CASE NOS. 20-11764, 20-11769, 20-11770, AND 20-11771

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JANE DOE #1, JANE DOE #2, AND JANE DOE # 4,
Plaintiffs-Appellants

v.

RED ROOF INNS, INC., ET AL.,
Defendants,

WYNDHAM HOTELS & RESORTS INC., MICROTEL INNS AND SUITES FRANCHISING, INC., AND CHOICE HOTELS INTERNATIONAL, INC.,

Defendants-Appellees.

JANE DOE #3,
Plaintiff-Appellant

v.

RED ROOF INNS, INC., ET AL.,
Defendants,

WYNDHAM HOTELS & RESORTS INC., MICROTEL INNS AND SUITES FRANCHISING, INC.,

Defendants-Appellees.

Consolidated Appeals from the United States District Court
for the Northern District of Georgia
Case Nos. 1:19-cv-3840-WMR, 1:19-cv-3841-WMR,
1:19-cv-3843-WMR, 1:19-cv-3845-WMR

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, 26.1-2, 26.1-3, the following is an alphabetical list of the trial judges, attorneys, persons, firms, partnerships, and corporations that are known to have an actual or potential interest in the outcome of this appeal:

1. 42 Hotel Cumberland LLC (Defendant)
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3. Adams, Emily M. (Defendants' Counsel)
4. Alleyne, Janelle E. (Appellee/Defendants' Counsel)
5. Allred, William (Defendants' Counsel)
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8. Atkins, Sabrina L. (Defendants' Counsel)
9. Auro Hotels Management, LLC (Defendant)
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22. CC&S Development, LLC (Defendant)

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25. CorePoint Lodging, LLC (Defendant)

26. CPLG HOL, LLC (Defendant)

27. CPLG Properties, LLC (Defendant)

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30. Desai, Hament (Defendant)

31. DLA Piper, LLP (Appellee/Defendants' Counsel Firm)

32. Dowling, Christie L. (Appellee/Defendants' Counsel)

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37. Encore Cumberland LLC (Defendant)

38. ESA Management, LLC (Defendant)

39. ESA P Portfolio, LLC (Defendant)

40. ESA P Portfolio Operating Lessee, LLC (Defendant)

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42. Essex Hotel Management, LLC (Defendant)

43. Extended Stay America, Inc. (Defendant)

    a. Stock Ticker Symbol: STAY

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45. FMW RRI NC, LLC (Defendant)

46. Fox, Warner S. (Defendants' Counsel)

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53. Hilton Franchise Holdings, LLC (Defendant)

54. Hilton Worldwide Holdings, Inc. (Defendant)

55. Hundredmark, Trinity (Appellant/Plaintiffs' Counsel)

56. HSI Chamblee, LLC (Defendant)

57. HVM, LLC (Defendant)

58. Jane Doe 1 (Appellant/Plaintiff)

59. Jane Doe 2 (Appellant/Plaintiff)

60. Jane Doe 3 (Appellant/Plaintiff)

61. Jane Doe 4 (Appellant/Plaintiff)

62. Jeet & JJ, LLC (Defendant)

63. JHM Hotels Management, Inc. (Defendant)

64. Jones Day (Defendants' Counsel Firm)

65. Keith, C. Shane (Defendants' Counsel)

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69. Kuzzins Buford, LLC (Defendant)

70. LQ Management, LLC (Defendant)

71. LQ Properties, LLC (Defendant)

72. LaQuinta Worldwide, LLC (Defendant)

73. LAXMI Druid Hills Hotel, LLC (Defendant)

74. Lee, Pamela N. (Defendants' Counsel)

75. Lewis, Brisbois, Bisgaard & Smith, LLP (Defendants' Counsel Firm)

76. Liberty Insurance Corporation

77. Liberty Mutual Fire Insurance Company

78. Mann, Lindsey B. (Defendants' Counsel)

79. MBW Law, LLC (Defendants' Counsel Firm)

80. Marshall, Emily (Appellee/Defendants' Counsel)

81. Martin, William James (Defendants' Counsel)

82. Mashelkar, Shubhra R. (Defendants' Counsel)

83. Mathews, Rachel Wilson (Defendants' Counsel)

84. McDonough, Patrick J. (Appellant/Plaintiffs' Counsel)

85. McKinley, Hall F. (Defendants' Counsel)

86. Microtel Inns and Suites Franchising, Inc. (Appellee/Defendant)

87. Moore, Patrick B. (Defendants' Counsel)

88. Mykkeltvedt, Tiana S. (Appellant/Plaintiffs' Counsel)

89. Newtel V Corporation (Defendant)

90. Perry, Nicole M. (Defendants' Counsel)

91. Purvis, Barbara J. (Member of Essex Hotel Management, LLC)

92. Ramada Worldwide, Inc. (Defendant)

93. Ray II, The Honorable William M. (District Court Judge)

94. Ream, Elliot C. (Defendants' Counsel)

95. Red Roof Inns, Inc. (Defendant)

96. Red Roof Franchising, LLC (Defendant)

97. Reed, Charles Kyle (Defendants' Counsel)

98. Richens, Dana (Defendants' Counsel)

99. Rothing, Stephen W. (Defendants' Counsel)

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101. RRF Holding Company, LLC (Defendant)

102. RRI III, LLC (Defendant)

103. RRI West Management, LLC (Defendant)

104. Sager, David S. (Appellee/Defendants' Counsel)

105. Seals, Amanda Kay (Appellant/Plaintiffs' Counsel)

106. Smith, Gambrell & Russell, LLP (Defendants' Counsel Firm)

107. Spainhour, Kevin A. (Movant Wellstar Kennestone Hospital's Counsel)

108. Straight, Alyson (Defendants' Counsel)

109. Steele, Kelli (Defendants' Counsel)

110. SUB-SU Hotel GP, LLC (Defendant)

111. SUB-SU Hotel ULC (Defendant)

112. Swift, Currie, McGhee & Heirs, LLP (Defendants' Counsel Firm)

113. Tonge, Jonathan S. (Appellant/Plaintiffs' Counsel)

114. Tornillo, Glenn C. (Defendants' Counsel)

115. Tropper, Joshua (Appellee/Defendant's Counsel)

116. Troutman Sanders, LLP (Defendants' Counsel Firm)

117. Turner, Sara M. (Appellee/Defendant's Counsel)

118. VAD Property Management, LLC (Defendant)

119. Vantage Hospitality Group, Inc. (Defendant)

120. Varahi Hotel, LLC (Defendant)

121. Varghese, Manoj S. (Appellant/Plaintiffs' Counsel)

122. Ward, Emily C. (Defendants' Counsel)

123. Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC (Defendants' Counsel Firm)

124. Welborn, G. Lee (Defendants' Counsel)

125. Wellstar Kennestone Hospital (Movant)

126. Westmont Hospitality Group, Inc. (Defendant)

127. Westmont Investments, LLC (Defendant)

128. WHG SU Atlanta, LLC (Defendant)

129. WHG SU Atlanta, LP (Defendant)

130. Whitaker, Angelina K. (Defendants' Counsel)

131. Whitlock, Kathryn S. (Defendants' Counsel)

132. WRRH Investments LP (Defendant)

133. Wyndham Hotels & Resorts, Inc. (Appellee/Defendant)

134. Yoder, Kristin L. (Defendants' Counsel)

STATEMENT REGARDING ORAL ARGUMENT

The Jane Doe Plaintiffs-Appellants respectfully request oral argument. Oral argument will help the Court review the Rule 12(b)(6) dismissal of simple yet novel claims against hotel franchisors (the "Franchisors") arising out of open and obvious sex trafficking at two Atlanta-area hotels. Plaintiffs brought claims under the Trafficking Victims Protection Reauthorization Act ("TVPRA"), 18 U.S.C. § 1595; Georgia RICO, O.C.G.A. § 16-14-4; and common law negligence.

First, this Court will benefit from oral argument to decide, as a matter of first impression in this Circuit, whether Congress meant what it said when it expanded the TVPRA civil remedy beyond just sex traffickers to include those like the Franchisors who profited from sex trafficking at their hotels. The District Court held otherwise, applying the heightened knowledge standard for prosecuting a criminal violation of the statute. According to the District Court, one who benefits from sex trafficking is not liable under the TVPRA unless it engages in "some participation in the sex trafficking act itself." Through oral argument, Plaintiffs intend to show that these hurdles the District Court erected are contrary to Congress' clear intention to hold defendants like the Franchisors liable for allowing sex trafficking to occur right under their noses.

Second, oral argument will assist this Court in determining whether the District Court misapplied the holdings of *Twombly* and *Iqbal*. In dismissing all

claims against the Franchisors, the District Court struck specific allegations about the defendants' knowledge of sex trafficking in Atlanta and in the hotel industry. Holding that knowledge of prostitution could not alert Franchisors to sex trafficking, the District Court then disregarded the very allegations of force, fraud and coercion that define sex trafficking. Turning the standard on its head, the District Court exercised all inferences in favor of Franchisors, concluding for example that the Franchisors' inspectors who Plaintiffs alleged were on the property at times when the sex trafficking was apparent, failed to appreciate those signs.

Finally, if this Court has any doubt about its jurisdiction to hear this appeal of an entry of final judgment under Rule 54(b), oral argument will help eliminate such doubt. In particular, oral argument would assist the Court in distinguishing between the two types of Rule 54(b) orders for purposes of the first prong of the *Curtiss-Wright* analysis and would show that this case falls into a category of final orders that completely dismisses the complaint as it relates to certain defendants. The interrelatedness of the claims is not at issue. Plaintiffs further would show this Court that, under the substantial deference standard *Curtiss-Wright* requires, the District Court's assessment of the second prong—no just reason for delay—was not clearly unreasonable.

For these reasons, Plaintiffs respectfully request oral argument.

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JURISDICTIONAL STATEMENT

The District Court had subject-matter jurisdiction of the four cases in this consolidated appeal under 28 U.S.C. § 1331 because the Jane Doe Plaintiffs brought claims under the Trafficking Victims Protection Reauthorization Act ("TVPRA"), 18 U.S.C. § 1595.

This Court has jurisdiction over this consolidated appeal of the final judgments in favor of Wyndham Hotels & Resorts, Inc. ("Wyndham"), Microtel Inn & Suites Franchising, Inc. ("MISF"), and Choice Hotels International, Inc. ("Choice") (collectively, the "Franchisors") under 28 U.S.C. § 1291. The District Court granted the Jane Doe Plaintiffs'[1] unopposed motions for entry of final judgment for these defendants under Federal Rule of Civil Procedure 54(b).[2] The District Court's entry of final judgment under Rule 54(b) was proper for the reasons in Plaintiffs' August 10, 2020 response to this Court's Jurisdictional Question, which all three Appellees echoed in their contemporaneous filings. The entry of final

[1] The "Jane Doe Plaintiffs" or simply the "Plaintiffs" are Jane Does 1 through 4 in the following district court cases: No. 1:19-cv-03840-WMR ("JD1"); 1:19-cv-03841-WMR ("JD2"); No. 1:19-cv-03843-WMR ("JD3"); No. 1:19-cv-03845-WMR ("JD4"). References to the record include the JD#, docket number, and page number from the header generated by the District Court's electronic filing system.

