IN THE SUPREME COURT OF THE STATE OF NEVADA

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ABEL CÁNTARO CASTILLO, No. 85926

Appellant,

vs.

WESTERN RANGE ASSOCIATION,

Respondent.

_____________________________________/

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

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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-RCJ-VPC **PLAINTIFFS' CONSOLIDATED OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS SECOND AMENDED COMPLAINT**

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Plaintiff Abel Cántaro Castillo ("Mr. Cántaro") alleges that Defendants Western Range Association ("WRA"), El Tejon Sheep Company ("El Tejon") and Melchor Gragirena ("Gragirena") have cheated him and others similarly situated out of his hard-earned wages. Plaintiff Rafael De La Cruz ("Mr. De La Cruz") asserts the same claims against Defendant Mountain Plains Agricultural Services ("MPAS"). Defendants did this by violating the Nevada Minimum Wage Amendment, the terms of Plaintiffs' employment contracts, and their duties under federal regulations issued by the Department of Labor ("DOL") to pay fair wages to Mr. Cántaro and Mr. De La Cruz.

Mr. Cántaro and Mr. De La Cruz, along with Plaintiff Alcides Inga Ramos ("Mr. Inga") also allege that Defendants violated the terms of their employment contracts, as well as federal law and DOL regulations, by failing to pay costs associated with obtaining Plaintiffs' H-2A labor certifications necessary to work legally in the United States.

The Court dismissed Plaintiffs' First Amended Complaint on jurisdictional grounds. Dkt. 107 ("Order"). The Court held there was no federal question jurisdiction because "the question raised in this case is a legitimate federal question, but it is not substantial because controlling law clearly resolves the issue." *Id.* at 11-12. The Court next held that a two-year, rather than six-year, statute of limitations applied to Plaintiffs' wage claims, and therefore Plaintiffs had failed to sufficiently allege that their claims could meet the amount-in controversy requirement of the Class Action Fairness Act, 28 U.S.C. § 1332(d) ("CAFA"), using this shorter recovery period. *Id.* at 17.

Unlike the First Amended Complaint, which included a bare allegation that the damages at issue were "over $10 million," the Second Amended Complaint presents detailed calculations, separately for WRA and MPAS. Plaintiffs' Second Amended Complaint sufficiently alleges that Mr. Cántaro's class claims against WRA meet CAFA's amount-in-controversy requirement, and that, separately, Mr. De La Cruz's class claims against MPAS also meet CAFA's amount-in-controversy requirement. Dkt. 111 ("SAC") at ¶¶ 8-11. The Court therefore has jurisdiction under CAFA over WRA and MPAS (the "Association Defendants").

Supplemental jurisdiction exists over the claims against Defendants El Tejon Sheep Company and Melchor Gragirena ("El Tejon/Gragirena")—Mr. Cántaro's joint employers along with WRA—because the claims against them are based on the same "case or controversy" as the claims against WRA. The same supplemental jurisdiction exists over Estill Ranches—Mr. Inga's joint employer along with MPAS—based on the Court's CAFA jurisdiction over MPAS. The Court therefore has supplemental jurisdiction over El Tejon, Gragirena and Estill Ranches (the "Ranch Defendants").

Defendants WRA's and MPAS's cursory attacks on Plaintiffs' damages allegations do not undermine the showing of CAFA jurisdiction. Defendants El Tejon/Gragirena and Estill Ranches do not even argue that the Court lacks supplemental jurisdiction. Instead, Defendants make arguments that have no relevance to this case or raise factual issues that cannot be decided on a motion to dismiss. None of Defendants' arguments should prevent the Court from adjudicating Plaintiffs' claims on their merits.

Finally, MPAS's argument, limited to Plaintiff De La Cruz's claims, that either *res judicata* or claim splitting should apply here, fails. There has been no final judgment on the merits as required for *res judicata* to apply, and there has been no simultaneous dispute of identical claims as required for claim splitting to apply.

BACKGROUND

The facts of this case, as well as the background of the statutes and regulations at issue (the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), and the DOL regulations setting minimum wages and working conditions for H-2A workers, 20 C.F.R. § 655 et seq.) are summarized in greater detail in Plaintiffs' Consolidated Opposition to Motions to Dismiss the First Amended Complaint, Dkt. 77, and the Second Amended Complaint, Dkt. 111.

Plaintiffs filed their First Amended Complaint on December 16, 2016. Dkt. 45 ("FAC"). Plaintiffs—former sheepherders who worked for Defendants in Nevada under the H-2A program—alleged they were entitled to wages and working conditions outlined in the DOL's H-2A regulations, which became part of Plaintiffs' employment contracts. *Id.* at ¶¶ 82-100. Plaintiffs further alleged that Defendants had a contractual obligation to pay Plaintiffs the Nevada minimum wage, and breached their contracts and violated state law when they failed to do so. *Id.* Plaintiffs argued that the Court had federal question jurisdiction over Plaintiffs' contract claims because they required resolution of the significant federal question of whether federal DOL regulations required certain terms to be included in a contract between the parties, which entitled Plaintiffs to the Nevada minimum wage. *Id.* at ¶ 6. Plaintiffs, in the alternative, alleged that the Court had jurisdiction over Mr. Cántaro's class claims against WRA under the Class Action Fairness Act ("CAFA") because the parties were minimally diverse, at least 100 plaintiffs were in the class, and the amount in controversy was "over $10 million" when looking at the six-year statute-of-limitations period for the WRA class' contract claims. *Id.* at ¶ 7.

On April 13, 2017, the Court dismissed Plaintiffs' First Amended Complaint on jurisdictional grounds. Dkt. 107 ("Order"). The Court first found that federal question jurisdiction did not exist. The Court noted that the issue was whether the terms of Plaintiffs' work contracts—which incorporated Defendants' obligations under the DOL's H-2A regulations to pay the state minimum wage, if higher than the federal minimum wage or the adverse effect wage rate ("AEWR")—"will raise a substantial question of federal law." *Id.* at 9. The Court held that "the question raised in this case is a legitimate federal question, but it is not substantial because controlling law clearly resolves the issue." *Id.* at 11-12. Specifically, the Court found that the employment contracts incorporated the DOL's H-2A regulations, and therefore "as a matter of law, Plaintiffs' H-2A shepherd contracts included a promise to pay the applicable state minimum wage, if higher than the applicable AEWR." *Id.* at 12.

The Court also held that Plaintiffs had insufficiently pled CAFA jurisdiction. First, the Court found that the proper statute of limitations for Plaintiffs' contract claims is two-years because the gravaman of the claims arose from the Nevada Minimum Wage Amendment, not on Plaintiffs' employment contracts. *Id.* at 16-17. Plaintiffs had alleged that their claims against WRA were "over $10 million" based on a six-year recovery period, and therefore the Court estimated that a two-year limitations period made the claims worth one-third of $10 million, or $3.33 million, below CAFA's $5 million amount-in-controversy requirement. *Id.* at 17. The Court granted Plaintiffs leave to amend in order "to allege that this case meets the requirements of CAFA jurisdiction." *Id.* at 17.

Separately, the Court recognized that Mr. Cántaro alleged he was jointly employed by WRA, El Tejon and Gragirena, and Mr. Inga had likewise alleged joint employment by MPAS and Estill

Ranches. *Id.* at 2. Plaintiffs had furthermore alleged that they were "engaged … twenty-four hours a day and seven days a week" while employed as Nevada sheepherders. *Id.*

The Court also acknowledged that its jurisdiction under CAFA over WRA (if CAFA's requirements had been met) could form the basis for the Court's supplemental jurisdiction over El Tejon and Gragirena. *Id.* at 5 ("Plaintiffs argue diversity jurisdiction under [CAFA] … which in turn supports supplemental jurisdiction … over the remaining defendants.").

Using the Court's guidance, Plaintiffs went back and calculated their actual damages to determine whether their claims met CAFA's $5 million amount-in-controversy requirement as to claims against WRA and MPAS, using the new two-year statute of limitations. (The other two requirements—complete diversity and number of plaintiffs—were undoubtedly met.) Using publicly-available government records to determine the number of plaintiffs in each of the WRA and MPAS classes, and citing to those data sources, Plaintiffs calculated the precise damages for each of the two Association Defendant classes for the two-year statute of limitations. Damages for the minimum wage claims (excluding reimbursement claims) for the WRA class amount to $25,990,220.21, and for the MPAS class amount to $7,319,415.10. SAC at ¶¶ 8-11. Plaintiffs filed their Second Amended Complaint thoroughly detailing the method they used to calculate these damages. *Id.*

Plaintiffs' claims remain substantively similar in the Second Amended Complaint, as the Court had not dismissed the First Amended Complaint for failure to adequately plead any of their claims, despite Defendants' urging to do so in their motions to dismiss. However, Mr. Inga, no longer a plaintiff with wage claims against MPAS and Estill Ranches because he worked before the two-year statute of limitations began on those claims, added contract claims, as well as promissory estoppel and unjust enrichment/*quantum meruit* claims, for failure to reimburse travel and visa-related expenses, which are based on Mr. Inga's employment contract, not on the Nevada Minimum Wage Amendment, and therefore carry a six-year, not two-year, statute of limitations. *Id.* at ¶¶ 246-260, 270-284. Plaintiffs Cántaro and De La Cruz brought similar failure-to-reimburse contract, promissory estoppel and unjust enrichment/*quantum meruit* claims against their respective employers. *Id.* at ¶¶ 193-222, 246-260.

Plaintiff De La Cruz, a sheepherder who had worked in Nevada for MPAS during the two-year statute of limitations, came into the case as a named plaintiff representing the class of MPAS shepherds in the Second Amended Complaint. Mr. De La Cruz had raised similar claims as a small part of a broader anti-trust action in *Llacua, et al v. W. Range Ass'n, et al.*, No.1:15-cv-01889-REB-CBS, 2017 WL 2537101, (D. Colo. June 12, 2017), where his claims were dismissed without prejudice on jurisdictional grounds prior to his filing of the Second Amended Complaint in the case at bar. *Llacua*, Dkt. 173 at 8, attached as Ex. A. *Llacua* is on appeal, but Mr. De La Cruz is not appealing the ruling on his state-law claims, instead bringing them here. *See Llacua, et al v. W. Range Ass'n, et al.*, No. 17-1113, (10th Cir. Mar. 29, 2017), Dkt. 01019794140, attached as Ex. B (Tenth Circuit Docketing Statement listing issues raised on appeal; jurisdictional ruling on state-law claims not listed).[1]

In a separate case, Mr. De La Cruz had raised claims against MPAS related to the manner in which the DOL calculated the federal AEWR wage rate, not minimum wage claims. *Hispanic Affairs Project, et al v. Perez, et al.*, No. 1:15-cv-01785-RM-MJW (D. Colo. Aug. 8, 2015). On a joint motion by all parties, including MPAS, that case was administratively closed before any litigation had taken place, *id.*, Dkt. 42, attached as Ex. C, and Mr. De La Cruz has since given notice of voluntary dismissal of those claims, *id.*, Dkt. 44, attached as Ex. D.

Between June 16 and July 5, 2017, Defendants filed Motions to Dismiss the Second Amended Complaint. Dkt. 118 ("MPAS Mot."); Dkt. 124 ("WRA Mot."); Dkt. 117 ("El Tejon/Gragirena Mot."); Dkt. 121 ("Estill Ranches Mot."). As to CAFA jurisdiction, WRA and MPAS have not provided any reason to find Plaintiffs' damages calculations are in any way inadequate to establish jurisdiction. El Tejon/Gragirena and Estill Racnhes do not address supplemental jurisdiction at all, instead arguing the Plaintiffs cannot aggregate claims against them

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[1] Another reason Mr. Inga now raises the claims for reimbursement of travel and visa-related expenses is that he had been an absent class member in *Llacua*. Once he could no longer rely upon the *Llacua* case to address those claims, since they had been dismissed and not appealed, he pursued those claims here.

with the claims against WRA and MPAS. Yet nowhere in Plaintiffs' Second Amended Complaint do Plaintiffs attempt to aggregate claims between the Association Defendants and the Ranch Defendants, nor do they assert original jurisdiction via CAFA over the Ranch Defendants. Aside from jurisdiction, Defendants continue to challenge Plaintiffs' claims by raising factual arguments that cannot be decided on a motion to dismiss. They also attempt to dismiss Plaintiffs' promissory estoppel and unjust enrichment/*quantum meruit* claims and claims against Gragirena in his individual capacity, citing inapposite case law and overlooking cases explicitly permitting such claims.

Plaintiffs have cured the jurisdictional deficiencies outlined by the Court, and none of the arguments Defendants present in their respective Motions to Dismiss should prevent the Court from fully considering Plaintiffs' claims.

STANDARD OF REVIEW

A rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction may be made in two ways, either as a facial or a factual challenge to the existence of federal jurisdiction. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir.2000). A facial challenge asserts that the pleadings are insufficient to support subject matter jurisdiction. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). When a party makes a facial challenge, the court must accept the allegations of the pleadings as true. *Id.* A factual challenge asserts that there is no actual existence of jurisdiction, and "relie[s] on extrinsic evidence" outside of the plaintiff's pleadings. *Id.* If the challenge is factual, the court is free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary. *Augustine v. U.S.*, 704 F.2d 1074, 1077 (9th Cir. 1983). Defendants have not stated whether their jurisdictional challenge is facial or factual, but they have not relied on any arguments or evidence outside of Plaintiffs' First Amended Complaint. Defendants therefore make a facial challenge, and the Court must accept Plaintiffs' allegations as true.

There is a strong presumption against dismissing an action for failure to state a claim. *Blanck v. Hager*, 360 F. Supp. 2d 1137, 1147 (D. Nev. 2005). "Dismissal without leave to amend is improper unless it is clear that the complaint could not be saved by any amendment." *Harris v. Amgen, Inc.*, 573 F.3d 728, 737 (9th Cir. 2009). Federal Rule of Civil Procedure 8(a)(2) requires only a "short and plain" statement that adequately informs the defendant of the plaintiff's cause of action. *Id.* When ruling on a 12(b)(6) motion to dismiss for failure to state a claim, the court must take all allegations of material fact as true and construe the facts in the light most favorable to the non-moving party. *W. Reserve Oil & Gas Co. v. New*, 765 F.2d 1428, 1430 (9th Cir. 1985). If there exists any set of facts that entitles the non-moving party to the relief the Court can grant, dismissal is improper. *Blanck*, 360 F. Supp. 2d at 1148. *See also Love v. U.S.*, 915 F.2d 1242, 1245 (9th Cir. 1989) ("Dismissal is improper unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.").

ARGUMENT

I. THE COURT HAS JURISDICTION OVER ALL CLAIMS

A. The Court Has Jurisdiction Under the Class Action Fairness Act Over the Claims Against Defendants WRA and MPAS

This Court has diversity jurisdiction over Plaintiffs' claims against WRA and MPAS based on the Class Action Fairness Act, 28 U.S.C. § 1332(d) ("CAFA"). "CAFA gives federal courts jurisdiction over … class actions … if the class has more than 100 members, the parties are minimally diverse, and the amount in controversy exceeds $5 million." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 552 (2014).

The Court dismissed the First Amended Complaint because Plaintiffs failed to allege that, based on a two-year rather than six-year statute of limitations, the case met CAFA's amount-in-controversy requirement. Order at 17. In doing so, the Court noted that "in order 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." *Id.* at 15 (emphasis omitted). With leave to amend and the Court's directive in mind, Plaintiffs went back and counted the number of Nevada shepherds employed by WRA and MPAS in the new two-year statutory period. SAC at 4-6. Using simple arithmetic, Plaintiffs calculated the total lost wages for each class, and found that the wage claims by the WRA class amount to $25,990,220.21, and the wage claims by the MPAS class amount to $7,319,415.10. *Id.* Thus, Plaintiffs have now alleged, with specificity, how their claims against the Association Defendants meet CAFA's amount-in-controversy requirements.

Defendants do not argue that the parties are not minimally diverse or that the WRA and MPAS classes have less than 100 members each. Nor do they argue that Plaintiffs have incorrectly counted the number of Nevada shepherds who worked for WRA and MPAS during the statutory period, as this information is publicly available on the DOL's website. SAC at ¶ 8 n.2. Instead, Defendants raise arguments that either misconstrue Plaintiffs' allegations or raise issues of fact not suited for a motion to dismiss.

WRA (along with the individual Ranch Defendants, *see infra* at 11-12) argues that Plaintiffs Cántaro and De La Cruz improperly aggregated their damages claims against WRA and MPAS together in order to reach CAFA's amount-in-controversy requirement. WRA Mot. at 6. They have not. Plaintiffs Second Amended Complaint clearly alleges that Plaintiff Cántaro and the WRA class might recover more than $5 million from WRA, and that Plaintiff De La Cruz and the MPAS class might recover more than $5 million from MPAS. As the Court noted, "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*." Order at 15. Plaintiffs have followed the Court's directive, and are not in any way aggregating their claims.

WRA next argues that Plaintiffs have "no factual basis" or "real evidence" to support their damages calculation. Yet Plaintiffs' calculation is simply based on the number of Nevada shepherds who worked for WRA in the statutory period—a number WRA does not and cannot dispute because it is publicly available on a federal government website cited by Plaintiffs. SAC at ¶¶ 10 n.5, 104. Plaintiffs cannot imagine a more accurate factual basis for their damages calculation. The number of hours worked per shepherd is spelled out in the well-plead allegations of the Complaint, and corroborated by the attached job order. SAC at ¶ 117; Ex. A at 4. The minimum wage in Nevada is established by law, and using these inputs, calculating the amount of wages due is straightforward. The offset for wages actually paid is also soundly sourced, as the well-plead allegations of the Complaint, attached job order, and published federal regulations setting forth the AEWR provide a firm foundation. SAC at ¶¶ 98, 104-05, 117. And, as WRA recognizes, now that Plaintiffs have alleged an amount in controversy sufficient to invoke CAFA jurisdiction, it is up to Defendants "to show that there is a legal certainty that a sufficient amount is *not* in controversy." WRA Mot. at 7 (citing *Bayol v. Zipcar, Inc.*, No. 14-CV-02483-TEH, 2015 WL 4931756, at *6 (N.D. Cal. Aug. 18, 2015)). Aside from its vague accusations that Plaintiffs' damages calculations are "arbitrary" and "unsubstantiated," WRA Mot. at 8-9, WRA has done nothing to show how Plaintiffs' calculations are incorrect.

In an apparent attempt to undermine Plaintiffs' credibility, WRA implies that Plaintiffs have not been candid with the Court because they alleged in the First Amended Complaint that the amount in controversy was "over $10 million" and now allege $25,990,220.21 in damages. WRA Mot. at 9. The only reason Plaintiffs did not perform precise damages calculations in their First Amended Complaint was because they thought it unnecessary—Plaintiffs believed the statute of limitations was six years, and knew without determining the exact number of shepherds employed or performing any detailed calculations that the damages for that recovery period would be well over $10 million, making more painstaking calculation unnecessary. After the Court dismissed for failure to properly allege damages sufficient to invoke CAFA jurisdiction for a two-year recovery period, Plaintiffs went back and performed the damages calculations the Court indicated were necessary to properly allege CAFA jurisdiction. Plaintiffs in no way hid facts or intentionally misled Defendants or the Court.

Finally, both WRA and MPAS argue that Plaintiffs inflate the number of hours Nevada shepherds worked in order to meet CAFA's amount-in-controversy requirement. WRA Mot. at 10; MPAS Mot. at 14. It is not clear whether WRA and MPAS seek to dismiss Plaintiffs' claims on this basis, but to the extent they do, these arguments are misplaced, as the number of hours worked is a factual issue that cannot be decided before discovery. *See, e.g., Hawkins v. Proctor Auto Serv. Ctr.*, LLC, No. RWT 09CV1908, 2010 WL 1346416, at *1 (D. Md. Mar. 30, 2010) (whether plaintiff worked overtime hours is a "factual issue[] [that] cannot be resolved on a motion to dismiss"). For example, MPAS argues that Plaintiffs may have been "on call" but not working during parts of their day, and should not be compensated for that time. MPAS Mot. at 14. Yet, as the Court already noted, Plaintiffs allege that they were engaged to work 24 hours a day, seven days a week, year round. Order at 2 ("Plaintiffs were … engaged to be on call twenty-four hours a day and seven days a week."). *See also Skidmore v. Swift & Co.*, 323 U.S. 134, 137 (1944) (employees must be compensated if they are "engaged to wait").

Other allegations in the Second Amended Complaint contradict MPAS's sleep time arguments. *See* SAC at ¶¶ 73, 91 (Mr. Inga did not receive adequate sleeping facilities, and Mr. De La Cruz was often awakened at night to tend to sheep). Whether Plaintiffs were engaged to wait, devoting their time and attention to the sheep, or whether they were permitted to and had the realistic opportunity to engage in uninterrupted personal pursuits, and whether they received eight hours of designated sleep time, five hours of uninterrupted sleep and adequate sleeping facilities sufficient to meet the requirements of Nevada Revised Statute 608.0195, *see* MPAS Mot. at 14, are all factual issues that cannot be addressed on a motion to dismiss.

Similarly, WRA argues that Plaintiffs' were "seasonal" workers under the H-2A regulations, and therefore did not work year round. Mot. at 10 n.10. Not only is this another factual issue, but it ignores the nature of sheepherding—shepherds, unlike seasonal agricultural workers who come to a farm for a short period to pick crops, must tend to sheep year round. There is no reason to believe that Defendants would leave their sheep unattended for portions of the year. *See* 20 C.F.R. § 655.215 (2015) ("The period of need identified on the H–2A … job order for range sheep or goat herding or production occupations must be no more than 364 calendar days."); *see also* Temporary Agricultural Employment of H-2A Foreign Workers in the Herding or Production of Livestock in the United States, 80 Fed. Reg. 200, 62999 (October 16, 2015) ("Many comments by employers of sheep and goat herders indicate that they use the 364-day maximum period of need permitted under current practice.").

Plaintiff Cántaro and the WRA class have sufficiently alleged CAFA jurisdiction over their claims against WRA, and Plaintiff De La Cruz and the MPAS class have done the same as to their claims against MPAS. No aggregation of claims has taken place, and any arguments these defendants raise as to hours worked or other factual issues cannot be addressed on a motion to dismiss.

RA 00146

B. The Court Has Supplemental Jurisdiction Over the Claims Against Defendants Gragirena, El Tejon and Estill Ranches

This Court has diversity jurisdiction over Plaintiffs' claims against WRA and MPAS based on CAFA. *See* Section I.A above, *supra* at 7-10. In turn, the Court has supplemental jurisdiction under 28 U.S.C. § 1367 over Mr. Cántaro's claims against Defendants Gragirena and El Tejon (based on jurisdiction over WRA), as well as over Mr. De La Cruz's claims against Defendant Estill Ranches (based on jurisdiction over MPAS). A court may assume supplemental jurisdiction over a claim for which it would not otherwise have jurisdiction when that claim and another claim within its jurisdiction "derive from a common nucleus of operative fact" such that the parties "would ordinarily be expected to try them all in one judicial proceeding." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1996). In addition, a decision to exercise jurisdiction should consider whether "judicial economy, convenience and fairness to litigants" favor hearing the claims together. *Id.* at 726.

Defendants El Tejon/Gragirena and Estill Ranches raise essentially the same arguments they made in their Motions to Dismiss the First Amended Complaint: Plaintiffs' claims against them cannot be aggregated to meet CAFA's amount-in-controversy requirements. *Compare* Dkt. 55 (El Tejon/Gragirena Mot. to Dismiss FAC) at 8-9 *with* El Tejon Mot. at 6-9; *compare* Dkt. 74 at 8-10 (Estill Ranches Mot. to Dismiss FAC) *with* Estill Mot. at 5-9. Again, Plaintiffs are not aggregating claims. The Court has CAFA jurisdiction over Mr. Cántaro's claims against WRA, totally apart from his claims against El Tejon; likewise for Mr. De La Cruz's claims against MPAS. The Court has jurisdiction over the Ranch Defendants based on supplemental jurisdiction, not based on aggregation. Thus, the Ranch Defendants' arguments that they did not employ at least 100 herders and the amount in controversy for claims against them individually is less than $5 million are irrelevant. El Tejon Mot. at 8-9; Estill Mot. at 5-8.[2] As the Court stressed in its Order dismissing

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[2] To the extent the Ranch Defendants deny Plaintiffs' allegations as to the number of hours they worked at their respective ranches, these arguments, like the Association Defendants' arguments on that issue, *supra* at 9-10, are misplaced in a motion to dismiss. For example, El Tejon cites several "happy camper" declarations from shepherds it currently employs to argue that its shepherds only work eight-hour days. El Tejon Mot. at 11. Such declarations are clearly

the First Amended Complaint, Plaintiffs must allege that they "might recover more than $5 million *from [their] alleged employers only*." Order at 15. Plaintiffs have done just that.

The Ranch Defendants do not argue that if the Court has CAFA jurisdiction over the Association Defendants, supplemental jurisdiction does not exist over the claims against them.[3] Nor could they. Section 1367 "confers supplemental jurisdiction over all claims, including those that do not independently satisfy the amount-in-controversy requirement, if the claims are part of the same … case or controversy." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 558 (2005). Here, Plaintiffs Cántaro and Inga bring the *exact same* legal claims, based on the same set of facts, against both their respective Ranch Defendants and their respective Association Defendants. *See* SAC at ¶¶ 185-284. Because Plaintiffs' claims against the Ranch Defendants arise out of the same case or controversy as the claims against the Association Defendants, this Court has supplemental jurisdiction.

Plaintiffs already explained the application of supplemental jurisdiction to the Ranch

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inappropriate at this stage. *See, e.g., Blake v. Hewlett-Packard Co.*, No. 4:11-cv-592, 2013 WL 3753965, at *11 (S.D. Tex. July 11, 2013) ("happy camper" declarations submitted in opposition to motion for conditional class certification "are of no value because they go to the merits of the case"). Plaintiffs must be given an opportunity to conduct discovery as to the circumstances surrounding the drafting of these seven nearly-identical declarations, as well as the information conveyed to the shepherds before they signed them. And contrary to El Tejon's assertions, El Tejon Mot. at 10-11, Plaintiffs in no way concede that they were permitted to engage in uninterrupted personal pursuits while employed with the Ranch Defendants. Similarly, El Tejon's claimed "offset" for room and board and reimbursements for meals are not permitted under the governing federal regulations, which require housing and meals to be provided at no cost to the worker. 20 CFR §§ 655.122(d), 655.210(e); *Ramos-Barrientos v. Bland*, 661 F.3d 587, 595 (11th Cir. 2011) ("[F]ederal law required [defendant employer] to provide this housing free of charge, see … 20 C.F.R. § 655.122(d)(1)").

[3] El Tejon asserts that the SAC is "facially deficient because it fails to make jurisdictional allegations against El Tejon and Gragirena." El Tejon/Gragirena Mot. at 5. This argument fails. The Court and Plaintiffs have made Plaintiffs' supplemental jurisdiction claim abundantly clear. *See* Dkt. 77 at 9-11; Order at 5 ("Plaintiffs argue diversity jurisdiction under [CAFA] … which in turn supports supplemental jurisdiction … over the remaining defendants."). Moreover, such a technicality cannot defeat jurisdiction. *See Mendoza v. U.S.*, 481 F. Supp. 2d 650, 657 (W.D. Tex. 2007), *aff'd sub nom. Mendoza v. Murphy*, 532 F.3d 342 (5th Cir. 2008) ("[T]his Court has original jurisdiction because Plaintiffs filed their First Amended Complaint under the FTCA against the United States of America. The First Amended Complaint reveals that the claims against the remaining Defendants are so related to the claims against the United States that they form part of the same case or controversy. Thus, this Court may exercise supplemental jurisdiction over the remaining Defendants. The fact that the complaint may be technically deficient in that it does not cite the statute conferring jurisdiction does not defeat jurisdiction in this case.").

Defendants in their Consolidated Opposition to Motions to Dismiss the First Amended Complaint, Dkt. 77 at 9-11; thus, the Ranch Defendants cannot claim to be unaware that this was the basis on which Plaintiffs asserted jurisdiction over them. Nonetheless, neither Ranch Defendant has presented any argument on supplemental jurisdiction in their current motions. Plaintiffs incorporate by reference that portion of their Consolidated Opposition, Dkt. 77 at 9-11, while taking this opportunity to further articulate why this Court has supplemental jurisdiction over the Ranch Defendants.

