IN THE SUPREME COURT OF THE STATE OF NEVADA

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ABEL CÁNTARO CASTILLO,

Appellant,

vs.

WESTERN RANGE ASSOCIATION,

Respondent.

______________________________________/

No. 85926

RESPONDENT WESTERN RANGE ASSOCIATION'S
APPENDIX VOLUME 1, PART 1

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ABEL CÁNTARO CASTILLO; ALCIDES INGA RAMOS; RAFAEL DE LA CRUZ, and those similarly situated,

Plaintiffs,

vs.

WESTERN RANGE ASSOCIATION; EL TEJON SHEEP COMPANY; MELCHOR GRAGIRENA; MOUNTAIN PLAINS AGRICULTURAL SERVICE; and ESTILL RANCHES, LLC,

Defendants.

CASE NO. 3:16-cv-00237-RCJ-VPC

DEFENDANTS MELCHOR GRAGIRENA AND EL TEJON SHEEP COMPANY'S MOTION TO DISMISS SECOND AMENDED COMPLAINT

Defendants El Tejon Sheep Company ("El Tejon") and Melchor Gragirena ("Gragirena") (jointly, "Defendants") by and through their attorneys of record of the law firm of Holland & Hart LLP, hereby move to dismiss Plaintiff Abel Cántaro Castillo's ("Cántaro") Second Amended Complaint as against El Tejon and Gragirena. This Motion is supported by the following Memorandum of Points and Authorities, the papers and pleadings on file herein, and any oral argument that this Court may allow.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

By his Second Amended Complaint, Cántaro still does not assert any federal claims. Instead, Cántaro asserts Nevada state minimum wage and waiting time penalty claims as well as various state contract, quasi-contract, and tort claims against El Tejon. Cántaro additionally asserts his state minimum wage claims against Gragirena as an individual. El Tejon and Gragirena seek to dismiss all claims against them for lack of jurisdiction because Cántaro has failed to demonstrate that this Court has either federal question jurisdiction or diversity jurisdiction. In fact, Cántaro failed to even make jurisdictional allegations against El Tejon. Even if Cántaro intended to assert jurisdiction under the Class Action Fairness Act (like he did against Defendant Western Range Association ("WRA")), this Court would still lack subject matter jurisdiction because Cántaro cannot meet the $5 million damages threshold or the 100-plaintiff requirement. Though Cántaro alleges that WRA is a joint-employer with El Tejon regarding employees of El Tejon, Cántaro does not allege that El Tejon is a joint employer with any of the other members of WRA. Thus, any joint liability would be limited to potential class members that were employed by El Tejon (and WRA as a joint employer)—not other ranches that are not parties to this case. Accordingly, Cántaro cannot meet his burden of demonstrating that this Court has subject matter jurisdiction.

In the event this Court decides these issues on the merits, El Tejon does not seek to dismiss the state minimum wage claims against it at this stage.[1] However, each of the remaining claims should be dismissed as against El Tejon and Gragirena and the minimum wage claims should be dismissed as against Gragirena. Cántaro alleges that Gragirena should be individually liable for unpaid minimum wages. Such allegation is directly contrary to binding Nevada law. In 2008, the Nevada Supreme Court determined that individual owners, agents, or officers of a company cannot be held liable for unpaid wages under Nevada law. Specifically, under Nevada law, regardless of the control Gragirena may or may not have exerted, Gragirena cannot be liable for unpaid minimum wages. As such, the claims asserted against Gragirena should be dismissed.

Cántaro also alleges that El Tejon is liable for breach of contract based on statutory violations. Cántaro asserts that El Tejon's failure to pay the minimum wage as required under the Nevada Constitution and the Code of Federal Regulations was an implied term of the contract and, therefore, constitutes a breach of contract. Such breach of contract claims, however, cannot be bootstrapped onto

[1] While El Tejon contends the minimum wage claim against it also fails, the factual issues necessary for such argument are not proper at this stage of the proceedings.

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a cause of action based on the alleged violation of an applicable law. Thus, Cántaro cannot allege statutory violations under the guise of a breach of contract claim.

Cántaro's other claims—promissory estoppel and unjust enrichment/quantum meruit—also fail for two reasons. First, such claims fail because there is an express, written agreement, and the validity of the contract is not in dispute. Second, Cántaro failed to plead with particularity that he read and understood the contract to incorporate the MWA and federal regulations, such that he justifiably relied to his detriment on said understanding.

Therefore, El Tejon and Gragirena respectfully request that this Court dismiss all claims for lack of jurisdiction. In the event this Court deems jurisdiction is proper, Defendants respectfully request that this Court dismiss all claims against El Tejon and Gragirena, except the minimum wage claims against El Tejon. *See supra* note 1.

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II. RELEVANT FACTS AND PROCEDURAL HISTORY[2]

Sometime in 2007, an unnamed representative from Defendant Western Range Association ("WRA") recruited Cántaro to come to the United States to work as a shepherd while Cántaro was living near Huancayo, Peru. *See* Second Am. Compl. ("SAC"), ¶ 33 (ECF No. 111). Cántaro signed a document with the unnamed WRA representative regarding the terms and conditions of his employment in the United States. *Id.* ¶ 34.

When Cántaro came to the United States at the behest of WRA, WRA assigned him to work for El Tejon. *Id.* ¶ 36. However, when he began to work at El Tejon, Cántaro signed another document prepared by WRA (not El Tejon) setting forth the terms and conditions of his employment. *Id.* Amongst these terms and conditions was that WRA could re-assign Cántaro to any other "WRA ranch at any time—regardless of whether it was his preference to stay on the ranch to which he was originally assigned and regardless of whether the individual WRA ranch on which he worked [El Tejon] agreed to the transfer." *Id.* Thus, according to Cántaro's allegations, Gragirena and El Tejon had no control over whether Cántaro would remain or continue employment with El Tejon. *Id.* Rather,

[2] The factual allegations are taken as true as they are stated in the Complaint for the purposes of this Motion. Defendants do not admit to any of the allegations by this Motion and reserve the right to challenge any of the allegations at any further stage of this litigation.

Cántaro alleges that his employment was controlled by WRA. *Id.* Cántaro voluntarily terminated employment with WRA and El Tejon in June 2014. *Id.* ¶ 59.

Cántaro contends that WRA sets and controls the wages for all sheepherders it recruits to work in the United States, regardless of which individual ranch may employ a particular sheepherder. *Id.* ¶¶ 37-38. He further contends that Defendants El Tejon and Gragirena adhered to pay and other employment policies WRA sets. *Id.* Cántaro does not contend that El Tejon or Gragirena set or otherwise created the pay or other employment policies, just that they followed WRA's policy and accepted WRA's assignment of Cántaro to El Tejon. *See generally id.*

On May 15, 2017, Cántaro filed the SAC against WRA, El Tejon, and Gragirena. *See generally* SAC.[3] In this SAC, Cántaro asserts a multitude of claims. As against El Tejon, Cántaro asserts the following claims: 1) Count 2, failure to pay minimum wage under the Nevada Constitution; 2) Count 6, breach of contract or quasi contract; 3) Count 7, promissory estoppel; 4) Count 8, unjust enrichment and quantum meruit; and 5) Count 10, waiting time penalties. *See generally id.* As to Gragirena, Cántaro asserts only the direct minimum wage claim (Claim 2) and ancillary waiting time penalty claim (Claim 10), not the contract or other claims.

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III. LEGAL STANDARD

A court may dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." FRCP 12(b)(6). A properly pled complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." FRCP 8(a)(2). Rule 12(b)(6) therefore affords a defendant an opportunity to test whether, as a matter of law, the plaintiff is entitled to legal relief even if everything alleged in the complaint is true. *See Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009). If the factual allegations, taken as true, do not support legal relief, the complaint as a whole or individually insufficient claims should be dismissed. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007).

In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply when considering motions to dismiss. First, a district court must accept as true all well-pled factual

[3] The SAC also includes additional Plaintiffs, Alcides Ingo Ramos and Rafael De La Cruz, who assert claims against Mountain Plains Agricultural Services and Estill Ranches, LLC. *See generally* SAC. Ramos and De La Cruz do not assert any claims against WRA, El Tejon, or Gragirena. Indeed, as will be discussed in more detail, these claims involve a distinct and separate set of plaintiffs and defendants that have no relationship whatsoever to El Tejon and have improperly been included in this case solely to falsely assert federal jurisdiction.

allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Iqbal*, 556 U.S. at 678. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. *Id.* Second, a district court must consider whether the factual allegations in the complaint allege a plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff's complaint alleges facts that allow the court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 678. Where the complaint does not permit the court to infer more than the mere possibility of misconduct, the complaint has "alleged—but it has not shown—that the pleader is entitled to relief." *Id.* (internal quotation marks omitted). When the claims in a complaint have not crossed the line from conceivable to plausible, the complaint must be dismissed. *See Twombly*, 550 U.S. at 570.

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IV. LEGAL ARGUMENT

A. This Court Lacks Jurisdiction Over Claims Against El Tejon and Gragirena

El Tejon and Gragirena facially and factually challenge Cántaro's ability to establish subject matter jurisdiction. "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). For a factual challenge, "[t]he court need not presume the truthfulness of the plaintiff's allegations." *Id.* Instead, "[o]nce the moving party has converted the motion to dismiss into a factual motion by presenting affidavits or other evidence properly brought before the court, the party opposing the motion must furnish affidavits or other evidence necessary to satisfy its burden of establishing subject matter jurisdiction." *Id.* (quoting *Savage v. Glendale Union High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003)). Here, the SAC is facially deficient because it fails to make jurisdictional allegations against El Tejon and Gragirena. But, even if the SAC alleged jurisdiction under the Class Action Fairness Act, as a matter of fact, Cántaro cannot establish subject-matter jurisdiction for his claims against El Tejon and Gragirena.

1. Cántaro Failed to Allege Jurisdiction as to El Tejon and Gragirena

A plaintiff's failure to make the necessary jurisdictional allegations warrants dismissal of a complaint. *See Matter of Morse Elec. Co.*, 805 F.2d 262, 264 (7th Cir. 1986) ("A party that fails to make the necessary jurisdictional allegations will have its claim dismissed."); *see also McLaughlin v. Safway Servs., LLC*, 429 F. App'x 347, 348 (4th Cir. 2011) ("A district court should dismiss a complaint for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) if the complaint fails to allege facts upon which subject matter jurisdiction can be based or if the jurisdictional allegations in the complaint are not true."). As the party asserting jurisdiction, "a plaintiff, suing in federal court, must show in his pleading, *affirmatively and distinctly*, the existence of whatever is essential federal jurisdiction . . . ." *Smith v. McCullough*, 270 U.S. 456, 459 (1926) (emphasis added).

Here, Cántaro failed to make any jurisdictional allegations against El Tejon and Gragirena. *See* SAC ¶¶ 7-12. Instead, Cántaro only alleged that this Court has subject-matter jurisdiction over his claims against Defendant WRA based on diversity jurisdiction under the Class Action Fairness Act. *Id.* ¶ 7. Nowhere in the SAC does Cántaro specifically allege a basis for jurisdiction against El Tejon and Gragirena, depriving El Tejon and Gragirena of sufficient notice and requiring them to argue against jurisdiction blindly. On this basis alone, Cántaro's claims against El Tejon and Gragirena should be dismissed for lack of subject-matter jurisdiction. Nevertheless, even if Cántaro meant to assert diversity jurisdiction against El Tejon and Gragirena based on the Class Action Fairness Act, this Court would still lack subject-matter jurisdiction.

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2. This Court Lacks Diversity Jurisdiction Under § 1332

In his SAC, Cántaro only alleged diversity jurisdiction against Defendants WRA and MPAS based on the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d). *See* SAC ¶¶ 7-12. CAFA grants jurisdiction to the district court over certain class actions, as long as "the class has more than 100 members, the parties are minimally diverse, *and* the amount in controversy exceeds \$5 million." *Yocupicio v. PAE Grp., LLC*, 795 F.3d 1057, 1059 (9th Cir. 2015) (emphasis added). Section 1332(d)(6) provides "the claims of the individual class members shall be aggregated whether the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interests and costs." Such aggregation is an exception to the general rule, which requires plaintiffs to each meet the amount in controversy, because it allows separate plaintiffs to add up the value of their claims to meet the \$5 million threshold requirement under CAFA. *See* 28 U.S.C. § 1332(d)(6). The burden on proving

CAFA applies rests with the party asserting jurisdiction. *See Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 684 (9th Cir. 2006). When assertions of jurisdiction under CAFA are challenged, "both sides submit proof and the court then decides where the preponderance lies. Under this system, CAFA's requirements are to be tested by consideration of real evidence and the reality of what is at stake in the litigation, using reasonable assumptions underlying the defendant's theory of damage exposure." *Ibarra v. Manheim Invs., Inc.*, 775 F.3d 1193, 1197-98 (9th Cir. 2015).

Claims against multiple defendants, however, cannot be aggregated to meet the $5 million threshold requirement unless those claims are based on joint liability between the multiple defendants. *See* ECF No. 107, at 14; *Vagle v. Archstone Communities, LLC*, No. CV 13-09044 RGK AJWX, 2014 WL 463532, at *3 (C.D. Cal. Feb. 5, 2014) ("While CAFA permits aggregation of claims of separate plaintiffs, claims against multiple defendants can only be aggregated when the defendants are jointly liable." (citations omitted)); *see also Middle Tenn. News Co. v. Charnel of Cincinnati, Inc.*, 250 F.3d 1077, 1081 (7th Cir. 2001) ("In diversity cases, when there are two or more defendants, plaintiff may aggregate the amount against the defendants to satisfy the amount in controversy requirement only if the defendants are jointly liable; however, if the defendants are severally liable, plaintiff must satisfy the amount in controversy requirement against each individual defendant.").

In this case, Cántaro cannot demonstrate that jurisdiction is proper under CAFA as against El Tejon and Gragirena because he has failed to meet the requirements of § 1332(d). As a preliminary matter, paragraph 7 of the SAC only asserts CAFA jurisdiction as against WRA, not El Tejon or Gragirena. Nevertheless, even if the jurisdictional assertions in paragraph 7 were construed to apply to El Tejon or Gragirena, Cántaro failed to meet his burden to demonstrate that, without aggregating separate and distinct claims against WRA, there are at least 100 members with a claim-value of over $5,000,000.

Cántaro cannot meet this burden because the jurisdictional allegations against WRA include damages for shepherds that were employed by non-party ranches—not El Tejon or Gragirena.[4] Even

[4] Plaintiffs based their damages-calculations on ranches beyond El Tejon to include any ranches that may have employed shepherds that worked in Nevada. *See* SAC at 4 n.2 (stating that the Department of Labor's "Disclosure Data" shows that "WRA certified 173 herders to work for *Nevada ranches* in 2014" (emphasis added)).

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accepting Cántaro's allegations that a joint-employer relationship exists between El Tejon/Gragirena and WRA, *see* SAC ¶¶ 38-39, 141, such joint liability would only extend to shepherds employed by El Tejon/Gragirena; it would not include shepherds that were employed by WRA and a non-party ranch. *See Aguayo v. AMCO Ins. Co.*, 59 F. Supp. 3d 1225, 1241 (D.N.M. 2014) ("If multiple defendants are jointly liable, or jointly and severally liable, *on some of the claims*, however, the amounts of *those claims* may be aggregated to satisfy the amount-in-controversy requirement *as to all defendants jointly liable for the claims*." (emphasis added)). In sum, Cántaro cannot aggregate claims against WRA to establish jurisdiction for El Tejon and Gragirena for potential plaintiffs for which El Tejon and Gragirena did not employ and are, thus, not jointly liable.

Assuming a joint-employer relationship exists between El Tejon/Gragirena and WRA, Cántaro cannot establish CAFA jurisdiction because there are not at least 100 potential plaintiffs. Cántaro alleges that "El Tejon and Gragirena employed approximately 48 herders during the two-year statutory period for Plaintiffs' wage claims," which is well below the 100-plaintiff threshold that CAFA requires. *See* SAC ¶ 140. But even this 48-herder-figure greatly exceeds the true amount of potential plaintiffs that worked for El Tejon.[5] Dating back to June 4, 2014[6] and including Cántaro, there are only 18 shepherds El Tejon employed. *See* **Exhibit A,** Declaration of Melchor Gragirena. However, out of those 18 shepherds, six of them have settled their claims. *See* Exhibit A, ¶ 7. Thus, for wage damages, there are only 12 shepherds (including Cántaro) employed by El Tejon in the applicable two-year statute of limitations period. *See id.* ¶ 6. And, for contract damages (*i.e.*, visa application fees), there are only an additional eight plaintiffs if the statute of limitations extends six years. *See id.* Accordingly, the total amount of shepherds for all of Cántaro's claims is 20 (or 12 if the statute of

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[5] Plaintiffs likely miscalculated the number of shepherds because the disclosure data does not specify whether the shepherds are continuing on from the prior year. Thus, if Plaintiffs simply added the amount of shepherds disclosed each year, the sum would yield higher results because it duplicates shepherds from prior years' Disclosure Data.

[6] Originally, the limitations period extended two years from May 3, 2016, which made the earliest date for wage violations May 3, 2014. However, due to this Court's order dismissing Plaintiffs' First Amended Complaint, the duration between the dismissal and Plaintiffs filing the SAC—32 days—is added to the limitations period, which renders the earliest date for wage violations June 4, 2014, instead of May 3, 2014, and June 4, 2010 for contractual violations. *See Georgescu v. Bechtel Constr., Inc.*, 15 F.3d 1085, 1994 WL 20007 (9th Cir. 1994) ("Because the court's dismissal of Georgescu's original complaint without prejudice did not toll the statute of limitations, the second amended complaint was time barred by the ninety-day statute of limitations." (citations omitted)); *Humphreys v. United States*, 272 F.2d 411, 412 (9th Cir. 1959) ("[A] suit dismissed without prejudice . . . leaves the situation the same as if the suit had never been brought in the first place.").

limitations is only two years), which is only one-fifth of the amount required under CAFA. These figures do not change simply because a joint-employer relationship is alleged to exist with WRA as El Tejon was not a joint employer for other non-party ranches associated with WRA.

Based on the correct amount of potential plaintiffs, as a matter of legal certainty, Cántaro cannot meet the $5 million damages threshold that CAFA requires. Even if all of the 12 shepherds (including Cántaro) were paid for a full two years at $8.25 per hour for every hour of every day, the amount of damages would still not meet the $5 million threshold, or even half of the CAFA threshold. Instead, 12 shepherds paid $8.25 per hour for every hour of every day for two years equates to $1,734,480.00 (24 hours multiplied by 365 days multiplied by 2 years multiplied by $8.25 multiplied by 12 shepherds). And, even if every potential plaintiff dating back six years suffered the same amount of "contractual" damages for visa application and other fees, which Cántaro alleges to be approximately $300 (*see* SAC ¶ 61), the additional damages still do not warrant CAFA jurisdiction. For 20 shepherds suffering approximately $300 each, the additional damages would amount to $6,000. Further, for the waiting-time penalties, which allow an additional 30 days of wage damages, the additional damages would be $71,280 (24 hours multiplied by 30 days multiplied by $8.25 multiplied by 12 shepherds), bringing the total of possible damages against El Tejon and Gragirena to $1,811,760.00. But even $1,811,760.00 greatly exceeds the actual amount of damages for potential plaintiffs based on four reasons.

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a. El Tejon Shepherds Worked Six Months of Each Year in California

The $1,811,760.00 figure does not exclude time periods in which the El Tejon shepherds worked in California, which is approximately half of each year. As Cántaro states, he worked in California from October until early April. *See* SAC ¶ 54. This is a standard practice for all shepherds employed by El Tejon; shepherds spend at least six months in California each year. *See* Exhibit A, ¶ 9. Although Cántaro states that "[t]his case only concerns the time Mr. Cántaro, or others similarly situated, worked in Nevada," *see* SAC ¶ 48, Cántaro's alleged damages against WRA calculate damages based on the entire year. *See* SAC ¶ 8. Thus, for purposes of calculating possible damages for shepherds employed by El Tejon, the wage damages should be halved to accommodate for the six months of each year spent in California, making the wage-damage total $867,240 ($1,734,480.00 divided by 2).[7]

b. El Tejon Shepherds Did Not Work 24 Hours Per Day Every Day

In addition, the liability and actual at-issue damages is much smaller than stated above because El Tejon shepherds did not work 24 hours per day every day. Cántaro's wage damages were calculated on the assumption that he and the potential class members were entitled to wages for every hour of every day for their entire period of employment. *See* SAC ¶ 8. In his jurisdictional allegations, Cántaro supports his assertion for a 24/7 workweek based on the allegation that "WRA's H-2A job orders specified that the work hours were 24 hours a day and seven days per week." *Id.* To begin, he misstates the job order, which specifies that he is "on-call" for up to 24 hours per day not working 24 hours per day. Further, and fatal to his damages calculation, Cántaro did not allege that he actually worked 24 hours per day seven days per week. Rather, he stated he "worked well over 40 hours per week, and was on duty in his workplace 24 hours per day, seven days per week." *Id.* ¶ 52. But this absolutist statement is contradicted by Cántaro's other allegation that he "was *often* engaged by the WRA Defendants to be on duty in his workplace 24 hours a day, seven days a week." *Id.* ¶ 51 (emphasis added).

Simply because an employee lives on the employer's premises does not entitle the employee to on-call compensation. *See Skrzecz v. Gibson Island Corp.*, No. CIV.A. RDB-13-1796, 2014 WL 3400614, at *8 (D. Md. July 11, 2014). Instead, a presumption exists that an employee is not working the entire time on the employer's premises. *See id.* ("When an employee resides on the employer's premises, there is a presumption that he or she is not working the entire time on the premises." (citing *Myers v. Baltimore Cty.*, 50 F. App'x 583, 587 (4th Cir. 2002)); *see also id.* ("Employees must be compensated if they are 'engaged to wait,' but an employer is not required to pay an employee who is merely 'waiting to be engaged.'" (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944)). Even if on the employer's premises, an employee may engage in uninterrupted personal pursuits, which are not subject to compensation. *See id.*

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[7] These general calculations do not reduce time for which shepherds, like Cántaro, would take time off to return to their home country. *See* SAC ¶ 46.

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> An employee who resides on his employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he is on the premises. Ordinarily, he may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he may leave the premises for purposes of his own.

Id. (quoting 29 C.F.R. § 785.23).

Here, El Tejon shepherds, including Cántaro, did not work 24/7; rather, they engaged in daily, uninterrupted personal pursuits. As stated in the attached declarations from six different El Tejon shepherds, shepherds work an average of 8 hours per day. *See* **Exhibit B**, Declaration of Cesario Yauri Garcia, ¶ 22; **Exhibit C**, Declaration of Elias Maximo Ascanoa Alania, ¶ 20; **Exhibit D**, Declaration of Elmer Alcides Cántaro Oteo, ¶ 21; **Exhibit E**, Declaration of Filomeno Leonardo Lapa Pomahuali, ¶ 20; **Exhibit F**, Declaration of Gilmar Jhonny Melo Castillo, ¶ 14; **Exhibit G**, Declaration of William Archi Lozano, ¶ 16. In the SAC, Cántaro only alleges that he "worked well over 40 hours per week," SAC ¶ 52, but does not specify his average time worked.

If this Court calculated damages based on 8 hours per day rather than 24 hours per day, the possible damages against El Tejon (without reducing for time in California) would only be $578,160 (8 hours multiplied by 365 days multiplied by 2 years multiplied by $8.25 per hour multiplied by 12 shepherds). If this amount were halved to take into account time spent in California, possible damages would only be $289,080 ($578,160 divided by 2). This figure is further reduced by the actual days worked by the 12 shepherds in the statute of limitations period offset by the wages paid and the value of room and board, as shown below.

c. *El Tejon Is Entitled to Offset Wages Paid, Plus Room and Board*

Cántaro's potential claim-value is also reduced by the wages El Tejon paid, plus the value of housing and meals. El Tejon provides shepherds with housing and daily meals, the equivalent of which is worth approximately $20.83 per day. The average value of the meals El Tejon provides to herders equates to $11.50 per day. *See* Exhibit B, ¶ 21; Exhibit C, ¶ 19; Exhibit D, ¶ 20; Exhibit E, ¶ 19. The average value of housing El Tejon provides, as estimated by El Tejon shepherds, ranges from $150 to $400 per month, with the average being $283.75 monthly, or $9.33 daily. *See* Exhibit B, ¶ 21; Exhibit C, ¶ 19; Exhibit D, ¶ 20; Exhibit E, ¶ 19.

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El Tejon is entitled to an offset for wages paid for work performed in Nevada during the statutory period. For the applicable statutory period, El Tejon paid herders the following monthly salaries for the following time periods. *See* Exhibit A, ¶ 10.

Time Period	Monthly Salary	Daily Salary	Daily Room/Board	Total Daily Offset
June 1, 2014 to Aug. 31, 2014	$1,422.52	$46.78	$20.83	$67.61
Sep. 1, 2014 to Dec. 31, 2015	$1,600.34	$52.61	$20.83	$73.44
Jan. 1, 2016 to June 30, 2016	$1,777.98	$58.45	$20.83	$79.28

Accordingly, when the daily salary and value of the room and board are combined, the total daily offset should be subtracted from each day of alleged wage violations. These calculations are demonstrated in the table below.

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d. El Tejon Shepherds Did Not Work Full Two Years of Limitations Period

Cántaro cannot meet the CAFA-damages threshold because the actual periods of employment for the El Tejon potential plaintiffs are significantly less than two years. Cántaro's damages-calculation assumed all of the shepherds worked for the full limitations period and even after the filing of the complaint, but that is grossly inaccurate. None of the 12 shepherds that were employed during the two-year limitations period worked the full two-years preceding the Complaint, filed on May 3, 2016, and none were employed after June 28, 2016. *See* ECF No. 1; *see also* Exhibit A, ¶ 8.

Thus, with the updated limitations period cut-off date of June 4, 2014, *see supra* note 6, Cántaro's actual damages are limited to **<u>five</u>** full days of work. Cántaro's last day of work with El Tejon was June 8, 2014. *See* Exhibit A, ¶¶ 8, 13; *see also* SAC ¶ 59. Assuming Cántaro worked 8 hours per day on June 4, 5, 6, 7, and 8, 2014, his maximum damages would be $330 (8 hours multiplied by 5 days multiplied by $8.25 per hour), without taking into account El Tejon's offset for wages and room and board. These calculations significantly reduce Cántaro's alleged class-damages, which assumed that all herders on the Disclosure Data worked the full limitations period.

The following table demonstrates the actual time El Tejon employed the 12 herders and the corresponding amounts of possible damages for an 8-hour workday and a 24-hour workday for each of the herders when taking into account the offset El Tejon is entitled to for wages and room and board:

Shepherd	Start Date[8]	End Date	Total Days Employed	Total Days in Nevada[9]	Offset To Damages[10]	Damages:[11] 8 Hours/Day $8.25/Hour	Damages: 24 Hours/Day $8.25/Hour
A. Cántaro	6/4/2014	6/8/2014	5	5	$338.05	0	$651.95
A.Y. Garcia	6/4/2014	11/5/2015	520	301	$21,586.57	0	$38,011.43
R.Y. Garcia	6/4/2014	12/31/2015	576	301	$21,586.57	0	$38,011.43
E.A. Arteaga	6/4/2014	1/4/2015	215	119	$8,220.49	0	$15,341.51
M.H. Archi	4/14/2015	7/19/2015	97	97	$7,123.68	0	$12,082.32
D.H.P. Mendoza	6/4/2014	6/30/2014	27	27	$1,825.47	0	$3,520.53
R.R.D. Quinones	6/4/2014	9/1/2014	90	90	$6,084.90	0	$11,735.10
J.R.G. Perez* *(Two periods of employment)	6/4/2014 11/13/2015	1/25/2015 4/15/2016	391	133	$9,330.41	0	$17,003.59
M.A.V. Rosales	12/24/2015	6/28/2016	188	88	$6,976.64	0	$10,447.36
W.I.V. Limaco	3/20/2015	6/21/2015	94	81	$5,948.64	0	$10,089.36
D.H. Lozano	4/17/2015	6/4/2015	49	49	$3,598.56	0	$6,103.44
P.N.H. Gonzalez	4/30/2016	6/11/2016	43	43	$3,409.04	0	$5,104.96
		TOTALS	**2,295**	**1,334**	**$96,029.02**	0	**$168,102.98**

As the table above demonstrates, when taking into account the true number of herders within the limitations period, the actual time of employment, the time spent in California, and the offset El Tejon is entitled to, Cántaro cannot meet the $5 million damages threshold or the 100-plaintiff requirement under CAFA.

e. The Class Allegations for the WRA Nevada Classes Should Be Dismissed

While Cántaro alleges a joint-employer relationship exists between El Tejon/Gragirena and WRA, such a relationship would not allow Cántaro to aggregate claims for shepherds that El Tejon/Gragirena never employed but were simply employees of another WRA member ranch. Cántaro

[8] If the start date is before the two-year statute of limitations cut-off date (June 4, 2014), then June 4, 2014 is used as the start date.