[2] JD1-Doc.295 at 2-3(Order); JD1-Doc.296-1 (Amended Final Judgment); JD2-Doc.288 (Order); JD2-Doc.289-1 (Amended Final Judgment); JD3-Doc.214 (Order); JD3-Doc.215-1 (Amended Final Judgment); JD4-Doc.194 (Order); JD4-Doc.195-1 (Amended Final Judgment).

judgment was immediately appealable under 28 U.S.C. § 1291.[3] The Jane Doe Plaintiffs timely filed notices of appeal on May 7, 2020.[4]

[3] The District Court's original judgment was "without prejudice" to the Plaintiffs' right to file a later motion for leave to amend the complaint to add claims against Franchisors. *See, e.g.*, JD1-Doc.296. The District Court later amended the final judgment to be with prejudice. JD1-Doc.298; JD1-Doc.296-1 (Amended Final Judgment). *See Schuurman v. Motor Vessel Betty K V*, 798 F.2d 442, 445 (11th Cir. 1986) (holding that if a plaintiff who was given leave to amend the complaint appeals instead of amending, the plaintiff "waives the right to later amend the complaint, even if the time to amend has not yet expired").

[4] *See, e.g.*, JD1-Doc.300.

STATEMENT OF THE ISSUES

This is a lawsuit brought by four women, sex trafficking survivors, for civil damages against the hotel owners, operators, franchisors and corporations that profited from the hotels where they were trafficked. This appeal presents the following issues:

1. Sex trafficking has been a federal crime since 2000, with a civil remedy against a sex trafficking perpetrator since 2003. When Congress expanded the civil remedy in 2008 beyond the perpetrator, to anyone who "knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known" engaged in a criminal violation of the statute, did Congress intend to require a civil plaintiff to meet the same standard of proof as the government prosecuting a criminal defendant?

2. Plaintiffs' claims under the TVPRA, Georgia RICO and common law negligence are all governed by the pleading standard of Rule 8(a)(2). Was Plaintiff required to plead with specificity details that are particularly within the knowledge of the defendants—such as specific dates when Franchisors inspected hotels—to allege that Franchisors knew or should have known of rampant, open and obvious sex trafficking at their hotels?

3. The District Court expressed its skepticism that Plaintiffs could prove their claims against the Franchisors of hotels where they were trafficked. Under

Rules 8 and 12, was the District Court permitted to dismiss Plaintiffs' claims against the Franchisors by viewing the allegations in the Amended Complaint in isolation, in the light most favorable to the defendants, and disregarding other relevant allegations as either irrelevant or conclusory?

4. Plaintiffs are sex trafficking victims. The District Court struck as not "germane" to the complaint allegations about sex trafficking, including allegations of defendants' knowledge of signs of sex trafficking, the hotel industry's role in sex trafficking, and the prevalence of sex trafficking in Atlanta. Did the District Court properly strike as irrelevant sex trafficking allegations from a complaint alleging injuries from sex trafficking?

5. Plaintiffs alleged arrests at the Microtel and SES for prostitution and customer reports to Franchisors describing "prostitutes and some pimps," and how the hotels were "frequently used for . . . prostitution." While acknowledging Plaintiffs' prostitution allegations, did the District Court properly dismiss Plaintiffs' Georgia RICO claims for failure to allege predicate acts for prostitution, keeping a place of prostitution and sexual servitude?

6. Under Georgia law, a franchisor may be liable for the negligent training and supervision of franchisee employees if it controls the manner in which they do their work. The question of control is a question of fact, not prone to resolution at the pleadings stage. Where Plaintiffs alleged the Franchisors controlled the manner

of work of the franchisee employees and inspected the hotels, did the District Court properly dismiss Plaintiffs' negligence claims?

INTRODUCTION

Plaintiffs are trafficking victims. Plaintiffs brought claims under the TVPRA, Georgia RICO, and common law negligence.

At its most basic level, the TVPRA criminalizes sex trafficking—the use of force, fraud or coercion to cause a person to engage in commercial sex. But Congress added a civil cause of action against both the perpetrator of the sex trafficking crime and anyone who "knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in" such a criminal violation. 18 U.S.C. § 1595(a). The Franchisors are precisely the type of defendant Congress had in mind when it devised this remedy.

Even so, under Rule 12(b)(6), the District Court dismissed all claims against the Franchisors. The District Court's decision rests on two fundamental errors.

First, the District Court erroneously held that, to state a claim under the TVPRA, a plaintiff must allege that the defendant "participated in the sex trafficking act itself" and "dealt with Plaintiff herself."[5] This holding eviscerates the negligence standard Congress adopted in the plain language of the civil cause of action. The District Court's opinion—the only one in this Circuit to apply TVPRA's civil

[5] JD1-Doc.282 at 9.

remedy against a hotel defendant—is an outlier nationally. With scant analysis, the District Court summarily rejected the reasoning of every other court to consider such a claim. Instead, the District Court referenced an unpublished Sixth Circuit opinion involving a criminal prosecution under the TVPRA and a district court opinion that relied on that same criminal case. But this is not a criminal case. By applying the wrong standard, the District Court erred.

Second, the District Court failed to view the allegations in the Amended Complaint in the light most favorable to Plaintiffs, an error that infected the District Court's review of all of Plaintiffs' claims. Plaintiffs alleged in detail the immense volume of sex trafficking at these hotels—from the revolving door of buyers to the heaps of used condoms in trashcans. Plaintiffs alleged they exhibited many well-known signs of trafficking, from obvious bruises to constant monitoring by their traffickers. And they alleged that the Franchisors' inspectors were on the property to see the open and obvious sex trafficking. This, together with public complaints of prostitution and crime, and private complaints of sex trafficking, sufficiently satisfy Rule 8's pleading standard to state claims for relief.

The District Court apparently disbelieved these allegations. It decried the lack of evidence and lack of particularity. It questioned why Plaintiffs had not alleged specific dates on which the Franchisors observed sex trafficking, as if Plaintiffs' claims were subject to Rule 9(b). And it failed to view the complaint as a whole, as

it must, instead viewing allegations in isolation and dismissing them as "conclusory." For these reasons, this Court should reverse the dismissal of claims against the Franchisors.

STATEMENT OF THE CASE

I. Factual Background[6]

A. Hotels are essential to sex trafficking operations.

For sex trafficking to thrive, it needs at least three things. First, victims. Often referred to as "modern-day slavery," a sex trafficking victim is treated as property of her trafficker.[7] But the victim retains no money and remains dependent on her trafficker for life's most basic necessities such as food and clothing.[8]

Second, traffickers. Traffickers profit from the forced labor of their victims. Traffickers force young women and underage girls to engage in commercial sex acts.[9] Traffickers control victims through force, using violence and threats of violence to restrain, beat, and drug them.[10] And they control victims through fraud

[6] For allegations common to all four cases, Plaintiffs reference the paragraphs of the Amended Complaint in JD1 (Doc. 87).

[7] JD1-Doc.87 ¶ 74.

[8] *Id.* ¶¶ 103-105.

[9] *Id.* ¶¶ 74-75.

[10] *Id.* ¶¶ 76-77.

and coercion, employing emotional and psychological manipulation, trauma, and isolation.[11]

Third, sex trafficking requires a venue, a place where victims can be sold for sex to as many buyers as possible. In Atlanta, sex trafficking ventures typically operate at hotels.[12] Traffickers rent rooms, arrange for buyers to come to those rooms to pay money for sex, and then use some of that money to pay for further rentals.[13] Hotels operators, including the Franchisors here, profit from the hotel room rental revenue generated in this dangerous cycle.

B. Hotels and Franchisors have long known how to spot and deter sex trafficking.

Atlanta's reputation as an "epicenter for human trafficking" is no secret to those who run and franchise Atlanta-area hotels—including the Franchisors.[14] Nearly twenty years ago, an article on the front page of Atlanta's newspaper entitled *Selling Atlanta's Children* shined light on the local sex trade.[15] And as the FBI

[11] *Id.* ¶¶ 1, 4, 76.

[12] *Id.* ¶¶ 5, 79, 87 n.17.

[13] *Id.* ¶¶ 6, 87 n.17.

[14] *Id.* ¶ 81.

[15] *Id.* ¶ 80 n.9.

ranked Atlanta as one of the worst cities in the country for sex trafficking,[16] the Franchisors were warned not to turn a blind eye.[17]

The Franchisors have long known how to spot and deter sex trafficking.[18] Since 2004, End Child Prostitution and Trafficking (ECPAT-USA), promoted the Tourism Child-Protection Code of Conduct ("Code"). Well-known in the hospitality industry, the Code identifies six steps hotels should take to combat child sex trafficking.[19] In 2010 Choice met with ECPAT-USA representatives to develop training materials to prevent trafficking,[20] and by 2011 Wyndham purported to adopt the Code.[21] Additionally, the Department of Homeland Security identifies specific signs that suggest the presence of sex trafficking at hotels—signs of which the Franchisors were well aware.[22] And by 2013, hotel industry representatives knew that eight out of ten human trafficking arrests occur in hotels.[23] The Franchisors of

[16] *Id.*

[17] *Id.* ¶ 85, 92.

[18] *Id.* ¶¶ 94-95.

[19] *Id.* ¶ 88-89.

[20] *Id.* ¶ 98.

[21] *Id.* ¶ 95, 98, 101.

[22] *Id.* ¶ 91, 94.

[23] *Id.* ¶ 85.

Microtel and SES knew of the epidemic of sex trafficking, its dependence on and connection to hotels, and the prevalence of the problem in Atlanta.[24]

C. Open and obvious sex trafficking at the Microtel.

The Microtel has been a hotbed for conspicuous sex trafficking for years, with multiple traffickers operating there at the same time. While Plaintiffs were trafficked at the Microtel—between 2010 and 2016—a sex trafficker controlled the entire third floor of the hotel.[25] He housed at least seven victims at the Microtel, paying the hotel for additional rooms for the victims to meet with buyers, which led to a steady stream of buyers coming through the hotel.[26] The trafficker also lived at the Microtel, along with several of his relatives and associates.[27] Management and employees facilitated this operation, refusing to rent rooms on this floor without the trafficker's express permission because that trafficking venture was so profitable for the hotel and Franchisors.[28]

This trafficker was unafraid to loudly beat his victims or their buyers at the Microtel and regularly roamed the halls with several women in tow.[29] He even used

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[24] *Id.* ¶¶ 84-85, 92, 94-95.

[25] *Id.* ¶¶, 203, 209; JD2-Doc.90 ¶¶ 202, 208; JD3-Doc.70 ¶¶ 157, 163; JD4-Doc.75 ¶¶ 174, 180.

[26] JD1-Doc.87 ¶ 211-212.

[27] *Id.* ¶ 211.

[28] *Id.* ¶ 210.

[29] *Id.* ¶ 214.

the hotel's banquet room for photo and video shoots for online advertisements he posted for commercial sex at the Microtel.[30]

Plaintiffs' traffickers were no less brazen, using the Microtel as one of their trafficking venues. The typical length of a forced stay at this hotel varied. Jane Does 1 and 2 were trafficked at the Microtel for up to two weeks at a time.[31] Jane Does 2, 3 and 4 were forced to see more than ten men daily at the Microtel. Jane Doe 1 saw up to thirty men daily.[32]

Traffickers liked the Microtel because it actively facilitated their operations. For example, front desk employees served as lookouts for the traffickers, frequently calling them if police were nearby.[33] Hotel employees even allowed the traffickers to use hotel computers for the trafficking venture to post online advertisements for sex with the Plaintiffs.[34]

D. Open and obvious sex trafficking at the Suburban Extended Stay.

Similarly, a well-established sex trafficking venture trafficked Jane Does 1, 2, and 4 at the SES with help from SES employees. Like the Microtel, starting about

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[30] *Id.* ¶ 213.

