

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

**KURIAN DAVID, et al.
Plaintiffs**

CIVIL ACTION

VERSUS

No. 08-1220

**SIGNAL INTERNATIONAL, LLC, et al.,
Defendants**

SECTION "E"

Related Cases:

**EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION,
Plaintiff**

CIVIL ACTION

VERSUS

No. 12-557

**SIGNAL INTERNATIONAL, LLC,
Defendant**

SECTION "E"

**LAKSHMANAN PONNAYAN ACHARI, et al.,
Plaintiffs**

CIVIL ACTION

VERSUS

**No. 13-6218
(c/w 13-6219, 13-6220,
13-6221, 14-732, 14-1818)**

SIGNAL INTERNATIONAL, LLC, et al.,

SECTION "E"

Applies To: *David v. Signal* (08-1220)

**PLAINTIFFS' TRIAL MEMORANDUM REGARDING FORCED LABOR AND
TRAFFICKING FOR FORCED LABOR CLAIMS**

By way of its January 22, 2015 Minute Entry, the Court ordered the parties to “submit memoranda addressing the following: (1) whether punitive damages are available under the Trafficking Victims Protection Reauthorization Act (TVPRA); (2) whether the standard for obtaining punitive damages is the same for all causes of action; (3) whether *in pari delicto* is a cognizable affirmative defense under the TVPRA, and, if so, whether that defense is appropriate in this case; and (4) whether reputational harm and psychological harm are components of ‘serious harm’ under the pre-amendment version of Section 1589 of the TVPRA.” Rec. Doc. 2189. Plaintiffs address each of these questions, *seriatim*.

ARGUMENT

A. Punitive Damages Are Available Under the TVPRA.

Thus far, every court that has addressed the question of whether punitive damages are available under the TVPRA, 18 U.S.C. § 1595, have answered in the affirmative. See Francisco v. Susano, No 12-1376, 525 Fed. Appx. 828, 833-35 (10th Cir. May 28, 2013); Ditullio v. Boehm, 662 F.3d 1091 (9th Cir. 2011); Carazani v. Zegarra, 972 F. Supp. 2d 1 (D.D.C. 2013); Doe v. Howard, No. 1:11-cv-1105, 2012 WL 3834867 (E.D. Va. Sept. 4, 2012). These decisions, spanning four circuits, adopt the inquiries set forth in Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992) and Barnes v. Gorman, 536 U.S. 181 (2002):¹

First, we are invited to determine whether there is any clear indication of congressional intent to limit the presumption in favor of any and all appropriate damage remedies; second, absent any such indication, we are invited to determine whether the remedy in question is ‘appropriate.’

¹ One additional court allowed for an award of punitive damages under the TVPRA, but without analysis. See Canal v. Dann, 09-03366 CW, 2010 WL 3491136, at *4 (N.D. Cal. Sept. 2, 2010) amended, 09-03366 CW, 2011 WL 3903166 (N.D. Cal. Sept. 6, 2011).

Francisco, 525 Fed. Appx. at 832 (quoting Moreno v. Consol. Rail Corp., 99 F.3d 782, 789 (6th Cir.1996)).²

Starting with the first step, the courts have agreed that punitive damages are available under the TVPRA, which indicates that a plaintiff may recover “damages and reasonable attorneys fees,” 18 U.S.C. § 1595(a), because they are presumptively available for federal statutory violations. Francisco, 525 Fed. Appx. at 833 (citing Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992); citing and distinguishing Barnes v. Gorman, 536 U.S. 181 (2002)). Indeed, “traditional [common law] remedies are available ‘absent clear direction to the contrary by Congress.’ Ambiguity is not clear direction.” Francisco, 525 Fed. Appx. at 833 (quoting Franklin, 503 U.S. at 70-71))(emphasis included). The availability of punitive damages under the TVPRA is further bolstered, the courts argue, by the fact that that Congress conceived of the TVPRA as a punitive statute, intended to address “conduct so reprehensible Congress made it criminal before adding the civil remedy in 2003.” Francisco, 525 Fed. Appx. at 834.

