

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

Turry v. Vervent, Inc., et al.

No. 20-cv-697-DMS-AHG (S.D. Cal. Feb. 26, 2025) · No. 20-cv-697-DMS-AHG · Decided February 26, 2025

SUMMARY

The United States District Court for the Southern District of California denied Defendants’ renewed motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b). The court held that Defendants preserved their statute-of-limitations argument and that the evidence did not compel the conclusion that Plaintiffs knew or should have known of the alleged PEAKS loan fraud before the applicable four-year RICO limitations period. The court also concluded that substantial evidence supported the jury’s findings concerning the RICO conspiracy, enterprise, and Defendants’ knowledge and intent.

CASE DETAILS

COURT	United States District Court for the Southern District of California
JURISDICTION	United States District Court for the Southern District of California
DECIDED	February 26, 2025
DOCKET	20-cv-697-DMS-AHG
DISPOSITION	other
PROCEDURAL POSTURE	After a jury returned a verdict finding Defendants liable for a RICO conspiracy, Defendants renewed their motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b).
STANDARD OF REVIEW	A renewed Rule 50(b) motion may be granted only if, viewing the evidence in the light most favorable to the nonmoving party, the evidence permits only one reasonable conclusion and that conclusion is contrary to the jury's verdict. The court must review the entire evidentiary record, avoid weighing evidence, draw reasonable inferences for the nonmoving party, and uphold the verdict if supported by substantial evidence.
PRECEDENTIAL VALUE	Unknown; federal district court order
PARTIES	Vervent, Inc., Activate Financial, LLC, David Johnson v. Heather Turry, Plaintiffs and class members

TOPICS

motion for directed verdict

civil procedure

consumer protection

commercial litigation

class actions

PRACTICE AREAS

civil procedure

RICO

consumer protection

commercial litigation

class actions

QUESTIONS PRESENTED

1. Whether Defendants preserved their injury-discovery-rule statute-of-limitations argument for a renewed Rule 50(b) motion.
2. Whether the evidence compelled a finding that Plaintiffs knew or should have known of their RICO injury before April 10, 2016, thereby barring the claim under the four-year civil RICO limitations period.
3. Whether the evidence was insufficient to support the jury's finding of a RICO conspiracy and enterprise because Plaintiffs did not establish that the PEAKS loans were invalid or otherwise establish the alleged enterprise.

HOLDINGS

1. Defendants sufficiently preserved their injury-discovery-rule argument because their Rule 50(a) motion identified that the RICO claim was time-barred and addressed accrual under the injury discovery rule; a Rule 50(b) argument may be a logical extension of the grounds raised under Rule 50(a).
2. Defendants were not entitled to judgment as a matter of law on their injury-discovery statute-of-limitations defense because the trial evidence did not compel the sole reasonable conclusion that Plaintiffs knew or should have known of the PEAKS loan fraud before April 10, 2016.
3. Defendants were not entitled to judgment as a matter of law because substantial evidence supported the jury's findings on the RICO conspiracy elements, including the existence of the PEAKS loan enterprise and Defendants' knowledge and intent to facilitate it.

KEY QUOTATIONS

"A renewed motion for JMOL is properly granted 'if the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, and that conclusion is contrary to the jury's verdict.'" (Discussion § II)

"Because it is a renewed motion, a proper post-verdict Rule 50(b) motion is limited to the grounds asserted in the pre-deliberation Rule 50(a) motion." (Discussion § III.A)

FACTUAL BACKGROUND

Plaintiffs alleged that ITT Educational Services and other entities created a PEAKS loan enterprise that defrauded students, the Department of Education, investors, and federal regulators. The jury found Vervent, Activate Financial, and David Johnson liable for participating in a RICO conspiracy. Evidence included minimal underwriting, a high projected and actual default rate, a guaranty structure under which ITT would receive payments exceeding borrower payments, and use of the program to evade the Department of Education's 90/10

Rule. Defendants argued that Plaintiffs' RICO claim was time-barred and that the evidence did not establish a RICO enterprise or invalid PEAKS loans.

PROCEDURAL HISTORY

A seven-day class action jury trial commenced on June 8, 2023. Plaintiffs dismissed their FDCPA, RFDCPA, and negligent misrepresentation claims after the Court expressed skepticism about class-wide adjudication, leaving a RICO conspiracy claim as the sole remaining class claim. The Court denied Defendants' Rule 50(a) motion, the jury found Defendants liable under 18 U.S.C. § 1962(d), and the Court denied Defendants' renewed Rule 50(b) motion.