[31] *Id.* ¶ 203; JD2 Doc. 90 ¶ 202.

[32] JD1-Doc.87 ¶ 220; JD2-Doc.90 ¶ 219; JD3-Doc.70 ¶ 174; JD4-Doc.75 ¶ 191.

[33] JD1-Doc.87 ¶ 202-207.

[34] *Id.* ¶ 208.

2011, Plaintiffs' traffickers arranged for as many as ten buyers a day—and for Jane Doe 1 up to twenty buyers a day—to engage in commercial sex acts in SES hotel rooms.[35] Each stay at the hotel lasted several days and, for Jane Doe 1, at times more than two weeks.[36] Several other traffickers also relied on the SES to support their trafficking ventures, so that at least fifty buyers came through the hotel to purchase sex each day.[37]

The buyers and traffickers made no effort to conceal their activities at the SES because multiple employees at the SES provided cover. When the Plaintiffs' traffickers arrived at the hotel, employees offered the traffickers' their "usual spot."[38] Employees served as lookouts for traffickers who asked them to call the room if "anything crazy is going on," which they did when, for example, police were present at the hotel.[39] These employees also ensured that Plaintiffs didn't escape by notifying their traffickers if they tried "something crazy."[40]

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[35] JD1-Doc.87 ¶¶ 176, 187; JD2-Doc.90 ¶¶ 175, 186; JD4-Doc.75 ¶¶ 148, 158.

[36] JD1-Doc.87 ¶ 176; JD2-Doc.90 ¶ 185; JD4-Doc.75 ¶ 157.

[37] JD1-Doc.87, ¶ 187.

[38] *Id.* ¶ 181; JD2-Doc.90 ¶ 180; JD4-Doc.75 ¶ 152.

[39] JD1-Doc. 87 ¶¶ 178-179 ¶ 182.

[40] *Id.* ¶ 179.

For example, one night Jane Doe 2 tried to escape by asking an employee for a ride or to use his phone to call a cab.[41] The employee refused to help and immediately informed her trafficker about Jane Doe 2's escape attempt. The result: the trafficker ruthlessly beat Jane Doe 2, telling her that "[n]one of these people are going to help you."[42] Trafficking of Jane Does 1, 2, and 4 at the SES continued like this for years.[43]

E. Franchisors knew or should have known the visible signs of force, fraud, and coercion at the Microtel and Suburban Extended Stay.

A steady stream of buyers, requests for excessive amounts of towels, and trash cans brimming with used condoms[44] weren't the only obvious signs that forced commercial sex was rampant at the Microtel and the SES. Many victims, including Plaintiffs, showed the hallmarks of sex trafficking: physical deterioration, malnourishment, poor hygiene, fatigue, sleep deprivation, and physical injuries.[45] Victims, including Plaintiffs, wouldn't make eye contact with others.[46] They had

[41] *Id.* ¶ 183.

[42] *Id.*¶ 184.

[43] *Id.* ¶ 176; JD2-Doc.90 ¶ 175; JD4-Doc.75 ¶ 148.

[44] JD1-Doc.87 ¶¶ 186, 219, 239.

[45] *Id.* ¶ 185.

[46] *Id.* ¶¶ 185, 218.

very few possessions and little or no money.[47] They could not freely walk about the property without monitoring by their traffickers.[48]

Even a lay person, untrained in the signs of sex trafficking, could see what was happening at these hotels. In fact, they did, and they told the Franchisors about it. In 2011, one customer informed Microtel hotel management and franchisors in an online review that he "suspect[ed] prostitution" because of the "many different people coming and going at all [h]ours" and the "hotel's proximity to a strip joint and a night club."[49] Another customer reported that he had to "wait for the prostitutes to clear the hallway" so he could leave the hotel for an early morning flight.[50] Lest anyone think the prostitutes were willing participants in commercial sex, other reports described the presence of pimps, who typically use force to ensure compliance.[51]

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[47] *Id.*

[48] *Id.* ¶ 185.

[49] *Id.* ¶ 223(a).

[50] *Id.* ¶ 223(b).

[51] *See, e.g.*, *id.* ¶ 223(c) (Microtel customer reporting that he suspected "stragglers hanging around the hotel were pimps and prostitutes"); *see also United States v. Craig*, 706 F. App'x 545, 550 (11th Cir. 2017) (holding that § 1591(a)(1) qualifies as a "crime of violence," because, "'regardless of whether the pimp uses force to cause his victim to engage in a sex act … there is always a serious risk that [the pimp] will use force afterward, if she disobeys his rules, fails to obtain a client, or for any number of reasons'") (quoting *United States v. Willoughby*, 742 F.3d 229, 242 (6th Cir. 2014)).

SES hotel's management and franchisor received similar public online reports. For example, in 2014, one customer detailed the "disgusting" conditions at SES where he found "2 prostitutes and many drug dealers."[52] Another customer complained a few days later about "felons, thieves, drug dealers … and also prostitutes and some pimps" surrounding the halls of the SES, openly offering guests drugs.[53] About one year later, another customer complained that, during his two-week stay, a local business owner told him that the SES was "frequently used for selling drugs and prostitution."[54]

These are just the publicly available complaints. The Franchisors of these hotels also privately received guest complaints relating to prostitution, commercial sex trafficking, and other criminal activity at the Microtel and SES—complaints they do not put online.[55] In fact, the sex trafficking was so notorious at the SES that nonprofit and religious organizations routinely visited that hotel to provide victims with food and rescue information.[56]

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[52] JD1-Doc.87 ¶ 191(a).

[53] *Id.* ¶ 191(b).

[54] *Id.* ¶ 191(c).

[55] *Id.* ¶¶ 192-194, 224-225.

[56] *Id.* ¶ 198.

F. The Franchisors actively controlled and monitored the Microtel and Suburban Extended Stay.

Wyndham and MISF[57] for Microtel and Choice for SES were active franchisors, establishing strong relationships with their franchisees that they nurtured for years.[58] They controlled the policies and standards of the Microtel and SES, respectively, including training of its managers and employees.[59] The Franchisors also received a royalty—a percentage of revenue generated by renting rooms to Plaintiffs' traffickers.[60]

The Franchisors knew or should have known about the rampant sex trafficking occurring at the franchised hotels. They sent inspectors to their hotels, sometimes anonymously, at times when the obvious sex trafficking activity—like the commandeering of an entire floor of the Microtel—would have been apparent.[61] They also received and reviewed online and other complaints about sex trafficking and prostitution occurring at the property during the relevant time.[62] And Choice, in particular, undoubtedly knew about publicized arrests relating to prostitution or

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[57] "Wyndham exercises complete control over [MISF]," which is "the entity that enters into franchise agreements with" Microtel hotels. *Id.* ¶¶ 40-41.

[58] *Id.* ¶¶ 37, 188.

[59] *Id.* ¶¶ 201, 174.

[60] *Id.* ¶¶ 173, 200.

[61] *Id.* ¶¶ 221, 188.

[62] *Id.* ¶¶ 190, 192-194, 224-225, 248.

trafficking at the SES between 2010 and 2016, during which time multiple women were arrested for prostitution at the hotel.[63] Despite knowledge of sex trafficking at these hotels, the Franchisors took no steps to stop it, preferring to profit from the rental of rooms used for sex trafficking.[64]

II. Course of Proceedings in the District Court

On August 26, 2019, the Jane Doe Plaintiffs sued defendants who owned, managed, or controlled hotels where Plaintiffs were trafficked.[65] Shortly thereafter, Plaintiffs filed the Amended Complaints at issue here.[66]

The Franchisors and others moved to dismiss under Rule 12(b)(6), and, in the alternative, Choice moved to strike specific allegations relating to sex trafficking that it contended were "impertinent and salacious."[67]

The District Court held a hearing on February 7, where it announced its intention to grant the Franchisors' motions. The District Court began by directing the Plaintiffs to amend, requiring a "recasted complaint" to "remove all of the puffing that existed in the original complaint about sex trafficking and what it is and

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[63] *See id.* ¶ 197.

[64] *Id.* ¶¶ 10-11, 93-94, 226.

[65] JD1-Doc.1; JD2-Doc.1; JD3-Doc.1; JD4-Doc.1.

[66] JD1-Doc.87; JD2-Doc.90; JD3-Doc.70; JD4-Doc.75.

[67] JD1-Doc.133 at 9 (citing paragraphs 1, 5-7, 74-80, and 83-90 of the Amended Complaint).

why it's bad," because such language was not "germane to the complaint itself."[68] It denied the motions of the local owners and operators with leave to refile following the second amendment of the complaint.[69]

Regarding the Franchisors, the District Court expressed skepticism that Plaintiffs had alleged facts sufficient to show that they knew or should have known of sex trafficking.[70] For example, in response to an allegation that a sex trafficker ran the third floor of the Microtel, the District Court did not infer knowledge on the part of the Franchisor—but instead inferred the opposite, stating, "the more plausible explanation is that if the franchisor knows about it . . . then they are going to revoke the franchise. I mean, isn't that the most reasonable."[71] And rather than credit Plaintiffs' allegations, the District Court faulted Plaintiffs' lack of "evidence" that Wyndham or MISF sent inspectors to the Microtel, or that the inspectors were present during the relevant time.[72]

Rejecting Plaintiffs' allegations as "conclusions," the District Court appeared skeptical that Plaintiffs could develop additional facts through discovery, noting "you have no facts to back that up nor do I see how you could ever have facts to

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[68] JD1-Doc.248.

[69] *Id.* at 5.

[70] *Id.* at 8, 47-56.

[71] *Id.* at 47-48.

[72] *Id.* at 55.

back that up."[73] Dismissing the "should have known" standard, the District Court rejected Plaintiffs' allegation that the Franchisors knew of sex trafficking because Plaintiffs' allegations lacked specificity, explaining "you can't give me any date that [the Franchisors] were there when [sex trafficking] was going on."[74] And although Plaintiffs detailed their allegations and how additional facts—facts uniquely in the possession of defendants—would be sought in discovery, the District Court simply disbelieved that the Franchisors knew or should have known of sex trafficking, dismissing Plaintiffs' allegations as insufficiently "factual."[75]

The District Court did not dismiss the Franchisors at that time, however. Instead, it directed the Franchisors to draft proposed dismissal orders.[76] The District Court said that after it dismissed the Franchisors, the Plaintiffs could file a second amended complaint against the local owners and operators, against whom the District Court thought "there [was] sufficient grounds to let the cases proceed."[77] But the District Court directed Plaintiffs to omit "gratuitous comment about the industry of sex trafficking," and to "be specific as to each defendant or group of defendants" including providing "dates and times" and "what it is they did or did not

[73] *Id.* at 56.

[74] *Id.* at 59.

[75] *Id.* at 57.

[76] *Id.* at 102.

[77] *Id.* at 103, 107.

do specifically."[78] Focusing on each claim, the District Court emphasized, "I need to know specifically."[79]

On April 13, the District Court issued substantially the same dismissal order in each case.[80] It held that, to state a TVPRA claim, Plaintiffs must allege that the defendants engaged "in some participation in the sex trafficking act itself" and "dealt with the Plaintiff herself."[81] The District Court also found that "many of the allegations that have been made are conclusory in nature," including allegations in support of the Georgia RICO and negligence claims.[82] The District Court then dismissed all claims against the Franchisors and similarly situated corporate affiliates. It denied the motions to dismiss of the local owner defendants with leave to renew their motions after Plaintiffs file a second amended complaint.[83]

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[78] *Id.* at 105-106.

