

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

KURIAN DAVID, *et al.*,

Plaintiffs,

-against-

SIGNAL INTERNATIONAL, LLC, *et al.*,

Defendants.

CIVIL ACTION

No. 08-1220-SM-DEK

SECTION "E"

Related Case:

**EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION**

Plaintiffs,

and

SABULAL VIJAYAN, *et al.*

Plaintiffs

-

Intervenors

-against-

SIGNAL INTERNATIONAL, LLC,

Defendant.

CIVIL ACTION

No. 12-557-SM-DEK

SECTION "E"

Related Case:

LAKSHMANAN PONNAYAN ACHARI, *et al.*

Plaintiffs,

-against-

SIGNAL INTERNATIONAL, LLC, *et al.*,

Defendants.

CIVIL ACTION

No. 13-6218-SM-DEK

**(c/w 13-6219, 13-6220, 13-6221,
14-732 and 14-1818)**

SECTION "E"

Applies To: David, No. 08-1220

TRIAL BRIEF REGARDING IN PARI DELICTO

Plaintiffs respectfully request the Court deny Defendant Signal's request for the inclusion of an *in pari delicto* charge to Plaintiffs' Racketeering and Influenced Corrupt Organizations Act ("RICO") jury instructions and verdict forms, Rec. Doc. 2230. As set forth herein, this defense is not appropriate as Signal cannot show the requisite elements for the charge, namely that (1) Plaintiffs were bear substantial equal responsibility for the alleged scheme in this case or (2) that the federal goals of the RICO statute would not be inhibited by the application of defense for the case at hand. Because Signal cannot meet its burden under these two elements, and there is in fact no third element related to causation as suggested by Signal, the charge cannot be properly applied here.

ARGUMENT

An *in pari delicto* defense may only be applied to causes of action created by federal statutes when two factors are met. *See 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)). Although Signal attempts to conflate their affirmative defense with Plaintiffs' burden to show causation by suggesting a "[c]onfluence of *in pari* charge and but for causation," *see* Doc. at 9-10, the *in pari delicto* defense is only appropriate if a defendant can show: (1) the plaintiffs' active participation in the violation *vel non* and (2) the policy goals of the federal statute. *Rogers*, 521 F.3d at 389. Although *in pari delicto* is a cognizable defense to RICO claims, the Defendants cannot show the aforementioned elements here.

The Plaintiffs did not Participate in the Scheme or Predicate Acts Alleged Here.

Defendants' burden to show the *vel non* argument requires a showing that "the plaintiff[s] bear[] at least substantially equal responsibility for the violations he seeks to redress_ *Bateman*

Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299, 306, 310-11 (1985). Firstly, as set forth in the parties' proposed jury instruction and verdict forms, the predicate acts upon which Plaintiffs' RICO claims are based on are immigration document fraud, wire fraud, mail fraud, forced labor, and labor trafficking. Signal's only attempt to tie Plaintiffs to any wrongdoing they allege appears to be, evidenced primarily through the attachment of two plaintiffs' testimony at trial but with no substantive discussion, is primarily the argument that two Plaintiffs' statements at the U.S. consulate evidence "conscious and deliberate complicity in actually perceived wrongdoing," Doc. at 2, and that the "the Second Claim for relief [RICO] would not exist but for this complicity." *Id.* Neither facially nor substantively, do the supposed wrongdoing supposedly done by the two Plaintiffs, mention, approach, or reflect relevance to the specific predicate acts at issue in this case. This is illustrated most simply in Signal's attempts to tie in defenses to common law fraud in India and the Fifth Circuit as a basis for the *in pari delicto* defense to Plaintiffs' RICO claim. *See* Doc. at 9. However, as the parties have repeatedly agreed and in fact, Defendants have repeatedly stressed, simple common law actions do not constitute an actionable predicate act or have relevance to a RICO claim; accordingly such acts cannot therefore now form the basis for a RICO defense.

Moreover, Signal's repeated statements of Plaintiffs' supposed-"complicity" highlights the inappropriateness of this defense as raised in connection to the alleged predicate acts. As the Fifth Circuit has noted, *in pari delicto* would be an appropriate RICO defense in a case only when the "[p]laintiff was not a passive participant in the fraudulent scheme giving rise to the lawsuit but an active one," or otherwise bears "substantially equal responsibility for the violations he seeks to redress." *Rogers*, 521 F.3d at 390 (quoting *Bateman Eichler*, 472 U.S. 299 at 310-11). Signal's attempts to tie plaintiffs' supposed-wrongdoings for the scheme and

predicate actions is therefore based in part on an argument that there would be no labor trafficking in this case if Plaintiffs hadn't supposedly trafficked themselves by following Defendants' instructions or pursuing Defendants promises. *See* Doc. at 9. However, beyond conclusory statements suggesting this incredulous argument, Defendants have provided no basis to show Plaintiffs' supposed wrongdoings approach an *equal* amount of culpability for the predicate acts at issue or the scheme giving rise to Plaintiffs' claims.