DISPOSITION

other

CASES CITED

- *Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236, 1242–43 (9th Cir. 2014)
- *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002)
- *E.E.O.C. v. Go Daddy Software, Inc.*, 581 F.3d 951, 961–62 (9th Cir. 2009)
- *Freund v. Nycomed Amersham*, 347 F.3d 752, 761 (9th Cir. 2003)
- *Reeves v. Teuscher*, 881 F.2d 1495, 1498 (9th Cir. 1989)
- *Rotella v. Wood*, 528 U.S. 549, 554 (2000)
- *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987)
- *Pincay v. Andrews*, 238 F.3d 1106, 1109–10 (9th Cir. 2001)
- *Bulletin Displays, LLC v. Regency Outdoor Advertising, Inc.*, 518 F. Supp. 2d 1182, 1186 (C.D. Cal. 2007)
- *Grimmett v. Brown*, 75 F.3d 506, 512 (9th Cir. 1996)
- *Fruit & Vegetable Packers & Warehousemen Loc. 760 v. Morley*, 378 F.2d 738, 746 (9th Cir. 1967)

OPINION

Aliff v. Vervent, Inc.

PER CURIAM.

1 2 3 4 5 6 7

8 UNITED STATES DISTRICT COURT

9 SOUTHERN DISTRICT OF CALIFORNIA

10 11 Case No.: 20-cv-697-DMS-AHG HEATHER TURRY, et al., 12 Plaintiffs, ORDER
DENYING MOTION FOR

13 v. JUDGMENT AS A MATTER OF

LAW PURSUANT TO RULE 50(b)

14 VERVENT, INC., etc., et al. 15 Defendants. 16 17 18 Pending before the Court is Defendants’
motion for judgment as a matter of law 19 (“JMOL”) pursuant to Rule 50(b) of the Federal Rules

of Civil Procedure. (Motion, ECF

20 No. 369). Plaintiffs filed a response in opposition, (Opp’n, ECF No. 375), and Defendants

21 filed a reply. (Reply, ECF No. 377). The matter is suitable for resolution without oral 22
argument pursuant to Civil Local Rule 7.1(d)(1). (ECF No. 378). For the reasons 23 discussed
below, Defendants’ motion is denied.

24 I. BACKGROUND

25 The background of this case has been summarized in numerous prior orders. (ECF

26 Nos. 128, 140, 151, 180). The facts below are relevant to the subject motion.

27 On June 8, 2023, a seven-day class action jury trial commenced. During the trial 28 and nearing
the close of Plaintiffs’ case in chief, the Court expressed skepticism that 1 Plaintiffs’ Fair Debt
Collection Practices Act (“FDCPA”), Rosenthal Fair Debt Collection 2 Practices Act
(“RFDCPA”), and negligent misrepresentation claims could be adjudicated 3 on a class-wide basis
and stated that it was inclined to decertify those claims. Plaintiffs 4 elected to dismiss those claims
and not pursue them on an individual basis. Thereafter, 5 Defendants filed a motion for judgment
as a matter of law pursuant to Rule 50(a), in which 6 they challenged Plaintiffs’ sole remaining
class-claim under RICO. (ECF No. 280). The 7 Court denied the motion, (ECF No. 287), and the
jury found Defendants Vervent, Inc., 8 Activate Financial, LLC, and David Johnson liable for
engaging in a RICO conspiracy 9 under 18 U.S.C. § 1962(d). (ECF No. 300). 10 Defendants now
renew their JMOL motion under Rule 50(b). Specifically, 11 Defendants argue they are entitled to
judgment as a matter of law because the RICO claim 12 is time-barred, and Plaintiffs’ evidence is
insufficient to establish a RICO “enterprise” and 13 invalidity of the underlying “PEAKS loans.”
Each argument is addressed below.

14 II. LEGAL STANDARD

15 Under Rule 50(b), a party that has previously moved for JMOL under Rule 50(a) 16 may file a
renewed motion. Fed. R. Civ. P. § 50(b). “A renewed motion for JMOL is 17 properly granted ‘if
the evidence, construed in the light most favorable to the nonmoving 18 party, permits only one
reasonable conclusion, and that conclusion is contrary to the jury’s 19 verdict.’ A jury’s verdict
must be upheld if it is supported by substantial evidence that is 20 adequate to support the jury’s
findings, even if contrary findings are also possible.” 21 *Escriba v. Foster Poultry Farms, Inc.*, 743
F.3d 1236, 1242 (9th Cir. 2014) (quoting 22 *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002))
(internal citations omitted). 23 “‘Reviewing a renewed motion for JMOL requires scrutiny of the
entire evidentiary record, 24 but the court ‘must not weigh the evidence, [and instead] should
simply ask whether the 25 [nonmoving party] has presented sufficient evidence to support the
jury’s conclusion.’ In 26 so doing, the court must draw all reasonable inferences in favor of the
nonmoving party 27 and ‘disregard all evidence favorable to the moving party that the jury is not
required to 28 believe.’” *Escriba*, 743 F.3d at 1242–43 (internal citations omitted).

