IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

PETRA UGARTE,

Plaintiff,

-vs-

Case No. A-03-CA-596-SS

DOUBLETREE HOTEL CORPORATION; DOUBLETREE HOTEL SYSTEMS, INC.; X d/b/a Doubletree Hotel; and ANDREW SALDANA,

Defendants.

ORDER

BE IT REMEMBERED on the 9th day of March 2004 the Court called the above-styled cause for a hearing on all pending matters and the parties appeared through counsel. Before the Court were the Doubletree Defendants' Motion for Sanctions [#59-1], Defendant Saldana's Motion for Sanctions [#60-1] and Request for Expedited Briefing Schedule [#60-2], the Doubletree Defendant's Motion to Dismiss [#38],[1] and Plaintiff's Motion for Dismissal of Federal Causes of Action Pursuant to Fed. R. Civ. P. 41(a)(2) or Alternatively, for Leave to Amend Complaint to Withdraw Federal Claims, Motion to Decline Supplemental Jurisdiction and Remand State Claims and Memorandum of Law [#63]. Having considered the motions, responses, the arguments of counsel at the hearing,

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[1]On February 6, 2004, the Court held a hearing on this motion and on February 10, 2004, entered an Order dismissing Plaintiff's claims under 42 U.S.C. § 1985. However, the Court carried the Doubletree Defendants' Motion to Dismiss the RICO claims so Plaintiff could file a RICO statement, which she has filed [#62]. Therefore, the Doubletree Defendants' Motion to Dismiss the Plaintiff's RICO claim is now ripe for consideration.

the relevant law, and the case file as a whole, the Court now confirms its oral announcements with the following opinion and orders.

Background

The plaintiff, Petra Ugarte, is a Mexican citizen and undocumented immigrant who used to work as a housekeeper for at the Doubletree Guest Suites located at 303 West 15th Street in Austin, Texas. She has filed this lawsuit against the Doubletree Hotel Corporation, Doubletree Hotel Systems, Hilton, DT Managment, and X d/b/a Doubletree Hotel (collectively, "the Doubletree Defendants"), as well as her supervisor at the Doubletree Guest Suites, Andrew Saldana. In her Fourth Amended Complaint, Plaintiff alleges Doubletree knowingly employed undocumented female workers (including Plaintiff), or employed them with constructive knowledge that they were undocumented, and utilized their undocumented status as a tool in their business plan, to further their profit motives, and as a means for supervisors to exercise control over them without exposure to legal liabilities. She claims the Doubletree Defendants obtained and utilized false social security numbers for the undocumented workers they hired in order to comply with the requirement that they retain I-9 forms. She also claims the Doubletree Defendants failed to advise the undocumented workers of their rights, including their right not to be subjected to discrimination.

Plaintiff contends she worked at the Doubletree Guest Suites in Austin from February 1996 until December 2001. She has alleges that on multiple occasions during August through September 2001, Saldana fondled and groped her, threatening that if she reported him he could have her and her children deported. She further alleges that on two separate occasions, Saldana forcibly raped her while she was cleaning rooms in the hotel, reiterating his threats of harm to her and her children and threatening that he could terminate her employment and get her and her children deported. Plaintiff

claims she had reservations but finally complained to a human resources employee about being groped (but not raped), but the human resources employee dismissed her allegations without a proper investigation. Plaintiff maintains after she reported Saldana's alleged harassment, he began retaliating against her, reducing her work schedule. According to Plaintiff, she left the employment of Doubletree on December 23, 2001 as a result of the above-described events and was formally terminated in April 2002.

