Signal, plaintiffs were free to live wherever they pleased.[86] Kandahasamy and Thangamani confirmed the choice as well.[87]

Sulekha testified that he was told that the boarding deductions were being used by Signal to recoup the cost of housing facility construction.[88] Sulekha confirms that he, like all other

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[85] S*ee* Khuttan, 179:14 – 20, Exhibit "PPPP". (Note: Plaintiff Kechuru Dhananjaya was not questioned at deposition, nor did he testify in Declaration, concerning any trips he took while working for Signal. Having only worked for Signal for about 45 days, it is not surprising that Dhananjaya never took vacation.).

[86] ***See*** Declaration of Hemant Khuttan, Depo. Ex. #295, page 6 paragraph 34, Exhibit "CCC".

[87] ***See*** Declaration of Murugan Kandahasamy, Depo. Ex. #359, page 6 paragraph 39, Exhibit "AAA" and Declaration of Palanyandi Thangamani, Depo. Ex. # 275, page 7 paragraph 27, Exhibit "GGG".

[88] ***See*** Declaration of Sony Sulekha, Depo. Ex. #274, page 4 paragraph 23, Exhibit "ZZ". Signal has already discussed how this approach was permissible under FLSA and entirely reasonable on the part of Signal.

plaintiffs, was free to live outside the facility had he so chosen.[89] Finally, Padaveettiyl testified that

REDACTED

[90]

F. **Testimony concerning the Lack of Direct Threats of Physical Harm by Signal:**

The plain language of 1589(1) and the case law interpreting it states that the claimant, in order to satisfy its burden, must prove that he was either harmed or "directly" threatened with physical injury or harm to him or his family. Critically, none of the class representatives claim that Signal physically harmed or injured them or directly threatened bodily harm or injury to procure labor. Several of the class representatives specifically refute the notion that Signal ever directly threatened violence. Khuttan, when asked "were there any threats, any statements made of causing physical harm in any way," he replied "No, no physical harm."[91] Dhananjaya, when questioned if he was "ever threatened by anyone at Signal," simply answered "no."[92] Clearly, these class representatives cannot make a viable 1589(1) claim and thus cannot possibly be adequate representatives.

Other class representatives testified that they were directly threatened or at least feared physical harm or injury by someone ***other*** than Signal. For instance, Thangamani testified that he was threatened with physical harm to him and his family by eight money lenders in India.[93] Sulekha testifies that he was threatened by defendant Sachin Dewan because Dewan brought co-

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[89] ***See*** *Id.*

[90] ***See*** T Visa Affidavit of Andrews I. Padaveettiyl, page 14 paragraph 53, Exhibit "RRRR". The only plaintiff that failed to testify about his ability to live outside the housing facility was Kechuru Dhananjaya. There was no reference in Kechuru's Declaration and he was never questioned on this topic at deposition. Dhananjaya's arrival to Signal several months after all other class members and his short-length employment with Signal, as will be discussed below, are likely reasons why this topic was never addressed with Kechuru.

[91] ***See*** Khuttan, 465:16 – 19, Exhibit "SSSS".

[92] ***See*** Dhananjaya, 283:11 – 16, Exhibit "TTTT".

[93] ***See*** Thangamani, 464:15 – 466:21, Exhibit "UUUU".

workers to meetings with Sulekha that claimed mob/gangster affiliations.[94] As Signal will show, the actions of money lenders and Dewan in allegedly defrauding plaintiffs cannot be attributed to Signal because a) they occurred prior to Signal's contractual relationship with Global and b) one cannot impute a *mens rea* for a crime of fraud under conspiracy law.[95] David intimated his fear that Dewan Consultants, specifically Manish Dewan, was connected with the mafia and how that relationship caused a fear for the safety of himself and his family.[96] Though plaintiffs Thangamani, David and Sulekha testified about either a direct or apparent threat of harm to them or their families by other persons, ***none*** of them ever testified about a direct threat of harm or violence from Signal.

Kandahasamy, in his Declaration, testifies that he was "afraid that Signal would physically harm" him.[97] Kandahasamy somehow acquires this fear after "a friend" at Signal in Pascagoula "told [him] by phone" about the events of March 9th when a few workers, who were placed in a room by Signal to be advised of their terminations.[98] Kandahasamy never states that Signal ever directly threatened him or anyone else with physical harm or injury. Kandahasamy simply states how a phone call from an unnamed friend, two states away, made him "feel." Signal has a constitutional and procedural right to question this individual about how certain events made him "feel." Regardless, a "feeling" derived from a message a friend told you about an event you never witnessed cannot ***possibly*** satisfy plaintiffs burden of establishing ***direct*** threats of physical injury or bodily harm by Signal.

Padaveettiyl never, whether in Deposition, Declaration or T Visa application, makes the allegation that any defendant in this lawsuit or person associated with said defendant ***ever***

[94] ***See*** Sulekha, 371:5 – 374:2, Exhibit "VVVV".
[95] ***See*** Section VII – D, Below.
[96] ***See*** David, 618:11 – 620:21, Exhibit "WWWW".
[97] ***See*** Declaration of Murugan Kandahasamy, Depo. Ex. #359, page 7 paragraph 49, Exhibit "AAA".
[98] ***See*** *Id*, Exhibit "AAA". Signal never injured nor directly threatened any of the workers involved in the March 9th incident with physical harm or violence.

threatened him with violence or physical harm. Padaveettiyl never even alleges that he was afraid or feared in any way for the safety of himself or his family.

In summary, two class representatives specifically state they were never injured or threatened with injury by Signal, three representatives state that they were threatened or at least ***feared*** a threat of harm from persons other than Signal, one class representative was completely silent on the issue and one class representative equated a fear of bodily harm with a story a friend told him – certainly never a direct threat by Signal. Since none of the seven class representatives ever allege either physical harm or a direct threat of physical harm to them by Signal, the claims cannot be certified.

G. Testimony Concerning Plaintiffs' Differing Backgrounds:

For the purposes of trafficking analysis, each individual plaintiff is, with regard to his "special vulnerabilities," a unique and wholly distinct individual – an island. One cannot apply elemental RICO law, namely, §1962, the core RICO statute, to the facts of this case with regard to predicate acts like forced labor, trafficking, fraud, etc., until the facts are in the record. In a RICO case, getting those facts properly into the record involves a multiplicity of individual issues. The Fifth Circuit recognized this to a significant extent in ***Sandwich Chef, supra***, with regard to proximate and "but for" cause.

The critical point to understand is that there are fact questions in addition to causation in a RICO case that underscore the predominance of individual issues. For example, in addition to causation, those predominant issues include facts that enable one to determine whether the only RICO law that applies to Signal in this case is conspiracy, i.e., §1962(d).[99]

i. Murugan Kandahasamy:

Plaintiff Murugan Kandahasamy **REDACTED**

[99] ***See*** 18 USC § 1962 ***infra***.

REDACTED [100] REDACTED

REDACTED [101] Kandahasamy is Hindi and attended, at least on one occasion, a Meenakshi Temple in Houston, Texas while employed by Signal.[102]

REDACTED .[103] Thus, before Signal even contemplated a contractual relationship with Pol, and before Huricanes Katrina and Rita,

REDACTED REDACTED

[104]

REDACTED

.[105] However, he admitted that he made the decision to marry before he ever heard the phrase "Signal International."[106] The name Signal was not in any advertisement Kandahasamy saw concerning available work opportunities in the United States.[107]

On June 23rd, 2006 Kandahasamy received a letter from Dewan stating that he would be working for Signal on an H-2B visa.[108] Until this time Kandahasamy believed he would be receiving a green card sponsored by a different employer. Kandahasamy never asked Dewan about the conditions of an H-2B visa, he testifies, because he is "not smart to understand those

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[100] ***See*** T Visa Affidavit of Murugan Kandahasamy, page 1 paragraph 3, Exhibit "XXXX".
[101] ***See*** T Visa Affidavit of Murugan Kandahasamy, page 1 paragraph 2. REDACTED On his Resume used to secure his employment with Signal, he states that he can speak Hindi and Malayalam, and can **read, write AND speak** Tamil and English. ***See*** Exhibit "YYYY".
[102] ***See*** Kandahasamy, 212:1 – 213:7, Exhibit "ZZZZ".
[103] ***See*** T Visa Affidavit of Murugan Kandahasamy, page 1 paragraph 3 and SIGP0003327, CV of Murugan Kandahasamy, attached herein as Exhibits "XXXX" and "AAAAA" respectively.
[104] ***See*** T Visa Affidavit of Murugan Kandahasamy, page 3 paragraph 7, attached herein as Exhibit "BBBBB".
[105] ***See*** T Visa Affidavit of Murugan Kandahasamy, page 3 paragraph 7, attached herein as Exhibit "BBBBB".
[106] ***See*** Kandahasamy, 366:16 – 20, Exhibit "CCCCC".
[107] ***See*** Kandahasamy, page 393, lines 11 – 15, Exhibit "DDDDD".
[108] ***See*** Kandahasamy, 393:16 – 394:4, Exhibit "EEEEE".

things." *Id.*[109] Clearly, Signal has a strong interest in questioning Kandahasamy concerning his level of knowledge and understanding of the H-2B visa program in exploring Kandahasmay's "vulnerabilities." In that same letter, Kandahasamy was informed he would be required to pay a portion of his salary for food and housing at Signal.[110] Kandahasamy doesn't remember asking Dewan, or anyone else, the amount of the boarding deduction.[111] Thus for four solid months, Kandahasamy knew about this H-2B visa and asked nothing and was still "shocked" when Dewan mentioned it again in November, 2006.

All told, Kandahasamy, unique in his history and background, was a married man who had experience working abroad before working for Signal. Considering he became the "man of the house" at the age of five supporting his entire family, Kandahasamy was anything but vulnerable.

ii. Hemant Khuttan:

Plaintiff Hemant Khuttan was born in Rohini, Delhi, India which is the second largest sub-city in Asia.[112] Khuttan's father, who passed away while Khuttan was on leave from Signal while working on an H-2B visa, was the Assistant Commissioner of the Delhi Police Department.[113] This was a "high-up position."[114] REDACTED REDACTED[115] He learned English at school, including University and he, at times, spoke English at home with his father.[116] He would even write letters home in English.[117]

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[109] Nevermind his SSLC educational certification (Secondary School Leaving Certificate. This certificate is awarded to students who pass an exam following at least 5 years of primary and 5 years of secondary school education.), his ITI (Industrial Training Institute) Fitter, NAC (National Apprenticeship Certification) and NTC (National Trade Certificate) certifications and the fact that Signal, until the filing of this law suit, was lead to believe by Murugan that he spoke 4 different languages. ***See*** CV of Murugan Kandahasamy, Exhibit "AAAAA".
[110] ***See*** Kandahasamy, 416:20 – 417:20, Exhibit "FFFFF".
[111] ***See*** *Id.*
[112] ***See*** Declaration of Hemant Khuttan, Depo Ex #295, page 1 paragraph 3, Exhibit "CCC".
[113] ***See*** Khuttan, 239:10 – 21, Exhibit "GGGGG".
[114] ***See*** Khuttan, 239:22 – 24, Exhibit "HHHHH".
[115] ***See*** T Visa Affidavit of Hemant Khuttan, page 1 paragraph 2, Exhibit "IIIII".
[116] ***See*** Khuttan, 126:22 – 127:6, Exhibit "JJJJJ".