1 III. DISCUSSION

2 A. Preservation of Issues under Rule 50(b) 3 Plaintiffs argue that Defendants waived their statute

of limitations defense when they 4 “did nothing to present [it] to the jury.” (Opp’n, at 9–10). Defendants disagree, noting that 5 is not a requirement to preserving an argument under Rule 50(b); rather, waiver of an 6 argument in a Rule 50(b) motion is determined by whether the moving party failed to assert 7 the argument in their Rule 50(a) motion. The Court agrees with Defendants. 8 “Because it is a renewed motion, a proper post-verdict Rule 50(b) motion is limited 9 to the grounds asserted in the pre-deliberation Rule 50(a) motion. Thus, a party cannot 10 properly ‘raise arguments in its post-trial motion for judgment as a matter of law under 11 Rule 50(b) that it did not raise in its preverdict Rule 50(a) motion.’” *E.E.O.C. v. Go Daddy Software, Inc.*, 581 F.3d 951, 961 (9th Cir. 2009) (quoting *Freund v. Nycomed Amersham*, 13 347 F.3d 752, 761 (9th Cir. 2003)). “Rule 50(b) ‘may be satisfied by an ambiguous or 14 inartfully made motion’ under Rule 50(a).” *Go Daddy*, 581 F.3d at 961 (quoting *Reeves v. 15 Teuscher*, 881 F.2d 1495, 1498 (9th Cir. 1989)). 16 Defendants advance two statute of limitations arguments in their post-verdict Rule 17 50(b) motion: (1) under the “injury discovery rule[,]” Plaintiffs knew or should have 18 known that their injuries from the alleged loan fraud occurred prior to the four-year statute 19 of limitations period (April 10, 2016 to September 2020) and therefore their claims are 20 time-barred; and (2) any injuries suffered by Plaintiffs during the four-year limitations 21 period (2016-20) are not saved by the “separate accrual rule” because those injuries are not 22 “new and independent” and they did not arise from “new and independent acts” of 23 Defendants that are “not merely a reaffirmation of a previous [wrongful] act[.]” (Motion, 24 at 8–21). In their pre-deliberation Rule 50(a) motion, Defendants titled their statute of 25 limitations argument, “The RICO Claim is Time-barred[,]” and made a brief statement 26 regarding how a RICO claim begins to accrue under the injury discovery rule. (ECF 27 No. 280, at 14) (stating “the statute of limitations begins running on a RICO claim 28 according to the ‘injury discovery accrual rule’ which ties accrual to the time when a 1 plaintiff first knew or should have known of his injury[,]” (citing *Rotella v. Wood*, 528 U.S. 2 549, 554 (2000))). The balance of Defendants’ argument focused on the separate accrual 3 rule. However, Defendants’ separate accrual argument was necessarily premised on the 4 assumption that the wrongful (injuring causing) acts attributed to Defendants occurred 5 outside the limitations period (before April 10, 2016) and that the later wrongful acts 6 attributed to Defendants within the limitations period (April 10, 2016 to September 2020) 7 were not “new and independent” and thus did not save Plaintiffs’ RICO claim from being 8 time-barred. See *Go Daddy*, 581 F.3d at 962 (finding an argument made in a Rule 50(b) 9 motion to be a “logical extension” of an argument made in Rule 50(a) motion). 10 Accordingly, the Court finds that Defendants sufficiently raised and preserved the injury 11 discovery rule argument in their pre-deliberation Rule 50(a) motion. 12 B. Statute of Limitations and Injury Discovery Rule 13 Civil RICO claims have a four-year statute of limitations. *Agency Holding Corp. v. 14 Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 156 (1987). Under the injury discovery rule, 15 the “civil RICO limitations period begins to run when a plaintiff knows or should know of 16 the injury that underlies his cause of action.” *Pincay v.*