Plaintiff asserted the following causes of action against the Doubletree Defendants in her Fourth Amended Complaint: (1) violations of Title VII of the Civil Rights Act of 1964 (including quid pro quo sexual harassment, hostile work environment, sex discrimination, national origin discrimination, and retaliation); (2) conspiracy to violate her civil rights under 42 U.S.C. § 1985(3); (3) violation of the Racketeer Influenced and Corruption Organization Act ("RICO"), 18 U.S.C. § 1961; (4) conspiracy to violate the Fair Labor Standards Act, 29 U.S.C. §§ 206, 207; (5) violation of Sections 21.051(1) & 21.056 of the Texas Labor Code; and (6) negligent hiring and retention. Additionally, Plaintiff asserted claims against Saldana under Section 21.051(1) of the Texas Labor Code and for assault and battery and intentional infliction of emotional injury. On February 10, 2004, the Court entered an Order dismissing Plaintiff's § 1985 claim against the Doubletree Defendants and her Texas Labor Code claim against Defendant Saldana. The Doubletree Defendants' motion to dismiss Plaintiff's RICO claim is still pending but is ripe now that Plaintiff has filed her RICO case statement.

Analysis

A. Motions for Sanctions

The Defendants have filed motions for sanctions under Rule 16(f) of the Federal Rules of Civil Procedure, contending you should dismiss this lawsuit due to Plaintiff's consistent failure to

comply with the Court's orders. Rule 16(f), entitled "Sanctions," provides in relevant part: " If a party or party's attorney fails to obey a scheduling or pretrial order . . .the judge, upon motion or the judge's own initiative may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(2)(B), (C), (D)." FED. R. CIV. P. 16(f). The cited sections of Rule 37 permit a court to sanction a party for failing to comply with a court order by disallowing the disobedient party to support or oppose designated claims or defenses, disallowing them to introduce designated matters into evidence, striking the pleadings, dismissing the action, rendering a default judgment, or holding the party in contempt. FED. R. CIV. P. 37.

Despite an explicit warning from this Court in its previous Order granting the Doubletree Defendants' motion to compel that failure "to fully respond to the Doubletree Defendants' interrogatories and requests for production . . . could result in the dismissal of this lawsuit," Plaintiff has persisted in providing discovery responses that are inadequate under the Federal Rules of Civil Procedure, the Local Rules and this Court's orders. She has provided (untimely) witness designations without addresses and expert designations without report or medical records. Plaintiff also has also designated as "witnesses" companies such as DT Management, Inc. without designating a representative. Similarly, she lists the "City of Austin" and the "Office of the Attorney General" as witnesses. Plaintiff has refused to respond to Defendants' simple interrogatory asking her to specify her alleged damages and her method for calculating those damages. She has failed to produce most of the medical records her exhibit and witness lists suggest she will offer at trial. The Court has already granted Plaintiff extra time to provide proper discovery responses, and now must consider the prejudice these delays have imposed on the Defendants. This case set for trial in June 2004 and the Defendants must have adequate time to prepare their case because it will proceed to trial during that month. Accordingly, although the Court refrains from imposing the harshest

sanction – dismissal – at this time, it will limit the witnesses and exhibits available to Plaintiff at trial in accordance with the written orders at the end of this opinion.

B. Motion to Dismiss RICO Claim

The Doubletree Defendants have moved to dismiss Plaintiff's RICO claim. In her RICO statement, Plaintiff makes clear she is alleging the Doubletree Defendants violated 18 U.S.C. § 1962 (a), (b) and (c) by engaging in an illegal immigrant hiring scheme that has caused her injury.[2] *See* RICO Statement at 8. To state a violation of the provisions of the RICO statute cited by Plaintiff, Plaintiff must allege the Doubletree Defendants have engaged in a pattern of "racketeering activity" for the purpose of: (a) using the income from racketeering activity to acquire an interest in an enterprise (money laundering), (b) obtaining an interest in an enterprise by means of racketeering activity (loan sharking or extortion); or (c) participating in the operation of an enterprise through a pattern of racketeering activity. *See* 18 U.S.C. § 1962 (a), (b), & (c); *Marriott Bros. v. Gage,* 911 F.2d 1105, 1108 (5th Cir. 1990).[3] RICO defines "racketeering activity" by specifically enumerating the statutes that will be considered predicate acts. *See* 18 U.S.C. § 1961(a); *Marriot Bros.*, 911 F.2d at 1108 ("'Racketeering activity' is defined to include any of the listed acts [in § 1961(a)], as well as certain other federal offenses, usually referred to as predicate acts.").