Khuttan earned a degree in history from University, graduating with honors, and earned a two-year vocational degree in welding.[118] REDACTED REDACTED [119] Until working for Signal, Khuttan had never worked abroad or even left India for any reason.[120]

While living in Delhi, Khuttan saw a newspaper advertisement in the Hindustan Times.[121] In response, Khuttan met with Dewan in Delhi in November, 2006[122] where Dewan informed Khuttan about his hourly wages, the company he would work for and the boarding deduction of $35 per day.[123] Khuttan went to Signal's website to educate himself about the company, deciding and believing that Signal was a good, big company.[124] Not needing to quit a job to participate in the H-2B program, Khuttan elected to work for Signal on an H-2B visa.[125]

Upon arrival at Signal, Khuttan was not pleased with the housing facility though he had nothing to compare it to as he had never before lived in company provided housing.[126] Within three months of working at Signal Khuttan, like "most" others working on the H-2B visa for Signal, bought a car.[127] He got his driver's license in Mississippi though other workers traveled to Chicago to get driver's licenses while working for Signal.[128] Khuttan was an "elder" for bunkhouse 4 in Pascagoula,[129] earning an additional $.50 per hour whether accomplishing elder

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[117] ***See*** Khuttan, 219:14 – 22, Exhibit "KKKKK".
[118] ***See*** Khuttan, 65:3 – 15, Exhibit "LLLLL".
[119] ***See*** T Visa Affidavit of Hemant Khuttan, page 1 paragraph 3, attached herein as Exhibit "MMMMM".
[120] ***See*** Khuttan, 65:18 – 66:2, Exhibit "NNNNN".
[121] ***See*** Khuttan, 108:16 – 109:4, Exhibit "OOOOO".
[122] ***See*** Khuttan, 111:22 – 112:4, Exhibit "PPPPP".
[123] ***See*** Khuttan, 112:5 – 13, Exhibit "QQQQQ".
[124] ***See*** Khuttan, 249:2- 16, Exhibit "RRRRR".
[125] ***See*** Khuttan, 123:13 – 24, Exhibit "SSSSS".
[126] ***See*** Khuttan, 332:9 – 333:14, Exhibit "TTTTT".
[127] ***See*** Khuttan, 180:12 – 181:5, Exhibit "UUUUU".
[128] ***See*** Khuttan, 172:21 – 173:15, Exhibit "VVVVV".
[129] An elder was meant to field concerns and complaints of workers and convey those concerns to Signal in an effort to improve communication between Signal and its employees. ***See*** Khuttan, 170:14-21, Exhibit "WWWWW".

duties or simply working on a rig.[130]

Khuttan, an educated man graduating with Honors from University, fluent in English, and the son of the former second-in-command of the Delhi Police Department, does not appear to be easily manipulated. Any claim that Khuttan, the unique individual that he is, is especially vulnerable lacks merit and flies in the face of his sworn testimony.

iii. Andrews I. Padaveettiyl:

Plaintiff Andrews Isaac Padaveettiyl is from Ambernath, India, a suburb of Mumbai.[131] Ambernath is known for its jobs and business opportunities. **REDACTED**[132]

REDACTED **REDACTED**

.[133] In Dubai, Padaveettiyl worked as a welder for the Dubai government.[134] Padaveettiyl decided to come on his H-2B visa to Signal because he wanted to make a lot of money – "that is the reason [he] came to America."[135]

Padaveettiyl first heard of a job opportunity to work for an American ship company from a friend who saw a newspaper advertisement (which Padaveettiyl never saw) in March 2004.[136] Before Katrina and Rita, and before any contact between Dewan/Pol/Burnett and Signal, Padaveettiyl pursued this work opportunity and began the process of paying for and applying for a green card through J&M.[137] In 2006, Dewan told Padaveettiyl that he should "forget about his green card" process through J&M which had been pending for two years and work for Signal on

[130] ***See*** Khuttan, 169:25 – 171:7, Exhibit "XXXXX".
[131] ***See*** Declaration of Andrews Padaveettiyl, page 2 paragraph 2, Depo Ex #277, attached herein as Exhibit "HHH".
[132] ***See*** T Visa Affidavit of Andrews Padaveettiyl, page 1 paragraph 2, attached herein as Exhibit "YYYYY".
[133] ***See*** T Visa Affidavit of Andrews Padaveettiyl, page 1 paragraph 3, Exhibit "ZZZZZ".
[134] ***See*** Padaveettiyl, Vol III, 50:18 – 23, Exhibit "AAAAAA".
[135] ***See*** Padaveettiyl, Vol III, 84:7 – 11, Exhibit "BBBBBB".
[136] ***See*** Padaveettiyl, Vol II, 38:8 – 39:8, Exhibit "CCCCCC".
[137] ***See*** fn. 20.

an H-2B visa.[138] Before Padaveettiyl left for Signal, Dewan told Padaveettiyl that the H-2B visa would last for ten (10) months in duration and that the company could apply for two (2) extensions.[139]

Upon arrival at Signal, Padaveettiyl was displeased with the housing arrangements. He had lived in a shipyard housing facility abroad before which provided free food, uniforms, shoes and laundry facilities.[140] Padaveettiyl's prior experience was similar in that it was a camp next to a shipyard.[141] Thus, Padaveettiyl, unlike others, was able to compare Signal's housing facility to other facilities in which he had lived. When questioned why he didn't simply quit Signal if displeased and return to India (which was an available option to him as described and supported by testimony above), Padaveettiyl, age 40, said that a consideration for him staying was his age and the difficulty in finding a job in his home state.[142]

As a hardened man with over 20 years of work experience, Padaveettiyl is not vulnerable. Unique in his own right, considering his employment by the government in Dubai and the fact that he was recruited to work for J&M three years before Signal's needs arose, it must be concluded that individual issues predominate. Signal has a strong interest in presenting the complete story of Padaveettiyl, and every other plaintiff, to assist the jury in determining whether a given plaintiff is especially vulnerable for manipulation.

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

Plaintiff Kurian David is a native of Kerala, India.[143] A married man, David has over 20 years of experience as a pipe fabricator and pipe fabrication shop foreman.[144] **REDACTED**

[138] ***See*** Padaveettiyl, Vol III, 59:10 – 24, Exhibit "DDDDDD".
[139] ***See*** Padaveettiyl, Vol III, 65:25 – 66:2, Exhibit "EEEEEE".
[140] ***See*** Padaveettiyl, Vol III, 51:14 – 20, Exhibit "FFFFFF".
[141] ***See*** *Id.*
[142] ***See*** Padaveettiyl, Vol I, 176:19 – 23, Exhibit "GGGGGG".
[143] ***See*** David, page 619:24 – 25, Exhibit "HHHHHH".
[144] ***See*** CV of Kurian David, Depo Ex #299, SIGE0008832, attached herein as Exhibit "IIIIII".

REDACTED[145] REDACTED

REDACTED[146] REDACTED[147]

David first heard of the opportunity to work in the United States while working as a "high level senior foreman" for NPCC in Abu Dhabi.[148] Unlike other plaintiffs in this case, David did not leave his job in Abu Dhabi to make more money in the United States because the money he was earning in Abu Dhabi was the same as the money he eventually earned from Signal.[149] David had earned "good money" for eight (8) years prior to choosing to come to Signal on an H-2B visa.[150] While in Abu Dhabi, David saw an advertisement in a newspaper about a work opportunity in the United States.[151] The advertisement David saw and eventually responded to mentioned Dewan Consultants but did not mention Signal.[152] Dewan told David when David responded to the advertisement that he could have a green card in 2 years and that he could bring his family with him to the United States.[153] Dewan also told David that though he would get a green card in two (2) years, he would be working for Signal on an H-2B visa because of the need created by the Hurricane.[154] David further testified that he was shown a video by Dewan, in May 2006, of what Dewan represented were the accommodations for David and other workers at

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[145] ***See*** T Visa Affidavit of Kurian David, page 1 paragraph 2, Exhibit "JJJJJJ". , his CV that he used to apply to work for Signal states, in order listed, that he speaks "English, Hindi, Malayalam, Urdu and Bengla." ***See*** CV of David, Depo Ex #299, SIGE0008832, attached as Exhibit "IIIIII".

[146] ***See*** T Visa Affidavit of Kurian David, page 1 paragraph 4, Exhibit "KKKKKK".

[147] ***See*** T Visa Affidavit of Kurian David, page 1 paragraph 4, Exhibit "KKKKKK".

[148] ***See*** David, 180:23 – 181:1, Exhibit "LLLLLL".

[149] ***See*** David, 315:4 – 317:25, Exhibit "MMMMMM".

[150] ***See*** *Id.*

[151] ***See*** David, 181:1 – 2, Exhibit "NNNNNN".

[152] ***See*** David, 320:11 – 18, Exhibit "OOOOOO".

[153] ***See*** David, 182:5 – 12, Exhibit "PPPPPP".

[154] ***See*** David, 182:24 – 183:4, Exhibit "QQQQQQ". Before Kurian came to the United States, he was informed he'd be working on an H-2B visa and ***not*** a green card for Signal.

Signal.[155] Since Signal did not construct its housing facility until August, 2006, Signal is unsure which, if any, housing facility was shown to the workers by Dewan. David was the only plaintiff to testify that he was shown a video of Signal's housing facility before he left for the United States stating he relied on the representations in the video.[156]

David was the only plaintiff to interview with the Consulate twice before coming to Signal.[157] David was prepared to lie to the United States Consulate during both interviews if needed even though he knew it was a crime.[158] David ***claims*** that he "usually" doesn't lie.[159] Upon arrival in the United States, David was assigned to work at Signal's Orange, Texas facility.[160] While working at Orange, David traveled to Chicago, Illinois with other H-2B workers.[161] David also traveled to Houston, Texas while working in Orange.[162] David was told, in India, that when an H-2B visa is expired, the worker would have to return home.[163]

As the only former foreman of the seven class representatives, David's unique factual background is undeniable. Earning the same amount of money before Signal as at Signal, David places a higher priority on the "The American Dream" than others when deciding to travel to the United States. With twenty plus years of working abroad under his belt, it must be concluded that David is not easily fooled. Considering the fact that he was ready to lie to a Consulate even though he knew it was illegal, David's credibility is of a questionable nature. Signal has a right for the jury to hear this background, to hear David's experiences and to weigh the veracity of his statements considering his ever willingness to lie. Individual issues clearly predominate here and

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[155] ***See*** David, 331:20 – 333:2, Exhibit "RRRRRR".
[156] ***See*** *Id.*
[157] ***See*** David, 407:20 – 411:13, Exhibit "SSSSSS".
[158] ***See*** David, 400:8 – 401:8, Exhibit "TTTTTT".
[159] ***See*** *Id.*
[160] ***See*** David, 24:14, Exhibit "UUUUUU".
[161] ***See*** David, 271:16 – 272:20, Exhibit "VVVVVV".
[162] ***See*** David, 270:6 – 271:1, Exhibit "WWWWWW".
[163] ***See*** David, 396:12 – 22, Exhibit "XXXXXX".

exploration of this man's vulnerabilities for the ears of the jury should be permitted.

v. **Sony Vasudevan Sulekha:**

Plaintiff Sony Vasudevan Sulekha, a married and educated man, completed his S.S.L.C. in India and received a Diploma in Welding Technology in 1992 from the Center for Engineering and Technical, placing in the 88th percentile and receiving the designation of 1st class.[164] REDACTED REDACTED [165]

REDACTED

"[166] However, on his CV which he used to procure employment with Signal, Sulekha lists "Language[s] Known" as "English, Hindi and Malayalam."[167] Sulekha is Hindu and, though he heard of a Hindu Temple in Pascagoula that he could attend while working for Signal, he chose not to do so.[168] REDACTED REDACTED .[169]

Sulekha first saw an advertisement to work in the United States in 2005 while working in Dubai.[170] At the end of his job in Dubai, Sulekha returned to Kerala and worked a "small welding job" while home in early 2006.[171] After returning to India, Sulekha saw ***another*** advertisement in the Malayalam Newspaper about work opportunities in the United States.[172] This advertisement, the one Sulekha saw in India, made no reference to Signal but did refer to an

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[164] ***See*** CV of Sony Sulekha SIGE0008951, Exhibit "YYYYYY".
[165] ***See*** CV, Depo Ex #338 and T Visa Affidavit of Sony Sulekha, page 1 paragraph 4, Exhibits "YYYYYY" and "ZZZZZZ" respectively.
[166] ***See*** T Visa Affidavit of Sony Sulekha, page 1 paragraph 2, Exhibit "AAAAAAA".
[167] ***See*** CV, Exhibit "YYYYYY".
[168] ***See*** Sulekha, 24:5 – 8 and 25:8 – 12, Exhibits "BBBBBBB" and "CCCCCCC" respectively.
[169] ***See*** T Visa Affidavit of Sony Sulekha, page 2 paragraph 5 and page 3 paragraph 9, Exhibits "DDDDDDD" and "EEEEEEE".
[170] ***See*** Sulekha, 126:10 – 127:24, Exhibit "FFFFFFF".
[171] ***See*** Sulekha, 135:1 – 12, Exhibit "GGGGGGG"
[172] ***See*** Sulekha, 129:17 – 130:15, Exhibit "HHHHHHH".

H-2B visa.[173] In May 2006, Sulekha attended a meeting in Cochin where Pol told him about Signal, showed him pictures of the yard in Pascagoula and gave him the particulars of an H-2B visa, including that they are of a 10-month duration.[174] Sulekha was prepared to lie to the U.S. consulate if so needed.[175]

Sulekha, an educated man, who worked in Southeast Asia for years, is nobody's fool. Sulekha stated that he wanted to work in the U.S. because of assurances he could bring his family along. Signal's interest in exploring this point as well as the unique background of Sulekha can not be underemphasized. Signal has a right to put Sulekha on the stand so that the jury can understand his background to assist them in determining Sulekha's lack of vulnerability.