Andrews, 238 F.3d 1106, 1109 (9th Cir. 2001). Plaintiffs' RICO claim "may accrue before [they] discovered that all of the 18 elements of the RICO claim exist, as long as in fact all such elements are present." *Bulletin 19 Displays, LLC v. Regency Outdoor Advertising, Inc.*, 518 F. Supp. 2d 1182, 1186 (C.D. 20 Cal. 2007) (citing *Grimmett v. Brown*, 75 F.3d 506, 512 (9th Cir. 1996)). Plaintiffs are 21 "deemed to have had constructive knowledge if [they] had enough information to warrant 22 an investigation which, if reasonably diligent, would have led to discovery of the fraud." 23 *Pincay*, 238 F.3d at 1110. 24 In the present motion, Defendants argue that Plaintiffs knew or should have known 25 of their injury due to ITT Educational Service's ("ITT") fraud in 2010 and 2011—when 26 ITT enrolled Plaintiffs in the fraudulent PEAKS loan program and Plaintiffs did not receive 27 required Truth in Lending Act ("TILA") loan disclosure forms—or in 2012 and 2013— 28 when Defendants started servicing Plaintiffs' PEAKS loans. (Motion, at 9–11). 1 Specifically, Defendants argue that Plaintiffs knew or should have known of the fraud from 2 2010 to 2013 because: (1) their loan agreements did not contain interest rates or other 3 required terms; (2) they did not receive the requisite loan disclosures within the legally 4 required timeframe; (3) they either had loans fraudulently taken out in their names or they 5 were misled into taking out the loans through a point-and-click process; and (4) they 6 learned of the existence of the loans by at least 2012 and 2013, when they started making 7 payments to Defendants. (*Id.*) 8 The "question of whether a plaintiff knew or should have become aware of a fraud 9 [is ordinarily left] to the jury." *Fruit & Vegetable Packers & Warehousemen Loc. 760 v. 10 Morley*, 378 F.2d 738, 746 (9th Cir. 1967). Here, that question relates to when Plaintiffs 11 knew or had enough information to warrant an investigation, which if reasonably diligent, 12 would have led to discovery of the fraudulent nature of the PEAKS loan scheme. 13 Defendants, however, did not request an affirmative defense jury instruction relating to the 14 timeliness of Plaintiffs' RICO claim. Nor did they request a special interrogatory to the 15 jury to make a factual finding regarding when Plaintiffs had actual or constructive notice 16 of the PEAKS loan scheme. And neither party made any arguments to the jury about the 17 statute of limitations because that defense was not prompted by Defendants for resolution 18 by the trier of fact. 19 A motion for JMOL is properly granted "if the evidence, construed in the light most 20 favorable to the nonmoving party, permits only one reasonable conclusion, and that 21 conclusion is contrary to the jury's verdict." *Pavao*, 307 F.3d at 918. The problem for 22 Defendants is that the jury never had occasion to make factual findings or arrive at a 23 conclusion under the injury discovery rule, as that inquiry was never submitted to the jury. 24 While the evidence at trial cited by Defendants could suggest that Plaintiffs and class 25 members should have been suspicious of the legitimacy of their loans and hence the 26 PEAKS loan fraud, it did not compel "only one reasonable conclusion[.]" (*Pavao*, 307 F.3d 27 at 918), that Plaintiffs knew or should have known of the PEAKS loan scheme before April 28 10, 2016. To the contrary, Plaintiffs presented evidence that there were efforts by ITT and 1 Defendants to ensure that Plaintiffs would not learn about the fraudulent nature of the loans. 2 For example, ITT made