In her RICO statement, Plaintiff alleges the Doubletree Defendants' predicate act to be "an illegal immigrant hiring scheme." *See* RICO Statement at 4 (citing 8 U.S.C. § 1324 and *Medoza v.*

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[2]Plaintiff has abandoned any allegation regarding mail fraud on the part of the Doubletree Defendants. *See* RICO Statement at 10 ("Plaintiff is withdrawing all civil RICO claims predicated upon wire, mail fraud or fraud and relying upon violations of the Immigration and Naturalization Act.").

[3]Plaintiff does not allege the Defendants violated 18 U.S.C. § 1962(d), conspiracy to violate subsections (a), (b), or (c). *See* RICO Statement at 17.

Zirkle Fruit Co., 301 F.3d 1163 (9th Cir. 2002)). However, the employment of illegal aliens constitutes a violation of 8 U.S.C. § 1324a, not 8 U.S.C. § 1324, which makes illegal bringing in and harboring illegal aliens. *Compare* 8 U.S.C. § 1324a *and* 8 U.S.C. § 1324. Harboring illegal aliens does constitute "racketeering activity" under the RICO statute, while merely employing them does not. *See* 18 U.S.C. § 1961(1)(F) (defining as racketeering activity "any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens)", which was codified at 8 U.S.C. § 1324, but not mentioning any statute related to *employing* illegal aliens). Plaintiff does not allege the Doubletree Defendants brought her into the United States illegally, harbored her while she resided in the United States, or concealed her from detection by the immigration authorities – in fact, she does not even allege the Doubletree Defendants ever knew how she entered the United States or whether she entered illegally.[4] *See* 8 U.S.C. § 1324; *cf. Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1168 (9th Cir. 2002) (refusing to dismiss civil RICO claim where the plaintiffs alleged "the defendants had knowledge of illegal harboring 'and/or' smuggling."). As such, Plaintiff has not stated a violation of 8 U.S.C. § 1324, and therefore her RICO claim must be dismissed.

Plaintiff in her RICO statement points out the Second Circuit has recognized a violation of 8 U.S.C. § 1324(a) can serve as a predicate act for purposes of RICO and she is correct: a violation of 8 U.S.C. **§ 1324(a)** can serve as a predicate RICO act, but not a violation of 8 U.S.C. **§ 1324a**. *See Commercial Cleaning Services, L.L.C. v. Colin Service Systems*, Inc. 271 F.3d 374, 387 & n.4

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[4]Although not relevant at this motion to dismiss stage, the Court notes it has been represented at the hearing that Plaintiff testified in her deposition that she was employed by another hotel in the United States before working at the Doubletree. Regardless of whether the Doubletree Defendants nevertheless should have known Plaintiff was brought into the country illegally, she has not alleged what the Doubletree Defendants did in fact know about the circumstances of her immigration.

(2nd Cir. 2001) (citing 8 U.S.C. § 1324(a)(3)(A)) (emphasis added)). In so far as Plaintiff is attempting to allege the Doubletree Defendants violated § 1324(a)(3)(A), her claim fails because she has not alleged the Doubletree Defendants hired her or other applicants with *actual knowledge* she or they were brought into the country illegally. *See* 8 U.S.C. § 1324(a)(3)(A) (declaring it an offense when a person "knowingly hires at least 10 individuals with actual knowledge that the individuals are aliens"); *Mgmt. Inc. v. Loiselle*, 91 F. Supp. 2d 401, 408 (D. Mass. 2000) (dismissing civil RICO claim predicated on violation of § 1324(a) where plaintiff failed to allege the defendant "had knowledge of how the aliens had been brought into the United States and that they were brought into the United States in violation of [§ 1324(a)]"); *cf. Commercial Cleaning*, 271 F.3d at 387(recognizing allegation of actual knowledge required to state a claim under § 1324(a)(3)(A) but remanding to district court because the district court, unlike this Court, had not permitted the plaintiff to replead her RICO claim).