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

A welder by trade, Plaintiff Palanyandi Thangamani **REDACTED** **REDACTED** .[176] Thangamani completed the 10th grade in school learning Tamil and a little bit of English.[177] **REDACTED** .[178] **REDACTED** [179] While in Singapore, Thangamani acquired a general understanding of the permanent residency laws and understood that a green card meant that a worker could work anywhere in the United States.[180] Thangamani came to the United States "for better pay."[181] He states that it is this

[173] ***See*** Sulekha, 130:16 – 23, Exhibit "IIIIIII".
[174] ***See*** Sulekha, 144:9 – 147:1, Exhibit "JJJJJJJ".
[175] ***See*** Sulekha, 179:2 – 181:8, Exhibit "KKKKKKK".
[176] ***See*** T Visa Affidavit of Palanyandi Thangamani, page 1 paragraph 3 and page 2 paragraph 5, Exhibits "LLLLLLL" and "MMMMMMM" respectively.
[177] ***See*** Thangamani, 452:3 – 12, Exhibit "NNNNNNN".
[178] ***See*** T Visa Affidavit of Palanyandi Thangamani, page 1 paragraph 1, Exhibit "OOOOOOO".
[179] ***See*** T Visa Affidavit of Palanyandi Thangamani, page 1 paragraph 2, Exhibit "PPPPPPP".
[180] ***See*** Thangamani, 242:4 – 19, Exhibit "QQQQQQQ".
[181] ***See*** Thangamani, 369:13, Exhibit "RRRRRRR".

reason – the desire for better pay – that prevented him from quitting his employment from Signal.[182]

In May 2006, Thangamani saw an advertisement about a work opportunity in a Tamil newspaper called *Dhina Thandi*.[183] This advertisement purportedly stated the name and contact information of a representative and a guarantee for the ability to apply for permanent residency.[184] Thangamani took and passed a welding test on May 30, 2006 procuring the necessary certification to work as a welder abroad.[185] Following his passing of the welding test, Thangamani quit his job in Trichy where he earned 5,000 rupees (approximately 109.70 U.S. dollars) per month, and began collecting money to make the necessary payments to Dewan and his employee Salimon in order to participate in the employment opportunity they advertised.[186] Signal has a strong interest in questioning Thangamani, in front of a jury, concerning this decision to quit an income-earning job to collect money to pay third parties he just met. These unique facts, specific only to Thangamani and his time in Trichy, emphasize the predominance of individual issues. The same can be said for each and every plaintiff herein.

On June 23rd, 2006, Dewan Consultants gave Thangamani a document which listed the details of the job he would be working in the United States.[187] That document stated that the company name was Signal, that a green card would be applied for by lawyers on Thangamani's behalf, that he would be paid $18 per hour, and that accommodations including food and housing would be free and provided by Signal.[188] Once confronted with this document at deposition, he

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[182] ***See*** Thangamani, 369:4- 13, Exhibit "SSSSSSS". As referenced earlier, Thangamani testifies that he was free to quit at any time.
[183] ***See*** Thangamani, 196:2 – 6, Exhibit "TTTTTTT".
[184] ***See*** Thangamani, 196:7 – 18, Exhibit "UUUUUUU".
[185] ***See*** Thangamani, 217:14 – 21, Exhibit "VVVVVVV".
[186] ***See*** Thangamani, 221:25 – 223:5, Exhibit "WWWWWWW". (Note: Conversions based on formula provided at http://coinmill.com/INR_USD.html).
[187] ***See*** Thangamani, 223:18 – 20, Exhibit "XXXXXXX".
[188] ***See*** Thangamani, 223:21 – 224:13, Exhibit "YYYYYYY".

admitted that the document never promised free food and lodging.[189] In reality, the document states that food and accommodation will be "on [a] salary reduction basis."[190] This was the first time Thangamani was actually informed about the company he would be working for, the wages he would be making or even the type of visa he would use to enter the United States.[191] When asked why he quit his job and committed to pay 120 months worth of salary (applying his average income while working in Trichy) before he even knew the background of his future employer, the type of visa he would receive or the amount of money he would earn in wages, Thangamani simply stated that "It was just fate."[192]

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

Plaintiff Kechuru Dhananjaya **REDACTED** "[193] Dhananjaya is from Karnataka which is in South India.[194] Dhananjaya speaks Kannada (the native tongue of Karnataka), Hindi and English.[195] Though listed on his CV as proficient in English, **REDACTED** "[196] A married man, Dhananjaya has extensive experience working in foreign countries, working in India, Saudi Arabia, UAE and the United States.[197] From January 12th 1997 to September 13th 1997, Dhananjaya worked for Avondale Shipyard in New Orleans,[198] on an H-2B visa, obtained through Pol, and has known since 1997 that an H-2B was a temporary work visa.[199] When Dhananjaya's visa expired in 1997, he left Avondale and returned to India.

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[189] ***See*** Thangamani, 229:11 – 231:18, Exhibit "ZZZZZZZ".
[190] ***See*** DAVID00004756, Depo Ex #330, attached herein as Exhibit "AAAAAAAA".
[191] ***See*** Thangamani, 224:14 – 17, Exhibit "BBBBBBBB".
[192] ***See*** Thangamani, 224:18 – 225:5, Exhibit "CCCCCCCC".
[193] ***See*** T Visa Affidavit of Kechuru Dhananjaya, page 1 paragraph 3, Exhibit "DDDDDDDD".
[194] ***See*** Dhananjaya, 11:5 – 19, Exhibit "EEEEEEEE". (Note: 56% of the workforce in Karnataka is engaged in agriculture and related activities. ***See*** *Karnataka Human Development Report*, 2005.)
[195] ***See*** CV, Depo Ex #792, SIGE0547923, Exhibit "FFFFFFFF".
[196] ***See*** T Visa Affidavit of Kechuru Dhananjaya, page 1 paragraph 2, Exhibit "GGGGGGGG".
[197] ***See*** CV of Kechuru Dhananjaya, attached herein as Exhibit "HHHHHHHH".
[198] ***See*** Dhananjaya, 17:17 – 22, Exhibit "IIIIIII".
[199] ***See*** Dhananjaya, 26:1 – 22, Exhibit "JJJJJJJ". ***See also*** Dhananjaya, 36:21 – 24, Exhibit "KKKKKKKK".

He knew that when the visa expired he was out of status and required to return home.

> Q: So, after you left Avondale, you returned to India?
>
> A: Yeah.
>
> Q: And why couldn't you go to work for another employer if you weren't working at Avondale?
>
> A: I didn't have a status. So, how will I work?
>
> Q: But you understood that coming over on an H2B, you had to work at IMI for Avondale, correct?
>
> A: Yes.

See Dhananjaya, 55:1 – 20, Exhibit "LLLLLLLL".

In December 2003, while working as a welder in Dubai, Dhananjaya saw an advertisement for an opportunity for employment and permanent residency in the United States.[200] Dhananjaya responded to this advertisement and paid for and, purportedly, began the process of applying for his green card through IAS with the assistance of Dewan Consultants.[201] In February, 2006 Dhananjaya was informed that the green card processing had a 12-month back log.[202] Sometime between February 2006 and November 2006, Dewan informed Dhananjaya that he would be traveling to the United States on an H-2B visa to work for Signal.[203] In March 2007, before Dhananjaya was able to come to the United States, Signal decided not to bring in any additional workers recruited by Dewan, Pol and Burnett.[204] In April, 2007 Dhananjaya was provided a document by Dewan stating that Signal's H-2B program had been cancelled.[205] After receipt of this notification that Signal no longer had a position for him, Dhananjaya nonetheless

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[200] ***See*** Dhananjaya, 61:10 – 62:25, Exhibit "MMMMMMMM".
[201] ***See*** Dhananjaya, 89:21 – 92:4, Exhibit "NNNNNNNN".
[202] ***See*** Dhananjaya, 125:24 – 127:22, Exhibit "OOOOOOOO".
[203] ***See*** Dhananjaya, 140:6 – 142:11, Exhibit "PPPPPPPP".
[204] ***See*** Depo Ex #510, DEWAN007898, attached herein as Exhibit "QQQQQQQQ".
[205] ***See*** Dhananjaya, 292:23 – 293:11, Exhibit "RRRRRRRR".

got on a plane, with a ticket acquired by Dewan, to the United States.[206] Dhananjaya testified that he didn't call Signal and enquire about his employment status because he had the visa and "didn't want to ask."[207]

Upon arrival in New York, Dhananjaya had a friend contact Signal on his behalf.[208] Dhananjaya's friend spoke to John Sanders at Signal seeking a job for Dhananjaya.[209] Though Dhananjaya emphasized that he had passed a skills test and possessed an H-2B visa to work for Signal, Sanders informed Dhananjaya that Signal was not hiring.[210] After a few days, Sanders contacted Dhananjaya and told him that Signal had arranged for a job for him at their Orange, Texas facility.[211] Upon arrival at Signal in Texas, Dhananjaya failed a skills test administered by Signal.[212] In a further effort to employ Dhananjaya, Sanders personally drove Dhananjaya to Signal Pascagoula to be tested there.[213] Dhananjaya passed the Mississippi skills test though he was not employed immediately by Signal because there were no available jobs.[214] Eventually, Sanders was able to get a job for Dhananjaya at Signal in Orange and personally drove Dhananjaya back to Texas to be employed by Signal as a welder.[215]

On July 30, 2007, Dhananjaya was informed by Signal – Orange that his H-2B visa would not be renewed.[216] After working for Signal for less than 45 days, Dhananjaya simply packed-up his belongings and left the Signal complex.[217]

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[206] ***See*** Dhananjaya, 294:8 – 24, Exhibit "SSSSSSSS".
[207] ***See*** Dhananjaya, 298:25 – 299:25, Exhibit "TTTTTTTT".
[208] ***See*** Dhananjaya, 231:15 – 232:8, Exhibit "UUUUUUUU".
[209] ***See*** Dhananjaya, 238:3 – 17, Exhibit "VVVVVVVV".
[210] ***See*** Dhananjaya, 239:24 – 240:19, Exhibit "WWWWWWWW". This was not news to Dhananjaya – he was informed in April, 2007, *in writing,* that Signal was no longer going to employ workers recruited by Dewan, Pol and Burnett.
[211] ***See*** Dhananjaya, 247:3 – 20, Exhibit "XXXXXXXX".
[212] ***See*** Dhananjaya, 249:16 – 24, Exhibit "YYYYYYYY".
[213] ***See*** Dhananjaya, 251:12 – 252:6, Exhibit "ZZZZZZZZ".
[214] ***See*** Dhananjaya, 252:15 – 253:15, Exhibit "AAAAAAAAA".
[215] ***See*** Dhananjaya, 263:16 – 264:24, Exhibit "BBBBBBBBB".
[216] ***See*** Declaration of Kechuru Dhananjaya, Depo Ex #807, page 5 paragraph 28, Exhibit "EEE".
[217] ***See*** Dhananjaya, 286:5 – 287:4, Exhibit "CCCCCCCCC".

viii. Testimony Concerning Statements Made in India:

Factually, eighty-five percent of the class representatives acknowledge that no Signal employee spoke to them directly, in India, about immigrating to the United States on a permanent basis in return for the payment of money.

For example, Khuttan confirmed that though he thinks he saw a Signal representative in India, he never spoke a word to him:

> Q: Did you ever see a representative of Signal International over in India before you left to come to the United States?
>
> A: I never met him but I know he was there.
>
> Q: ...Was it just one person?
>
> A: One. One.
>
> Q: Do you happen to know his name?
>
> A: No.
>
> * * *
>
> Q: Being that you never met the Signal guy, am I safe to assume that you never had any discussions with the Signal representative over in India?
>
> A: No.
>
> Q: In India?
>
> A: In India, no.

See Khuttan, 113:16 – 115:3, in pertinent part, Exhibit "DDDDDDDDD".

Kandahasamy confirmed that though he met and spoke to a Signal representative in India, there was no talk of permanent residency or green cards:[218]

> Q: Did you ever need a translator or did Salimon ever have to translate when the

[218] Plaintiffs used "permanent residency" and "green card" interchangeably. "Green card" is the colloquial term for "lawful permanent resident" status.

> Signal representative spoke to you, or is it like you said before, two times now, that the only thing the Signal representative said directly to you was, congratulations, you passed the test, and you could go to America?
>
> A: Those are the only two things I remember.
>
> Q: That the Signal representative said to you?
>
> A: That's all I remember.

See Kandahasamy, 173:6 – 22, Exhibit "EEEEEEEEE".