A number of federal cases stand for the proposition that claims against multiple employers, or employers and labor agencies, may arise out of a "common nucleus of operative fact," and thus should be tried together. *Gibbs,* 383 U.S. at 725. Indeed, Plaintiffs have alleged a joint employment relationship, with joint liability, as to WRA and El Tejon, and as to MPAS and Estill Ranches, respectively. For example, in *Ouedraogo v. Durso Assocs., Inc.*, No. 03-cv-1851 (RLC), 2005 WL 1423308, at *1 (S.D.N.Y. June 16, 2005), plaintiffs brought FLSA and state-law minimum wage claims against both delivery services companies and individual grocery stores, arguing joint employment by the delivery companies and stores. The court exercised supplemental jurisdiction over the store defendants, finding that the claims "all share a basic common story, namely, that, as employees of [the delivery companies], they were placed in various … stores where they delivered groceries and allegedly provided a range of in-store help, worked long hours, and were paid wages below the statutory minimum." *Id.* at *2. The court noted how problematic it would be to separate the state and federal proceedings, including that plaintiffs would have to testify twice as to the same set of facts. *Id.* In the case at bar, the "nucleus of fact" is even narrower because Plaintiffs assert the *same claims* against both the Association Defendants and the Ranch Defendants, as opposed to separate state law claims and federal claims.

Similarly, in *Ansoumana v. Gristede's Oper. Corp.*, 255 F. Supp. 2d 184, 193-95 (S.D.N.Y. 2003), a class of deliverymen sued several drug stores, as well as their labor agencies, to recover unpaid minimum and overtime wages under the FLSA and New York state labor laws. The court found that the drug stores and their labor agencies were joint employers, and therefore exercised supplemental jurisdiction over plaintiffs' state law claims. *Id.*

The Ninth Circuit agrees. In *Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 761 (9th Cir. 2010), *vacated on other grounds*, 132 S. Ct. 74 (2011), the Ninth Circuit found that the district court had supplemental jurisdiction over state-law wage claims because it had original jurisdiction over claims of the smaller FLSA class. Similarly, in *Daprizio v. Harrah's Las Vegas, Inc.*, No. 2:10-CV-00604-GMN, 2010 WL 5099666, at *3 (D. Nev. Dec. 7, 2010), a court within this District applied *Wang* to allow plaintiffs to seek certification of two separate classes—one FLSA opt-in class and one Rule 23 opt-out class. Other circuit courts to consider the issue have also rejected the argument that a difference in size of classes or an overlap between classes bars the exercise of supplemental jurisdiction. *See, e.g., Shahriar v. Smith & Wollensky Rest. Grp., Inc.*, 659 F.3d 234, 248-49 (2d Cir. 2011); *Ervin v. OS Rest. Servs., Inc.*, 632 F.3d 979-81 (7th Cir. 2011); *Lindsay v. Gov't Emps. Ins. Co.*, 448 F.3d 416, 418 (D.C. Cir. 2006).

The Ranch Defendants also argue that no jurisdiction exists against them because they have no relationship with the other individual ranches that are also members of the Association Defendants. El Tejon Mot. at 14-15; Estill Mot. at 8. El Tejon states this as an issue of the WRA class not meeting Rule 23's "typicality" and "adequacy" requirements—the claims by Mr. Cántaro are not typical of those who did not work at El Tejon, as he did, and he is not an adequate representative for herders working at other individual ranches. First, the WRA class does not make any claims against El Tejon, only against WRA, and thus El Tejon's views of this claim are irrelevant. Second, as to WRA, Mr. Cántaro's claims are typical, and he is an adequate representative. The claims brought by the WRA class do not involve any of the individual ranches; they concern the employment relationship each WRA class member has with WRA, which is governed by identical contracts for all class members. Mr. Cántaro and each WRA class member were employed by the same employer—WRA. SAC at ¶¶ 121-22. Each class member also has a relationship with one or more ranches who were joint employers with WRA, but that is of no moment, as no claims have been raised against those other ranches. Each joint employer is individually liable for any wages due arising from the joint employment. *Cf.* 29 C.F.R. § 791.2(a) (2017); *Salinas De Hernandez v. Silver Saddle, Inc.*, No. 13A678016, 2016 WL 3036676 (Nev. Dist. Ct. Apr. 14, 2016), *1 (defendant companies were joint employers and therefore judgment entered against them jointly and severally); *Valdez v. Cox Commc'ns Las Vegas, Inc.*, No. A-09-597433-C, 2012 WL 3919981, *1 (Nev. Dist. Ct. July 10, 2012) ("Nevada's wage and hour statutes ... impose joint employer liability in the same fashion as the FLSA"); *Nevada Bus. Serv. v. State*, No. A450698, 2006 WL 6346580, *1 (Nev. Dist. Ct. Aug. 8, 2006) ("[T]he City was a joint employer of the NBS employees and therefore is jointly and severally liable for the prohibited labor practices."); *cf.* 29 C.F.R. § 791.2(a) (2017) (joint employers are responsible, both individually and jointly, for FLSA compliance); *Falk v. Brennan*, 414 U.S. 190, 193, 195 (1973). The fact that there are potentially other joint employers of class members against whom claims could be made does not defeat certification of a class of shepherds who share one common joint employer, WRA. *Torres v. Mercer Canyons Inc.*, 835 F.3d 1125, 1141 (9th Cir. 2016) (affirming class certification where class included some workers hired directly by defendant and others hired through a labor contractor who was joint employer).[4] No allegations are necessary against any of the other WRA member ranches for the claims set forth in the Second Amended Complaint to be adequate. Nor has El Tejon shown that Plaintiff Cántaro is seeking relief that will "affect employers who are not even parties." El Tejon Mot. at 15. He only seeks relief from El Tejon, for the El Tejon class, and from WRA, for the WRA class. He does not seek relief from any other ranches. He need not, given that one joint employer, WRA, can be held liable for wages owed by any and all ranches who were joint employers with WRA. *Salinas*, 2016 WL 3036676, *1; *Valdez*, 2012 WL 3919981, *1; *Nevada Bus. Serv.*, 2006 WL 6346580, *1. El Tejon cites no authority, or even logical basis, for its claim that Plaintiff's pursuit of claims against WRA makes any other party "indispensable." El Tejon Mot. at

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[4] El Tejon relies upon cases in which there was no employment relationship alleged between the plaintiff and a defendant, yet the plaintiff sought to represent a class suing said defendant. Dkt. 117 at 14. Such cases are inapposite here, where plaintiff Cántaro did have an employment relationship with WRA and with the El Tejon defendants, the only defendants he seeks to sue.

El Tejon also states that Mr. Cántaro "admits that he only worked for El Tejon," and he therefore cannot represent the WRA class. El Tejon Mot. at 14. This is incorrect: as the Court already recognized, Mr. Cántaro "alleges that he was jointly employed by WRA, El Tejon and Gragirena while working in the United States." Order at 2. *See also infra* at 29-32 (discussing joint employment). Mr. Cántaro was jointly employed by both El Tejon and WRA, and is therefore an adequate representative for both the El Tejon class and the WRA class.

15.

The Court's supplemental jurisdiction is all the more logical when considering the alternative the Ranch Defendants propose. Were the Court to remand the claims against the Ranch Defendants to state court but retain the claims against the Association Defendants (as it must under CAFA), there would be two parallel cases addressing the exact same conduct, with overlapping classes of plaintiffs, alleging a joint employment relationship, with possible contradictory findings. Indeed, despite the joint employment relationship alleged between the Ranch Defendants and their corresponding Association Defendants, there could be diverging treatment of the employment relationship between the same plaintiffs and the same joint employer entities in state and federal court. This is precisely what supplemental jurisdiction is meant to prevent. *See, e.g., Moore v. Dollar Tree Stores Inc.*, 85 F. Supp. 3d 1176, 1194 (E.D. Cal. 2015) ("[T]he Court's exercise of supplemental jurisdiction would best advance economy, convenience, fairness, and comity. The state and federal claims are so intertwined that it makes little sense to decline supplemental jurisdiction. To do so would create the danger of multiple suits, courts rushing to judgment, increased litigation costs, and wasted judicial resources.").

The Court has already recognized the availability of supplemental jurisdiction over the Ranch Defendants, Order at 5, and the Ranch Defendants have done nothing to argue otherwise.

II. PLAINTIFF HAS NOT ENGAGED IN CLAIM SPLITTING, AND RES JUDICATA DOES NOT APPLY HERE

MPAS argues that *res judicata* and claim-splitting provide a basis to dismiss Mr. De La Cruz's claims due to his prior involvement in cases against MPAS in other courts. MPAS Mot. at 7-10. Other than this case, Mr. De La Cruz is pursuing or has pursued the following claims against MPAS:

Case Name	Status of Claims
Llacua, et al v. W. Range Ass'n, et al., No. 1:15-cv-01889-REB-CBS (D. Colo. June 12, 2017)	State law claims, including NV minimum wage claim, brought in amended complaint on December 4, 2015, and dismissed without prejudice on jurisdictional grounds on March 7, 2017 Federal claims dismissed on same date and are the only claims on appeal

RA 00152

Hispanic Affairs Project, et al v. Perez, et al., No. 1:15-cv-01785-RM (D. Colo. Aug. 8, 2015)	Claims against MPAS, not involving minimum wage, brought in amendment on December 12, 2015. Case administratively closed shortly after filing; De La Cruz filed a stipulation of dismissal on July 24, 2017

While Mr. De La Cruz's claims here are identical to claims brought in *Llacua*, they never co-existed. Mr. De La Cruz brought them here only after they were dismissed without prejudice in *Llacua*, and Mr. De La Cruz is appealing only his federal claims in that case. The claims in *Perez* are even more irrelevant, as they address claims not pursued here, regarding how the AEWR rate was set; they include no minimum wage claims. Moreover, there has been no litigation of those claims as the case has remained administratively closed, and Mr. De La Cruz has nevertheless dismissed himself from that case. For the reasons below, the claims here are neither barred by *res judicata* nor subject to the Ninth Circuit's claim splitting doctrine.

A. Res Judicata

MPAS argues that Mr. De La Cruz's claims are precluded by his claims against MPAS in *Llacua* that were dismissed without prejudice, on jurisdictional grounds, on March 7, 2017. Ex. A at 10 ("judgment without prejudice shall enter as to plaintiffs' state law claims"). MPAS rightly notes that *res judicata* requires a final judgment on the merits and that a claim dismissed without prejudice is not a final judgment. MPAS Mot. at 9-10. *See also, e.g., Hells Canyon Preservation Council v. US Forest Serv.*, 403 F. 3d 683, 686 (9th Cir. 2005) ("Final judgment on the merits is synonymous with dismissal with prejudice.") (citation and quotation marks omitted); *Watson v. Chessman*, 362 F. Supp. 2d 1190, 94 (S.D Cal. 2005) ("Dismissal for lack of subject matter jurisdiction is not a judgment on the merits, and therefore it has no claim preclusive or res judicata effect.") (citing *Thompson v. Cty. of Franklin*, 15 F.3d 245, 253 (2nd Cir.1994)); *see also* Fed. R. Civ. P. 41(b) ("any dismissal not under this rule—*except one for lack of jurisdiction*, improper venue, or failure to join a party under Rule 19—operates as an adjudication on the merits.") (emphasis added). Since *Llacua* was dismissed *without prejudice* and for lack of jurisdiction, there has been no judgment on the merits that could give rise to preclusive effects.

MPAS, without citation, argues that Mr. De La Cruz failed to assert CAFA jurisdiction in

Llacua and therefore the dismissal without prejudice constitutes a final judgment on the merits with respect to jurisdiction. MPAS Mot. at 10 n.3. This argument misses the mark. There is no requirement to plead every possible basis of jurisdiction in a complaint or risk a *res judicata* bar on asserting an alternative basis for jurisdiction in a subsequent suit on the same claims. *See Epperson v. Entm't Express, Inc.*, 242 F.3d 100, 109 (2d Cir. 2001) ("To find that appellants were required to assert all possible bases for jurisdiction in the first action or lose them, where there has been no final decision on the merits of the claim, would be unfair."); *Kulinski v. Medtronic Bio-Medicus*, 112 F.3d 368, 373 (8th Cir. 1997) ("Medtronic first argues that res judicata requires Kulinski to plead all bases for jurisdiction in his original pleading. This argument is inconsistent with our precedent.").

As in the original Complaint in this case, in *Llacua,* Mr. De La Cruz originally asserted federal question jurisdiction over all of his claims, state and federal. *See Llacua*, Dkt. 73 ¶ 13, attached as Ex. E (relevant complaint alleging only federal question jurisdiction). When a plaintiff fails in an attempt to pursue all of his claims under a single broad jurisdictional basis, he is not barred from pursuing some of those same claims in a future suit on a narrower jurisdictional basis. *See Epperson,* 242 F.3d at 109 ("In short, we decline to adopt a rule that would prohibit litigants from pursuing some of their claims on a narrower jurisdictional basis after their attempt to allege a jurisdictional basis that would resolve all of their claims in one proceeding was rejected.") (citing 18 Wright, Miller and Cooper, Federal Practice and Procedure, § 4412, at 93 (1981) ("It is clear enough that a litigant should not be penalized for failing to seek unified disposition of matters that could not have been combined in a single proceeding, and even clearer that no penalty should be inflicted if a deliberate effort to combine such matters has been expressly rejected.")). The history here tracks precisely the circumstances addressed in *Epperson*: after the Colorado District Court in *Llacua* rejected Mr. De La Cruz's blanket assertion of federal question jurisdiction over all of his claims, Mr. De La Cruz refiled his state law claims here, asserting a narrower jurisdictional basis: CAFA. *Res judicata* does not apply.[5]

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[5] The defendants in *Llacua* never objected to the assertion of federal question jurisdiction over the state law claims, but the court—like this Court—rejected it anyway. *See* Ex. A. Thus, in

B. Claim Splitting

MPAS's claim splitting argument also fails. First, as to Mr. De La Cruz's claims in *Llacua*, there can be no claim splitting because the claims never co-existed in both cases. Mr. De La Cruz filed his claims in this case after the March 7, 2017 dismissal of *Llacua*, and he is appealing only his federal claims in *Llacua*, not his state law claims. *See* Exs. A and B.[6] Thus, because the court in *Llacua* dismissed Mr. De La Cruz's state law claims on jurisdictional grounds, without prejudice, it only made sense that Mr. De La Cruz would then file those claims again in another court where jurisdiction was proper.

Second, as to *Perez*, it is clear from the operative complaint in that case that the claims made there are distinct from those made here. "[I]n the claim-splitting context, the appropriate inquiry is whether, assuming that the first suit were already final, the second suit could be precluded pursuant to claim preclusion." *Katz v. Gerardi,* 655 F.3d 1212, 1218 (10th Cir. 2011) (quoting *Hartsel Springs Ranch of Colo., Inc. v. Bluegreen Corp.*, 296 F.3d 982, 987 n.1 (10th Cir. 2002)). In the Ninth Circuit, to determine whether one cause of action precludes a future cause of action, courts apply the transaction test, which includes four criteria:

> (1) whether 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.

Adams v. Cal. Dep't of Health Servs., 487 F.3d 684, 689 (9th Cir. 2007) (overruled on other grounds

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addition to the fact that a dismissal without prejudice for lack of jurisdiction has no preclusive effect, the decision in *Llacua* is not a grounds for issue preclusion because it was never litigated by the parties. *See In re Palmer*, 207 F.3d 566, 568 (9th Cir. 2000) (no issue preclusion where issue was not "actually litigated" in prior proceeding).

[6] In addition, before the dismissal in *Llacua*, Mr. De La Cruz moved to sever and transfer his Nevada minimum wage claims so that they could be brought to this Court. *Llacua*, Dkt. 156, attached as Ex. F. Defendants, including MPAS, did not oppose this motion. *Id.* And while the *Llacua* court dismissed the case before ruling on the motion to sever and transfer, it was clear to both the *Llacua* court and to MPAS that De La Cruz would bring his Nevada claims only in this Court.

by *Taylor v. Sturgell*, 553 U.S. 880 (2008)) (quoting *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982)). When considering whether a prior action involved the same "nucleus of facts" for preclusion purposes, courts must narrowly construe the scope of the earlier action. *Cent. Delta Water Agency v. U.S.*, 306 F.3d 938, 953 (9th Cir. 2002).

In *Perez*, Mr. De La Cruz asserted claims against MPAS based on underpayment of wages, but the two cases plead infringement of distinct rights. The single quasi-contract, or, in the alternative, unjust enrichment and *quantum meruit* claim brought by Mr. De La Cruz against MPAS in *Perez* alleged that the H-2A wage paid to him and the MPAS class he sought to represent—the AEWR—was illegally set too low by the federal government, and that MPAS was complicit in this scheme. *Perez*, Dkt. 23 at ¶¶ 122-26, attached as Ex. G. In the case at bar, Mr. De La Cruz makes no allegations as to the legality of the AEWR wage for H-2A herders; rather, he claims that he was owed the Nevada minimum wage pursuant to the Nevada's Minimum Wage Amendment, and therefore brings claims against MPAS for the difference between the actual wages paid to him (the AEWR) and the higher Nevada minimum wage. SAC at ¶¶ 250-60.

The gap between what the H-2A visa regulations allegedly *should* set as the herder minimum wage and what they actually do (*Perez*) is a different dollar amount, and arises out of a different set of allegations, than the gap between the AEWR and the Nevada minimum wage (this case). Indeed, the success of De La Cruz's claim against MPAS in *Perez* was contingent upon a finding against the federal government under the Administrative Procedure Act that the rules setting the H-2A shepherd minimum wages were illegal. The current case requires no such finding—in fact, it explicitly relies upon the H-2A program regulations that require employers to pay their workers the higher of the AEWR or the state minimum wage. SAC at ¶ 27. Thus, these cases implicate wholly separate rights and do not result in claim splitting.

Courts in the Ninth Circuit have declined to find claim splitting in a number of comparable scenarios. In *Beckerley v. Alorica, Inc.*, No. SACV 14-0836-DOC, 2014 WL 4670229, at *7 (C.D. Cal. Sept. 17, 2014), a California district court held that a pending FLSA lawsuit did not bar an overlapping class, including several of the same named plaintiffs, from bringing another minimum wage suit under California state wage-and-hour laws. In so holding, the judge explained that even though both cases met factors 1, 2, and 4 of the transaction test, their failure to meet the third factor—infringement of the same right—prevented him from dismissing the case on grounds of claim splitting. *Id.* at *6 ("[T]he third factor, which inquires whether the two suits involve the infringement of the same right, is not met. An individual's rights under the FLSA and state wage-and-hour laws are distinct. Many state wage-and-hour laws provide greater protections for workers than the FLSA. Nothing in the FLSA collective action statute suggests that certification of a FLSA collective action precludes collective action members from seeking state law remedies based on the same set of facts.") (internal citations omitted).

Similarly, in *Rodriguez v. Taco Bell Corp.*, No. 1:13-CV-01498-SAB, 2013 WL 5877788, at *3-*4 (E.D. Cal. Oct. 30, 2013), the court declined to find claim splitting, despite noting the possibility of overlap between the classes in two meal-break cases in the same district court against Taco Bell. The certified class in the original case included Taco Bell employees whose first meal period was only given after their fifth hour of work, and the proposed class in *Rodriguez* included Taco Bell employees who were given legally inadequate meal breaks by being forced to remain on the premises during such breaks. *Id.* at *4. The court noted that many Taco Bell employees might fall into both classes, but "at this stage the possibility of overlap is only theoretical and the Court will not stay this action due to the mere possibility of overlapping class claims." *Id.*

And, as with Mr. De La Cruz's claims in *Llacua*, there is no claim splitting with *Perez* because those claims no longer exist. In order to ensure that there could be no question as to whether Mr. De La Cruz is splitting claims that are pending in two courts, Mr. De La Cruz filed a Rule 41(a)(1)(A)(i) notice of voluntarily dismissal of his claims in *Perez* on July 24, 2017. *See* Ex. D. This dismissal was made before MPAS filed an answer, and so was effective immediately and without a court order. Fed. R. Civ. P. 41(a)(1)(A)(i); *Saldana v. Lewis*, 597 F. App'x 436 (9th Cir.), *cert. denied sub nom. Saldana v. Ducart*, 136 S. Ct. 108, 193 L. Ed. 2d 88 (2015) ("A voluntary dismissal terminates the action immediately, leaving nothing more for the district court to do.").[7]

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[7] A voluntary dismissal is without prejudice and does not operate as a judgment on the merits. Fed. R. Civ. P. 41(a)(1)(B). Mr. De La Cruz's dismissal from *Perez* therefore has no *res*

Without simultaneous claims in either *Llacua* or *Perez*, MPAS cannot object on the grounds of claim splitting. *See Rotec Indus., Inc. v. Mitsubishi Corp.*, 348 F.3d 1116, 1119 (9th Cir. 2003) (defendant may only object to claim splitting "while both proceedings are pending").

Finally, unlike *res judicata*, the Court's decision as to claim splitting is completely discretionary. *Adams*, 487 F.3d at 688 ("After weighing the equities of the case, the district court may *exercise its discretion* to dismiss a duplicative later-filed action, to stay that action pending resolution of the previously filed action, to enjoin the parties from proceeding with it, or to consolidate both actions.") (emphasis added). This is because the primary purpose of the doctrine against claim splitting is to prevent the unnecessary expenditure of judicial resources—that is, if the result of one case will affect the results of another pending case, both need not be litigated at the same time. *Id. See also Katz v. Gerardi*, 655 F.3d 1212, 1217 (10th Cir. 2008). Such a concern simply does not exist between *Perez* and the case at bar because the claims Mr. De La Cruz now brings are no longer being litigated—and had never been litigated—in *Perez*. No judicial resources are being expended on *Perez*, so, even assuming, *arguendo*, that the Court finds the *Perez* claims could be a basis for claim splitting, the Court should exercise its discretion to let Mr. De La Cruz pursue his claims here since he will not actively pursue them in *Perez*.

Because Mr. De La Cruz's claims in this case are not the same as those brought in *Perez*, and because those claims no longer exist in either *Perez* or *Llacua*, there is no claim splitting.

III. PLAINTIFFS PROPERLY ALLEGE BREACH OF EMPLOYMENT CONTRACTS

El Tejon argues that Mr. Cántaro has no contract claims because the contract terms at issue are incorporated from DOL regulations, and therefore only tort claims based on those regulations may be made. El Tejon Mot. at 17-20. This argument misconstrues Mr. Cántaro's contract claims and ignores settled precedent permitting such claims.

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judicata effect in this case. *See*, *e.g.*, *Coleman v. Barnhart*, No. C 03-0089 SI, 2003 WL 22722816, at *5 (N.D. Cal. Nov. 12, 2003) ("Dismissal without prejudice is not a final adjudication on the merits and does not invoke *res judicata*."); *Westenberg v. CNF Transp., Inc.*, No. CIV. 98-1514-AS, 1999 WL 571231, at *9 (D. Or. July 14, 1999), *aff'd*, 44 F. App'x 765 (9th Cir. 2002) (same).

El Tejon attempts to argue that Plaintiffs cannot make contract claims based on violations of H-2A regulations incorporated through a contract. That argument is wrong on the law. *See Tyus v. Wendy's of Las Vegas, Inc.*, No. 2:14-cv-00729-GMN-VCF, 2015 WL 5021644, at *4 (D. Nev. Aug. 21, 2015) ("[W]hen a statute imposes additional obligations on an underlying contractual relationship, a breach of statutory obligation *is a breach of contract* ....") (citing *Brewer v. Premier Golf Props.*, 86 Cal. Rptr. 3d 225, 235 (Cal. Ct. App. 2008) (citations omitted) (emphasis added)). Here, payment of the Nevada minimum wage, as well as reimbursement for travel and visa expenses, is explicitly required by statute *and* by an explicit contract term, and therefore the failure to pay the minimum wage and reimbursements are both a statutory and contractual breach.

Defendants attempt to obfuscate the law by citing cases outside the H-2A context. Those cases all address violations of statutes that do not themselves dictate the terms that must be written into a contract, but instead impose legal duties independent of any contractual obligations. El Tejon Mot. at 18 (citing, *inter alia*, *Berger v. Home Depot U.S.A., Inc.*, 476 F. Supp. 2d 1174 (C.D. Cal. 2007) (claims based on contract and consumer protection laws); *In re Anthem, Inc. Data Breach Litig.*, No. 15-MD-02617-LHK, 2016 WL 3029783, at *1 (N.D. Cal. May 27, 2016) (claims based on contract and patient privacy laws)). What makes the H-2A regulations so plainly different is that they dictate the actual terms that must be written into H-2A employment contracts. *See* 20 C.F.R. § 655.122 (titled: "Contents of job offers"); 20 C.F.R. § 655.210 (titled: "Contents of herding and range livestock job orders"); 20 C.F.R. § 655.135 (titled: "Assurances and obligations of H-2A employers"). *See also De Luna-Guerrero v. N. Carolina Grower's Ass'n, Inc.*, 338 F. Supp. 2d 649, 652 (E.D.N.C. 2004) ("The terms of H2A visas are controlled by statute, 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a) and 1188, as well as DOL regulations applicable to the temporary labor certification process. 20 C.F.R. § 655.100 et seq."). A violation of the H-2A regulations is therefore a violation of the terms of the contract.

El Tejon does not cite a single case in which a court dismissed the contract claims of an H-2 worker because the claims were instead based on tort law. El Tejon's argument was made in *Lopez v. Fish,* No. 2:11-cv-113, 2012 WL 2126856, at *1-2 (E.D. Tenn. May 21, 2012), and rejected as "a gross misunderstanding of the law" and "completely unsubstantiated and devoid of merit." *See id.* at

*2 ("[T]here are federal cases too numerous to count which have held that H–2A workers may pursue state breach of contact claims against employers who fail to comply with clearance orders issued by the DOL.") (citing *Arriaga v. Fla. Pac. Farms, LLC*, 305 F.3d 1228, 1235 (11th Cir.2002); *Frederick Cty. Fruit Growers Ass'n, Inc. v. Martin*, 968 F.2d 1265, 1268 (D.C.Cir.1992); *Salazar–Calderon v. Presidio Valley Farmers Ass'n*, 765 F.2d 1334, 1342 (5th Cir.1985); *Perez–Benites v. Candy Brand, LLC*, No. 1:07-cv-1048, 2011 WL 1978414 at *15–6 (W.D.Ark. May 20, 2011); *Vazquez v. Lamont Fruit Farm, Inc.*, No. 06-cv-582S, 2011 WL 4572066 at * 11 (W.D.N.Y. Sept.30, 2011); *GarciaCelestino v. Ruiz Harvesting, Inc.*, No. 2:10-cv-542-FTM-99DNF, 2012 WL 602728 at *7 (M.D.Fla. Feb.24, 2012)).[8]

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[8] *See also Cuellar-Aguilar v. Deggeller Attractions, Inc.*, 812 F.3d 614, 620 (8th Cir. 2015), *reh'g denied* (Feb. 10, 2016) ("[T]he workers' allegation that [defendant] failed to pay the prevailing wage stated a valid claim for breach of their employment contracts."); *Mencia v. Allred*, 808 F.3d 463, 472 (10th Cir. 2015) ("[Plaintiff's] complaint alleges his contract … included the [defendants'] promise to obey the H–2A regulations …. The factual and legal bases for Mr. Saenz's claim are plainly stated, and we see no basis for affirming the district court's decision because of any flaw in the complaint."); *Rodriguez v. SGLC, Inc.*, No. 2:08-cv-01971-MCE, 2012 WL 5705992, at *25 (E.D. Cal. Nov. 15, 2012) (defendants' summary judgment motion denied with respect to plaintiff's contract claim); *Salazar-Martinez v. Fowler Bros.*, 781 F. Supp. 2d 183, 198 (W.D.N.Y. 2011) (same). Plaintiffs could find no case in which a contract claim based on violations of the H-2 regulations was not permitted to proceed because the claim should be viewed as based on tort law, not contract.