monthly payments on behalf of borrowers who were at risk of 3 default, approximately \$16.1 million, to keep those loans out of default and from being 4 reported. (ECF No. 307-8, at 59–68). And when a borrower affirmatively reached out to 5 Defendants regarding late loan payments, they were told that their loan qualified for a 6 “recovery program” and would be brought current. (Id.) There was no indication that they 7 would be liable for the loan forgiveness. (Id.). Construing this and other evidence in the 8 light most favorable to Plaintiffs, as the Court must, there was substantial evidence to 9 support the jury’s verdict and its consideration of the RICO claim. In other words, there 10 was sufficient evidence to support a finding—had it been presented to the jury—that 11 Plaintiffs neither knew nor should have known of the PEAKS loan fraud before April 10, 12 2016. Thus, the jury’s verdict that Defendants conduct caused Plaintiffs and class members 13 “damages that occurred between April 10, 2016, and September 2020[,]” when they made 14 payments on the fraudulent loans, (ECF No. 300, Verdict Form ¶ 3), is supported by 15 substantial evidence. Accordingly, the Court denies Defendants’ Rule 50(b) motion on 16 this ground.¹ 17 C. RICO Claim 18 Plaintiffs alleged that ITT and other entities formed the “PEAKS Loan Enterprise” 19 to defraud the Department of Education (“DOE”) and investors “to produce an illicit 20 revenue stream for participating conspirators, including Defendants, who allegedly joined 21 the ongoing enterprise with knowledge of its purpose and with intent to facilitate the 22 enterprise.” ECF No. 304, at 22 (Jury Instruction No. 19). To prove RICO conspiracy 23 under 18 U.S.C. § 1962(d), Plaintiffs had to establish that: (1) a conspiracy existed between 24 two or more persons to conduct or participate, directly or indirectly, in the affairs of the 25 charged enterprise; (2) an enterprise as alleged existed, which consisted of a group of 26 27 1 Because the Court denies Defendants’ Rule 50(b) motion under the injury discovery rule, it need not 28 1 persons or entities associated together for a common purpose or to engage in a course of 2 conduct, through a pattern of racketeering activity; (3) Defendants knowingly joined or 3 became members of the conspiracy with knowledge of its purpose and with the intent to 4 facilitate the enterprise; (4) Defendants knew that a member of the conspiracy, not 5 necessarily the Defendants, would commit a least two racketeering acts; and (5) the 6 activities of the enterprise in some way affected interstate or foreign commerce. Id. 7 As noted, in their Rule 50(a) motion, Defendants challenged Plaintiffs’ RICO claim 8 on grounds that there was an absence of evidence to establish: (1) that the PEAKS loans 9 were invalid, i.e., not consummated, and (2) a RICO enterprise. (ECF No. 280, at 6–14). 10 Defendants renew these arguments in the subject motion. 11 Regarding loan consummation, that is not an element of the RICO claim. While the 12 alleged invalidity of the PEAKS loans was principally directed to Plaintiffs’ dismissed 13 FCPA, RFDCPA, and negligent misrepresentation claims, (ECF No. 180, at 3), it was also 14 directly relevant to the RICO claim, as invalidity of the loans was “one of the alleged red 15 flags” that put Defendants on notice of ITT’s fraudulent loan scheme. Id. Thus, Plaintiffs 16 fairly argued to the jury that these were “sham” loans and Defendants knew it. Evidence 17 of the absence of TILA loan disclosures and invalidity of the loans, whether such invalidity 18 was proven or not, was relevant to proving up

an element of the RICO claim, to wit, 19 Defendants’ knowledge of the conspiracy and their intent to facilitate the enterprise. 20 In support of the argument that Plaintiffs failed to present substantial evidence of a 21 RICO enterprise, Defendants highlight three points of testimony by Plaintiffs’ expert Persis 22 Yu. (Motion, at 26). First, Ms. Yu testified that she was “not aware of any widespread 23 failure to make TILA disclosures for the PEAKS loans.” (Id.). Second, Ms. Yu noted that 24 “there was no official finding that the servicing of the loans should be stopped until the 25 CFBP [Consumer Financial Protection Bureau] settlement in 2020.” (Id.). Third, Ms. Yu 26 “ha[d] no reason to believe that all of the loan funds were not credited to student borrowers’ 27 accounts.” (Id.). 28 1 The trial record, however, contains more than what Defendants highlight. Ms. Yu 2 testified about how the PEAKS loan program involved little to no underwriting for 3 ||loan acceptance. ECF No. 295 402:15—18, 406:6—19, 429:24-430:2; ECF No. 269 595:3- 4 ||14. The projected (and actual) default rate of the PEAKS loan portfolio was extremely 5 ||high. ECF No. 295 403:17-24, 406:20-407:1; ECF No. 271 1037:22—1039:1. The 6 || program’s guaranty structure ensured that ITT would pay three times what borrowers paid. 7 ||ECF No. 271 1041:20—1042:23; 1049:2-1050:3. The PEAKS loan “enterprise” allowed 8 to evade DOE’s 90/10 Rule, (ECF Nos. 295 404:8-405:11; 298 1170:9-20), and 9 || defraud its investors and federal regulators. ECF Nos. 295 430:10-19; No. 271 993:9- 10 || 994:2, 1019:19-1021:1. Construing the evidence in the light most favorable to Plaintiffs, 11 ||the jury’s verdict and findings on each RICO element are supported by substantial 12 || evidence.

13 IV. CONCLUSION

14 For these reasons, the Court denies Defendants’ motion. 15 SO ORDERED. 16 || Dated: February 26, 2025 17 mw. Lh, 18 Hon. Dana M. Sabraw 19 United States District Judge 20 21 22 23 24 25 26 27 28