As for the second Franklin inquiry – the appropriateness of the remedy – the courts have similarly agreed that punitive damages are appropriate under the TVPRA. The Tenth Circuit in Francisco, following the lead of the Ninth Circuit in Ditullio and the Eastern District of Virginia in Doe v. Howard, found that “punitive damages are available under the TVPA because the Act’s civil remedy provision creates a cause of action that sounds in tort.” Francisco, 525 Fed. Appx. at 835 (quoting Doe v. Howard, 2012 WL 3834867, *4; citing Dutillio 662 F.3d at 1097). This is because

the traditional use of punitive damages is to punish and deter misconduct involving an element of outrage. The TVPA “creates a cause of action for

² The courts in Carazani and Doe did not directly reference the Franklin inquiry, but nevertheless followed the same reasoning in allowing for an award of punitive damages. Carazani, 972 F.Supp.2d at *26; Doe, 2012 WL 3834867, *4-5.

tortious conduct that is ordinarily intentional and outrageous”—what “Congress described as ‘a contemporaneous manifestation of slavery.’”⁹ *Id.* at 1098 (quoting Pub.L. No. 106–386, § 102, 114 Stat. 1464, 1466 (2000)). “Such conduct *835 obviously meets the common law standards for award of punitive damages[.]” *Id.* And the purpose and policy of the statute require no modification of the common law understanding: “permitting punitive damages is consistent with Congress’ purposes in enacting the TVPA [and later including a civil remedy in the TVPRA], which include increased protection for victims of trafficking and punishment of traffickers.” *Id.*

Francisco, 525 Fed. Appx. at 834-35.

For the reasons set forth above, Plaintiffs respectfully request that the Court issue an instruction for the jury allowing for an award of punitive damages under the TVPRA.

B. A Similar Standard for an Award of Punitive Damages is Applicable Across the Plaintiffs’ Causes of Action

The following chart provides a comparison of the standards for punitive damages across Plaintiffs’ claims:

Claim	Standard for Punitive Damages
TVPRA	Preponderance of the evidence ³ that Defendants acted with malice or reckless indifference to Plaintiffs’ rights. ⁴
42 U.S.C. § 1981 discrimination	Preponderance of the evidence ⁵ that Defendants acted with malice or reckless indifference to Plaintiffs’ rights ⁶
India fraud ⁷	Malicious, reckless, abusive, fraudulent, or oppressive conduct ⁸

³ See *White v. Burlington N. & Santa Fe R. Co.*, 364 F.3d 789, 805-06 (6th Cir. 2004) *aff’d sub nom. Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) (discussing general presumption that punitive damages in civil cases are to be assessed under a preponderance of the evidence standard unless the applicable law specifies otherwise).

⁴ *Abner v. Kansas City Southern R. Co.*, 513 F.3d 154, 160 (5th Cir. 2008); Court’s Instructions to the Jury, *Ramos v. Hoyle*, No. 08-21809, Rec. Doc. 171 (S.D. Fla. Aug. 10, 2009).

⁵ *White*, 364 F.3d at 805-06.

⁶ 42 U.S.C. § 1981a (b)(1).

⁷ In Indian law, punitive damages are frequently referred to as “exemplary damages.” See *Common Cause v. Union of India*, 1996 AIR 3538; see also *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 491 (2008) (explaining that, at common law, punitive damages awards were “generally dubbed ‘exemplary,’ implying that these verdicts were justified as punishment for extraordinary wrongdoing”).

⁸ *Sheikh Jaru Bepari v. AG Peters*, AIR 1942 Cal 493.

Claim	Standard for Punitive Damages
Mississippi Contract and Quasi Contract Claims	Clear and convincing evidence of malice, fraud, gross negligence, or reckless disregard for Plaintiffs' rights ⁹
42 U.S.C. § 1981 retaliation for Plaintiff Jacob Joseph Kadakkarappally	Preponderance of the evidence ¹⁰ that Defendants acted with malice or reckless indifference to Plaintiff's rights ¹¹
Mississippi False imprisonment for Plaintiff Jacob Joseph Kadakkarappally	Clear and convincing evidence of malice, fraud, gross negligence, or reckless disregard for Plaintiffs' rights ¹²
Mississippi Intentional Infliction of Emotional Distress for Plaintiff Jacob Joseph Kadakkarappally	Clear and convincing evidence of malice, fraud, gross negligence, or reckless disregard for Plaintiffs' rights ¹³

As indicated above, the claims for which Plaintiffs seek punitive damages have highly similar standards that apply to the determinations of punitive damages, but distinctions exist. The applicable standards can be grouped into three categories: the standard for Plaintiffs' federal claims, the standard for Plaintiffs' India law claim, and the standard for Plaintiffs' Mississippi law claims. Accordingly, Plaintiffs suggest that a question about punitive damages be set forth in each claim for which punitive damages is available. Plaintiffs propose punitive damage questions with language along the following lines for each of the claims specified below:

Forced Labor and Trafficking in Forced Labor

1. Do you find by a preponderance of the evidence, that in subjecting Plaintiff [name] to forced labor, the [name] Defendants acted with malice or reckless indifference to Plaintiff [name] rights?