Permitting these claims to move forward as contract claims is a separate inquiry from the "gravamen of the action" test for determining which statute of limitations is applicable to a claim that sounds in both contract and tort. *See* Order at 16-18. Plaintiffs note, however, that several courts, including the Ninth Circuit, have determined that wage claims based on violations of H-2A contracts have a statutory period based on contract, not tort law. *Rivera v. Peri & Sons Farms, Inc.*, 735 F.3d 892, 902 n.6 (9th Cir. 2013) ("The farmworkers interpret the district court's order as applying a two-year statute of limitations to their breach of contract claims as well. It is not entirely clear whether the district court did so, but to the extent it did, it was in error. Nevada law provides a six-year statute of limitations for breach of contract claims."); *Ojeda-Sanchez v. Bland Farms, LLC*, No. 608CV096, 2010 WL 3282984, at *16 (S.D. Ga. Aug. 18, 2010) ("The Court … is … of the opinion that regulations governing the H-2A program expressly state that the job clearance order creates a contract between the employer and employer, invoking the six-year statute of limitations.") (internal citation and quotation marks omitted). *Perez-Benites v. Candy Brand, LLC*, No. 1:07-cv-1048, 2011 WL 1978414, at *3 n.2 (W.D. Ark. May 20, 2011) ("Defendants … question whether the five-year statute of limitations on contracts is applicable in light of the fact that the FLSA has a different statute of limitations …. The … FLSA does not provide an exclusive remedy for violations of its provisions. Plaintiffs' breach of contract claims are not preempted by the FLSA."). Plaintiffs are aware that the Court has reached a decision on this issue, and because "interlocutory appeals are not available to address statute of limitations issues," *Estate of Kennedy v. Bell Helicopter Textron, Inc.*, 283 F.3d 1107, 1111 (9th Cir. 2002), they will treat their contract claims related to the Nevada minimum wage as having a two-year statute of limitations. However, Plaintiffs' claims for failure

El Tejon also argues that Mr. Cántaro has failed to identify an express contractual provision that El Tejon breached. El Tejon Mot. at 20 n.17. He has. The clearance orders, also called job orders, explicitly require compliance with applicable state minimum wage rules, like Nevada's constitutional minimum wage. All clearance orders must include an employer assurance that it will "comply with all applicable Federal, State and local laws and regulations." 20 C.F.R. § 655.135(e) (listing "[a]ssurances and obligations of H-2A employers."). Those include state minimum wage laws, as emphasized by regulations in the H-2A shepherd context: "As a condition of receiving an H-2A labor certification, an employer must comply with all applicable Federal, State and local employment-related laws and regulations, *including the mandatory State minimum wage rates for the occupation*." *TEGL No. 32-10, Special Procedures: Labor Certification Process for Employers Engaged in Sheepherding and Goatherding Occupations Under the H-2A Program*, 76 Fed. Reg. 47,256, 47,258 (Aug. 4, 2011) (emphasis added) (interpreting 20 C.F.R. § 655.122).[9] Thus, *every* H-2A shepherd contract includes an explicit promise to pay the state minimum wage, if applicable.

Specifically, WRA's clearance order assured Plaintiff Cántaro that his employers would comply with state and federal law, including state minimum wage laws. *See* SAC Exhibit A at 7 ("Employer *agrees* to abide by the regulations at 20 C.F.R. § 655.135") (emphasis added). Plaintiff Cántaro also alleges he was subject to a separate Sheepherder Employment Agreement, which states that "[i]n no event shall Employee's compensation be less than the minimum required by the United States of America" and that the employer "agrees to comply with all applicable laws of the United

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to reimburse travel and visa expenses, unlike their contract claims related to the Nevada minimum wage, clearly fall under Nevada's six-year limitations period for contract claims.

[9] In November 2015, these special procedures were incorporated into the Code of Federal Regulations, 20 C.F.R. §§ 655.200 *et seq.*, but Plaintiffs were subject to the interpretive guidance for shepherds in place prior to that date and only published in the Federal Register. Consistent with the previously published guidance, the new regulation requires that "[t]he employer must pay the worker at least the monthly AEWR, as specified in § 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 C.F.R. § 655.210(g).

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States *and the individual states*, including but not limited to compliance with immigration laws." *See* SAC at ¶¶ 31, 37-39; SAC Exhibit B at 2 (emphasis added). Nevada is an "individual state" that requires payment of the minimum wage to shepherds. Nev. Const. Art. 15 § 16. Meanwhile, the United States, through its immigration laws, requires that all H-2A shepherds receive at least the state minimum wage. 76 Fed. Reg. at 47,258; *see also* 20 C.F.R. § 655.210(g) (requiring shepherds be paid *minimum wage imposed by ... State law*") (emphasis added).

In short, Plaintiffs allege that Defendants, through their various contractual assurances, promised to pay at least the Nevada minimum wage and reimburse for travel and visa-related expenses, but did not. SAC at ¶¶ 196, 211, 259, 273. These allegations state a claim for breach of contract. If Defendants would like to offer evidence that they did not agree contractually to pay the Nevada minimum wage or reimburse certain expenses, they will have that opportunity at summary judgment and trial.

For its part, MPAS argues that Plaintiffs' contract claims for reimbursement of travel and visa-related expenses do not cure Plaintiffs' jurisdictional flaws, apparently mistaking the addition of these claims as an attempt to create federal question jurisdiction. MPAS Mot. at 11-12. To be clear, adding these claims does not alter the analysis as to jurisdiction outlined in Section I.A and I.B above, *supra* at 7-16. In fact, the damages alleged for these failure-to-reimburse contact violations were not added to the minimum wage damages that form the basis for Plaintiffs' CAFA amount-in-controversy allegations. These claims were added solely because parallel claims were dismissed without prejudice from the *Llacua* case, and because Plaintiff Inga ended his employment outside the two-year statute of limitations, and therefore cannot succeed on his minimum wage claims absent reconsideration of the Court's ruling as to the statute of limitations or reversal on appeal. He does, however, have claims for failure to pay costs associated with obtaining H-2A labor certifications. These breach-of-contract claims are not derived from the Nevada Constitution; they are separate claims with their own applicable statutes of limitation. Nevada statute provides that contract actions may be commenced within six years of the breach. Nev. Rev. Stat. Ann. § 11.190(1)(b). A four-year statute of limitations applies to the promissory estoppel, unjust enrichment and *quantum meruit* claims, as they are "action[s] upon a contract, obligation or liability not founded upon an instrument in writing." Nev. Rev. Stat. Ann. § 11.190 (2)(c); *see also In re Amerco Derivative Litig.* 252 P.3d 681, 703 (D. Nev. 2011); *KlaCaizner v. Countrywide Fin.*, 2015 WL 627927 at 18 (D. Nev. 2015). Thus, Inga remains a proper Plaintiff in this case, and reserves his right to appeal the argument that a six-year statute of limitations applies to his minimum wage claims based on violations of his H-2A contract.

IV. PLAINTIFFS PROPERLY ALLEGE THAT DEFENDANTS ARE LIABLE IN EQUITY FOR STEALING PLAINTIFFS' WAGES

The Ranch Defendants argue that Plaintiffs cannot argue promissory estoppel and unjust enrichment/*quantum meruit* theories because the Court has already held there to be a valid contract, or because Plaintiffs have failed to sufficiently allege their promissory estoppel and unjust enrichment/*quantum meruit* claims. El Tejon Mot. at 20-23; Estill Mot. at 9-10; Order at 12. Both sets of arguments fail.

The Ranch Defendants argue that because they concede the existence of written employment contracts, Plaintiffs may not proceed with their claims in equity. Although the general rule is that "unjust enrichment does not apply where there is an express, written contract," *Crockett & Myers, Ltd. v. Napier, Fitzgeralld & Kirby, LLP*, 440 F. Supp. 2d 1184 (D. Nev. 2006), "a party can recover on a quasi-contract when the implied-in-law contract covers conduct outside the express contract or matters arising subsequent to the express contract," *Leighton v. City and Cty. of Denver*, No.14-cv-02812-PAB-NYW, 2015 WL 5532751, * 8 (D. Colo. Sep. 21, 2015) (internal citations omitted). Therefore, a party can proceed with unjust enrichment and breach of contract claims that arise out of separate facts or separate violations of a party's rights. *Custom Teleconnect, Inc. v. Int'l Tele-Services, Inc.*, 254 F. Supp. 2d 1173, 1181-81 (D. Nev. 2003); *see also D'Amato v. Lillie*, 401 Fed. Appx. 291 (9th Cir. 2008) (unpublished) (upholding "the unjust enrichment offset to the jury's damages award [because it] did not 'relat[e] to the same matter' as the express Agreements."); *Rhodes v. Designer Distrib. Serv., LLC*, 128 Nev. 929, 381 P.3d 655 (Nev. Sup. Ct.2012) (dismissal of quasi contract claim is appropriate only where it covers "the same subject matter as the express contract and [i]s not separate and distinct.").

Here, although the Ranch Defendants concede the existence of written agreements, they may nonetheless dispute the terms of those employment contracts, including the terms regarding reimbursement of travel and visa-related expenses. Pending the Court's resolution of those disputes, Plaintiffs may proceed with their equitable claims against the Ranch Defendants in the alternative, as they may cover factual matter separate from that covered by the written agreements.

The Ranch Defendants also ignore that the Association Defendants have not acknowledged that a contractual relationship exists, and at any time may contend that Plaintiffs' contracts are not valid as to them or that they are not parties to those contracts. Indeed, WRA made exactly this argument in its Motion to Dismiss Plaintiffs' First Amended Complaint, contending that Mr. Cántaro's breach of contract claim should be dismissed because WRA had no contract with Mr. Cántaro.[10] Dkt. 66 at 14-15. WRA simultaneously argued for dismissal of Mr. Cántaro's unjust enrichment claim by stating that it had a written contract with Mr. Cántaro. Dkt. 66 at 17-20. Of course, both cannot be true simultaneously, which only re-enforces the need for alternative pleading.

As El Tejon itself recognizes, this District permits alternative pleading in the event a contract is found unenforceable. El Tejon Mot. at 21 n.18 (citing *DFR Apparel Co. v. Triple Seven Promotional Prod., Inc.*, No. 2:11-cv-01406-APG, 2014 WL 4891230, at *3 (D. Nev. Sept. 30, 2014)). A plaintiff "is free to seek equitable remedies and breach of contract in the alternative." *DFR Apparel Co. v. Triple Seven Promotional Products, Inc.*, No. 2:11-cv-001406-APG, 2014 WL 4891230, at *3 (D. Nev. Sept. 30, 2014). "[A] party can recover on a quasi-contract when the party will have no right under an enforceable contract, such as when an express contract failed or was rescinded." *Leighton v. City and Cty. of Denver*, No.14-cv-02812-PAB-NYW, 2015 WL 5532751, * 8 (D. Colo. Sep. 21, 2015) (quotation marks and citations omitted). To the extent the Court may determine that Mr. Cántaro's contract with WRA and El Tejon fails in some way, Plaintiff Cántaro may proceed with claims in equity in the alternative. The same holds true for the contract claims made by Mr. Inga and Mr. De La Cruz. This, of course, is why the federal rules allow a plaintiff to

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[10] Similarly, MPAS claims it is not the employer of Mr. Ramos or Mr. De La Cruz. MPAS Mot. at 12-14, an argument addressed *infra* at 29-32.

plead in the alternative. *See* Fed. R. Civ. P. 8(a)(3).

El Tejon also insists that Mr. Cántaro's promissory estoppel claim is inadequate due to failure to plead "*justifiable* and *reasonable* reliance." El Tejon Mot. at 22 (emphasis in original). "'To establish promissory estoppel … the party asserting the estoppel … must have relied to his detriment on the conduct of the party to be estopped.'" *Pink v. Busch*, 100 Nev. 684, 689, 691 P.2d 456, 459-60 (1984) (quoting *Cheqer, Inc. v. Painters & Decorators Joint Comm., Inc.*, 98 Nev. 609, 614, 655 P.2d 996, 998-99 (1982)).

Mr. Cántaro properly alleges that he relied to his detriment. Mr. Cántaro alleges that El Tejon agreed "to comply with all H-2A program regulations—including the H-2A program's requirement that an employer pay the state minimum wage if that is higher than the AEWR." SAC at ¶ 30. Mr. Cántaro relied on this promise in leaving his family and his country to come to the United States to work as a shepherd. *Id.* ¶¶ 46-47. And Mr. Cántaro worked hard while here, "almost never declin[ing] work and [] often engaged by the WRA Defendants to be on duty in his workplace 24 hours a day, seven days a week." *Id.* ¶ 51. Mr. Cántaro alleges that, despite his reliance, he was not paid the wages to which he was entitled. *Id.* ¶¶ 93-107. These allegations are sufficient to allow Mr. Cántaro to proceed with his promissory estoppel claim against El Tejon. *Id.* ¶¶ 213-216.

Thus, Plaintiffs have properly made claims under theories of promissory estoppel and unjust enrichment/*quantum meruit*.

V. PLAINTIFFS HAVE PROPERLY ALLEGED JOINT EMPLOYMENT

MPAS contends that it is not a joint employer of shepherds with Estill Ranches, accusing Plaintiffs of "brazenly misrepresent[ing] MPAS's status." MPAS Mot. at 12-14. It is not clear whether MPAS moves to dismiss on this ground—Plaintiffs made the same allegations of joint employment in their First Amended Complaint, Dkt. 40-1 at ¶ 3, and MPAS did not move to dismiss. But if it does, MPAS's arguments on this issue are misguided.

Mr. Inga's and Mr. De La Cruz's allegations are sufficient at this stage to establish joint employment. The Court has already recognized as much. Order at 2 ("Inga alleges that he was jointly employed by MPAS [and] Estill Ranches … while working in the United States.").

Specifically, Mr. Inga alleges that an MPAS representative made him sign a form contract in which MPAS established many of the conditions of employment, including salary, work hours, location of work, and certain other requirements Mr. Inga had to meet to continue working for MPAS. SAC at ¶¶ 78-79, 89. The claims by Mr. De La Cruz against MPAS, as well as those by Mr. Cántaro against WRA, are substantively similar. *See* SAC at ¶¶ 34-39, 63-70.

Another court in the Ninth Circuit has already meticulously examined the comparable relationship between WRA and a group of plaintiff shepherds to find that WRA was a joint employer. In *Ruiz v. Fernandez*, 949 F. Supp. 2d 1055, 1064 (E.D. Wash. 2013), *order clarified on other grounds*, No. 11-cv-3088-RMP, 2013 WL 12167930 (E.D. Wash. June 24, 2013), the court addressed the relevant factors in the "economic realities" test used to determine joint employment: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Id.* at 1065 (internal quotation marks omitted). The court found that WRA "play[ed] an integral role in initiating H-2A sheepherders' employment with its member ranches," *id.* at 1066; obtained the necessary visas for the shepherds to work in the United States, *id.*; assigned each sheepherder to a member ranch, *id.*; arranged and paid for the sheepherders' transportation from their country of origin to the member ranches, *id.*; had the ultimate power to transfer sheepherders from one ranch to the next, *id.* at 1067; had the power to fire sheepherders, *id.*; "exercised considerable control over the terms and conditions of [the sheepherders'] employment," *id.* at 1068; "ha[d] some involvement in the wages and benefits offered to its sheepherders, *id.* at 1069; and maintained employment files for its sheepherders, *id.* at 1069-70. Considering these factors together, the Court concluded that WRA was a joint employer. *Id.* at 1071. The fact that WRA did not control the day-to-day activities of the sheepherders did not preclude a finding of joint employer status. *Id.* at 1068. The well-plead allegations of the Second Amended Complaint include comparable allegations regarding MPAS's role. SAC at ¶¶ 78-79, 89.

Most importantly, *Ruiz* was decided on summary judgment, after discovery had been conducted. Courts cannot address joint employment through the arguments set forth in a complaint and motion to dismiss. *See, e.g., Virgo v. Riviera Beach Assocs., Ltd.*, 30 F.3d 1350 (11th Cir. 1994) (joint employment is a factual question); *Kaiser v. Trofholz Tech., Inc.*, 935 F. Supp. 2d 1286, 1293 (M.D. Ala. 2013) (denying motion to dismiss and finding that determination of joint employment is best addressed "after the parties have had an opportunity to uncover facts through discovery to support or refute this claim"). Thus, whether MPAS is a joint employer of Plaintiffs Inga and De La Cruz cannot be decided at this stage of the case.

Even so, MPAS puts great emphasis on the fact that it has always labeled itself an "agent" rather than an employer. MPAS Mot. at 13-14. Of course, what one calls itself is not determinative of employer status; otherwise, there would be no need for an "economic realities" test or any other kind of test to decide who is an employer. It is long established that a worker cannot waive FLSA coverage simply by entering into a contract stating that no overtime is due; the same holds true with respect to an agreement purporting to identify which legal entity will be considered the employer. *See Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 740 (1981) ("This Court's decisions interpreting the FLSA have frequently emphasized the nonwaivable nature of an individual employee's right to a minimum wage and to overtime pay under the Act. Thus, we have held that FLSA rights cannot be abridged by contract or otherwise waived because this would 'nullify the purposes' of the statute and thwart the legislative policies it was deigned to effectuate."). As such, the labels used by the parties (*e.g.*, the assertion that MPAS is not an employer of Plaintiffs) do not control whether there is an employment relationship; rather, the FLSA's test for employment—the economic realities test—governs. *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 301 (1985) (finding persons were employees despite their insistence they were volunteers, holding "these protestations, however sincere, cannot be dispositive. The test of employment under the Act is one of 'economic reality.'"); *Falk v. Brennan*, 414 U.S. 190, 193, 195 (1973) (despite agreement designating one entity as the employer, economic realities test applied to find both entities were joint employers).[11] This is an issue that cannot be resolved at the motion to dismiss stage, and must await

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[11] Nevada's Minimum Wage Amendment follows the FLSA in determining who is an employer. *Terry*, 336 P.3d at 953 (Nevada Supreme Court adopting the FLSA's "economic realities" test to determine who is an employer in the minimum wage context); *see also supra* at 32-33.

discovery.

As the Court has already found, Mr. Inga has "allege[d] that he was jointly employed by MPAS [and] Estill Ranches … while working in the United States." Order at 2. Plaintiffs simply remind the Court that they are entitled to discovery on this issue, and had every reason to allege joint employment.[12]

VI. DEFENDANT GRAGIRENA MAY BE HELD INDIVIDUALLY LIABLE UNDER THE NEVADA CONSTITUTION

As he did in his Motion to Dismiss Plaintiffs' First Amended Complaint, Dkt. 55 at 10-12, Defendant Gragirena argues that Nevada law does not allow for individual liability against him, relying exclusively on *Boucher v. Shaw*, 124 Nev. 1164, 1168, 196 P.3d 959, 961 (2008). As detailed in Plaintiffs' Consolidated Opposition to Motions to Dismiss the First Amended Complaint, Dkt. 77 at 11-13, *Boucher* addressed the Nevada Revised Statute, not the Nevada Constitution's Minimum Wage Amendment under which claims are stated against Gragirena, and *Boucher*'s approach to interpreting state wage and hour laws has since been overturned. Gragirena has not shown why subsequent Nevada case law does not apply, and completely ignores a District of Nevada case Plaintiffs previously cited that directly addresses this issue.

Boucher addressed the limited question of whether individual managers could be held liable under Chapter 608 of the Nevada Revised Statutes. 124 Nev. at 1165. Neither the statute nor the legislative history offered guidance as to who qualified as an "employer," and so the Nevada Supreme Court relied upon principles of state corporate law to find that individual management-level employees could not be held liable under that specific statute. *Id.* at 1170. In particular, the Court declined to apply the "economic realities" test used in FLSA employment claims, finding it "an [in]appropriate application of Nevada law." *Id.* at 1170 n.27.

But in 2014, the Nevada Supreme Court explicitly "adopted the [FLSA]'s 'economic realities' test for employment in the minimum wage context." *Terry v. Sapphire Gentlemen's Club*,

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[12] For its part, WRA agrees that joint employment cannot be addressed in a motion to dismiss. WRA Mot. at 10.

130 Nev. Adv. Op. 87, 336 P.3d 951, 953 (2014), *reh'g denied* (Jan. 22, 2015). Under the "economic realities" test, individual officers can be "employers" based on a number of non-dispositive factors, including the power to hire and fire, supervision and control of work schedules and conditions of employment, the power to determine pay, and the responsibility to maintain employment records. *Kenny v. Trade Show Fabrications W., Inc.*, No. 215CV410JCMVCF, 2016 WL 697110, at *2 (D. Nev. Feb. 18, 2016) (citing *Hale v. State of Ariz.*, 993 F.2d 1387, 1394 (9th Cir. 1993)). And while the *Terry* Court was careful to point out that, like *Boucher*, it was interpreting only the Nevada Revised Statutes, it further explained that the Nevada Constitution's Minimum Wage Amendment had its own definition of "employer," and that the "text of the Minimum Wage Amendment supplants that of our statutory minimum wage laws." The Minimum Wage Amendment is therefore subject to the "economic realities" test, as this is the rule of statutory interpretation now mandated by the Nevada Supreme Court, and in no way does *Boucher*'s "analysis hold[] true under the [Minimum Wage Amendment]." El Tejon Mot. at 16.

Interestingly, Gragirena attempted to address *Terry* in its Reply to Plaintiffs' Consolidated Opposition to Motions to Dismiss the First Amended Complaint, Dkt. 94 at 9-10, but has since abandoned that effort. This makes sense, as Gragirena's attempt to distinguish between *Terry* and *Boucher*—claiming the former addressed whether an employment relationship existed while the latter addressed individual liability—made no sense. The relevant holding in *Terry* was that the "economic realities" test applied to the employment relationship, and that the Minimum Wage Amendment had its own definition of "employer" which would need to be examined under the "economic realities" test in later cases.

A later case came, though Gragirena has ignored it entirely. In *Becky Kariuki & Dixie Kaiuki v. Shac, LLC, et al.*, No. 214CV1118JCMCWH, 2016 WL 6069927 (D. Nev. Oct. 13, 2016), a court within this District addressed the precise issue laid out by *Terry*, and found that individuals can indeed be subject to liability under the Nevada Constitution. There, the plaintiff workers brought suit under the Minimum Wage Amendment against their employer company, as well as the company's owner and the owner's wife, who acted in the capacity of a manager. Applying the "economic realities" test as mandated in *Terry*, Judge Mahan denied summary judgment as to the individual defendants, finding that there remained a factual dispute over whether their roles and responsibilities subjected them to individual liability as employers.

In sum, *Boucher* is inapposite because it did not interpret the Minimum Wage Amendment and applied a rule of statutory interpretation that has since been overturned. Defendant Gragirena may therefore be held liable under the "economic realities" test for violations of the Minimum Wage Amendment, and further discovery is needed to determine whether he is in fact individually liable under that test.

VII. THE COURT HAS ALREADY HELD THAT DEFENDANTS MUST PAY THE NEVADA MINIMUM WAGE, NOT THE AEWR

In its Order dismissing Plaintiffs' First Amended Complaint on jurisdictional grounds, the Court held that there were no substantial questions of federal law as to the terms of Plaintiffs' H-2A work contracts because the terms of the contracts were set out by law, and "as a matter of law, Plaintiffs' H-2A shepherd contracts included a promise to pay *the applicable state minimum wage*, if higher than the applicable AEWR." Order at 12 (emphasis added). Ignoring this holding, WRA offers the Court its own interpretation of the H-2A regulations, asserting that "the AEWR must be applied as a matter of law," even if the state minimum wage is higher. WRA Mot. at 12. Perhaps WRA is asking the Court to revisit its holding, but to the extent it does, the Court would be putting into contention the very question—interpretation of the terms of Plaintiffs' contracts and the federal H-2A regulations underlying those contracts—that the Court has already determined is "not substantial because controlling law clearly resolves the issue." Order at 12.

Moreover, WRA's interpretation of the DOL regulations is nonetheless erroneous. The DOL requires employers to pay H-2A workers the *highest* of all applicable minimum wage rates, whether set by state or federal law. 20 C.F.R. §§ 655.210(g), 655.211(a); 76 Fed. Reg. at 47,258; 20 C.F.R. § 653.501(d)(4). In a blatant misreading of the H-2A regulations, WRA argues that it complied with its obligations under federal law because it paid its H-2A workers the federal AEWR wage. WRA Mot. at 11-12. However, the regulations could not be clearer: the Nevada minimum wage is higher than the AEWR, and so employers must pay their H-2A workers the Nevada minimum wage, just as they would pay their domestic workers the Nevada minimum wage. 20 C.F.R. §§ 655.210(g), 655.211(a). *See also* Dkt. 77 (Consolidated Opposition to Motions to Dismiss First Amended Complaint) at 13-14.

WRA concludes its Motion by asserting that Plaintiffs are "insulting … this Court" and "wast[ing] … the Court's resources" by bringing mostly the same claims they made in their First Amended Complaint. Plaintiffs find these accusations confusing. The Court dismissed Plaintiffs' claims on jurisdictional grounds, not for failing to state claims upon which relief could be granted, and thus Plaintiffs have no reason to drastically alter their claims. Plaintiffs have cured the jurisdictional defects outlined by the Court, and now seek to move this case forward.

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Motions to Dismiss, Dkts. 117, 118, 121 and 124.

Dated: July 26, 2017

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2017, a true and correct copy of the foregoing was served via the United States District Court CM/ECF system on all parties or persons requiring notice.

By: *\/s/Christine E. Webber*

Christine E. Webber

Exhibit A

Llacua, et. al. v. Western Range Association, et. al
No. 15-cv-01889

Order Re: Objections to Recommendation of United States Magistrate Judge (Dkt. 173)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

Civil Action No. 15-cv-01889-REB-CBS

RODOLFO LLACUA, et al.,

Plaintiffs,

v.

WESTERN RANGE ASSOCIATION, et al.,

Defendants.

ORDER RE: OBJECTIONS TO RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Blackburn, J.

The matters before me are (1) the magistrate judge's **Memorandum Opinion and Recommendation on Plaintiffs' Motion To Amend the Second Amended Complaint** [#158],[1] filed December 21, 2016; (2) **Defendant MPAS's Objection to Magistrate Judge's Memorandum Opinion and Recommendation on Plaintiff's Motion To Amend the Second Amended Complaint** [#162], filed January 26, 2017; (3) **Defendant Western Range Association's Objection to Magistrate Judge's Memorandum Opinion and Recommendation on Plaintiff's Motion To Amend the Second Amended Complaint as it Relates to Count VIII** [#163], filed January 26, 2017; and (4) plaintiffs' **Objection to Report and Recommendation** [#164], filed January 26, 2017. As required by 28 U.S.C. § 636(b), I have reviewed *de novo* all

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[1] "[#158]" is an example of the convention I use to identify the docket number assigned to a specific paper by the court's case management and electronic case filing system (CM/ECF). I use this convention throughout this order.

portions of the recommendation to which objections have been filed, and have considered carefully the recommendation; plaintiffs' and defendants' respective objections and responses thereto; the arguments presented in the underlying motion, responses, and reply; and all applicable caselaw.

As he did in vetting plaintiffs' Second Amended Complaint, the magistrate judge here has masterfully and cogently analyzed the viability of the substantive allegations included in this latest proposed amendment of plaintiffs' Sherman Act and civil RICO claims. It would add nothing to his adroit discussion and well-supported arguments for this court to expound further on these matters. Put succinctly, plaintiffs' proposed amendment does little more than heap factual detail on top of the same insupportable legal theories previously asserted. Nothing in their objections convinces this court the magistrate judge misapprehended or misapplied the relevant law. I thus approve and adopt the magistrate judge's recommendation to dismiss plaintiffs' proposed Sherman Antitrust Act claims, as well as the majority of their civil RICO claims, as futile.

However, I must respectfully must reject the recommendation that plaintiffs be granted leave to amend to assert a civil RICO claim against defendant Dennis Richins. Regardless whether these allegations are substantively sufficient to withstand a motion to dismiss, I agree with defendants – based on a more complete understanding of the procedural history of this case – that plaintiffs' undue delay in filing this most recent proposed amendment is undue, unjustified, and prejudicial.

Some background is necessary to put the court's determination in context. Soon after this case was filed, defendant Mountain Plains Agricultural Service ("MPAS") filed a motion to stay, pending resolution of pending and anticipated motions to dismiss

[#23]. Less than a week later, on October 28, 2015, plaintiffs filed their First Amended Complaint [#32].[2] On November 13, 2015, the magistrate judge held a status conference to consider, *inter alia*, the motion to stay (***see*** [#52]).[3] In addressing that motion, the magistrate judge pointed out that the then-imminent (now fully applicable) changes to Rule 1 of the Federal Rules of Civil Procedure expressly imposed on both the court and all parties the responsibility for ensuring the "just, speedy, and inexpensive determination of every action." Emphasizing the seriousness with which he took the objectives underlying the rule, the magistrate judge cautioned the parties at length that he already foresaw the case – a putative class action involving complex antitrust and racketeering claims – "on a glide path to slow," in contravention of Rule 1. He therefore denied the motion to stay, and authorized limited discovery.[4]

The magistrate judge then addressed plaintiffs' counsel. Noting two motions to dismiss the First Amended Complaint already had been filed and two more were anticipated the following Monday, the magistrate judge made it plain that plaintiffs should not expect unfettered leeway to proffer multiple iterations of their complaint, followed by multiple rounds in which defendants' motions to dismiss were countered with yet further requests to amend. He therefore specifically informed plaintiffs' counsel that he would "impose upon you a specific obligation":

---

[2] The filing of that amended complaint mooted both MPAS's motion to dismiss and a separate motion to dismiss [#39] filed by Cunningham Sheep Company contemporaneously with the amended complaint. (***See*** [## 42 & 43].).

[3] Although no transcript was ordered, the court has reviewed carefully the audio recording of the status conference in its entirety.

[4] Requesting the parties to produce a phased discovery plan, he noted his intent was not to "jump into the deep end of the discovery pool," but rather merely to "dip[] a toe in the water."