[9] As discussed *supra* Part IV(A)(2)(a), El Tejon herders spent approximately October 1st through April 1st of each year in California. This case only involves wages for labor in Nevada. *See* SAC ¶ 48 ("This case only concerns the time Mr. Cántaro, or others similarly situated, worked in Nevada."). Accordingly, dates between and including October 1st through April 1st are deducted from the "Total Days Employed" to determine "Total Days in Nevada."

[10] The "Offset to Damages" is determined by multiplying the "Total Daily Offset" from the table in Part IV(A)(2)(c) with the amount of days in each salary time period (as herders' salaries progressively increased). For example, for A.Y. Garcia, his offset would be calculated by determining the number of days between and including:

- June 4, 2014 to Aug. 31, 2014 (89 days), multiplying 89 days by $67.61 ($6,017.29);
- Sept. 1, 2014 to Sept. 30, 2014 (30 days), multiplying 30 days by $73.44 ($2,203.20);
  - (calculations cease after September 30th because starting October 1st herders are in California until April 1st);
- Apr. 2, 2015 to Sept. 30, 2015 (182 days), multiplying 182 days by $73.44 ($13,366.08);
  - Add 6,017.29 + 2,203.20 + 13,366.08 = $21,586.57.

[11] The Damages are calculated by multiplying the total days in Nevada by either 8 or 24 hours (depending on the column) multiplied by $8.25, then the total Offset is subtracted to determine the amount of damages.

defines the WRA Nevada Classes as "[a]ll persons whom WRA employed as shepherds through the H-2A program, who worked in Nevada during the applicable statute of limitations." SAC ¶ 121. The problem with the WRA Nevada Classes is that they are not limited to potential class members employed by El Tejon. Rather, the broad definition of the WRA Nevada Classes includes other non-party ranch-employers beyond El Tejon, even though Cántaro did not work for those other ranch-employers. Indeed, the only relationship Cántaro has to the employees of the other ranches is that they worked for employers that belonged to the same association as his employer belonged to. Accordingly, the claims against other WRA ranches cannot be aggregated with El Tejon to meet the CAFA requirements.

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El Tejon moves to dismiss the class allegations for the WRA Nevada Classes. As a matter of law, Cántaro cannot satisfy the "typicality" and "adequacy" requirements under Rule 23 for potential class members that were employed by other ranch-employers because he was not employed by the same employer. *See, e.g.*, *Easter v. Am. W. Fin.*, 381 F.3d 948, 962 (9th Cir. 2004) ("[A] plaintiff having a cause of action against one defendant could not represent a class with actions against defendants who had behaved similarly but had not injured the plaintiff."); *La Mar v. H&H Novelty & Loan Co.*, 489 F.2d 461, 465 (9th Cir. 1973) ("[T]ypicality is lacking when the representative plaintiff's cause of action is against a defendant unrelated to the defendants against whom the cause of action of the members of the class lies.").

Here, simply because El Tejon is a member of the same association (WRA) as other ranch-employers does not provide Cántaro with the requisite typicality and adequacy sufficient to be a class representative for potential class members employed by other ranch-employers beyond El Tejon. Thus, Cántaro cannot properly represent a class of employees against an employer he never worked for. Because Cántaro admits that he only worked for El Tejon, *see* SAC ¶ 35, the complaint does not allege facts sufficient to make out a class, rendering dismissal of the deficient class allegations (the broadly-defined "WRA Nevada Classes") appropriate. *See Picus v. Wal-Mart Stores, Inc.*, 256 F.R.D. 651, 655 (D. Nev. 2009) ("Although it would be improper to require a plaintiff to establish she can maintain a class before she attempts to do so, it would be appropriate to dismiss the class allegations if the plaintiff does not allege facts sufficient to make out a class."); *see also id.* ("[W]hen there has been no discovery and the defendants challenge class certification on the basis of the allegations in the complaint only, the proper standard is the same as a motion to dismiss for failure to state a claim." (quoting *Blihovde v. St. Croix Cty.*, 219 F.R.D. 607, 614 (W.D. Wis. 2003))).

Cántaro's attempt to aggregate WRA's potential plaintiffs from non-party ranch-employers with those of El Tejon is not only improper as a matter of law, it is fundamentally unfair to a small, family-owned business, like El Tejon. El Tejon is being dragged into a large class action lawsuit even though it only has 12 herders within the two-year statute of limitations. As this Court recognized in its Order Dismissing the First Amended Complaint, "This case essentially consists of two parallel class actions asserting like claims under similar factual circumstances. However, each Plaintiff's claims are wholly unrelated to the claims of the other." *See* ECF No. 107, at 14:17-19. While this Court's statement was referencing the relationship between Cántaro and Plaintiff Inga, the same reasoning holds true with Cántaro's attempt to force together the claims against several different ranch-employers that are simply members of WRA but have no relationship with one another.

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To make matters worse, the employers affected by this complaint (*e.g.*, the other WRA members) are not parties to the case, nor could they be joined since Cántaro never worked for them. Thus, he is improperly trying to bring a claim that affects employers who are not even parties to the action. On this basis, as well, this Court should dismiss the WRA Nevada Classes for failure to join necessary and indispensable parties. Federal Rule of Civil Procedure 19 requires joinder of parties when the court cannot accord complete relief among existing parties in that party's absence. *See* Fed. R. Civ. P. 19(a); Fed. R. Civ. P. 12(b)(7); *see also Henry v. Rizzolo*, No. 2:08-CV-00635-PMP, 2011 WL 2975539, at *2 (D. Nev. July 21, 2011).

B. The Minimum Wage and Waiting Time Penalty Claims Fail Against Gragirena

Cántaro seeks to impose individual liability for El Tejon's alleged minimum wage violations against Gragirena as the owner of El Tejon. Nevada law does not allow for such individual liability and, thus, Cántaro's minimum wage and associated waiting time penalty claims (Claims 2 and 10) should be dismissed as against Gragirena with prejudice.

In 2008, subsequent to the passage of the Nevada Constitution's Minimum Wage Amendment ("MWA") in 2006, the Ninth Circuit Court of Appeals certified the question of whether individual agents of corporate employers could be liable for wage and hour claims under Nevada state law. *Boucher v. Shaw (Boucher I)*, 196 P.3d 959, 960 (Nev. 2008).[12] In answering this question, the Nevada Supreme Court first analyzed the definition of employer provided in NRS 608.011: "'[E]mployer' includes every *person* having control or custody of any employment, place of employment or any employee." *Id.* at 961 (emphasis added). After determining that the statutory language and legislative history was unclear as to whether the statute included individual managers or corporate agents as potential "employers," the Court analyzed Illinois, Kansas, and Colorado law. *Id.* at 962. Unlike the Nevada statute, the Illinois and Kansas statutes expressly "provided for officer and agent liability." *Id.* In contrast to Kansas and Illinois, Colorado did not provide expressly for agent or officer liability even though it referenced agents and officers within the definition of an employer. *Id.* In examining these jurisdictions, the Nevada Supreme Court agreed with the Colorado Supreme Court's view[13] and determined "that had the Nevada Legislature intended to qualify individual managers as employers and thus expose them to personal liability, it would have done so explicitly." *Id.* at 963. Thus, because NRS 608.011 was not explicit in including individual managers or corporate agents as employers or in making them subject to unpaid wage liability, "in Nevada, individual corporate managers are not personally liable, as employers, for unpaid wages." *Id.*

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This same analysis holds true under the MWA. The MWA defines an employer as "any individual, proprietorship, partnership, joint venture, corporation, limited liability company, trust, association, or other entity *that may employ individuals or enter into contracts of employment*." Nev. Const. art. 15, § 16 (emphasis added). The MWA does not reference or create, explicitly or otherwise, individual liability for corporate agents, officers, or managers. *See id.* Rather, it provides that the employer is liable, not the owner or other representative of that entity. *See id.* Thus, just as the Nevada Supreme Court determined that NRS Chapter 608 does not provide for individual liability of agents, managers, or officers of a company for unpaid wages because it does not do so explicitly, the Nevada

[12] While the specific question related to NRS Chapter 608 and not the MWA, the same analysis applies as described below.

[13] *See Leonard v. McMorris*, 63 P.3d 323, 327 (Colo. 2003) (explaining that, unlike the Illinois and Kansas provisions, "Colorado's Wage Claim Act does not contain language directly addressing the issue of corporate officer and agent personal liability for paying earned but unpaid wages" and holding that there was no individual liability for corporate officers and agents).

Supreme Court would also determine that the MWA fails to create such liability. Accordingly, only individuals (*e.g.*, a sole proprietorship) or entities that directly employ an individual are potentially liable for wage and hour violations under Nevada law, whether the claim is alleged under the MWA or NRS Chapter 608. *Compare* Nev. Const. art. 15, § 16, *with Boucher I*, 196 P.3d at 960-63.

Here, Cántaro does not allege that Gragirena personally hired or employed Cántaro or any shepherd he seeks to represent. *See generally* SAC. Rather, Cántaro contends that he entered into employment contracts with WRA and was assigned to work for El Tejon. *See* SAC ¶¶ 33-35. Cántaro specifically contends that he "was employed by one particular WRA ranch, Defendant El Tejon Sheep Company, which is owned and managed by Defendant Gragirena." *Id.* ¶ 35. He then bases his claims against Gragirena merely on allegations that Gragirena owns El Tejon, manages El Tejon, and manages El Tejon workers in those capacities. *See id.* ¶¶ 35, 41-43 (describing how Gragirena allegedly operated as a manager, but never contending El Tejon was not Cántaro's actual employer).[14] Cántaro does not contest that his employment was with El Tejon, not Gragirena in Gragirena's personal capacity. *See* **Exhibit H**, Cántaro's Employment Agreement between Cántaro and El Tejon.[15] As Cántaro alleges that he was employed by El Tejon, not Gragirena personally, the state law claims (Claims 2 and 10) against Gragirena should be dismissed with prejudice.[16]

C. Cántaro's Breach of Contract Claim Fails Against El Tejon

Cántaro alleges a breach of contract cause of action (Claim 6) against El Tejon based on two

[14] These allegations would be relevant to a joint employer theory of liability under the Fair Labor Standards Act (the "FLSA"), which Cántaro removed from the SAC, but are irrelevant under Nevada law. *Compare Boucher I*, 196 P.3d at 963, *with Boucher v. Shaw* (*Boucher II*), 572 F.3d 1087, 1090-91 (9th Cir. 2009) (describing joint employment liability under the FLSA).

[15] Exhibit H is authenticated in the Declaration of Melchor Gragirena, attached as Exhibit A. Further, in analyzing a motion to dismiss, the district court may, without converting the motion into one for summary judgment, consider "matters of public record" and other documents that are extrinsic to the complaint "if the documents' authenticity is not contested and the plaintiff's compliant necessarily relies on them." *Lee v. City of L.A.*, 250 F.3d 668, 688-89 (9th Cir. 2001) (internal quotation marks omitted); *see also Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) ("A court may consider evidence on which the complaint necessarily relies if: (1) the complaint refers to the document; (2) the document is central to the plaintiff's claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion." (internal quotation marks omitted)); *Comm. for Reasonable Regulation of Lake Tahoe v. Tahoe Reg'l Planning Agency*, 365 F. Supp. 2d 1146, 1153 (D. Nev. 2005) ("A court may also treat certain documents as incorporated by reference into the plaintiff's complaint if the complaint refers extensively to the document or the document forms the basis of the plaintiff's claim." (internal quotation marks omitted)). Here, Cántaro's SAC relies on this contract as the basis of his breach of contract claim and, thus, this Court can review it on the motion to dismiss.

[16] Not only does the same individual liability analysis apply to Claim 10, but Claim 10 necessarily relies on Claim 2. If Gragirena did not owe Cántaro unpaid minimum wages, he cannot be liable for waiting time penalties for having failed to pay those minimum wages timely.

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theories: (1) El Tejon's alleged failure to pay the minimum wage required under the MWA; and (2) El Tejon's alleged "cost-shifting" for activities related to H-2A certification. *See* SAC ¶ 210-11. Both theories rely on the incorporation of 20 C.F.R. §§ 655.122, 655.210, 655.135 and El Tejon's alleged violation of those regulations. *See id.*

"Nevada law requires the plaintiff in a breach of contract action to show: (1) the existence of a valid contract; (2) a breach by the defendant; and (3) damage as a result of the breach." *Saini v. Int'l Game Tech.*, 434 F. Supp. 2d 913, 919-20 (D. Nev. 2006) (citing *Richardson v. Jones*, 1 Nev. 405, 405 (Nev. 1865)). Here, Cántaro cannot demonstrate that El Tejon breached the sheepherder employment agreement based on alleged violations of laws not expressly included in the contract. As discussed below, a breach of contract cause of action cannot be bootstrapped onto a cause of action based on a violation of a statute, particularly when the statute does not provide for such action.

"[A]n alleged violation of any purportedly applicable law does not constitute a breach of contract." *Berger v. Home Depot U.S.A., Inc.*, 476 F. Supp. 2d 1174, 1176 (C.D. Cal. 2007). For example, in *Berger*, the plaintiff alleged that the Home Depot's contract, which incorporated consumer protection laws, rendered any violation of those laws a breach of contract. *See id.* at 1176-77 (stating plaintiff proposed "that allegations establishing a statutory violation alone may provide the basis for a breach of contract claim"). The court rejected the plaintiff's argument, stating "it is not evident that the statutes allegedly violated in this case . . . were intended to provide a basis for a breach of contract action." *Id.* at 1177. If the court found otherwise, such a holding

> would create two claims for relief, something that is not provided by the statute. Plaintiff's novel theory would create a new breach of contract claim in all circumstances where a statute was allegedly violated. Plaintiff's claim would thus significantly change the core principles of contract law. This expansion of liability is not and should not be part of our jurisprudence. While the [statutes] do[] not necessarily provide plaintiffs with an exclusive remedy, plaintiffs must be required to do something more to allege a breach of contract claim than merely point to allegations of a statutory violation.

Id.; *see also Goldwell of N.J., Inc. v. KPSS, Inc.*, 622 F. Supp. 2d 168, 195 (D.N.J. 2009) (rejecting "Mid-Atlantic's attempt to re-argue its NJFPA claim under the guise of breach of contract" because "Mid-Atlantic cannot bootstrap its NJFPA cause of action onto its distinct breach of contract claim; the two are separate causes of action accompanied by separate requirements").

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Generally, a violation of a statutory right is considered a tort, which is independent of contract. *See Bernard v. Rockhill Dev. Co.*, 734 P.2d 1238, 1240 (Nev. 1987) ("A breach of contract may be said to be a material failure of performance of a duty arising under or imposed by agreement. A tort, on the other hand, is a violation of a duty imposed by law, a wrong independent of contract." (quoting *Malone v. Univ. of Kan. Med. Ctr.*, 552 P.2d 885, 888 (Kan. 1976))). Parties to a contract can still commit torts, but the contractual relationship does not automatically render all torts a breach of contract. *See id.* ("Torts can, of course, be committed by parties to a contract."). Thus, to determine whether an action is a breach of contract or a tort, the court must ask "whether the actions or omissions complained of constitute a violation of duties imposed by law, or of duties arising by virtue of the alleged express agreement between the parties." *Id.*

Even when a contract expressly commits to comply with a statute, a violation of that contractual provision does not necessarily give rise to a breach of contract claim. *See In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617-LHK, 2016 WL 3029783, at *20 (N.D. Cal. May 27, 2016). For example, in *In re Anthem*, the plaintiffs claimed breach of contract for violations of HIPAA (Health Insurance Portability and Accountability Act). *Id.* The contract at issue did not specifically and expressly state the provisions of HIPAA of which the plaintiffs complained were violated; rather, the contract "states that the Anthem Defendants must comply with the legal requirements set forth under HIPAA." *Id.* The court rejected plaintiffs' argument that such a provision warrants a breach of contract cause of action, noting that "plaintiffs must . . . do something more to allege a breach of contract claim than merely point to allegations of a statutory violation." *Id.* The court held that "[a] breach of contract claim based *solely* upon a pre-existing legal obligation to comply with HIPAA cannot survive dismissal." *Id.*; *see also Dixon v. Wells Fargo Bank, N.A.*, No. 12-10174, 2012 WL 4450502, at *8 (E.D. Mich. Sept. 25, 2012) ("[A] breach of contract claim cannot be premised on an obligation that the defendant already had a duty under the law to perform.").

Here, Cántaro's breach of contract claim against El Tejon fails as a matter of law. The SAC makes clear that Cántaro's breach of contract claim is premised upon El Tejon's alleged failure to comply with the Code of Federal Regulations ("CFR") and, in turn, the MWA. Cántaro claims that El Tejon breached the contract because it has a clause which generally states El Tejon will comply with

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applicable law and, thus, implies the MWA and CFR were part of the contract. *See* SAC ¶ 31. Though, the Agreement does not expressly incorporate the MWA or the applicable provisions of the CFR, *see* Exhibit H, even assuming such terms are included in the contract as a matter of law, Cántaro's breach of contract claim fails because it is based on a preexisting legal duty.[17]

As related to the wage-violations, Cántaro's breach of contract claim is duplicative of his MWA claims. The MWA does not provide for a breach of contract cause of action in addition to its private cause of action listed. *See* Nev. Const. art. 15, § 16. Thus, Cántaro's breach of contract claim based on the unpaid wages theory is an attempt to seek duplicative compensation for the same alleged harm—such bootstrapping of claims is not allowed. *See Goldwell of N.J., Inc.*, 622 F. Supp. 2d at 195. As related to the H-2A Certification Fees argument, Exhibit A to the SAC (WRA's job order), at page 7, generally states: "Employer agrees to abide by the regulations at 20 CFR 655.135." Even if this general statement is considered an express term of the contract, the violation of such does not constitute a breach of contract, simply a tort claim—a violation of 20 C.F.R. § 655.135. Like in *In re Anthem*, a breach of contract does not occur based on a preexisting duty to comply with 20 C.F.R. § 655.135. Accordingly, for both theories underlying the breach of contract claim, Cántaro is simply alleging a tort claim under the guise of a breach of contract. On this basis, Cántaro's breach of contract claim should be dismissed.

D. Cántaro's Promissory Estoppel, Unjust Enrichment/Quantum Meruit Claims Fail

Cántaro argued in the alternative to his breach of contract cause of action that El Tejon is liable under theories of promissory estoppel and unjust enrichment/quantum meruit. *See* SAC ¶¶ 213-22. However, both of these causes of action fail because there is an express, written contract, and neither

[17] In addition, the failure to identify a specific, express contractual provision that El Tejon allegedly breached is, on its own, fatal to Cántaro's breach of contract claim. *See, e.g., In re Anthem, Inc. v. Data Breach Litig.*, 162 F. Supp. 3d 953, 979 (N.D. Cal. 2016) (dismissing plaintiff's breach of contract claim that alleged defendants were bound to comply with federal and state laws and regulations because it failed to "identify a specific contractual provision" that the defendants supposedly breached); *In re Worldcom, Inc. v. Sec. Litig.*, 456 F. Supp. 2d 508, 519 (S.D.N.Y. 2006) (dismissing breach of contract claim based on contract's general provision that it is subject to all applicable laws because it failed to identify a specific contractual provision, and stating: "To the extent that Holmes is contending that Smith Barney violated any law or regulation, then he was obligated to identify the law and bring a claim pursuant to it, assuming it created a private right of action"). Here, the Agreement did not include as an express term that El Tejon would pay Cántaro the hourly minimum wage prescribed under the MWA. Instead, the Agreement provides as an express term that El Tejon would pay Cántaro no less than $750.00 per month. *See* Exhibit H. Cántaro does not claim that El Tejon breached this express term. *See* SAC ¶ 52 (stating Cántaro was paid $1422.55 monthly).

party disputes its validity.[18] *See* Exhibit H; *see supra* note 15.

1. Cántaro's Promissory Estoppel Claim Fails

Promissory estoppel is a consideration substitute, not a contract substitute. *See Vancheri v. GNLV Corp.*, 777 P.2d 366, 369 (Nev. 1989) ("The doctrine of promissory estoppel, which embraces the concept of detrimental reliance, is intended as a substitute for consideration, and not as a substitute for an agreement between the parties." (citing *Kruse v. Bank of Am.*, 248 Cal. Rptr. 217 (1988)); *Pink v. Busch*, 691 P.2d 456, 459 (Nev. 1984). To establish a claim of promissory estoppel, a plaintiff must prove four elements:

> (1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; (4) he must have relied to his detriment on the conduct of the party to be estopped.

Pink, 691 P.2d at 459-60 (quoting *Cheqer, Inc. v. Painters & Decorators Joint Comm., Inc.*, 655 P.2d 996, 998-99 (Nev. 1982)).

When an express agreement exists between the parties, promissory estoppel does not apply. *See Morgan v. Aurora Loan Servs., LLC*, 646 F. App'x 546, 551 (9th Cir. 2016) ("Under California law, promissory estoppel applies only in the absence of an express agreement between the parties."); *see also Am. Sav. & Loan Ass'n v. Stanton-Cudahy Lumber Co.*, 455 P.2d 39, 41 (Nev. 1969) ("[T]he doctrine of promissory estoppel which provides that in a case *where traditional consideration is lacking*, reliance which is foreseeable, reasonable, and serious will require enforcement if injustice cannot otherwise be avoided." (emphasis added)).

In this case, the express agreement between the parties defeats Cántaro's cause of action for

[18] Cántaro's causes of action for promissory estoppel and unjust enrichment/quantum meruit are pleaded in the alternative to his breach of contract action. While some courts have allowed such alternative pleading in the event the contract is found unenforceable, *see DFR Apparel Co. v. Triple Seven Promotional Products, Inc.*, No. 2:11-CV-01406-APG, 2014 WL 4891230, at *3 (D. Nev. Sept. 30, 2014), other courts reject alternative quasi-contract pleading when the validity of the express contract is not in dispute. *See Res. Title Agency, Inc. v. Morreale Real Estate Servs., Inc.*, 314 F. Supp. 2d 763, 772 (N.D. Ohio 2004) ("[U]njust enrichment may be pled in the alternative when the existence of an *express contract is in dispute*, and may be maintained despite the existence of an express contract where there is evidence of fraud, bad faith, or illegality." (emphasis added) (citation omitted)); *Advanced Plastics Corp. v. White Consol. Indus., Inc.*, 828 F. Supp. 484, 491 (E.D. Mich. 1993) ("[A]lternative pleading of an implied contract claim is only allowed in a contract setting where a party doubts the existence of a contract."). Here, neither party disputes the existence and validity of the contract. *See* SAC ¶ 36.

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promissory estoppel. Further, it appears that Cántaro's promissory estoppel claim is based on El Tejon's alleged promise to Cántaro to adhere to the supposed implied incorporation of the Code of Federal Regulations into the Agreement. *See* SAC ¶ 215 ("Defendant El Tejon promised Plaintiff Cántaro and the El Tejon Class that it would adhere to 20 C.F.R. § 655.122, 20 C.F.R. § 655.210, and 20 C.F.R. § 655.135."). To the extent that Cántaro's claim is based on the theory underlying the breach of contract cause of action, it must also be dismissed for the same reasons. *See supra* Part IV(C).

Moreover, Cántaro failed to plead *justifiable* and *reasonable* reliance, which is necessary to maintain a claim for promissory estoppel. *See Pellegrini v. State*, 34 P.3d 519, 531 (Nev. 2001) (stating equitable estoppel "requires justifiable reliance by the party invoking the doctrine"); *Am. Sav. & Loan Ass'n*, 455 P.2d at 41. Here, Cántaro's reliance is not justifiable or reasonable because the alleged promise from El Tejon was based on El Tejon's general contract term that it would comply with all applicable laws. Cántaro did not plead that he read and understood such a broad statement to mean that El Tejon would comply with 20 C.F.R. §§ 655.122, 655.210, 655.135, which, in turn, means that El Tejon would pay the wage required under the MWA and reimburse his H-2A Certification fees.[19] Because promissory estoppel is required to be pleaded with particularity,[20] Cántaro's allegations of detrimental reliance in his promissory estoppel claim are conclusory and should, thus, be dismissed.

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[19] Cántaro's failure to plead this element makes sense because it would stretch beyond any credibility that a sheepherder from a foreign country would have any knowledge of what these regulations are, particularly when the regulations do not explicitly state the rule of law on which Cántaro relies. For example, with regard to 20 C.F.R. §§ 655.122, 655.210, Cántaro argues these regulations establish he should have been paid $8.25 per hour. But this argument requires Cántaro to have understood these regulations to render the Nevada MWA applicable, which means that he also had knowledge and an understanding of the Nevada MWA. This is unlikely, particularly for a foreign sheepherder that was based out of California. *See, e.g.*, SAC ¶ 100. Further, Cántaro's failure to state he read and understood 20 C.F.R. § 655.135 to require reimbursement of the H-2A Certification Fees makes even more sense because the regulation does not clearly say such. In fact, the regulation seems to indicate the opposite: "This provision does not prohibit employers or their agents from receiving reimbursement for costs that are the responsibility and primarily for the benefit of the worker, such as government-required passport fees." 20 C.F.R. § 655.135(j). Plaintiffs rely on the interpretation discussed in the preamble to the February 2010 Final Rule at 75 Fed. Reg. 6884, 6925 to allege that visa application fees are the employer's responsibility, but Cántaro never pleads that he was aware of or relied upon the interpretation of the preamble. These omissions are fatal to his claim of promissory estoppel.

[20] *See Hasan v. Ocwen Loan Serv., LLC*, No. 2:10-CV-00476-RLH, 2010 WL 2757971, at *2 (D. Nev. July 12, 2010) ("Requiring specificity for plaintiffs who plead promissory estoppel is analogous to the heightened pleading standard for fraud under Rule 9(b) of the Federal Rules of Civil Procedure, which requires a party to 'state with particularity the circumstances constituting fraud.' Although Rule 9(b) does not expressly apply to promissory estoppel claims, the Court concludes that Rule 9(b)'s heightened pleading standard applies because promissory estoppel involves false statements and conduct amounting to misrepresentation.").

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2. Cántaro's Unjust Enrichment/Quantum Meruit Claim Fails

Like Cántaro's claim of promissory estoppel, the claim of unjust enrichment/quantum meruit also fails because an express, written agreement exists. "An action based on a theory of unjust enrichment is not available when there is an express, written contract, because no agreement can be implied when there is an express agreement." *Leasepartners Corp. v. Robert L. Brooks Tr. Dated Nov. 12, 1975*, 942 P.2d 182, 187 (Nev. 1997) ("The doctrine of unjust enrichment or recovery in quasi-contract applies to situations where there is no legal contract . . . ." (quoting 66 Am. Jur. 2d *Restitution* § 11 (1973)); *see also WuMac, Inc. v. Eagle Canyon Leasing, Inc.*, No. 2:12-CV-0926-LRH-VCF, 2013 WL 593396, at *4 (D. Nev. Feb. 14, 2013) ("[A] claim for quantum meruit is not actionable when the claim is based on an express contract. As there is an express contract at issue in this action, the court shall grant Eagle's motion as to this issue and dismiss WuMac's claim for quantum meruit."); *Lipshie v. Tracy Inv. Co.*, 566 P.2d 819, 824 (Nev. 1977) ("To permit recovery by quasi-contract where a written agreement exists would constitute a subversion of contractual principles.").