The Fifth Circuit's analysis of a RICO claim *Rogers* is instructive here. In analyzing "equal" culpability in a RICO case, the Fifth Circuit held that because the RICO theory was premised on a check kiting scheme, wherein the RICO plaintiffs' -- successors to a bank -- were affirmatively involved in the very check kiting racketeering forming the basis for plaintiffs' RICO claim, there was a basis for the *in pari delicto* defense. *See Rogers*, 521 F.3d at 390. However, no such unity between the supposed *in pari delicto* conduct, or equal or affirmative participation in the relevant RICO acts at issue in this case 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.* RICO 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 Supreme

Court in held the masterminds' were far more culpable because the defendants' "[c]onduct [was] particularly egregious when committed by a [professional], who owes a duty of honesty and fair dealing toward his clients." *Id.* at 314-315. The Court therefore rejected the *in pari delicto* defense. The similar reasoning holds true to this case as the Plaintiffs' testimony cited by Signal shows that Plaintiffs simply alleged in any supposed-wrongdoing on account of the instructions provided to them by Defendant Sachin Dewan, Defendant Signal's representative and labor recruiter at the relevant times.

The reality is, by raising some sort of alleged wrongdoing by two Plaintiffs, Signal is attempting to assert an "unclean hands" defense in the guise of its *in pari delicto* charge. However, as this court has held, the "*in pari delicto* doctrine" is a corollary of the unclean hands maxim, the principal difference being that the *in pari delicto* doctrine technically applies only when the plaintiff's fault is substantially equal to the defendants," *Stanley v. Trincharad*, No. CIV.A. 02-1235, 2010 WL 3168113, at *7 (E.D. La. Aug. 9, 2010) (internal citations omitted). As the Fifth Circuit in *Rogers* noted, 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* 521 F.3d 381 at 390, n.45.

The Public Interest Would be Injured by the Application of an In Pari Delicto Charge.

Additionally, as to the second policy prong, RICO is "designed to prevent and punish racketeering." *Rogers*, 521 F.3d at 390 n.45. Signal overstates the need for judicial wariness of RICO claims. *See* Mot. 7-9. In *Bateman*, the Supreme Court upheld the denial of the *in pari delicto* defense despite the plaintiffs' supposed wrongdoings, because such a denial would "best

promote the primary objective of the federal” securities laws since otherwise barring such private actions would result in “a number of alleged fraudulent practices going undetected,” and the need to maximize deterrence of the relevant wrongdoings by bringing “enforcement pressures to bear on the sources.” See *Bateman Eichler*, 472 U.S. 299 at 15-318. The same policy considerations should apply here. *In pari delicto* should not be used here to deprive Plaintiffs – who Signal has not alleged to be racketeers or perpetrators of any of the predicate acts in question in this case – from a RICO remedy against the alleged racketeers.

Finally, Signal attempts to distinguish *Hills Farms* from the case at hand, see Doc. at 10-11, but if anything, *Hills Farm* is not indistinguishable; omitted from Signal’s cites is the analysis holding the *in pari delicto* defense inapplicable since although the plaintiffs could be “on the hook” for potential IRS tax issues, these acts were because “[plaintiffs] participated in or based deductions on the scheme provided to them by Defendants.” *W. Hills Farms, LLC v. Classicstar (In re Classicstar Mare Lease Litig.)*, 823 F. Supp. 2d 599, 637-38 (E.D. Ky. 2011), *aff’d*, 727 F.3d 473 (6th Cir. 2013). The same reasoning should apply here since as stated testimony offered by Signal, see Docs. 2230-1 and Docs. 2230-2, Plaintiffs’ alleged-wrongdoings were a result of following the instructions of the racketeers named to be in Signal’s RICO enterprises.

CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that this Court deny Signal’s request to include an *in pari delicto* charge to Plaintiffs’ RICO jury instructions or verdict forms.

Respectfully submitted this 3rd day of February, 2015,

s/ Daniel Werner

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of February, 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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