> As to the motions to dismiss that were filed on November 11 and November 12, as for the motions to dismiss that are filed on Monday, I will require plaintiffs' counsel, to the extent that plaintiffs' counsel as any inclination, even as a fall-back position, to the extent that plaintiff's counsel has any inclination to raise the possibility of further amendments as a cure, I'll require you to take the initiative to put together a telephone conference call with all the defense counsel on or before November 20 to raise that prospect. I don't want to wait 21 days [after the motions to dismiss are filed] for you to simply say "OK, judge, well we think the motions are losers, [but] we want to amend yet one more time." Because that doesn't benefit . . . it certainly doesn't benefit the plaintiffs and I can tell you without a moment's of [sic] hesitation, it doesn't benefit the court.
>
> So if you have any inclination to respond to these motions by raising or asserting yet another motion for leave to amend, I want that discussed with defense counsel, um, no later than November 20. You're going to have to put your cards on the table. Okay?

Counsel for plaintiff's replied, "Understood, Your Honor." In case that discussion were not sufficiently clear, the magistrate judge shortly thereafter again cautioned he did not "want to be in a situation where we spend untold months briefing, with an outside possibility of amending . . ."

That discussion gives context to the magistrate judge's prior recommendation that the federal claims set forth in the Second Amended Complaint be dismissed without further leave to amend:[5]

> Plaintiffs have not formally requested leave to amend their complaint a third time. When Plaintiffs do not formally seek leave to amend, the court need not provide for amendment upon dismissal. To obtain leave, Plaintiffs would have to show that a third amendment would likely enable them to

[5] Nothing in the record before me suggests the meeting between the parties contemplated by the magistrate judge occurred on or before the designated November 20 deadline.

> plausibly allege the federal claims or diversity jurisdiction. Nothing in the record indicates that a third amendment would enable Plaintiffs to do either. The court accordingly recommends dismissing without leave to amend.

(**Recommendation on Defendants' Motions To Dismiss the Second Amended Complaint** at 42 n.25 [#125], filed June 3, 2016 (internal citations omitted).) Two and a half months after that recommendation had been docketed – and nearly three weeks after plaintiffs' objections had been fully briefed, with barely a mention of the prospect of amendment, much less a request for same[6] – plaintiffs submitted a proposed Third Amended Complaint, conditioned on this court's ruling on the recommendation regarding the pending motions to dismiss. (***See* Motion To Amend** [#139], filed August 18, 2016.)

At the time plaintiffs' motion for leave to amend was filed, the court followed its routine practice and referred it to the magistrate judge [#141]. Meanwhile, three weeks later, the court approved and adopted the magistrate judge's recommendation to dismiss the federal claims asserted in the Second Amended Complaint. At that time, however, this court was unaware of the magistrate judge's prior pointed admonishments regarding further attempts to amend. Therefore, in light of the filing of the motion for leave to amend, I noted I felt "constrained to conditionally reject" the recommendation to deny leave to amend, and thus dismissed plaintiffs' federal claims without prejudice pending determination of the motion for leave to amend. (**Order Overruling**

---

[6] On the penultimate page of their brief, plaintiffs claimed to be perplexed as to why they should not be allowed to amend to attempt to address the magistrate judge's conclusion that the Second Amended Complaint failed to state a viable civil RICO claim against Mr. Richins. (***See* Plf. Obj.** at 19 [#131], filed July 1, 2016.) Yet they neither requested leave to amend nor addressed the relevant standards for leave to amend. Instead, they primarily insisted the claim was viable as pled.

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 2, PART 2

ELLEN JEAN WINOGRAD, ESQ.
Nevada State Bar No. 815
JOSE TAFOYA, ESQ.
Nevada State Bar No. 16011
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ATTORNEYS FOR RESPONDENT
WESTERN RANGE ASSOCIATION

Docket 85926 Document 2023-20295

Objections to Recommendation of the United States Magistrate Judge at 3 [#142], filed September 6, 2016.) Now, with a fuller understanding of the context of the magistrate judge's prior recommendation to deny leave to amend, this court's prior determination appears overly facile.

Moreover, the magistrate judge's current recommendation that plaintiffs now should be granted leave to amend seems to take inadequate account of his own prior efforts to prevent just this type of prodigal machination. Nor do the reasons cited by the magistrate judge as justifying granting leave to amend strike the court as particularly compelling. Indeed, the reason trial has not been set is attributable largely to plaintiffs' inability to land and stick on a definitive articulation of their claims. The limited nature of the discovery undertaken thus far likewise is a consequence of plaintiffs' vacillation.

Indeed, the magistrate judge specifically (and rightly) rejected plaintiffs' arguments that amendment was appropriate because the court had misconstrued their claims. He also stressed plaintiffs' *seriatim* amendments were "inefficient" and inconsistent with their responsibilities under Rule 1, exactly the circumstance he had attempted to avoid by directing plaintiffs to "put their cards on the table" more than a year ago, just before they filed their Second Amended Complaint. (**Recommendation** at 31.) Further, the magistrate judge noted plaintiffs' counsel should have been aware of many of the facts they proposed to add to their claim against Mr. Richins. (***See id.*** at 31 n.20.)[7] It is hard to square this discussion with a recommendation that plaintiffs be allowed to amend at this late date after repeated unsuccessful attempts to assert viable

[7] Mr. Richins argues plaintiffs appear to merely have recast their prior breach of contract claim against him as a RICO violation. (***See*** [#171] at 2-3.)

claims.

Given all these circumstances, the court is compelled to conclude that plaintiffs' attempts at amendment have been dilatory, resulting in undue delay and prejudice to all defendants, not just Mr. Richins. Although "[l]ateness does not of itself justify the denial of the amendment,"

> [a] party who delays in seeking an amendment is acting contrary to the spirit of the rule and runs the risk of the court denying permission because of the passage of time. The longer the delay, the more likely the motion to amend will be denied, as protracted delay, with its attendant burdens on the opponent and the court, is itself a sufficient reason for the court to withhold permission to amend.

Minter v. Prime Equipment Co., 451 F.3d 1196, 1204-05 (10th Cir. 2006) (citations and internal quotation marks omitted). In determining whether delay is undue, the Tenth Circuit has advised district courts to focus on the reasons for the delay. ***Id.*** at 1206. Denial of leave to amend is appropriate "when the party filing the motion has no adequate explanation for the delay." ***Frank v. U.S. West***, 3 F.3d 1357, 1365-66 (10th Cir. 1993). ***See also Durham v. Xerox Corp.***, 18 F.3d 836, 840 (10th Cir.) ("[U]nexplained delay alone justifies the district court's discretionary decision."), ***cert. denied***, 115 S.Ct. 80 (1994).

Such is the case here. Although plaintiffs' delay is not wholly unexplained, their explanations as to why further amendment was necessary are wholly unconvincing. Specifically, plaintiffs maintain they could not have known the importance of certain issues in the case until defendants filed their responses to plaintiffs' objections to the recommendation to dismiss the Second Amended Complaint. That argument is, frankly, nonsensical. Assuming *arguendo* defendants' arguments in response to the objections truly were new, as plaintiffs suggest, the magistrate judge plainly could not have relied on them in recommending dismissal. Nor did this court, as it simply approved and adopted the magistrate judge's substantive recommendations without further exegesis.

What strikes this court as far more likely is that plaintiffs – knowing the magistrate judge recommended dismissal of their federal claims, and fully aware from prior discussions with the magistrate judge that this court was likely to rule on the motions to dismiss the Second Amended Complaint before the end of September 2016 – decided to chance one last shot at attempting to cure the deficiencies the magistrate judge had identified. It is precisely this 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[.]" ***Minter***, 451 F.3d at 1206 (citations and internal quotation marks omitted). All three of those boundaries are transgressed by plaintiffs' efforts to amend in this matter.

I therefore respectfully reject the magistrate judge's recommendation that this single federal claim be allowed to proceed, and concomitantly deny plaintiffs' motion to amend as to that claim as well. Moreover, because that determination disposes of all federal claims in this lawsuit, I exercise my prerogative to decline supplemental jurisdiction over the pendant state law claims. 28 U.S.C. § 1367(a)(3). ***See also Koch v. City of Del City***, 660 F.3d 1228, 1248 (10th Cir. 2011), ***cert. denied***, 133 S.Ct. 211 (2012).

THEREFORE, IT IS ORDERED as follows:

1. That the magistrate judge's **Memorandum Opinion and Recommendation on Plaintiffs' Motion To Amend the Second Amended Complaint** [#158], filed December 21, 2016, is approved in part and rejected in part, as follows:

    a. That the recommendation is rejected insofar as it recommends allowing plaintiffs to assert a civil RICO claim against Mr. Richins and allowing the pendant state law claims to proceed; and

    b. That in all other respects, the recommendation is approved and adopted as an order of this court;

2. That the objections stated in plaintiffs' **Objection to Report and Recommendation** [#164], filed January 26, 2017, are overruled;

3. That the objections stated in **Defendant MPAS's Objection to Magistrate Judge's Memorandum Opinion and Recommendation on Plaintiff's Motion To Amend the Second Amended Complaint** [#162], filed January 26, 2017, are deemed to be moot;

4. That the objections stated in **Defendant Western Range Association's Objection to Magistrate Judge's Memorandum Opinion and Recommendation on Plaintiff's Motion To Amend the Second Amended Complaint as it Relates to Count VIII** [#163], filed January 26, 2017, are deemed to be moot;

5. That plaintiffs' **Motion To Amend** [#139], filed August 18, 2016, is denied;

6. That the plaintiffs' federal claims are dismissed with prejudice;

7. That plaintiffs' pendant state law claims are dismissed without prejudice;

8. That judgment shall enter on behalf of defendants, Western Range Association; Mountain Plains Agricultural Service, Martin Auza Sheep Corporation, Nottingham Land and Livestock, LLLP; Two Bar Sheep Corporation, LLC; Ball Brothers Sheep Company; Estill Ranches, LLC; Cunningham Sheep Company; Dennis Richins dba Dennis Richins Livestock; and Child Ranch, LLC, and against plaintiffs, Rodolfo Llacua; Esliper Huaman; Leovegildo Vilchez Guerra; Liber Vilchez Guerra; Rafael de la Cruz, and behalf of themselves and all others similarly situated, as follows:

a. That judgment with prejudice shall enter as to plaintiffs' federal antitrust and RICO claims against defendants; and

b. That judgment without prejudice shall enter as to plaintiffs' state law claims;

9. That defendants are awarded their costs, to be taxed by the clerk of the court in the time and manner required by Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1; and

10. That this case is closed.

Dated March 7, 2017, at Denver, Colorado.

BY THE COURT:

Bob Blackburn

Robert E. Blackburn
United States District Judge

Exhibit B

Llacua, et. al v. Western Range Association, et. al.
No. 17-1113

Docketing Statement (Dkt. 01019794140)

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DOCKETING STATEMENT

Case Name: Llacua, *et al.* v. Western Range Association, *et al.*

Appeal No. (if available): 17-1113

Court/Agency Appeal From: United States District Court for the District of Colorado

Court/Agency Docket No.: 15-cv-01889-REB-CBS District Judge: Judge Blackburn

Party or Parties filing Notice of Appeal/Petition: Rafael De La Cruz, Leovegildo Vilchez Guerra, Liber Vilchez Guerra, Esliper Huaman, and Rodolfo Llacua

I. TIMELINESS OF APPEAL OR PETITION FOR REVIEW

A. APPEAL FROM DISTRICT COURT

1. Date notice of appeal filed: March 28, 2017

   a. Was a motion filed for an extension of time to file the notice of appeal? If so, give the filing date of the motion, the date of any order disposing of the motion, and the deadline for filing notice of appeal:
   No

   b. Is the United States or an officer or an agency of the United States a party to this appeal? No

2. Authority fixing time limit for filing notice of appeal:

Fed. R. App. 4 (a)(1)(A)	X	Fed. R. App. 4(a)(6)	____
Fed. R. App. 4 (a)(1)(B)	____	Fed. R. App. 4(b)(1)	____
Fed. R. App. 4 (a)(2)	____	Fed. R. App. 4(b)(3)	____
Fed. R. App. 4 (a)(3)	____	Fed. R. App. 4(b)(4)	____
Fed. R. App. 4 (a)(4)	____	Fed. R. App. 4(c)	____
Fed. R. App. 4 (a)(5)	____		
Other: ____________			

3. Date final judgment or order to be reviewed was filed and **entered** on the district court docket: March 7, 2017

4. Does the judgment or order to be reviewed dispose of **all** claims by and against **all** parties? *See* Fed. R. Civ. P. 54(b).

Yes

II. LIST ALL RELATED OR PRIOR RELATED APPEALS IN THIS COURT WITH APPROPRIATE CITATION(S). None.

III. GIVE A BRIEF DESCRIPTION OF THE NATURE OF THE PRESENT ACTION AND RESULT BELOW.

This case concerns claims under the Sherman Antitrust Act, 15 U.S.C. § 1, *et seq.*, the RICO Act, 15 U.S.C. § 1, *et seq.*, and state law brought by former shepherds against several ranchers and two trade associations. Plaintiffs allege that Defendants have combined to set the wages offered to foreign and domestic shepherds. They also allege that some Defendants have violated the RICO Act as they are associated with enterprises and participate, directly or indirectly, in the conduct of such enterprises' affairs through a pattern (or patterns) of racketeering activity that include multiple acts of wire or mail fraud relating to the payments made to foreign shepherds working under H-2A visas. Plaintiffs' state claims relate to payments made to foreign, H-2A shepherds.

The District Court dismissed Plaintiffs' federal claims on the pleadings and denied supplemental jurisdiction over Plaintiffs' state law claims. *See* Ex. A.

IV. ISSUES RAISED IN THIS APPEAL.

The issues raised on appeal include the following:

- Whether Plaintiffs plausibly plead that Association Defendants violated the Sherman Act by setting the wages offered foreign and domestic shepherds.
- Whether Plaintiffs plausibly plead that Rancher Defendants violated the Sherman Act by delegating decisions about offered wages to foreign and domestic shepherds or by otherwise participating in a combination to set offered wages.
- Whether Plaintiffs have plausibly alleged RICO Act claims against Association Defendants and Defendant Richins.
- Whether Plaintiffs unduly delayed in seeking leave to amend their Second Amended Complaint.

V. ATTORNEY FILING DOCKETING STATEMENT:

Name: Alexander Hood Telephone: (720) 239-2606

Firm: Towards Justice

Email Address: alex@towardsjustice.org

Address: 1535 High Street, Suite 300, Denver, CO 80218

A. PLEASE IDENTIFY ON WHOSE BEHALF THE DOCKETING STATEMENT IS FILED:

Appellants

B. PLEASE IDENTIFY WHETHER THE FILING COUNSEL IS:

Retained Attorney

s/Alexander Hood
Alexander Hood
TOWARDS JUSTICE
1535 High St., Suite 300
Denver, CO 80218
(720) 239-2606
alex@towardsjustice.org

April 12, 2017
Date

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2017 I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to all counsel of record.

s/Alexander Hood

Exhibit C

Hispanic Affairs Project, et. al. v. Perez, et. al
No. 15-cv-01785

Minute Order (Dkt. 42)

ALLMTN,TERMED

U.S. District Court
District of Colorado (Denver)
CIVIL DOCKET FOR CASE #: 1:15-cv-01785-RM-MJW

Hispanic Affairs Project, et al v. Perez, et al
Assigned to: Judge Raymond P. Moore
Referred to: Magistrate Judge Michael J. Watanabe
Cause: 28:1346 Breach of Contract

Date Filed: 08/18/2015
Date Terminated: 06/27/2017
Jury Demand: Plaintiff
Nature of Suit: 190 Contract: Other
Jurisdiction: Federal Question

Date Filed	#	Docket Text
08/18/2015	1	MOTION for Temporary Restraining Order *AND/OR MOTION FOR PRELIMINARY INJUNCTION* by Plaintiffs JOHN DOE, HISPANIC AFFAIRS PROJECT, RODOLFO LLACUA. (Attachments: # 1 Ex. A - Proposed Notice to Employers, # 2 Ex. B - Dec. of Attorney Dermot Lynch, # 3 Ex. C - July 2011 USDOL Wage Determination, # 4 Ex. D. - Dec. of Brian Pasternak, # 5 Ex. E. - CA SWA Wage Finding, # 6 Ex. F. - CO SWA Wage Finding, # 7 Ex. G. - NV SWA Wage Finding, # 8 Ex. H - OR SWA Wage Finding, # 9 Ex. I - WY SWA Wage Finding, # 10 Ex. J - Dec. of Ricardo Perez, # 11 Ex. K - Dec. of Rodolfo Llacua, # 12 Ex. L - Dec. of John Doe, # 13 Ex. M - Pending H-2A Sheepherder Applications)(Hood, Alexander) (Entered: 08/18/2015)
08/18/2015	2	COMPLAINT against All Defendants (Filing fee $ 400,Receipt Number 1082-4559717), filed by HISPANIC AFFAIRS PROJECT, JOHN DOE, RODOLFO LLACUA.(Hood, Alexander) (Entered: 08/18/2015)
08/18/2015	3	NOTICE re 1 MOTION for Temporary Restraining Order *AND/OR MOTION FOR PRELIMINARY INJUNCTION (Proposed Order)* by Plaintiffs JOHN DOE, HISPANIC AFFAIRS PROJECT, RODOLFO LLACUA (Attachments: # 1 Ex. A Proposed Order) (Hood, Alexander) (Entered: 08/18/2015)
08/18/2015	4	SUMMONS REQUEST as to THOMAS E. PEREZ; UNITED STATES DEPARTMENT OF LABOR; and PORTIA WU by Plaintiffs JOHN DOE, HISPANIC AFFAIRS PROJECT, RODOLFO LLACUA. (Hood, Alexander) (Entered: 08/18/2015)
08/19/2015	5	Case assigned to Judge Robert E. Blackburn. Text Only Entry (sphil,) (Entered: 08/19/2015)
08/19/2015	6	SUMMONS issued by Clerk. Magistrate Judge Consent form issued pursuant to Local Rule (Attachments: # 1 Magistrate Judge Consent Form) (sphil,) (Entered: 08/19/2015)
08/19/2015	7	ORDER denying 1 Ex Parte Motion for a Temporary Restraining Order and Scheduling Briefing on Motion for Preliminary Injunction. Telephone Conference set for 9/24/2015 10:30 AM before Judge Robert E. Blackburn. By Judge Robert E. Blackburn on 8/19/2015.(mlace,) (Entered: 08/19/2015)
08/20/2015	8	NOTICE of Entry of Appearance by Erez Reuveni on behalf of All Defendants Attorney Erez Reuveni added to party Thomas E. Perez(pty:dft), Attorney Erez Reuveni added to party United States Department of Labor(pty:dft), Attorney Erez Reuveni added to party Portia Wu(pty:dft) (Reuveni, Erez) (Entered: 08/20/2015)
08/27/2015	9	Unopposed MOTION for Leave to *PROCEED UNDER A PSEUDONYM BY PLAINTIFF*

RA 00191

		to the extent the parties' Motion advises the Court as to named parties and/or counsel that have been listed or captioned in this action incorrectly, the parties are directed to include the appropriate docket entry so indicating. SO ORDERED by Judge Raymond P. Moore on 5/9/2017. (Text Only Entry) (rmsec) (Entered: 05/09/2017)
05/10/2017	39	NOTICE of Entry of Appearance by Ellen Jean Winograd on behalf of Western Range AssociationAttorney Ellen Jean Winograd added to party Western Range Association(pty:dft) (Winograd, Ellen) (Entered: 05/10/2017)
06/14/2017	40	MINUTE ORDER: This matter is before the Court sua sponte upon consideration that the parties have not fully advised the Court concerning the matters raised in its orders of May 4 and 9, 2017 36 38 . In addition, based on the filings, it appears that administrative closure of this case pursuant to D.C.COLO.LCivR 41.2 may be appropriate. Accordingly, on or before Friday, June 23, 2017, the parties shall show cause why this action should not be administratively closed, subject to reopening for good cause. SO ORDERED by Judge Raymond P. Moore on 6/14/2017. (Text Only Entry) (rmsec) (Entered: 06/14/2017)
06/23/2017	41	Joint MOTION for Order to *ADMINISTRATIVELY CLOSE CASE AND TO STRIKE MISTAKENLY DOCKETED PARTIES AND DOCUMENTS, AND RESPONSE TO ORDER TO SHOW CAUSE [ECF DOC. 40]* by Plaintiffs Rafael De La Cruz, Hispanic Affairs Project, Rodolfo Llacua, Alfredo Salcedo. (Hood, Alexander) (Entered: 06/23/2017)
06/27/2017	42	MINUTE ORDER: This matter is before the Court on the parties' Joint Motion 41 filed in response to the Order to Show Cause 40 as to why this case should not be administratively closed, subject to reopening for good cause. The Joint Motion advises the following: (1) Plaintiff Hispanic Affairs Project is not a party to the counts transferred to this court; (2) ECF Nos. 24-27 and 35 should be stricken; and (3) the parties consent to the administrative closure of this case, subject to reopening for good cause. Upon consideration of the Joint Motion, relevant parts of the court file, and being otherwise fully advised, the Court ORDERS as follows: (1) the clerk shall terminate Plaintiff Hispanic Affairs Project as a party to this action; (2) ECF Nos. 24-27 shall be STRICKEN, but ECF No. 35 shall not as the referral has already been terminated by the court; (3) pursuant to D.C.COLO.LCivR 41.2 the clerk shall administratively close this case, subject to reopening for good cause; and (4) the Order to Show Cause 40 is made absolute. SO ORDERED by Judge Raymond P. Moore on 6/27/2017. (Text Only Entry) (rmsec) (Entered: 06/27/2017)
06/27/2017	43	Party Hispanic Affairs Project terminated and the case is Administratively Closed pursuant to the Order entered at docket entry 42 . (cthom,) (Entered: 06/27/2017)
07/24/2017	44	NOTICE of Voluntary Dismissal of Case by Plaintiff Rafael De La Cruz (Hood, Alexander) (Entered: 07/24/2017)

PACER Service Center

Transaction Receipt

07/26/2017 13:42:46

PACER Login:	Cmst1100:4480511:3941711	**Client Code:**	99900-023 0036
Description:	Docket Report	**Search Criteria:**	1:15-cv-01785-RM-MJW
Billable Pages:	7	**Cost:**	0.70

Exhibit D

Hispanic Affairs Project, et. al v. Perez, et. al.
No. 15-cv-01785

Notice of Dismissal (Dkt. 44)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Case No. 15-cv-01785-RM-MJW

HISPANIC AFFAIRS PROJECT, *et al.*,

Plaintiff,

v.

PEREZ, *et al.*,

Defendants.

NOTICE OF DISMISSAL PURSUANT TO FED. R. CIV. P. 41(a)(1)(A)(i)

TO THE COURT AND ALL PARTIES OF RECORD:

Pursuant to Fed. R. Civ. P. 41(a)(1)(A)(i), Plaintiff Rafael De La Cruz hereby dismisses his claims in this action without prejudice.

Respectfully Submitted,

s/Alexander Hood
Alexander Hood
Towards Justice
1535 High Street, Suite 300
Denver, CO 80218
Tel.: 720-239-2606
Fax: 303-957-2289
Email: alex@towardsjustice.org

Certificate of Service

I hereby certify that on 7/24/2017, I filed the above using the Court's CM/ECF filing system causing all parties of record to be served pursuant to Fed. R. Civ. P. 5.

s/Alexander Hood
Alexander Hood

Exhibit E

Llacua, et. al v. Western Range Association, et. al.
No. 15-cv-01889

Second Amended Complaint (Dkt. 73)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Case 15-cv-01889-REB-CBS

RODOLFO LLACUA;
ESLIPER HUAMAN;
LEOVEGILDO VILCHEZ GUERRA;
LIBER VILCHEZ GUERRA;
RAFAEL DE LA CRUZ;
and those similarly situated

Plaintiffs,

v.

WESTERN RANGE ASSOCIATION;
MOUNTAIN PLAINS AGRICULTURAL SERVICE;
MARTIN AUZA SHEEP CORPORATION;
NOTTINGHAM LAND AND LIVESTOCK, LLLP;
TWO BAR SHEEP CORPORATION, LLC;
BALL BROTHERS SHEEP COMPANY;
ESTILL RANCHES, LLC;
CUNNINGHAM SHEEP COMPANY;
DENNIS RICHINS DBA DENNIS RICHINS LIVESTOCK; and
CHILD RANCH, LLC

Defendants.

SECOND AMENDED COMPLAINT

Plaintiffs file this Second Amended Complaint pursuant to the parties' revised scheduling order, adopted by the Court on November 27, 2015. *See* ECF Doc. No. 68.

INTRODUCTORY STATEMENT

I. An Industry Pervaded by Lawlessness

1. The market that supplies labor for sheep ranchers is regulated by a complex scheme of federal and state laws that, among other things, allows for the importation of temporary foreign workers and sets minimum wage floors for shepherds.

2. Notwithstanding government's heavy regulation of this industry, the labor market for shepherds in the United States is pervaded by lawlessness that harms shepherds and contravenes the basic tenets of a free and competitive market.

3. Sheep ranchers perpetuate this lawlessness through, with the aid of, and in conjunction with membership associations known as the Western Range Association ("WRA") and the Mountain Plains Agricultural Service ("MPAS"). The industry is dominated by ranches that are members of these associations.

4. The lawlessness begins in the setting of wages for shepherds. Ranchers, like all employers, have a legal obligation to compete for shepherd labor in an open market. Instead, they use these membership organizations to fix wages across the industry – for both domestic *and* foreign shepherds – at precisely the wage floor set by the United States Department of Labor (the "DOL") for foreign shepherds working in the United States on temporary, H-2A visas.

5. The concerted conduct that results in the fixing of wages is starkly illustrated by the WRA's and MPAS's explicit communications to their members to adjust the wages they pay their shepherds to precisely the DOL-set wage floor, but no more, and the WRA's and MPAS's preparation of job announcements and job offers that set shepherd

wages at precisely this amount without any acknowledgement of even the possibility that appropriate shepherd wages might differ from ranch to ranch or shepherd to shepherd.

6. The lawlessness continues in the importation of desperate, foreign workers to fill shepherd positions. To obtain the temporary visas necessary to import these workers legally, the WRA and the MPAS, on behalf of their member ranches, provide assurances to state and federal agencies that ranches will not deduct certain expenses from shepherds' wages and will reimburse shepherds for various expenses, including travel expenses.

7. These assurances are false and fraudulent. The WRA and the MPAS, as a matter of policy, fail to make promised reimbursements, which amounts to an illegal deduction from wages.

8. Finally, in at least one state—Nevada—the MPAS illegally refuses to pay Nevada minimum wage to shepherds who fall within state minimum wage protections.

II. Resulting Market Distortions that Foster Harsh and Anachronistic Employment Practices

9. Because of the ranches' collusion in setting shepherds' wages at levels that are strikingly low even relative to the most low-wage employment opportunities in the rest of the American economy, few domestic workers desire to work as shepherds. Therefore, the sheep ranching industry is now dependent on the importation of foreign H-2A

shepherds who are, in essence, indentured servants.[1] A 2010 survey by Colorado Legal Services found deplorable conditions for shepherds:

- Almost 73 percent of the shepherds reported having zero days off over the course of a year.
- More than 80 percent were not permitted to leave their ranch.
- Approximately 35 percent were paid less than once a month.
- 85 percent were not allowed to have visitors who were not ranch employees.
- Roughly 70 percent reported never having access to a functioning toilet.
- 85 percent were never permitted to engage in social activities.
- Almost 50 percent reported not having the opportunity or ability to read their employment contracts.[2]

10. The industry is not shy in viewing shepherds less as employees with legal rights and more as indentured servants who should be subject to even criminal sanction if they refuse to work. One sheep rancher and MPAS member recently introduced a state bill that would have made it a crime for a shepherd to leave his flock. Meanwhile, the WRA has labeled some shepherds as "runaways" that need to be rounded up and deported. As explained by WRA President Lane Jensen, "[a] significant effort was made jointly between Western Range and Mountain Plains last summer to locate and deport shepherds that had jumped their contract as well as to penalize those that assisted contract breakers in finding employment. While the effort succeeded in locating runaways, there was no assistance from Immigration officials or the Department of

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[1] *See generally* Southern Poverty Law Center, Close to Slavery: Guestworker Programs in the United States (2013), *available at* https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf.

[2] Colorado Legal Services *et al.*, *Overworked and Underpaid: H-2A Herders in Colorado* (2009), *available at* http://users.frii.com/cls/Overworked%20and%20Underpaid.pdf.

Labor to penalize, deport, or even make contact with known jumpers." The use of criminal sanctions to enforce civil work contracts and the industry's use of the terms "runaways" or "jumpers" to describe non-compliant workers echoes some of the darkest periods of our nation's labor past and is indicative of the problems engrained in the H-2A program in general and the importation of H-2A shepherds specifically.