Here, there was a written agreement between Cántaro and El Tejon governing pay. *See* SAC ¶ 36; Exhibit H. As such, Cántaro's unjust enrichment claim fails as a matter of law and should be dismissed. As to Cántaro's quantum meruit claim, the "Nevada Supreme Court recently explained the contours of the often confused quantum meruit claim. Quantum meruit is pled in two distinct contexts: contract and restitution." *See Risinger v. SOC LLC*, 936 F. Supp. 2d 1235, 1246-47 (D. Nev. 2013) (citing *Certified Fire Prot. Inc. v. Precision Constr.*, 283 P.3d 250, 256 (Nev. 2012)). In the contract context, quantum meruit may supply absent terms to contracts implied-in-fact. *See id.* at 1247. "Quantum meruit's other role," however, "is in providing restitution for unjust enrichment . . . ." *Id.* (quoting *Certified Fire*, 283 P.3d at 256). In this role, quantum meruit serves as a remedy for unjust enrichment. *Id.* It is in this context Cántaro pleads quantum meruit, as a remedy for the alleged unjust enrichment, as demonstrated by Count 8 being labeled "Unjust Enrichment and Quantum Meruit." *See* SAC ¶ 219. However, as the unjust enrichment claim fails, there can be no remedy and no quantum meruit. Thus, to the extent this Court considers the quantum meruit aspect of Count 8 in any way separate from the unjust enrichment claim, it too should be dismissed.

E. Cántaro's Claims Should Be Dismissed With Prejudice

This Court should dismiss Cántaro's claims against El Tejon and Gragirena with prejudice because Cántaro failed to comply with this Court's order to remedy, if possible, the jurisdictional defects. *See* ECF No. 107, at 18:6-7; *see also Cobb v. Reyes*, 467 F. App'x 599, 599 (9th Cir. 2012) (affirming district court's dismissal of action with prejudice for failure to comply with district court's order to amend complaint to plainly and clearly allege claims). The SAC failed to make jurisdictional allegations against El Tejon and Gragirena, but even if it did, El Tejon and Gragirena have submitted ample evidence demonstrating to a legal certainty that Cántaro cannot establish CAFA jurisdiction. Cántaro's deficiencies in direct violation of this Court's order should not be rewarded with additional leave to amend—a tactic that is likely used for Cántaro to continue to search for additional potential class members.

V. CONCLUSION

For the reasons set forth above, Cántaro's claims should be dismissed with prejudice because this Court lacks jurisdiction under 28 U.S.C. § 1332. On the merits, however, counts 2 and 10 should be dismissed as against Gragirena because he cannot be held individually liable under the Minimum Wage Amendment as he is not an "employer." Count 6 should be dismissed against El Tejon because a breach of contract cause of action cannot be maintained solely based on the alleged violation of a statute. Counts 7 and 8 should be dismissed because they are quasi-contract claims, pleaded in the alternative, and neither party disputes the validity or existence of an express, written agreement.

DATED this 16th day of June 2017.

By: /s/ Anthony L. Hall
Anthony L. Hall, Esq.
Erica C. Smit, Esq.
HOLLAND & HART LLP
5441 Kietzke Lane, Second Floor,
Reno, Nevada 89511

Attorneys for Defendants El Tejon Sheep Company and Melchor Gragirena

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b), I hereby certify that on June 16, 2017, I served a true and correct copy of the foregoing **DEFENDANTS MELCHOR GRAGIRENA AND EL TEJON SHEEP COMPANY'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT** by electronic transmission to the parties on electronic file and/or depositing same in the United States mail, first class postage fully prepaid to the persons and addresses listed below:

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/s/ Valerie Larsen
An Employee of Holland & Hart LLP

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EXHIBIT A

EXHIBIT A

Anthony L. Hall, Esq.
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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ABEL CÁNTARO CASTILLO; ALCIDES INGA RAMOS; RAFAEL DE LA CRUZ, and those similarly situated, Plaintiffs, vs. WESTERN RANGE ASSOCIATION; EL TEJON SHEEP COMPANY; MELCHOR GRAGIRENA; MOUNTAIN PLAINS AGRICULTURAL SERVICE; and ESTILL RANCHES, LLC, Defendants.	CASE NO. 3:16-cv-00237-RCJ-VPC **DECLARATION OF MELCHOR GRAGIRENA**

I, Melchor Gragirena, hereby declare as follows:

1. My name is Melchor Gragirena. I am over the age of eighteen years old and am competent to testify as to the following facts based upon my personal knowledge, or where indicated, upon information and belief. As to any facts stated on information and belief, I believe them to be true. If called as a witness, I can testify to a court competently as to my knowledge of the facts contained herein.

2. I am a defendant in this action and an owner of El Tejon Sheep Company ("El Tejon").

3. El Tejon is a small, family-owned and operated business and a member of Western Range Association ("WRA"). El Tejon does not have a relationship with any other ranches—except possibly being members of the same association (WRA)—or knowledge of whether other ranches'

practices are the same as El Tejon's practices.

4. Since May 2010, El Tejon has only employed twenty-six (26) different shepherds, including Plaintiff Abel Cántaro Castillo ("Cántaro").

5. Despite this small amount of shepherds, El Tejon is being dragged into a large lawsuit, mainly involving shepherds from ranches unrelated to El Tejon.

6. For the two years preceding the filing of the complaint in this case, May 3, 2016, there are only twelve (12) individuals including Cántaro, whom could be members of a class action, that were employed as shepherds for El Tejon. For the six year period preceding the filing of the complaint, there are only eight (8) additional individuals, whom could be members of a class action, bringing the total of all individuals for a six year period prior to the filing of the complaint to twenty (20) potential opt-in plaintiffs (including Cántaro).

7. The remaining six (6) shepherds have settled their claims with El Tejon. Each of these shepherds have signed declarations describing their employment, including their daily schedule and duties.

a. Exhibit B is a true and correct copy of the Declaration of Cesario Yauri Garcia, dated July 18 2016;
b. Exhibit C is a true and correct copy of the Declaration of Elias Maximo Ascanoa Alania, dated July 18, 2016;
c. Exhibit D is a true and correct copy of the Declaration of Elmer Alcides Cántaro Oteo, dated July 19, 2016;
d. Exhibit E is a true and correct copy of the Declaration of Filomeno Leonardo Lapa Pomahuali, dated July 18, 2016;
e. Exhibit F is a true and correct copy of the Declaration of Gilmar Jhonny Melo Castillo, dated July 19, 2016;
f. Exhibit G is a true and correct copy of the Declaration of William Archi Lozano, dated July 19, 2016.

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8. Starting on June 4, 2014, and excluding the six (6) shepherds El Tejon settled with, El Tejon employed the following shepherds for the following dates:

Shepherd	Start Date	End Date
Abel Cántaro Castillo	June 4, 2014	June 8, 2014
Alcides Yauri Garcia	June 4, 2014	Nov. 5, 2015
Ricardo Yauri Garcia	June 4, 2014	Dec. 31, 2015
Elmer Aquino Arteaga	June 4, 2014	Jan. 4, 2015
Marcelino Huaynalaya Archi	Apr. 14, 2015	July 19, 2015
David Hernan Palacin Mendoza	June 4, 2014	June 30, 2014
Reynaldo Roger Diaz Quinones	June 4, 2014	Sept. 1, 2014
Jimy Rafael Gabino Perez* *(Two periods of employment)	June 4, 2014 Nov. 13, 2015	Jan. 25, 2015 Apr. 15, 2016
Miguel Angel Vasquez Rosales	Dec. 24, 2015	June 28, 2016
Wilder Ivan Varillas Limaco	Mar. 20, 2015	June 21, 2015
Denis Huaman Lozano	Apr. 17, 2015	June 4, 2015
Paul Neuman Huaman Gonzalez	Apr. 30, 2016	June 11, 2016

9. El Tejon is based in California, which is where El Tejon shepherds spend approximately six (6) months—typically, early October until early to mid-April—of each year. The other six (6) months of each year are spent in Nevada.

10. El Tejon paid its shepherds the following amounts, shown as a monthly salary and a daily salary, for the following time periods:

Time Period	Monthly Salary	Daily Salary
June 1, 2014 to Aug. 31, 2014	$1,422.52	$46.78
Sep. 1, 2014 to Dec. 31, 2015	$1,600.34	$52.61
Jan. 1, 2016 to June 30, 2016	$1,777.98	$58.45

11. On October 26, 2013, I signed a Sheepherder Employment Agreement ("Agreement") on behalf of El Tejon for the employment of Cántaro. Exhibit H is a true and correct copy of the Agreement.

12. Cántaro worked exclusively for El Tejon and did not have a connection to or relationship with other WRA ranches.

13. Without notice to El Tejon, Cántaro voluntarily terminated his employment on June 8, 2014. The last paycheck El Tejon paid to Cántaro was for the month of May 2014, which totaled

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$1,477.08.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed this 16th day of June 2017.

/s/ Melchor Gragirena
MELCHOR GRAGIRENA

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IN THE SUPREME COURT OF THE STATE OF NEVADA

ABEL CÁNTARO CASTILLO, No. 85926

Appellant,

vs.

WESTERN RANGE ASSOCIATION,

Respondent.

_____________________________________/

RESPONDENT WESTERN RANGE ASSOCIATION'S APPENDIX VOLUME 1, PART 2

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ATTORNEYS FOR RESPONDENT
WESTERN RANGE ASSOCIATION

EXHIBIT B

EXHIBIT B

DECLARATION OF CESARIO YAURI GARCIA

Cesario Yauri Garcia hereby deposes and says as follows:

1. I am over eighteen years of age and have personal knowledge of the matters set forth in this Declaration, except as to the matters stated upon information and belief, and as to those matters, I believe them to be true. I am competent to testify to the matters contained herein and if called as a witness, I could and would competently testify to the information that this Declaration contains.

2. This declaration is freely given by me and not as a result of coercion, threats or promises of any benefit to me or my family.

3. I am able to speak and write in Spanish. Through an interpreter, I was able to make any and all changes that I felt were necessary or appropriate to this Declaration before I signed it. Specifically, the interpreter read it to me, line by line, and I was able to have the interpreter repeat anything that I requested and I was able to change anything that I felt needed to be changed.

4. I am an employee of El Tejon Sheep Company (hereinafter "El Tejon"). I have been working for El Tejon since July 20, 2006 to the present. During that time I have had all promises made to me by El Tejon fulfilled.

5. Other than the fact that I was recruited by and given the formal employment offer from Western Range Association, during the prior 3 year time period, I have not worked in the United States as a sheep herder for any other company than El Tejon.

6. Since I have worked for El Tejon for almost 10 years, and I cannot recall the exact dates we moved sheep from one location to another, I am giving my general memory of the schedule since it is similar each year, depending on feed and other environmental factors.

7. It is my understanding that the government issued permit allows El Tejon to graze sheep in the Mojave Desert, in California, from March 1 to June 1. However, based on feed conditions, the sheep are normally moved to Elko county around April 1 of each year.

8. This Mojave Desert area, in California, is very rural range land, it is the desert. There are no permanent structures, the roads that we take to get close to our herding areas are dirt and some

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require 4x4 trucks to travel on these roads, our housing is a trailer that must be brought in by trucks and there is no power. I work this rugged area by walking. This area is uncultivated and I do not know acres or other means to measure how large it is. This area does not include feedlots or corrals, they feed on natural habitat (grass, leaves, etc.). The grazing area is not near El Tejon's headquarters, this is far away from the office. We work this area in pairs of two, he tends one set of sheep and I care for another and we do not camp together. There is a far distance from each other. A supervisor brings food and water in the morning and only stays about 2 hours. The rest of the day I am alone and my activities are not monitored. Thus, no one but me can testify as to my daily work activities or work time. Similarly, since I am alone, I cannot testify as to the work time or work activities of other sheep herders working for El Tejon, much less herders working for other employers.

9. Depending on feed conditions, we move the sheep by truck from the Mojave Desert to Elko county around early April. The sheep remain in this area from April 1 up to the end of May. Specifically, we are about 1 hours north of Rendon, Nevada, and it is all dirt roads. You have to drive slow. There are no permanent structures. My housing consists of a tipi tents and items that can be brought in by 4x4 and there is no power. I work this rugged area by walking. This area is uncultivated. The area is too big for me to estimate its size. This area does not include feedlots or corrals, the sheep eat natural grass and leaves. It is not near El Tejon's headquarters.

10. From the end of May or early June through approximately October, the sheep are moved to Columbia basin and Jack creek areas. The specific area that I worked on during this time period is in a very remote location in the mountains with only dirt roads. The roads that I took to get close to my herding area was dirt and required a 4x4 truck to travel on these roads. My housing consists of tents, a cot and must be brought in by 4x4 trucks. There is no power. I work this rugged area by walking. This area is uncultivated and is about 8-10 square miles. This area does not include feedlots or corrals, and is not near El Tejon's headquarters.

11. There are no other herders with me in the Nevada locations. A supervisor brings food and checks on me, according to weather and how others are doing, about every other day. When the supervisor visits he typically stays about 1 hour. Thus, no one but me can testify as to my daily work

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activities or work time. Similarly, since I am alone, I cannot testify as to the work time or work activities of other sheep herders working for El Tejon, much less herders working for other employers.

12. Between October 1 to October 15 all the sheep are trucked back to California. The nearest large city is Bakersfield and is about a 1/2 hour drive away. El Tejon's headquarters is not located where we are grazing. The area is completely rural and consist of dirt roads. The accommodations are portable units that have to be towed to the grazing areas. We do not have electricity. The sheep and herders are here from October 1-15 through approximately the end of January.

13. The lambing season starts about mid November and lasts until the end of December. All of this varies with the weather and how dry/wet it is that particular year.

14. During February and March, depending on availability of feed, the sheep are moved to rural areas west of Bakersfield, about 1 hour and 45 mins away from Bakersfield. Specifically, the leases are mostly on oil fields and is not cultivated. While there are some dirt roads and no permanent housing. We use the same housing we use in the Mojave Desert. This area does not include feedlots or corrals, and is not near El Tijon's headquarters. There are no other herders with me in this location and the supervisor situation is the same as I described in the Mojave desert, since like the desert there is no water and water has to be brought out to the sheep in a big water truck. In Nevada, the areas all have natural streams and water is not brought in for the sheep.

15. As mentioned above, at the end of March, we move the sheep to the Mojave desert or Nevada, depending on feed and weather, and the cycle starts again.

16. To be specific, this breaks down to about 6 months in Nevada and 6 months in California. The exact time may vary, but this is a fair general characterization. About 1 month in California is spent in the Mojave Desert. Further, about 2 months in California are spent on rural oil field lands. The remaining time in California (only about 3 months) is spent on cultivated fields.

17. From my personal experience, I conclude that I worked in range land (e.g., uncultivated land which consists of thousands of acres, is located in a remote and isolated area, range

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housing is required, there are no feedlots or corrals, and are not near El Tejon's headquarters) for significantly more than 50% of every year that I worked for El Tejon. As I mentioned above, for almost the entire year each herder works alone and in different geographic locations. This means that while I personally worked on range land, other herders were not with me and my area of work is not the same as another sheep herder's area of work. Thus, while I worked on range land, this says nothing about other herders working for El Tejon and certainly my work locations and time in each location cannot be equated to herders working for other employers.

18. In a very general sense, and not during lambing season, while in Nevada and the Mojave Desert in California, the sheep have a pretty standard routine, as follows:

a. The sheep bed down from just after sunset until just before sunrise. Obviously, the time of sunrise/set varies with the time of the year. The sheep need no attention from me during this time period.

b. Around 5 am I get up and go the where the sheep are sleeping. I check on them and direct them to the water. The sheep are at water 8-9 am. I leave them and go back and eat and take a nap at same time they do.

c. Around 2-3 pm I go to the sheep and direct them toward the area I want them to move that night. I am with the sheep about 2-3 hours and go back to camp and I can eat sleep. This can be longer or shorter, based on where I plan to send them the next day, by checking out that area.

d. The tipi is normally located where a vehicle can get to it and the sheep are 30-45 minutes away.

19. The schedule set forth above varies a little when I am in California, not including lambing season, in that it is less work.

20. During lambing season, the time worked is a little more than the time in Nevada.

21. During my employment, I was paid the same wage rate for the time periods that I worked in California that I was paid when I worked in Nevada. Specifically, during 2014 and 2015, I was paid $1,661.72 per month. Beginning on January 1, 2016, I was paid twice a month at a rate of

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$888.99 per pay period. In addition, part of my wage is room and board. This was explicitly agreed to as part of my compensation in my employment offer. I am also permitted to slaughter a lamb to eat. I am supplied with meals every day and a place to stay. I believe that it is a fair estimate to say that the value of my food is $12/day or $82/week. I also believe that a fair value for my housing is $300-400/month.

22. I estimate that I actually perform work an average of 56 hours per week, taking the full year into account. I truly believe I work an average of 8 hours per day.

23. I was also given 2 weeks of paid vacation time each year by El Tejon. I have also received surprise discretionary bonus, based on their judgment of my work, of about $1,000 in 2014 and 2015.

24. As a result, I do not believe that I was paid below Nevada's minimum wage of $8.25/hour during any time period that I worked in Nevada.

I hereby declare under penalty of perjury under the laws of the United States and the State of Nevada that the foregoing is true and correct to the best of my knowledge.

Date: This 18th day of July, 2016.

CESARIO YAURI GARCIA

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Reno, Nevada 89511

DECLARATION OF INTERPRETATION

Ruben Burnias, hereby deposes and says as follows:

1. I am over eighteen years of age and have personal knowledge of the matters set forth in this Declaration, except as to the matters stated upon information and belief, and as to those matters, I believe them to be true. I am competent to testify to the matters contained herein and if called as a witness, I could and would competently testify to the information that this Declaration contains.

2. This declaration is freely given by me and not as a result of coercion, threats or promises of any benefit to me or my family.

3. I hereby certify that I am currently working with Interpreting Enterprises and have previously worked as a State and Federal Court Interpreter for over 25 years. I have also served in my capacity of Spanish Court Interpreter in over 1800 depositions.

4. I am fluent in both English and Spanish languages and I am competent to translate from Spanish to English and English to Spanish.

5. I personally attended the witness interview of Cesario Yauri Garcia ("Garcia") in Elko, Nevada, along with Anthony L. Hall, Esq. I have acted as an interpreter throughout the witness interview in order to ensure accuracy.

6. Following the witness interview, I certify that I read the Declaration of Garcia to him in a language that he understood (Spanish), and that he was given the opportunity to ask any questions and to make any changes or corrections that he felt were appropriate. I also certify that my translation of his declaration to him was true and correct. I certify that Garcia confirmed that he understood and agreed with his Declaration before signing it.

I hereby declare under penalty of perjury under the laws of the United States and the State of Nevada that the foregoing is true and correct to the best of my knowledge.

Date: This 18th day of July, 2016.

Ruben Burnias
Interpreting Enterprises

EXHIBIT C

EXHIBIT C

DECLARATION OF ELIAS MAXIMO ASCANOA ALANIA

Elias Maximo Ascanoa Alania hereby deposes and says as follows:

1. I am over eighteen years of age and have personal knowledge of the matters set forth in this Declaration, except as to the matters stated upon information and belief, and as to those matters, I believe them to be true. I am competent to testify to the matters contained herein and if called as a witness, I could and would competently testify to the information that this Declaration contains.

2. This declaration is freely given by me and not as a result of coercion, threats or promises of any benefit to me or my family.

3. I am able to speak and write in Spanish. Through an interpreter, I was able to make any and all changes that I felt were necessary or appropriate to this Declaration before I signed it. Specifically, the interpreter read it to me, line by line, and I was able to have the interpreter repeat anything that I requested and I was able to change anything that I felt needed to be changed.

4. I am an employee of El Tejon Sheep Company (hereinafter "El Tejon"). I have been working for El Tejon since May 22, 2014 to the present. During that time I have had all promises made to me by El Tejon fulfilled.

5. Other than the fact that I was recruited by and given the formal employment offer from Western Range Association, during the prior 3 year time period, I have not worked in the United States as a sheep herder for any other company than El Tejon.

6. Since I have worked for El Tejon for more than 2 years, and I cannot recall the exact dates we moved sheep from one location to another, I am giving my general memory of the schedule since it is similar each year, depending on feed and other environmental factors.

7. I, personally, have not herded sheep in the Mojave Desert. Instead, I stayed in the oil field area, that I will describe below.

8. Depending on feed conditions, we move the sheep by truck from California to Nevada. The sheep remain in this area from April 1 up to first weeks of June. This area is about 40 minutes north of Rendon, by truck. The roads are all dirt in the area that we herd the sheep. There

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are no permanent structures. My housing consists of tents and items that can be brought in by 4x4 and there is no power. This area is uncultivated and unfenced. This area does not include feedlots or corrals, and is not near El Tejon's headquarters. Sheep feed on natural grass in this area and water from streams. There are no other herders with me in this location.

9. From the beginning of June, I moved with my sheep to the Jack Creek area of Nevada. I stayed in this area to mid-October. Specifically, me and my band of sheep were in the Snow Canyon allotment. The specific area that I worked on during this time period is in a very remote location in the mountains with only dirt roads. My housing consists of tents and a cot. There is no power. This area is uncultivated. This area does not include feedlots or corrals, and is not near El Tejon's headquarters.

10. For both areas in Nevada, the supervisor comes around every other day or so and only stays about 20-30 minutes. Thus, no one but me can testify as to my daily work activities or work time. Similarly, since I am alone, I cannot testify as to the work time or work activities of other sheep herders working for El Tejon, much less herders working for other employers.

11. In mid-October all the sheep are trucked back to California and are in an area that is East of Bakersfield. They sheep stay here until mid to late January.

12. The lambing season starts about November 10 and lasts until the end of December.

13. During February and March, depending on availability of feed, the sheep are moved to rural areas west of Bakersfield to oil fields. This area is also very rural. While there are some roads (mostly dirt) near the grazing areas that I worked and there is no power. This area is uncultivated. We live in a trailer that is towed to the location. This area does not include feedlots or corrals, and is not near El Tijon's headquarters. The sheep eat natural grown (not cultivated) grass. Water for the sheep is brought in by truck. There are no other herders with me in this location and my daily activities are not monitored. The supervisor visits daily to bring water and he typically stays about 1 hour. Thus, no one but me can testify as to my daily work activities or work time. Similarly, since I am alone, I cannot testify as to the work time or work activities of other sheep herders working for El Tijon, much less herders working for other employers.

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14. As mentioned above, my band moved back to Nevada each year around April 10.

15. To be specific, this breaks down to about 6 months in Nevada and 6 months in California. The exact time may vary, but this is a fair general characterization. For me, I spent about 2 months in California in uncultivated oil field lands.

16. From my personal experience, I conclude that I worked in range land (e.g., uncultivated land that is located in a remote and isolated area, range housing is required, there are no feedlots or corrals, and are not near El Tejon's headquarters) for significantly more than 1/2 of every year that I worked for El Tejon. As I mentioned above, for almost the entire year each herder works alone and in different geographic locations. This means that while I personally worked on range land, other herders were not with me and my area of work is not the same as another sheep herder's area of work. Thus, while I worked on range land, this says nothing about other herders working for El Tejon and certainly my work locations and time in each location cannot be equated to herders working for other employers.

17. In a very general sense, and not during lambing season, while in Nevada and the oil fields of California, the sheep have a pretty standard routine, as follows:

a. The sheep bed down from just after sunset until just before sunrise. Obviously, the time of sunrise/set varies with the time of the year. The sheep need no attention from me during this time period.

b. I get up around 4-4:30 am and prepare my breakfast. I start walking to the sheep around 5 am. The walk to the sheep is normally around 20-25 minutes.

c. I direct the flock to food and water and check on them. My routine varies depending on the situation. I prepare my lunch when the sheep sleep during the day. The sheep sleep about 5 hours or more each mid-day. I also go back to camp to eat during the day and sleep during this time period.

d. The sheep need no attention from me, since they drink water, nap and graze during this time period.

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e. I go back to the sheep around 2 pm and stay with them about 2 hours, to direct them to where I want them heading for the evening.

18. The schedule set forth above varies a little when I am in California, on cultivated land, my day is shorter. This is mostly because this is winter and the day light hours are shorter.

19. During my employment, I was paid the same wage rate for the time periods that I worked in California that I was paid when I worked in Nevada. Specifically, in 2015 I earned $1,661.72 per month. Beginning on January 1, 2016, I was paid twice a month at a rate of $888.99 per pay period. In addition, part of my wage is room and board. This was explicitly agreed to as part of my compensation in my employment offer. I am also allowed to slaughter lamb for food. I am supplied with meals every day and a place to stay. I believe that it is a fair estimate to say that the value of my food is $10/day or $70/week. I also believe that a fair value for my housing is $150-200/month.

20. I estimate that I actually perform work an average of 8 hours each day.

21. I was also given 2 weeks of paid vacation time each year by El Tejon. I have also received surprise discretionary bonus of $1,000 each year.

22. As a result, believe that I was paid above Nevada's minimum wage of $8.25/hour during all time periods that I worked in Nevada.

I hereby declare under penalty of perjury under the laws of the United States and the State of Nevada that the foregoing is true and correct to the best of my knowledge.

Date: This 18th day of July, 2016.

Eul

ELIAS MAXIMO ASCANOA ALANIA

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DECLARATION OF INTERPRETATION

Ruben Burnias, hereby deposes and says as follows:

1. I am over eighteen years of age and have personal knowledge of the matters set forth in this Declaration, except as to the matters stated upon information and belief, and as to those matters, I believe them to be true. I am competent to testify to the matters contained herein and if called as a witness, I could and would competently testify to the information that this Declaration contains.

2. This declaration is freely given by me and not as a result of coercion, threats or promises of any benefit to me or my family.

3. I hereby certify that I am currently working with Interpreting Enterprises and have previously worked as a State and Federal Court Interpreter for over 25 years. I have also served in my capacity of Spanish Court Interpreter in over 1800 depositions.

4. I am fluent in both English and Spanish languages and I am competent to translate from Spanish to English and English to Spanish.

5. I personally attended the witness interview of Elias Maximo Ascanoa Alania ("Alania") in Elko, Nevada, along with Anthony L. Hall, Esq. I have acted as an interpreter throughout the witness interview in order to ensure accuracy.

6. Following the witness interview, I certify that I read the Declaration of Alania to him in a language that he understood (Spanish), and that he was given the opportunity to ask any questions and to make any changes or corrections that he felt were appropriate. I also certify that my translation of his declaration to him was true and correct. I certify that Alania confirmed that he understood and agreed with his Declaration before signing it.

I hereby declare under penalty of perjury under the laws of the United States and the State of Nevada that the foregoing is true and correct to the best of my knowledge.

Date: This 18th day of July, 2016.

Ruben Burnias
Interpreting Enterprises

EXHIBIT D

EXHIBIT D

DECLARATION OF ELMER ALCIDES CANTARO OTEO

Elmer Alcides Cantaro Oteo hereby deposes and says as follows:

1. I am over eighteen years of age and have personal knowledge of the matters set forth in this Declaration, except as to the matters stated upon information and belief, and as to those matters, I believe them to be true. I am competent to testify to the matters contained herein and if called as a witness, I could and would competently testify to the information that this Declaration contains.

2. This declaration is freely given by me and not as a result of coercion, threats or promises of any benefit to me or my family.

3. I am able to speak and write in Spanish. Through an interpreter, I was able to make any and all changes that I felt were necessary or appropriate to this Declaration before I signed it. Specifically, the interpreter read it to me, line by line, and I was able to have the interpreter repeat anything that I requested and I was able to change anything that I felt needed to be changed.

4. I am an employee of El Tejon Sheep Company (hereinafter "El Tejon"). I have been working for El Tejon since September 18, 2014 to the present. During that time I have had all promises made to me by El Tejon fulfilled. I was initially a sheepherder and I became a supervisor in January of 2016.

5. Other than the fact that I was recruited by and given the formal employment offer from Western Range Association, during the prior 3 year time period, I have not worked in the United States as a sheep herder for any other company than El Tejon.