[79] *Id.* at 107.

[80] JD1-Doc.282; JD2-Doc.275; JD3-Doc.201; JD4-Doc.182.

[81] JD1-Doc. 282 at 9 (quoting *Noble v. Weinstein*, 335 F. Supp. 3d 504, 524 (S.D.N.Y. 2018)).

[82] *Id.* at 9-12.

[83] *Id.*

Plaintiffs filed an unopposed motion for entry of final judgment as to the Franchisors under Rule 54(b), which the District Court granted on April 29, entering final judgment.[84] This appeal followed.

STANDARDS OF REVIEW

This Court reviews *de novo* the District Court's dismissal under Rule 12(b)(6) for failure to state a claim, "accepting all factual allegations in the complaint as true and viewing them in the light most favorable to the plaintiff." *Williamson v. Travelport, LP*, 953 F.3d 1278, 1288 (11th Cir. 2020). This Court reviews an order granting or denying a motion to strike for abuse of discretion. *In re Fancher*, 802 F. App'x 538, 544 (11th Cir. 2020). But "[s]uch discretion does not extend to the exclusion of crucial relevant evidence necessary to establish" a claim. *United States v. Wasman*, 641 F.2d 326, 329 (5th Cir. 1981) (reversing district court's decision to exclude relevant evidence crucial to a criminal defendant's valid defense as an abuse of discretion).[85]

SUMMARY OF ARGUMENT

The District Court made two fundamental errors in dismissing all claims against the Franchisors. *First*, the District Court misconstrued the civil beneficiary

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[84] JD1-Doc.295 (Order); JD1-Doc.296-1 (Amended Final Judgment); *see also supra note* 2.

[85] *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).

claim under the TVPRA, 18 U.S.C. § 1595(a), holding civil plaintiffs to a heightened standard taken from the criminal section of this statute. Section 1591 criminalizes sex trafficking—the use of force, fraud, or coercion to cause a person to engage in a commercial sex act. 18 U.S.C. § 1591(a)(1). It also criminalizes knowingly harboring a sex trafficking victim, as well as knowingly benefiting from assisting, supporting, or facilitating the sex trafficking. *Id.* § 1591(a)(2). Section 1595(a), in contrast, provides a civil cause of action against not only the sex trafficking perpetrator, but any person who "knowingly benefits, financially or by receiving anything of value, from participation in a venture which that person knew or should have known has engaged in an act in violation" of § 1591(a). Thus, unlike the criminal provision, this civil provision creates negligence liability for defendants that did not participate in the sex trafficking act itself, so long as they participated in a venture that they knew or should have known violated § 1591.

The District Court disregarded the standard for civil liability set forth in § 1595(a), and instead applied the heightened criminal standard from § 1591(a) to hold that a defendant is not liable for benefiting from a venture unless it "participated in the sex trafficking act itself" and "dealt with Plaintiff herself."[86] The District Court erred in dismissing Plaintiffs' TVPRA claim under this inapplicable standard.

[86] JD1-Doc. 282 at 9.

Second, the District Court applied a heightened, erroneous standard to review the Franchisors' 12(b)(6) motion. This error infected not just Plaintiffs' TVPRA claims, but their Georgia RICO and negligence claims as well. Rather than make plausible inferences in favor of Plaintiffs and reading the totality of the allegations against the Franchisors—as it must under Rule 12(b)(6)—the District Court disaggregated and disregarded them. The District Court simultaneously found allegations that Franchisors inspected franchised property "by itself insufficient," while also concluding that public complaints about prostitution at the same hotels "itself … insufficient."[87]

The District Court disbelieved other allegations because they lacked specificity. For example, the District Court ignored Plaintiffs' allegations that inspectors at the Microtel saw a bustling commercial sex trade along with many bruised and battered victims—because Plaintiffs did not identify the specific dates of those inspections. But a district court's doubts that the plaintiff will ultimately prevail do not justify dismissing the plaintiff's claims on the pleadings. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

These errors led the District Court to dismiss Plaintiffs' Georgia RICO and negligence claims with almost no discussion. The District Court summarily

[87] *Id.*

concluded that Plaintiffs did not allege even a single predicate act of racketeering activity. The District Court also dismissed the negligence claims after disregarding Plaintiffs' allegations that the Franchisors controlled the standards of their franchised hotels and the training of hotel employees. The Federal Rules do not permit the District Court to raise the pleading bar higher than Rule 8(a)(2) requires. *In re Se. Banking Corp.*, 69 F.3d 1539, 1551 (11th Cir. 1995).

For these reasons, this Court should reverse the dismissal of the claims against the Franchisors and remand for further proceedings.

ARGUMENT AND CITATIONS OF AUTHORITY

I. The District Court erred in dismissing Plaintiffs' TVPRA claims under § 1595(a).

The District Court dismissed the TVPRA claims against the Franchisors based on two fundamental errors. The first was an error of statutory interpretation; the second was an error in applying the pleading standard to the facts alleged.

A. TVPRA's civil beneficiary cause of action is governed by a negligence standard.

About two decades ago, Congress made human trafficking a federal crime. Victims of Trafficking and Violence Protection Act of 2000 ("TVPA"), Pub. L. No. 106-386, § 112, 114 Stat. 1464, 1486-87 (2000) (codified at 18 U.S.C. § 1589, *et seq.*). Congress passed the TVPA to "combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to

ensure just and effective punishment of traffickers, and to protect their victims." *Id.* § 102, 114 Stat. at 1466.

Recognizing the increasing need to assist trafficking victims and to more effectively continue the nationwide fight against human trafficking, in 2003, Congress added a civil cause of action "against the perpetrator" of a violation of the Act's criminal provisions, including, among others, 18 U.S.C. § 1591. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (codified at 18 U.S.C. § 1595(a)). Following the 2003 amendment, a trafficking victim who suffers a violation of § 1591 can bring a civil claim against "the perpetrator" of those crimes. 18 U.S.C. § 1595(a) (2003). Thus, to recover for a civil perpetrator claim under § 1595(a), a plaintiff must prove the same facts a prosecutor must prove to convict.

Then in 2008, Congress significantly expanded the civil cause of action. Now, under § 1595(a), the victim can sue not only the trafficking perpetrator—the person who committed the crimes identified in § 1591—but also "whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter." William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044, 5067 (2008) (codified at 18 U.S.C. § 1595(a)). Often described as a civil *beneficiary* claim, in this amendment,

"Congress gave 'victims a cause of action against those who have profited from their exploitation.'" *A.B. v. Marriott Int'l, Inc.*, No. CV 19-5770, 2020 WL 1939678, at *7 (E.D. Pa. Apr. 22, 2020) (internal citations omitted) (quoting Charles Doyle, Cong. Research Serv., R40190, The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (P.L.110-457): Criminal Law Provisions (2009)). This amendment "opened the door for liability against facilitators who did not directly traffic the victim[] but benefitted from what the facilitator should have known was a trafficking venture." *Id.* (internal quotation marks omitted).

In crafting this civil beneficiary provision, Congress could have set the standard for liability at various points along a *mens rea* continuum. *See M.A. v. Wyndham Hotels & Resorts, Inc.*, 425 F. Supp. 3d 959, 965 (S.D. Ohio 2019). For example, Congress could have adopted the "knowing" standard for criminal liability. Or it could have adopted a "reckless disregard" standard, under which a person is liable if he "knows of a substantial and unjustified risk of . . . wrongdoing" and fails to try to avoid it. *Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 770 (2011).

Instead, Congress adopted the plain language of negligence. Under the civil beneficiary provision of § 1595(a), a person is liable for knowingly benefiting from participating in a venture if the defendant "knew or should have known" that the venture violated the criminal provisions of the TVPRA. It is well-established that this "knew or should have known" language specifies a negligence standard. *See*

Faragher v. City of Boca Raton, 524 U.S. 775, 799-800 (1998) (acknowledging that the "knew or should have known" language refers to a negligence standard); *Amy v. Carnival Corp.*, 961 F.3d 1303, 1308 (11th Cir. 2020) (holding that for a duty to arise in a maritime negligence case, the defendant must have had actual or constructive knowledge which "hinges on whether it knew or should have known about the [risk-creating condition]").

Because of this "knew or should have known" language, every court other than this District Court here agrees that Congress established a negligence standard of care that can be satisfied with constructive knowledge. *See, e.g.*, *Ricchio v. Bijal, Inc.*, 424 F. Supp. 3d 182, 193–94 (D. Mass. 2019) ("The phrase 'knew or should have known,' echoes common language used in describing an objective standard of negligence.")(collecting authority); *M.A.*, 425 F. Supp. 3d at 965 ("M.A. brings a claim under § 1595(a), which uses the words 'should have known,' and therefore invokes a negligence standard, not knowledge through willful blindness."); *A.B.*, 2020 WL 1939678, at *12.[88]

B. Plaintiffs sufficiently alleged all three elements of a TVPRA civil beneficiary claim under § 1595(a), and the District Court erred in holding otherwise.

To state a civil beneficiary claim under § 1595(a), Plaintiffs must allege that

[88] *See also infra* note 92.

(1) the defendant knowingly benefited (2) from participation in a venture (3) that the defendant knew or should have known violated the TVPRA. As explained below in Part 1, Plaintiffs satisfy the first element of a TVPRA civil beneficiary claim by alleging the Franchisors received rental royalties from participating in the venture that managed hotels. In Part 2, Plaintiffs explain how they sufficiently alleged that the Franchisors "participated in a venture" and how the District Court's erroneous statutory interpretation nullifies the civil cause of action Congress intended.

Finally, in Part 3, Plaintiffs show how the Amended Complaint easily alleges that the Franchisors knew or should have known the Microtel and SES hotels were violating the criminal provisions of the TVPRA. Properly reviewed under Rule 8, Plaintiffs show how the District Court's imposition of a heightened pleading standard, reading of facts in isolation, and acceptance of inferences in favor of defendants led to the erroneous dismissal under *Twombly* of Plaintiffs' claims against the Franchisors.

1. TVPRA Element 1: Plaintiffs sufficiently alleged that the Franchisors "knowingly benefited."

Though not at issue, Plaintiffs easily alleged the first element. The "knowing benefit" element is satisfied by the rental of a hotel room. *Ricchio v. McLean*, 853 F.3d 553, 556 (1st Cir. 2017). Showing that the defendant had a financial stake in the success of the hotel, or even renting a single room for a short period could constitute a "benefit" under the statute. *Ricchio v. Bijal*, 386 F. Supp. 3d at 131

(benefit is not required to reach a certain threshold, a *de minimis* benefit is sufficient). "The first element merely requires that Defendant knowingly receive a financial benefit." *H.H. v. G6 Hosp., LLC*, No. 2:19-CV-755, 2019 WL 6682152, at *2 (S.D. Ohio 2019) (finding room rental itself sufficient and rejecting argument that there must be a causal relationship between the room rental and the sex trafficking); *M.A.*, 425 F. Supp. 3d at 965 (same); *A.B.*, 2020 WL 1939678, at *15.