11. The deplorable conditions of H-2A shepherds and the lack of U.S. workers participating in the shepherd labor market are not the result of natural market conditions. Instead, both are the result of the WRA's, the MPAS's, and all of their member ranchers' collusion and conspiracy to fix wages, thereby eliminating any competitive market for shepherd labor and stripping shepherds, both foreign and domestic, of their ability to bargain for wages in a free market.

12. The result of this price fixing conspiracy or conspiracies is absurdly low wages for all shepherds, the exclusion of most American workers from the shepherd labor market, and the importation of vulnerable foreign workers working for meager pay, under atrocious living and working conditions, and without any meaningful opportunity to bargain for anything better like other employees in the labor market.

JURISDICTION AND VENUE

13. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1331 [Federal Question].

14. Venue is proper pursuant to 28 U.S.C. § 1391, 18 U.S.C. § 1965(a), 15 U.S.C. §§ 15(b) & 22. Defendants all transact business in Colorado and a substantial part of

the events or omissions giving rise to the claims against each Defendant occurred in Colorado.

15. The Court has *in personam* jurisdiction over Defendants because each, among other things: (a) transacted business in the United States, including in this District; (b) paid Plaintiffs and members of the Classes (defined herein) artificially fixed and suppressed wages throughout the United States, including in this District; or (c) had substantial aggregate contacts with the United States as a whole, including in this District.

PARTIES

16. Plaintiff Rodolfo Llacua is a former shepherd and WRA employee who resides in Colorado. He is originally from Peru and worked as an H-2A shepherd for more than nine years.

17. Plaintiff Esliper Huaman is a former shepherd and WRA employee who worked in Utah. He is originally from Peru and worked as an H-2A shepherd for around six years.

18. Plaintiff Leovegildo Vilchez is a former shepherd and WRA employee who worked in Colorado. He is originally from Peru and worked as an H-2A shepherd for more than four years

19. Plaintiff Liber Vilchez Guerra is a former shepherd and WRA employee who worked in Colorado. He is originally from Peru and worked as an H-2A shepherd for more than three years.

20. Plaintiff Rafael De La Cruz is a former shepherd and MPAS employee who worked in Nevada. He is originally from Peru and worked as an H-2A shepherd for around six years.

21. Plaintiffs each entered into multiple H-2A employment contracts. Each of the H-2A employment contracts entered into by each of the Plaintiffs included a wage term equal to the DOL-set wage floor for the state in which each Plaintiff worked.

22. Defendant Western Range Association is a California non-profit corporation with its principal place of business at 1245 E. Brickyard Road, Suite # 190, Salt Lake City, UT 84106. The WRA transacts business in Colorado by, among other things, recruiting shepherds for Colorado ranches.

23. Defendant Mountain Plains Agricultural Service is a Wyoming non-profit corporation with its principal place of business at 811 N Glenn Rd, Casper, WY 82601. The MPAS transacts business in Colorado by, among other things, recruiting shepherds for Colorado sheep ranches.

24. Together the WRA and MPAS shall be referred to as "Association Defendants."

25. Defendant Martin Auza Sheep Corporation is an Arizona Corporation with its principal place of business in Yuma, Arizona. Defendant Martin Auza Sheep Corporation also does business in Brawley, California. Defendant Martin Auza Sheep Corporation is or was a member of the WRA and the MPAS.

26. Defendant Nottingham Land and Livestock, LLLP, is a Colorado Limited Liability Limited Partnership, with its principal place of business in Craig, Colorado. Defendant Nottingham Land and Livestock, LLLP, is or was a member of the WRA.

27. Defendant Two Bar Sheep Corporation, LLC, is a Colorado Limited Liability Corporation with its principal place of business in Craig, Colorado. Defendant Two Bar Sheep Corporation, LLC, is or was a member of the WRA and the MPAS.

28. Defendant Ball Brothers Sheep Company is an Idaho Corporation with its principal place of business in Lewisville, Idaho. Defendant Ball Brothers Sheep Company is or was a member of the WRA and the MPAS.

29. Defendant Estill Ranches, LLC, is a Nevada Limited Liability Company with its principal place of business in Gerlach, Nevada. Defendant Estill Ranches, LLC, is or was a member of the WRA and the MPAS.

30. Defendant Cunningham Sheep Company is an Oregon Domestic Business Corporation with its principal place of business in Pendleton, Oregon. Defendant Cunningham Sheep Company is or was a member of the WRA and the MPAS.

31. Defendant Dennis Richins DBA Dennis Richins Livestock is an individual who is domiciled in Utah. Defendant Richins is or was a member of the WRA.

32. During at least some of the period from 2001 until 2014, Defendant Richins was the Executive Director of the WRA. During this period, he oversaw substantially all of the WRA's operations, including its submission of job orders and H-2A Applications (explained below) on behalf of ranches based in Colorado. In fact, Defendant Richins signed off on almost all—if not all—H-2A job orders and H-2A Certification Applications during his time as Executive Director, including a substantial number of H-2A Certification Applications and job orders for Colorado-based ranches.

33. Defendant Child Ranch, LLC, is a Wyoming Limited Liability Corporation with its principal place of business in Cokeville, Wyoming. Defendant Child Ranch, LLC, is or was a member of the WRA and the MPAS.

34. Together, Martin Auza Sheep Corporation, Nottingham Land and Livestock, LLLP, Ball Brothers Sheep Company, Estill Ranches, LLC, Cunningham Sheep Company, Dennis Richins DBA Dennis Richins Livestock, Child Ranch, LLC, shall be referred to as "Rancher Defendants."

35. Each of the Rancher Defendants was a member of the WRA, the MPAS, or both at some point within 4 years prior to the filing of this action.

36. Upon information and belief, all of the Rancher Defendants are either directly, or through their states' growers associations, members of the American Sheep Industry Association (ASI). The ASI is located in Colorado.

37. Among other things, ASI members benefit from the ASI's news and educational materials, trainings and conferences, and public policy advocacy.

38. All of the Rancher Defendants produce sheep on the open range.

39. According to the National Research Council's Committee on the Economic Development and Current Status of the Sheep Industry in the United States, most sheep raised on the open range are moved to feedlots for finishing, and all of the major sheep feedlots in the United States are located in Colorado.

40. Upon information and belief, the Rancher Defendants use Colorado feedlots to finish their sheep.

STATEMENT OF FACTS

III. The American Sheepherding Industry and Its Shepherds

41. Sheep ranches in the western United States raise sheep to produce meat and wool, which generate roughly $275 million per year for the industry.

42. The industry depends upon thousands of shepherds, employed by ranches, to tend to the sheep herds.

43. As the WRA and the MPAS describe, the shepherds tend herds of 1,000 sheep or more, "often in rugged high altitude terrain or dry desert conditions, hauling water for the animals, herding them to grazing areas and making sure they have enough to eat, keeping them from going astray, and protecting them from the constant threat of natural predators like coyotes, mountain lions, and wolves, harmful or poisonous plants, and man-made dangers like highways and domesticated dogs. During lambing, calving or kidding season, the shepherds assist the animals in the birthing process, and at all times, the shepherds provide for the health and medical needs of the herd."

IV. Regulatory Scheme Governing Importation of Foreign Shepherd Labor

44. The H-2A Visa Program is an agricultural guest worker visa program administered by the DOL that allows for the issuance of work visas to foreign workers to fill positions that employers cannot fill through the domestic labor market.

45. Pursuant to the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, before issuing H-2A visas, the DOL is charged with ensuring that there is in fact a shortage of American workers willing and able to fill the positions that employers seek to fill with foreign H-2A workers.

46. Specifically, before permitting the importation of foreign workers under H-2A visas, the INA requires the DOL to certify that:

> (A) there are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and
> (B) the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

47. To implement its statutory duty under the INA, the DOL has promulgated regulations. *See* 20 C.F.R. §§ 655.100 *et seq.*

48. Under the regulations, before a foreign worker can be imported under an H-2A visa, an employer must first offer the job to U.S. workers through State Workforce Agencies. *Id.* § 655.121. Because H-2A visas are only issued for positions that cannot be filled by the domestic labor market, DOL regulations prescribe that employers offer domestic workers "no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H–2A workers." 20 C.F.R. § 655.122(a).

49. Additionally, ranchers or membership associations acting on their behalf must offer, among other things, the "worker at least the AEWR [Adverse Effect Wage Rate], the prevailing hourly wage rate, the prevailing piece rate, the agreed-upon collective bargaining rate, or the Federal or State minimum wage rate, in effect at the time work is performed, whichever is highest, for every hour or portion thereof worked during a pay period." 20 C.F.R. § 655.122(l).

50. These job offers to domestic workers are called "job orders."

51. Only if American workers do not accept a position offered through a job order can the employer submit an Application for Temporary Employment Certification (an "H-2A Application") to the DOL for certification.

52. The DOL can promulgate exceptions to the H-2A Visa Program, known as "special procedures," for particular agricultural industries.

53. The DOL has implemented special procedures in the sheepherding industry. The DOL implemented one set of special procedures in 2011 that were in effect until November 16, 2015. *See* 76 Fed. Reg. 47,256 (issued Aug. 4, 2011).

54. Prior to November 16, 2015, the wage floor established by 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

55. As of November 16, 2015, the wage floor for H-2A shepherds was raised by the Department of Labor to $1206.31 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. 70,840, 70840 (the "2015 Special Procedures"). This wage floor can be higher in individual states, such as California and Oregon, based on higher state-level minimum-wage laws.

56. Although the special procedures depart and expand upon the requirements set out in the regulations, they are intended to effectuate the same basic principles and policies: shepherd jobs paid at or above a DOL-set wage floor must first be offered to American workers through "job orders" and only after American workers do not take the offered jobs—and after application to, and certification by, the DOL—can ranchers import foreign shepherds through H-2A visas.

57. Although "[t]he employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers," 20 C.F.R. § 655.122(a), there is no statute, regulation, or special procedure preventing ranchers from offering higher wages to the domestic workers in the job orders than they do to H-2A workers in the H-2A Applications.

58. Furthermore, although the DOL sets wage floors for foreign H-2A shepherds, there is no statute, regulation, or special procedure preventing ranchers from offering higher wages to some or all foreign shepherds working in the United States on H-2A visas.

V. Allegations Regarding Defendants' Wage Fixing

A. Association Defendants, Rancher Defendants, and their Collusive Relationships

59. The sheep ranching industry is highly concentrated under Association Defendants. From October 1, 2013, to October 1, 2014, the WRA hired roughly 55% of all open range shepherds hired in the United States. From October 1, 2013, to October

1, 2014, the MPAS hired roughly 36% of all open range shepherds hired in the United States.

60. Association Defendants play a considerable role in the recruitment, hiring, and oversight of H-2A shepherds, and as a consequence, WRA and MPAS members have frequent opportunities to communicate with Association Defendants and with each other regarding the recruitment and hiring of shepherds.

61. Members of the ASI benefit from online educational tools and weekly newsletters that also provide ranchers with frequent opportunities to communicate about issues regarding the employment of shepherds.

62. Although ranches compete in the sale of their products, principally meat and wool, the ranches that are members of the WRA and MPAS have conspired to fix one of their principal costs: shepherd wages.

63. Rancher Defendants and other members of Association Defendants do not share profits or distribute losses, but through the WRA and MPAS they collude to fix shepherd wages at precisely the wage floor set by the DOL.

64. The members of the WRA and the members of the MPAS each entered into and implemented nearly identical price fixing conspiracies and, together, tacitly colluded to perpetuate both conspiracies.

65. The fixing and suppression of shepherd wages results in a windfall for MPAS and WRA members and causes shepherds to work for shockingly low wages without any opportunity to bargain for more.

66. Absent this unreasonable restraint of trade resulting from the price fixing conspiracy or conspiracies, the ranchers currently conspiring to fix the wages of shepherds would compete in the shepherd labor market for shepherds. Similarly, absent the price fixing, shepherds would compete in the shepherd labor market for the best sheepherding jobs, putting normal upward pressure on wages.

B. Concerted Conduct to Fix Wages Offered to Domestic Shepherds

67. With respect to the recruitment of domestic shepherds, the WRA and the MPAS each act as illegal combinations of competitors.

68. In this role, among other things, the WRA's and the MPAS's principal purpose is to create job orders for and on behalf of their members.

69. With respect to the recruitment of domestic shepherds, member ranchers—including Rancher Defendants—maintain membership in the WRA and the MPAS and enlist their services in preparing job orders for the purpose of allocating decisions regarding wages offered to domestic shepherds to associations constituted by competitor ranchers, and with the knowledge that the Association Defendants use job orders to illegally fix shepherd wages at the DOL-set wage floor for each state.

70. Additionally, these job orders evidence concerted conduct among the WRA and its members and the MPAS and its members to offer domestic shepherds at precisely the wage floor set by the Department of Labor for foreign shepherds.

71. Based upon a review of the WRA job orders associated with WRA H-2A Applications filed between October 1, 2013 and October 1, 2014, the job orders to U.S. workers that preceded these H-2A Applications offered the same wages as the H-2A

Applications and therefore almost always offered exactly the DOL H-2A wage floors for each state as a fixed wage to potential U.S. workers.

72. Based upon a review of the MPAS job orders associated with the MPAS H-2A Applications filed between October 1, 2013 and October 1, 2014, the job orders to U.S. workers that preceded these H-2A Applications offered the same wages as the H-2A Applications and therefore almost always offered exactly the DOL H-2A wage floors for each state as a fixed wage to the U.S. workers.

73. Attached to this complaint as Exhibit A are job orders prepared by Association Defendants on behalf of Rancher Defendants within the four years prior to the commencement of this litigation.

74. Each Rancher Defendant offered a shepherd position in at least one of the attached job orders, and in all of these job orders, Rancher Defendants, acting through either the WRA or the MPAS, offered exactly the same wage as all of the other ranches making offers within the same state. *See* Ex. A.

75. The content of the job orders strikingly illustrates Defendants' collusive activity. For example, in job orders filed by Association Defendants on behalf of multiple member ranches, Association Defendants do not separate out the wages offered to domestic shepherds by ranch, but instead provide a blanket wage rate for all ranches operating in a state. For example, the "Wage Rates" section of a job order prepared by the WRA in 2014 states as follows:

17. Wage Rates, Special Pay Information and Deductions / Tarifa de Pago, Información Sobre Pagos Especiales y Deducciones (Rebajas)

Crop Activities	Hourly Wage	Piece Rate / Unit(s)	Special Pay (bonus, etc.)	Deductions*	Yes/Si	No	Pay Period / Periodo de Pago
Cultivos	Salario por Hora	Pago por Pieza / Unidad(es)	Pagos Especiales (Bono, etc.)	Deducciones			/ /
Sheepherding	$750.00	$		Social Security / Seguro Social	✓	☐	Weekly / Semanal
	$	$		Federal Tax / Impuestos Federales	✓	☐	☐
	$	$		State Tax /Impuestos Estatales	✓	☐	Bi-weekly/ Quincenal
	$	$		Meals / Comidas	☐	✓	☐
	$	$		Other (specify) / Otro (especifica)	☐	✓	Monthly/Mensual ✓
							Other/Otro ☐

18. More Details About the Pay / Mas Detalles Sobre el Pago:

76. The wage offered in this order is $750 per month.

77. The portion of the job order that requires listing the address of every employer offering this wage (Field 2 below) directs the potential job applicant to an addendum:

(Print or type in each field block – To include additional information, go to block # 28 – Please follow Step-By-Step Instructions)
(Favor de usar letra de molde en la solicitud – Para incluir información adicional vea el punto # 28 – Favor de seguir las instrucciones paso-a-paso)

1. Employer's and/or Agent's Name and Address (Number, Street, City, State and Zip Code / Nombre y Dirección del Empleador/Patrón y/o Agente (Número, Calle, Ciudad, Estado y Código Postal):

WESTERN RANGE ASSOCIATION A JOINT EMPLOYER
1245 E. BRICKYARD ROAD, SUITE190
SALT LAKE CITY, UTAH 84106

a) Federal Employer Identification Number (FEIN) / Número federal de Identificación del Empleador:
[redacted]

b) Telephone Number / Número de Teléfono:
(801) 486-2004

c) Fax Number / Número de Fax:
(801) 486-2315

d) E-mail Address / Dirección de Correo Electrónico:
legal@westernrange.net

2. Address and Directions to Work Site / Domicilio y Direcciones al lugar de trabajo:

(please see addendum attached)

3. Address and Directions to Housing / Domicilio y Direcciones al lugar de vivienda:

(please see addendum attached)

Nos. 4 through 8 for STATE USE ONLY
Números 4 a 8 para USO ESTATAL

4. SOC (O*NET/OES) Occupational Code / Código Industrial:

a. SOC (ONET/OES) Occupational Title / Título Ocupacional

5. Job Order No. / Num. de Orden de Empleo:

6. Address of Order Holding Office (Include Telephone number) / Dirección de la Oficina donde se radico la oferta (Incluya el número de teléfono):

a. Name of Local Office Representative (Include direct dial telephone number) / Nombre del Representante de la Oficina Local (Incluya el número de teléfono de su línea directa).

7. Clearance Order Issue Date / Fecha de Emisión de la Orden de Empleo:

8. Job Order Expiration Date / Fecha de Vencimiento o Expiración de la Orden de Empleo:

9. Anticipated Period of Employment / Periodo anticipado o previsto de Empleo:

From / Desde: **01/10/2014** To / Hasta: **01/09/2015**

10. Number of Workers Requested / Número de Trabajadores Solicitados:
39

11. Anticipated Hours of Work per Week / Horas Anticipadas/Previstas de Trabajo por Semana. Total:*** **ON CALL FOR UP TO 24 hours per day, 7 days a week**

Sunday / Domingo______ Thursday /Jueves______
Monday / Lunes Friday / Viernes

78. In the case of the job order excerpted above, the Addendum names 18 ranches, each of which, pursuant to the generic language in the "Wage Rates" section offers domestic workers exactly the DOL-set wage floor and no more. *See* Ex. B at 7-9.

79. This job order is the same or substantially similar to dozens of other WRA job orders.

80. The irrationality of Defendants' conduct provides further evidence of these conspiracies. In a competitive market, and absent the price fixing, ranchers would offer at the very least a nominally higher wage to U.S. workers than they do H-2A workers to account for the additional cost of bringing an H-2A worker to the country normally from Peru. H-2A workers are more costly to employers because, pursuant to the H-2A

regulations, they must be reimbursed by their employers for travel to and from the place of recruitment in their home country. Instead, Defendants fix wages for domestic workers at the DOL-set wage floor for foreign workers to ensure the unavailability of domestic workers and the stagnation of the DOL-set wage floor.

81. In most states, the DOL-set wage floor for most H-2A shepherds used to be only $2 to $3 per hour. At the time of the filing of this Second Amended Complaint, it is approximately $4.50 per hour or $1206.30 per month for most workers. And, yet, in the absence of the ranchers' combination or agreement to fix shepherd wages, ranchers would negotiate with available range workers and the average wage would increase to something similar to the minimum wage for domestic ranch hands, general ranch farmworkers, or closed range herders. All of these employees earn substantially more than H-2A shepherds and, unlike H-2A shepherds, these employees receive differing wages commensurate with multiple variables, including skill, job location, experience, and work environment, as would be expected in a competitive labor market.

82. Furthermore, freely negotiated wages would be reflected in the wage surveys upon which the government will rely in setting a wage floor for foreign laborers in future years, thus increasing the meager wage floor for H-2A shepherds.

83. Defendants set wages offered to domestic shepherds at low levels because Rancher Defendants know that if the positions are not filled domestically, the Immigration and Nationality Act allows them to look to an international market for vulnerable and desperate immigrants. These immigrants are willing to work for wages

that are aberrational in the American labor market and that, for the reasons set out below, Defendants agree to fix at the bare minimum allowable by law.

84. The DOL recently estimated that there were only 18 domestic shepherds left in the United States.

C. <u>Concerted Conduct to Fix Wages Paid to Foreign Shepherds</u>

85. With respect to the recruitment of foreign shepherds, the WRA and the MPAS each act as illegal combinations of competitors.

86. Among other things, one of the principal purposes of the WRA and the MPAS is to file H-2A applications on behalf of their members with the DOL.

87. With respect to the recruitment of foreign ranchers, member ranchers—including Rancher Defendants—maintain membership in the WRA and the MPAS, and enlist their services in preparing H-2A applications, for the purpose of allocating decisions regarding foreign shepherd wages to associations constituted by competitor ranchers, and with the knowledge that the Association Defendants use job orders to illegally fix shepherd wages at the DOL-set wage floor for each state.

88. Additionally, these H-2A Applications evidence concerted conduct among the WRA and its members and the MPAS and its members to pay foreign shepherds exactly the wage floor set by the DOL for each state.

89. The DOL releases statistics each year for the shepherd H-2A program. The latest year for which the DOL has released complete data runs from October 1, 2013 to October 1, 2014.

90. In that time period, the WRA submitted, on behalf of its members, H-2A Applications for approximately 1,214 H-2A shepherds. All of these WRA H-2A Applications offered exactly the DOL-prescribed H-2A wage floors as the relevant wage term.

91. In the same time period, the MPAS submitted H-2A Applications for approximately 788 H-2A shepherds for its members. All but one of these H-2A Applications offered exactly the DOL H-2A wage floors as a wage term.

92. Attached to this complaint as Exhibit C are H-2A Applications prepared by Association Defendants on behalf of Rancher Defendants within the four years prior to the commencement of this litigation.

93. Each Rancher Defendant offered a shepherd position in at least one of the attached H-2A Applications, and in all of these H-2A Applications, Rancher Defendants, acting through either the WRA or the MPAS, offered exactly the same wage as all of the other ranches making offers within the same state. *See* Ex. C.

94. The content of the H-2A Applications strikingly illustrate Defendants' collusive activity. For example, in substantially all H-2A Applications filed by Association Defendants on behalf of multiple member ranches, Association Defendants do not separate out the wages for H-2A shepherds by ranch, but instead provide a blanket wage rate for all ranches operating in a state. For example, the "Rate of Pay" set out in a WRA-prepared H-2A Application filed in 2014 appears as follows:

G. Rate of Pay

1. Basic Rate of Pay Offered *	1a. Overtime Rate of Pay (if applicable) §
From: $ 750 . 00 To (Optional): $ 1,603 . 33	From: $ 0 . 00 To (Optional): $ 0 . 00
2. Per: (Choose only one) * ☐ Hour ☐ Week ☐ Bi-Weekly ☑ Month ☐ Year ☐ Piece Rate	
2a. If Piece Rate is indicated in question 2, specify the wage offer requirements: § N/A	
3. Additional Wage Information (e.g., multiple worksite applications, itinerant work, or other special procedures). If necessary, add attachment to continue and complete description. § SEE ADDENDUM CA $1,600.34; AZ, CO, ID, ND, SD, UT, WY $750.00; OR $1,603.33; NV $800.00 PER MONTH. EMPLOYER SHALL PROVIDE HOUSING AND BOARD IN	

Ex. D, at 5.

95. The "Rate of Pay" section of the H-2A Application does not mention the names of individual ranches, which are set out in an attached "Addendum."

96. In the case of the H-2A Application excerpted above, the Addendum includes the names of dozens of ranches, each of which, pursuant to the generic language in the "Rate of Pay" section pays its H-2A shepherds exactly the DOL-set wage floor and no more.

97. This H-2A Application is the same or substantially similar to dozens of other WRA H-2A Applications.

98. The price fixing conspiracy is further evidenced by Defendants' conduct in adjusting the wages paid to H-2A shepherds in lockstep with changes to the DOL-set wage floor for each state.

99. For example, in January 2015, the WRA instructed its members in Oregon to <u>uniformly</u> begin paying <u>exactly</u> the new DOL wage floor: "[B]eginning January 1, 2015 the wage rate for shepherds working in Oregon is $1,326.46." You "should immediately adjust your wage payments to [that] monthly wage amount."

100. In the absence of a conspiracy, Defendants' conduct in fixing wages for H-2A shepherds would be irrational. In a free market, ranchers would negotiate with H-2A shepherds who would, therefore, receive differing wages commensurate with multiple variables, including skill, job location, experience, and work environment.

D. The Effects of the Anti-Competitive Conspiracy on the DOL's Wage Determinations

101. The DOL sets wage floors to prevent an "adverse effect" on the U.S. workers in the shepherd labor market and sets these floors by conducting wage surveys that review the wages paid to shepherds in the relevant market.

102. By agreeing to a cap on the amount that Defendant ranchers pay their shepherds at exactly the minimum DOL wage floor, the result of Defendants' conspiracy is an artificial ceiling on wages that would otherwise increase under normal market forces. As a consequence of this wage stagnation, the DOL's wage surveys reflect an artificially low wage for shepherds.

103. Because the Defendants' wage fixing has artificially depressed wages in the shepherd labor market, it has also artificially depressed the DOL's wage floors, the very same minimum wage that Defendants rely on in fixing wages paid to their workers.

104. While wages in other similar industries have continued to rise with normal inflation, the wages for shepherds—until recently—were stuck, in some cases at less than half of the federal minimum wage for covered workers.

105. The price fixing's downward pressure on the DOL's wage floors, and therefore on the fixed wage, has led to absurdly low wages for shepherds. When the Industrial Welfare Commission of the State of California examined shepherd wages in 2000, it

determined that "the wages paid to shepherds may be inadequate to supply the cost of proper living and that the hours and working conditions of shepherds may be prejudicial to their health and welfare." It then voted to remove the shepherd exemption from California's minimum wage.

106. The stagnation of DOL's H-2A wage floor represents both a motive for Defendants' wage fixing and one of the market distortions resulting from Defendants' wage-fixing conspiracies in a highly regulated labor market.

E. The Resulting Restraint of Trade and Antitrust Injuries

107. Defendants' wage-fixing conspiracy has artificially restrained trade in the United States labor market for shepherds, generally, as well as in the markets for domestic shepherds and H-2A shepherds separately.

108. With regard to the market for shepherds generally, the result of Defendants' conspiracies is suppressed, stagnated wages for all shepherds in the United States. As a consequence, shepherds working on U.S. sheep ranches are deprived of the normal fruits of their labor and have very little incentive to become better shepherds.

109. The fixed wages entice relatively few domestic shepherds, who are effectively deprived of their right to work as shepherds in the domestic labor market.

110. Ranchers historically have claimed that there is an insufficient supply of domestic shepherds and, therefore, that they must look to the foreign labor market to recruit workers. While there was a true labor shortage during the Second World War which gave rise to the Bracero program (a precursor to today's H-2A visa program), the dearth of domestic shepherds today is not the result of an unwilling or incapable workforce, but

rather the Defendants' concerted efforts to suppress wages well below the fair market value of the shepherds' work.

111. In this distorted labor market, Defendants rely on foreign shepherds, over whom Defendants can exert substantial and even anachronistic control, including by preventing "runaways" and abusing employees whose lack of familiarity with English and the United States legal system renders less likely to complain about their deplorable working conditions.

VI. Allegations Regarding Illegal Deductions

A. The Enterprises

1. "Richins Enterprise"

112. As Executive Director of the WRA, Defendant Richins formed an association-in-fact with the WRA, which shall be referred to as the "Richins Enterprise."

113. Richins served as Executive Director of the WRA from 2001 until sometime in 2014. From 1985 until 2001 he was a WRA board member, and president of the WRA from 1988 until 2001.

114. In this role, Richins had substantial involvement in the WRA's policies regarding payment of shepherd wages and signed all—or almost all—H-2A job orders and H-2A Certifications for WRA employees. *See also Ruiz v. Fernandez*, 949 F. Supp. 2d 1055, 1069 (E.D. Wash. 2013) (citing Richins's testimony regarding WRA's wage-payment policies).

115. In conducting their illegal racketeering scheme, Richins and the WRA acted with the common purpose of minimizing member ranches' payments to H-2A shepherds and thereby increasing the WRA's market share or profits.

2. The "WRA Enterprise"

116. The WRA and its members have formed an association-in-fact, which shall be referred to as the "WRA Enterprise."

117. The common purpose of each of the members of the WRA Enterprise was and is recruiting shepherds for WRA member ranches and minimizing member ranches' payments to H-2A shepherds.

118. The WRA is the lynchpin of the WRA Enterprise, but the WRA Enterprise could not function without the informal, association-in-fact established between the WRA and its members.

119. The WRA uses the WRA Enterprise to file job orders and H-2A Applications on behalf of the WRA's members.

120. Because it receives fees from member ranches in exchange for preparing job orders and H-2A Applications, the WRA has independent financial incentive to participate in the WRA Enterprise's pattern of racketeering.