6. Since I have worked for El Tejon for almost 2 years, and I cannot recall the exact dates we moved sheep from one location to another, I am giving my general memory of the schedule since it is similar each year, depending on feed and other environmental factors.

7. I started in Nevada in the Snow Canyon and Columbia Basin allotments. I worked these areas from September through early October. The areas are not cultivated. The roads that we take to get close to our herding areas are dirt and require trucks to travel on these roads for about 40 minutes. This area does not include feedlots or corrals, and is not near El Tejon's headquarters. My

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Supervisor visited me 2-3 times per week and would stay with me about 2-3 hours, depending on what needs to be accomplished.

8. Between October 1 to October 15, all the sheep are trucked back to California. 3 months were on cultivated land as a sheepherder, until about the end of January.

9. At the end of January, we moved the sheep and myself to oil fields west of Bakersfield. We were on these fields until March 17, 2015. This area is also very rural. Our range housing is a towed trailer. The area is uncultivated. This area does not include feedlots or corrals, and is not near El Tijon's headquarters. The sheep eat naturally growing grasses. There are no other herders with me in this location and my daily activities are not monitored. Thus, no one but me can testify as to my daily work activities or work time. My supervisor visited me daily since he had to bring water for the sheep and would typically stay only about 1-1 1/2 hours. Unlike in Nevada, where the sheep have streams, the water must be brought in. Similarly, since I am alone I cannot testify as to the work time or work activities of other sheep herders working for El Tijon, much less herders working for other employers.

10. After March 17, 2015 until April 19, 2015, we were on the Mojave Desert, in California. This area is also very rural. Our range housing is a towed trailer. The area is uncultivated. This area does not include feedlots or corrals, and is not near El Tijon's headquarters. The sheep eat naturally growing grasses. There are no other herders with me in this location and my daily activities are not monitored. Thus, no one but me can testify as to my daily work activities or work time. My supervisor visited me daily since he had to bring water for the sheep and would typically stay only about 1-1 1/2 hours. Unlike in Nevada, where the sheep have streams, the water must be brought in. Similarly, since I am alone I cannot testify as to the work time or work activities of other sheep herders working for El Tijon, much less herders working for other employers.

11. April 19 through the beginning of October, 2015, I was in Nevada. My first location was in an area I call La Cantina (which is about an hour north of Rendon by dirt road). The second area was Snow Canyon area (moved here at beginning of June). These areas are also very rural. Our range housing is a tipi tent. The areas are uncultivated. This areas do not include feedlots or corrals,

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and are not near El Tijon's headquarters. The sheep eat naturally growing grasses. There are no other herders with me in this location and my daily activities are not monitored. Thus, no one but me can testify as to my daily work activities or work time. My supervisor visited me 2-3 days per week and would typically stay only about 2-3 hours. Since I am alone I cannot testify as to the work time or work activities of other sheep herders working for El Tijon, much less herders working for other employers.

12. From the end of October 2015 through December 2015, I was a herder on cultivated land.

13. On January 2016, I became a supervisor.

14. As a supervisor, I help the herder decide where to direct the sheep, ship water to the sheep when needed, supply food and water for herders, help tend for sick sheep and when camps are moved I tow the trailers and move gear.

15. As a supervisor, I only spend a few hours a day with each herder, depending on what is going on. I cannot say what they do except for the limited time I am with them. Since the area is so rural and the roads are so rough, I spend a lot of my time traveling from one herder's area to the other.

16. I have to get supplies from Elko about 3 times every two weeks. I have to go to Elko to get provisions. When my herders are in the Columbia basin and Snow Mountain areas, it takes me 1 hour and 50 minutes to get to Elko. When my herders are in El Cantina area, it takes me about 1 hour and 10 minutes to get to Elko. The vast majority of both trips is dirt roads.

17. As a herder, I conclude that I worked in range land (e.g., uncultivated land, is located in a remote and isolated area, range housing is required, there are no feedlots or corrals, and are not near El Tejon's headquarters) for significantly more than 1/2 of every year that I worked for El Tejon.

18. In a very general sense, while in Nevada, the oil fields and the Mojave Desert in California, the sheep and I have a pretty standard routine, as follows:

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a. I would wake up around 3:30 or 4 am, and I make breakfast. I would typically start walking to the sheep anywhere from 4:30 – 5 am. The walk to the sheep would take 30 minutes – 1 1/2 hours, depending on circumstances.

b. When I get to the sheep, I feed the dogs first. I then start moving the sheep and watching for any that are hurt or sick. I direct them to water and food.

c. I typically start walking back to camp 9 – 10:30 am, depending. It totally depends on the circumstances.

d. When I get back to camp, I would make a meal, sleep, read, wash clothes, etc.

e. I start the walk back to the sheep around 2 or later. I arrive to sheep and give them direction and watch to see how they are proceeding, I am with them from 1-2 hours and then walk back to camp.

19. As a supervisor, I start my day around earlier, but I work about the same total hours as I did as a herder.

20. During my employment, I was paid the same wage rate for the time periods that I worked in California that I was paid when I worked in Nevada. Specifically, during 2014 and 2015, I was paid $1,661.72 per month. Beginning on January 1, 2016, I was paid twice a month at a rate of $888.99 per pay period. In addition, part of my wage is room and board. This was explicitly agreed to as part of my compensation in my employment offer. I can also slaughter a lamb for food and I do this about twice per month. I am supplied with meals every day and a place to stay. As the supervisor I buy the food, and I believe that it is a fair estimate to say that the value of the food I give to the herders is $11-12/day. I also believe that a fair value for my housing is $300-320/month.

21. I estimate that I actually perform work, both as a herder and a supervisor, an average of 8 hours per day, taking the full year into account.

22. I was also given 2 weeks of paid vacation time each year by El Tejon. I have also received surprise discretionary bonus of $1,000 at the end of 2015.

23. I do not believe that I was paid below Nevada's minimum wage of $8.25/hour during any time period that I worked in Nevada.

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I hereby declare under penalty of perjury under the laws of the United States and the State of Nevada that the foregoing is true and correct to the best of my knowledge.

Date: This 19th day of July, 2016.

ELMER ALCIDES CANTARO OTEO

Holland & Hart LLP
5441 Kietzke Lane, Second Floor
Reno, Nevada 89511

DECLARATION OF INTERPRETATION

Ruben Burnias, hereby deposes and says as follows:

1. I am over eighteen years of age and have personal knowledge of the matters set forth in this Declaration, except as to the matters stated upon information and belief, and as to those matters, I believe them to be true. I am competent to testify to the matters contained herein and if called as a witness, I could and would competently testify to the information that this Declaration contains.

2. This declaration is freely given by me and not as a result of coercion, threats or promises of any benefit to me or my family.

3. I hereby certify that I am currently working with Interpreting Enterprises and have previously worked as a State and Federal Court Interpreter for over 25 years. I have also served in my capacity of Spanish Court Interpreter in over 1800 depositions.

4. I am fluent in both English and Spanish languages and I am competent to translate from Spanish to English and English to Spanish.

5. I personally attended the witness interview of Elmer Alcides Cantaro Oteo ("Oteo") in Elko, Nevada, along with Anthony L. Hall, Esq. I have acted as an interpreter throughout the witness interview in order to ensure accuracy.

6. Following the witness interview, I certify that I read the Declaration of Oteo to him in a language that he understood (Spanish), and that he was given the opportunity to ask any questions and to make any changes or corrections that he felt were appropriate. I also certify that my translation of his declaration to him was true and correct. I certify that Oteo confirmed that he understood and agreed with his Declaration before signing it.

I hereby declare under penalty of perjury under the laws of the United States and the State of Nevada that the foregoing is true and correct to the best of my knowledge.

Date: This ___ day of July, 2016.

Ruben Burnias
Interpreting Enterprises

EXHIBIT E

EXHIBIT E

DECLARATION OF FILOMENO LEONARDO LAPA POMAHUALI

Filomeno Leonardo Lapa Pomahuali hereby deposes and says as follows:

1. I am over eighteen years of age and have personal knowledge of the matters set forth in this Declaration, except as to the matters stated upon information and belief, and as to those matters, I believe them to be true. I am competent to testify to the matters contained herein and if called as a witness, I could and would competently testify to the information that this Declaration contains.

2. This declaration is freely given by me and not as a result of coercion, threats or promises of any benefit to me or my family.

3. I am able to speak and write in Spanish. Through an interpreter, I was able to make any and all changes that I felt were necessary or appropriate to this Declaration before I signed it. Specifically, the interpreter read it to me, line by line, and I was able to have the interpreter repeat anything that I requested and I was able to change anything that I felt needed to be changed.

4. I am an employee of El Tejon Sheep Company (hereinafter "El Tejon"). I have been working for El Tejon since September 20, 2014, to the present. During that time I have had all promises made to me by El Tejon fulfilled.

5. Other than the fact that I was recruited by and given the formal employment offer from Western Range Association, during the prior 3 year time period, I have not worked in the United States as a sheep herder for any other company than El Tejon.

6. Since I have worked for El Tejon for almost 2 years, and I cannot recall the exact dates we moved sheep from one location to another, I am giving my general memory of the schedule since it is similar each year, depending on feed and other environmental factors.

7. I have not personally herded sheep in the Mojave Desert, in California. I worked in the Oil field area that I will describe below during the time period others worked in the Mojave Desert.

8. Depending on feed conditions, we move the sheep by truck from the oil fields to Elko county around April 1. The sheep remain in two areas of this area from April 1 up to the end of

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May. We are north of Rendon. The area is a full hour from Rendon. My housing consists of tents and items that can be brought in by 4x4 and there is no power. This area is uncultivated. This area does not include feedlots or corrals, and is not near El Tejon's headquarters. The sheep eat natural growing grass.

9. From the end of May until October, we move the sheep further north in Nevada, near Jacks Creek. I am personally in the Snow Canyon allotment. The specific area that I worked on during this time period is in a very remote location in the mountains with only dirt roads. My housing consists of tents, a cot and must be brought in by 4x4 trucks. There is no power. This area is uncultivated and the sheep eat natural grass. This area does not include feedlots or corrals, and is not near El Tejon's headquarters.

10. During the periods in Nevada and the oil fields, there are no other herders with me in this location and my daily activities are not monitored. There is a supervisor that comes every other day or so and he stays with me only about 2-3 hours. Thus, no one but me can testify as to my daily work activities or work time. Similarly, since I am alone, I cannot testify as to the work time or work activities of other sheep herders working for El Tejon, much less herders working for other employers.

11. In October all the sheep are trucked back to California.

12. The lambing season starts about November 10 and lasts until the end of December.

13. During February and March, depending on availability of feed, the sheep are moved to rural areas west of Bakersfield. Specifically, the oil fields. This area is also very rural and only has dirt roads. There is no power. This area is uncultivated. The housing is a tow trailer. This area does not include feedlots or corrals, and is not near El Tijon's headquarters. There are no other herders with me in this location and my daily activities are not monitored. My supervisor comes out daily to bring the sheep water and he stays about 1-2 hours.

14. As mentioned above, on April 1, we move the sheep to Nevada and the cycle starts again.

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15. To be specific, this breaks down to about 6 months in Nevada and 6 months in California. The exact time may vary, but this is a fair general characterization. Further, about 2 months in California are spent on rural oil field lands.

16. From my personal experience, I conclude that I worked in range land (e.g., uncultivated land, is located in a remote and isolated area, range housing is required, there are no feedlots or corrals, and are not near El Tejon's headquarters) for significantly more than 1/2 of every year that I worked for El Tejon. As I mentioned above, for almost the entire year each herder works alone and in different geographic locations. This means that while I personally worked on range land, other herders were not with me and my area of work is not the same as another sheep herder's area of work. Thus, while I worked on range land, this says nothing about other herders working for El Tejon and certainly my work locations and time in each location cannot be equated to herders working for other employers.

17. In a very general sense, and not during lambing season, while in Nevada and the oil fields of California, the sheep have a pretty standard routine, as follows:

a. The sheep bed down from just after sunset until just before sunrise. Obviously, the time of sunrise/set varies with the time of the year. The sheep need no attention from me during this time period.

b. I get up from 4-5 am or later, I get up and make breakfast. I then walk to the flock, which is about 15-20 mins away.

c. Then I will be with the flock until about a little before 10 am or just after. They go to the water and then the sheep need no attention from me, since they drink water, sleep and graze during this time period.

d. I go back to my camp and eat and rest, bathe, wash clothes, etc.

e. I go back to flock about 3 pm and move them. If it is hot, I will go even later, since when hot the sheep sleep longer.

f. I am with them from about 3 until maybe 5-5:30.

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18. The schedule set forth above varies a little when I am in California, on cultivated fields, and it is shorter. Since, we have fences on cultivated fields.

19. During my employment, I was paid the same wage rate for the time periods that I worked in California that I was paid when I worked in Nevada. Specifically, during 2014 and 2015, I was paid $1,661.72 per month. Beginning on January 1, 2016, I was paid twice a month at a rate of $888.99 per pay period. In addition, part of my wage is room and board. This was explicitly agreed to as part of my compensation in my employment offer. I can also slaughter a lamb and I do this about 1 time per month. I am supplied with meals every day and a place to stay. I believe that it is a fair estimate to say that the value of my food is $12/day. I also believe that a fair value for my housing is $300/month.

20. I estimate that I actually perform work an average of 8 per day, taking the full year into account.

21. I was also given 2 weeks of paid vacation time each year by El Tejon. I have also received surprise discretionary bonus of $1,000 around each year.

22. As a result, I do not believe that I was paid below Nevada's minimum wage of $8.25/hour during any time period that I worked in Nevada.

I hereby declare under penalty of perjury under the laws of the United States and the State of Nevada that the foregoing is true and correct to the best of my knowledge.

Date: This 18th day of July, 2016.

[signature]

FILOMENO LEONARDO LAPA POMAHUALI

Holland & Hart LLP
5441 Kietzke Lane, Second Floor
Reno, Nevada 89511

DECLARATION OF INTERPRETATION

Ruben Burnias, hereby deposes and says as follows:

1. I am over eighteen years of age and have personal knowledge of the matters set forth in this Declaration, except as to the matters stated upon information and belief, and as to those matters, I believe them to be true. I am competent to testify to the matters contained herein and if called as a witness, I could and would competently testify to the information that this Declaration contains.

2. This declaration is freely given by me and not as a result of coercion, threats or promises of any benefit to me or my family.

3. I hereby certify that I am currently working with Interpreting Enterprises and have previously worked as a State and Federal Court Interpreter for over 25 years. I have also served in my capacity of Spanish Court Interpreter in over 1800 depositions.

4. I am fluent in both English and Spanish languages and I am competent to translate from Spanish to English and English to Spanish.

5. I personally attended the witness interview of Filomeno Leonardo Lapa Pomahuali ("Pomahuali") in Elko, Nevada, along with Anthony L. Hall, Esq. I have acted as an interpreter throughout the witness interview in order to ensure accuracy.

6. Following the witness interview, I certify that I read the Declaration of Pomahuali to him in a language that he understood (Spanish), and that he was given the opportunity to ask any questions and to make any changes or corrections that he felt were appropriate. I also certify that my translation of his declaration to him was true and correct. I certify that Pomahuali confirmed that he understood and agreed with his Declaration before signing it.

I hereby declare under penalty of perjury under the laws of the United States and the State of Nevada that the foregoing is true and correct to the best of my knowledge.

Date: This 18 day of July, 2016.

Ruben Burnias
Interpreting Enterprises

EXHIBIT F

EXHIBIT F

DECLARATION OF GILMAR JHONNY MELO CASTILLO

Gilmar Jhonny Melo Castillo hereby deposes and says as follows:

1. I am over eighteen years of age and have personal knowledge of the matters set forth in this Declaration, except as to the matters stated upon information and belief, and as to those matters, I believe them to be true. I am competent to testify to the matters contained herein and if called as a witness, I could and would competently testify to the information that this Declaration contains.

2. This declaration is freely given by me and not as a result of coercion, threats or promises of any benefit to me or my family.

3. I am able to speak and write in Spanish. Through an interpreter, I was able to make any and all changes that I felt were necessary or appropriate to this Declaration before I signed it. Specifically, the interpreter read it to me, line by line, and I was able to have the interpreter repeat anything that I requested and I was able to change anything that I felt needed to be changed.

4. I am an employee of El Tejon Sheep Company (hereinafter "El Tejon"). I have been working for El Tejon since August 7, 2015 to the present. During that time I have had all promises made to me by El Tejon fulfilled.

5. Other than the fact that I was recruited by and given the formal employment offer from Western Range Association, during the prior 3 year time period, I have not worked in the United States as a sheep herder for any other company than El Tejon.

6. When I started, in August of 2015, I started in California and did work to prepare the winter grazing area for the sheep. I did this work until October, when the sheep were brought back from Nevada. I started tending sheep from October through about the end of January.

7. In February up to April 10, 2016, me and my band of sheep moved to a rural area west of Bakersfield on oil fields. This area is also very rural. While there are some roads (mostly dirt) near the grazing areas that I worked, there is no power and permanent housing. This area is uncultivated and the sheep eat natural growing grasses and plants. This area does not include feedlots or corrals, and is not near El Tejon's headquarters. There are no other herders with me in this

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location and my daily activities are not monitored. My supervisor visits daily to bring water for the sheep and supplies. He stays with me only about 30-60 minutes, but maybe more depending on circumstances. Thus, no one but me can testify as to my daily work activities or work time. Similarly, since I am alone, I cannot testify as to the work time or work activities of other sheep herders working for El Tejon, much less herders working for other employers.

8. On April 10, 2016, we moved the sheep that I tended and myself to Nevada. My band of sheep and I were about 40 minutes on dirt roads north of Rendon, Nevada. I was in this area until the end of June. At the end of June to the present, we moved to Snow Canyon and then to Columbia basin area. The specific areas that I worked during all of the time in Nevada is very remote locations with only dirt roads. My housing in these areas is tipi tents and a cot and must be brought in by 4x4 trucks. There is no electricity. I work this rugged area by walking. This areas are uncultivated and there are no permanent structures. This area does not include feedlots or corrals, and is not near El Tejon's headquarters. There are no other herders with me in this location and my daily activities are not monitored. My supervisor visits me about 3-4 times a week and he typically only stays about 2 hours. Thus, no one but me can testify as to my daily work activities or work time. Similarly, since I am alone, I cannot testify as to the work time or work activities of other sheep herders working for El Tejon, much less herders working for other employers.

9. To be specific, this breaks down to about 3 months in Nevada and 7 months in California. Further, about 3 months of the California time is spent on rural oil field lands that were uncultivated. The remaining time in California (only about 4 months) is spent on cultivated fields.

10. From my personal experience, I conclude that I worked in range land (e.g., uncultivated land, is located in a remote and isolated area, range housing is required, there are no feedlots or corrals, and are not near El Tejon's headquarters) for significantly more than 1/2 of the year. As I mentioned above, for almost the entire year each herder works alone and in different geographic locations. This means that while I personally worked on range land, other herders were not with me and my area of work is not the same as another sheep herder's area of work. Thus, while

I worked on range land, this says nothing about other herders working for El Tejon and certainly my work locations and time in each location cannot be equated to herders working for other employers.

11. In a very general sense, while in Nevada and the California oil fields, the sheep and I have a pretty standard routine, as follows:

a. I get up about 4-4:30 and make breakfast. I start walking to the sheep around 5 am, and it takes 15-45 minutes to walk to the sheep, depending on conditions and the location of the sheep.

b. When I get to the sheep in the morning, I make a count of the number of sheep with bells (I am supposed to have 9 sheep with bells at present). I then direct them to water and food that I want them to use that day.

c. After the sheep feed and water they typically sleep. How long they sleep depends on how hot it is, the hotter it is the longer they sleep. I typically start walking back to camp around 10 am, this can be earlier or later depending on circumstances.

d. When I get back to camp I sleep, prepare my meal, engage in activities to distract myself like write letters, play the guitar, wash my clothes, take care of personal hygiene, etc.

e. I start walking back to the sheep around 2:30-3 pm and I stay with them about 1-3 hours, depending on circumstances.

f. The sheep bed down from just after sunset until just before sunrise. The sheep need no attention from me during sleep periods or when they moving in the direction I sent them, if they are moving appropriately. I use my discretion to decide this.

12. During the time the sheep are on cultivated fields, my day is shorter (days are shorter in the winter), though we have more work to do in the shorter time period.

13. During my employment, I was paid the same wage rate for the time periods that I worked in California that I was paid when I worked in Nevada. Specifically, from August 2015 through December 31, 2015, I was paid $1,661.72 per month. Beginning on January 1, 2016, I was paid twice a month at a rate of $888.99 per pay period. In addition, part of my wage is room and

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board. This was explicitly agreed to as part of my compensation in my employment offer. I can also slaughter a lamb to eat and I do this about once every 2 weeks. I am supplied with meals every day and a place to stay. I have not been in America long enough to be able to estimate the value of my food and lodging.

14. I estimate that I actually perform work an average of 7-8 hours per day, if that. In fact, that may be an over estimate.

15. I was also given 2 weeks of paid vacation time each year by El Tejon. I have also received surprise discretionary bonus of $400 around the end of 2015.

16. As a result, I do not believe that I was paid below Nevada's minimum wage of $8.25/hour during any time period that I worked in Nevada.

I hereby declare under penalty of perjury under the laws of the United States and the State of Nevada that the foregoing is true and correct to the best of my knowledge.

Date: This 19th day of July, 2016.

GILMAR JHONNY MELO CASTILLO

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Reno, Nevada 89511

DECLARATION OF INTERPRETATION

Ruben Burnias, hereby deposes and says as follows:

1. I am over eighteen years of age and have personal knowledge of the matters set forth in this Declaration, except as to the matters stated upon information and belief, and as to those matters, I believe them to be true. I am competent to testify to the matters contained herein and if called as a witness, I could and would competently testify to the information that this Declaration contains.

2. This declaration is freely given by me and not as a result of coercion, threats or promises of any benefit to me or my family.

3. I hereby certify that I am currently working with Interpreting Enterprises and have previously worked as a State and Federal Court Interpreter for over 25 years. I have also served in my capacity of Spanish Court Interpreter in over 1800 depositions.

4. I am fluent in both English and Spanish languages and I am competent to translate from Spanish to English and English to Spanish.

5. I personally attended the witness interview of Elmer Alcides Cantaro Castillo ("Castillo") in Elko, Nevada, along with Anthony L. Hall, Esq. I have acted as an interpreter throughout the witness interview in order to ensure accuracy.

6. Following the witness interview, I certify that I read the Declaration of Castillo to him in a language that he understood (Spanish), and that he was given the opportunity to ask any questions and to make any changes or corrections that he felt were appropriate. I also certify that my translation of his declaration to him was true and correct. I certify that Castillo confirmed that he understood and agreed with his Declaration before signing it.

I hereby declare under penalty of perjury under the laws of the United States and the State of Nevada that the foregoing is true and correct to the best of my knowledge.

Date: This 19th day of July, 2016.

Ruben Burnias
Interpreting Enterprises

IN THE SUPREME COURT OF THE STATE OF NEVADA

ABEL CÁNTARO CASTILLO, No. 85926

Appellant,

vs.

WESTERN RANGE ASSOCIATION,

Respondent.

______________________________________/

RESPONDENT WESTERN RANGE ASSOCIATION'S APPENDIX VOLUME 1, PART 3

ELLEN JEAN WINOGRAD, ESQ.
Nevada State Bar No. 815
JOSE TAFOYA, ESQ.
Nevada State Bar No. 16011
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Reno, Nevada 89511
Tel: 775-688-3000
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ANTHONY HALL. ESQ.
Nevada State Bar No. 5977
JONATHAN McGUIRE, ESQ.
Nevada State Bar No. 15280
SIMONS HALL JOHNSTON, P.C.
690 Sierra Rose Drive
Reno, Nevada 89511
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jmcguire@shjnevada.com

ATTORNEYS FOR RESPONDENT
WESTERN RANGE ASSOCIATION

EXHIBIT G

EXHIBIT G

DECLARATION OF WILLIAM ARCHI LOZANO

William Archi Lozano hereby deposes and says as follows:

1. I am over eighteen years of age and have personal knowledge of the matters set forth in this Declaration, except as to the matters stated upon information and belief, and as to those matters, I believe them to be true. I am competent to testify to the matters contained herein and if called as a witness, I could and would competently testify to the information that this Declaration contains.

2. This declaration is freely given by me and not as a result of coercion, threats or promises of any benefit to me or my family.

3. I am able to speak and write in Spanish. Through an interpreter, I was able to make any and all changes that I felt were necessary or appropriate to this Declaration before I signed it. Specifically, the interpreter read it to me, line by line, and I was able to have the interpreter repeat anything that I requested and I was able to change anything that I felt needed to be changed.

4. I am an employee of El Tejon Sheep Company (hereinafter "El Tejon"). I have been working for El Tejon since October 14, 2015 to the present. During that time I have had all promises made to me by El Tejon fulfilled.

5. Other than the fact that I was recruited by and given the formal employment offer from Western Range Association, during the prior 3 year time period, I have not worked in the United States as a sheep herder for any other company than El Tejon.

6. My October 2015 employment began in California and I worked 3 months in cultivated alfalfa fields and then 3 months in the uncultivated oil fields to the west of Bakersfield. I did not work in the Mojave desert.

7. This area is also very rural. To be more specific, this area is uncultivated. The range housing is a trailer that is towed. This area does not include feedlots or corrals, and is not near El Tejon's headquarters. There are no other herders with me in this location and my daily activities are not monitored. The supervisor comes and visits me to bring water and food. The supervisor is only with me for about 1 hour. Thus, no one but me can testify as to my daily work activities or work

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time. Similarly, since I am alone I cannot testify as to the work time or work activities of other sheep herders working for El Tejon, much less herders working for other employers.

8. On or about April 10 of 2016, we moved the sheep by truck from the oil fields to Elko county. The sheep remained in this area from April 10 up to June 5 of this year. This area is about an hour by truck on dirt roads north of Rendon, Nevada. This area is uncultivated and isolated area. My range housing is a tipi tents. There are no permanent structures. This area does not include feedlots or corrals, and is not near El Tejon's headquarters. The sheep feed on natural growing grass.

9. From June 5 until the present, we moved my band of sheep to the Columbia basin, Nevada. The specific area that I worked on during this time period is in a very remote location in the mountains with only dirt roads. There is no power. I work this rugged area by walking. This area is uncultivated, so the sheep eat natural growing grasses. My range housing is the same tipi tent. There are no permanent structures. This area does not include feedlots or corrals, and is not near El Tejon's headquarters.

10. In both Nevada locations, there are no other herders with me and my daily activities are not monitored. My supervisor comes to see me about 2-3 times per week and his stay with me varies depending on what needs to be done. Thus, no one but me can testify as to my daily work activities or work time with the exception of the hours my supervisor is present. Similarly, since I am alone, I cannot testify as to the work time or work activities of other sheep herders working for El Tejon, much less herders working for other employers.

11. To be specific, during my 9 months of employment, I have spent 3 months in Nevada and 6 months in California. Further, 3 months in California was spent on rural uncultivated oil field lands. The remaining time in California (only about 3 months) was spent on cultivated fields.

12. From my personal experience, I conclude that I worked in range land (e.g., uncultivated land, is located in a remote and isolated area, range housing is required, there are no feedlots or corrals, and are not near El Tejon's headquarters) for significantly more than 1/2 of my employment. As I mentioned above, for almost the entire year each herder works alone and in different geographic locations. This means that while I personally worked on range land, other

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herders were not with me and my area of work is not the same as another sheep herder's area of work. Thus, while I worked on range land, this says nothing about other herders working for El Tejon and certainly my work locations and time in each location cannot be equated to herders working for other employers.

13. In a very general sense, while in Nevada and the oil fields, the sheep and I have a pretty standard routine, as follows:

a. I get up around 4 am and make breakfast.

b. I start walking to where the sheep are at about 5 am and it takes me 30-60 minutes to get to the sheep.

c. I direct the flock to feed and water. I typically head back to camp around 10 am or a bit before or after, depending on circumstances.

d. The sheep bed down after they have morning food and water and sleep for 4-6 hours depending on how hot it is. The hotter it is, the more they sleep. They do not need my attention when they sleep (during the day or at night), so I head back to camp and may my meal, clean my possessions, wash my clothes and myself, etc.

e. Later in the afternoon, I direct them to where I want them that night. I spend about 2-3 hours with them before I walk back to camp.