2. TVPRA Element 2: Plaintiffs sufficiently alleged that the Franchisors "participated in a venture."

The District Court erroneously held that to "participate in a venture" for purposes of civil beneficiary liability under § 1595(a) requires a defendant to engage in "some participation in the sex trafficking act itself" and to have "dealt with the Plaintiff herself."[89] The language of section § 1595(a)'s civil beneficiary claim contains no such requirements. Nothing in § 1595(a) requires knowledge of Plaintiff specifically. The statutory text imposes liability for constructive knowledge of "an act in violation" of the TVPRA.[90] And under the plain language of the statute, a defendant participates in a venture by engaging in any undertaking that involves risk, like, for example, running a hotel.

[89] JD1-Doc. 282 at 8-9.

[90] The criminal provision of the TVPRA, § 1591(a), on the other hand, requires explicit knowledge of "a person."

a. To allege "participation in a venture" Plaintiffs are not required to allege participation in the act of sex trafficking.

The District Court's holding comes with no explanation, but it appears that the District Court imported these limitations from the definition of the term "participation in a venture" to establish *criminal* liability under § 1591. 18 U.S.C. § 1591(e)(4); *see A.B.*, 2020 WL 1939678, at *12-13 (surveying district court decisions on § 1595(a) claims and concluding that the District Court in these cases imposed the definition of 'participation in a venture' from the criminal offense defined by Congress in section 1591(a)(2)). This definition, added to § 1591 in 2017, provides that for purposes of "this section," *i.e.*, § 1591 only, the term participation in a venture specifically means "knowingly assisting, supporting, or facilitating a violation of subsection (a)(1)." Thus, to trigger *criminal* liability, a defendant must not only participate in a venture (like the operation of a hotel, for example) that violates the TVPRA, he must also knowingly participate in the sex trafficking itself.[91] The District Court erred by applying this same definition for purposes of civil beneficiary liability under the TVPRA.

[91] The Amended Complaint asserted multiple claims against the Franchisors, including civil *perpetrator* claims under § 1595(a). Civil perpetrator claims must satisfy all the elements of a violation of the criminal provision of § 1591. But in this appeal, Plaintiffs pursue only their *beneficiary* claims, which are subject to the "knew or should have known" standard. *See* JD1-Doc. 87, Count 9 ¶¶ 400-407, Count 15 ¶¶ 450-457.

As the Supreme Court has held, there is "no 'effectively irrebuttable' presumption that the same defined term in different provisions of the same statute must 'be interpreted identically.'" *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 575–76 (2007). Instead, "although this court presumes that the same words in different parts of the statute have the same meaning, such a presumption is rebuttable." *Estate of Shelfer v. Comm'r*, 86 F.3d 1045, 1051 (11th Cir. 1996). Here any presumption is undeniably rebutted for three reasons.

First, the express language of § 1591 limits its definitions to that "section." Courts do not freely disregard Congress's express admonition that a definition applies only to a specific section of a statute. *See, e.g.*, *Raymond B. Yates, M.D., P.C. Profit Sharing Plan v. Hendon*, 541 U.S. 1, 21, (2004) (limiting a regulation's definition given '[f]or purposes of this section,' only to the application of the stated section); *United States v. Mazza-Alaluf*, 621 F.3d 205, 210 (2d Cir. 2010).

Second, engrafting onto the civil beneficiary provision of § 1595(a) the definition of "participation in a venture" from § 1591 would negate the negligence standard Congress adopted, violating the "basic premise of statutory construction" that no provision should be construed to render it meaningless. *See United States v. Forey-Quintero*, 626 F.3d 1323, 1327 (11th Cir. 2010). Congress provided for a civil claim against any person that knowingly benefits from participation in a venture that the defendant knew *or should have known* committed a criminal violation of the

TVPRA. *A.B.*, 2020 WL 1939678 at *13. But, if as the District Court suggested, "participation in a venture" in this section means "knowingly assisting, supporting, or facilitating" a criminal TVPRA violation, then a defendant could never be liable under the lesser "should have known" standard. Indeed, that is the essence of the District Court's erroneous holding.

Third, the legislative history of the "participation in a venture" definition confirms that the § 1591 definition does not apply to a civil beneficiary claim under § 1595(a). Before 2017, neither section defined "participation in a venture." Congress then amended § 1591 to add a definition of that term for criminal TVPRA violations as part of the Allow States and Victims to Fight Online Sex Trafficking Act of 2017 ("FOSTA"), Pub. L. 115-164. Congress passed FOSTA to address a potential unintended consequence of the Communications Decency Act of 1996, which could have resulted in providing legal protection to "websites that unlawfully promote and facilitate prostitution" and "websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims." Pub. L. 115-164, § 2.

In FOSTA, Congress added the "participation in a venture" definition to a section of the Act entitled "Ensuring Federal Liability for Publishing Information Designed to Facilitate Sex Trafficking or Otherwise Facilitating Sex Trafficking." Congress did *not* add any definitions to § 1595. Instead, Congress announced that,

except for actions preempted by Section 230 of the Communications Act of 1934 (which does not apply here), "[n]othing in this Act or the amendments made by this Act shall be construed to limit or preempt any civil action . . . under Federal law . . . filed before or after the day before the date of enactment of this Act." Pub. L. 115-164, § 7. By this language, Congress expressed an intent not to limit civil actions under § 1595. By applying the definition of "participation in a venture" from this Act to § 1595, the District Court did precisely that.

In fact, despite the well-established rule that "any statutory construction case" must "start, of course, with the statutory text," *Sebelius v. Cloer*, 569 U.S. 369, 376 (2013), the District Court provided no analysis of the actual text of § 1595(a). Instead, the District Court turned to *United States v. Afyare*, 632 F. App'x 272 (6th Cir. 2016), an unpublished opinion involving a *criminal* prosecution under § 1591, and *Noble v. Weinstein*, 335 F. Supp. 3d 504 (S.D.N.Y. 2018), which relied on *Afyare*. Unlike here, *Noble* involved only civil *perpetrator* claims, not civil beneficiary claims.

Every other court to consider *Afyare* and *Noble* in connection with a civil beneficiary claim under § 1595(a) have held them inapplicable.[92] That includes

[92] *A.C. v. Red Roof Inns, Inc.*, No. 2:19-CV-4965, 2020 WL 3256261, at *4 (S.D. Ohio June 16, 2020) (Marbley, C.J.); *Doe S.W. v. Lorain-Elyria Motel, Inc.*, No. 2:19-CV-1194, 2020 WL 1244192, at *6 (S.D. Ohio Mar. 16, 2020) (Marbley, C.J.); *A.B.*, 2020 WL 1939678, at *13 (collecting cases); Report and

district courts in Ohio, Washington, California and Pennsylvania. In *A.B. v. Marriott International,* for example, the district court thoroughly compared the opinions on appeal here with all other decisions, which declined to apply *Afyare* to §1595(a) civil beneficiary claims. 2020 WL 1939678, at *9-13. The *A.B.* court declined to rely on *Noble* or the decisions below because "[b]oth the court in the Red Roof cases [the opinions below] and the court in *Noble* essentially required the victim of sex trafficking seeking a civil remedy to first prove a criminal violation of § 1591(a)(2)." *Id.* at *13. But that is not what the statute requires for a civil beneficiary claim.

Afyare involved the prosecution under § 1591 of dozens of defendants in an alleged sex trafficking ring. 632 F. App'x at 273-74. In the first decision and appeal of *Afyare*, both the Sixth Circuit and the district court expressed significant doubt that a sex trafficking ring even existed, because the prosecution's evidence was

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Recommendation, *M.L. v. Craigslist, Inc.*, No. 19-6153 (Doc. 62) (W.D. Wash. Apr. 17, 2020); *J.C. v. Choice Hotels Int'l, Inc.*, No. 20-CV-00155-WHO, 2020 WL 3035794, at *1 n.1 (N.D. Cal. June 5, 2020) (agreeing with the court in *M.A.* that "applying the 'participation in a venture' definition from the criminal liability section of the TVPRA, section 1591(e)(4), to the civil liability section of the TVPRA, section 1595, would void the 'should have known' language in the civil remedy,"); *M.A.*, 425 F. Supp. 3d at 971 (Marbley, C.J.) ("Defendants need not have actual knowledge of the sex trafficking in order to have participated in the sex trafficking venture for civil liability under the TVPRA, otherwise the 'should have known' language in § 1595(a) would be meaningless."); *H.H. v. G6 Hospitality, LLC*, No. 2:19-cv-755, 2019 WL 6682152 (S.D. Ohio Dec. 6, 2019) (Marbley, C.J.).

"contradict[ory], disavowed, refuted," and "defied belief." *United States v. Fahra*, 643 F. App'x 480, 484 (6th Cir. 2016).

Undeterred, the prosecution pressed on. In the second appeal of the case, the Sixth Circuit considered whether the trial court erred in excluding evidence that the defendants were part of ventures "that were not involved with sex trafficking." *Afyere*, 632 F. App'x at 274. The extent of this evidence was that the defendants "were in a car together during unrelated traffic stops, or dined together, or drove one another's cars[.]" *Id*. The trial court excluded such evidence under Federal Rule of Evidence 404(b), and Sixth Circuit affirmed. *Id.* "We agree with the district court," the court held, "and find that § 1591(a)(2) targets those who participate in sex trafficking." *Id.* The court considered the goal of criminalizing sex trafficking and the maxim that a "criminal statute" must be "strictly construed against the Government." *Id.* (internal quotation marks omitted). It held that § 1591(a)(2) appeared to target only "those who participate in sex trafficking" and not simply those who "turn a blind eye" to it. *Id.*

And so it is for criminal liability. But for civil liability under the civil beneficiary provision of § 1595(a), Congress adopted a constructive knowledge standard that *does* target those who turn a blind eye. *See Burchfield v. United States*, 168 F.3d 1252, 1256 (11th Cir. 1999) (holding that in a negligence suit against the Department of Veterans Affairs that "[a]n agency cannot . . . turn a blind eye to facts

that become obvious when it investigates the alleged events."); *see also In re: The Home Depot, Inc., Customer Data Sec. Breach Litig.*, No. 1:14-MD-2583-TWT, 2016 WL 2897520, at *4 (N.D. Ga. May 18, 2016) (holding that under a negligence standard, defendant may be liable if it "turn[s] a blind eye" to significant risks of harm). Moreover, *Afyare* does not apply because courts do not strictly construe civil statutes in favor of defendants. And for the reasons explained above, applying the criminal standard as set forth in *Afyare* would strip the TVPRA of its civil beneficiary cause of action. *Afyare* thus provides no basis for disregarding the plain language of § 1595.

Nor does *Noble* support the District Court's decision. 335 F. Supp. 3d 504. The plaintiff in *Noble* brought *no* beneficiary claim against the defendant; each of her claims under § 1595(a) were instead *perpetrator* claims. *See id.* at 513. Thus, to state a claim for relief, the plaintiff had to establish that the defendant committed a *criminal* violation. *Id.* at 510, 513. This explains why the court in *Noble* relied on *Afyare*, a criminal case, to analyze the claims. Here, in contrast, Plaintiffs do not need to show that the Franchisors committed a crime. They must allege only that the Franchisors participated in a venture that committed such crimes, and the Franchisors should have known about it. 18 U.S.C. § 1595(a). As explained next, Plaintiffs easily satisfied that burden.

b. Plaintiffs sufficiently alleged Franchisors' "participation in a venture" by their operation of the hotel.