121. The WRA has existed as a membership organization recruiting shepherds for its members since at least the 1950s.

3. The "MPAS Enterprise"

122. The MPAS and its members have formed an association-in-fact, which shall be referred to as the "MPAS Enterprise."

123. The common purpose of each of the members of the MPAS Enterprise was and is recruiting shepherds for MPAS member ranches and minimizing member ranches' payments to H-2A shepherds.

124. The MPAS is the lynchpin of the WRA Enterprise, but the MPAS Enterprise could not function without the informal, association-in-fact established between the MPAS and its members.

125. The MPAS uses the MPAS Enterprise to file job orders and H-2A Applications on behalf of the MPAS's members.

126. Because it receives fees from member ranches in exchange for preparing job orders and H-2A Applications, the MPAS has an independent financial incentive to participate in the MPAS Enterprise's pattern of racketeering.

127. The MPAS has existed as a membership organization recruiting shepherds for its members since at least 1988.

B. Patterns of Racketeering

128. The Enterprises engaged in patterns of racketeering activity by committing multiple, continuing, and related acts of fraud for the benefit of the respective Enterprises over a period of years.

129. Specifically, the Enterprises continually and repeatedly have made material and false representations to state governments, the federal government, and shepherds by assuring all of these entities that shepherds would not be subject to unreasonable deductions pursuant to 20 C.F.R. § 655.122, which requires free and clear wage

payments, bars illegal kickbacks, and bars employers from using deductions to "reduce the wage payment made to the employee below the minimum amounts required."

130. The Enterprises also have continually and repeatedly defrauded state governments, the federal government, and shepherds by misrepresenting to these entities that shepherds would be reimbursed "for reasonable costs incurred by the worker for transportation and daily subsistence from the place from which the worker has come to work for the employer, whether in the U.S. or abroad to the place of employment," as required by 20 C.F.R. § 655.122.

131. The Enterprises made these assurances despite simultaneously knowingly and intentionally implementing policies that violated 20 C.F.R. § 655.122.

132. In recent job orders to state workforce agencies, the WRA has promised that

> [t]ransportation from point of recruitment to worksite and from the worksite back to the point of recruitment will be provided by Employer. Employer will reimburse worker for subsistence costs during travel to the worksite not later than the end of the first pay period upon the presentation of receipts and from the worksite at the end of the job based on the rates established by the applicable regulations.

133. The WRA made this promise or substantially the same promise in substantially all of its job orders submitted within the four years prior to the filing of this Second Amended Complaint.

134. In recent job orders to state workforce agencies, the MPAS has promised that

> [t]he employer will provide advance inbound transportation (most economical common carrier or other transportation which conforms to the Interstate Commerce Commission (ICC)). The employer will also provide subsistence at a minimum amount of $11.86 per 24-hour period of travel from the place of recruitment to the place of employment. Workers who provide receipts for meals and non-alcoholic beverages in excess of $11.86 will be reimbursed during the first pay period, up to the maximum

> amount of $46.00 per 24-hour period of travel (12:01 A.M.-12:00 midnight) from the place of recruitment to the place of employment. Transportation and subsistence which was advanced to the worker may be deducted from the worker's pay, but will be reimbursed to the worker upon 50% completion of the work contract. Workers who voluntarily quit or are terminated for cause prior to completing 50% of the contract period will be required to reimburse the employer for the full amounts of transportation and subsistence which were advanced and/or reimbursed to the worker. In the event of termination for contract impossibility, employer will reimburse the worker the full amount of any deductions made from the workers' pay by the employer for transportation and subsistence expenses to the place of employment; and pay the worker for any costs incurred by the worker for transportation and daily subsistence to that employer's place of employment. Upon completion of the work contract, or termination for contract impossibility (including due to Act of God or medical reasons), the employer will provide or pay outbound transportation (under the most economical common carrier or other transportation which conforms to ICC regulations) and subsistence from the work site to the place of recruitment. The amounts the employer will pay outbound subsistence will be the minimum amount of $11.86 per 24-hour period of travel. The maximum amount reimbursed not to exceed $46.00 per 24-hour period of travel (12:01- 12:00 midnight) for workers who provide receipts. This requirement will be nullified if the worker has contracted with a subsequent H-2A employer who has agreed to pay for the worker's transportation and subsistence costs from the present employer's work site. Written notification to the NPC, and DHS in case of H-2A workers, or any other method specified by the Department or DHS in a notice published in the Federal Register, will relieve the employer of the responsibility of providing outbound (return to place of recruitment) transportation and subsistence expenses to workers who voluntarily abandon employment before the end of the contract period, or who are terminated for cause.

135. The MPAS made this promise or substantially the same promise in substantially all its job orders submitted within the four years prior to the filing of this complaint.

136. In reliance on statements like these in the job orders, the state workforce agencies review and approve job orders to be offered to domestic workers.

137. The Enterprises, acting through Association Defendants, submit or have submitted H-2A Applications to the DOL with attached copies of job orders offering

positions that domestic workers did not fill. These job orders contain the promises to reimburse travel expenses described above.

138. All H-2A Applications filed within the relevant statute of limitations also make the following promise:

> The employer and its agents have not sought or received payment of any kind from the H-2A worker for any activity related to obtaining labor certification, including payment of the employer's attorneys' fees, application fees, or recruitment costs. For purposes of this paragraph, payment includes, but is not limited to, monetary payments, wage concessions (including deductions from wages, salary, or benefits), kickbacks, bribes, tributes, in kind payments, and free labor.

139. Each H-2A Application submitted by the WRA is signed under penalty of perjury by an agent of the WRA.

140. Each H-2A Application submitted by the MPAS includes a certification by an agent of the MPAS that the information in the H-2A Application is true and correct.

141. In reliance on these H-2A Applications and job orders, the DOL reviews and approves H-2A Applications and allows the WRA and the MPAS to recruit foreign workers using H-2A visas.

142. Pursuant to state and DOL instructions, all job orders and H-2A Applications must be submitted to the respective agencies by wire or mail.

143. The statements by the WRA and the MPAS are fraudulent because the MPAS and WRA each has a policy of unreasonably deducting expenses that are primarily for the benefit or convenience of the employer from the wages of shepherd employees, including medical checkups, criminal background checks and travel and subsistence expenses (which include bus fares, meals, and hotels necessary to travel between the

shepherd's place of recruitment and the workplace, and travel necessary to complete the other pre-travel requirements, *e.g.,* the medical checkups).

144. The WRA's fraudulent intentions are further evidenced by the discrepancies between its representations to the state workforce agencies and the DOL, which parrot the regulatory travel reimbursement requirements, and the vague promise made to shepherds in their form "PRE-EMPLOYMENT NOTICE OF RIGHTS AND OBLIGATIONS," which the WRA gives to shepherds before travelling to the United States. That form states only that "[t]ransportation for travel to and from your home country are paid if you complete the contract terms."

C. These Patterns of Racketeering and Fraudulent Acts Injured Plaintiffs

145. The Enterprises' fraudulent misrepresentations caused Plaintiffs injury by inducing the DOL to issue H-2A certifications authorizing each of Plaintiffs' H-2A visas for employment as shepherds.

146. Notwithstanding the assurances the Enterprises made to the DOL, Plaintiffs were victims of illegal deductions that were primarily for the benefit of the Association Defendants and their members. In this way, the Richins Enterprise's and the WRA Enterprise's underlying predicate acts of mail and wire fraud caused injury to Plaintiffs Huaman, Leovegildo Vilchez Guerra, and Liber Vilchez Guerra. And the MPAS Enterprise's underlying predicate acts of mail and wire fraud caused injury to Plaintiff De la Cruz.

147. Furthermore, notwithstanding the assurances the Enterprises made to the Department of Labor, the Enterprises did not receive the legally-required travel

reimbursement. In this way, the Richins Enterprise's and the WRA Enterprise's underlying predicate acts of mail and wire fraud caused injury to Plaintiffs Huaman, Leovegildo Vilchez Guerra, and Liber Vilchez Guerra. And the MPAS Enterprise's underlying predicate acts of mail and wire fraud caused injury to Plaintiff De la Cruz.

148. These frauds occurred when Plaintiffs arrived in the United States after paying these expenses and not being reimbursed. Plaintiff De La Cruz arrived in the United States in April 2012 and April 2015 without being reimbursed for travel and other expenses. Plaintiff Leovegildo Vilchez Guerra arrived in May 2011 and May 2014 without being reimbursed. Plaintiff Liber Vilchez Guerra arrived November 2014 without being reimbursed. And Plaintiff Huaman arrived in March 2011 without being reimbursed.

149. Each of these named Plaintiffs incurred expenses that were required to be reimbursed pursuant to 20 C.F.R. § 655.122 and were not. For example, each of the named Plaintiffs incurred travel and subsistence expenses from his place of recruitment and his workplace that were never reimbursed, *e.g.*, bus tickets, hotels, and meals.

150. All H-2A Applications and job orders filed by the Enterprises with state workforce agencies or the DOL with start dates corresponding to the dates when Plaintiffs began working as H-2A shepherds contained the fraudulent statements detailed above in paragraphs 134-150, or substantially similar statements. *See* Ex. E.

VII. Allegations Regarding the Failure to Pay Nevada Minimum Wage

151. For several years until mid-November 2015, the MPAS has employed shepherds in Nevada, including Plaintiff De la Cruz, and paid those shepherds approximately $800 per month.

152. Upon information and belief, the MPAS currently pays its shepherd employees in Nevada exactly the minimum set by the DOL in the 2015 Special Procedures.

153. The MPAS has exerted substantial control over the recruitment and hiring of shepherds in Nevada and has set shepherd wages.

154. At all relevant times, the MPAS controlled its shepherd employees' employment by, among other things, setting the terms and conditions of employment, including the wage rate, recruiting the employees, and maintaining employment records.

155. At all relevant times, the Nevada minimum wage was set by the Nevada Constitution at either $7.25 per hour or $8.25 per hour, depending on whether the employer provides health benefits.

156. Shepherds are entitled to the Nevada constitutional minimum wage.

157. During a normal workweek, shepherds, including Plaintiff De la Cruz, work more than 40 hours per week.

158. $800 in wages per month compensates an employee in Nevada for less than 24 hours per week of work.

159. The $800 per month wage rate is therefore unconstitutional and illegal under Nevada law.

RULE 23 CLASS ALLEGATIONS

VIII. The Price Fixing Classes

160. Plaintiffs incorporate by reference all previous paragraphs of this Complaint as if fully re-written herein.

161. Pending any modifications necessitated by discovery, the named Plaintiffs define the "Price Fixed Class" as follows:

> ALL PERSONS WHO WORKED OR APPLIED TO WORK AS A SHEPHERD FOR THE WRA, MPAS, OR ANY OF THE MEMBER RANCHERS OF THE WRA OR THE MPAS BEGINNING IN 9/1/11

162. Pending any modifications necessitated by discovery, the named Plaintiffs define the "WRA Price Fixed Class" as follows:

> ALL PERSONS WHO WORKED OR APPLIED TO WORK AS A SHEPHERD FOR THE WRA OR ANY OF THE WRA MEMBER RANCHERS BEGINNING ON 9/1/11

163. Pending any modifications necessitated by discovery, the named Plaintiffs define the "MPAS Price Fixed Class" as follows:

> ALL PERSONS WHO WORKED OR APPLIED TO WORK AS A SHEPHERD FOR THE MPAS OR ANY OF THE MPAS MEMBER RANCHERS BEGINNING ON 9/1/11

164. The members of the putative class are so numerous that joinder of all potential classes members is impracticable. Plaintiffs do not know the exact size of the classes because that information is within the control of the Defendants. However, WRA and the MPAS claim to recruit "nearly all" of the roughly 2000 to 2500 shepherds employed in the United States each year.

165. There are questions of law or fact common to the classes that predominate over any individual issues that might exist. Common questions include, but are not limited to

whether the WRA and the MPAS and their respective members fix shepherd wages through the operation of joint ventures that recruit workers and set wages.

166. The class claims asserted by Plaintiffs are typical of the claims of all of the potential members of the classes because all potential class members suffered suppressed wages as a consequence of Defendants' price fixing. A class action is superior to other available methods for the fair and efficient adjudication of this controversy because numerous identical lawsuits alleging similar or identical causes of action would not serve the interests of judicial economy.

167. Plaintiffs will fairly and adequately protect and represent the interests of the class. Plaintiffs' wages were artificially kept at the same low level as other shepherds as a result of the same conspiracy.

168. Plaintiffs are represented by counsel experienced in litigation on behalf of low-wage workers and in class actions.

169. The prosecution of separate actions by the individual potential Class Members would create a risk of inconsistent or varying adjudications with respect to individual potential Class Members that would establish incompatible standards of conduct for Defendants.

170. Plaintiffs are unaware of any members of the putative classes who are interested in presenting their claims in a separate action.

171. Plaintiffs are unaware of any pending litigation commenced by members of the putative classes concerning the instant controversies.

172. It is desirable to concentrate this litigation in this forum because many of the Defendants and Plaintiffs are located in, or do business in, Colorado and H-2A shepherds operate exclusively in the western United States.

173. This class action will not be difficult to manage due to the uniformity of claims among the Class Members and the susceptibility of the claims to class litigation and the use of representative testimony and representative documentary evidence.

174. The contours of the classes will be easily defined by reference to Defendants' records and government records.

IX. The WRA Illegal Deduction Class

175. Plaintiffs incorporate by reference all previous paragraphs of this Complaint as if fully re-written herein.

176. Plaintiffs Huaman, Leovegildo Vilchez Guerra, and Liber Vilchez Guerra assert Counts II and V as a Class Action pursuant to Fed. R. Civ. Proc. 23 as what is termed here the "Illegal Deduction Class."

177. Pending any modifications necessitated by discovery, the "WRA Illegal Deduction Class" is defined as follows:

> ALL PERSONS WHO WERE RECRUITED AS SHEPHERDS, A.K.A. SHEEPHERDERS, BY THE WRA BETWEEN 9/1/2011 AND THE PRESENT

178. The members of the putative class are so numerous that joinder of all potential class members is impracticable. The Plaintiffs do not know the exact size of the class since that information is within the control of the Defendant. However, according to the

DOL's 2014 statistics, the WRA recruited approximately 1200 shepherds in the previous year.

179. There are questions of law or fact common to the classes that predominate over any individual issues that might exist, including whether or not the WRA took illegal deductions from shepherd wages.

180. The class claims asserted by the Plaintiff are typical of the claims of all of the potential Class Members because all potential Class Members experienced the same illegal deductions due to the WRA's policies. A class action is superior to other available methods for the fair and efficient adjudication of this controversy because numerous identical lawsuits alleging similar or identical causes of action would not serve the interests of judicial economy.

181. Plaintiff will fairly and adequately protect and represent the interests of the class. Plaintiff suffered from the same illegal deductions as the Class Members.

182. Plaintiff is represented by counsel experienced in litigation on behalf of low-wage workers and in class actions.

183. The prosecution of separate actions by the individual potential Class Members would create a risk of inconsistent or varying adjudications with respect to individual potential Class Members that would establish incompatible standards of conduct for Defendants.

184. Plaintiff is unaware of any members of the putative class who are interested in presenting their claims in a separate action.

185. Plaintiff is unaware of any pending litigation commenced by members of the Class concerning the instant controversies.

186. It is desirable to concentrate this litigation in this forum because many of the Defendants and Plaintiffs are located in, or do business in, Colorado and shepherds operate exclusively in the western United States.

187. This class action will not be difficult to manage due to the uniformity of claims among the Class Members and the susceptibility of the claims to class litigation and the use of representative testimony and representative documentary evidence.

188. The contours of the class will be easily defined by reference to Defendant's records and government records.

X. The MPAS Illegal Deduction Class

189. Plaintiffs incorporate by reference all previous paragraphs of this Complaint as if fully re-written herein.

190. Plaintiff De La Cruz asserts Count III and VI as a Class Action pursuant to Fed. R. Civ. Proc. 23 as what is termed here the "MPAS Illegal Deduction Class."

191. Pending any modifications necessitated by discovery, the "Illegal Deduction Class" is defined as follows:

> ALL PERSONS WHO WERE RECRUITED AS SHEPHERDS, A.K.A. SHEEPHERDERS, BY THE MPAS BETWEEN 9/1/2011 AND THE PRESENT

192. The members of the putative class are so numerous that joinder of all potential class members is impracticable. Plaintiff De La Cruz does not know the exact size of the class since that information is within the control of the Defendant. However, according

to the DOL's 2014 statistics, the MPAS recruited approximately 780 shepherds in the previous year.

193. There are questions of law or fact common to the classes that predominate over any individual issues that might exist, including whether or not the MPAS took illegal deductions from shepherd wages.

194. The class claims asserted by the Plaintiff are typical of the claims of all of the potential Class Members because all potential Class Members experienced the same illegal deductions due to the MPAS' policies. A class action is superior to other available methods for the fair and efficient adjudication of this controversy because numerous identical lawsuits alleging similar or identical causes of action would not serve the interests of judicial economy.

195. Plaintiff will fairly and adequately protect and represent the interests of the class. Plaintiff suffered from the same illegal deductions as the Class Members.

196. Plaintiff is represented by counsel experienced in litigation on behalf of low-wage workers and in class actions.

197. The prosecution of separate actions by the individual potential Class Members would create a risk of inconsistent or varying adjudications with respect to individual potential Class Members that would establish incompatible standards of conduct for Defendants.

198. Plaintiff is unaware of any members of the putative class who are interested in presenting their claims in a separate action.

199. Plaintiff is unaware of any pending litigation commenced by members of the Class concerning the instant controversies.

200. It is desirable to concentrate this litigation in this forum because many of the Defendants and Plaintiffs are located in, or do business in, Colorado and shepherds operate exclusively in the western United States.

201. This class action will not be difficult to manage due to the uniformity of claims among the Class Members and the susceptibility of the claims to class litigation and the use of representative testimony and representative documentary evidence.

The contours of the class will be easily defined by reference to Defendant's records and government records.

XI. The Nevada Minimum Wage Class

202. Plaintiffs incorporate by reference all previous paragraphs of this Complaint as if fully re-written herein.

203. Plaintiff De La Cruz asserts Count IV as a Class Action pursuant to Fed. R. Civ. Proc. 23 as what is termed here the "NV Minimum Wage Class."

204. Pending any modifications necessitated by discovery, the "NV Minimum Wage Class" is defined as follows:

> ALL PERSONS WHO WERE EMPLOYED AS SHEPHERDS, A.K.A. SHEEPHERDERS BY THE MPAS IN NEVADA BETWEEN 9/1/2013 AND THE PRESENT

205. The members of the putative class are so numerous that joinder of all potential class members is impracticable. Plaintiff De La Cruz does not know the exact size of the class since that information is within the control of the Defendant. However, according

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 2, PART 3

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ATTORNEYS FOR RESPONDENT
WESTERN RANGE ASSOCIATION

to the DOL's 2014 statistics, the MPAS employed 43 shepherds in Nevada in the previous year.

206. There are questions of law or fact common to the classes that predominate over any individual issues that might exist, whether the MPAS fail to pay Nevada shepherds at least Nevada minimum wage.

207. The class claims asserted by the Plaintiff are typical of the claims of all of the potential Class Members because all potential Class Members allege they were paid less than the Nevada minimum wage by the MPAS. A class action is superior to other available methods for the fair and efficient adjudication of this controversy because numerous identical lawsuits alleging similar or identical causes of action would not serve the interests of judicial economy.

208. Plaintiff will fairly and adequately protect and represent the interests of the class. Plaintiff suffered from the same illegally low wage as the class.

209. Plaintiff is represented by counsel experienced in litigation on behalf of low-wage workers and in class actions.

210. The prosecution of separate actions by the individual potential Class Members would create a risk of inconsistent or varying adjudications with respect to individual potential Class Members that would establish incompatible standards of conduct for Defendants.

211. Plaintiff is unaware of any members of the putative class who are interested in presenting their claims in a separate action.

212. Plaintiff is unaware of any pending litigation commenced by members of the Class concerning the instant controversies.

213. It is desirable to concentrate this litigation in this forum because many of the Defendants and Plaintiffs are located in, or do business in, Colorado and shepherds operate exclusively in the western United States.

214. This class action will not be difficult to manage due to the uniformity of claims among the Class Members and the susceptibility of the claims to class litigation and the use of representative testimony and representative documentary evidence.

The contours of the class will be easily defined by reference to Defendant's records and government records.

COUNT I: RESTRAINT OF TRADE IN VIOLATION OF 15 U.S.C. §§ 1 *ET SEQ.*

Plaintiffs and the Price Fixed Class against all Defendants

215. Plaintiffs incorporate by reference all previous paragraphs of this Complaint as if fully re-written herein.

216. As set forth above, Plaintiffs assert this count on their own behalf and on behalf of all other similarly situated employees pursuant to Fed. R. Civ P. 23.

217. The conduct of the Defendants, as described herein, substantially affected interstate and international commerce and caused antitrust injury.

218. Defendant ranchers are competitors in the industry and should be competing with each other to attract the most capable shepherds.

219. They do not share profits or risk of loss.

220. But, through collusive conduct, they offer all shepherds price-fixed wages that vary solely based on the state in which the ranch is located.

221. Also through collusive conduct, they pay all of their shepherds price-fixed wages that vary solely based on the state in which the ranch is located.

222. The WRA, the MPAS, and their members, including Defendant Ranchers, conspired and agreed to fix the wages offered and paid to shepherds at the minimum DOL wage floor. This fixed rate is artificially low, and the fixing of wages through the operation of Defendant membership associations, the WRA and the MPAS, amounts to a *per se* violation of the Sherman Antitrust Act.

223. The tacit collusion between the WRA and the MPAS necessary to carry out identical illegal price fixing conspiracies within each organization is also a *per se* violation of the Sherman Antitrust Act.

224. The WRA and its members conspired and agreed to fix wages offered and paid to shepherds at the DOL wage floors through the WRA's filing of (a) job offers for domestic workers, and (b) applications for certifications of H-2A workers that both offered exactly the same wage set at exactly the wage floors set by the DOL. The fixing of wages amounts to a *per se* violation of the Sherman Antitrust Act, and the fixed rate set by Defendants has remained artificially low because it has continually put downward pressure on the DOL's wage surveys and, thus, the basis for Defendants' price-fixed wages.

225. The MPAS and its members conspired and agreed to fix wages offered and paid to shepherds at the wage floors set by the DOL through the MPAS's filing of (a) job

offers for domestic workers, and (b) applications for certifications of H-2A workers that both offered exactly the same wage set at exactly the DOL wage floors. The fixing of wages amounts to a *per se* violation of the Sherman Antitrust Act, and the fixed rate set by Defendants has remained artificially low because it has continually put downward pressure on the DOL's wage surveys and, thus, the same minimum wage requirements upon which Defendants rely to fix wages.

226. In the alternative, Plaintiffs allege that the Defendants' price-fixing agreement is anticompetitive and illegal under the Rule of Reason. For purposes of the Rule of Reason, the relevant geographic market for the claim alleged in this Count is the United States, and the relevant markets consist of (a) the labor market for shepherds in the United States; (b) the labor market for domestic shepherds in the United States; and (c) the labor market for immigrant, H-2A shepherds in the United States.

227. The WRA's and MPAS's relevant conduct—price fixing in their role as a recruiter for their members—unreasonably restrains trade in the shepherd labor market. The price fixing is not essential to the H-2A program and has no procompetitive virtues. Defendants' collusive activity had and has the effect of –

(a) fixing the compensation of shepherd Plaintiffs and the Price Fixed Class at an artificially low level;

(b) eliminating, to a substantial degree, competition for shepherd labor, particularly among potential domestic shepherds;

(c) driving Plaintiffs and other workers from the shepherd labor market;

(d) restraining trade in that shepherds are not able to negotiate their wage rates above the DOL wage floors; and

(e) restraining trade by artificially lowering the H-2A shepherd wage floors resulting from the DOL's surveys.

228. Defendants' unreasonable restraint or restraints of trade have damaged the Plaintiffs and the members of the Price Fixed Class.

229. As a result, Plaintiffs and those similarly situated suffered injuries and are entitled to treble damages, fees, and costs as set forth by law.

230. Plaintiffs and those similarly situated are also entitled to injunctive relief to end the price fixing scheme, and to force the Defendants to take affirmative steps to correct the market.

<u>COUNT II: RESTRAINT OF TRADE IN VIOLATION OF 15 U.S.C. §§ 1 *ET SEQ.*</u>

Plaintiffs and the WRA Price Fixed Class against the WRA and Rancher Defendants

231. Plaintiffs incorporate by reference all previous paragraphs of this Complaint as if fully re-written herein.

232. As set forth above, Plaintiffs assert this count on their own behalf and on behalf of all other similarly situated employees pursuant to Fed. R. Civ P. 23.

233. The conduct of the Defendants, as described herein, substantially affected interstate and international commerce and caused antitrust injury.

234. Defendant ranchers are competitors in the industry and should be competing with each other to attract the most capable shepherds.

235. They do not share profits or risk of loss.

236. But, through collusive conduct, they offer all shepherds price-fixed wages that vary solely based on the state in which the ranch is located.

237. Also through collusive conduct, they pay all of their shepherds price-fixed wages that vary solely based on the state in which the ranch is located.

238. The WRA and its members, including Defendant Ranchers, conspired and agreed to fix the wages offered and paid to shepherds at the minimum DOL wage floor. This fixed rate is artificially low, and the fixing of wages through the operation of the WRA amounts to a *per se* violation of the Sherman Antitrust Act.

239. The WRA and its members conspired and agreed to fix wages offered and paid to shepherds at the DOL wage floors through the WRA's filing of (a) job offers for domestic workers, and (b) applications for certifications of H-2A workers that both offered exactly the same wage set at exactly the wage floors set by the DOL. The fixing of wages amounts to a *per se* violation of the Sherman Antitrust Act, and the fixed rate set by Defendants has remained artificially low because it has continually put downward pressure on the DOL's wage surveys and, thus, the basis for Defendants' price-fixed wages.

240. In the alternative, Plaintiffs allege that the Defendants' price-fixing agreement is anticompetitive and illegal under the Rule of Reason. For purposes of the Rule of Reason, the relevant geographic market for the claim alleged in this Count is the United States, and the relevant markets consist of (a) the labor market for shepherds in the United States; (b) the labor market for domestic shepherds in the United States; and (c) the labor market for immigrant, H-2A shepherds in the United States.

241. The WRA's relevant conduct—price fixing in their role as a recruiter for their members—unreasonably restrains trade in the shepherd labor market. The price fixing is not essential to the H-2A program and has no procompetitive virtues.

Defendants' collusive activity had and has the effect of –

(a) fixing the compensation of shepherd Plaintiffs and the Price Fixed Class at an artificially low level;

(b) eliminating, to a substantial degree, competition for shepherd labor, particularly among potential domestic shepherds;

(c) driving Plaintiffs and other workers from the shepherd labor market;

(d) restraining trade in that shepherds are not able to negotiate their wage rates above the DOL wage floors; and

(e) restraining trade by artificially lowering the H-2A shepherd wage floors resulting from the DOL's surveys.

242. Defendants' unreasonable restraint or restraints of trade have damaged the Plaintiffs and the members of the WRA Price Fixed Class.

243. As a result, Plaintiffs and those similarly situated suffered injuries and are entitled to treble damages, fees, and costs as set forth by law.

244. Plaintiffs and those similarly situated are also entitled to injunctive relief to end the price fixing scheme, and to force the Defendants to take affirmative steps to correct the market.

COUNT III: RESTRAINT OF TRADE IN VIOLATION OF 15 U.S.C. §§ 1 *ET SEQ.*

Plaintiffs and the MPAS Price Fixed Class against the MPAS and all Rancher Defendants Except Nottingham Land and Livestock and Defendant Richins

245. Plaintiffs incorporate by reference all previous paragraphs of this Complaint as if fully re-written herein.

246. As set forth above, Plaintiffs assert this count on their own behalf and on behalf of all other similarly situated employees pursuant to Fed. R. Civ P. 23.

247. The conduct of the Defendants, as described herein, substantially affected interstate and international commerce and caused antitrust injury.

248. Defendant ranchers are competitors in the industry and should be competing with each other to attract the most capable shepherds.

249. They do not share profits or risk of loss.

250. But, through collusive conduct, they offer all shepherds price-fixed wages that vary solely based on the state in which the ranch is located.

251. Also through collusive conduct, they pay all of their shepherds price-fixed wages that vary solely based on the state in which the ranch is located.

252. The MPAS and its members, including Defendant Ranchers that are members of the MPAS, conspired and agreed to fix the wages offered and paid to shepherds at the minimum DOL wage floor. This fixed rate is artificially low, and the fixing of wages through the operation of the MPAS amounts to a *per se* violation of the Sherman Antitrust Act.