14. When the sheep are on cultivated land, we work less time, because this is during the winter and the days are shorter.

15. During my employment, I was paid the same wage rate for the time periods that I worked in California that I was paid when I worked in Nevada. Specifically, from October 2015 through December 31, 2015, I was paid $1,661.72 per month. Beginning on January 1, 2016, I was paid twice a month at a rate of $888.99 per pay period. In addition, part of my wage is room and board. This was explicitly agreed to as part of my compensation in my employment offer. I can also slaughter a sheep and I do this about 1 time per month. I am supplied with meals every day and a place to stay. I do not know the cost of food well enough in America to estimate the value of my meals or my lodging.

16. I estimate that I actually perform work an average of 8 hours per day, taking the full year into account.

17. I was also given 2 weeks of paid vacation time each year by El Tejon. I have also received surprise discretionary bonus of $500 around October of 2015.

18. As a result, I do not believe that I was paid below Nevada's minimum wage of $8.25/hour during any time period that I worked in Nevada.

I hereby declare under penalty of perjury under the laws of the United States and the State of Nevada that the foregoing is true and correct to the best of my knowledge.

Date: This 19th day of July, 2016.

WILLIAM ARCHI LOZANO

Holland & Hart LLP
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Reno, Nevada 89511

DECLARATION OF INTERPRETATION

Ruben Burnias, hereby deposes and says as follows:

1. I am over eighteen years of age and have personal knowledge of the matters set forth in this Declaration, except as to the matters stated upon information and belief, and as to those matters, I believe them to be true. I am competent to testify to the matters contained herein and if called as a witness, I could and would competently testify to the information that this Declaration contains.

2. This declaration is freely given by me and not as a result of coercion, threats or promises of any benefit to me or my family.

3. I hereby certify that I am currently working with Interpreting Enterprises and have previously worked as a State and Federal Court Interpreter for over 25 years. I have also served in my capacity of Spanish Court Interpreter in over 1800 depositions.

4. I am fluent in both English and Spanish languages and I am competent to translate from Spanish to English and English to Spanish.

5. I personally attended the witness interview of William Archi Lozano ("Lozano") in Elko, Nevada, along with Anthony L. Hall, Esq. I have acted as an interpreter throughout the witness interview in order to ensure accuracy.

6. Following the witness interview, I certify that I read the Declaration of Lozano to him in a language that he understood (Spanish), and that he was given the opportunity to ask any questions and to make any changes or corrections that he felt were appropriate. I also certify that my translation of his declaration to him was true and correct. I certify that Lozano confirmed that he understood and agreed with his Declaration before signing it.

I hereby declare under penalty of perjury under the laws of the United States and the State of Nevada that the foregoing is true and correct to the best of my knowledge.

Date: This ___ day of July, 2016.

Ruben Burnias
Interpreting Enterprises

EXHIBIT H

EXHIBIT H

CONTRATO DE TRABAJO PARA PASTORES DE OVEJAS

Contrato para Pastores de Ovejas este 26 de Octubre de 2013, entre El Tejon Sheep Company, un miembro de WESTERN RANGE ASSOCIATION, denominado de aquí en adelante como el "Empleador" y CANTARO Castillo, Abel #70166, denominado de aquí en adelante como el "Empleado".

UNO-PERÍODO DE EMPLEO

El empleador por la presente emplea al Empleado y el Empleado por la presente acepta el empleo como pastor de ovejas con el Empleador o cualquier otro Empleador el cual es miembro de la Asociación quien podrá ser seleccionado por la Asociación a opción de la Asociación por un período que inicia cuando el Empleado comienza a trabajar en el lugar de su empleo en los Estados Unidos de América hasta 7/9/2014 Sin embargo, dicho período, no puede exceder más de un año, y cualquier extensión(es) de permanencia (por un período total en el país de no más de tres años) está condicionado a la renovación de la certificación H-2A por el Ministerio de Trabajo de los Estados Unidos, Inmigración (INS) y lo acordado entre empleador y empleado. En el caso de que no se obtenga la renovación de la certificación, este contrato se inferirá como un período de empleo equivalente al período de la última certificación del Ministerio de Trabajo y la fecha de caducidad de la Visa/formulario I-94.

DOS- OBLIGACIONES DEL EMPLEADO

El Empleado por la presente es contratado como pastor de ovejas. El Empleado vivirá en un lugar señalado por el Empleador y cumplirá con cualquier trabajo que le sea asignado por el Empleador de acuerdo a la descripción del trabajo del ovejero en la Visa H-2A.

TRES-COMPENSACIÓN DEL EMPLEADO

Como compensación por los servicios prestados bajo este Contrato, el Empleado tendrá derecho a recibir del Empleador un salario no menor de $750.00 en moneda legal de los Estados Unidos de América mensual, cuya cantidad será por lo menos tan alta como el "Prevailing Wage Rate" en efecto para los pastores de ovejas en el estado donde el Empleador esté establecido. El Empleado comprende y está de acuerdo en que su compensación puede cambiar si es transferido a otro Empleador durante el período de este Contrato, pero de ninguna manera el monto podrá ser menor al "Prevailing Wage Rate" para el estado donde esté localizado el nuevo Empleador. Deberá pagársele al Empleado en sumas mensuales el último día de cada mes durante el período de empleo, prorrateado en cualquier período de empleo temporal. Como compensación adicional por los servicios prestados bajo este Contrato y sin ningún costo para el Empleado, el Empleador le proporcionará vivienda y comida de acuerdo con las reglas y reglamentos (incluyendo variaciones) del gobierno federal de los Estados Unidos de América. En ningún caso la compensación del Empleado será menor al mínimo requerido por el gobierno federal de los Estados Unidos de América. El Empleado tendrá derecho a acumular dos (2) semanas de vacaciones pagadas por año durante el período de empleo.

CUATRO-ASEGURANZA

El Empleador deberá, sin ningún costo para el Empleado, obtener un seguro que cubra lesiones y enfermedades surgidas durante el transcurso y como resultado del trabajo del empleado en los Estados Unidos de América. La cobertura no deberá ser menor a los mínimos establecidos por cada Estado en donde el Empleado se encuentre trabajando. El Empleador además acuerda incluir al Empleado bajo los términos de la póliza de seguro para los pastores de ovejas del grupo de salud de la Asociación, si la Asociación decide proveer dicho seguro. El Empleador acuerda pagar una mitad (1/2) del costo y el Empleado pagar la otra mitad (1/2) de la prima mensual de dicha póliza.

CINCO-HERRAMIENTAS Y EQUIPO

El Empleador proporcionará al Empleado, sin ningún costo para el Empleado, todas las herramientas, materiales o equipo requerido para desempeñar las tareas asignadas al Empleado de acuerdo con este Contrato. El Empleado deberá proveer toda la vestimenta, incluyendo zapatos y botas, artículos para dormir, y objetos personales.

SEIS-DEDUCCIONES SALARIALES

El Empleador hará las siguientes deducciones del salario pagado al Empleado: (1) Lo requerido por ley; (2) Los adelantos por salario; (3) Pagos por artículos de consumo producidos por el Empleador que el Empleado haya comprado; (4) Pagos de más en el salario; (5) Cualquier pérdida del Empleador debido a la negativa o negligencia del Empleado en devolver cualquier propiedad entregada a él por el Empleador, o debido a la destrucción premeditada de dicha propiedad por el Empleado; (6) Deducciones por transporte y costos de subsistencia pagados por el Empleador como se estipula en la sección SIETE de este Contrato; (7) La mitad (1/2) de la prima de la póliza de seguro de salud para el Empleado, si dicha póliza es proporcionada por la Asociación. Las deducciones bajo los párrafos (3), (4), (5) o (7) del presente párrafo en cada período de pago no excederán el diez (10) por ciento del total del salario ganado en ese período de pago. La suma de las deducciones bajo el párrafo (6) del presente párrafo en cada período de pago no deberán exceder el cincuenta (50) por ciento del total del salario ganado en ese período de pago. A la finalización del contrato de trabajo, sin embargo, o si el Empleado abandona su contrato de trabajo, el Empleador puede deducir del cheque final del Empleado cualquier balance adeudado al Empleador por deducciones permitidas mediante esta provisión.

SIETE-TRANSPORTE

El Empleador pagará por el transporte y la subsistencia para el camino desde el lugar de reclutamiento al lugar de empleo si el Empleado cumple con al menos cincuenta (50) por ciento del período de empleo estipulado en el presente. No obstante, El Empleador puede deducir este costo de transporte y subsistencia para el camino del salario del Empleado hasta que el Empleado haya terminado el cincuenta (50) por ciento del término del empleo estipulado en el presente. Al completar el cincuenta por ciento de este Contrato, el Empleado tendrá derecho a un reembolso por los montos deducidos. Si el Empleado completa el término de empleo mencionado en el presente, el Empleador le proveerá transporte de regreso y subsistencia para el camino desde el lugar de empleo hasta el lugar de reclutamiento, excepto cuando el Empleado no regrese al lugar de reclutamiento. Todo transporte proporcionado por el Empleador será transporte público u otros medios de transporte que sea conforme al reglamento de la Comisión de Comercio Interestatal de los Estados Unidos de América.

OCHO-ARCHIVOS Y DECLARACIONES

El Empleador deberá conservar registros adecuados y exactos con respeto a todas las ganancias y deducciones del Empleado y tales registros deberán estar disponibles por un tiempo razonable para su inspección por representantes autorizados de los Estados Unidos de América y por el Empleado o sus representantes. Tales registros deberán ser conservados por el Empleador por un período no menor de (3) años después de la finalización del período de trabajo. El Empleador deberá proporcionar al Empleado en el momento o antes del tiempo de pago de cada período de pago una declaración por escrito conteniendo la siguiente información: Total de ganancias del período de pago y un detalle de todas las deducciones hechas al salario.

NUEVE-OBLIGACIONES DEL EMPLEADO

El Empleado deberá indemnizar y librar de responsabilidad al Empleador de todo daño y perjuicios por pérdidas, daños o lesiones a personas o a la propiedad, resultantes de la negativa o negligencia del Empleado en devolver cualquier propiedad que el Empleador le haya entregado o debido a la destrucción premeditada de dicha propiedad por el Empleado. Durante el período de este Contrato, el Empleado deberá trabajar solamente para un miembro de la Asociación y dicho miembro será designado únicamente por la Asociación. El Empleado deberá notificar a la Asociación por escrito o mediante llamada telefónica por cobrar dentro de treinta (30) días de cualquier falta por parte del Empleador de pagarle al Empleado cualquier suma debida al Empleado por salarios o alguna otra. En el caso en que la lejana asignación de trabajo del Empleado haga imposible notificar a la Asociación dentro de treinta (30) días sobre la falla del Empleador de hacer efectivo el pago del salario, el Empleado deberá notificar a la Asociación tan pronto como le sea más razonablemente práctico pero en ningún caso más de noventa (90) días después de la falla del Empleador en realizar el pago del salario adeudado al Empleado. La falla del Empleado en notificar a la Asociación constituirá un rompimiento material del Contrato la cual liberará substancialmente a la Asociación (pero no al Empleador) de cualquier obligación o responsabilidad con dicho Empleado, excepto en cuanto al transporte de regreso establecido en la Sección 11. El Empleador está de acuerdo en cumplir con todas las leyes aplicables de los Estados Unidos y de los Estados individualmente, incluyendo sin limitarse al cumplimiento a todas las leyes de Inmigración.

DIEZ-EMPLEO

Si el Empleado desempeña fielmente sus tareas, el Empleador hará efectivas las garantías en este párrafo. El Empleador garantiza al Empleado la oportunidad de empleo de por lo menos tres cuartos (3/4) del período total durante el cual el Contrato y todas sus extensiones estén en efecto, comenzando con el primer día de trabajo después de la llegada del Empleado al lugar de empleo y terminando en la fecha de finalización especificada en este Contrato, o extensiones, si las hubiere. Si al Empleado, durante tal período, se le da menos trabajo del requerido bajo esta provisión, al Empleado se le pagará la cantidad, que hubiera ganado si de hecho, hubiese trabajo por el período garantizado. Para determinar si la garantía de empleo ha sido satisfecha, los días en los cuales el Empleado falte a trabajar durante el período de trabajo aun cuando se le presentó la oportunidad por el Empleador, y todos los días de trabajo realizados, serán contados calculando los días de empleo requeridos para satisfacer ésta garantía. Si, antes de la fecha de expiración especificada en este Contrato los servicios del Empleado no son requeridos por el Empleador, por razones fuera de control del Empleador (debido a un acto divino como helada, inundación, sequía, terremoto, granizo, incendio forestal o cualquier otra calamidad natural de tal magnitud que haga imposible el cumplimiento de este Contrato), este Contrato con el empleador mencionado puede darse por finalizado. La Asociación hará esfuerzos por transferir al Empleado a otro empleo similar con otro miembro de la Asociación con el cual el Empleado esté de acuerdo en aceptar bajo los mismos términos de este Contrato. Si la oportunidad de ser transferido a un empleo similar no se le proporciona por la Asociación, el Empleado regresará al lugar de reclutamiento a expensas del Empleador. En dicho caso, las deducciones por transporte y subsistencia en el camino desde el lugar de reclutamiento hasta el lugar de empleo le serán reembolsadas. Cuando este Contrato termina (sin la oportunidad de ser transferido) bajo esta provisión, el Empleador será responsable por los tres cuartos (3/4) de garantía por el período comenzando con el primer día de trabajo después del arribo del Empleado al lugar de empleo y terminando con la fecha en que este Contrato finaliza, y el Empleador le pagará al Empleado todos los otros gastos adeudados bajo este Contrato. No obstante, si el Empleado se rehúsa aceptar un empleo similar, no habrá ningún reembolso por subsistencia en el camino o alguna responsabilidad por cualquier empleo garantizado requerido por la Asociación o el Empleador.

ONCE-TERMINACIÓN DEL EMPLEO

Este Contrato puede darse por terminado antes de su cumplimiento por las siguientes razones:

A. Si el Empleado rompe voluntariamente o habitualmente descuida sus tareas que le son requeridas desempeñar bajo los términos de este Contrato, la Asociación y/o el Empleador podrán a su elección finalizar este Contrato avisando por escrito de su finalización al Empleado sin perjuicio de cualquier otro recurso a que la Asociación y el Empleador estén facultados por ley, en igualdad, o bajo este Contrato. NOTA: Si su I-94 expira el Contrato se cancela en la fecha de caducidad en la I-94.
B. Por acuerdo mutuo por escrito de la Asociación, El Empleador, y el Empleado.
C. Terminación voluntaria del empleo por abandono de trabajo, trabajar para personas no miembros de Western Range, rehusarse a desempeñar el trabajo para el cual fue contratado.

DOCE-TRANSFERENCIAS Y ASIGNACIONES

El Empleado entiende y está de acuerdo que durante la duración de este Contrato, la Asociación y el Empleador pueden transferir al Empleado a otro Empleador, quien es miembro de la Asociación, siempre que el nuevo Empleador esté de acuerdo en cumplir todos los términos y condiciones de este Contrato. Si el Empleado se rehúsa a ser transferido, la Asociación considerará los motivos del trabajador; sin embargo, el hecho de rehusarse el trabajador a ser transferido puede exponer al trabajador al despido como se advierte en los reglamentos del Ministerio de Trabajo.

TRECE-OBLIGACIÓN DEL EMPLEADOR CON LA ASOCIACIÓN

El Empleador acuerda defender, indemnizar y librar de daños a la Asociación por cualquier reclamo, demanda o juicio que surja de o esté relacionado con el empleo del Empleado, incluyendo sin limitarse a cualquier reclamo por el Empleado por salarios o daños de cualquier tipo y cualquier reclamo por terceras partes o cualquier entidad de gobierno por daños o alivio imparcial. La Asociación (como su propia opción) puede elegir atender la defensa de cualquier asunto sujeto a esta provisión por indemnización al Empleador o puede elegir un abogado a elección de la Asociación, en cuyo caso el Empleador tendrá que pagar por todos los honorarios del abogado y el costo de dicho abogado. La selección del abogado por la Asociación no deberá afectar la indemnización y mantendrá inalteradas las provisiones de este párrafo. Cualquier juicio entre el Empleador y la Asociación tiene que ser realizado en una corte competente en California, y la parte que prevalezca tendrá derecho a los honorarios del abogado. Esta provisión por costas procesales no es aplicable a las acciones entre el Empleado y el Empleador o la Asociación. El Empleador reconoce que es un miembro de la Asociación y que deberá cumplir con todas las reglas, regulaciones, pólizas, y leyes privadas de la Asociación existentes o futuras. Además el Empleador reconoce que ha recibido y comprende su paquete de membrecía y el Memorando de Campo 74-89 del Ministerio de Trabajo, Procedimientos Especiales: Certificación Laboral para Pastores de Ovejas Bajo el Programa H-2A.
Del EMPLEADOR enlistado a continuación (Miembro de Western Range Association) y que Western Range Association no es el Empleador por la duración de mi estadía en los Estados Unidos.

PASTOR (Empleado)

Abel CANTARO Castillo #70166 ____ Nombre (imprimir)

____ Dirección Permanente

____ Firma del Pastor

Al firmar entiendo que soy el empleador del pastor (empleado) y Western Range Asociación no es el empleador.

EMPLEADOR (Miembro de Western Range Association)

El Tejon Sheep Company ____ Nombre (imprimir)
P.O. Box 80715
Bakersfield, CA 93380
____ Dirección Permanente

Melchor Pangirena ____ Firma del Empleador

SHEEPHERDER EMPLOYMENT AGREEMENT

This Sheepherder Agreement this 26th day of October 2013, between, El Tejon Sheep Company, a member of WESTERN RANGE ASSOCIATION, hereinafter referred to as the "Employer" a CANTARO Castillo, Abel #70166 hereinafter referred to as the "Employee".

ONE-TERM OF EMPLOYMENT

The employer hereby employs the Employee and the Employee hereby accepts employment as a sheepherder with the Employer or any other Employer who is a member of the Association who may be selected by the Association at the Association's option for a period commencing the day the Employee begins work at the place of his employment in the United States of America to 7/9/2014 However, said term, cannot exceed one year and any extension(s) of stay (for a total period in country no greater than 3 years) is conditioned upon H-2A certification renewal by the United States Department of Labor, INS and in agreement between Employer and Employee. In the event certification renewal is not obtained, this contract shall be construed as a term of employment equal to the term of the last certification from the Department of Labor and Expiration date of the Visa/I-94 form.

TWO-DUTIES OF EMPLOYEE

The employee is hereby hired as a sheepherder. The employee shall live in a location designated by the Employer and shall perform any or all of the sheepherder tasks as may be assigned by Employer in compliance with the H-2A sheepherder job description.

THREE-COMPENSATION OF EMPLOYEE

As compensation for services rendered under this Agreement, the Employee shall be entitled to receive from the Employer a salary no less than $750.00 lawful money of the United States of America per month, which amount shall be at least as high as the "Prevailing Wage Rate" then in effect for sheepherders in the state the Employer is based. Employee understands and agrees that his compensation may change if he is transferred to another Employer during the term of this Agreement, but in no event shall said amount be less than the "Prevailing Wage Rate" then in effect for the state in which the new Employer is located. Employee shall be paid in monthly installments on the final day of each month during the period of employment, prorated for any partial employment period. As additional compensation for services rendered under this Agreement and at no cost to the Employee, Employer shall provide housing and board (meals) in accordance with the rules and regulations (including variations) of the federal government of the United States of America. In no event shall Employee's compensation be less than the minimum required by the United States of America. Employee shall be entitled to accrue two (2) weeks paid vacation per year prorated during the period of employment.

FOUR-INSURANCE

Employer shall, at no cost to Employee, obtain insurance covering injury and disease arising out of and in the course of the worker's employment in the United States of America. The coverage shall not be less than the minimums established by the individual states in which the Employee is employed. The Employer further agrees to include the Employee under the terms of the Association's group health policy for sheepherders, if the Association elects to provide such a policy. Employer agrees to pay one-half (1/2) the cost and Employee agrees to pay one-half (1/2) of the monthly premium of such a policy.

FIVE-TOOLS AND EQUIPMENT

The Employer shall furnish Employee, without cost to the Employee, all tools, supplies or equipment required to perform the duties assigned to Employee pursuant to this Agreement. Employee shall provide all clothing, including shoes and boots, bedding items, and personal items.

SIX-DEDUCTIONS FROM COMPENSATION

The Employer shall make the following deductions from the compensation paid Employee: (1) Those required by law; (2) Those for advances against wages; (3) Payment for articles of consumption produced by the Employer which the Employee has purchased; (4) Overpayment of wages; (5) Any loss to the Employer due to an Employee's refusal or negligent failure to return any property furnished to him by the Employer, or due to such Employee's willful destruction of such property; (6) Deductions for transportation and subsistence costs paid for by the Employer as provided in section SEVEN of this Agreement; (7) One-half (1/2) the premium for group health policy for the Employee, if such a group policy is provided by the Association. The deductions under subparagraphs (3), (4), (5) or (7) of this paragraph in each pay period shall not exceed the ten (10) percent of the total wages earned in that pay period. The sum of deductions under subparagraph (6) of this paragraph in each pay period shall not exceed fifty (50) percent of the total wages earned in that pay period. At the termination of the work contract, however, or if the Employee abandons his work contract, the Employer may deduct from such Employee's final wage payment any outstanding balance due to the Employer for deductions permitted by this provision.

SEVEN-TRANSPORTATION

The Employer will pay for the transportation and subsistence en route from the place of recruitment to the place of employment if the Employee completes at least fifty (50) percent of the term of employment set forth herein. However, Employer may deduct this cost of transportation and subsistence en route from the earnings of the Employee until the Employee has completed fifty (50) percent of the term of employment set forth herein. Upon completion of fifty (50) percent of the term of this Agreement, the Employee shall be entitled to reimbursement of the amounts so deducted. If Employee completes the term of employment set forth herein, the Employer will provide return transportation and subsistence en route from the place of employment to the place of recruitment, except when the Employee is not returning to the place of recruitment. All transportation provided by the Employer will be by common carrier or other transportation facilities which conform to applicable regulation of the Interstate Commerce Commission of the United States of America.

EIGHT-RECORDS AND STATEMENTS

The Employer shall keep accurate and adequate records in regard to all earnings and deductions of the Employee and such records shall be available at any reasonable time for inspection by authorized representatives of the United States of America and by Employee or his representatives. Such records shall be retained by Employer for a period of not less than three (3) years following the completion of the employment period. Employer shall furnish Employee at or before the time he is paid for each pay period a written statement containing the following information: Total earnings for the pay period and an itemization of all deductions made from earnings.

NINE-OBLIGATIONS OF EMPLOYEE

The Employee shall indemnify and save harmless the Employer from all liability from loss, damage or injury to person or property resulting from the employee's refusal or negligent failure to return any property furnished to him by the Employer or due to such Employee's willful destruction of such property. During the term of this Agreement, Employee shall work only for a member of the Association, and such member shall only be designated by the Association. The Employee shall notify the Association in writing or by collect telephone call within thirty (30) days of any failure on the part of the Employer to pay the Employee any sums owed to the Employee for compensation or otherwise. In the event that the Employee's remote job assignment makes notification of the Association impossible within thirty (30) days of failure of the Employer to make wage payments, the Employee shall notify the Association as soon as reasonably practical but in no event longer than (90) days after failure of the Employer to pay wages owed to the Employee. Failure of the Employee to so notify the Association shall constitute a material breach of the Agreement, which shall substantially release the Association (but not the Employer) if any further obligation or liability to said Employee, except for the return transportation set forth in Section 11. Employer agrees to comply with all applicable laws of the United States and the individual states, including but not limited to compliance with all immigration laws.

TEN-EMPLOYMENT

If the Employee faithfully performs his duties, the Employer makes the guarantees in this paragraph. The Employer guarantees Employee the opportunity for employment for at least three-fourths (3/4) of the total period during which the Agreement and all extensions thereof are in effect, beginning with the first work day after the Employee's arrival at the place of employment and ending on the termination date specified in this Agreement, or its extension, if any. If the Employee, during such period, is afforded less employment than required under this provision, the Employee shall be paid the amount, which he would have earned had he, in fact, worked for the guaranteed period. In determining whether the guarantee of employment has been met, any days which the Employee fails to work during a work period when is afforded the opportunity to do so by the Employer, and all days of work performed shall be counted in calculating the days of employment required to meet this guarantee. If, before the expiration date specified in this Agreement, the services of the Employee are no longer required by the Employer, for reason beyond the control of the Employer (due to an act of God such as frost, flood, drought, earthquake, forest fire, hail, or other natural calamities of such character as to make the fulfillment of this Agreement impossible), this Agreement with this named Employer may be terminated. Efforts will be made by the Association to transfer the Employee to other comparable employment with another member of the Association which Employee agrees to accept under the same terms as this Agreement. If such opportunity to transfer to comparable employment is not provided by the Association, the Employee shall be returned to the place of recruitment at the Employer's expense. In such case deductions for transportation and subsistence en route from the place of recruitment to the place of employment shall be refunded. Whenever this Agreement is terminated (without such opportunity to transfer) under this provision, the Employer shall be responsible for the three-fourths (3/4) guarantee for the period beginning with the first work day after the Employee's arrival at the place of employment and ending with the date this Agreement is terminated, and the Employer shall pay the Employee all other amounts due under this Agreement. Nonetheless, if the Employee refuses to accept comparable employment, there shall be no such en route refunds or responsibility for any guaranteed employment required of the Association or the Employer.

ELEVEN-TERMINATION OF EMPLOYMENT

This agreement may be terminated prior to its expiration as follows:

A. If the Employee willfully breaches or habitually neglects the duties which he is required to perform under the terms of this Agreement, the Association and/or the Employer may at their option terminate this agreement by giving written notice of termination to the Employee without prejudice to any other remedy to which the Association and the employer may be entitled at law, in equity, or under this Agreement. NOTE: If your I-94 expires the contract is void as of the date of expiration of the Visa/I-94.

B. By mutual written agreement of the Association, the Employer, and the Employee.

C. Voluntary termination of employment for Job Abandonment, working for non-member of Western Range, refusing to perform Job contracted.

TWELVE-TRANSFER AND ASSIGNMENT

Employee understands and agrees that during the term of this Agreement, the Association and Employer may transfer Employee to another Employer, who is a member of the Association, provided that the new Employer agrees to be bound by all terms and conditions of this Agreement. If Employee objects to a transfer, the Association will consider the worker's concerns; however refusal on the part of the worker to transfer may subject the worker to dismissal as provided in Department of Labor regulations.

THIRTEEN-OBLIGATION OF EMPLOYER TO ASSOCIATION

The Employer agrees to defend, indemnify and hold the Association harmless from any claim, demand, or lawsuit arising out of or related to the employment of the Employee, including but not limited to any claim by the Employee for wages or damages of any kind and any claim by any third-party or any governmental entity for damages or equitable relief. The Association (at its sole option) may elect to tender the defense of any matter subject to this indemnity provision to the Employer or may elect to retain counsel of the Association's choice, in which case the Employer shall pay all attorney's fees and costs of said counsel. Selection of counsel by the Association shall not affect the indemnity and hold harmless provisions of this paragraph. Any lawsuit between the Employer and the Association shall be brought in a competent court in California, and the prevailing party shall be entitled to attorneys' fees. This attorneys' fee provision does not apply to actions between the Employee and Employer or the Association. The Employer acknowledges that he is a member of the Association and shall be bound by all rules, regulations, policies, and Bylaws of the Association now in existence or in the future. The Employer further acknowledges that he has received and understands his membership package and Department of Labor Field Memorandum 74-89 Special Procedures: Labor Certification for Sheepherders Under the H-2A Program.

Of the below listed EMPLOYER (Member of Western Range Association) and that Western Range Association is not the employer for the duration of my stay in the United States.