Because § 1595 does not define "participation in a venture" this Court should look to the ordinary meaning of these terms, guided by dictionary definitions. *See In re James*, 406 F.3d 1340, 1343 (11th Cir. 2005). Starting first with the term "venture," this term commonly refers to an "undertaking that involves risk." Black's Law Dictionary (11th ed. 2019); *see also* Merriam-Webster, "venture," https://www.merriam-webster.com/dictionary/venture (last visited Aug. 15, 2020); *see, e.g.*, *Gilbert v. United States Olympic Comm.*, No. 18-CV-00981-CMA-MEH, 2019 WL 1058194, at *11 (D. Colo. Mar. 6, 2019) (noting that the term "venture" "has not been defined by Congress or the Tenth Circuit," and thus adopting the "common definition of 'venture'" from Black's Law Dictionary to construe 18 U.S.C. § 1589(b)), *report and recommendation adopted in relevant part, rejected in part*, 423 F. Supp. 3d 1112 (D. Colo. 2019). A venture might also refer to "any group of two or more individuals associated in fact." 18 U.S.C. § 1591(e)(6); *see, e.g.*, *Ricchio v. McLean*, 853 F.3d 553, 556 (1st Cir. 2017) (Souter, J.)

The operation of the Microtel and SES are ventures. As Plaintiffs alleged, multiple people and entities, including the Franchisors, worked together, facing risk, to operate the hotels for profit. And as explained above, "liability under § 1595 can attach when an individual participates in a venture that is not specifically a sex trafficking venture and participation is not direct participation in the sex

trafficking"). *See A.B.*, 2020 WL 3256261, at *6 (citing *Jean-Charles v. Perlitz*, 937 F. Supp. 2d 276, 288–89 (D. Conn. 2013)).[93]

As alleged in the Amended Complaint, the Franchisors also "participated" in these ventures. The term "participation" broadly refers to the act of "tak[ing] or hav[ing] a part or share, as with others." Merriam-Webster, definition of "participate," https://www.merriam-webster.com/dictionary/participate (last visited July 1, 2020); *see, e.g. Equal Employment Opportunity Comm'n v. CVS Pharmacy, Inc.*, 70 F. Supp. 3d 937, 940 (N.D.Ill. 2014) (construing the term "participate" in a contract, noting that it is a "broad term" that typically means "to be involved with others in doing something" and "to take part in an activity . . . with others") (quoting http://www.merriam-webster.com/dictionary/participate), *aff'd sub nom., E.E.O.C. v. CVS Pharmacy, Inc.*, 809 F.3d 335 (7th Cir. 2015). Plaintiffs alleged that the Franchisors took part in the management of the hotel by controlling the standards, policies, and training at these hotels thereby participating in the hotel venture.[94]

[93] In *Jean-Charles*, the district court held that the operation of a residential school for poor children, where one employee forced minor boys to engage in sexual activity in exchange for basic necessities, constituted a venture that violated § 1591 for purposes of § 1595. 937 F. Supp. 2d at 288-89.

[94] JD1-Doc.87 ¶¶ 174, 201.

3. TVPRA Element 3: Plaintiffs sufficiently alleged the Franchisors knew or should have known of sex trafficking at their hotels.

Plaintiffs alleged in the Amended Complaint that the Franchisors are liable because they participated in ventures—the management of hotels—which violated § 1591, and the Franchisors knew or should have known of such violations. The totality of the District Court's errors, taken together, turned the Rule 12(b)(6) standard on its head.

a. The District Court improperly raised the pleading bar under Rule 8, which led it to characterize Plaintiffs' factual allegations as merely "conclusory."

The District Court's doubt that proof of Plaintiffs' allegations will surface drove its decision to dismiss Plaintiffs' claims as "conclusory." As the District Court explained at the motion to dismiss hearing, "you have no facts to back that up nor do I see how you could ever have facts to back that up."[95] The District Court fell victim to what one court has described as the "*Twombly/Iqbal* compulsion," where defendants feel "compelled to file a motion to dismiss in nearly every case, hoping to convince the Court that it now has the authority to divine what the plaintiff may plausibly be able to prove rather than accepting at the motion to dismiss stage that the plaintiff will be able to prove his allegations." *Barker ex rel. U.S. v. Columbus Reg'l Healthcare Sys., Inc.*, 977 F. Supp. 2d 1341, 1346 (M.D. Ga. 2013) (Land, J.)

[95] JD1-Doc. 248 at 56.

As the *Barker* court reminded litigants, the Supreme Court has admonished that "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Id.* (quoting *Twombly*, 550 U.S. at 556). "[T]he District Court is not free to disregard allegations in a petition simply because they seem unbelievable." *Streets v. Wainwright*, 402 F.2d 87, 88 (5th Cir. 1968).

The District Court faulted Plaintiffs for lacking specificity and evidence. For example, the District Court criticized Plaintiffs for failing to give specific dates when the Franchisors' inspectors visited the hotels and for failing to provide evidence that they visited when the sex trafficking was apparent.[96] And at the hearing, the District Court explained that Plaintiffs must "be specific as to each defendant or group of defendants" including providing "dates and times" and "what it is they did or did not do specifically."[97] The District Court's Order then expressly required "specific facts."[98] Of course, Plaintiffs' claims need not be pleaded with specificity and are not subject to Rule 9(b). The Rules simply "do not permit district courts to impose upon plaintiffs the burden to plead with the greatest specificity they can." *In re Se. Banking Corp.*, 69 F.3d 1539, 1551 (11th Cir. 1995).

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[96] JD1-Doc.248 at 59.

[97] *Id.* at 105-106.

[98] JD1-Doc.282 at 13.

Finally, the District Court erred by exercising inferences in defendants' favor. Plaintiffs alleged facts to show that the Franchisors knew or should have known of open and obvious sex trafficking at the hotel but that the Franchisors looked the other way because they profited from room rentals.[99] For example, Plaintiffs alleged that a sex trafficker brazenly ran a sex trafficking operation on the third floor of the Microtel, which he did with the assistance of the hotel's employees.[100] Instead of exercising inferences in favor of Plaintiffs, as the law requires, the District Court concluded that such allegations suggested that the Franchisors did not know about sex trafficking: "[T]he more plausible explanation is that if the franchisor knows about it . . . then they are going to revoke the franchise. I mean, isn't that the most reasonable?"[101] While that describes how the Franchisors should have responded, it is not a basis to infer lack of knowledge in light of Plaintiffs' allegations to the contrary.

[99] JD1-Doc.87 ¶¶ 10, 226.

[100] *Id.* ¶¶ 209-217.

[101] JD1-Doc.248 at 47-48.

b. By improperly striking allegations about sex trafficking, the District Court weakened Plaintiffs' facts supporting the Franchisors' knowledge.

The District Court also struck allegations relating to sex trafficking generally as "redundant, immaterial, impertinent, or scandalous matter."[102] The District Court concluded that these allegations were "not germane to the complaint."[103] That is, the District Court struck as irrelevant allegations about sex trafficking from a complaint alleging sex trafficking. Not only are these paragraphs directly relevant, they establish critical facts about defendants' knowledge. Although the District Court may strike allegations that are scandalous or impertinent, it abused its discretion by striking allegations that are directly relevant to Plaintiffs' claims. *See Wasman*, 641 F.2d at 329 (reversing district court's decision to exclude relevant evidence crucial to a criminal defendant's valid defense as an abuse of discretion).

These allegations not only describe sex trafficking generally but describe specific facts that were known to defendants. This includes that Atlanta, where the Microtel and SES operate, is a city known as the "epicenter for human trafficking." The FBI ranked Atlanta as one of the worst cities in the country for child sex

[102] JD1-Doc.282 at 12-13.

[103] JD1-Doc.248 at 5.

trafficking, and the Amended Complaint describes the public news reports dating back to 2001—all of which the Franchisors were aware.[104]

The District Court also struck allegations that establish defendants' knowledge of the role hotels play in sex trafficking. Ninety-two percent of calls to the National Human Trafficking Hotline involving hotels and motels report sex trafficking and sixty-three percent of trafficking incidents occur in hotels.[105] The District Court struck allegations specifically describing the warning signs of sex trafficking—many of which Plaintiffs displayed—and of which defendants were familiar. The ECPAT Code and materials from the Department of Homeland Security all support Plaintiffs' allegations that the Franchisors knew the warning signs of sex trafficking, the risks of trafficking particular to the hotels, the prevalence of sex trafficking in Atlanta, and the steps they should take to ensure they did not profit from sex trafficking.[106] It was improper to strike these allegations.

c. Instead of reading the totality of Plaintiffs' allegations, the District Court rendered facts meaningless by viewing them in isolation.

Finally, the District Court erred when, rather than read the Amended Complaint in its totality, it read facts in isolation concluding that each, viewed alone,

[104] JD1-Doc.87 ¶¶ 79-81.

[105] *Id.* ¶¶ 83-87.

[106] *Id.* ¶¶ 88-92.

did not support Plaintiffs' claims. Courts must "give attention to the whole body of allegations" in a complaint, rather than viewing allegations in isolation to render them "meaningless," explained Justice Souter, sitting by designation, in a TVPRA civil action. *Ricchio*, 853 F.3d at 557; *accord Bistline v. Parker*, 918 F.3d 849, 874 (10th Cir. 2019) ("combined allegations" in complaint supported an inference of defendants' knowledge for purposes of a TVPRA claim under § 1589); *Gilbert v. USA Taekwondo, Inc.*, No. 18-CV-00981-CMA-MEH, 2020 WL 2800748, at *6 (D. Colo. May 29, 2020) (viewing the allegations in the complaint as a whole to hold that the plaintiff sufficiently alleged a claim under § 1595(a)).

This is particularity true when assessing the "knew or should have known" standard, which is widely recognized as a fact-intensive inquiry based on the totality of circumstances. *See, e.g.*, *Allen v. Bd. of Pub. Educ. for Bibb Cty.*, 495 F.3d 1306 (11th Cir. 2007) (applying a fact-intensive inquiry to the constructive knowledge standard under FLSA); *Love v. Weeco (TM)*, 774 F. App'x 519 (11th Cir. 2019) (holding that plaintiff adequately alleged a Georgia negligence claim); *Matt v. Days Inns of Am., Inc.*, 443 S.E.2d 290, 293 (Ga. Ct. App. 1994) (considering the totality of circumstances to hold that a hotel knew or should have known of a risk of harm), *aff'd*, 265 Ga. 235, 454 S.E.2d 507 (1995).

To assess the constructive knowledge element of a negligence claim, courts consider the severity and pervasiveness of the conduct. *See, e.g.*, *Henson v. City of*

Dundee, 682 F.2d 897, 905 (11th Cir. 1982) (holding that the "pervasiveness of the harassment" gives rise to the inference of knowledge or constructive knowledge in a Title VII hostile work environment claim); *Reich v. Dep't of Conservation & Nat. Res.*, 28 F.3d 1076, 1082 (11th Cir. 1994) (This court often construes the question of actual or constructive knowledge as an issue of fact to be reviewed for clear error.). And in the context of a TVPRA civil beneficiary claim, courts consider the defendant's "failure to implement policies sufficient to combat a known problem in one's operations." *M.A.*, 425 F. Supp. 3d at 968 (citing *Brown v. Corr. Corp. of Am.*, 603 F. Supp. 2d 73, 81 (D.D.C. Mar. 26, 2009)).