The plaintiffs concede that other individuals (e.g. Dewan, Pol and Burnett) had these conversations, about green cards and permanent residency, with them, but not Signal. Padaveettiyl testified that Dewan, not a Signal representative, promised him a green card in exchange for payment of money and that he never heard of Signal until after his consulate interview, merely two days before his departure for the United States.[219] Thangamani confirms that Salimon, an employee of Dewan, and not Signal, promised him a green card.[220] Sulekha concedes that Dewan, at a meeting in Cochin in May 2006 told him that he could get a green card through Signal.[221] Finally, Dhananjaya testified that he was told about green card opportunities after responding to an advertisement which promised permanent residency in exchange for monetary payments and following conversations with an employee of Medtech, a Dewan office, in Dubai in 2003.[222] Only one plaintiff testified that a Signal representative, along with Burnett, promised him a green card in India in exchange for payment of fees.[223] Signal vigorously denies this allegation and when impeached on this testimony in deposition, David was

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[219] ***See*** Padaveettiyl, Vol II, 86:2 – 89:3 and Vol III, 60:15 – 21, Exhibits "FFFFFFFFF" and "GGGGGGGGG" respectively.
[220] ***See*** Thangamani, 200:11 – 201:9, Exhibit "HHHHHHHHH".
[221] ***See*** Sulekha, 138:1 – 140:15, Exhibit "IIIIIIII". Sulekha was first told by Sachin Dewan about green card opportunities in New Orleans and California a full year before this meeting, in early 2005, well before Katrina and Rita and well before Signal contracted with Global Resources. ***See*** Sulekha, 140:16 – 22, Exhibit "JJJJJJJJ".
[222] ***See*** Dhananjaya, 62:7 – 65:25, Exhibit "KKKKKKKKK".
[223] ***See*** David, 217:23 – 219:21, Exhibit "LLLLLLLLL".

unable to even describe these individuals or identify them by name. Regardless, this testimony, inconsistent with the testimony of all other class representatives, underscores the importance of having each plaintiff testify in front of a jury concerning the facts and circumstances surrounding their recruitment from India.

The question of whether the behavior of others can be attributed to Signal is one of law, not fact. But, to even know which legal question to rightly ask, one has to develop the facts, and that causes individual issues to predominate. No class wide proof is available, for example, on the threshold question of whether a plaintiff claims that he spoke directly to Signal in India. This is thus the classic case in which the question degenerates into a series of mini-trials, precluding certification. ***Gene, supra***.

H. <u>The Trafficking Claims Cannot be Certified</u>:

The claims arising under Chapters 75 and 77 of the United States Criminal Code, the claims Signal has called "the Chapter 77" or "trafficking" claims are addressed below.[224] ***See e.g., United States v. Alzanki***, 54 F.3d 994, 1000 n. 3 (1st Cir. 1995) ("Most peonage and involuntary servitude cases in recent years have involved migrant agricultural workers.").

These are the claims that Signal knowingly used illegal means to bring Indian workers to its shipyard intending to turn them into involuntary servants. There is no case to which this Court can turn for a simple recipe for resolving the class certification questions under Rule 23(b)(3). This Court must resolve each question using the methodology set forth in ***Gene***, thinking about how a trial on the merits would be conducted if a class were certified. ***Gene, supra***, at 326.

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[224] Chapter 77 is titled, "Peonage, Slavery, and Trafficking in Persons." ***See*** 18 U.S.C. §§ 1581, *et seq.* (West Supp. 2009). Chapter 77 cases cover human trafficking in violation of § 1590; enticement into slavery in violation of § 1583; involuntary servitude in violation of § 1584; forced labor in violation of § 1589 and unlawful document practices to further trafficking in violation of § 1592(a). After the events in this case, these laws were amended by Congress in ways that Signal is confident cannot be retroactively applied to this case.

i. RICO Requirements Preclude Certification:

When other district courts in the Fifth Circuit have thought about how a trial on the merits would be conducted if a class were certified with regard to a civil RICO claim, these courts have concluded that "it may not be possible to certify a class in a RICO action within the Fifth Circuit." ***Cf. Richard, supra***, 208 F.R.D. at 584; ***Gyarmathy, supra*** (same). One of this brief's major themes is that RICO's legal requirements preclude the certification of this suit's multiple, Chapter 77-based and mail and wire fraud-based RICO claims. ***See, e.g.***, footnote 226, ***infra***.[225]

One RICO theory is founded on Chapter 75 of the Criminal Code, rather than Chapter 77. The § 1546 claim, concerning "immigration document fraud," ***see*** FAC, ¶ 284(c), is based on a statute that looks to whether fraud occurred with regard to immigration documents, as the title of the statute suggests. Signal will address why this claim cannot be certified at the end of this brief.

The classic illustration of the truism that RICO claims defy certification is ***Sandwich Chef's*** discussion of RICO's causation requirements.[226] Causation is not the only attribute of

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[225] In a discussion of fraud, it is useful to recall what fraud is said to be. As the Fifth Circuit observed in ***Mukasey, supra***, 519 F.3d at 540, "'fraud', . . . is 'a ***knowing*** misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.' . . . 'fraud occurs with consent . . . ***unlawfully*** obtained.'" (Emphasis added). Therefore, when the allegation in a RICO case is that a conspiracy was formed to engage in fraud, proof of the agreement, ***see Akpan, infra***, must involve proof that all of the partners in the conspiracy intend for one or more of the persons in the conspiracy to misrepresent the truth or conceal material facts knowingly to induce a victim to act to his or her detriment. ***Id***. Each participant in the conspiracy must have the conscious intent to engage in fraud. Not every conspirator, however, needs to commit an overt act. ***See Salinas, infra***.

[226] ***See Sandwich Chef of Texas, supra***, 319 F.3d at 219-20: "Proximate cause generally demands that a misrepresentation be relied upon by the plaintiff, individually. *See Summit*, 214 F.3d at 562 ("When civil RICO damages are sought for injuries resulting from fraud, a general requirement of reliance *by the plaintiff* is a commonsense liability limitation.") (emphasis added)). RICO fraud cases "require a showing of detrimental reliance *by the plaintiff*, which is consistent with *Holmes*' admonition that federal courts employ traditional notions of proximate cause when assessing the nexus between a plaintiff's injuries and the underlying RICO violation." *Id.* at 560 (footnote omitted) (emphasis added); *see Bolin*, 231 F.3d at 978 ("[A] finding of RICO fraud liability requires a showing of reliance by *each plaintiff*." (emphasis added)). ***"Individual findings of reliance necessary to establish RICO liability and damages preclude . . . (b)(3) certification[.]"*** *Bolin*, 231 F.3d at 978. "Claims for money damages in which individual reliance is an element are poor candidates for class treatment, at best. We have made that plain." *Patterson*, 241 F.3d at 419. . . . When a district court certifies a case as a class action, despite the fact that the predominance requirement cannot be met, it errs as a matter of law. *See id.*

RICO law that profoundly complicates certification. Also complicating the certification of RICO cases under Rule 23(b)(3) is what the Fifth Circuit has labeled the "substantive" RICO statute, § 1962. ***See United States v. Elliott***, 571 F.2d 880, 902 (5th Cir. 1978) (noting also that RICO statute was born of desire to facilitate criminal prosecution of "multi-faceted, diversified" conspiracies like those used by organized crime figures). ***See also Sedima, S.P.R.L.*** v. ***Imrex Co., Inc.***, 473 U.S. 479, 489, 105 S. Ct. 3275, 3281, 87 L. Ed.2d 346 (1985) ("Section 1962 renders certain conduct 'unlawful'; § 1963 and § 1964 impose consequences, criminal and civil, for 'violations' of § 1962.").

The complication, as the United States Supreme Court indirectly noted is that determining whether any individual has a cause of action under § 1964(c) for a violation of § 1962 requires the Court to assess whether the person claiming injury has shown that his injury was caused by an overt act of racketeering or by an act otherwise wrongful under RICO. This burden, on its face, implies a multitude of individual issues concerning whether the plaintiff's individual injury was caused by an overt act of racketeering or by an act otherwise wrongful under RICO.[227]

The pervasive issues of individual reliance that generally exist in RICO fraud actions create a working presumption against class certification." (Emphasis added). ***See also In re: Mastercard Int'l Inc. Internet Gambling Litigation***, 132 F. 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. Therefore, plaintiffs 'face[] an additional hurdle' . . ." (Internal citation omitted); ***Ladd v. Equicredit Corp. of America***, 2001 U.S. Dist. LEXIS 14422, * 9 (E.D.La. Sept. 6, 2001) (Clement, J.) (same). ***Cf. Regents, supra***, 482 F.3d at 393 (in non-RICO case, Fifth Circuit observes, "Reliance 'provides the ***requisite*** causal connection between a defendant's misrepresentation and a plaintiff's injury.'") (Citation omitted and emphasis added). ***Abraham v. Singh***, 480 F.3d 351 (5th Cir. 2007) is not to the contrary, for although the case involved RICO claims paralleling those in this case, ***Abraham*** did not consider either proximate causation or, like ***Sandwich Chef***, the intersection of RICO causation and class certification.

[227] ***See Beck v. Prupis***, ***infra***, at 505, 120 S. Ct. at 1616 ("injury caused by an overt act that is not an act of racketeering or otherwise wrongful under RICO . . . is not sufficient to give rise to a cause of action under § 1964(c) for a violation of § 1962(d)."). ***See also Salinas v. U.S.***, 522 U.S. 52, 63, 118 S. Ct. 469, 477, 139 L. Ed.2d 352 (1997) (partners in criminal plan must agree to pursue same ***criminal*** objective; *scienter* required is agreement that one or more partners will engage in conduct that constitutes the crime); ***Beck v. Prupis***, 529 U.S. 424, 501 n. 6, 120

A majority of the threshold facts in this case occurred in India, where the plaintiffs allege that persons fraudulently induced them to pay thousands of dollars for documents the plaintiffs incorrectly believed would enable them to permanently immigrate to the United States. In prior briefs, plaintiffs have represented to the Court that the law will easily enable them to attribute to Signal the allegedly unlawful actions of these third persons, in India, who were never employees of Signal. When plaintiffs argue that this rule of decision is easy for a court to manage, they demonstrate, Signal believes, a profound ignorance of § 1962. ***See*** footnote 228, ***infra***. Signal's position is that the behavior of third persons who were not employees of Signal cannot be attributed to Signal, under § 1962, other than through the RICO conspiracy statute, § 1962(d). ***See Beck***, ***supra***, at 503, 120 S. Ct. at 1614 ("conspiracy claim" is "mechanism for subjecting co-conspirators to liability when one of their member committed a tortious act."); ***Salinas***, ***supra***, at 65, 118 S. Ct. at 477 ("A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, . . ."); ***Crowe v. Henry***, 43 F.3d 198, 203 (5th Cir. 1995); ***Landry v. Air Line Pilots Ass'n***, 901 F.2d 404, 425 (5th Cir. 1990).

The FAC invokes two bases for liability against Signal: § 1962, conspiracy, i.e., §

S. Ct. 1608, 1614 n. 6, 146 L. Ed.2d 561 (2000) ("We have turned to the common law of criminal conspiracy to define what constitutes a violation of § 1962(d), ***see Salinas***, . . ."); ***United States v. Akpan***, 2010 U.S. App. LEXIS 19790, *2 (5th Cir. Sept. 23, 2010) (when fraud is object of conspiracy Government must prove that defendant acted with intent to defraud); ***United States v. Diecidue***, 603 F.2d 535, 546 (5th Cir. 1979) ("'Conspiracy' incorporates willfulness and specific intent.") (Citations omitted). ; FAC ¶ 282 (alleging that defendants engaged in pattern of racketeering activity involving "fraudulent promises; exorbitant fees, forced labor, and/or trafficking."). Congress enacted the Racketeer Influenced and Corrupt Organizations Act in 1970 in an effort to eradicate organized crime. Terrance G. Reed, ***Symposium—Reforming RICO: If, Why and How?/The Defense Case for RICO Reform***, 43 Vand. L. Rev. 691, 693 (1990) (hereinafter, "Symposium"); ***See also*** 18 U.S.C. §§ 1961, *et seq.* (West Supp. 2006) (Racketeer Influenced and Corrupt Organizations Act). ***Cf.*** FAC ¶ 282 (alleging that defendants engaged in pattern of racketeering activity involving "fraudulent promises; exorbitant fees, forced labor, and/or trafficking."). "RICO's novel contribution consisted of elevating certain types of criminal conduct to a new level of culpability when the conduct had a corrupting influence on legitimate business." ***See Symposium, supra***, at 693-94. "[T]he 'enterprise' concept was RICO's singular contribution to criminal law. Congress enacted RICO primarily to combat enterprise criminality . . ." ***See id.***, at 699 (footnote omitted). To accomplish its purposes, one of the Act's innovations was a new conspiracy crime, set forth in § 1962(d), of conducting or participating in the affairs of "an enterprise through a pattern of racketeering activity . . ." This new conspiracy crime enabled the Government to "cast a wider net" with regard to conspiracies than had previously been true under more traditional, conspiracy theories. ***See Elliott***, ***supra***; ***see also U.S. v. Turkette***, 656 F.2d 5 (1st Cir. 1981), ***rev'd on other grounds***, ***United States v. Turkette***, 452 U.S. 576 (1981).