HERDER (Employee)

Abel CANTARO Castillo #70166 ________ Name (Print)

________ Permanent Address

________ Signature of Herder

By my signature below I understand that I am the employer of the Herder (employee) and Western Range is not the Employer

EMPLOYER (Member of Western Range Association)

El Tejon Sheep Company ________ Name (Print)

P.O. Box 80715
Bakersfield, CA 93380
________ Permanent Address

________ Signature of Employer

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Attorneys for Defendant
Mountain Plains Agricultural Service

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

ABEL CÁNTARO CASTILLO; ALCIDES INGA RAMOS; RAFAEL DE LA CRUZ and those similarly situated,	Civil Case No. 3:16-cv-00237-MMD-VPC
Plaintiffs,	
v.	**MOTION TO DISMISS SECOND AMENDED COMPLAINT BY DEFENDANT MPAS**
WESTERN RANGE ASSOCIATION; MELCHOR GRAGIRENA; EL TEJON SHEEP COMPANY; MOUNTAIN PLAINS AGRICULTURAL SERVICE; and ESTILL RANCHES, LLC,	
Defendants.	

COMES NOW Defendant Mountain Plains Agricultural Service (MPAS), by and through counsel, and files the following Motion to Dismiss Plaintiffs' Second Amended Complaint (Dkt. 111). Plaintiffs initiated this lawsuit by filing a Complaint seeking allegedly unpaid minimum wages (Dkt. 1), which was superseded by a First Amended Complaint (Dkt. 45.) By Order dated April 13, 2017, this Court granted Motions to Dismiss the First Amended Complaint (FAC), granting leave to file a Second Amended Complaint (SAC) (Dkt. 107). Defendants MPAS now moves to dismiss the SAC.

I.

PROCEDURAL BACKGROUND

Plaintiffs' triple attempts to sue WRA and MPAS, and their rancher members, have created a convoluted and complex procedural history, and they have compounded the confusion by adding Plaintiff Rafael De la Cruz to this lawsuit via the SAC. Mr. De la Cruz already has asserted the very same causes of action as to minimum wage, breach of contract, quasi-contract, and quantum meruit against MPAS (and other Defendants) in two other actions. One of these cases was dismissed and is on appeal to the Tenth Circuit.

A. *Llacua*

On September 1, 2015, in *Llacua et al. v. WRA et al.*, No. 1:15-cv-01889-REB-CBS (D. Colo.) (*Llacua*), Plaintiff Rafael De la Cruz and others filed a class action in the District of Colorado concerning his supposed employment by MPAS.[1] He alleged a class action against MPAS and others for alleged violations of the Sherman Antitrust Act, 15 U.S.C. § 1 et seq. and the Racketeer Influenced and Corrupt Organizations Act (Civil RICO), 18 U.S.C. § 1964(c) (*Llacua* Dkt. 1). On October 28, 2015, Plaintiff De la Cruz filed his First Amended Complaint (*Llacua* Dkt. 32) and added Counts against MPAS for a class action for failure to pay Nevada Minimum Wage, Nev. Const. art. 15,

[1] MPAS has consistently denied that it employed De la Cruz, or any other H-2B sheepherder. *See infra* Part IV ("Argument and Authority"), Section D.

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§ 16; Nev. Rev. Stat. § 608.260, and a class action for breach of contract, promissory estoppel, unjust enrichment, and quantum meruit for alleged illegal deductions — the identical claims he now seeks to bring in the instant action. While a motion to dismiss the Second Amended Complaint was pending, Plaintiff De la Cruz sought leave to file a Third Amended Complaint in which he alleged, *inter alia*, that his starting pay was $800 per month but he received a raise to $900 per month — a fact that he did not plead in this case. (*Llacua* Dkt. 139, ¶ 222.)[2] The court entered final judgment in favor of MPAS against Mr. De la Cruz on March 7, 2017, dismissing the Second Amended Complaint and denying leave to file a Third Amended Complaint. (*Llacua* Dkt. 174.) At no time did Mr. De la Cruz argue that the court should exercise jurisdiction over his state law claims under the Class Action Fairness Act (CAFA), as he now attempts to do before this Court.

By Order dated March 7, 2017, the Colorado court dismissed all the plaintiffs' claims. (*Llacua*, Dkt. 173.) On March 28, 2017, Mr. De la Cruz filed his Notice of Appeal to the Tenth Circuit Court of Appeals, where this matter is currently pending. *See Llacua et al. v. WRA et al.*, No. 1:15-cv-01889-REB-CBS (D. Colo. 2015). Those are facts Plaintiffs also failed to mention at all in the SAC. (*See, e.g.*, Dkt. 111 ¶¶ 9, 131, 148, 164, 180.)

B. *Perez*

Mr. De la Cruz also is currently suing MPAS, WRA, and several of their rancher members in *Hispanic Affairs Project et al. v. Perez*, No. 15-cv-01562-BAH (D.D.C.), which has been transferred to District of Colorado (No. 1:15-cv-01785-RM-MJW). This action originally was filed on August 18, 2015 in the District of Colorado against

[2] "222. Finally, Plaintiff De La Cruz began earning $800 a month in Nevada but had his wage raised to $900 per month, despite representations from Defendant MPAS that he would be earning the offered wage of $800 per month, which was the relevant minimum wage in Nevada at the time." In *Castillo*, De la Cruz repeatedly alleges that he was paid only $800/month. (Dkt. 111, ¶¶ 3, 74, 109, 112, 117.)

Thomas Perez, then-Secretary of Labor; and Portia Wu, then-Assistant Secretary for Employment and Training Administration, and alleged a collusive scheme between the U.S. Department of Labor, the associations, and ranchers to depress shepherds' wages along with the state-law theories for damages for quasi-contract, unjust enrichment, and quantum meruit. The case was transferred to the District of Columbia at the behest of the Secretary. On December 22, 2015, Plaintiff De la Cruz joined *Perez* as a Plaintiff to sue MPAS in a class action for damages under state law. (*Perez* Dkt. 23). Mr. De la Cruz's action against MPAS was transferred back to the District of Colorado on November 23, 2016. *Hispanic Affairs Project v. Perez*, 206 F. Supp. 3d 348, 353 (D.D.C. 2016). The D.C. case ended as to Mr. De la Cruz when the court granted Defendants' motion to dismiss as to all but two claims — counts 8 and 9 for back pay against WRA and MPAS — which were severed and transferred to the Colorado District Court, where they are pending. (*Perez* D.C. Dkt. 82; CO Dkt. 35.)

C. *Llacua*, *Perez*, and *Castillo*

The underlying factual basis for all three lawsuits relates to Mr. De la Cruz and his alleged employment by MPAS as an H-2A shepherd in Nevada. Attorney Alexander Hood, of the Colorado organization "Towards Justice," appears as counsel for Plaintiffs in all three actions, including the Tenth Circuit appeal. Mr. Hood is well aware that Mr. De la Cruz is a lead plaintiff in all three putative class actions against MPAS and other Defendants where money damages for alleged improper payment of wages are sought.

WRA and MPAS are named as Defendants in all three lawsuits, along with several other overlapping ranch and individual defendants. While there is some variation on the themes in each lawsuit – *Llacua* and *Perez* also included antitrust and Civil RICO claims — the Plaintiff sheepherders, or an organization acting on their behalf, have claimed that the ranchers for whom they worked under the H-2A special visa program for range livestock workers denied them their proper wages because they

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were paid at rates determined by the U.S. Department of Labor for their occupation and locality; and failed to reimburse them for all pre-employment expenses they incurred. If Plaintiffs' appeal of *Llacua* is successful, and the case is remanded to the trial court, then there will be three cases pending in Federal district court (*Llacua* and *Perez* in Colorado, and *Castillo* in Nevada) asserting the same claims brought by the same Plaintiffs against the same Defendants, on the same common nucleus of operative facts.

II.

FACTS

The facts are aptly summarized in the Court's Order dismissing the FAC (Dkt. 107), and the allegations in the SAC are substantially the same, with the addition of De la Cruz as a Plaintiff in an attempt to cure a statute of limitations problem, and claims for reimbursement of incoming expenses in an attempt to cure jurisdictional flaws. Plaintiffs allege that they were employed by one or more of the Defendants at different times, and that the pay they agreed by contract to receive for working as shepherds, although in compliance with the rules and regulations prescribed by the U.S. Department of Labor for nonimmigrant H-2A laborers exercising that occupation, fell short of the Nevada minimum wage. Plaintiffs also allege that they are entitled to relief under various State law theories such as breach of contract, promissory estoppel, unjust enrichment, quantum meruit, and quasi contract because of Defendants' failure to reimburse them for all inbound travel and visa expenses. (Dkt. 111 Count 12, ¶ 249; Count 13, ¶ 254; Count 14, ¶ 259; Count 16, ¶ 273; Count 17, ¶ 278; Count 18, ¶ 284.) The same claims were presented as RICO violations in Counts 4 and 5 of the *Llacua* SAC. (*Llacua* Dkt. 73 ¶¶ 7, 80, 130, 144, 147, 148, 149 (Plaintiff De la Cruz); *id.* ¶¶ 161, 261, 262, 269.)

In its decision granting Defendants' Motion to Dismiss the FAC, this Court

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found that the Complaint did not raise substantial questions of Federal law sufficient to support jurisdiction. The court found that federal jurisdiction is not proper in cases where suit is brought to enforce the terms of H-2A job orders (such as reimbursement for travel and visa expenses), even where those same terms were subsequently omitted from the actual work contracts. (Dkt. 107 at 10, citing *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1233 n.5 (11th Cir. 2002) ("[T]he [H–2A] clearance orders ultimately become the work contract between the employers and farmworkers."); *Mitchell v. Osceola Farms Co.*, 447 F. Supp. 2d 1307, 1312 (S.D. Fla. 2006).)

In the SAC, Plaintiffs attempt to satisfy the jurisdictional amounts required to proceed under the Class Action Fairness Act (CAFA), 28 U.S.C. § 1332(d), with wildly exaggerated estimates of the potential damages to be recovered: nearly $26 million against WRA and $7 million against MPAS, assuming Plaintiffs worked 168-hour weeks, 52 weeks a year – in other words, for every single hour of the year. (Dkt. 111, ¶ 8.) Furthermore, even with the wildly exaggerated hours, Plaintiffs' SAC only reaches the $5,000,000 CAFA mark by adding Mr. De la Cruz, allowing Plaintiffs to add his two years of alleged liability. If Mr. De la Cruz is precluded from joining this case, as he should be, the SAC fails to meet the $5,000,000 jurisdictional threshold as to MPAS and the case against it should be dismissed.

III.

STANDARD OF REVIEW

Federal Rule of Civil Procedure (FRCP) 12(b)(6) provides for the dismissal of an action where plaintiff fails to state a claim upon which relief can be granted. Dismissal is appropriate when no relief may be granted consistent with the allegations set forth in the complaint. *See Williamson v. Gen. Dynamics Corp.,* 208 F.3d 1144, 1149 (9th Cir. 2000). Normally, the court must accept as true all material allegations in the complaint, as well as reasonable inferences to be drawn from them. *Pareto v. F.D.I.C.,*

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139 F.3d 696, 699 (9th Cir. 1998). However, the Court need not accept as true conclusory allegations or legal characterizations. *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981), *cert. denied*, 454 U.S. 1031, 102 S. Ct. 567, 70 L.Ed.2d 474 (1981). Nor must the court accept as true allegations that contradict facts which may be judicially noticed by the court. *Mullis v. United States Bankr. Ct.*, 828 F.2d 1385, 1388 (9th Cir. 1987). A matter that is properly the subject of judicial notice may be considered along with the complaint when deciding a motion to dismiss for failure to state a claim. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986). Therefore, the defense of res judicata can be raised by a Rule 12(b)(6) motion when "all relevant facts are shown by the court's own records, of which the court takes notice." *Day v. Moscow*, 955 F.2d 807, 811 (2nd Cir. 1992).

IV.

ARGUMENT AND AUTHORITY

A. This Case Should Be Dismissed for Improper Claim-Splitting.

A suit is duplicative and should be dismissed for improper claim-splitting if an earlier suit by the same plaintiff against the same defendant for the same claim is already pending, such that the eventual adjudication of the previous suit would preclude the claim in the later-filed suit. *See Adams v. Cal. Dep't of Health Servs.*, 487 F.3d 684, 688–89 (9th Cir. 2007). That rule should be followed here, and the instant case dismissed because the claims asserted by Plaintiffs here already have been asserted against Defendants in not just one, but two other actions.

A main purpose behind the rule preventing claim-splitting is "to protect the defendant from being harassed by repetitive actions based on the same claim." Restatement (Second) Judgments, § 26 comment a; *Clements v. Airport Auth. of Washoe Cnty.*, 69 F.3d 321, 328 (9th Cir. 1995). "Plaintiffs generally have 'no right to maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant.'" *Adams*, 487 F.3d at 688, quoting *Walton v. Eaton Corp.*, 563 F.2d 66, 70 (3d Cir. 1977) (en banc). A district court thus has discretion to dismiss a later-filed action if "the causes of action and relief sought, as well as the parties or privies to the action, are the same." *Id.* at 689. The "most important" criterion in this comparison is "whether the two suits arise out of the same transactional nucleus of facts." *Id.* (quoting *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201–02 (9th Cir. 1982)).

In *Greystone Nevada v. Anthem Highlands Community Ass'n*, 2013 WL 150183 (D. Nev. 2013) (Jones, J.) (not reported, copy attached), this Court ruled that the *Adams* anti-claim-splitting rationale applied and granted a partial motion to dismiss. In such cases, the court observed, a defendant is forced to defend duplicative class actions simultaneously. While plaintiffs have the option to pursue their claims individually (though they may not then join a class in a case with duplicative claims), they may not force defendants to defend a duplicative class action, at least not in the way they attempted to do in *Greystone*. As that court observed, although two groups of attorneys may bring duplicative class actions with different named plaintiffs in a race towards certification, where the same group of attorneys has brought duplicative actions, the concerns where different named plaintiffs and their attorneys are competing for bonuses and attorney's fees, respectively, via the race to certification disappear.

It is undisputed that the same group of attorneys represent the Plaintiffs, including but not limited to Mr. De la Cruz, in *Llacua*, *Perez*, and *Castillo*. In this situation, there is no excuse for duplicative filings that undeniably burden and harass the Defendants without materially advancing the Plaintiffs' cause.

In an appropriate case, a class of plaintiffs could be narrowly defined to segregate those with differing interests, such that multiple class actions against the same defendants but by different groups of plaintiffs would not necessarily violate the anti-claim-splitting rule. But where, as here, the class is very broadly defined to include all H-2A sheepherders, the rule against claim-splitting should preclude competing actions. The *Greystone* court granted the defendants' motion to dismiss because of the plaintiffs' improper claim-splitting, and this Court should do the same here.

B. The SAC Should Be Dismissed on Grounds of Res Judicata

This is the third federal district court to entertain Plaintiff De La Cruz's wage claims. The dismissal of his Colorado action, even though it was without prejudice; and the pendency of a Tenth Circuit appeal, justify granting this Motion to Dismiss the SAC.

"[A] party who has had a full opportunity to present a contention in court ordinarily should be denied permission to assert it on some subsequent occasion." Geoffrey C. Hazard, *Res Nova in Res Judicata,* 44 S. Cal. L. Rev. 1036, 1043 (1971). This bar protects against "the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States,* 440 U.S. 147, 153-54, 99 S. Ct. 970 (1979). Res judicata doctrine encompasses two distinct barriers to repeat litigation: claim preclusion and issue preclusion. *See Baker by Thomas v. General Motors Corp.,* 522 U.S. 222, 233 n. 5, 118 S. Ct. 657 (1998); 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 4402, at 7 (2d ed. 2002).

A party who has had one fair and full opportunity to prove a claim and has failed in that effort, should not be permitted to go to trial on the merits of that claim a second time. *Blonder-Tongue Laboratories v. Univ. of Ill. Found.,* 402 U.S. 313, 324, 91 S. Ct. 1434 (1971). "Under the doctrine of claim preclusion, a judgment on the merits precludes the same parties from re-litigating issues in a subsequent action that

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were, or could have been, raised in the prior action." *Faust v. United States*, 101 F.3d 675, 677 (Fed. Cir. 1996); *citing Allen v. McCurry*, 449 U.S. 90, 94, 101 S. Ct. 411 (1980). The Court should bar as res judicata claims in a suit that could have been raised in an earlier action, "so long as opposing parties had an adequate opportunity to litigate disputed issues of fact." *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 485 n.26, 102 S. Ct. 1883 (1982).

"Claim preclusion prevents parties from litigating issues that could have been raised in a prior action." *Carson v. Dep't of Energy*, 398 F.3d 1369, 1375 (Fed. Cir. 2005) (citing *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S. Ct. 2424 (1981)). "This form of res judicata applies if (1) the prior decision was rendered by a forum with competent jurisdiction; (2) the prior decision was a final decision on the merits; and (3) the same cause of action and the same parties or their privies were involved in both cases." *Id.* "Unlike issue preclusion, which only bars matters actually litigated in a prior proceeding, claim preclusion forecloses matters that, although never litigated or even raised, could have been advanced in an earlier suit." *Id.* at 1375 n.8.

The grant of a motion to dismiss or a motion for summary judgment is a final decision on the merits of a plaintiff's prior claims. *See, Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387–88, 98 S. Ct. 1117, 55 L.Ed.2d 357 (1978); *Colello v. U.S. Sec. and Exchange Comm'n*, 908 F. Supp. 738, 747 (C.D. Cal. 1995) (holding that summary judgment is a judgment on the merits). In this case, Plaintiff De la Cruz had the opportunity to litigate each of his causes of action that the plaintiffs now assert against Defendants in the SAC in the Colorado case, and failed. This Court need not entertain those claims again.[3]

The Ninth Circuit determines whether or not two claims are the same for

[3] The State law claims were dismissed without prejudice; however, the Court did not find federal jurisdiction. Plaintiff De la Cruz had the opportunity to argue for federal jurisdiction under CAFA and failed to raise it. As to the claim of federal jurisdiction, De la Cruz does not get to argue for federal jurisdiction again.

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purposes of res judicata with reference to the following criteria: (1) whether the rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts. *Nordhorn v. Ladish Co., Inc.*, 9 F.3d 1402, 1405 (9th Cir. 1993). The last of these criteria is the most important. *Id.; Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982). And it is plain, in this case, that the claims asserted in the SAC arise out of the same common nucleus of facts. There is a near-identity of Plaintiffs and Defendants in all three lawsuits. Plaintiffs' claims arise out of their employment as sheepherders under the H-2A program, pursuant to which they were paid contractually-agreed-upon wages at rates determined by the U.S. Department of Labor. In this important respect, the claims in all three lawsuits are the same. Defendants' rights and interests would be destroyed or impaired by prosecution of Plaintiffs' new case. Defendants previously litigated Plaintiffs' claims, and prevailed when the Courts ultimately dismissed the complaints. Allowing Plaintiffs to proceed with a new Complaint would allow Plaintiffs to force Defendants to re-litigate the same meritless lawsuit a third time -- subject to a potentially inconsistent decision by the Tenth Circuit, before which Plaintiffs have sought review of the *Llacua* decision.

C. Plaintiffs' Claims for Reimbursement of Inbound Travel Expenses Do Not Cure Jurisdictional Flaws.

The SAC superficially differs from the FAC in that Plaintiffs assert vague claims for reimbursement of certain inbound travel expenses, but such claims are not substantial enough to correct the shortcomings of the FAC and create a toehold for federal jurisdiction; moreover, those same claims (there presented as RICO violations, but based on the same facts) were rejected by the court in *Llacua*. Although the

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magistrate had recommended that the *Llacua* plaintiffs be allowed to file a third amended complaint to set forth their reimbursement arguments, the district court considered and rejected that request, and dismissed the case in its entirety, noting that the existence of those claims could not have been unknown to plaintiffs when they filed their original, first, and second amended complaints; and that their decision "to chance one last shot at attempting to cure the deficiencies the magistrate judge had identified . . . is precisely th[e] type of manipulation which has led the Tenth Circuit to caution courts against allowing plaintiffs 'to make the complaint a moving target, to salvage a lost case by untimely suggestion of new theories of recovery, [or] to present theories seriatim in an effort to avoid dismissal[.]'" (*Llacua* Dkt. 173, at 8 (quoting *Minter v. Prime Equipment Co.*, 451 F.3d 1196, 1206 (10th Cir. 2006) (citations and internal quotation marks omitted)).

Claims similar to those asserted in the SAC have been rejected by other courts. In *Mitchell v. Osceola Farms Co.*, 447 F. Supp. 2d 1307, 1312 (S.D. Fla. 2006), the central jurisdictional issue was that the work contracts between an employer and its H-2A workers did not expressly incorporate all the terms of the job orders. *Mitchell*, 447 F. Supp. 2d at 1311–12. This raised a legitimate federal question regarding whether the terms of the job orders "trump" the terms of the work contracts. However, the court held that this question was not "substantial" because the governing law was settled.

D. Plaintiffs Brazenly Misrepresent MPAS's Status.

Plaintiffs go too far in asserting that MPAS "self-declared" that it was the employer of the sheepherders that it assisted its members to employ. (See Dkt. 111, ¶ 85.) This is irresponsible nonsense. Defendant MPAS has made it abundantly clear at every step of this and the related lawsuits, not to mention at every step of the H-2A application process, that it has only ever acted as an agent on behalf of its members, and has never stood in the capacity of an "employer" of any Plaintiff. The agent role is

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plainly contemplated by the H-2A regulations, which expressly contemplate that "agents" and "associations acting as agent" can file job orders ("Agricultural and Food Processing Clearance Order ETA Form 790") and H-2 applications on behalf of employers. (*See, e.g.*, Dkt. 40-4; Dkt. 73-2 at 2 (job order at block 1); Dkt. 73-5 at 4 (H-2A application at block E.1).) In fact, Plaintiffs' own attachments to the SAC show that MPAS signed job orders explicitly as agent, not employer. (Dkt. 111, Ex. C, p.2: "Signed by Executive Director Kelli M. Griffith for members of Mountain Plains Agricultural Service (see Designation of Agent Form signed by employer).") It is frankly ridiculous to suggest that MPAS ever held itself out as acting as anything but an agent acting on behalf of its members.

The "agent" role is confirmed by the very documents that Plaintiffs attach to the SAC. Plaintiffs are bound by what those documents say, and this court may take notice of their contents. The Ninth Circuit has extended the doctrine of incorporation by reference to consider documents in situations where the complaint necessarily relies upon a document or the contents of the document are alleged in a complaint, the document's authenticity is not in question, and there are no disputed issues as to the document's relevance. *See Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005); *Parrino v. FHP, Inc.*, 146 F.3d 699, 705, 706 n.4 (9th Cir. 1998), *rev'd by statute on other grounds*; *Faulkner v. Beer*, 463 F.3d 130, 134 (2d Cir. 2006); *Int'l Audiotext Network v. Am. Tel. & Tel. Co.*, 62 F.3d 69, 72 (2d Cir. 1995) (considering an agreement that was not specifically incorporated into the complaint because the complaint "relies heavily upon its terms and effect" such that the agreement is "integral" to the complaint); *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010). Plaintiffs are in no position to question the documents they themselves selected to buttress their claims, let alone to distort their contents. It is manifestly incorrect for Plaintiffs to assert that MPAS "self-declared" as an employer, as they

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suggest. MPAS explicitly identified itself as acting in the capacity of an agent for the employer at every step of the process.

E. Plaintiffs Grossly Inflate the Number of Hours Worked to Manufacture Jurisdiction.

Plaintiffs exaggerate the number of hours they claim to be due pay under the Nevada minimum wage law in order to shoehorn their claim into the CAFA, but this ploy should be rejected. Plaintiffs were subject to being called to work at any time, but that is not the same as having to work 24/7. There is a very real difference between being "on call," sleeping, and working that the Nevada legislature has explicitly recognized. N.R.S. 608.0195: Periods for sleep, provides that

> If an employee . . . is required to be on duty for 24 hours or more, the employer and employee may agree in writing to exclude from the employee's wages a regularly scheduled sleeping period not to exceed 8 hours if adequate sleeping facilities are furnished by the employer. If the sleeping period is interrupted by any call for service by the employer, the interruption must be counted as hours worked. If the sleeping period is interrupted by any call for service by the employer to such an extent that the sleeping period is less than 5 hours, the employee must be paid for the entire sleeping period.

The statute recognizes exceptions for caretakers in residential facilities for individuals with disabilities, but that has no relevance to the Plaintiff sheepherders, who were responsible for sheep, not disabled people. This court should disregard Plaintiffs' contrafactual claims as to the number of hours allegedly worked

V.

CONCLUSION

Without Plaintiff De la Cruz, Plaintiffs calculations of damages fall short of the required $5,000,000 threshold. Additionally, an argument that Plaintiffs are entitled to minimum wages for every minute of the year is so unreasonable that the Complaint fails to reasonably plead the required $5,000,000, even with the inclusion of Plaintiff De la Cruz. For the foregoing reasons, the SAC should be dismissed.

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Respectfully submitted this 20th day of June, 2017.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

ABEL CÁNTARO CASTILLO; ALCIDES INGA RAMOS; RAFAEL DE LA CRUZ and those similarly situated, *Plaintiffs,* v. WESTERN RANGE ASSOCIATION; EL TEJON SHEEP COMPANY; MELCHOR GRAGIRENA; MOUNTAIN PLAINS AGRICULTURAL SERVICE; and ESTILL RANCHES, LLC, *Defendants.*	Civil Case No. 3:16-cv-00237-MMD-VPC **CERTIFICATE OF SERVICE**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing **MOTION TO DISMISS SECOND AMENDED COMPLAINT BY DEFENDANT MPAS** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following and all attorneys of record:

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This 20th day of June, 2017.

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Attachment 1

Greystone Nevada v. Anthem Highlands Community Association

2013 WL 150183
Only the Westlaw citation is currently available.
United States District Court, D. Nevada.

GREYSTONE NEVADA, LLC et al., Plaintiffs,
v.
ANTHEM HIGHLANDS COMMUNITY ASSOCIATION, Defendant.

No. 2:11–cv–01424–RCJ–CWH.
|
Jan. 14, 2013.

Attorneys and Law Firms

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ORDER

ROBERT C. JONES, District Judge.

*1 These consolidated removed class actions arise out of the installation in new homes of allegedly defective high-zinc-content brass ("yellow brass") plumbing fittings.[1] Pending before the Court is Third-party Defendants' motion to dismiss the Third Party Complaint and strike the class allegations therein, as well as three motions to reconsider, a motion to shorten time, and a motion to extend time.

I. FACTS AND PROCEDURAL HISTORY

On or about June 30, 2011, Defendant Anthem Highlands Community Association ("Anthem Highlands") forwarded to Plaintiffs Greystone Nevada, LLC ("Greystone") and U.S. Home Corp. ("U.S.Home") notices of construction defects (the "Notices") pursuant to Nevada Revised Statutes ("NRS") section 116.3102(d) [sic]. (*See* Compl. ¶ 7, Sept. 2, 2011, ECF No. 1).

The Notices stated that Anthem Highlands, in its statutory representative capacity, thereby made the claims against Plaintiffs for construction defects in Anthem Highlands' members' homes based upon the installation of plumbing systems with defective yellow brass components. (*Id.* ¶¶ 8–9). Each of the individual homeowners in Anthem Highlands (the "Homeowners") had previously entered into arbitration agreements with Plaintiffs, agreeing to arbitrate potential disputes, and these agreements are alleged to be covenants running with the land enforceable against any present owners. (*See id.* ¶ 11).