Alternatively, even if the Court were to hold Plaintiff had validly pled a predicate act, the Court would nevertheless dismiss the RICO claim because in order to demonstrate she has standing to assert her RICO claim, Plaintiff must plead damages to her business or property and that the damages were caused by the Doubletree Defendants' racketeering activity. In her RICO Statement, Plaintiff alleges as a result of the Doubletree Defendants' illegal immigrant hiring scheme, the Defendants took advantage of her undocumented status and failed to pay her overtime, paid her lower wages than documented workers, and denied her raises and promotions. *See* RICO Statement at 17-18. First of all, it is not even clear Plaintiff has alleged any injury to her property or business.[5]

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[5]As the Ninth Circuit explained, the property interest RICO protects is "a legal entitlement to business relations unhampered by schemes prohibited by the RICO predicate statutes." *Mendoza*, 301 F.3d at 1168 n.4. But in this case, without the Defendants' scheme prohibited by the RICO predicate statutes – that is, without Doubletree's practice of hiring undocumented workers – it is not

But more importantly, the "illegal immigrant hiring scheme" was not the cause of Plaintiff's decreased wages, lost overtime pay, or lack of promotions. As the Fifth Circuit has explained, there must be a direct causal nexus between the plaintiff's alleged injury and the defendant's alleged predicate acts. *Marriott Bros.*, 911 F.2d at 1108. For instance, "an employee discharged for blowing the whistle on his employer's alleged RICO activities could not state a RICO claim because his discharge did not flow from the commission of the predicate acts." *Marriott Bros.*, 911 F.2d at 1108 (citing *Collum v. Hibernia Nat'l Bank*, 859 F.2d 1211 (5th Cir. 1988)). Likewise, that Plaintiff received less pay or overtime than documented workers or fewer promotions did not flow from the Doubletree Defendants' alleged scheme of hiring illegal aliens– in fact, the alleged scheme is what resulted in Plaintiff earning any wages at all because presumably, if the Doubletree Defendant refused to hire undocumented workers, Plaintiff would not have earned any wages.

On the other hand, documented Doubletree employees might have a RICO claim against the Doubletree Defendants if they could show the wages for housekeepers were depressed as a result of Doubletree's illegal hiring practices. *See Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1168-72 (9th Cir. 2002) (refusing to dismiss civil RICO claim by documented workers who alleged fruit growers conspired to hire undocumented workers in order to depress wages). Similarly, a competing hotel chain might have a RICO claim against the Doubletree Defendants if it could show it was suffering a business disadvantage as a result of the Doubletree Defendants' illegal immigrant hiring scheme. *See Commercial Cleaning*, 271 F.3d at 381 (declaring an adequate relationship between the plaintiff's alleged injury and the defendant's alleged racketeering activity where the plaintiff-cleaning company's claimed it was injured by defendant-competitor's ability to underbid it because

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clear Plaintiff would have any business relations *(i.e.*, employment) at all.

of the competitor's practice of hiring undocumented workers). In contrast, Plaintiff Ugarte, if anything, benefitted from the Doubletree Defendants' hiring of undocumented workers.[6] Because her alleged injuries were not directly caused by the Doubletree Defendants' alleged illegal immigrant hiring scheme, Plaintiff's RICO claim must be dismissed.

C. Motion to Dismiss Federal Causes of Action

The Plaintiff has filed a Motion for Dismissal of Federal Causes of Action Pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure, or Alternatively, for Leave to Amend Complaint to Withdraw Federal Claims, Motion to Decline Supplemental Jurisdiction and Remand State Claims and Memorandum of Law, which is opposed by the Defendants who have already expended much time and effort on their defense of the federal claims. However, it has been brought to this Court's attention that the Equal Employment Commission has filed a discrimination lawsuit in this division that has been assigned to the Honorable James Nowlin, Cause No. A-03-CA-689-JN, based on Plaintiff Ugarte's allegations. Because it will be most efficient to handle these cases together and dismissal of Plaintiff Ugarte's federal claims could prejudice the EEOC's case against the Doubletree Defendants, the Honorable James Nowlin has agreed to transfer the EEOC case to this Court, at which point Court will consolidate the two cases.