1962(d), and § 1962(c). ***See id.***, at ¶ 282. The § 1962(c) theory which prohibits "any person employed by or associated with any enterprise . . . [from] conduct[ing] or participat[ing]" in its affairs through a pattern of racketeering activity, ***is invalid as to Signal***. ***See*** 18 U.S.C. § 1962(c) (West Supp. 2006). ***See Crowe v. Henry***, ***supra***; ***Landry v. Air Line Pilots Ass'n***, ***supra***. This theory is accordingly ripe for dismissal. ***Cf. In re: Andrew Mounce***, 390 B.R. 233, 241 (W.D.Tex. 2008) (motion for class certification cannot be granted as to legal theory that is not recognized by applicable state or federal law). ***See also*** footnote 252, ***infra*** ("[t]he general rule is that pre-certification dispositive rulings are not prohibited." 5 Moore's Federal Practice, ***infra***, at § 23.81[2], ***citing***, *inter alia*, ***Floyd v. Bowen***, 833 F.2d 529, 534-535 (5th Cir. 1987). Because this theory is invalid, there is no need to consider whether cases from other Circuits suggesting that § 1962(c) encompasses *respondeat superior* and agency liability apply in this Circuit to a case with these facts.[228]

The Fifth Circuit explained why the plaintiffs' § 1962(c) claim is invalid in ***Crowe*** and ***Landry***. "Because of the structure of this language, th[e] Court has held that the RICO person [i.e., usually, the defendant] and the RICO enterprise must be distinct." ***See Crowe***, ***supra***, at 205. "[A] RICO person cannot employ or associate with [it]self under this subsection." ***See id.***,

[228] In ***Crowe***, for example, the Fifth Circuit said that, in contrast to subparagraph (c), subparagraphs (a) and (b) of § 1962, which have ***not*** been invoked in this case, present no barrier to vicarious liability, but this case does not allege that Signal is liable here for the acts of officers or employees, and vicarious liability is therefore not an issue in this case. ***See Crowe***, ***supra***, at 206. ***See also*** FAC ¶¶ 271, ***et seq***. (setting forth RICO claims under §§ 1962(c) and (d) only). One of the unsettled weaknesses of the agency argument is that § 1962 is unambiguously a criminal statute, in contrast to § 1964. Signal recognizes that courts have held that § 1964 is to be construed liberally when doing so furthers RICO's broad goals, but ***FCC***, ***infra***, and ***H.J., Inc.***, ***infra***, stress that criminal statutes have to be uniformly construed strictly in civil and criminal cases. In addition, no United States Supreme Court or Fifth Circuit case has squarely confronted the contradiction between criminal responsibility and conventional agency liability. However, a long discussion of the common law of civil conspiracy in ***Beck*** implies that the Supreme Court views § 1962(d) as the exclusive source of law pertaining to liability for concerted action. ***See Beck***, ***supra***, at 502, 120 S. Ct. at 1614. In light of the way the present action has been pled, however, this is not a question squarely presented by this case because the § 1962(c) theory is in this instance invalid and the agency theory has no applicability whatsoever to § 1962(d). By definition, the subject-matter of § 1962(d) preempts the field when the question is whether a group of allegedly affiliated persons are, in fact, conspirators who are liable, in law, for one another's actions. ***See***, ***e.g.***, ***Salinas***, ***supra***, at 64-65, 118 S. Ct. at 477 (citing ALI's Model Penal Code for principle that person may be convicted of conspiracy so long as he agrees with other persons that they or one or more of them will engage in conduct that constitutes a crime).

at 206. Crucially, the FAC alleges that Signal was a "member" of all RICO Enterprises alleged in the FAC. ***See*** FAC ¶¶ 279, 285, and 290 (describing RICO Enterprises). ***Cf. Crowe, supra***, at 206 ("In this case, Crowe has alleged that Henry is both the RICO person and ***a member*** of the Crowe/Henry association-in-fact. This Court has found, though, that a RICO person cannot employ or associate with himself under this subsection.") (Emphasis added). ***See also Landry, supra***, 901 F.2d at 425 (RICO person ordinarily synonymous with "defendant"). Therefore, as a matter of law, the § 1962(c) theory is unsound as to Signal. ***See, e.g., Landry, supra***, 901 F.2d at 425 ("Under this theory, [Signal] cannot be a RICO person – or defendant – for the § 1962(c) violation because in such a situation, 'the 'person' and the 'enterprise' must be distinct.'"). (Citation omitted).

This leaves § 1962(d), the conspiracy subparagraph of § 1962, which makes it "unlawful for any person to conspire to violate any of the provisions of subsection (a), (b) or (c) of this section." ***See*** 18 U.S.C. § 1962(d) (West Supp. 2006). This law likewise precludes certification.[229]

Section 1962(d) requires the plaintiffs to prove that Signal ***specifically intended*** to commit every predicate offense Signal is alleged to have committed in this case in India through other persons. ***See*** footnote 227, ***supra***(emphasis added). Signal has an overwhelming interest in establishing that § 1962(d) is the plaintiffs' exclusive remedy in this case by elaborating this threshold proof about who allegedly, directly, injured the plaintiffs in the case of every claimant. Signal's profound interest in adducing this proof is deeply relevant to certification under ***Allison, supra***. ***See Allison, supra***, 151 F.3d at 407 ("plaintiffs' claims for money damages and the

[229] ***Cf. Gene, supra***, at 329 (when absence of class-wide proof suggests that action will degenerate into series of mini-trials over critical fact question certification under Rule 23(b)(3) is precluded); ***Strain v. Nutri/System, Inc.***, 1990 U.S. Dist. LEXIS 17031, *16 (E.D.Pa. Dec. 12, 1990) ("Absent in the instant matter is the fixed set of fraudulent statements . . . that can be presumed to have been heard and relied upon by each member of the class, therefore this court's analysis in determining whether individual issues predominate must consider the individual issues of reliance.").

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."). The RICO claims are therefore not amenable to certification.

The evidence Signal wants to gather from every plaintiff is that the plaintiffs were fraudulently solicited (allegedly), in India, ***as individuals***, by third persons who were not employees of Signal. Signal has an overwhelming interest in this threshold evidence in every plaintiff's case, i.e., in establishing that every plaintiffs' exclusive remedy with regard to behavior that occurred in India is § 1962(d). This is so because the question the law wants answered is whether Signal and the actors in India were co-conspirators, ***see Beck***, ***supra***. Signal conspired with no one, making this theory of liability a case-determinative one.[230]

Since the salient question under ***Gene*** is whether class-wide proof exists to decide the threshold issue on behalf of each claimant, and since the proof adduced in this case at the beginning of this brief shows that this threshold issue does not lend itself to resolution by means of class-wide proof, this case cannot be certified with regard to the RICO claims that originated in India, which are the mail, wire and trafficking claims. ***Gene***, ***supra***, at 329. As to these claims, the class certification motion should be denied.

I. The First Claim for Relief Under § 1595 Cannot be Certified:

The First Claim for Relief is a claim under § 1595 of Chapter 77 of the Criminal Code. That statute grants a civil remedy for certain violations of Chapter 77. For the many reasons set forth throughout this memorandum as to the reasons why the underlying §§ 1589 and 1590 claims cannot be certified, the § 1595 claim cannot be certified. This disposes of the First Claim for Relief.

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[230] *See* ***Regents of the Univ. of Calif.***, ***supra***, 482 F.3d at 380 (". . . we may address arguments that implicate the merits of plaintiffs' cause of action insofar as the arguments also implicate the merits of the class certification decision.").

J. *Allison* Precludes Certification of Trafficking Claims:

The trafficking claims underscore ***Allison's*** warnings about certifying fact-driven cases seeking tort damages. ***See Kozminski, supra***, at 960, 108 S. Ct. at 2769 (Brennan, J., concurring) (observing that individuals who claim psychological coercion make a claim that is more highly individualized). Further, the Fifth Circuit has emphasized that claims that reverberate with reliance defy certification. ***Patterson v. Mobil Oil Corp.***, 241 F.3d 417, 419 (5th Cir. 2001) ("Claims for money damages in which individual reliance is an element are poor candidates for class treatment at best."); ***Martinez v. Mukasey***, 519 F.3d 532, 540 (5th Cir. 2008) (fraud is behavior calculated to induce another to act to his detriment). Trafficking claims reverberate with reliance because they presuppose reliance on threats. Therefore, the trafficking claims in this case cannot be certified. ***Id.***

K. Signal's Codal, Statutory and Constitutional Rights also Preclude the Certification of the Traffficking Theories:

Understanding why the forced labor claims cannot be certified also involves considering codal, statutory and constitutional impediments to certification in addition to the United States Supreme Court cases discussed in this brief. ***Cf. Allison, supra***, at 423;[231] Legislative History, ***supra***. For example, Signal's rights have a basis in the Fifth Amendment in addition to the Seventh Amendment. ***See In re: Eisenberg***, 654 F.2d 1107, 1111 (5th Cir. 1981) (full and fair hearing includes right not only of each party to be apprised of all evidence upon which adjudication will rest but also right of each party to explain or rebut ***all*** such evidence). ***See also Lindsey v. Normet***, 405 U.S. 56, 66, 92 S. Ct. 862, 870-71, 31 L. Ed.2d 36 (1972) ("'Due process requires that there be an opportunity to present ***every available*** defense.'") (Citations omitted).

[231] "In this case, both parties have a *Seventh Amendment* right to have a jury determine all factual issues necessary to establish the plaintiffs' . . . claim for legal damages . . ."

Also, the codal impediments to certification include the Federal Rules of Evidence which grant Signal the ***right*** to cross-examine each claimant about his claim that Signal terrorized him into nonconsensually providing his labor. Fed.R.Evid. 402 (West Pamph. 2009) (relevant evidence is admissible). Even if there are countervailing considerations under Rule 403, Rule 403 must be utilized ***"sparingly."*** ***See Baker v. Canadian National/Ill. Cent. Railroad***, 536 F.3d 357, 369 (5th Cir. 2008), ***cert. denied***. (Emphasis added).

Under Rule 601, no witness is more "competent" to testify about coercion than the person coerced. ***Cf.*** 2 Moore's Federal Pamphlet, § 601.5 (LexisNexis 2006) (fully competent or especially competent witnesses should be freely allowed to testify). The relevance of the testimony of every one of the claimants is undeniable under Fed.R.Evid. 401 (West Pamph. 2009). The rule of Fed.R.Evid. 402 is therefore of indescribable importance in light of ***Allison***: "***All*** relevant evidence ***is*** admissible . . ." Fed.R.Evid. 402 (West Pamph. 2009) (emphasis added). Therefore, the trafficking claims cannot be tried representatively. ***Cf. Gene***, ***supra***, at 327 (". . . only mini-trials can determine this issue.")

V. RICO PROXIMATE CAUSE ANALYSIS PRECLUDES CERTIFICATION OF ALL RICO CLAIMS:

In this Circuit, RICO proximate cause analysis precludes certification so strongly that ***Richard*** observed that, in this Circuit, the certification of RICO claims is not possible. ***Cf. Sandwich Chef***, ***supra***, at 219 ("'[I]ndividual findings of reliance necessary to establish RICO liability and damages preclude . . . (b)(3) certification[.]'") (Citation omitted). ***See*** also footnote 226, ***infra***. Therefore, these claims cannot be certified. ***See, e.g., Hemi Group, LLC v. City of New York***, -- U.S. --, 130 S. Ct. 983, 175 L. Ed.2d 943, 952 (2010) (when proof fails to show that alleged RICO violations led "directly" to plaintiff's injuries, plaintiff fails to meet RICO's

"'requirement of a direct causal connection'" between predicate offense and alleged harm).[232]

VI. THE FORCED LABOR CLAIM UNDER § 1589 CANNOT BE CERTIFIED:

The trafficking statutes themselves further multiply the reasons for concluding that the certification of such claims is not possible. At the time of the filing of this suit, the forced labor statute, 18 U.S.C. § 1589 (West Supp. 2006), 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 . . ." (Section 1589 has since been amended but the amendments are substantive).

Section 1589(1) covers what ***Kozminski*** addressed, i.e., ***direct*** threats of serious, physical harm, i.e., a beating or something of like kind. This is not something that the plaintiffs in this case actually claim, factually, and this claim therefore cannot be certified. ***See, e.g.***, FAC ¶ 247 (reference to allegation that class representatives were reasonably in fear of their own safety based on events that physically happened to ***other*** H-2B workers). ***See also*** Sec. III – F.

The second prong, § 1589(2), the scheme-based section of § 1589, was Congress' response to ***Kozminski***. Section 1589(2), however, is also the subparagraph of § 1589 addressed by the Legislative History of the statute in a way that stunningly precludes certification because it underscores the predominance of individual fact questions. Legislative History, ***infra*** ("section

[232] Just so, the Fifth Circuit's pattern jury charge on RICO causation, which is reprinted on the Court's website, reads: ". . . to find that injury to the plaintiff's business or property was caused by reason of the defendant's violation of RICO, you must find that the injury . . . was caused by, ***and was a direct result of the defendants' violation*** . . . Therefore, you must find that the commission of the acts . . . ***directly resulted in*** the injury or played a substantial role in producing the injury." (Emphasis added).