YES _____

NO _____

⁹ Miss. Code Ann. § 11-1-65(a) (2002).

¹⁰ White, 364 F.3d at 805-06.

¹¹ 42 U.S.C. § 1981a.

¹² Miss. Code Ann. § 11-1-65(a).

¹³ Id.

If you marked "yes," please specify the amount of punitive damages to be assessed against Defendant [name]

\$ _____ TOTAL against [name] Defendants.

2. Do you find by a preponderance of the evidence, that trafficking Plaintiff [name] for forced labor, the [name] Defendants acted with malice or reckless indifference to Plaintiff [name]'s rights?

YES _____

NO _____

If you marked "yes," please specify the amount of punitive damages to be assessed against Defendant [name]

\$ _____ TOTAL against [name] Defendants.

Discrimination in Violation of 42 U.S.C. § 1981

1. Do you find by a preponderance of the evidence that in discriminating against Plaintiff [name], the Signal Defendants acted with malice or reckless indifference to Plaintiff [name]'s rights?

YES _____

NO _____

If you marked "yes," please specify the amount of punitive damages to be assessed against the Signal Defendants:

\$ _____ TOTAL against Signal Defendants

Retaliation Against Jacob Joseph Kadakkarappally

1. Do you find by a preponderance of the evidence that in discriminating against Plaintiff Jacob Joseph Kadakkarappally, the Signal Defendants acted with malice or reckless indifference to Plaintiff Kadakkarappally's rights not to be retaliated against?

YES _____

NO _____

If you marked "yes," please specify the amount of punitive damages to be assessed against the Signal Defendants:

\$ _____ TOTAL against Signal Defendants

India Fraud

1. Do you find by a preponderance of the evidence that in committing fraud against Plaintiff [name] in violation of the laws of India, the [name] Defendants' conduct was malicious, reckless, abusive, fraudulent, or oppressive?

YES _____

NO _____

If you marked "yes," please specify the amount of punitive damages to be assessed against the [name] Defendants:

\$ _____ TOTAL against [name] Defendants

Mississippi Law Contract and Quasi-Contract Claims

1. Do you find that by clear and convincing evidence that in breaching their contracts or quasi-contracts with Plaintiff [name], the [name] Defendants' conduct was malicious, fraudulent, grossly negligent, or recklessly disregarded Plaintiff [name]'s rights?

YES _____

NO _____

If you have marked "yes," please specify the amount of punitive damages to be assessed against the [name] Defendants:

\$ _____ TOTAL against [name] Defendants

Mississippi Intentional Infliction of Emotional Distress Claims

1. Do you find by clear and convincing evidence that in intentionally inflicting emotional distress on Plaintiff Jacob Joseph Kadakkarappally, the Signal Defendants' conduct was malicious, fraudulent, grossly negligent, or recklessly disregarded Plaintiff Jacob Joseph Kadakkarappally's rights?

YES _____

NO _____

If you have marked "yes," please specify the amount of punitive damages to be assessed against the Signal Defendants:

\$ _____ TOTAL against Signal Defendants

Mississippi False Imprisonment

1. Do you find by clear and convincing evidence that in falsely imprisoning Plaintiff Jacob Joseph Kadakkarappally, the Signal Defendants' conduct was malicious, fraudulent, grossly negligent, or recklessly disregarded Plaintiff Jacob Joseph Kadakkarappally's rights?

YES _____

NO _____

If you have marked "yes," please specify the amount of punitive damages to be assessed against the Signal Defendants:

\$ _____ TOTAL against Signal Defendants

C. In Pari Delicto Is Not a Congizable Affirmative Defense Under the TVPRA.

During the initial TVPRA charging conference, counsel for Signal acknowledged that he had "made up" the in pari delicto TVPRA jury charge. Indeed, to allow an in pari delicto charge under the TVPRA not only would be unprecedented; it would eviscerate the important remedial purpose of the statute. For example, threats of deportation as a form of abuse of legal process that violates the forced labor provision of the TVPRA, 18 U.S.C. § 1589, would become meaningless if a defendant could merely place blame on the plaintiff for contributing to the immigration status that made her vulnerable to the threat. Similarly, in a TVPRA sex trafficking case under 18 U.S.C. § 1591, a victim of forced prostitution could be prevented from recovering because she engaged in an illegal activity.