Plaintiffs sued Anthem Highlands in this Court on five nominal causes of action: (1)-(3) declaratory judgment (impliedly under 28 U .S.C. § 2201); (4) injunctive relief (impliedly under § 2202); and (5) compulsion of arbitration under 9 U.S.C. § 4.[2] Defendants moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim, and Plaintiffs moved to compel arbitration, i.e., for offensive summary judgment on the fifth cause of action. The Court denied the motions to dismiss, finding that there was diversity jurisdiction supporting the claims, because Defendants had statutory authority to sue on behalf of the individual homeowners, making them real parties in interest under the rules, whose claim was the aggregate of the claims of the individual parties it represented. The Court also found that Plaintiffs had sufficiently stated a claim. The Court granted the motion to compel arbitration in part, ruling that arbitration was required as to any homeowner who had individually signed the arbitration agreement, but that the arbitration agreement was not a real covenant enforceable against a subsequent purchaser.[3] The Court left it to the arbitrator(s) whether homeowners could consolidate their arbitration hearings under the arbitration agreement. The Court refused to dismiss the claims for declaratory and injunctive relief based upon lack of jurisdiction. Finally, the Court solicited a proposed consolidated judgment compelling arbitration. Plaintiffs submitted a proposed judgment, which the Court signed. The Judgment requires arbitration by all homeowners identified in Exhibit A thereto, which lists 271 homeowners (counting tenants-in-common as a single party). The operative part of the judgment reads:

> *2 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that in accordance with the Court's February 24, 2012 Order, judgment is hereby entered in these consolidated actions against the Homeowners compelling them to arbitrate any and all claims they have related to alleged "yellow brass" plumbing components and systems within their respective Properties, including any and all claims related to the January 27, 2011 and June 30, 2011, NRS 40.600, *et seq.* Notices of Defects forwarded to Plaintiffs by Defendants on behalf of the Homeowners. The arbitrations must proceed pursuant to the terms of the Arbitration Agreements.
>
> The Court shall retain jurisdiction in these actions over the homeowners listed in Exhibit "A" for the purposes set forth within sections 9 though 16 of the Federal Arbitration Act (9 U.S.C. § 9, *et seq.*).

(J. 2:3–12, Mar. 14, 2012, ECF No. 31). The parties filed several motions to reconsider, to dismiss, and to stay the case. The Court denied the motions to reconsider, granted the motions to dismiss the Counterclaim in part, with leave to amend in part, denied the motions to stay, struck a motion to dismiss filed improperly under Case No. 2:11–cv–1422, and order the parties to file a joint status report listing which homeowners are and are not required to arbitrate consistent with the Court's rulings thus far and discussing Article III standing under *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977).

II. LEGAL STANDARDS

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief" in order to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action that fails to state a claim upon which relief can be granted. A motion to dismiss under Rule 12(b)(6) tests the complaint's sufficiency. *See N. Star Int'l v. Ariz. Corp. Comm'n*, 720 F.2d 578, 581 (9th Cir.1983). When considering a motion to dismiss under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable claim and the grounds on which it rests. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir.1986). The court, however, is not required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir.2001). A formulaic recitation of a cause of action with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a violation is plausible, not just possible. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 555).

*3 "Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion. However, material which is properly submitted as part of the complaint may be considered on a motion to dismiss." *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir.1990) (citation omitted). Similarly, "documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be considered in ruling on a Rule 12(b)(6) motion to dismiss" without converting the motion to dismiss into a motion for summary judgment. *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir.1994). Moreover, under Federal Rule of Evidence 201, a court may take judicial notice of "matters of public record." *Mack v. S. Bay Beer Distribs., Inc.*, 798 F.2d 1279, 1282 (9th Cir.1986). Otherwise, if the district court considers materials outside of the pleadings, the motion to dismiss is converted into a motion for summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 925 (9th Cir.2001).

III. ANALYSIS

A. Motion to Dismiss

The class identified in the TPC consists of all yellow-brass-aggrieved "owners or residences constructed in the Anthem Highlands community...." (*See* Answer, Counterclaim, and TPC 29, Mar. 9, 2012, ECF No. 27). Defendants bring eight class claims against TPD. TPD ask the Court to dismiss the TPC for three reasons: (1) lack of Article III standing; (2) impermissible claim-splitting; and (3) failure to state a claim. The Court grants the motion based upon impermissible claim-splitting. As the Court recently ruled in a related case:

> A suit is duplicative and should be dismissed for improper claim splitting if an earlier suit by the same plaintiff against the same defendant for the same claim is already pending such that the eventual adjudication of the previous suit would preclude the claim in the later-filed suit. *See Adams v. Cal. Dep't of Health Servs.*, 487 F.3d 684, 688–89 (9th Cir.2007). Movants argue that the rule should apply where the same law firms bring a duplicative class action on behalf of the same class and against the same defendants, albeit with different named plaintiffs.
>
> The Court rules that the *Adams* anti-claim-splitting rationale applies in the present context, at least as against the Uponor Defendants. In such cases, a defendant is forced to defend duplicative class actions simultaneously. Plaintiffs may pursue their claims here individually (though they may not then join a class in a case with duplicative claims), but they may not make Defendants defend a duplicative class action, at least not in the way they have done ... here. Although two groups of attorneys may bring duplicative class actions with different named plaintiffs in a race towards certification, here, the same group of attorneys has brought the duplicative actions, obviating the concerns in the contrary example where different named plaintiffs and their attorneys are competing for bonuses and attorney's fees, respectively, via the race to certification. Plaintiffs' attorneys are of course not adverse to themselves, and insofar as they might argue that their different sets of named plaintiffs have adverse interests in separately prosecuting the duplicative actions because they are competing for class representative bonuses, it is the attorneys themselves who have (potentially unethically) created this direct conflict of interests between their own clients in the present matter.
>
> *4 In an appropriate case, the class of plaintiffs could be narrowly defined to include only those homeowners in certain developments, such that multiple class actions against the same defendants but by different groups of homeowners would not necessarily violate the anti-claimsplitting rule. But here, as in the other related cases, the class is very broadly defined to include every yellow-brass-aggrieved homeowner in southern Nevada. The *Slaughter* and *Fulton Park* cases preclude the present class action as against Uponor Defendants. The Court will therefore grant the motion to dismiss Uponor Defendants.

(Order 18:12–19:13, July 10, 2012, ECF No. 104 in Case No. 2:11–cv–1498). Likewise here, the determination of the *Slaughter* and *Fulton Park* cases, i.e., the certification of the class in either case, would preclude the present claims. Although the present putative class includes only those homeowners in the Anthem Highlands community, the putative classes in *Slaughter* and *Fulton Park* also include those homeowners.

B. Motions to Reconsider

Plaintiffs via this action sought to compel arbitration by "original purchasers" of the units, i.e., those who had purchased those units directly from the developer. In its February 24 and July 9 orders, the Court noted that the dispositive issue with respect to the requirement to arbitrate was not from whom a particular owner had purchased his unit, but whether there existed any arbitration agreement binding upon that owner. Arbitration is required (or not) based upon agreements to arbitrate. Plaintiffs have identified no statute or principle of law requiring arbitration based upon whether a unit owner has purchased his unit directly from the builder or developer. The Court noted in its July 9 order that the seven owners whom Defendant had identified as being "subsequent purchasers" allegedly not subject to arbitration had in fact signed agreements to arbitrate construction defect claims. In some cases the agreements were part of the purchase agreement, and in some cases they were separate agreements to arbitrate, but each of the seven identified unit owners were bound to arbitrate. The Court therefore reaffirmed its previous ruling that any owner who had signed an arbitration agreement was required to arbitrate, and it ordered the parties to file a joint status report identifying

IN THE SUPREME COURT OF THE STATE OF NEVADA

ABEL CÁNTARO CASTILLO, No. 85926

Appellant,

vs.

WESTERN RANGE ASSOCIATION,

Respondent.

_____________________________________/

RESPONDENT WESTERN RANGE ASSOCIATION'S APPENDIX VOLUME 1, PART 4

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WESTERN RANGE ASSOCIATION

IT IS HEREBY ORDERED that the Motion to Dismiss Third Party Complaint and Strike Class Allegations (ECF No. 77) is GRANTED.

*6 IT IS FURTHER ORDERED that Plaintiffs' Motion to Reconsider (ECF No. 82) is DENIED.

IT IS FURTHER ORDERED that the Defendants' Motion to Reconsider (ECF No. 91) is GRANTED.

IT IS FURTHER ORDERED that Defendants' Motion to Reconsider (ECF No. 94) is DENIED. The Court declines to reconsider dismissal of the strict liability claims or to certify for immediate appeal or certify the issue to the Nevada Supreme Court. The Court clarifies that Plaintiffs may only inspect a representative sample of the homes (up to 10%, which Plaintiffs may select).

IT IS FURTHER ORDERED that the Motion for Extension of Time (ECF No. 73) and the Motion to Shorten Time (ECF No. 84) are DENIED.

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2013 WL 150183

Footnotes

1 The cases are factually related to the *Slaughter v. Uponor* case, which has been reversed and remanded, and which is once again pending before the Court. The Court has not consolidated the present cases with the *Slaughter* case, and the Court of Appeals' ruling in *Slaughter* does not affect the present cases, which concern arbitration requirements, as opposed to class action certification and the interplay between Rule 23 and the construction-defect notice procedures under state law.

2 In the '1422 Case, Greystone sued Defendant Fiesta Park Homeowners' Association ("Fiesta Park") upon similar facts, using a substantially identical complaint. The actions have been consolidated, with the present case as the lead case.

3 At oral argument, Plaintiffs retracted their argument that the agreements were real covenants and agreed to pursue arbitration only against those homeowners who had signed the agreements.

4 If necessary, the Court can make this determination on its own by examining the documentary evidence, owner-by-owner, but the Court should be able to expect that the parties can amicably delineate which owners must arbitrate according to a good faith interpretation of the Court's ruling.

5 The parties' joint status report indicates some disagreement between the parties, but the parties agree that the Court has jurisdiction over the original claims pursuant to 28 U.S.C. § 1332(a) even if the defect counterclaims are barred, because there remain unresolved issues as to the arbitration claims.

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ABEL CÁNTARO CASTILLO; ALCIDES INGA RAMOS, RAFAEL DE LA CRUZ, and those similarly situated, Plaintiffs, v. WESTERN RANGE ASSOCIATION; EL TEJON SHEEP COMPANY; MELCHOR GRAGIRENA; MOUNTAIN PLAINS AGRICULTURAL SEVICE; and ESTILL RANCHES, LLC, Defendants.	Case No.: 3:16-cv-00237-RCJ-VPC **DEFENDANT ESTILL RANCHES, LLC'S MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT**

Defendant Estill Ranches, LLC ("Estill Ranches") by and through its counsel, McDonald Carano LLP, hereby moves, pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), to dismiss Plaintiffs' Second Amended Complaint. This Motion is based upon the following Memorandum of Points and Authorities, the Declaration of Lani Estill ("Estill Declaration") attached hereto as **Exhibit 1**, the pleadings and papers on file, and any argument of counsel entertained by the Court at any hearing on this matter.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

In the Second Amended Complaint ("Complaint"), only Plaintiff Alcides Inga Ramos ("Inga") asserts claims against Estill Ranches. In Counts 16, 17 and 18, Inga asserts common law claims for breach of contract, promissory estoppel, and unjust enrichment. Each claim alleges that Estill Ranches failed to reimburse Inga for his inbound travel expenses in the amount of "at least $250" purportedly in violation of federal regulations incorporated into his contract. The face of the Complaint reveals that Inga cannot meet the minimum requirements for this Court to exercise jurisdiction over his claims against Estill Ranches. Inga purports to assert claims against Estill Ranches on behalf of a class of "at least 50 shepherds," asserting jurisdiction under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d). However, basic arithmetic reveals that Inga cannot meet the requirements for class-wide jurisdiction pursuant to CAFA because Inga has not put at least $5,000,000 at issue and has not alleged claims on behalf of at least 100 putative class members. Moreover, Estill Ranches only employed a total of 45 shepherds, including Inga. Thus, the Court lacks jurisdiction over the claims asserted against Estill Ranches and the claims against Estill Ranches should be dismissed, with prejudice.[1]

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II. STATEMENT OF ALLEGED FACTS

The Complaint contains minimal factual allegations in support of Inga's claims against Estill Ranches. Inga alleges that in early 2012, a representative of Defendant Mountain Plains Agricultural Service ("MPAS") approached Inga in Peru and recruited him to be a shepherd in the United States. (*See* ECF No. 111 at ¶ 77.) Inga signed a form contract with the MPAS representative detailing the terms of his employment. (*Id.* at ¶ 78.) While still in Peru, Inga incurred allegedly unreimbursed expenses in an amount of "at least $250" to apply for his visa and to travel to Lima to secure his visa. (*Id.* at ¶ 90.)

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[1] The Court has already given Inga the opportunity to amend his complaint to correct the jurisdictional defects of the First Amended Complaint. As a result, the claims against Estill Ranches should be dismissed with prejudice. *Righthaven LLC v. Newman*, 838 F. Supp.2d 1071, 1078 (D. Nev. 2011) (holding that dismissal with prejudice is appropriate where no amendment can save the complaint) (citing *Schmier v. U.S. Court of Appeals for Ninth Circuit*, 279 F.3d 813, 824 (9th Cir. 2002)).

Once in the United States, Inga allegedly signed another MPAS form contract to which Estill was also a party. (*Id.* at ¶ 80.) Inga worked at Estill Ranches from April 2012 until he abandoned his job in February 2013. (*Id.* at ¶¶ 88, 92.)

II. RELEVANT PROCEDURAL BACKGROUND

On April 13, 2017, the Court entered an Order granting Estill Ranches' Motion to Dismiss the First Amended Complaint. (ECF No. 107.) The Court ruled that federal question jurisdiction was lacking because the First Amended Complaint alleged no federal claims and failed to set forth a state law cause of action raising a substantial question of federal law. (*Id.* at 12.) With that ruling, the Court determined that the federal question at issue—whether the H2A job orders and/or requirements of applicable federal regulations constitute employment contracts—had already been resolved as a matter of law by federal court decisions holding that job orders and the requirements of the federal regulations indeed form an employment contract. (*Id.*) The Court also determined that diversity jurisdiction under CAFA was lacking because Inga's claims failed to satisfy CAFA's amount in controversy requirement because the claims against Estill Ranches cannot be aggregated with claims against other defendants. (*Id.* at 14.) The Court granted leave to amend. (*Id.* at 18.)

In the Second Amended Complaint, Inga brings claims against Estill Ranches for: (1) Breach of Contract or Quasi Contract (Count 16); (2) Promissory Estoppel (Count 17); and (3) Unjust Enrichment and Quantum Meruit (Count 18). (*Id.* at ¶¶ 270-284.) In all three claims, Inga alleges that Estill failed to reimburse him for labor certification-related expenses of "at least $250." (ECF No. 111 at ¶¶ 90, 273, 278, 281, 283.) Inga asserts each claim on behalf of himself and on behalf of a putative class of "at least 50 shepherds" employed by Estill Ranches through the H2A program "in Nevada at any time during the applicable statute of limitations." (*Id.* at ¶ 169 – 172.)

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III. LEGAL STANDARD

A. Standard for Motion to Dismiss Pursuant to FRCP 12(b)(1)

The court may dismiss a claim for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). Fed. R. Civ. P. 12(b)(1). Because the plaintiff is the party invoking the court's jurisdiction, "the plaintiff bears the burden of proving that the case is properly in federal court." *Wright v. Incline Vill. Gen. Imp. Dist.*, 597 F. Supp. 2d 1191, 1198 (D. Nev. 2009) (citing *McCauley v. Ford Motor Co.*, 264 F.3d 952, 957 (9th Cir. 2001)). A Rule 12(b)(1) motion may take one of two forms. *Thornhill Publ'g Co. v. Gen. Tel & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). It may be a "facial" challenge or it may be a "factual" challenge. *Id.* "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "[I]n a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id.*

If the movant's challenge is a facial one, then the "court must consider the allegations of the complaint to be true and construe them in the light most favorable to the plaintiff." *Nevada ex rel. Colo. River Comm'n of Nev. v. Pioneer Cos.*, 245 F. Supp.2d 1120, 1124 (D. Nev. 2003) (citing *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989)). If the attack is factual, however, "no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims." *Thornhill Publ'g Co.*, 594 F.2d at 733 (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)). The plaintiff has the burden of establishing that the court possesses subject matter jurisdiction by presenting affidavits or any other necessary evidence. *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989). Indeed, the district court is "free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary." *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983) (citing *Thornhill Publ'g Co.*, 594 F.2d at 733).

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Here, because the plain language of the Second Amended Complaint reveals that CAFA's numerosity and amount in controversy requirements are not met, Estill Ranches brings a facial jurisdictional challenge. Estill Ranches also brings a factual challenge to jurisdiction based upon the Estill Declaration, attached hereto as **Exhibit 1**.

B. Standard for Motion to Dismiss Pursuant to FRCP 12(b)(6)

This Court may dismiss the Plaintiffs' Complaint if it "[fails] to state a claim upon which relief can be granted." FRCP 12(b)(6). A complaint fails to state a claim upon which relief can be granted if the factual allegations contained in the complaint, taken as true, are insufficient to entitle the plaintiff to legal relief. *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 555 (2007) ("Factual allegations must be enough to raise a right to relief above the speculative level."). With this standard in mind, to "state a valid claim, a complaint must contain either direct or inferential allegations respecting all the material elements to sustain recovery under some viable legal theory." *Id.* at 568. While the Court must accept factual allegations as true, legal conclusions are entitled to no such presumption. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). It is not enough for the Plaintiffs to allege misconduct; they must "[nudge] their claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. As Plaintiffs' Complaint falls far short of this standard, Estill and Estill Ranches respectfully request that this Court grant the Motion in its entirety.

IV. DISCUSSION

A. Inga's Claims Against Estill Ranches Cannot Meet Jurisdictional Requirements

The Second Amended Complaint fails to allege a specific basis for jurisdiction over the claims against Estill Ranches. (*See* ECF No. 111 ¶¶ 7-11.) Generally, the Complaint asserts diversity jurisdiction under CAFA, alleging that the amount in controversy against the other defendants exceeds $5,000,000. (*Id.*) However, even if Estill Ranches had been included in the general jurisdiction allegations, the Court

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cannot exercise jurisdiction over the Inga's claims against Estill Ranches because Inga cannot meet CAFA requirements.

CAFA provides alternative diversity, numerosity, and amount in controversy requirements for federal court jurisdiction over class actions. *See* 28 U.S.C. § 1332(d). Under CAFA, a federal court has original jurisdiction only if: (1) the class is minimally diverse from the defendants, (2) there are at least 100 plaintiffs, and (3) the amount in controversy exceeds $5,000,000. *Id.*; *accord Yocupicio v. PAE Grp., LLC*, 795 F.3d 1057, 1059 (9th Cir. 2015). CAFA allows the putative class members to aggregate their claims *against the same defendant* to meet the $5,000,000 amount in controversy requirement. *Id.* 28 U.S.C. § 1332(d)(6). Because there is a presumption against federal diversity jurisdiction, the burden of proving CAFA's requirements falls on Plaintiffs. *Hunter v. Phillip Morris USA*, 582 F.3d 1039, 1043 (9th Cir. 2009) ("[I]t is to be presumed that a cause lies outside the limited jurisdiction of the federal courts and the burden of establishing the contrary rests upon the party asserting jurisdiction.") (internal quotations and brackets omitted).

Here, Inga clearly cannot meet CAFA's minimal jurisdictional requirements. First, CAFA's numerosity requirements are not met. The purported class asserting claims against Estill Ranches is defined to include all H2A workers employed by Estill Ranches as shepherds in Nevada at any time during the applicable statute of limitations. (*Id.* ¶ 171.) According to Inga, the purported class against Estill Ranches consists of "at least 50 shepherds during the statutory period for Mr. Inga's contract claims for failure to pay for labor certification-related expenses." (ECF No. 111 at ¶ 172.) Thus, Inga has failed to meet his burden to establish a putative class of at least 100 members, and the claims against Estill Ranches should be dismissed for this reason alone. Though the face of the complaint itself reveals that numerosity requirements are not met, the Estill Declaration confirms that there are not at least 100 class members at issue. Affording Plaintiffs the most generous possible statutory period of six years for "[a]n action upon a contract, obligation or liability founded upon

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an instrument in writing," (NRS 11.190(1)(b)),[2] the potential class is comprised of Estill Ranches' H2A shepherds going back to October 2010, or six years before the First Amended Complaint was filed in October 2016.[3] Here, the Estill Declaration establishes that, as of June 21, 2017, Estill Ranches has employed only 45 H2A workers, including Inga, since October 2010. (Ex. 1 ¶ 5.)[4] Thus, Estill Ranches' evidence establishes that Inga's claims cannot possibly meet CAFA's numerosity requirements.

Second, Inga cannot meet CAFA's amount in controversy requirement. Inga alleges an amount in controversy of "at least $250" for his individual claims multiplied by the "at least 50 shepherds" at issue, resulting in an amount in controversy of "at least" $12,500 in total.[5] This amount is significantly less than CAFA's amount in controversy requirement of $5,000,000.

In an apparent attempt to achieve the required amount in controversy, the Complaint seeks to join unrelated plaintiffs Abel Cántaro Castillo ("Castillo") and Rafael de la Cruz ("Cruz"), who each bring claims against unrelated defendants. (*See*

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[2] While Inga's breach of contract claim (Count 16) is allegedly based upon a written instrument, Inga's alternative claims for promissory estoppel (Count 17) and unjust enrichment/quantum meruit (Count 18), are arguably subject to a shorter statutory period of four years for an action upon a contract, obligation or liability not founded upon an instrument in writing. (NRS 11.190(2)(c). Furthermore, each of these claims are not true contract claims, but rather allegations of violations of federal statutes and regulations whose terms are incorporated into the job orders that become employment contracts. (Order (ECF No. 107) at 12.) As such, each of these claims is likely subject to the shorter limitation period of three years for an action upon a liability created by statute. NRS 11.190(3)(a). However, the Court need not resolve this issue because Inga's claims do not meet jurisdictional numerosity requirements even if the longest possible statutory period of six years applies.

[3] Neither Inga nor Estill Ranches were parties to the original Complaint filed on May 3, 2016. (*See* ECF No. 1.) Rather, Inga first joined the suit and asserted claims against Estill Ranches in the First Amended Complaint, filed on October 13, 2016. (*See* ECF No. 45.)

[4] In support of Estill Ranches' previous Motion the First Amended Complaint (ECF No. 74), Estill Ranches submitted the previous declaration of Lani Estill, establishing that Estill Ranches had employed only 40 H2A workers since October 2010 as of December 9, 2016. (ECF No. 74-1 ¶ 3.)

[5] Because there are only 45 workers at issue, the amount in controversy is only $11,250.

generally ECF No. 111.) There is no allegation that Estill Ranches employed, or is somehow liable for the claims asserted by, Castillo or Cruz. (*See generally id.*) "In diversity cases, when there are two or more defendants, plaintiff may aggregate the amount against the defendants to satisfy the amount in controversy requirement *only if the defendants are jointly liable*" and "if the defendants are severally liable, plaintiff must satisfy the amount in controversy requirement against *each individual defendant*." *Middle Tenn. News Co. v. Charnel of Cinncinnati, Inc.*, 250 F.3d 1077, 1081 (7th Cir. 2001) (emphasis added); *see also Vagle v. Archstone Communities, LLC*, No. CV 13-09044 RGK AJWX, 2014 WL 463532, at *3 (C.D. Cal. Feb. 5, 2014) ("While CAFA permits aggregation of claims of separate plaintiffs, claims against multiple defendants can only be aggregated when the defendants are jointly liable.").

Here, there is no allegation that Estill Ranches is liable in any capacity—whether jointly, severally or otherwise—for the claims asserted against the other defendants. To the contrary, the single class that Inga seeks to represent in the claims asserted against Estill Ranches is defined as those employed by Estill Ranches. (ECF No. 111 ¶ 171.) While Inga also asserts putative class claims against defendant Mountain Plains Agricultural Service ("MPAS"), Inga makes no allegations that Estill Ranches is liable for those claims as they pertain to other rancher employers who recruited shepherds through MPAS, and Inga does not assert those claims (Counts 12-14) against Estill. (*Id.* ¶¶ 153-168, 246-260.) In other words, Estill Ranches is allegedly liable only as to those approximately 50 shepherds that it employed. Inga's claims against Estill Ranches are improperly aggregated with the unrelated claims against the other defendants. *See Aguayo v. AMCO Ins. Co.*, 59 F. Supp. 3d 1225, 1241 (D.N.M. 2014) (holding that where multiple defendants are jointly liable on some of the claims, only the amounts of those particular claims may be aggregated to satisfy CAFA's amount in controversy requirement).

Without the impermissible aggregation, the amount in controversy and numerosity requirements are not met, as related above. Because Inga's alleged facts

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establish that Inga cannot satisfy either the numerosity requirement or the amount in controversy requirement of CAFA, the claims against Estill Ranches should be dismissed with prejudice.

B. The Promissory Estoppel, Unjust Enrichment, and Quantum Meruit Claims Should be Dismissed With Prejudice

Inga asserts claims for promissory estoppel (Count 17) and unjust enrichment/quantum meruit (Count 18) in the alternative to his breach of contract claim (Count 16). These claims fail as a matter of law in the face of a valid, written contract. Where neither party disputes the existence of a contract, pleading of alternative theories is not permitted. *See, e.g., O'Neill v. Kemper Ins. Companies*, 497 F.3d 578, 583 (6th Cir. 2007) (noting that "[i]n Ohio, where the parties have an enforceable contract and merely dispute its terms, scope, or effect, one party cannot recover for promissory estoppel...") (internal quotations omitted). Here, the Court previously determined that Inga's job order constitutes a valid written contract which incorporates the terms of the federal regulations governing H2A shepherds. (ECF No. 107 at 12.) Thus, neither party disputes that there is an enforceable contract. Therefore, the alternative claims are invalid.

The promissory estoppel claim is specifically barred by a written contract. "The doctrine of promissory estoppel, which embraces the concept of detrimental reliance, is intended as a substitute for consideration, and not as a substitute for an agreement between the parties." *Vancheri v. GNLV Corp.*, 421, 777 P.2d 366, 369 (1989). Like Inga's unjust enrichment/quantum meruit claim, his claim for promissory estoppel fails in the presence of an express, written contract. *See, e.g., Am. Sav. & Loan Ass'n v. Stanton-Cudahy Lumber Co.*, 455 P.2d 39, 41 (Nev. 1969) (noting that the doctrine of promissory estoppel "provides that in a case *where traditional consideration is lacking*, reliance which is foreseeable, reasonable, and serious will require enforcement if injustice cannot otherwise be avoided.") (emphasis added).

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Further, Inga has not alleged any damage from a failure of consideration. (*See generally* ECF No. 111.) Rather, Inga's promissory estoppel claim rests on the same grounds as his contract claim: Estill Ranches' alleged "promise" to adhere to 20 C.F.R. § 655.135 and reimburse his labor-certification related expenses. (*See id.* ¶¶ 277-278.) The promissory estoppel claim fails because it is based upon the same allegations of the breach of contract claim.

Inga also raises an Unjust Enrichment and Quantum Meruit claim. (*Id.* ¶¶ 279-284.) This claim also specifically fails due to the existence of an express written contract. *Leasepartners Corp. v. Robert L. Brooks Trust Dated Nov. 12, 1975*, 942 P.2d 182, 187 (Nev. 1997) ("An action based on a theory of unjust enrichment is not available when there is an express, written contract, because no agreement can be implied when there is an express agreement."); *Lipshie v. Tracy Inv. Co.*, 566 P.2d 819, 824 (Nev. 1977) ("To permit recovery by quasi-contract where a written agreement exists would constitute a subversion of contractual principles."). Further, "a claim for quantum meruit is not actionable when the claim is based on an express contract." *WuMac, Inc. v. Eagle Canyon Leasing, Inc.*, No. 2:12-CV-0926-LRH-VCF, 2013 WL 593396, at *4 (D. Nev. Feb. 14, 2013).

When pled in conjunction with unjust enrichment, quantum meruit "serves as a remedy." *Risinger v. SOC LLC*, 936 F. Supp. 2d 1235, 1247 (D. Nev. 2013). Inga alleges quantum meruit in conjunction with unjust enrichment, so if the unjust enrichment claim fails, so too does the quantum meruit claim. *See id.* (noting the plaintiff could only seek quantum meruit "as a remedy to the extent he can demonstrate unjust enrichment"). The unjust enrichment claim, entirely duplicative of the breach of contract claim, fails in the presence of an express contract. Therefore, the quantum meruit claim cannot stand and should be dismissed.