In accordance with the foregoing:

IT IS ORDERED that the Doubletree Defendants' Motion for Sanctions [#59] and Defendant Saldana's Motion for Sanctions [#60-1] are GRANTED IN PART, and although

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[6]The Court does not mean to suggest Plaintiff has not alleged any injuries related to her status as an undocumented worker. However, her discharge and loss of benefits were allegedly caused by the Defendants' discrimination, retaliation, and harassment and this discussion concerns only her RICO claims and her alleged RICO injuries and RICO requires more than a relationship between the injuries and the Defendants' alleged racketeering act – it requires a direct causal nexus.

the Court will not dismiss this case as requested by the Defendants, it enters the following orders as sanctions for the Plaintiff[7]:

(1) The following witnesses designated by the Plaintiffs are stricken for failure to comply with the relevant discovery rules: Dale Ossip Johnson, Jason Nassour, Patrick Fagerberg, David Morledge, M.D., Guadalupe Zamora, M.D., Sue Isola, LPC, Roland Williams, M.D., Sharon Lockhart, M.D., Duke Hildreth, David Gann, Delores Laparte-Litton, "City of Austin," Geronima de Paz Flores, Junior Rentaria, Lupe Ugarte Caballero, Teresa Ugarte, Roberto Ugarte, Melissa Mason, James Renkus, M.D., "Office of the Attorney General, State of Texas," and Ronald Emmons.

(2) The Court also strikes the following companies designated as "witnesses," unless a representative of the company had been deposed as of March 9, 2004 and that deposition is available to Defendants: DT Management, Inc., Doubletree Management Company, Defendant Doubletree Hotels Corporations, Hilton Hotels Corporation, and Doubletree Hotel Systems, Inc.

(3) Carlos M. Laredo, Plaintiff's designated expert witness, will be permitted to testify only if Plaintiff produces to Defendants on or before March 16, 2004 Dr. Laredo's complete expert report and all medical records in his possession related to Plaintiff. If Plaintiff does produce the report and records, Defendants have ten (10) days from the date the report and records are produced to designate their own psychologist or psychiatrist.

(4) The following witnesses are the only other witnesses Plaintiff may call to testify at trial: Plaintiff Petra Ugarte, Defendant Andrew Saldana, Angie Betancourt, Blanca Marroquin, Fernando Nolasco, Bertha Garcia, Ernestina Hernandez, Veronica Garcia, Maria Teresa Gutierrez, Nereyda Sinfuente, Juan Rivera, Stella Fisher, Julia Skinner, Anastacia Nunez, Jorge Ugarte, Gabrielle Ugarte, Juan Carlos Ugarte, and Raul Ugarte.

(5) Plaintiff will be allowed to offer at trial the medical records from the University Physicians Group and Children's Hospital of Austin only if all such records are produced to the Defendants on or before March 16, 2004.

(6) The only exhibits in addition to the aforementioned medical records of Dr. Laredo and the University Physicians Group and Children's Hospital of Austin (assuming Plaintiff produces those records by March 16, 2004) that will be available

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[7]The Court reserves the right to assess monetary sanctions on Plaintiff and or Plaintiff's counsel at the end of this case for the grossly incompetent manner in which this case thus far has been handled.

to the Plaintiff at trial are those exhibits Plaintiff had already produced to Defendants as of the March 9, 2004 hearing.

(7) Plaintiff must answer Interrogatory #5 and must set forth her alleged damages and her method of calculating those damages on or before March 16, 2004 or her claim for damages will be deemed waived.

IT IS FURTHER ORDERED that Defendant Saldana's Request for Expedited Briefing Schedule [#60-2] is DISMISSED AS MOOT.

IT IS FURTHER ORDERED that the Doubletree Defendant's Motion to Dismiss [#38] Plaintiff's RICO claim is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's Motion for Dismissal of Federal Causes of Action Pursuant to Fed. R. Civ. P. 41(a)(2) or Alternatively, for Leave to Amend Complaint to Withdraw Federal Claims, Motion to Decline Supplemental Jurisdiction and Remand State Claims [#63] is DENIED.

SIGNED this the 10th day of March 2004.

SAM SPARKS
UNITED STATES DISTRICT JUDGE