The case of *M.A.* is instructive. There, the plaintiff alleged that she was trafficked out of a hotel for a little over one year. *Id.* at 962. She alleged that "hotel staff should have recognized . . . signs of her trafficking." *Id.* Such signs included that: (1) "her trafficker asked for rooms near exits"; (2) her trafficker "escorted" her by the front desk; (3) the rooms where she stayed contained bottles of lubricants, boxes of condoms, and "an extraordinary number of used condoms" in the trash cans; (4) the "trafficker operated the sex trafficking venture out of the same hotel room for multiple days or weeks in succession"; (5) the plaintiff was forced to see ten buyers per day, who came in and out of her room; (6) the plaintiff made excessive requests for linens; (7) the rooms were "frequently paid for with cash"; and (8) the plaintiff exhibited obvious signs of human trafficking like physical deterioration and

unwillingness to make eye contact. *Id.* at 967. The plaintiff also alleged that hotel staff ignored her desperate screams for help. *Id.* And according to the plaintiff, news articles and online reviews showed that these hotels were in "an area known for sex trafficking activity." *Id.*

After she escaped, the plaintiff brought a TVPRA civil beneficiary claim against Wyndham, Choice, and others. Applying a negligence standard, the court considered the facts above in totality and held that the plaintiff had "alleged that Defendants were on notice about the prevalence of sex trafficking generally at their hotels." *Id.* at 968. The court also held that the plaintiff's allegations of her own sex trafficking were enough to infer that the defendants should have been alerted to her situation. *Id.* For these reasons, the court held that the plaintiff sufficiently alleged a TVPRA civil beneficiary claim against the franchisors. *Id.*

Here, Plaintiffs alleged detailed facts that the Franchisors knew or should have known the Microtel and SES hotels violated the TVPRA. For one thing, the TVPRA violations at the Microtel and the SES were severe and pervasive. *Henson,* 682 F.2d at 905 (pervasiveness of conduct gives rise to constructive knowledge). Multiple victims were forced to engage in commercial sex acts at these hotels for weeks at a time in ventures that continued unabated *for years*.[107] Jane Doe 1 alone saw up to

[107] *Id.* ¶¶ 3-10.

thirty men per day during her more than twenty separate stays at the Microtel.[108] Jane Doe 2 and Jane Doe 3 were often trafficked at the same time bringing dozens of buyers—all while a sex trafficker controlled an entire floor where he operated with impunity.[109] And as to the SES, Plaintiffs alleged there were at least fifty buyers a day.[110]

Moreover, Plaintiffs alleged the Franchisors' inspectors were on the property and saw the obvious signs of sex trafficking.[111] But the District Court held that the "fact a franchisor may conduct inspections of a franchised property by itself [was] insufficient to impart knowledge of trafficking activity."[112] Plaintiffs did not allege inspection alone. Based on the severity and pervasiveness of this conduct, the only reasonable inference is that any inspector saw the obvious signs of sex trafficking at the Microtel and SES.

Plaintiffs also alleged the Franchisors monitored public complaints, online reviews, and criminal activity at the Microtel and SES. On top of the sheer volume of criminal activity—from 2010 to 2016 at least seventeen people were found dead

[108] *Id.* ¶¶ 203, 220.

[109] *Id.* ¶¶ 204, 205, 209, 211.

[110] *Id.* ¶ 187.

[111] *Id.* ¶¶ 188, 221.

[112] JD1-Doc.282 at 9.

at the SES[113]—the Franchisors received reports of "drug dealers," "thieves," and prostitution arrests.[114] And these Franchisors also received private guest complaints relating to commercial sex trafficking itself.[115] Thus, it is no defense for the Franchisors to claim they were unwitting, distant corporate affiliates that never noticed these violations, because Plaintiffs alleged they *should have* noticed them.

Again, ignoring the totality of the allegations, the District Court dismissed customer complaints "about prostitution existing on the properties itself" as "insufficient to meet a known or should have known standard," apparently assuming acts of prostitution are always voluntary.[116] That's wrong for two reasons.

First, Plaintiffs' Amended Complaint describes not only how the Microtel and SES participated in thriving commercial sex operations—but Plaintiffs allege conspicuous *sex trafficking*—marked by force, fraud and coercion. Like in *M.A.*, Plaintiffs' own physical appearance evidenced physical violence, including recent beatings, physical deterioration, malnourishment, poor hygiene and other outward and well-known signs of sex trafficking.[117] And public reviews disclosed prostitutes

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[113] JD1-Doc.87 ¶1967.

[114] *Id.* ¶¶ 190, 192, 193, 223-224.

[115] Id. ¶¶ 193-194, 224-225.

[116] JD1-Doc.282 at 9; *see also* JD1-Doc.248 at 45 (asking whether a person who "willingly engages in prostitution who's not underage and who is not held against their will" would have a RICO claim).

[117] JD1-Doc.87 ¶ 218.

and pimps, the presence of which is specifically suggestive of sex trafficking.[118] There could be no more clear allegation of force than Jane Doe 2's failed effort to escape by asking an SES employee to lend her a cell phone or give her a ride.[119] Instead of helping Jane Doe 2, the employee told her trafficker, and Jane Doe 2 was ruthlessly beaten.

Moreover, there was no question the traffickers, not Plaintiffs, controlled operations at the Microtel and SES. When police were present at the Microtel or SES, front desk employees alerted Jane Doe 1's trafficker, not Jane Doe 1.[120] And along with alleging that Plaintiffs had no money or control of money, Plaintiffs specifically alleged that Microtel employees witnessed Plaintiffs hand over cash to traffickers.[121]

Second, prostitution—particularly in the volumes alleged here—*does* suggest the likelihood of sex trafficking, because both prostitution and sex trafficking involve commercial sex. Combined with the Franchisors' knowledge of sex trafficking's prevalence in the hotel industry, the presence of wide-spread prostitution should have heightened the Franchisors' awareness of the possibility of

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[118] *See, e.g.*, *id.* ¶¶ 191(b), 223(c); *see supra* note 51.

[119] *Id.* ¶¶ 183-184.

[120] *Id.* ¶¶ 206-207, 182.

[121] *Id.* ¶ 217.

sex trafficking at their hotels and triggered a fulsome investigation. *See Mallard v. Aluminum Co. of Canada*, 634 F.2d 236, 245 (5th Cir. 1981) (holding that the "failure to inspect would constitute negligence" when there were sufficient facts warranting inspection). And based on the facts alleged, any reasonable investigation would have uncovered the open and obvious sex trafficking operations at these hotels. At best for the Franchisors, they turned a blind eye to this issue, which is more than enough to trigger liability under a negligence standard. *See Burchfield*, 168 F.3d at 1256.

In sum, when the whole body of allegations of the Amended Complaint is read together, Plaintiffs plausibly allege that the Franchisors benefited financially from a venture that they knew or should have known criminally violated the TVPRA. For these reasons, this Court should reverse the dismissal of the TVPRA claims against the Franchisors.

II. The District Court erred in dismissing Plaintiffs' state law negligence claims.

The District Court erroneously held that the Franchisors had no duty to train or supervise franchisee employees and thus could not be liable for negligence because those employees failed to exercise reasonable care in the face of obvious sex trafficking. Under Georgia law, a franchisor may be "liable for the negligent training and supervision of franchisee employees" if it controls the manner in which its franchisees execute their work. *New Star Realty, Inc. v. Jungang PRI USA, LLC*,

816 S.E.2d 501, 513 (Ga. Ct. App. 2018) (citing *Hyde v. Scholtzsky's, Inc.*, 561 S.E.2d 876 (Ga. Ct. App. 2002)); *see Ledbetter v. Delight Wholesale Co.*, 380 S.E.2d 736, 739 (Ga. Ct. App. 1989) (holding that the plaintiff amassed enough evidence to create a fact question whether the defendant exercised sufficient control over the time, method, and manner of work of vendors to trigger a duty to train and supervise). Whether a franchisor exercises enough control over the franchisee to trigger a duty is a question of fact not prone to resolution at the pleadings stage. *See, e.g.*, *Toppel v. Marriott Int'l, Inc.*, No. 03 CIV. 3042 (DAB), 2006 WL 2466247, at *6 (S.D.N.Y. Aug. 24, 2006) (applying materially similar New York law, recognizing that cases dismissing negligence claims against a franchisor were resolved "on a summary judgment motion, not, as here, on a motion to dismiss").[122]

Plaintiffs alleged that the Franchisors didn't just set recommendations or suggestions for their franchised hotels, they actively "controlled the policies and standards" of these properties.[123] They also "controlled the training of [their hotel's] managers and employees."[124] And according to Plaintiffs, Franchisors sent

[122] Indeed, most cases addressing the franchisor-franchisee relationship for purposes of a negligence claim arise out a summary judgment ruling. *See, e.g.*, *Anderson v. Turton Dev., Inc.*, 483 S.E.2d 597, 601 (Ga. Ct. App. 1997).

[123] *Id.* ¶¶ 201, 174.

[124] *Id.*

inspectors to the properties to ensure compliance with its mandatory standards.[125] Assuming these facts are true, as required on a motion to dismiss, Franchisors cannot claim immunity from negligence liability simply because they have a franchise agreement in place. *See Hunter v. Ramada Worldwide, Inc.*, No. 1:04-cv-0062, 2005 WL 1490053, at *8 (E.D. Mo. June 23, 2005) ("[T]he mere fact that a franchise agreement governs the parties' relationship does not automatically preclude a finding that an agency relationship exists.").

The District Court held otherwise based, again, on its suspicion that Plaintiffs will be unable to prove that Franchisors exercised sufficient control to trigger negligence liability. To be sure, the District Court is correct that simply '"reserving the right to inspect, monitor, or evaluate the franchisee's compliance with its standards and to terminate the franchise for noncompliance is *not* the equivalent of training day-to-day supervisor control of the franchisee's business operations.'"[126] If, after summary judgment, that is all Plaintiffs can prove, then dismissal of the negligence claim against Franchisors might be appropriate. But at the *pleadings* stage, the District Court must accept as true that the Franchisors controlled the standards and training of managers and employees. Based on that fact, and

[125] *Id.* ¶¶ 188, 221.

[126] JD1-Doc.282 at 11-12 (quoting *Scholtzsky's, Inc. v. Hyde*, 538 S.E.2d 561, 563 (Ga. App. 2000)).

Plaintiffs' additional allegations that employees allowed an obvious sex trafficking operation to persist unabated for years, Plaintiff sufficiently alleged that Franchisors failed to adequately train employees to spot the well-known signs of sex trafficking and take steps to curtail it.

Moreover, even if the Franchisors did not exercise the degree of control necessary to trigger its liability here, Plaintiffs alleged facts that, if true, would establish that the Franchisors were liable under the principle of ratification. Under O.C.G.A. § 10-6-1, the "relation of principal and agent arises wherever one person . . . subsequently ratifies the acts of another in his behalf." Ratification "can be implied from the acts and conduct of the principal." *Hyer v. Citizens & S. Nat. Bank in Macon*, 373 S.E.2d 391, 393-94 (Ga. Ct. App. 1988). As the Georgia Court of Appeals held in *Hyer*, "if the principal, with full knowledge of all the material facts, accepts and retains the benefits of the unauthorized act, he thereby ratifies the act." *Id.*; *cf. DaimlerChrysler Motors Co., LLC v. Clemente*, 668 S.E.2d 737, 746 (Ga. Ct. App. 2008) ("For ratification to occur, the principal must accept and retain the benefits of the unauthorized act.").