253. The MPAS and its members conspired and agreed to fix wages offered and paid to shepherds at the DOL wage floors through the MPAS's filing of (a) job offers for

domestic workers, and (b) applications for certifications of H-2A workers that both offered exactly the same wage set at exactly the wage floors set by the DOL. The fixing of wages amounts to a *per se* violation of the Sherman Antitrust Act, and the fixed rate set by Defendants has remained artificially low because it has continually put downward pressure on the DOL's wage surveys and, thus, the basis for Defendants' price-fixed wages.

254. In the alternative, Plaintiffs allege that the Defendants' price-fixing agreement is anticompetitive and illegal under the Rule of Reason. For purposes of the Rule of Reason, the relevant geographic market for the claim alleged in this Count is the United States, and the relevant markets consist of (a) the labor market for shepherds in the United States; (b) the labor market for domestic shepherds in the United States; and (c) the labor market for immigrant, H-2A shepherds in the United States.

255. The MPAS's relevant conduct—price fixing in their role as a recruiter for their members—unreasonably restrains trade in the shepherd labor market. The price fixing is not essential to the H-2A program and has no procompetitive virtues.

Defendants' collusive activity had and has the effect of –

(a) fixing the compensation of shepherd Plaintiffs and the Price Fixed Class at an artificially low level;

(b) eliminating, to a substantial degree, competition for shepherd labor, particularly among potential domestic shepherds;

(c) driving Plaintiffs and other workers from the shepherd labor market;

(d) restraining trade in that shepherds are not able to negotiate their wage rates above the DOL wage floors; and

(e) restraining trade by artificially lowering the H-2A shepherd wage floors resulting from the DOL's surveys.

256. Defendants' unreasonable restraint or restraints of trade have damaged the Plaintiffs and the members of the MPAS Price Fixed Class.

257. As a result, Plaintiffs and those similarly situated suffered injuries and are entitled to treble damages, fees, and costs as set forth by law.

258. Plaintiffs and those similarly situated are also entitled to injunctive relief to end the price fixing scheme, and to force the Defendants to take affirmative steps to correct the market.

COUNT IV: CIVIL RICO, 18 U.S.C. 1964(C)

Plaintiffs Huaman, Leovegildo Vilchez Guerra, Liber Vilchez Guerra, and the WRA Illegal Deduction Class against Defendant WRA and Defendant Richins

259. Plaintiffs incorporate by reference all previous paragraphs of this Complaint as if fully re-written herein.

260. As set forth above, Plaintiffs Huaman, Leovegildo Vilchez Guerra, Liber Vilchez Guerra assert this count on his own behalf and on behalf of all those similarly situated pursuant to Fed. R. Civ. P. 23.

261. All relevant job orders submitted to the state workforce agencies within the relevant statute of limitations contained false promises that shepherds would be reimbursed consistent with 20 C.F.R. § 655.122. In fact, the WRA had and has a policy of not reimbursing consistent with 20 C.F.R. § 655.122, including failing to reimburse for

expenses incurred by the named Plaintiffs and those similarly situated prior to leaving their countries of origin. The WRA therefore has and had knowledge that the representations to the SWAs were false or, at best, had ignorance regarding the veracity of those representations. State workforce agencies rely on the representations in job orders to determine whether the jobs in the job orders will be offered to domestic workers. If a job order is not offered to domestic workers, it cannot subsequently be offered to foreign workers through an H-2A Application.

262. All relevant H-2A applications submitted to the DOL by WRA during the relevant statute of limitations included, and were the result of, the fraudulent job orders described in the previous paragraph and contained additional false promises that any sheepherder hired pursuant to the applications would be reimbursed consistent with 20 C.F.R. § 655.122. In fact, the WRA had and has a policy of not reimbursing consistent with 20 C.F.R. § 655.122, including failing to reimburse for expenses incurred by the named Plaintiffs and those similarly situated prior to leaving their countries of origin. The WRA therefore has and had knowledge that the representations to the DOL in the applications were false or, at best, had ignorance regarding the veracity of those representations. The DOL relied on the representations in applications to determine whether the jobs requested in the applications would be offered to foreign workers. The WRA knew or should have known that it was not reimbursing consistent with 20 C.F.R. § 655.122, despite its representations to the state workforce agencies and DOL to the contrary, because it had agents directing the named Plaintiffs and those similarly situated to undertake these pre-departure expenses and knew that it did not reimburse

for the expenses. These expenses include medical checkups, criminal background checks and travel and subsistence expenses (which include bus fares, meals, and hotels necessary to travel between the shepherd's place of recruitment and the workplace, and travel necessary to complete the other pre-travel requirements, e.g., the medical checkups).

263. The submission of job orders to the state workforce agencies and the H-2A Applications to the DOL containing the false statements, while simultaneously implementing a policy of not reimbursing consistent with 20 C.F.R. § 655.122, represents a scheme or artifice by the WRA to defraud or obtain money or property by false pretenses, representations, or promises. U.S. mails or interstate wires were used to execute this scheme because state workforce agencies only accept job orders by mail or email and the DOL only accepts H-2A Applications by mail or through its online filing system.

264. These acts violated 18 U.S.C. § 1343 (wire fraud) or 18 U.S.C. § 1341 (mail fraud).

265. By participating in the Richins Enterprise and the WRA Enterprise, which engaged in patterns of racketeering and commission of the underlying predicate acts, Defendant Richins and the WRA injured Plaintiffs and the WRA Illegal Deduction Class.

266. Plaintiffs and those similarly situated suffered injuries and are entitled to treble damages, fees, and costs as set forth by law.

COUNT V: CIVIL RICO, 18 U.S.C. 1964(C), AGAINST THE MPAS

Plaintiff De La Cruz and the MPAS Illegal Deduction Class against Defendant MPAS

267. Plaintiffs incorporate by reference all previous paragraphs of this Complaint as if fully re-written herein.

268. As set forth above, Plaintiff De La Cruz asserts this count on his own behalf and on behalf of all those similarly situated pursuant to Fed. R. Civ. P. 23.

269. All relevant job orders submitted to the state workforce agencies within the relevant statute of limitations contained false promises that shepherds would be reimbursed consistent with 20 C.F.R. § 655.122. In fact, the MPAS had and has a policy of not reimbursing consistent with 20 C.F.R. § 655.122, including failing to reimburse for expenses incurred by the named Plaintiffs and those similarly situated prior to leaving their countries of origin. The MPAS therefore has and had knowledge that the representations to the SWAs were false or, at best, had ignorance regarding the veracity of those representations. State workforce agencies rely on the representations in job orders to determine whether the jobs in the job orders will be offered to domestic workers. If a job order is not offered to domestic workers, it cannot subsequently be offered to foreign workers through an H-2A Application.

270. All relevant H-2A applications submitted to the DOL by MPAS during the relevant statute of limitations included, and were the result of, the fraudulent job orders described in the previous paragraph and contained additional false promises that any sheepherder hired pursuant to the applications would be reimbursed consistent with 20 C.F.R. § 655.122. In fact, the MPAS had and has a policy of not reimbursing consistent

with 20 C.F.R. § 655.122, including failing to reimburse for expenses incurred by the named Plaintiffs and those similarly situated prior to leaving their countries of origin. The MPAS therefore has and had knowledge that the representations to the DOL in the applications were false or, at best, had ignorance regarding the veracity of those representations. The DOL relied on the representations in applications to determine whether the jobs requested in the applications would be offered to foreign workers.

271. The MPAS knew or should have known that it was not reimbursing consistent with 20 C.F.R. § 655.122, despite its representations to the state workforce agencies and DOL to the contrary, because it had agents directing the named Plaintiffs and those similarly situated to undertake these pre-departure expenses and knew that it did not reimburse for the expenses. These expenses include medical checkups, criminal background checks and travel and subsistence expenses (which include bus fares, meals, and hotels necessary to travel between the shepherd's place of recruitment and the workplace, and travel necessary to complete the other pre-travel requirements, e.g., the medical checkups).

272. The submission of job orders to the state workforce agencies and the H-2A Applications to the DOL containing the false statements, while simultaneously implementing a policy of not reimbursing consistent with 20 C.F.R. § 655.122, represents a scheme or artifice by the MPAS to defraud or obtain money or property by false pretenses, representations, or promises. U.S. mails or interstate wires were used to execute this scheme because state workforce agencies only accepts job orders by

mail or email and the DOL only accepts H-2A Applications by mail or through its online filing system.

273. These acts violated 18 U.S.C. § 1343 (wire fraud) or 18 U.S.C. § 1341 (mail fraud).

274. By participating in the MPAS Enterprise, which engaged in patterns of racketeering and commission of the underlying predicate acts, Defendant MPAS injured Plaintiffs and the MPAS Illegal Deduction Class.

275. Plaintiffs and those similarly situated suffered injuries and are entitled to treble damages, fees, and costs as set forth by law.

COUNT VI: FAILURE TO PAY AT LEAST NEVADA MINIMUM WAGE

Plaintiff De La Cruz and the NV Minimum Wage Class against Defendant MPAS

276. Plaintiffs incorporate by reference all previous paragraphs of this Complaint as if fully re-written herein.

277. As set forth above, Plaintiff De La Cruz asserts this count on his own behalf and on behalf of all those similarly situated pursuant to Fed. R. Civ. P. 23.

278. MPAS employed Plaintiff De La Cruz and the NV Minimum Wage Class in Nevada during the relevant statute of limitations and paid the Plaintiffs less than the Nevada minimum wage, usually only $800 per month until mid-November 2015.

279. Upon information and belief, since mid-November 2015, the MPAS pays its Nevada shepherd employees exactly the 2015 special procedures minimum, which is still far less than Nevada minimum wage.

280. As a result, the Plaintiffs are entitled to the difference between the wages paid and the Nevada minimum wage pursuant to Nev. Const. art. 15, § 16; Nev. Rev. Stat. § 608.260; and *Thomas v. Nevada Yellow Cab Corp.*, 327 P. 3d 518 (Nev. 2014).

281. Plaintiff De La Cruz sent a written demand demanding wages at least five days prior to bringing this claim. The Plaintiff and the NV Minimum Wage Class are therefore additionally entitled to attorney's fees.

COUNT VII: BREACH OF CONTRACT OR QUASI CONTRACT AGAINST THE WRA

Plaintiff Huaman, Leovegildo Vilchez Guerra, Liber Vilchez Guerra, and the WRA Illegal Deduction Class against Defendant WRA

282. Plaintiffs incorporate by reference all previous paragraphs of this Complaint as if fully re-written herein.

283. As set forth above, Plaintiffs Huaman, Leovegildo Vilchez Guerra, and Liber Vilchez Guerra assert this count on their own behalf and on behalf of all those similarly situated pursuant to Fed. R. Civ. P. 23.

284. Plaintiffs and the WRA Illegal Deduction Class entered into contracts with the WRA that explicitly or impliedly incorporated the requirements of 20 C.F.R. § 655.122 either through the H-2A Applications and job orders, which constitute job offers accepted by Plaintiffs and those similarly situated, or as implied terms in their employment contracts.

285. As set forth above, the WRA breached these contracts by deducting expenses that were primarily for the benefit and convenience of the employer from shepherd wages. These deductions include expenses incurred by the Plaintiffs, which were never reimbursed by the WRA, such as expenses for medical checkups, criminal background

checks, and travel and subsistence expenses (which include bus fares, meals, and hotels necessary to travel between the shepherd's place of recruitment and the workplace, and travel necessary to complete the other pre-travel requirements, e.g., the medical checkups).

286. As a result of the breach, the Plaintiffs and the WRA Illegal Deduction class suffered damages.

287. In the alternative to a contract claim, the Plaintiffs are entitled to relief in promissory estoppel. The WRA promised the Plaintiffs and the WRA Illegal Deduction Class that it would adhere to 20 C.F.R. § 655.122. The Plaintiffs and the WRA Illegal Deduction Class relied on this promise to their detriment by traveling to WRA member ranches to work as shepherds, where the WRA illegally deducted wages that were primarily for the benefit and convenience of the WRA. The Plaintiffs and WRA Illegal Deduction Class are entitled to damages, including the illegally deducted wages.

288. Similarly, in the alternative to a contract claim, the Plaintiff and the WRA Illegal Deduction Class are also entitled to relief in unjust enrichment and quantum meruit. A benefit was conferred on the WRA when the Plaintiff and the WRA Illegal Deduction Class traveled to WRA member ranches to work and the WRA illegally deducted amounts from their wages in violation of 20 C.F.R. § 655.122; that benefit was appreciated by the WRA as it retained the illegal deductions; and it is unjust for the WRA to be permitted to retain the illegally deducted wages. The Plaintiff and the WRA Illegal Deduction Class reasonably expected to be paid wages free and clear pursuant to 20 C.F.R. § 655.122 and were not. As a result, the Plaintiff and the WRA illegal

deduction class are entitled to the reasonable value of the services provided without amounts illegally deducted and the WRA should be disgorged of the illegally deducted wages.

COUNT VIII: BREACH OF CONTRACT OR QUASI CONTRACT AGAINST THE MPAS

Plaintiff De La Cruz and the MPAS Illegal Deduction Class against Defendant MPAS

289. Plaintiffs incorporate by reference all previous paragraphs of this Complaint as if fully re-written herein.

290. As set forth above, Plaintiff De La Cruz asserts this count on his own behalf and on behalf of all those similarly situated pursuant to Fed. R. Civ. P. 23.

291. Plaintiffs and the MPAS Illegal Deduction Class entered into contracts with the MPAS that explicitly or impliedly incorporated the requirements of 20 C.F.R. § 655.122 either through the H-2A Applications and job orders, which constitute job offers accepted by Plaintiffs and those similarly situated, or as implied terms in their employment contracts.

292. As set forth above, the MPAS breached these contracts by deducting expenses that were primarily for the benefit and convenience of the employer from shepherd wages. These deductions include expenses incurred by the Plaintiffs, which were never reimbursed by the MPAS, such as expenses for medical checkups, criminal background checks, and travel and subsistence expenses (which include bus fares, meals, and hotels necessary to travel between the shepherd's place of recruitment and the

workplace, and travel necessary to complete the other pre-travel requirements, e.g., the medical checkups).

293. As a result of the breach, the Plaintiff and the MPAS Illegal Deduction class suffered damages.

294. In the alternative to a contract claim, the Plaintiff is entitled to relief in promissory estoppel. The MPAS promised the Plaintiff and the MPAS Illegal Deduction Class that it would adhere to 20 C.F.R. § 655.122. The Plaintiff and the MPAS Illegal Deduction Class relied on this promise to their detriment by traveling to MPAS member ranches to work as shepherds, where the MPAS illegally deducted wages that were primarily for the benefit and convenience of the MPAS. The Plaintiff and MPAS Illegal Deduction Class are entitled to damages, including the illegally deducted wages.

295. Similarly, in the alternative to a contract claim, the Plaintiff and the MPAS Illegal Deduction Wage Class are also entitled to relief in unjust enrichment and quantum meruit. A benefit was conferred on the MPAS when the Plaintiff and the MPAS Illegal Deduction Class traveled to MPAS member ranches to work and the MPAS illegally deducted amounts from their wages in violation of 20 C.F.R. § 655.122; that benefit was appreciated by the MPAS as it retained the illegal deductions; and it is unjust for the MPAS to be permitted to retain the illegally deducted wages. The Plaintiff and the MPAS Illegal Deduction Class reasonably expected to be paid wages free and clear pursuant to 20 C.F.R. § 655.122 and were not. As a result, the Plaintiff and the MPAS Illegal Deduction Class are entitled to the reasonable value of the services provided

without amounts illegally deducted and the MPAS should be disgorged of the illegally deducted wages.

PLAINTIFFS DEMAND A JURY TRIAL

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that judgment be entered in their favor and in favor of those similarly situated as follows:

a. Certifying and maintaining this action as a class action, with Plaintiffs as designated class representatives and with their counsel appointed as class counsel;

b. Declaring Defendants in violation of each of the counts set forth above;

c. Awarding treble damages for antitrust injuries to Plaintiffs and those similarly situated;

d. Awarding treble damages for RICO injuries to Plaintiffs and those similarly situated;

e. Awarding damages for failing to pay NV minimum wage;

f. Awarding contract damages;

g. Awarding pre-judgment, post-judgment, and statutory interest;

h. Awarding attorneys' fees;

i. Awarding costs;

j. Ordering equitable relief, including a judicial determination of the rights and responsibilities of the parties;

k. Awarding such other and further relief as the Court may deem just and proper.

Respectfully Submitted,

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Attorneys for the Plaintiffs

Certificate of Service

I hereby certify that on December 4, 2015, I served a true and correct copy of the forgoing on the individuals below pursuant to F.R.C.P. 5.

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Raymond Perez , II

s/ Alexander Hood
Alexander Hood

Exhibit F

Llacua, et. al. v. Western Range Association, et. al
No. 15-cv-0188

Unapposed Motion to Sever and Transfer Plaintiff De la Cruz's Nevada Wage Minimum Wage Claim to the District of Nevada (Dkt. 156)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Case No. 15-cv-01889-REB-CBS

RODOLFO LLACUA, *et al.*

Plaintiffs,

v.

WESTERN RANGE ASSOCATION, *et al.*

Defendants.

UNOPPOSED MOTION TO SEVER AND TRANSFER PLAINTIFF DE LA CRUZ'S NEVADA MINIMUM WAGE CLAIM TO THE DISTRICT OF NEVADA

CERTIFICATE OF CONFERRAL PURSUANT TO D.C.COLO.LCIVR 7.1(A)

Plaintiffs have conferred with all Defendants and none of the Defendants oppose this motion.

INTRODUCTION

This case principally concerns two separate alleged courses of conduct by Defendants: first, the fixing of offered wages at the government-set wage floor, and second, failure to provide plaintiffs with required reimbursements notwithstanding conflicting representations to the federal government. One of the Plaintiffs (Rafael De La Cruz) has also asserted a claim against one Defendant (Mountain Plains Agricultural Association, or "MPAS") related to a different course of conduct. He alleges that he was not paid Nevada's minimum wage for his work as an H-2A shepherd in Nevada notwithstanding that Nevada minimum wage applies to H-2A shepherds. Dkt. No. 73 at ¶¶ 276-81 (Count VI); *see also* Nev. const. art. 15, § 16; Nev. Rev. Stat. § 608.260. This Court has never addressed the merits of that claim. *See, e.g.*, Dkt. No. 125 at 42 ("The court recommends declining to exercise jurisdiction over Plaintiffs' state law claims.").

After this case was filed, a different shepherd—who is not a named plaintiff in this case—filed a putative class action in the District of Nevada alleging that the Association Defendants here (along with a handful of other alleged employers) violated these same minimum wage provisions of Nevada law. *Castillo v. Western Range Assoc., et al.*, 16-00237-RCJ-VPC (D. Nev.). Here, Plaintiff De La Cruz moves the Court to sever his Nevada minimum wage claim and to transfer that claim to the District of Nevada where it can be adjudicated together with the Nevada minimum wage claims in *Castillo*.

ARGUMENT

The Court has broad authority to "sever any claim against a party," Fed. R. Civ. P. 21, and then to transfer that claim to another district for the "convenience of parties and witnesses, [and] in the interest of justice," 28 U.S.C. § 1404(a); *Chrysler Credit Corp. v. Country Chrysler, Inc.*, 928 F.2d 1509, 1516 (10th Cir. 1991). The Tenth Circuit has explained that

> [a]mong the factors a district court should consider is the plaintiff's choice of forum; the accessibility of witnesses and other sources of proof, including the availability of compulsory process to insure attendance of witnesses; the cost of making the necessary proof; questions as to the enforceability of a judgment if one is obtained; relative advantages and obstacles to a fair trial; difficulties that may arise from congested dockets; the possibility of the existence of questions arising in the area of conflict of laws; the advantage of having a local court determine questions of local law; and, all other considerations of a practical nature that make a trial easy, expeditious and economical.

Chrysler Credit Corp., 928 F.2d at 1516 (internal quotation marks and alterations omitted).

All the relevant factors counsel in favor of severance and transfer to the District of Nevada. Most importantly, both Plaintiff De la Cruz and MPAS – the sole Defendant to the claim at issue – consent to the motion, a consideration that should we heavily in determining whether transfer would "convenience [the] parties," 28 U.S.C. § 1404(a). *Bayer Healthcare, LLC v. Norbrook Labs., LTD*, 2009 WL 235635, at *2 (D. Kan. Feb. 2, 2009); *ITT Thorp Corp. v. Firemen's Ins. Co. of Newark, New Jersey*, 428 F. Supp. 62, 64 (E.D. Wis. 1977). Nearly all the facts giving rise to Plaintiff De la Cruz's claims under Nevada law occurred in Nevada, where he was employed as a shepherd. At trial, the factfinder will need to consider the nature of Plaintiff De la Cruz's work, and to calculate damages, how many hours he worked. The evidence and witnesses related to these questions are all in Nevada. Further, the court in Nevada is now considering a motion to dismiss where it will determine the scope of Nevada minimum wage law and its application to foreign H-2A shepherds, the precise issue raised by De la Cruz's Nevada claims. *Bayer Healthcare., LTD*, 2009 WL 235635, at *2. In deciding that issue, the Nevada court has the benefit of comprehensive briefing from the parties that has not been possible in this litigation and, of course, more familiarity with Nevada law than a court in this District. *See, e.g.*, *Mut. of Omaha Ins. Co. v. Dolby*, 531 F. Supp. 511, 516 (E.D. Pa. 1982) (familiarity with state law one consideration potentially relevant to transfer motion).

Finally, Plaintiffs' counsel has taken to heart the Magistrate Judge's urgings at oral argument that they simplify this litigation for the convenience of the parties and judicial economy. *Cf.* Dkt. No. 139-2 (redlined Third Amended Complaint, adding more substantial factual allegations but streamlining legal argument). To be sure, the law permits De la Cruz to raise his state law claims in this litigation. But the Magistrate Judge is right that this case raises several complex questions of federal law. Severing De la Cruz's Nevada state law claim will helpfully narrow this dispute.

CONCLUSION

Plaintiffs' respectfully request that the Court sever Plaintiff De la Cruz's claim under Nevada law (Count VI of Second Amended Complaint, Count VII of Third Amended Complaint) and transfer that claim to the District of Nevada.

Respectfully Submitted,

s/Alexander Hood

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Attorneys for Plaintiffs

Certificate of Service

I hereby certify that on 12/12/2016, I served a true and correct copy of the forgoing on all parties that have appeared pursuant to Fed.R.Civ.P. 5.

s/Alexander Hood
Alexander Hood

Exhibit G

Hispanic Affairs Project, et. al. v. Perez, et. al
No. 15-cv-01785

Second Amended Complaint (Dkt. 23)

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

Civil Case No. 15-cv-01562-BAH

HISPANIC AFFAIRS PROJECT,
RODOLFO LLACUA,
JOHN DOE,
RAFAEL DE LA CRUZ, and
ALFREDO SALCEDO,

Plaintiffs,

v.

THOMAS E. PEREZ, in his official capacity as United States Secretary of Labor;
UNITED STATES DEPARTMENT OF LABOR;
PORTIA WU, in her official capacity as Assistant Secretary, Employment and Training Administration, United States Department of Labor;
JEH JOHNSON, in his official capacity as United States Secretary of Homeland Security
UNITED STATES DEPARTMENT OF HOMELAND SECURITY,
WESTERN RANGE ASSOCIATION, and
MOUNTAIN PLAINS AGRICULTURAL SERVICE,

Defendants.

SECOND AMENDED COMPLAINT

Plaintiffs amend their complaint by written consent of the opposing parties, pursuant to Federal Rule of Civil Procedure 15(a)(2). All parties will meet and confer within the next week to provide a revised responsive pleading schedule for the Second Amended Complaint.

INTRODUCTORY STATEMENT

This case was originally filed to challenge the implementation of the Department of Labor's 2011 Shepherd TEGL. Since filing, DOL has published the 2015 Rule for herders, which became effective November 16, 2015, and which Plaintiffs challenge by amending their complaint. Plaintiffs oppose the 2015 Rule because, as implemented, it creates a two-tiered system for agricultural work and exploits a vulnerable class of mainly foreign shepherds who cannot out-lobby an industry that has captured the agency supposedly charged with protecting worker rights.

By DOL regulation, the minimum wage for most H-2A agricultural workers is the Adverse Effect Wage Rate (AEWR)—so named because Congress requires that it be high enough to ensure that agricultural employers do not rely on the influx of cheap foreign labor that would depress American wages and displace American workers from agricultural jobs. The AEWR for most H-2A agricultural workers is between $10 and $13 per hour, higher than the federal and most state minimum wages. Further, all H-2A visas must be "temporary or seasonal" in nature, as Congress did not design the H-2A visa program to create a permanent foreign workforce.

None of these rules, however, apply to an ever-expanding group of workers who fall under the DOL's new definition of "herder," which now includes those working with cattle, goats, sheep, and (for the first time) horses. First, under the 2015 Rule, these workers earn only $7.25 per hour—a minimum wage that Defendant Secretary Perez has admitted cannot provide "the essentials a family needs to survive" and whose inadequacy Secretary Perez has linked to a civil rights issue on the scale of the structural injustices addressed by Martin Luther King, Jr.[1] Worse still, the federal hourly minimum wage of $7.25 per hour has never before applied to foreign agricultural workers, who, as explained above, are almost always paid more than the minimum wage to protect against the displacement of American workers and the depression of American wages.

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[1] Tom Perez, *3 Out of 4 Americans Agree: It's Time To Raise the Wage*, *U.S. Dep't of Labor Blog* (Jan. 15, 2014), https://blog.dol.gov/2014/01/15/3-out-of-4-americans-agree-its-time-to-raise-the-wage/.

Second, unlike other H-2A workers, who are paid the hourly AEWR for every hour they work, under the 2015 Rule, herders are paid only for 48 hours of work per week, even if they work many more hours in such a period. Worse still, DOL deems that herders work exactly these 48 hours per week based solely on an unaudited survey of self-reported data provided by employers that grossly underestimates the actual number of hours worked by shepherds. Third, the 2015 Rule creates an illegal, permanent H-2A workforce, rather than the "temporary or seasonal" workforce approved by Congress.

The 2015 Rule gives rise to multiple violations of the Administrative Procedure Act by both the DOL, which enforces the new wage rule and authorizes H-2A applications, and by the Department of Homeland Security, which approves H-2A visa petitions for herders.

While the 2015 Rule is illegal for the reasons stated above, the 2011 Shepherd TEGL is also illegal and continues to cause injury to H-2A herders who were subject to this rule. Further, as this Court has now noted, Plaintiffs "have persuasively pointed out the deficiencies in the [minimum] wage rate implemented under the authority of the 2011 [Shepherd] TEGL." Order, ECF # 38, at 9. The Court has also suggested that Plaintiffs are likely to succeed on the merits of their APA challenge related to the 2011 Shepherd TEGL, *id.* at 9-10, and that defects with that rule have been well-documented virtually since the rule was promulgated by DOL, *see, e.g.*, *id.* at 11.

The illegality of both the 2011 and 2015 Rules cause those who have worked as H-2A herders injury because almost all employers of H-2A herders, including the Western Range Association (WRA) and Mountain Plains Agricultural Service (MPAS), have a policy of only paying herders exactly the illegal minimum wage authorized by DOL. Plaintiffs John Doe and Alfredo Salcedo, as WRA employees, and Plaintiff De La Cruz, as an MPAS employee, were or are subject to this policy. Plaintiffs Doe, Salcedo, and De La Cruz therefore bring claims in quasi-contract for themselves and on behalf of a class of similarly situated H-2A shepherds for the difference between the illegally low wage they have been paid and a reasonable wage to be determined by the Court.

JURISDICTION AND VENUE[2]

1. This Court has jurisdiction over claims against the government defendants under 28 U.S.C. § 1346 for review of final agency action under the APA, 5 U.S.C. §§ 701-706. In addition, it has jurisdiction over all claims pursuant to 28 U.S.C. § 1331 because they arise under the laws of the United States, and it has jurisdiction under 28 U.S.C. § 1367 over the quasi-contract claims.

2. Finally and in the alternative, this Court has jurisdiction over the quasi-contract claims under 28 U.S.C. § 1332(d)(2) because these claims are brought as class actions in which the amount in controversy of each action exceeds the sum or value of $5,000,000, exclusive of interest and costs. There is also diversity of citizenship as between the WRA, a California corporation, and members of the class who are citizens of states other than California and/or foreign states, and as between MPAS, a Wyoming corporation, and members of the class who are citizens of states other than Wyoming and/or foreign states. Further, Defendants WRA and MPAS usually enter into three-year long contracts with H-2A shepherds and almost all of these contracts were entered into at exactly the illegal minimum wage set by the DOL. At a minimum

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[2] Throughout this Complaint, Plaintiffs use shorthand similar to that employed by this Court to reference shepherd-related regulations published by DOL. *See Temporary Agricultural Employment of H-2A Foreign Workers in the Herding or Production of Livestock on the Range in the United States*, 80 Fed. Reg. 62,958 (Oct. 16, 2015) (to be codified at 20 CFR pt 655) ("2015 Rule"); *TEGL No. 32-10, Special Procedures: Labor Certification Process for Employers Engaged in Sheepherding and Goatherding Occupations Under the H-2A Program*, 76 Fed. Reg. 47,256 (Aug. 4, 2011) ("2011 Shepherd TEGL").

for the 2011 Shepherd TEGL, the difference in the value between what they were paid and what they should be paid is approximately $500 per month. Finally, the WRA currently employs over twelve-hundred shepherds and MPAS employs over eight-hundred shepherds, and both organizations have done so for years.