If, however, the Court did find that there is a basis to consider allowing an in pari delicto instruction for the TVPRA claims, Plaintiffs nevertheless object to the inclusion of the instruction for the same reasons it would not be proper under TVPRA.

Two requirements must be satisfied before an in pari delicto defense may be applied: (1) the plaintiffs' "active participation in the violation *vel non* and (2) the policy goals of the federal statute." Rogers v. McDorman, 521 F.3d 381, 389 (5th Cir. 2008) (quoting Official Comm. of

Unsecured Creditors of PSA, Inc. v. Edwards, 437 F.3d 1145, 1154 (11th Cir. 2006)).

The standard for active participation is a showing of “substantially equal responsibility”. Rogers v. McDorman, 521 F.3d 381, 390 (5th Cir. 2008) (quoting Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 306, 310-11 (1985)). A showing of equal responsibility simply cannot be made on the facts of this case. Assuming that Signal’s argument is based on its speculation that some Plaintiffs lied at the US Consulate in India, that does not even approach the TVPRA violations at issue in this case. The supposed lies have no relevance to – much less active participation in – forced labor, or trafficking for the purpose of forced labor. But putting aside the absence of a connection between the purported in pari delicto conduct and the TVPRA, there is no reasonable basis to find that the purported lies are even approaching an “equal” amount of culpability for the predicate acts at issue. By contrast, in Rogers, a RICO case, the legal theory was premised on a check kiting scheme, wherein the RICO plaintiffs’ – successors to a bank – involvement in the very check kiting racketeering at issue was the basis for an in pari delicto defense. Such unity between the supposed in pari delicto conduct and the relevant TVPRA violations does not exist here.

Further, in Bateman, the Supreme Court recognized that simple involvement in a deceptive scheme – there, the violation of securities laws – would not be a basis to advance an in pari delicto defense: “There is certainly no basis for concluding at this stage of this litigation that the respondents were in pari delicto with Lazzaro and Neadeau. The allegations are that Lazzaro and Neadeau masterminded this scheme to manipulate the market in TONM securities for their own personal benefit, and that they used the purchasing respondents as unwitting dupes to inflate the price of TONM stock.” The Court recognized that “[t]he respondents [i.e. plaintiffs] may well have violated the securities laws, and in any event we place no ‘stamp of approval’ on their

conduct” but held that the scheme’s masterminds were “far more culpable under any reasonable view than the respondents’ alleged conduct.” Bateman, 472 U.S. at 314. The Court therefore rejected the in pari delicto defense.

Additionally, as to the second (policy goals) prong, TVPRA is designed to “combat trafficking in persons, a contemporary manifestation of slavery[.]” Nunag-Tanedo v. E. Baton Rouge Parish Sch. Bd., 790 F. Supp. 2d 1134, 1143 (C.D. Cal. 2011) (citing H.R. Conf. Rep. 106–939, at 3 (2000)). In pari delicto should not be used here to deprive plaintiffs from a TVPRA remedy. As the Fifth Circuit in Rogers noted in the RICO context, the lower court appropriately concluded that in pari delicto should not be used against “even negligent plaintiffs or plaintiffs who are slow on the uptake and, based on Bateman Eichler, even plaintiffs who had unclean hands.” Rogers v. McDorman, 521 F.3d 381, 390, n.45 (5th Cir. 2008).

For the reasons set forth above. An in pari delicto jury charge is not appropriate for the TVPRA claims – or any claim – in this action.

D. Reputational Harm and Psychological Harm are Components of ‘Serious Harm’ Under the Pre-Amendment Version of Section 1589 of the TVPRA

From the inception the 2000 Trafficking Victims Protection Act, bolstered by case law since, reputational harm and psychological harm have cognizable as forms of serious harm under the forced labor statute, 18 U.S.C. § 1589. Signal, however, takes an overly restrictive view of serious harm, contending that the Court should apply a narrow meaning to claims arising before the 2008 TVPRA reauthorization because it was only then that Congress expressly defined serious harm to include reputational, psychological, and financial harm, among others.

Signal attempts to couch this as a retroactivity issue. However, the TVPA legislative history and case law demonstrate that 2008 reauthorization language memorialized – as opposed to supplementing – existing law. Therefore, there is no retroactivity issue. See, e.g., Nuñag-

Tanedo v. E. Baton Rouge Parish Sch. Bd., No. SA CV10-01172 JAK (MLGx), 2012 WL 5378742, at *3-4 (C.D. Cal. Aug. 27, 2012) (“Financial harm was cognizable as serious harm prior to the December 23, 2008 amendment.”).