Plaintiffs alleged that Franchisors sent inspectors to the properties, who would have seen obvious signs that sex trafficking occurred at the hotel in plain sight, while

hotel employees either assisted or at the very least, turned a blind eye.[127] Nonetheless, as Plaintiffs alleged, Franchisors continued to accept royalties on the rental of these rooms. These facts render it plausible that the Franchisors knowingly accepted and retained the benefits of their franchised hotels' assistance to the sex traffickers. For this additional reason, the District Court erred in dismissing Plaintiffs' negligence claims against the Franchisors.

III. The District Court erred in dismissing Plaintiffs' Georgia RICO claims.

A. Plaintiffs alleged a substantive Georgia RICO claim against the Franchisors.

The District Court dismissed Plaintiffs' Georgia RICO claims holding that Plaintiffs' allegations of acts of racketeering activity were "conclusory."[128] The District Court's failure to credit Plaintiffs' allegations as true contributed to its erroneous dismissal of Plaintiffs' RICO claims. And because Plaintiffs alleged[129] that Franchisors violated Georgia's prostitution[130] and sexual servitude[131] statutes the District Court's conclusion that Plaintiffs failed to allege any predicate acts must be reversed.[132]

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[127] JD1-Doc.87 ¶¶ 179-84, 188, 221, 205-206, 216-217.

[128] JD1-Doc.282 at 10-11.

[129] JD1-Doc.87 ¶ 534-35. *See* O.C.G.A. § 16-14-3(5)(A)(vii).

[130] O.C.G.A. §§ 16-6-10 and 16-6-11.

[131] O.C.G.A. § 16-5-46(c)(3).

[132] JD1-Doc.282 at 10.

Under O.C.G.A. § 16-14-6(c), "[a]ny person who is injured by reason of any violation of [O.C.G.A. §] 16-4-4 shall have a cause of action" against the violator. A person violates O.C.G.A § 16-14-4(a) when it obtains money, directly or indirectly, through a pattern of racketeering activity. A defendant may commit an act of racketeering activity individually or as a party to the crime. *Akintoye v. State*, 798 S.E.2d 720, 724-25 (Ga. Ct. App. 2017);[133] *Whaley v. State*, 808 S.E.2d 88, 92 (Ga. Ct. App. 2017) (A defendant may violate RICO itself as a party to the crime.) Evidence of two related acts of racketeering activity (defined in O.C.G.A. § 16-14-3(5)(A) and commonly referred to as "predicate acts") is sufficient to constitute a pattern. *Dorsey v. State*, 615 S.E.2d 512, 518-19 (Ga. 2005). Financial gain is sufficient to link acts of racketeering activity into a pattern. *Overton v. State*, 671 S.E.2d 507, 517-18 (Ga. Ct. App. 2008); *see also* O.C.G.A. § 16-14-2(b).

Plaintiffs plausibly alleged that each Franchisor engaged in far more than two predicate acts, including violations of Georgia's prostitution and sexual servitude statutes. A person who exercises control over a place commits the offense of keeping a place of prostitution if he "knowingly grants or permits the use of such place for the purpose of prostitution." O.C.G.A.§ 16-6-10. That knowledge may be actual or implied. *Frazier v. State,* 91 S.E.2d 85, 87 (Ga. Ct. App. 1956); *Smith v. State,* 182

[133] *See* O.C.G.A. § 16-2-21 (party to a crime).

S.E. 816, 818 (Ga. Ct. App. 1935). And the defendant need only indirectly contribute to the prohibited use. *Clifton v. State*, 53 Ga. 241, 243 (1874); *Kessler v. State*, 46 S.E. 408 (Ga. 1904).

Plaintiffs alleged that the Franchisors exercised control over Microtel and SES and knowingly allowed these hotels to be used for prostitution.[134] Plaintiffs were prostituted at both hotels on hundreds of occasions and they personally witnessed others, including minors, being prostituted at the same hotels at the same time.[135] The District Court acknowledged that customers complained to the Franchisors about prostitution.[136] And while the District Court concluded that this information alone was insufficient to provide notice to the Franchisors of sex trafficking, it erroneously failed to even consider these allegations for Plaintiffs' RICO claims.[137]

Plaintiffs also alleged that the Franchisors engaged in violations of O.C.G.A § 16-6-11(5), which prohibits aiding or abetting another in the commission of prostitution. The Franchisors aided and abetted traffickers and Franchisees in committing prostitution by allowing the use of their brand names, signage, logos,

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[134] *See supra* Factual Background § C. (Microtel), § D. (SES); *supra* § I.B.3.c.

[135] *Id.*

[136] JD1-Doc.282 at 9.

[137] *Id.*

advertising and reservation systems long after they knew that prostitution and sexual servitude were rampant at the SES and the Microtel.

Similarly, Plaintiffs alleged the Franchisors violated Georgia's sexual servitude statute. The sexual servitude statute is violated when a person knowingly benefits financially or receives anything of value from the sexual servitude of another. O.C.G.A. § 16-5-46(c)(3). Sexual servitude under O.C.G.A. § 16-5-46(a)(8), similar to sex trafficking under the TVPRA, includes sexually explicit conduct in exchange for anything of value where the conduct "is induced or obtained …. [b]y coercion or deception." O.C.G.A. § 16-5-46(a)(8).

As detailed above in Part I.B.1, the Franchisors received pecuniary gain from the sexual servitude of Plaintiffs and others. Plaintiffs alleged that the hotel employees who knowingly accepted room rental payments derived from the sexual servitude of the Plaintiffs and others were effectively agents of the Franchisors acting within the scope of their employment and were aware of and participated in the racketeering activity.[138] Moreover, Plaintiffs alleged that accepting rental payments from known sex trafficking operations was a regular occurrence at both the Microtel and the SES.[139]

[138] *See supra* Part II(A).

[139] *See supra* § I.B.1.

Plaintiffs' allegations relating to the frequency and length of stays, the number of buyers, and the Franchisors' knowledge of online reviews, direct customer complaints, and the open and obvious conduct viewed by Franchisor inspectors allege violations of Georgia law that qualify as RICO predicate acts.[140] For example, with regard to Choice, Plaintiffs not only set forth the date and content of specific customer complaints, but also details on the numerous prostitution arrests at the SES.[141] Far from conclusory, these allegations set forth a pattern of racketeering activity which, because it took place exclusively in rented hotel rooms, resulted in pecuniary gain to Choice and its franchisees.

Plaintiffs also alleged Wyndham and MISF were aware of online complaints and direct guest complaints, allegations included the date and content of some complaints.[142] But they were not just aware of trafficking and prostitution, they jointly ventured with a trafficker who was allowed to operate an entire floor of the hotel as a place of prostitution.[143] And because these allegations do not sound in fraud, they are not subject to the particularity requirements of Rule 9(b). Plaintiffs'

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[140] *See supra* § I.B.1., Factual Background.

[141] JD1-Doc.87 ¶ 197.

[142] *Id.* ¶ 223.

[143] *Id.* ¶¶ 209-217.

allegations are more than sufficient to provide notice to the Franchisors under Rule 8(a) to state a substantive Georgia RICO claims against the Franchisors.

B. Plaintiffs alleged a Georgia RICO conspiracy.

Plaintiffs also sufficiently alleged that Franchisors engaged in a RICO conspiracy in violation of O.C.G.A. § 16-14-4(c). A person engages in such a conspiracy when "together with one or more persons [he] conspires to violate [O.C.G.A. § 16-14-4(a)] and any one or more of such persons commits any overt act to effect the object of the conspiracy." O.C.G.A. § 16-14-4(c)(1); *see also, Cotman v. State*, 804 S.E.2d 672, 684 (Ga. Ct. App. 2017).

The District Court erroneously dismissed Plaintiffs' RICO conspiracy claims based on its conclusion that Plaintiffs had not "plausibly allege[d] that there was a criminal agreement between . . . any of the Franchisor and Corporate Affiliate Defendants and the franchisees or alleged traffickers."[144] The District Court applied an incorrect standard. "The type of agreement necessary to form a conspiracy is not the 'meeting of the minds' necessary to form a contract and may be a 'mere tacit understanding between two or more people that they will pursue a particular criminal objective.'" *Kilgore v. State*, 305 S.E.2d 82, 90 (Ga. 1983); *Akintoye v. State*, 798

[144] JD1-Doc.282 at 11.

S.E.2d 720, 724 (Ga. Ct. App. 2017) (applying *Kilgore* to an alleged RICO conspiracy).

Plaintiffs alleged facts sufficient to plausibly allege a tacit understanding between the Franchisors and their franchisees to turn a blind eye to allow and profit from the sex trafficking at the Microtel and SES. Conspiracies are rarely reflected by formal agreements and direct proof is seldom available. Among the factors that may be considered in inferring a conspiracy are the relationship of the parties and the duration of their joint activity.

Plaintiffs have alleged facts plausibly showing years of rampant sex trafficking, sexual servitude and prostitution at the hotels in question. This is sufficient, at the pleading stage, to support an inference that there was a tacit understanding to permit and facilitate criminal conduct and retain the economic benefits of that conduct. *Williamson v. State*, 685 S.E.2d 784, 792-93 (Ga. Ct. App. 2009) (finding sufficient evidence of tacit understanding to sell methamphetamine from defendant's house, noting defendant's statement that "I don't see because I don't want to"); *Aquilera v. State*, 667 S.E.2d 378, 381 (Ga. Ct. App. 2008) (tacit understanding can be inferred from the nature of the acts done in the relationship of the parties, the interest of the alleged conspirators, and other circumstances). Having entered into such an understanding, the Franchisors are liable for the acts of their co-conspirators. *Akintoye*, 798 S.E.2d at 724 ("It is well settled that when individuals

associate themselves in an unlawful enterprise, any act done in pursuance of the conspiracy by one or more of the conspirators is in legal contemplation the act of all."). For these reasons, the District Court erred in dismissing the RICO conspiracy claims against the Franchisors.

CONCLUSION

The TVPRA provides a civil remedy for sex trafficking victims against *anyone* who financially benefits from their trafficking. That includes the Franchisors. Plaintiffs' alleged facts to show that the Franchisors knew or *at a minimum,* should have known of the open and obvious sex trafficking at their hotels. The District Court's interpretation of the civil beneficiary provision of § 1595(a) deprives these Plaintiffs, and any plaintiff, of the civil remedy Congress intended. By requiring Plaintiffs to essentially prove a criminal violation, the District Court's order nullifies the civil remedy.

Similarly, the District Court's imposition of pleading standards beyond those of Federal Rule of Civil Procedure 8 has the same nugatory effect. The District Court required Plaintiffs to plead with specificity facts no Plaintiff would have before discovery, made inferences in favor of defendants, and viewed facts in isolation to render them meaningless. This was error. Plaintiffs respectfully request that this Court reverse the dismissal of Plaintiffs' TVPRA§ 1595(a) civil beneficiary claims, Georgia RICO claims and negligence claims against the Franchisors.

Respectfully submitted this 17th day of August, 2020.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this Brief contains 12,975 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f) and 11th Circuit Rule 32-4, as counted by Microsoft® Office 365, the word processing software used to prepare this Motion.

This Brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(6) and the type style requirements of Fed. R. App. P. 32(a)(5) because this Brief has been prepared in a proportionally spaced typeface using Microsoft® Office 365, Times New Roman, 14 point.

This certification is made on August 17, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day caused a copy of the **CONSOLIDATED BRIEF OF APPELLANTS** to be served by electronically filing the same with the Clerk of the Court using the CM/ECF system, which will automatically send email notification of that filing to counsel of record.

This 17th day of August, 2020.

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