1589's terms and provisions are 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.").[233] Congress precluded the certification of § 1589(2) in that History. ***Id. See also Kozminski, supra***, at 970, 108 S. Ct. at 2774 (Stevens, J., concurring).

That leaves the third prong, § 1589(3), the legal process abuse prong, as the sole issue with regard to certification. In light of the plaintiffs' contention that the plaintiffs were threatened with deportation and that this constituted a violation, by Signal, of § 1589(3), § 1589(3) is the focus of the balance of this brief.

Claims under subparagraphs (1) and (3) are also based on individual reliance and are therefore impervious to certification. ***See Sandwich Chef of Texas, supra***, 319 F.3d at 219-20. A threat is only threatening if the "victim" relies on it and acts accordingly, out of fear. Therefore, threats are reliance-based events. They are also inherently coercive. This is significant, because cases based on coercion cannot be certified.[234] ***See also Kozminski, supra***, 487 U.S. at 952, 108 S. Ct. at 2765 (vulnerabilities of victim are relevant in determining whether physical or legal ***coercion or threats thereof*** compelled victim to labor).

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[233] ***See*** Legislative History ("Legislative History"), at § 12, reprinted at http://thomas.loc.gov/cgi-bin/cpquery/R?cp106:FLD010:@1(hr939. (Emphasis added).

[234] ***See Bogosian v. Gulf Oil Corp.***, 561 F.2d 434, 450 (3rd Cir. 1977) (when coercion is necessary element of *prima facie* case each claimant must prove coercion on individual basis and this precludes certification); ***Owner-Operator Independent Drivers Assoc. v. Supervalu***, 2008 U.S. Dist. LEXIS 20420, *9 (D.Minn. March 14, 2008) (if plaintiffs were asking Court to certify class of plaintiffs who had actually been coerced there would be merit in defendant's argument that individual issues predominated); ***Freeland v. AT&T Corp.***, 238 F.R.D. 130, 155 (S.D.N.Y. 2006) ("This evidence does not establish that coercion could be proved on a classwide basis."); ***Larry James Oldsmobile-Pontiac-GMC v. General Motors Corp.***, 164 F.R.D. 428, 439 (N.D.Miss. 1996) (same, though coercion may be implied when it arises from uniform, written agreement common to all class members). ***See also Scheidler v. National Organization for Women***, 537 U.S. 393, 123 S. Ct. 1057, 154 L. Ed.2d 991 (2003) (crime of "coercion" separate from extortion and involves use of force or threat of force to restrict another's freedom); ***Brown & Root, Inc. v. Louisiana State AFL-CIO***, 10 F.3d 316 (5th Cir. 1994) (to determine whether union engaged in action constituting coercion unions' entire course of conduct would need to be examined).

In addition, the class representatives signed contracts with Signal stipulating to the payment of wages, a fact that underscores the predominance of individual issues in light of ***Channer***.[235] Plaintiffs do not allege that these contracts contained illegal clauses that coerced them into providing labor against their will. Therefore, this is not one of those exceptional cases in which coercion can be inferred from a uniform agreement. ***Cf. Larry James Oldsmobile-Pontiac-GMC, supra.***

The Legislative Histories of the TVPA (Trafficking Victims Protection Act) and TVPA reauthorization do not address the issue of class certification. While the Legislative History of the 2003 reauthorization discusses civil litigation extensively, both with regard to § 1595, which the 2003 legislation created, and with regard to civil RICO, for which the 2003 legislation added additional predicates, Congress said nothing about using such offenses in class actions.[236] Thus, neither Congress nor the Department of Justice has considered the issues that now confront this Court with regard to certification.[237]

A fact complicating certification is that the Chapter 77 statutes are criminal statutes to be construed strictly.[238] The Court must fold this principle into the analysis and be "rigorous" in its thinking about certification as it considers the formidable, individual burdens the plaintiffs face in light of § 1589's Legislative History to prove that their labor was coerced rather than

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[235] ***See*** Affidavits, Exhibits "SSS" and "TTT".

[236] The 2003 legislation added the predicate acts of forced labor (§ 1589); trafficking to carry out the other Chapter 77 offenses (§ 1590) and sex trafficking (§ 1591).

[237] ***Cf.*** Order and Reasons, Doc. # 754, at p. 5 ("Signal contends that the trafficking and peonage claims turn on proof of compulsion, that being the antithesis of consent . . .")

[238] ***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 in Judgment) (". . . 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).

consensually rendered.[239]

VII. THE ALLEGED THREATS OF DEPORTATION CANNOT BE CERTIFIED:

Since no plaintiff alleges or testifies that he was the subject of a deportation proceeding commenced at Signal's request or that Signal caused him to be served with legal process, ***cf. Hemi, supra***, the only, possible, legal coercion violation of § 1589(3) at issue in this proceeding is "threatened abuse . . ." ***See*** 18 U.S.C. § 1589(3) (West Supp. 2009).[240]

A. Individual Issues Dominate Threats of Deportation:

Plaintiffs allege: "Defendant Signal . . . ***threatened Plaintiffs*** and other class members ***with deportation*** and deceived Plaintiffs . . . about the terms of their visas ***in a manner that constitutes an abuse of the legal process under . . . § 1589(3).***"[241] Neither the FAC nor the plaintiffs in testimony allege, however, that the plaintiffs were also threatened with arrest and confinement when they were threatened with deportation. ***Cf. United States v. Farrell***, 563 F.3d 364, 372-73 (8th Cir. 2009) (H-2B workers testified about threats of arrest and deportation unless they did what they were told and that defendants, who were eventually convicted of peonage, called police and FBI when two workers expressed desire to leave housekeeping jobs at hotel; defendants exploited workers' fear of being imprisoned by immigration authorities if they left their jobs earlier than expected).

As a matter of law, these facts are insufficient to satisfy the elements of the legal coercion cause of action. ***See Kozminski, supra***, at 943, 108 S. Ct. at 2760 (legal coercion occurs when imprisonment, confinement or peonage, or threats thereof, are used to extract labor from

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[239] ***Cf. Kozminski, supra***, at 960, 108 S. Ct. at 2769 (Brennan, concurring) ("criminal punishment cannot turn on a case-by-case assessment of whether the alternatives confronting an individual are sufficiently intolerable to render any continued service 'involuntary.'")

[240] In relevant part, on penalty of long imprisonment, the forced labor statute, § 1589(3), proscribes "knowingly provid[ing] or obtain[ing] the labor or services of a person-- . . . (3) by means of the abuse or threatened abuse of law or the legal process." ***See*** 18 U.S.C. § 1589(3) (West Supp. 2009). Congress expanded § 1589 further ***after the events in this action took place.***

[241] FAC ¶ 266 (emphasis added).

unwilling person). Signal is therefore entitled to judgment on this claim as a matter of law at the class certification stage. ***See Mounce, supra***; ***see also*** footnote 251, ***infra***.

Even if legal coercion is triable, it is incompatible with certification because individual issues arise from the need to, in every instance, consider whether the author of the threat knew, or believed that, he or she was saying something to "the victim" that offended the law. These fact questions preclude certification. ***Cf. Alzanki, supra***, at 1005 (threat of deportation should be evaluated in light of victim's special vulnerabilities, multiplying individual issues). ***See also Allison, supra***, at 423; ***Hemi, supra***, at 953; Fed. R. Evid. 601; Fed. R. Evid. 402; ***Eisenberg, supra***.

If § 1589(3) is construed in harmony with ***Kozminski, see Mukasey, supra***, 519 F.3d 541, which is the interpretive approach most consistent with the rule of lenity discussed below and with the doctrine of constitutional avoidance, § 1589(3) must be interpreted to require threats of confinement, imprisonment or peonage or worse, which is how Circuits other than the Seventh have construed § 1589(3). ***See Farrell, supra***. Since no one in this case alleges such a threat and since no one asserts that such a threat occurred factually, Signal can also argue that this claim is now ripe for dismissal on legal grounds, ***see Mounce, supra***.

B. Source of Legal Coercion Requires that Legal Coercion be Imprisonment or Peonage:

Interpretation of § 1589(3) is an exercise in statutory interpretation which must begin with the language of the statute itself. ***See*** 18 U.S.C. § 1589 (West Supp. 2006); ***Bourlesan v. Aramco, infra***, 857 F.2d at 1018-1019 (statutory language ordinarily regarded as conclusive unless ambiguous); ***United States v. Phillips, infra***, 543 F.3d at 1206 (statutory language must be consulted first).

In this case, the language of the statute is, "knowingly provid[ing] or obtaining the labor

or services of a person -- . . . (3) by means of the abuse or threatened abuse of law or the legal process." However, in light of ***Mukasey***, Signal will briefly postpone examination of the plain language of § 1589(3) in order to turn first to the opinion that locates the origin of the concept of legal coercion in the Thirteenth Amendment, namely, ***Kozminski***. ***Cf. Kozminski***, ***supra***, at 954, 108 S. Ct. at 2766 (Brennan, J., concurring) (". . . the use of the master's whip and the power of the State to compel one human to labor for another were clearly core elements of slavery that the Thirteenth Amendment and its statutory progeny intended to eliminate.").[242]

Kozminski concludes that the Thirteenth Amendment proscribed imprisonment, confinement or peonage. ***See Kozminski***, ***supra***, at 943, 108 S. Ct. at 2760. Section 1589(3) should be interpreted accordingly. The phrase, "abuse or threatened abuse of law or the legal process" in § 1589(3) was taken directly from ***Kozminski***.[243] This indicates that the concepts mean the same thing in both locations. ***See Mukasey***, ***supra***, 519 F.3d 541. Not one word of § 1589(3)'s Legislative History contradicts this view of the proper way to interpret § 1589(3).

"Section 1584 was enacted as part of the 1948 revision to the Criminal Code. At that time, all of the Court's decisions identifying conditions of involuntary servitude had involved compulsion of services through the use or threatened use of physical or legal coercion." ***Kozminski***, ***supra***, at 945, 108 S. Ct. at 2761 (internal citations omitted and emphasis added).

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[242] ***See also Mukasey***, ***supra***, 519 F.3d 541 (statutes must be construed as whole construing each section in harmony with every other part or section on same subject-matter because acts of Congress should not be read as series of unrelated and isolated provisions). ***See also*** 18 U.S.C. §§ 1581 *et seq.* (West Supp. 2006) (demonstrating that forced labor and involuntary servitude statutes are statutes on same subject matter by showing that both appear in Chapter 77 of Title 18, entitled, "Peonage, Slavery, and Trafficking in Persons); ***Kozminski***, ***supra***, at 945, 108 S. Ct. at 2761 (one gives effect to congressional intent by construing phrase, 'involuntary servitude,' in § 1584 in way consistent with understanding of Thirteenth Amendment prevailing at time of § 1584's enactment) (citation omitted).

[243] The defendants in ***Kozminski*** exploited two mentally challenged individuals, forcing them to work on their farm. A jury convicted them of involuntary servitude. Eventually, the Sixth Circuit reversed the convictions on the ground that the jury instructions were too amorphous. This was so partly because of the use of psychological coercion principles. ***Kozminski*** expressly rejected that concept and affirmed the reversal of the convictions, partly on the ground that the rule of lenity applied. ***Kozminski***, ***supra***, at 944, 108 S. Ct. at 2760 (guarantee of freedom from involuntary servitude "has never been interpreted specifically to prohibit compulsion of labor by other means, such as psychological coercion.").

The Supreme Court further held, "Absent change by Congress, we hold that, for purposes of criminal prosecution under § 241 or § 1584, the term 'involuntary servitude' ***necessarily*** means a condition of servitude in which the victim is forced to work for the defendant by the use of or threat of physical restraint or physical injury, ***or by the use or threat of coercion through law or the legal process.***"[244]

Hence, what legal coercion proscribes is using or threatening to use the power of the State to compel one to labor. ***See Kozminski, supra***, at 954, 108 S. Ct. at 2766 (Brennan, J., concurring). ***Kozminski*** developed this view of what legal coercion proscribes by reviewing the Court's prior precedents concerning the Thirteenth Amendment on the subject of slavery and involuntary servitude. "[I]n every case in which this Court found a condition of involuntary servitude, the victim had no choice but to work or be subject to ***legal sanction***. . . .," the Court said.[245]

The Court explained that "legal sanction" means, "'Compulsion of . . . service by the constant fear of imprisonment under the ***criminal laws***' violate[s] 'rights intended to be secured by the Thirteenth Amendment.'" ***Kozminski, supra***, at 943, 108 S. Ct. at 2760 (emphasis added). Also proscribed was peonage, or the threat thereof. Peonage refers to "a condition in which the victim is coerced by threat of ***legal*** sanction to work off a debt to a master; . . ." ***Id.*** (Citation omitted and emphasis added).