This Court, however, already has found that the definition of serious harm should not be limited as Signal would like. In denying Signal’s summary judgment motion for claims under the TVPRA, the Court found in the context of financial harm as a form of serious harm,

That the pre-amendment version distinguished between “serious harm” and “physical restraint” suggests “Congress intended that serious harm not be limited to physical harm, and instead include at least some non-physical harm, e.g., financial harm.” Moreover, “[s]tandard definitions of ‘harm’ do not restrict the term to physical harm, but also encompass economic injury.” Second, the legislative history suggests Congress intended pre-amendment Section 1589 to cover a “broad array of harms,” such as causing the victim to believe he or she would face “bankruptcy in their home country.” Third, at least two courts have squarely held that “financial harm was cognizable as serious harm prior to the December 23, 2008 amendment.” This Court joins their lead and holds that serious harm under pre-amendment Section 1589 includes financial harm.

David v. Signal Int'l, LLC, CIV.A. 08-1220, 2015 WL 75276, at *2 (E.D. La. Jan. 6, 2015) (internal citations omitted). Therefore, this Court already recognized that one form of serious harm set forth in the 2008 TVPRA reauthorization – financial harm – applied to claims arising before 2008.

Therefore, the issue before this Court is simply whether the other two forms of serious harm Plaintiffs seek to include in the jury instruction (in addition to financial harm) – reputational and psychological harm – are supported by the pre-Amendment version of the forced labor statute.

1. Psychological Harm

The question of whether psychological coercion is an element of serious harm has been resolved by the Fifth Circuit. See United States v. Nnaji, 447 Fed.Appx. 558, 559 (5th Cir.2011)

(“serious harm can include psychological coercion”)¹⁴ (citing H.R. Conf. Rep. No. 106–939, at *91 (2000); United States v. Bradley, 390 F.3d 145, 150 (1st Cir.2004), vacated on Booker grounds, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005)).

Plaintiffs’ proposed jury instruction provides that “the term ‘serious harm’ means any harm, whether physical or non-physical harm, including psychological, financial, or reputational harm... .” Because the Congressional Record and its case law progeny speak of psychological coercion, rather than psychological harm, Plaintiffs would not oppose changing the jury instruction to “the term ‘serious harm’ means any harm, whether physical or non-physical harm, including psychological coercion, financial harm, or reputational harm... .”

2. Reputational Harm

In setting forth what may constitute “serious harm” when it enacted the TVPA in 2000, the House Conference Report provided that it included “a broad array of harms.” H.R. Conf. Rep. No. 106–939, at 101, 2000 WL 1479163, at *101. Encapsulated in these harms is reputational harm. Thus, for example, Congress recognized that causing the victim to believe his family will suffer “banishment ... in their home country” would be a form of serious harm.

In U.S. v. Dann, 652 F.3d 1160, 1171-72 (9th Cir. 2011), a case involving conduct that pre-dated the 2008 TVPRA reauthorization, see Nunag-Tanedo, 2012 WL 5378742, at *3 (Dann “concerned trafficking that occurred between 2006 and 2008, i.e., before the December 23, 2008 amendment.”), the Ninth Circuit expressly recognized that reputational harm – in that case an accusation that the victim was a thief – may be an element of serious harm.

In the instant case, Plaintiffs have testified extensively about the severe reputational harm they feared they would suffer if they were forced to return to India without repaying their debts.

¹⁴ Nnaji involved conduct that occurred entirely before the 2008 TVPRA reauthorization and does not reference the reauthorization language. Id.

This testimony was bolstered by Amy Mowl, Plaintiffs' expert on India debt and financing. Plaintiffs feared banishment and alienation from their communities and families, and this was one of the principal reasons understood that they could not leave Signal. As Ms. Mowl testified, for workers from Plaintiffs' cultural background, the shame associated with the loss of family assets (primarily gold jewelry and land) was particularly pronounced.

Plaintiffs therefore respectfully request that the Court include reputational harm as an element of serious harm in the TVPRA jury instruction.

Respectfully submitted this 26th day of January, 2015,

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CERTIFICATE OF SERVICE

I hereby certify that on the 26th of January, 2015, I filed the foregoing document using the Court's Electronic Case Filing system, which will provide service on counsel for all ECF-registered parties.

I further certify that the attached has been deposited in a U.S. Mail receptacle for delivery by first class mail, properly addressed and with postage pre-paid to:

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