V. CONCLUSION

For the reasons set forth above, Plaintiff Inga's claims should be dismissed because Plaintiff fails to properly invoke the Court's jurisdiction. Even if this Court had

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jurisdiction, Inga cannot maintain an action for promissory estoppel, unjust enrichment or quantum meruit in the presence of an express, written contract. Accordingly, Estill Ranches respectfully request that this Court dismiss Inga's claims against it with prejudice.

DATE: June 27, 2017

McDONALD CARANO LLP

By: _/s/ Leigh Goddard_
Leigh Goddard
Laura Jacobsen

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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that I am an employee of McDonald Carano LLP and I caused to be electronically filed on this date a true and correct copy of the Defendant Estill Ranches, LLC's Motion to Dismiss Plaintiffs' Second Amended Complaint with the Clerk of the Court using the CM/ECF system, which will automatically e-serve the same on the attorney(s) of record set forth below:

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DATED: June 27, 2017.

/s/ Andrea J. Black
Andrea J. Black

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Exhibit 1

Declaration of Lani Estill in Support of Defendant Estill Ranches, LLC's Motion to Dismiss Plaintiff's Second Amended Complaint

Exhibit 1

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ABEL CANTARO CASTILLO; ALCIDES INGA RAMOS, RAFAEL DE LA CRUZ, and those Similarly situated,

Plaintiffs,

v.

WESTERN RANGE ASSOCIATION; EL TEJON SHEEP COMPANY; MELCHOR CRAGIRENA; MOUNTAIN PLAINS AGRICULTURAL SERVICE; and ESTILL RANCHES, LLC,

Defendants.

Case No.: 3:16-cv-00237-MMD-VPC

DECLARATION OF LANI ESTILL IN SUPPORT OF DEFENDANT ESTILL RANCHES, LLC'S MOTION TO DISMIS! PLAINTIFFS' SECOND AMENDED COMPLAINT

I, Lani Estill, declare as follows:

1. My name is Lani Estill. I am over the age of eighteen years old and competent to testify as to the following facts.

2. I have personal knowledge of the facts herein, except where the facts are stated upon information and belief, and as to those facts I believe them to be true. If called to testify to the contents of this Declaration, I could and would do so competentl

3. I make this declaration in support of Estill Ranches, LLC's Motion to Dismiss Plaintiffs' Second Amended Complaint.

4. I am a managing member of Estill Ranches, LLC ("Estill Ranches").

5. According to Estill Ranches' records, Estill Ranches has employed a total of 45 H-2A workers, including Plaintiff Alcides Inga Ramos, since October 2010.

6. I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

EXECUTED this 21st day of June, 2017

L. Estill

LANI ESTILL

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEVADA

ABEL CANTARO CASTILLO; ALCIDES INGA RAMOS, RAFEL DE LA CRUZ; and those similarly situated, Plaintiffs, vs. WESTERN RANGE ASSOCIATION; EL TEJON SHEEP COMPANY; MELCHOR GRAGIRENA; MOUNTAIN PLAINS AGRICULTURAL SERVICE; and ESTILL RANCHES, LLC, Defendants.	Case No. 3:16-cv-00237-MMD-VPC

DEFENDANT WESTERN RANGE ASSOCIATION'S MOTION TO DISMISS COUNTS I, III, IV, V AND IX OF PLAINTIFFS' SECOND AMENDED COMPLAINT

COMES NOW Defendant WESTERN RANGE ASSOCIATION ("WRA"), by and through its attorney Ellen Jean Winograd of Woodburn and Wedge, and hereby moves the Court to dismiss Counts I, III, IV, V and IX of Plaintiffs' Second Amended Complaint ("SAC"). WRA's Motion to Dismiss is supported by the following Memorandum of Points and Authorities and the pleadings and papers on file herein.

MEMORANDUM OF POINTS AND AUTHORITIES

I
INTRODUCTION

The instant action purports to be a "class action" lawsuit brought by Abel Cántaro Castillo ("Cántaro"), Alcides Inga Ramos ("Ramos"), and Rafael De La Cruz ("De La Cruz") (collectively "Plaintiffs"), on behalf of themselves and "all of those similarly situated."[1] Plaintiff Cántaro is suing Defendants WRA, El Tejon Sheep Company ("El Tejon") and Melchor Gragirena ("Gragirena"); Plaintiff Ramos is suing Defendants Mountain Plains Agricultural Service ("MPAS") and Estill Ranches, LLC ("Estill Ranches"); Plaintiff De La Cruz is suing Defendant MPAS. [SAC, Doc #111, p. 23, ¶ 120-p. 32, ¶ 184]. In the SAC, only Plaintiff Cántaro is suing WRA. Defendant WRA is a California non-profit corporation involved in recruiting foreign shepherds.[2] [Doc #111, p. 7] WRA is currently headquartered in Twin Falls, Idaho. [Doc #111, p. 7]

Plaintiffs' SAC asserts 18 causes of action (labeled as Counts One through Eighteen). [Doc #111] WRA's Motion to Dismiss pertains to Counts One, Three, Four, Five and Nine brought by Plaintiff Cántaro against WRA and all other Defendants have

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[1] Although the "class" Plaintiffs seek to establish is disputed, that will be the subject of subsequent motion practice, should any of Plaintiffs' claims survive as to Defendant WRA.

[2] The Department of Labor's ("DOL") H-2A statutes and regulations, discussed *infra*, create the regulatory scheme governing foreign H-2A labor for sheep herding and goat herding. Because the DOL has occupied the entire field of H-2A regulations (with inter-agency participation by the Department of Homeland Security ["DHS"], Immigration and other agencies), the wage floors are established in a statutorily specific federal regulatory setting.

also filed dismissal motions and to move for stay of discovery.[3] The alleged WRA "class" is "All persons whom WRA 'employed' as shepherds through the H-2A program, who worked in Nevada during the applicable statute of limitations." [Doc #111, p. 23, ¶ 121] The alleged "WRA Former 'Employee' Sub-Class" is "All persons whom WRA 'employed' as shepherds through the H-2A program, who worked in Nevada during the applicable statute of limitations and who are no longer employed by the WRA."

As set forth in WRA's Motion to Dismiss the First Amended Complaint ("FAC") [Doc #45], the "breach of contract claims" and the promissory estoppel/unjust enrichment/*quantum meruit* claims are substantively inadequate to withstand dismissal because Cántaro can neither identify specific express contractual provisions herein to be interpreted, nor can Plaintiff Cántaro establish even an arguable entitlement to relief under a theory of unjust enrichment, because of his complete failure to plead any facts in the SAC that would constitute "promises" outside the express contract alleged or express promises that arose after the contract. [Doc #111]

This Motion to Dismiss the SAC, however, focuses primarily on subject matter jurisdiction, the basis upon which this Court dismissed the FAC and the (only) basis upon which Plaintiffs attempted to remedy pleading deficiencies in their SAC.

II
STATEMENT OF FACTS

Plaintiff Cántaro was a herder at El Tejon, dividing his time between California and Nevada. [Doc #111, p. 7, ¶ 13] Plaintiff Cántaro claims to have worked from about October to mid-April (seven months out of the year) in California [Doc #111, p. 13, ¶ 47], and from mid-April to September or early October (the remaining five months of the

[3] The remaining Counts are brought against other Defendants and <u>not</u> WRA.

year) in Nevada. [Doc #111, p. 13, ¶ 47] Defendant El Tejon, a WRA member, paid Plaintiff Cántaro the higher California H-2A rate of $1,422 per month during his course of employment. [Doc #45, p. 16, ¶ 97] The $1,422 monthly rate paid to Plaintiff Cántaro was the prevailing California wage rate at the time, in compliance with the then-current monthly Adverse Effect Wage Rate ["AEWR"]. [Doc #111, p. 20, ¶ 105] This higher $1,422 California rate was paid, despite the fact that Plaintiff Cántaro was dividing his time between California and Nevada during his work as a herder.[4] [Doc #111, p. 7, ¶¶ 13, 15]

Plaintiff Ramos was an employee of Estill Ranches in Nevada from April, 2012 to approximately February, 2013. [Doc #111, p. 7, ¶ 15] Plaintiff Ramos' causes of action are against Defendants Estill Ranches and MPAS. [Doc #111, pp. 28-32, 42-47] Plaintiff De La Cruz was an employee of MPAS from March, 2009 until late 2014, [Doc #111, p. 7, ¶ 14] Plaintiff De La Cruz's causes of action are against Defendant MPAS. [Doc #111, pp. 28-30, 41-45]

III
PROCEDURAL BACKGROUND

For purposes of the pending motion, WRA seeks dismissal of Counts One, Three, Four, Five and Nine; the only claims against WRA.

Originally, sole Plaintiff Cántaro filed suit against WRA, El Tejon and Gragirena on May 3, 2016. [Doc #1] On September 10, 2016, WRA and El Tejon both filed motions to dismiss. On October 13, 2016, Plaintiff Cántaro, plus newly-named Plaintiff Ramos filed an Amended Complaint, wherein additional defendants were added.

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[4] Prior to November 15, 2015, Nevada's monthly wage rate was much lower than California's. As the Complaint points out, the DOL previously set the wage floor at $800 per month in Nevada, until it was recently changed to $1,206.31, effective November 16, 2015. [Doc #45, p. 15, ¶ 90] This Nevada change was in accordance with the "phasing in" provisions of new monthly wage requirements. This amount will increase annually by 10% in both 2017 and 2018 in order to reach the overall total monthly wage calculated in the federal regulation changes. *See*, 20 CFR 655.211(c)-(d). **However, these recent changes are inapplicable to Plaintiff Cántaro because he never worked as a herder for El Tejon in 2015.** [Doc #45, p. 4, ¶ 9.]

Seventeen (17) new causes of action also appeared. [Doc #45] The Amended Complaint omitted the *Fair Labor Standards Act* ("FLSA") cause of action previously asserted in the original Complaint. [Doc #1, pp. 21-22]

Co-Defendants El Tejon and Gragirena filed a Motion to Dismiss the FAC on November 10, 2016. [Doc #55] WRA filed a Joinder in El Tejon and Gragirena's Motion to Dismiss and filed its own Motion to Dismiss Counts One, Three, Four, Five and Nine of Plaintiffs' FAC. [Doc #66] Plaintiffs Cántaro and Ramos filed a Consolidated Opposition to Motions to Dismiss. The Court ordered dismissal of Plaintiffs' FAC and granted Plaintiffs leave to file a Second Amended Complaint. [Doc #107] Therein, the Court stated, *inter alia*:

> Having concluded that a two-year statute of limitations applies, the Court cannot give credence to Cántaro's allegation that "over $10 million" is in controversy. Cántaro based this calculation on the six-year statute of limitations for breach of a written contract. After reducing the recovery period to two years, the FAC facially alleges, at best, that the class members' aggregated claims against Cántaro's employers equal approximately $3.33 million. Cántaro has thus failed to allege that this case meets the requirements of CAFA jurisdiction, and his claims must be dismissed.
>
> The Court will therefore dismiss the FAC in its entirety for lack of subject matter jurisdiction, with leave to amend.

Doc #107, p. 17, emphasis added.

The SAC was filed on May 15, 2017. WRA now files this Motion to Dismiss Plaintiff's SAC.

IV
ARGUMENT

A. Legal Standard

Defendant WRA adopts and incorporates by reference the Legal Standard section of Defendant Estill Ranch's Motion to Dismiss the SAC. [Doc #121, pp. 4-5] In addition, Defendant WRA adopts and incorporates by reference the El Tejon Defendants' Legal Standard section. [Doc #117, pp. 4-5]

As this Court stated in its April 13, 2017 Order:

> While the defendant is the moving party in a motion to dismiss, the plaintiff is the party invoking the court's jurisdiction. Consequently, "the plaintiff bears the burden of proving that the case is properly in federal court." *Wright v. Incline Vill. Gen. Imp. Dist.*, 597 F.Supp.2d 1191, 1198 (D. Nev. 2009) (citing *McCauley v. Ford Motor Co.*, 264 F.3d 952, 957 (9th Cir. 2001)). A motion to dismiss for lack of subject-matter jurisdiction pursuant to Rule 12(b)(1) may take one of two forms. *Thornhill Publ'g Co. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). It may be a "facial" challenge or it may be a "factual" challenge. *Id.* "In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "[I]n a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id.*
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> * * *
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> The plaintiff has the "burden of establishing that the court, in fact, possesses subject-matter jurisdiction" by present[ing] affidavits or any other evidence necessary." *St. Clair v. City of Chico*, 880 F.2d 199, 201 (9th Cir. 1989).

Doc #107, pp. 4-5.

In the instant case, Plaintiffs' claims against Defendant WRA (still) fail to meet the applicable standard; no plausible claim has been alleged that would confer subject matter jurisdiction. *Ashcroft v. Iqbal*, *supra*. Counts One, Three, Four, Five and Nine of Plaintiffs' SAC must be dismissed as a matter of law.

B. This Court Lacks Jurisdiction Under 28 USC § 1332(d) (CAFA).

To the extent that co-Defendants assert legal arguments supporting the lack of jurisdiction, Defendant WRA adopts those arguments and incorporates them herein by reference.

With no substantial factual changes, Plaintiffs' SAC again alleges that this Court has diversity jurisdiction under 28 U.S.C. § 1332(d), based on the *Class Action Fairness*

Act ("CAFA"). CAFA confers jurisdiction to the District Court over certain class actions, as long as "the class has more than 100 members, the parties are minimally diverse, and the amount in controversy exceeds $5 million." *Yocupicio v. PAE Grp., LLC*, 795 F.3d 1057, 1059 (9th Cir. 2015). "While CAFA permits aggregation of claims of separate plaintiffs, claims against multiple defendants can only be aggregated when the defendants are jointly liable." *See Vagle v. Archstone Communicites, LLC,* No. CV 13-09044 RGK AJWX, 2014 WL 463532 (C.D. Cal. Feb. 5, 2014).

In the Order dismissing the FAC herein, Judge Jones refused to aggregate damages and noted that Plaintiffs' FAC:

> ...essentially consists of two parallel class actions asserting like claims under similar factual circumstances. ...each Plaintiff's claims are wholly unrelated to the claims of the other,...
>
> * * *
>
> **There is no relationship alleged between Cántaro and Inga, other than their common status as H-2A workers in Nevada....**

Doc #107, p.14, emphasis added.

> **Accordingly, there is no conceivable basis on which to assert, for example, that Cantaro's employers are jointly liable for the claims alleged by Inga.**

Doc #107, p. 15, emphasis added.

This failure to assert claims has not been remedied by the SAC. The burden of proving CAFA jurisdiction rests with the party asserting jurisdiction. *See Abrego Abrego v. Dow Chem. Co.*, 443 F.3d 676, 684 (9th Cir.2006) (it is to be presumed that a cause lies outside the limited jurisdiction of the federal courts and the burden of establishing the contrary rests upon the party asserting jurisdiction [internal quotation marks omitted[5]].

[5] "CAFA's requirements are to be tested by consideration of real evidence and the reality of what is at stake in the litigation, using reasonable assumptions underlying the defendant's theory of damage exposure." *Ibarra v. Manheim Invs., Inc.*, 775 F.3d 1193, 1197-98 (9th Cir. 2015), emphasis added.

As set forth above, Plaintiffs' initial claim of jurisdiction under CAFA in the FAC was dismissed by this Court. *See* Order, Doc #107, filed April 13, 2017. Therein, the Court held that Plaintiffs could not meet the requirements under CAFA to establish jurisdiction. To establish CAFA jurisdiction, each Plaintiff must show, independently, that he and the class members he seeks to represent might recover more than $5 million from his alleged employers only. And, again, this fatal failure has not been remedied in the SAC.

"When a plaintiff invokes federal-court jurisdiction, the plaintiff's amount-in-controversy allegation is accepted if made in good faith." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 553 (2014). "Applying this principle, courts in the Ninth Circuit have stated that the amount in controversy requirement is 'presumptively satisfied' by a complaint that alleges a sufficient amount on its face, subject to the legal certainty test." *Bayol v. Zipcar, Inc.*, No 14-CV-02483-THE, 2015 WL 4931756, at *6 (N.D. Cal, Aug. 18, 2015) (citing 9th Circuit cases). Where a complaint facially alleges an adequate amount, some courts in this circuit have required the defendant challenging diversity jurisdiction "to show that there is a legal certainty that a sufficient amount is *not* in controversy." *Id.* (emphasis in original). In the instant case, however, that facial adequacy has not been met.

In its Order dismissing Plaintiffs' FAC, the Court agreed with the Northern District of California's reasoning in *Bayol*, that the best approach "is to credit a plaintiff's good faith allegation, absent a factual challenge, but to require the plaintiff to justify it when challenged by a defendant's evidence." 2015 WL 4931756 at *6 (citing *St. Paul Mercury*, 303 U.S. 283). The Court in *Bayol* opined it was **plaintiffs'** burden to establish a legal possibility that they and their proposed classes might recover more than $5 million.

In the instant case, Plaintiffs have no basis for establishing recovery in excess of the jurisdictional requirement. Plaintiffs' SAC offers a detailed "chart" that while graphically impressive, is unsupported. It summarily enumerates alleged numbers of herders employed during certain years and alleged lost wages for each year. [Doc #111, p. 5] Plaintiffs have offered no factual basis to support this "chart", nor have they even attempted to verify the numbers.

While factually this chart could appear at first blush to meet the minimum requirements to establish CAFA jurisdiction, even a cursory review shows otherwise. Plaintiffs offer no support, facts or explanation as to the validity of the numbers. Having been told by the Court that their claims cannot be aggregated to establish the minimum required class member numbers this chart appears for the first time, "factually" demonstrating a purportedly sufficient number of class members. This is not enough; Plaintiffs are required to offer some credible evidence that establishes a legal possibility that their proposed class *might* recover more than $5 million. Mere charts with seemingly arbitrary numbers simply will not suffice to create a "factual" basis upon which jurisdiction allegedly exists.[6] Nor does it rise to the level of "real evidence" required by the 9th Circuit. *Ibarra v. Manheim Investments, supra.*

In granting Plaintiffs leave to file yet another amended complaint, this Court has been both generous and indulgent. Plaintiffs have now attempted three times to "get it right", yet the official looking charts with unsubstantiated numbers and wage claims are Plaintiffs' best attempt and are still woefully inadequate to confer CAFA jurisdiction.

[6] Furthermore, the lost wage claims as alleged in Plaintiffs' SAC appear grossly and dramatically exaggerated. Plaintiffs claim they were to be paid the Nevada minimum wage for 24 hours a day, 7 days a week. This is simply not true. While the agreement required the herders to be "on call," this does not entitle them to be paid for every minute, as reflected by the applicable AEWR rates.

C. The Statute of Limitations Bars Plaintiffs' Claims

In its Order dismissing the FAC, this Court unequivocally held that Plaintiffs' claims for unpaid wages were based upon Defendants' alleged failure to pay the Nevada minimum wage and were subject to a two-year statute of limitations.

> Plaintiffs' claims are to recover unpaid wages based on Defendants' failure to pay the Nevada minimum wage. As such, the gravamen of this action is the alleged failure to pay the Nevada minimum wage, arising under the MWA.
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> ...
>
> Therefore, <u>the two-year statute of limitations applicable to claims arising under the MWA is also applicable to Cántaro's contract claims for unpaid Nevada minimum wages</u>.

Doc #107, pp. 16-17, emphasis added.

The Court refused to give credence to Cántaro's allegation that "over $10 million" was in controversy, as his calculations were based upon a six-year statute of limitations. Again, having been given direction from the Court and utilizing the applicable two-year statute of limitations, why is it that Plaintiffs can (now) somehow come up with these unsubstantiated charts, purportedly demonstrating both the required number of class members and the required amount in controversy within the two-year statute of limitations put forth by the Court.[7] Why are these "facts" pleaded for the first time in Plaintiffs' <u>third</u> attempt to assert their claims? If Plaintiffs had these "facts" before, why were they never previously pleaded? If Plaintiffs did not have these alleged "facts" for prior pleadings, how did they suddenly appear, specifically after such direct criticism from the Court in its Order dismissing the FAC?[8]

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[7] The two-year statute of limitations would determine that the furthest date back in time that Plaintiffs could go to fulfill the requirements of CAFA jurisdiction would be May 2014. All of a sudden, Plaintiffs appear to have claims that exceed the requirement of the amount in controversy, yet in the FAC, the same time period would have only amounted to $3.33 million in controversy.

[8] How many chances do these Plaintiffs have to desperately attempt to create subject matter jurisdiction where the Court has already found there is none?

It invites great scrutiny that Plaintiffs now summarily conclude that "WRA employed between at least 98 and 173 Nevada shepherds each year in the 154 weeks between May 3, 2014 (two years before the initial complaint in this action as filed) and the filing of the Second Amended Complaint on May 15, 2017." [Doc #111, p. 4, ¶ 8][9] What Plaintiffs overlook or misunderstand is that the number of herders certified to work each year, in no way signifies that each herder worked continuously for a 12-month period.[10]

Accordingly, Plaintiffs' unsupported assertions that some given number of herders were employed in a given year, ignores the obvious non-continuous nature of each year's work in the Nevada sheepherding industry.

D. *Llacua, et al. v. Western Range, et al.*

As set forth in Defendant WRA's prior Motions to Dismiss, one class action lawsuit was already brought in Colorado, alleging the same or similar claims for H-2A herders of DOL wage floor and Nevada law violations. *See Llacua, et al. v. Western Range, et al.*, 1:15-cv-01889-REB-CBS (D. Colo. 2015). Plaintiff Cántaro mentioned the *Llacua* class action case in the original complaint [Doc #1], the FAC [Doc #45], and again in the SAC [Doc # 111].

In *Llacua*, a Colorado federal court addressed (some) similar wage issues and issued a 42-page Magistrate's Recommendation and subsequent District Court Order adopting the Recommendation. *See*, *Llacua, et al. v. Western Range, et al.*, (Magistrate) Recommendation on Defendants' Motions to Dismiss the Second Amended Complaint and (Judge Blackburn) Order Overruling Objections to

[9] In fact, WRA does not "employ" herders, its members do, but for purposes of this motion only, such "employment" will not be addressed.

[10] The H-2A visa program allows agricultural employers to hire foreign workers on a temporary work visa to fill seasonal jobs. These "seasonal jobs" are just that: seasonal. Thus, the majority of the contracts are not for a full year, most are for a limited number of months each year.

Recommendation of the United States Magistrate Judge previously submitted. *Llacua* is now pending before the 10th Circuit, Case No. 17-1113.

E. Federal Regulation of H-2A Herders

If this Court addresses any substantive aspects of Plaintiffs' claims, Defendant WRA provides the following H-2A summary to illustrate that even if the Court somehow finds jurisdiction over these claims, they must fail as a matter of law and the action is still subject to dismissal.

Plaintiffs have alleged 18 Causes of Action. Counts One and Two both claim a failure to pay Nevada minimum wage "in violation of the Nevada Constitution."[11] These causes of action are <u>identical</u> to those pleaded in the FAC and dismissed by this Court. Thus, we refer to Defendant WRA's Motion to Dismiss the FAC, and incorporate by reference the arguments set forth therein.

The relevant special provisions outlining H-2A sheep herder workers' rates of pay are 20 CFR. §§ 655.210(g) and 655.211. Section 655.210(g) provides that an "employer must pay the worker at least the monthly AEWR, as specified in 20 CFR § 655.211, the agreed-upon collective bargaining wage, or the applicable minimum wage imposed by federal or state law [or judicial action] in effect at the time work is performed, whichever is highest, for every month of the job order period or portion thereof." 20 CFR § 655.210. The specific Federal minimum H-2A wage floor (AEWR), by State, **<u>is dictated</u>**

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[11] Those two claims arising from alleged Nevada constitutional claims, one under Section 16 of Article 15 of the Nevada Constitution [Doc #111, pp. 33-34]. Only Count One pertains to Defendant WRA.

by the DOL.[12] For Nevada (pre-November 15, 2015) it was $800 per month, plus room and board.[13]

Plaintiffs may argue in a tortured analysis that the "whichever is highest" clause imposes a requirement that employers of sheepherders must pay (state or federal) minimum wage if it is indeed higher. This ignores the fact that the AEWR rates account for state wage differences. Further, sheep herding work has been deemed to be impossible to track via "hours worked" due to the remoteness of the services provided, so the monthly AEWR must be applied as a matter of law. 80 Fed. Reg. 62957, 62984; *see also*, 80 Fed. Reg. 78840. The existence of the AEWR belies Plaintiffs' attempts to inflate the jurisdictional amount in controversy, as a policy determination has already been made setting wage floors for herders.

In the instant case, Plaintiff Cántaro's allegations as pleaded in the SAC, illustrate compliance with the Federal mandates, **not** the breach thereof. Accordingly, as

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[12] Prior to November 16, 2015, the AEWR wage floor established by the DOL was as follows:

State(s)	Wage Floor ($/Month)
Colorado, Idaho, Montana, New Mexico, North Dakota, Oklahoma, Texas, Utah and Wyoming	$750
Arizona and Washington	$750
Nevada	$800
California	$1,422.55
Oregon	$1,277

As of November 16, 2015, the wage floor for H-2A sheep herders in Nevada was raised by the DOL to $1,206.31 per month. *See*, Labor Certification Process for the Temporary Employment of Aliens in Agriculture in the United States: Adverse Effect Wage Rate for Range Occupations Through 2016, 80 Fed. Reg. 70840 (the "2015 Special Procedures").

[13] The post-November 15, 2016 rates are irrelevant since Plaintiffs' own pleading states that Plaintiff Cántaro worked for El Tejon in Nevada and California only through 2014. [Doc #45, p. 4, ¶ 9.]

set forth herein, as pleaded, Plaintiff Cántaro's First, Third, Fourth, Fifth and Ninth counts against WRA must substantively fail as a matter of law.[14]

Counts One, Three, Four, Five, and Nine against WRA remain almost identical to the way in which they were pleaded in Plaintiffs' First Amended Complaint. Plaintiffs' were given a <u>third</u> opportunity by this Court to correct fatal jurisdictional deficiencies in their Complaint when they were given permission to file a Second Amended Complaint. To allege the exact same or substantially similar arguments against Defendant WRA that were dismissed by this Court, appears insulting to both this Court and this Defendant. This is a waste of Defendant's time and the Court's resources. *See*, e.g., FRCP 1.

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[14] These counts must fail legally, without even addressing the question of whether WRA can be held to the standards of an "employer", a fact specifically **<u>contradicted by Plaintiffs' own Exhibit B</u>** to the Notice of Filing Second Amended Complaint [Doc #111], which states:

> Of the below listed EMPLOYER (Member of Western Range Association) and that Western Range Association is not the employer for the duration of my stay in the United States.
>
> HERDER (Employee)
>
> Plnes VIVAS Moreno #70305 ______ Name (Print)
> 66418 Hwy 6
> [redacted] Permanent Address
>
> ______ Signature of Herder
>
> By my signature below I understand that I am the employer of the Herder (employee) and Western Range is not the Employer
>
> EMPLOYER (Member of Western Range Association)
>
> James Craig Bair Ranch Company ______ Name (Print)
> 66418 Hwy 6
> Glenwood Springs, CO 81601
> [redacted] Permanent Address
>
> ______ Signature of Employer

(Highlighted for this Court's convenience.)

Although this was initially attached to the "Notice of Filing First Amended Complaint," it was intended by Plaintiffs to be a sample, although it clearly involves a different herder and a different rancher member.

VI
CONCLUSION

Based on the foregoing, Defendant WRA respectfully requests that Counts One, Three, Four, Five and Nine of Plaintiffs' Second Amended Complaint against WRA be dismissed, thus dismissing WRA completely from this action.

DATED this 5th day of July, 2017.

WOODBURN AND WEDGE

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CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing **DEFENDANT WESTERN RANGE ASSOCIATION'S MOTION TO DISMISS COUNTS ONE, THREE, FOUR, FIVE AND NINE OF PLAINTIFFS' SECOND AMENDED COMPLAINT** was made through CM/ECF or, as appropriate, by sending a copy thereof by first-class mail from Reno, Nevada, addressed as follows:

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DATED this 5th day of July, 2017.

Employee of Woodburn and Wedge