Also mentioned were cases in which the breach of a contract to labor were treated as a crime by the State. The Court recalled that its cases "invalidated [such] state laws subjecting debtors to prosecution and criminal punishment for failing to perform labor after receiving an

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[244] ***See Kozminski, supra***, 487 U.S. at 952, 108 S. Ct. at 2765 (emphasis added). ***Cf. id.***, at 938, 108 S. Ct. at 2757 ("Accordingly, [in *Shackney*] Judge Friendly concluded that § 1584 prohibits only "'service compelled by law, by force or by the threat of continued confinement of some sort . . .'").

[245] ***See Kozminski, supra***, at 943, 108 S. Ct. at 2760.

advance payment." ***Id.***

In summary, ***Kozminski*** concluded that "'§ 1584 prohibits . . . 'service compelled by law, by force or by the threat of continued confinement of some sort . . .'" ***Cf. Kozminski, supra***, at 938, 108 S. Ct. at 2757 (citation omitted). The legal coercion that violates § 1584 is peonage, confinement or imprisonment, conditions that only operate under the law's sanction, or threats thereof. ***See Kozminski, supra***, at 943, 108 S. Ct. at 2760. ***See also Channer, supra***, at 218 (assuming without deciding that ***state-imposed***, segregated detention is form of ***legal*** punishment where claim is that such detention has been threatened to obtain labor). This, then, is also what § 1589(3) proscribes. Not one word of § 1589's Legislative History contradicts this view.

A different theory, namely, that a threat of deportation might amount to a scheme-type violation of § 1589(2), may be viable in the abstract, but this does not aid the class representatives. The Legislative History of scheme-based claims under § 1589(2) conclusively proves that such theories are impervious to certification. ***Cf. Kozminski, supra***, at 960, 108 S. Ct. at 2769 (Brennan, concurring) (coercion ***is inherently individualized***) (Emphasis added).[246]

In addition, the FAC specifically claims that the threat of deportation argument has been linked by the plaintiffs not to the scheme-based part of § 1589 but rather to the legal coercion prong of the statute, i.e., § 1589(3). FAC ¶ 266 alleges: "Defendant Signal . . . ***threatened Plaintiffs*** and other class members ***with deportation*** and deceived ***Plaintiffs*** . . . about the terms of their visas in a manner that constitutes an abuse of the legal process ***under . . . § 1589(3)***." (Emphasis added). The Court should conduct its analysis accordingly, focusing on the fact that

[246] As discussed throughout this brief, § 1589(2) cannot be a source of certification because § 1589(2) is, by definition, a theory about what the plaintiffs were "caused [by the defendant] ***to believe*** . . ." 18 U.S.C. § 1589(2) (West Supp. 2006). (Emphasis added). Section 1589(1) similarly precludes certification. Section 1589(1) proscribes conventionally threatening behavior, the kind of behavior expressly proscribed by ***Kozminski***, "threats of serious harm to, or physical restraint against, that person or another person" because threats of that kind are equivalent to theories of individual reliance which preclude certification. ***See Calimlim, infra***, 538 F.3d at 711 (§ 1589(1) criminalizes ***direct*** 'threats of serious harm to . . . . [the victim] or another person.'") (Emphasis added).

legal coercion means the same thing under § 1589(3) that it means in ***Kozminski***, i.e., peonage, imprisonment, or confinement, or threats thereof.

In *dicta*, ***Kozminski*** thought about whether threatening an immigrant with deportation could constitute a threat of legal coercion. ***Kozminski***, ***supra***, at 948, 108 S. Ct. at 2762-3. ***Kozminski*** concluded that Congress did ***not*** in § 1584 hold that a threat of deportation is equivalent to legal coercion. Nor did ***Kozminski*** hold that a threat of deportation *ipso facto* violates § 1584. Further, ***Kozminski*** expressly held that § 1584 did ***not*** incorporate an immigrant-centric view of legal coercion. ***Id.*** ***Kozminski*** observed: "far from broadening the definition of involuntary servitude for immigrants . . . ***§ 1584 eliminated any special*** distinction among, or ***protection of, classes of victims.***" ***Id.*** (emphasis added). No case has held that a threat of deportation is in and of itself a crime under § 1589(3). To the extent that ***Calimlim***, which Signal discusses below, suggests otherwise, Signal will show in a moment that ***Calimlim*** does not deserve to be followed on this question.

C. Plain Language Interpretation of Section 1589(3) Favors Signal:

As noted earlier, elemental, federal law provides that Congressional intent, the ultimate benchmark in every statutory interpretation exercise, is to be sought first in the plain language of the statute. ***See Bourlesan v. Aramco***, 857 F.2d 1014, 1018-1019 (5th Cir. 1988), ***adopted on en banc rehearing***, ***cert. granted***, ***aff'd*** (statutory language ordinarily regarded as conclusive unless ambiguous); ***United States v. Phillips***, 543 F.3d 1197, 1206 (10th Cir. 2008) (statutory language must be consulted first). In their briefs, plaintiffs refer to Congress' intent with regard to § 1589 by referring to § 1589's Legislative History. In so doing, they obviously overlook the plain

language rule and therefore engage in a legally flawed argument, ***id.***, which should be ignored. ***Id.***[247]

If the Court gives the words of § 1589(3) – "abuse or threatened abuse of the law or legal process" -- their generally prevailing meaning, § 1589(3) refers to actually using or threatening to use "the principles and regulations established in a community by some authority and applicable to its people, whether in the form of legislation or of custom and policies recognized and enforced by judicial decision" and/or the law's summonses, mandates, or writs, in a way that ***wrongs, harms, injures or offends the law, or constitutes an impropriety, with regard to the law***, to obtain the labor or services of a person. ***Cf.***, ***e.g.***, http://dictionary.reference.com.

Under the generally prevailing meaning of the language of § 1589(3), individual issues undoubtedly predominate. Partly, this is true because of the need to evaluate whether the perpetrator wronged or injured "the law." The speaker's "*scienter*" also has to be considered. ***Calimlim***, ***infra***. The appeal of a plain language interpretation of § 1589(3) is that it conforms to what lay persons think. Such an interpretation of the statute therefore has the appeal of representing a constitutional avoidance measure. This is a reference to the doctrine that states that courts must avoid interpretations of statutes that lead to potential problems of unconstitutionality, such as applied vagueness. ***See Clark v. Rozos***, 543 U.S. 371, 381, 125 S. Ct. 716, 724, 160 L. Ed.2d 734 (2005).

The generally prevailing meaning of the terms used in § 1589(3) signifies wronging or offending the law, or dealing with it improperly, to obtain the labor or services of a person. A layperson would find such an interpretation of the statute organic; one wrongs the law or deals with it improperly if one tells an immigrant that the State will punish him with imprisonment

[247] Signal is aware of no brief in which the plaintiffs have endeavored to provide this Court with an interpretation of § 1589(3) that is based on is plain language.

unless he labors. What is critical about this plain language interpretation of § 1589(3) in accordance with constitutional avoidance principles is that it multiplies the number of individual issues. The fact-finder has to consider each speaker's motives and intentions under the circumstances of each speaker's interaction with the victim for reasons rooted in both the language of the law and "*scienter*." Also, abusing the law implies a consciousness of employing the law's precepts in a way that twists and distorts the law to achieve a purpose that is evil. Such an inquiry is intensely case-specific, too specific to be certified. ***See Kozminski, supra***, at 956, 108 S. Ct. at 2767 (Brennan, J., concurring).

One simply cannot be imprisoned for decades under § 1589(3), consistently with the Constitution, for interpreting the law in good faith with significant accuracy. Mentioning to an H-2B worker, with significant accuracy, that failing to satisfy the employer's standards risks termination and that termination implies deportation, the gist of the complained-of remark, cannot be a crime. It cannot be a crime because such a statement is objectively, largely correct and the vagueness of the statute prevents a person from knowing that a significantly accurate statement can be criminal.[248] Under ***Allison***, Signal has a corresponding right to demand that

[248] Paragraph 266 of the FAC alleges that Signal misrepresented the law to the plaintiffs with regard to the conditions of their visas. This is a presumably the substance that underlies their complaint about threats of deportation. Signal, however, did not, in fact or in law, misrepresent to the plaintiffs, the conditions of their visas. The underlying statute is 8 U.S.C. § 1184(a). The statute authorizes regulations that provide that when the alien's status expires "or upon failure to maintain the status under which he was admitted . . . such alien ***will*** depart from the United States." 8 U.S.C. § 1184(a) (West Supp. 2009) (emphasis added). "Will" is an emphatic and unequivocal word. In addition, in 2007, subparagraph 17 of 8 C.F.R. 214.2 stressed that "any alien who violates his or her status or who remains in the United States after his or her authorized period of stay has expired ***will be*** subject to deportation." This language is similarly mandatory. Subparagraph 13 of the same regulation stressed that the beneficiary of an H-2B visa "may not work except during the validity period of the petition." Another subparagraph reminded the employer that the employer had to notify the DHS if the beneficiary "is terminated prior to the completion of the nonagricultural labor or services for which he or she was hired," and another subparagraph reminded the employer that the petition would be invalidated *pro tanto* as to that individual. 8 C.F.R. § 214.2(h)(6)(vi)(E), effective May 5, 2005 to May 15, 2007, provided: "Liability for transportation costs. The employer will be liable for the reasonable costs of return transportation of the alien abroad, if the alien is dismissed from employment for any reason by the employer before the end of the period of authorized admission pursuant to section 214(c)(5) of the Act. If the beneficiary voluntarily terminates his or her employment prior to the expiration of the validity of the petition, the alien has not been dismissed. If the beneficiary believes that the employer has not

every plaintiff's case be tried individually to investigate these many, factual questions.

D. Ambiguity and the Interpretation of § 1589(3) Favors Signal:

If, after plain language interpretation, this Court nonetheless, ultimately deems the language of § 1589(3) ambiguous, the rule of lenity applies. The Supreme Court has observed:

> '. . . ***ambiguity 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).

United States v. Bass, 404 U.S. 336, 347, 92 S. Ct. 515, 522, 30 L. Ed.2d 488 (1971).[249]

Kozminski concluded that § 1584 was ambiguous and that the rule of lenity applied to ***its*** interpretation. ***See Kozminski, supra***, at 952, 108 S. Ct. at 2764. It may be appropriate to think that all of the trafficking statutes are ambiguous. The most straightforward way to enforce the rule of lenity with regard to this section is to construe § 1589(3) in accordance with ***Kozminski***, as a statute that proscribes threats of imprisonment or peonage. Factually, however, this case does not involve such threats. Thus, the § 1589(3) claim should be dismissed.[250]

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complied with this provision, the beneficiary shall advise the Service Center which adjudicated the petition in writing. The complaint will be retained in the file relating to the petition. Within the context of this paragraph, the term 'abroad' means the alien's last place of foreign residence. This provision applies to any employer whose offer of employment became the basis for the alien obtaining or continuing H-2B status." These effects were provided for *by law*.

[249] In ***Clark v. Rozos***, ***supra***, the Court said, to the same effect: "In other words, when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." ***See infra.***, at 380-81, 125 S. Ct. at 724 (internal citations and footnote omitted).

[250] As the Court knows, "[t]he general rule is that pre-certification dispositive rulings are not prohibited." 5 Moore's Federal Practice, ***infra***, at § 23.81[2], ***citing***, *inter alia*, ***Floyd v. Bowen***, 833 F.2d 529, 534-535 (5th Cir. 1987). If, as Signal argues in this brief for the *in pari materiae*-interpretation reasons stated in text, the correct interpretation of § 1589(3) is that legal process abuse only occurs if peonage or imprisonment is threatened, the FAC fails to state a claim under § 1589(3) upon which relief can be granted and the claim should actually be dismissed. If a generally prevailing meaning-interpretation of § 1589(3) is the one that prevails, the need, for the reasons explored in text, to

E. *Calimlim* is Unpersuasive, Favoring Signal:

The argument Signal makes in this brief was seemingly not accepted by the Seventh Circuit in ***United States v. Calimlim***, 538 F.3d 706 (7th Cir. 2008), ***cert. denied.***[251] ***Calimlim*** construed § 1589(3) by reference to the tort of legal process abuse in the Restatement (Second) of Torts, the section touching civil extortion. ***Calimlim***, ***supra***, at 713 (affirming forced labor conviction partly on basis of theory of legal process abuse defined by § 682 in Restatement (Second) of Torts). ***Calimlim*** profoundly misread ***Kozminski***. It therefore should not be followed.[252]

Additional reasons for not following ***Calimlim*** are the Seventh Circuit's violation of the plain language rule, violation of the rule of lenity,[253] violation of the doctrine of constitutional avoidance,[254] and repudiation of ***FCC***, ***supra***. As cases like ***Alzanki*** and ***Farrell*** show, only the

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then heavily explore each allegedly threatening interaction in an individual way precludes certification for the countless reasons discussed in text.

[251] Obviously, from a precedential standpoint, the denial of cert. is of no moment. As for the underlying decision, ***Calimlim*** is profoundly distinguishable from the present case both factually and legally. ***Calimlim*** was a criminal prosecution under § 1589 and was obviously not a class action. Also unlike the present case, the prosecution in ***Calimlim*** involved a quintessential trafficking crime, the virtual imprisonment of a live-in, Filipino maid who was not in the United States legally, as her Filipino employer/physicians were not. ***See id.***, at 709 ("On September 29, 2004, federal agents, acting on an anonymous tip, executed a search warrant and found a trembling Martinez huddled in the close of her bedroom."). Yet another critical difference between the present case and the noted one is that ***Calimlim*** observes that the verbal threats that were made in ***Calimlim*** were made to maintain the victim's "***secret***" employment. (Emphasis added). There was nothing secret about the employment of the claimants in this case. The plaintiffs in the present case signed contracts to provide their labor under reciprocal conditions. Here, crucially, moreover, the plaintiffs were validly in this country on the basis of H-2B visas. In no way were they illegal aliens who suffered from those, additional special vulnerabilities. ***Calimlim***, in short, is inapposite on many levels.

[252] ***Calimlim*** says that ***Kozminski*** "***only*** prohibited servitude by threats of physical harm . . ." ***Calimlim***, ***supra***, at 712. (Emphasis added). Obviously, that statement is profoundly incorrect. ***Kozminski*** is ***not*** confined to compulsion by threats of physical harm. It expressly holds that legal coercion is also proscribed. ***See Kozminski***, 487 U.S. at 952, 108 S. Ct. at 2765. Indeed, ***Kozminski*** goes on to define what legal coercion. ***See id.***, 487 U.S. at 943, 108 S. Ct. at 2760 ("Similarly, in . . . *Reynolds*, . . . the Court held that '[c]ompulsion of . . . service by the constant fear of imprisonment under the criminal laws' violated 'rights intended to be secured by the Thirteenth Amendment.'"). ***Calimlim*** therefore viewed ***Kozminski*** incorrectly, making ***Calimlim*** a dubious authority on legal coercion.

[253] ". . . we adhere to the time-honored interpretive guideline that uncertainty concerning the ambit of criminal statutes should be construed in favor of ***lenity***."

[254] ***See also Clark***, ***supra*** (discussing doctrine of "constitutional avoidance"); ***Kozminski***, ***supra***, at 952, 108 S. Ct. at 2764. In a proceeding in federal court involving laws that are federal, a vagueness challenge implicates the due process clause of the Fifth Amendment. ***Calimlim***, ***infra***, 538 F.3d at 710. "A vagueness challenge is best described by the evils it seeks to prevent. 'Unconstitutionally vague statutes pose two primary difficulties: (1) they fail to

Seventh Circuit has erroneously used the Restatement of Torts to inform the interpretation of § 1589(3) and ***Calimlim*** is thus an anomaly.

VIII. SECTION 1592 CANNOT BE CERTIFIED:

Signal refrains from lengthy analysis of the 18 U.S.C. § 1592 claim concerning alleged "unlawful conduct with respect to documents in furtherance of trafficking." The statute is only violated "in the course of" a violation of another Chapter 77 offense. ***See*** 18 U.S.C. § 1592 (West 2006). This brief shows that the underlying, Chapter 77 offenses defy certification. Section 1592 therefore defies it as well.

IX. SECTION 1546 CANNOT BE CERTIFIED:

As a result of Rule 9(b) and the fact that the subject of the underlying statute is, expressly, fraud, plaintiffs do not benefit with regard to this claim from the rules of notice pleading. Plaintiffs are ***obliged*** to plead "the circumstances constituting fraud . . . with particularity."[255] This claim, however, likewise resists certification. No federal court has addressed the question of whether the claims set forth in the First Amended Complaint ("FAC") with regard to § 1546 are amenable to certification.[256]

A. The Section 1546-Based Fraud Claims Set Forth in the Complaint Cannot be Tried Representatively:

i. The Allegations of the FAC as to Enterprise I Cannot be Certified:

The First Amended Complaint ("FAC") sets forth three claims founded on § 1546, always with other crimes. The first one is laid out from ¶ 279 to ¶ 284 of the FAC. FAC ¶¶ 279-284 describe an "enterprise" plaintiffs designate RICO Enterprise I consisting of all defendants

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provide due notice so that 'ordinary people can understand what conduct is prohibited,' and (2) they 'encourage arbitrary and discriminatory enforcement.'" ***Id.*** (citations omitted). ***Calimlim*** expressly concludes that § 1589 "provides sufficient notice of what it criminalizes." Outside of the First Amendment, vagueness challenges are "as applied." ***See id.***, at 710.

[255] ***See*** Fed.R.Civ.Proc. 9(b) (West Pamph. 2010).

[256] Because § 1546 is so long, Signal will not quote it here.

and the United States Consular offices in India. ***See*** FAC ¶ 279 (emphasis added). According to this paragraph, the enterprise's "common purpose [was] recruiting, transporting, providing, processing and obtaining foreign workers to work on (sic) shipyards in the United States, including on (sic) Signal's operations in Texas and Mississippi." ***See*** FAC ¶ 279.

FAC ¶ 282 elaborates on the substance of these allegations. It states that the core theory is that "Defendants" carried out their nefarious work "through a pattern of numerous acts of racketeering activity in violation of . . . § 1962(c) and § 1962(d), related by the common goal to recruit, obtain, transport, process, and provide workers through the use of fraudulent promises, exorbitant fees, forced labor and/or trafficking." ***See*** FAC ¶ 282. Paragraph 283 then alleges that the predicate acts of racketeering activity allegedly committed by RICO Enterprise I are the Chapter 77 offenses proscribed by §§ 1583, 1584, 1589, 1590 and 1592(a); the offense proscribed by § 1546; and mail and wire fraud, i.e., §§ 1341 and 1343. ***See*** FAC ¶¶ 283-284.

These allegations cannot be tried representatively. To try these allegations on the merits, ***cf. Gene***, ***supra***, the fact-finder would have to assess whether each plaintiff was affected by promises that were fraudulent; by exorbitant fees; and by forced labor and/or trafficking. ***Cf. Allison***, ***supra***. Signal, however, has a profound interest in questioning every claimant about these allegations. Furthermore, as ***Allison*** stresses, Signal has a constitutional right to present this question to the jury using the most competent evidence available on the issue, namely, the evidence of the alleged victims.

ii. <u>The Allegations of the FAC as to Enterprise II Cannot be Certified</u>:

The next § 1546, *et al.* claim is set out in ¶¶ 285, *et seq.* of the FAC. FAC ¶¶ 285-289 describe an "enterprise" designated RICO Enterprise II by the plaintiffs. It consists of the Recruiter Defendants, the Legal Facilitator Defendants and Signal. ***See*** FAC ¶ 285.

According to this paragraph, the enterprise is "an ongoing business relationship . . . with the common purpose of selling United States green cards, visas and work opportunities to Indian workers ***to convince such workers to pay fees and to travel to the United States to work for companies including Signal.***" ***See*** FAC ¶ 285 (emphasis added).

These allegations cannot be tried representatively because the fact finder has to assess whether each plaintiff proved both that he was "***convinced*** . . . to pay fees and to travel to the United States to work for companies including Signal," and that his work was then typified by involuntary servitude or forced labor. There is no appreciable difference between persuasion and causing the "victim" to "individually rely" on the "tortfeasor's" words. Therefore, this claim, which is partly predicated on § 1546, cannot be tried representatively.

iiI. The Allegations of the FAC as to Enterprise III Cannot be Certified:

The final, partly § 1546-based claim, set forth in the FAC, is the one set forth with regard to RICO Enterprise III. FAC ¶ 290 describes RICO Enterprise III as one consisting of the Recruiter Defendants, the Legal Facilitator Defendants, Signal and the non-parties Swetman Security and M & M Bank; "the common purpose" of this alleged Enterprise was "providing and maintaining a consistent and acquiescent labor force at Signal." ***See*** FAC ¶ 290. Crucially, FAC ¶ 293 elaborates on these allegations by alleging that the racketeers carried out "their common goal to maintain a consistent and acquiescent H-2B Indian labor force at Signal ***through the use of fraudulent promises, forced labor and trafficking.***" ***See*** FAC ¶ 293. FAC ¶ 294 then alleges that the defendants carried out the affairs of this enterprise by engaging in the same unlawful predicate acts: §§ 1583, 1584, 1589, 1590 and 1592(a); the offense proscribed by Chapter 75, i.e., § 1546; and mail and wire fraud. For the many reasons discussed before, these allegations defy certification.

iv. The Allegations of the FAC Expressly Pertaining to § 1546(a) Cannot be Certified:

Paragraphs 305-307 of the FAC summarize the prior allegations of the FAC with regard to § 1546 and attempt to set forth with more specificity precisely what this theory of liability is, presumably to comply with Rule 9(b). Paragraph 305 claims that the Defendants "fraudulently sold and/or conspired to sell H-2B visa extensions and green cards to Plaintiffs despite these Defendants' awareness that applications for these green cards and visa extensions were not bona fide or lawful under United States immigration law." Paragraph 306 makes the exact same allegation but claims that these acts were carried out "through RICO Enterprises I, II and III . . ." Finally, paragraph 307 alleges that these fraudulent "acts" were carried out "willful[ly], knowing[ly], and intentional[ly] . . ." Signal denies these allegations. These allegations have to be proven and proven by every claimant. ***Allison***, ***supra***. Therefore, individual issues predominate. ***Id.***

X. FRAUD CLAIMS CANNOT BE CERTIFIED:

This Court has stated that "Plaintiffs contend that they relied on the representations made at those meetings abroad and signed green card contracts with Defendants. Plaintiffs contend that in reasonable reliance on Defendants' assertions they undertook considerable personal and familial sacrifices to amass the funds necessary to initiate the green card process often plunging deeply into debt. Plaintiffs . . . assert that they would not have done so had they known that Defendants' assertions . . . were false."[257]

Plaintiffs have relinquished common law fraud and breach of contract but have inexplicably decided to stand on their RICO mail and wire fraud claims. As the prior discussion has shown, ***see*** Sec. III., the facts the plaintiffs advance concerning mail and wire fraud amount

[257] ***See*** Order and Reasons, Rec. Doc #754 at p.3 (Internal citations omitted)

to individual reliance. Certification is therefore precluded. ***See Sandwich Chef, supra.***

XI. THE CIVIL RIGHTS CLAIMS CANNOT BE TRIED REPRESENTATIVELY

As for the civil rights claims, Signal has already largely shown in separate briefing that these claims preclude certification under any part of Rule 23. ***Allison***, ***supra***. The civil rights theories are bound to drag the Court into complaints of mental anguish and other subjective injuries, as ***Allison*** stresses. ***Allison***, ***supra***, 151 F.3d at 416 (recovery of compensatory and punitive damages "require[s] particularly individualized proof of injury, including how each class member was personally affected by the discriminatory conduct [of the defendant].") These very concerns led Magistrate Judge Knowles ***not*** to certify the ***Braud*** action even though it arose from a single event. Because the class claims under §§ 1981 and 1985 expressly "seek . . . compensatory" and other damages, ***see*** FAC ¶ 331, the lens through which this Court must refract the evidence pertaining to the civil rights claims must therefore be a deeply skeptical one as a matter of law.[258]

XII. CONCLUSION

There is agreement that RICO actions cannot be certified in the Fifth Circuit due to RICO's requirements with regard to causation. Signal has also shown that there are numerous other reasons that should lead this Court to the inevitable conclusion that there is ***no*** claim in this case that can be certified. One need look no further than the testimony of the plaintiffs. The fact that fair wages were paid, every man was free to live outside of Signal's living quarters and that not one of the class representatives suffered physical harm or, a direct threat of physical harm, defy certification. Moreover, reliance is at the core of every thought, belief, decision, and action taken, by each plaintiff. Perhaps most significantly, despite continuous claims made by plaintiffs,

[258] ***Cf. Allison***, ***supra***, at 419 (district judge did not abuse discretion in refusing to certify hybrid class action under (b)(2) and (b)(3) because liability for damages "could be established only through examination of each plaintiff's individual circumstances. Individual issues therefore predominated the litigation.").

their testimony shows that every single worker was free to come and go from Signal whenever he chose, and they did – they went to Houston, Galveston, Chicago, Gulfport, Orlando and even to India. The jury must be afforded the opportunity to hear the unique story of each plaintiff making claims against Signal, for this is, in fact, what justice and dictates.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 1, 2010, I electronically filed the foregoing Memorandum in Support with the Clerk of Court by using the CM/ECF system, which sends 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