3. Venue is proper pursuant to 28 U.S.C. § 1391(b)(2) and (e)(1).

PARTIES

4. Plaintiff Hispanic Affairs Project (HAP) is a Colorado nonprofit corporation and organization open to H-2A shepherds, other members of the immigrant worker community, members of the Hispanic community in Western Colorado, former shepherds, and their supporters. Members live and work primarily in Western Colorado. Members include current H-2A shepherds who have labored under the 2011 Shepherd TEGL and 2015 Rule, and former herders who would legally work as herders again but for the low wages earned by workers in this industry. Through its work, HAP strives to improve the working and living conditions of its members and member communities. HAP seeks to protect its members' interest in ensuring DOL and DHS are enforcing the H-2A regulations, setting a rationally calculated wage floor, and operating in accordance with the Administrative Procedure Act. HAP has members, its central office, and staff in Montrose, Colorado. Plaintiff HAP brings claims related to the 2011 Shepherd TEGL only on behalf of its members who were H-2A herders subject to this rule.

5. Plaintiff John Doe, an employee of the Western Range Association, is a current Colorado-based H-2A shepherd who earned the illegal wage of $750 per month under the 2011 Shepherd TEGL and now earns the illegal minimum of $1206.31 per month under the 2015 Rule. Plaintiff John Doe is willing, qualified, and available for continued employment as a shepherd. He fears serious retaliation in the form of possible physical violence, adverse

employment action, removal from the United States, and blacklisting because of his decision to participate in this lawsuit. He is therefore participating using a pseudonym.[3]

6. Plaintiff Alfredo Salcedo is a Colorado-based herder who agreed to wage contract terms with the Western Range Association of $750 per month under the 2011 Shepherd TEGL and $1206.31 per month under the 2015 Rule and who was paid those amounts.

7. Plaintiff Rafael De La Cruz agreed to wage contract terms of $800 per month with Defendant Mountain Plains Agricultural Service under the 2011 Shepherd TEGL and was paid this amount.

8. Plaintiff Rodolfo Llacua is a former shepherd and U.S. Citizen residing in Grand Junction, Colorado. He has enjoyed working with sheep and other livestock for most of his life and worked for over ten years as a shepherd in the United States. He is able, willing, qualified, and available for employment as a shepherd, and his preference is to work as a shepherd. At the same time, he does not work as a shepherd anymore because of the low wages that shepherds make, including the new wages under the 2015 Rule. He is in direct competition with current H-2A shepherds for work in this labor market but is effectively excluded from it because the DOL's illegal wage rules allow for the importation of very cheap foreign labor.

9. Defendant Thomas E. Perez is the United States Secretary of Labor. The Secretary is responsible for all the functions of the DOL, including administration of the H-2A program for herders. Secretary Perez is sued in his official capacity, pursuant to 5 U.S.C. § 703.

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[3] Plaintiff John Doe is entitled to proceed anonymously. *See* ECF # 11.

10. Defendant United States Department of Labor is responsible for issuing prevailing wage determinations as a part of the process of granting labor certifications for the H-2A program and is charged with enforcing the 2011 Shepherd TEGL.

11. Defendant Portia Wu is Assistant Secretary, Employment and Training Administration (ETA). ETA is responsible for making annual wage determinations for shepherds and otherwise complying with the laws governing this class of workers. She is sued in her official capacity, pursuant to 5 U.S.C. § 703.

12. Defendants Secretary Perez, DOL, and Assistant Secretary Wu shall hereinafter collectively be referred to as the "DOL Defendants."

13. Defendant Jeh Johnson is the United States Secretary of Homeland Security. The Secretary is responsible for all functions of DHS and its component organizations, including the approval of H-2A visa petitions. Secretary Johnson is sued in his official capacity, pursuant to 5 U.S.C. § 703.

14. Defendant United States Department of Homeland Security is responsible for the approval of visa petitions for H-2A workers.

15. Defendants Secretary Perez, DOL, Assistant Secretary Wu, Secretary Johnson, and DHS shall hereinafter collectively be referred to as the "Government Defendants."

16. Defendant Western Range Association (WRA) is a California non-profit corporation with its principal place of business at 1245 E. Brickyard Road, Suite # 190, Salt Lake City, UT 84106. Defendant WRA is Plaintiff John Doe's employer. Defendant WRA has a policy of paying all of its employees exactly the minimum wage authorized by DOL: this means that almost all H-2A employees of Defendant WRA, including Plaintiffs Doe and Salcedo, earned the minimum of

$750 per month under 2011 Shepherd TEGL. Defendant WRA has continued with this policy by paying almost all employees $1206.31 under the 2015 Rule.

17. Defendant Mountain Plains Agricultural Service (MPAS) is a Wyoming non-profit corporation with its principal place of business at 811 N. Glenn Rd, Casper, WY 82601. Defendant MPAS has a policy of paying all of its employees exactly the minimum wage authorized by DOL: this means that almost all H-2A employees of Defendant MPAS, including Plaintiff De La Cruz, earned the minimum of $800 per month under 2011 Shepherd TEGL. MPAS has continued with this policy by paying almost all employees $1206.31 under the 2015 Rule.

STATEMENT OF FACTS

The H-2A Visa Program

18. The H-2A program takes its name from the statutory provision, 8 U.S.C. §1101(a)(15)(H)(ii)(a), which describes the visa category for nonimmigrant foreign workers who come to the United States to perform agricultural work on a temporary basis. In that statute, Congress has limited the definition of who qualifies as a recipient of an H-2A visa to "an alien . . . having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services . . . of a temporary or seasonal nature . . . ."

19. Defendant Department of Homeland Security authorizes visa petitions for H-2A herders, including shepherds.

20. Congress has also mandated that foreign workers can come to the United States only if the Secretary of Labor certifies that an employer seeking to use the H-2A program has given preference to U.S. workers over foreign workers for the available positions, and that, to the

extent foreign workers are employed, their employment will not adversely affect the wages and working conditions of U.S. workers. *See* 8 U.S.C. § 1188(a)(1)(A), (B); *id.* § 1188(b).

21. To obtain authorization to hire an H-2A worker, an H-2A employer prepares an Application for Temporary Employment Certification (hereinafter "H-2A Application").

22. An H-2A Application is an agreement between the employer and employee that in part governs herder working and living conditions, including herder salaries. The H-2A Application must ultimately be certified by the DOL.

23. DOL can only certify an H-2A Application that complies with H-2A program requirements.

24. Obtaining DOL certification for an H-2A Application is a necessary precondition for an H-2A employer to bring an H-2A worker to the United States.

25. By regulation, H-2A employers must agree to pay H-2A workers at least the Adverse Effect Wage Rate (AEWR), the prevailing wage, the federal or state minimum or the agreed-upon collective bargaining rate (whichever is highest). *See* 20 C.F.R. § 655.120.

26. The AEWR is often the highest wage available for H-2A workers and generally accords them a minimum hourly wage of between approximately $10-13, depending on the state in which the worker is employed.

27. H-2A herders, however, do not receive the hourly AEWR mandated by DOL regulations. Instead, DOL has created what it calls "Special Procedures" that govern herder living and working conditions.

28. According to the DOL, the Special Procedures are exceptions from normal rules governing other classes of H-2A workers. Over the last thirty years, DOL has published various iterations of Special Procedures that apply to H-2A herders.

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29. The Special Procedures at issue here are the 2011 Shepherd TEGL and the 2015 Rule.

2011 Shepherd TEGL Wage Determination Methodology

30. The 2011 Shepherd TEGL dictates that shepherd minimum wages are determined based on annual prevailing wage surveys conducted by State Workforce Agencies (SWAs).

31. In conducting these prevailing wage surveys, SWAs are only allowed to rely on wages reported by domestic (i.e., non-H-2A) workers.

32. According to the 2011 Shepherd TEGL, SWAs are required to conduct these annual surveys between May 1 and June 1 of each calendar year.

33. The 2011 Shepherd TEGL then dictate that DOL review the SWA findings and publish annually in the Federal Register the shepherd wage floor applicable in each state.

34. As part of the DOL's annual review of the SWA surveys, DOL must determine if the survey is statistically valid.

35. DOL has stated that surveys with sample sizes of less than thirty workers are insufficient to support statistically reliable wage results.

36. If a state does not provide usable survey data in its prevailing wage survey, the 2011 Shepherd TEGL allows DOL to use several alternative methodologies to determine shepherd wages.

37. First, DOL can issue a prevailing wage rate for that State based on the wage floor findings submitted by an adjoining or proximate SWA for the same or similar agricultural activities to ensure that the wages of similarly employed workers are not adversely affected.

38. DOL can also consider aggregating survey data for sheepherding activities across states to create regional prevailing wage rates and/or can rely on data from the U.S. Department of

Agriculture's production or farm resource regions or other groupings of States the USDA used to conduct its Farm Labor Survey.

39. Under the 2011 Shepherd TEGL, however, one additional method is no longer available for DOL to determine herder wages. In particular, while DOL used to rely on prior surveys of herders to establish their current wages, in the 2011 Shepherd TEGL, DOL opted not to continue using this methodology.

40. DOL precluded use of prior state surveys to establish the current wages because reliance on this methodology caused herder wage stagnation.

Wage Floors Set By the DOL Until November 2015

41. Despite the requirement mandated in the 2011 Shepherd TEGL that DOL make annual determinations of shepherd wages, the last time DOL published a wage determination was in January 2013.

42. The January 2013 Wage Determination does not even apply to every state: some determinations date from July 2011.

43. DOL neither issued nor published in the Federal Register an annual wage determination in 2014 or 2015.

44. DOL certified H-2A Applications for shepherds in 2014 and 2015 at the wage floors set pursuant to DOL wage determinations for 2013 or 2011.

45. In 2013-2015, DOL received data from SWAs and other sources that could have been used for the purposes of making annual herder wage determinations for those years. Nevertheless, DOL has chosen to continue to rely on antiquated data and wage determinations as the basis for herder wages today.

46. DOL has also chosen to rely on statistically invalid data to make wage determinations for every state in which it currently uses a SWA prevailing wage survey (PWS) as the basis for determining herder wages.

47. Under the 2011 Shepherd TEGL, the basis for the shepherd wage floor in most states was as follows:

State(s)	**Monthly Wage Floor**	**Basis for Wage**	**Date SWA Finding Made**	**Date of DOL Determination**	**# of Workers Surveyed**
Nine States[4]	$750	Colorado PWS	May 16, 2012	January 8, 2013	Nine
Arizona Washington	$750	Wyoming PWS	April 15, 2011	July 26, 2011	Six
Nevada	$800	Nevada PWS	June 9, 2009	July 26, 2011	Seven
California	$1,422.55	California PWS	January 18, 2012	January 8, 2013	Ten
Oregon	$1,277	Settlement Agreement	January 24, 2011	July 26, 2011	N/A

48. As the above establishes, DOL did not comply with three regulatory mandates from the 2011 Shepherd TEGL to: (1) update its determination of shepherd wages annually, (2) rely on statistically valid data (of 30 herders or more) to determine wages, and (3) rely on current data.

THE 2015 SPECIAL PROCEDURES

49. DOL recently published a new version of special procedures for all herders, including herders of sheep, cattle, horses, and goats. DOL made this new rule effective on November 16, 2015.

50. This case now also concerns in part the new wage portion of the 2015 Rule. In particular, under this portion of the 2015 Rule, "the new monthly prevailing wage rate will be phased in

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[4] The nine states are Colorado, Idaho, Montana, New Mexico, North Dakota, Oklahoma, Texas, Utah, and Wyoming.

over two years and will be determined by using the base federal minimum wage of $7.25 per hour, multiplied by 48 hours per week, multiplied by 4.333 weeks in a month, multiplied by 80% for the first year, resulting in a new monthly wage of $1206.31 as of the effective date." Order, ECF # 38, at 3 (citing 80 Fed. Reg. at 63,014 n.62).[5]

51. Further, this case concerns the type of work for which H-2A visas can be authorized. For H-2A shepherds, DOL's and DHS's policy is that visa petitions will be issued for indefinite periods, with short breaks every three years for this permanent workforce. In contrast to shepherds, visa petitions for cattle-herders are issued for, at most, ten-month periods, even though it appears that ranchers are asking for visa authorizations for much shorter periods.

52. The visa and minimum-wage policies established by DOL and DHS violate the APA on multiple grounds, including the following:

53. **Illegal Visas for Permanent All-Purpose, Sheep-Ranch Support Staff**: Congress created the H-2A program for foreign workers to perform only "temporary or seasonal" agricultural work. 8 U.S.C. § 1101(a)(15)(H)(ii)(a). The 2015 Rule, however, creates a program that authorizes the employment of foreigners who serve not as shepherds but as permanent all-purpose sheep-ranch support staff. As contemplated under the 2015 Rule, these workers do not perform "temporary or seasonal" work, in violation of this Congressional mandate.

54. **Wages Based Exclusively On Erroneous, Employer-Provided Data**: In the 2015 Rule, DOL has persisted in relying on only employer-provided data to determine the number of herder hours worked. In particular, DOL has declared that all herders will be paid for only 48 hours work, based on an unaudited review of applications for H-2A herders that were filed by

[5] This minimum wage will increase in 2017 and 2018, but those wages are undermined by the same methodological problems affecting wage that will be in place in 2015-16.

employers. These applications contain near-identical cookie-cutter language about number of weekly hours worked, and it was irrational and arbitrary to rely on such inadequate data, especially in light of similar problems with data-collection from employers DOL has had in administering the H-2A shepherd program in the past.

55. **An Arbitrary, Industry-Option Minimum Wage**: DOL arbitrarily decided that herders, unlike all other foreign agricultural workers, should be paid the federal minimum wage, a rate that does not apply to any other foreign agricultural workers and makes little sense when divorced from the statutory and regulatory protections that are provided to earners of the federal minimum wage. DOL picked this wage because it was blessed by the ranching industry in comments submitted in response to the proposed rule published in April 2015.

56. **A New Definition of "Herder" and "Range" that is Illegally Expansive and Will Have An Adverse Effect on American Workers in Related Industries, Who Currently Earn Salaries Higher than the New H-2A Herders**: The new definition of herder, which entitles ranchers to require herders to "assist" in numerous jobs often performed by American workers who earn higher wages, will have an adverse effect on these workers' wages. Coupled with the DOL's new definition of "range," which encompasses ever-more territory that used be managed by workers paid a much higher rate, DOL will wipe out a domestic workforce that cannot compete with foreigners willing to work for much lower wages.

THE WESTERN RANGE ASSOCIATON'S AND MOUNTAIN PLAINS AGRICULTURAL SERVICE'S ILLEGAL CONTRACTS WITH SHEPHERDS

57. Defendants Western Range Association (WRA) and Mountain Plains Agricultural Service (MPAS) have employed hundreds of individual H-2A shepherds, including Plaintiffs John Doe, Salcedo, and De La Cruz.

58. WRA and MPAS entered into contracts with these Plaintiffs and those similarly situated to pay exactly the minimum monthly wage determined by DOL using the 2011 Shepherd TEGL. WRA and MPAS have continued with the same policy by paying exactly the minimum wage allowed under the 2015 Rule.

59. The minimum wages determined under the 2011 Shepherd TEGL and 2015 Rule are illegal and therefore the wage terms in the WRA and MPAS contracts are illegal and unenforceable.

60. Plaintiffs John Doe, Salcedo, De La Cruz, and those similarly situated are therefore each entitled to the difference between the illegal wage they were paid and a reasonable wage determined by this Court.

CLASS ACTION ALLEGATIONS FOR CLAIMS AGAINST THE GOVERNMENT DEFENDANTS REGARDING 2011 AND 2015 SPECIAL PROCEDURES

61. Plaintiffs assert Claims 1-7 as a Fed. R. Civ. P. 23 class action on their own behalf and on behalf of two classes for which Plaintiffs seek certification.

62. Pending any modifications necessitated by discovery, the Plaintiffs preliminarily define the "2011 Shepherd TEGL Class" as follows:

> ALL PERSONS WHO WORKED AS SHEPHERDS UNDER THE UNITED STATES DEPARTMENT OF LABOR'S 2011 SHEPHERD TEGL WITHIN THE RELEVANT STATUTE OF LIMITATIONS.

63. Pending any modifications necessitated by discovery, the Plaintiffs preliminarily define the "2015 Rule Class" as follows:

> ALL PERSONS WHO HAVE WORKED AS HERDERS UNDER THE UNITED STATES DEPARTMENT OF LABOR'S H-2A VISA PROGRAM AND WERE OR ARE SUBJECT 2015 RULE.

64. The classes are so numerous that joinder of all potential class members is impracticable. Plaintiffs do not know the exact size of the Class, but roughly 2,000-2,500 foreign shepherds come to the United States under H-2A visas each year.

65. The named Plaintiffs therefore estimate that the classes are composed of well more than 2,500 persons.

66. In failing to legally implement its 2011 Shepherd TEGL and promulgating the illegal 2015 Rule, DOL has acted or refused to act on grounds that apply generally to each of the classes, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.

67. There are questions of law or fact common to the class that predominate over any individual issues that might exist for each class. Common questions of law and fact include whether or not the DOL's implementation of the 2011 Shepherd TEGL and the 2015 Rule violate the Administrative Procedure Act.

68. The class claims asserted by the Plaintiffs are typical of the claims of all of the potential class members. All of the class members are pursuing the same claim for an injunction to prevent DOL from adhering to the 2011 Shepherd TEGL or 2015 Rule in a manner violative of the Administrative Procedure Act.

69. The named Plaintiffs will fairly and adequately protect and represent the interests of the class.

70. The named Plaintiffs are represented by counsel experienced in class action litigation representing workers.

71. The prosecution of separate actions by the individual potential Class Members would create a risk of inconsistent or varying adjudications with respect to individual, potential Class Members that would establish incompatible standards of conduct for Defendants.

72. Each Class Member is seeking identical injunctive relief. Thus, the interest of potential Class Members in individually controlling the prosecution or defense of separate actions is slight. In addition, public policy supports the broad remedial purposes of class actions.

73. The Plaintiffs are unaware of any members of the putative class who are interested in presenting their claims in a separate action.

74. The Plaintiffs are unaware of any pending litigation commenced by members of the Class concerning the instant controversy.

75. It is desirable to concentrate this litigation in this forum given this Court's familiarity with the regulations governing H-2A herders.

76. This class action will not be difficult to manage due to the uniformity of claims among the Class Members.

CLASS ACTION ALLEGATIONS FOR WAGE CLAIM AGAINST THE WRA

77. Plaintiffs Doe and Salcedo assert Claim 8 pursuant to Fed. R. Civ. Proc. 23 on behalf of themselves and the "WRA Wage Class."

78. Pending any modifications necessitated by discovery, the "WRA Wage Class" is defined as follows:

> ALL PERSONS WHO ENTERED INTO CONTRACTS AS H-2A SHEPHERDS WITH THE WRA DURING ANY TIME WHICH H-2A SHEPHERD MINIMUM WAGES WERE ESTABLISHED BY DOL USING THE H-2A SPECIAL PROCEDURES WITHIN THE RELEVANT STATUTE OF LIMITATIONS

79. The members of the putative class are so numerous that joinder of all potential class members is impracticable. Plaintiffs Doe and Salcedo do not know the exact size of the class since that information is within the control of the Defendant. However, according to the DOL's 2014 statistics, the WRA recruited approximately 1200 shepherds.

80. There are questions of law or fact common to the classes that predominate over any individual issues that might exist, including whether or not the 2011 Shepherd TEGL and the 2015 Rule are legally valid.

81. The class claims asserted by Plaintiff Doe and Salcedo are typical of the claims of all of the potential Class Members because all potential Class Members were paid at or near the illegal minimum wage or wages established under the 2011 Shepherd TEGL. A class action is superior to other available methods for the fair and efficient adjudication of this controversy because numerous identical lawsuits alleging similar or identical causes of action would not serve the interests of judicial economy.

82. Plaintiffs Doe and Salcedo will fairly and adequately protect and represent the interests of the class. Plaintiff Doe and Salcedo's wage rate in their contracts with the WRA are illegal for the same reasons as the Class Members.

83. Plaintiffs Doe and Salcedo are represented by counsel experienced in litigation on behalf of low-wage workers and in class actions.

84. The prosecution of separate actions by the individual potential Class Members would create a risk of inconsistent or varying adjudications with respect to individual potential Class Members that would establish incompatible standards of conduct for Defendants.

85. Plaintiffs Doe and Salcedo are unaware of any members of the putative class who are interested in presenting their claims in a separate action.

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86. Plaintiffs Doe and Salcedo are unaware of any pending litigation commenced by members of the Class concerning the instant controversies.

87. It is desirable to concentrate this litigation in this forum because separate claims in this case will establish the legality, or lack thereof, of the 2011 Shepherd TEGL or the 2015 Rule and any declaration regarding those claims will be dispositive of the claims of this class.

88. This class action will not be difficult to manage due to the uniformity of claims among the Class Members and the susceptibility of the claims to class litigation and the use of representative testimony and representative documentary evidence.

89. The contours of the class will be easily defined by reference to Defendant's records and government records.

CLASS ACTION ALLEGATIONS FOR CLAIM AGAINST MPAS

90. Plaintiff Rafael De La Cruz asserts Claim 9 pursuant to Fed. R. Civ. Proc. 23 on behalf of himself and the "MPAS Wage Class."

91. Pending any modifications necessitated by discovery, the "MPAS Wage Class" is defined as follows:

> ALL PERSONS WHO ENTERED INTO CONTRACTS AS H-2A SHEPHERDS WITH MPAS DURING ANY TIME WHICH H-2A SHEPHERD MINIMUM WAGES WERE ESTABLISHED BY DOL USING THE H-2A SPECIAL PROCEDURES WITHIN THE RELEVANT STATUTE OF LIMITATIONS

92. The members of the putative class are so numerous that joinder of all potential class members is impracticable. Plaintiff does not know the exact size of the class since that information is within the control of the Defendant. However, according to the DOL's 2014 statistics, the MPAS recruited over eight-hundred shepherds.

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93. There are questions of law or fact common to the classes that predominate over any individual issues that might exist, including whether or not the 2011 Shepherd TEGL and 2015 Rule are legally valid.

94. The class claims asserted by Plaintiff De La Cruz are typical of the claims of all of the potential Class Members because all potential Class Members were paid at or near the illegal minimum wage or wages established under the 2011 Shepherd TEGL or 2015 Rule. A class action is superior to other available methods for the fair and efficient adjudication of this controversy because numerous identical lawsuits alleging similar or identical causes of action would not serve the interests of judicial economy.

95. Plaintiff will fairly and adequately protect and represent the interests of the class. Plaintiff's wage rate in his contract with the MPAS is illegal for the same reasons as the Class Members.

96. Plaintiff is represented by counsel experienced in litigation on behalf of low-wage workers and in class actions.

97. The prosecution of separate actions by the individual potential Class Members would create a risk of inconsistent or varying adjudications with respect to individual potential Class Members that would establish incompatible standards of conduct for Defendant.

98. Plaintiff De La Cruz is unaware of any members of the putative class who are interested in presenting their claims in a separate action.

99. Plaintiff De La Cruz is unaware of any pending litigation commenced by members of the Class concerning the instant controversies.

100. It is desirable to concentrate this litigation in this forum because separate claims in this case will establish the legality, or lack thereof, of the 2011 Shepherd TEGL or the 2015 Rule and any declaration regarding those claims will be dispositive of the claims of this class.

101. This class action will not be difficult to manage due to the uniformity of claims among the Class Members and the susceptibility of the claims to class litigation and the use of representative testimony and representative documentary evidence.

102. The contours of the class will be easily defined by reference to Defendant's records and government records.

I. <u>FIRST CAUSE OF ACTION (2011 SHEPHERD TEGL)</u>

5 U.S.C. § 706(2)(A)

By Plaintiffs HAP, Salcedo, Doe, De La Cruz, and the 2011 Shepherd TEGL Sub-Class Against DOL Defendants

103. 5 U.S.C. § 706(2)(A) requires that this Court shall "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

104. For the reasons stated above, the DOL's actions in certifying labor certification applications violate 5 U.S.C. § 706(2)(A) by:

i. failing to publish and require employers to pay annual adjustments in the applicable shepherd wage rates;

ii. approving wages that are based on data that are three to six years old:

iii. approving wages that are based on data that are statistically invalid; and

iv. approving wages that adversely affect similarly situated American workers.

II. <u>SECOND CAUSE OF ACTION (2011 SHEPHERD TEGL)</u>

5 U.S.C. § 706(2)(C)

By Plaintiffs HAP, Salcedo, Doe, De La Cruz, and the 2011 Shepherd TEGL Sub-Class Against DOL Defendants

105. 5 U.S.C. § 706(2)(C) requires that this Court shall "hold unlawful and set aside" agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

106. For the reasons stated above, the DOL's actions in certifying labor certification applications in 2013, 2014 and 2015 violated 5 U.S.C. § 706(2)(C) and in particular the statutory mandate contained in 8 U.S.C. § 1188 by:

i. failing to publish and require employers to pay annual adjustments in the applicable shepherd wage floors;

ii. approving wages that are based on data that are three to six years old:

iii. approving wages that are based on data that are statistically invalid; and

iv. approving wages that adversely affect similarly situated American workers.

III. <u>THIRD CAUSE OF ACTION (2011 SHEPHERD TEGL)</u>

5 U.S.C. § 706(2)(D)

By Plaintiffs HAP, Salcedo, Doe, De La Cruz, and the 2011 Shepherd TEGL Class Against DOL Defendants

107. 5 U.S.C. § 706(2)(D) requires that this Court shall "hold unlawful and set aside" agency action that is "without observance of procedure required by law."

108. For the reasons stated above, the DOL's actions in certifying labor certification applications in 2013, 2014 and 2015 violated 5 U.S.C. § 706(2)(C) and in particular the statutory mandate contained in 8 U.S.C. § 1188 by:

i. failing to publish and require employers to pay annual adjustments in the applicable shepherd wage floors;

ii. approving wages that are based on data that are three to six years old:

iii. approving wages that are based on data that are statistically invalid;

iv. approving wages that adversely affect similarly situated American workers; and

v. failing to explain the basis for any of these decisions and/or changes in policy.

IV. FOURTH CAUSE OF ACTION (2011 SHEPHERD TEGL)

5 U.S.C. § 706(1)

By Plaintiffs HAP, Salcedo, Doe, De La Cruz, and the 2011 Shepherd TEGL Class Against DOL Defendants

109. 5 U.S.C. § 706(1) requires that this Court "shall compel agency action unlawfully withheld or unreasonably delayed."

110. For the reasons stated above, DOL has unlawfully withheld and unreasonably delayed action in violation of 5 U.S.C. § 706(1) by failing in its duty to make an annual publication of prevailing wage surveys.

V. FIFTH CAUSE OF ACTION (2015 RULE)

5 U.S.C. § 706(2)(A)

By Plaintiffs HAP, Salcedo, Doe, Llacua, Salcedo, and the 2015 Rule Class Against Government Defendants

111. 5 U.S.C. § 706(2)(A) requires that this Court shall "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

112. For the reasons stated above, the DOL's actions in certifying labor certification applications and DHS's actions in issuing H-2A herder visa authorizations in accord with the 2015 Special Procedures violate 5 U.S.C. § 706(2)(A) by:

i. Authorizing the creation of permanent herder jobs that are not temporary or seasonal;

ii. Relying on data to calculate herder hours and the base-rate of pay that were arbitrarily derived; and

iii. Authorizing an illegally expansive definition of "herder" and "range" that locks current H-2A shepherds into a lower wage and adversely affects the wages of American workers.

VI. <u>SIXTH CAUSE OF ACTION (2015 RULE)</u>

5 U.S.C. § 706(2)(C)

By Plaintiffs HAP, Salcedo, Doe, Llacua, Salcedo, and the 2015 Rule Class Against Government Defendants

113. 5 U.S.C. § 706(2)(C) requires that this Court shall "hold unlawful and set aside" agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

114. For the reasons stated above, the DOL's actions in certifying labor applications and DHS's actions in authorizing H-2A visa petitions violates 5 U.S.C. § 706(2)(C) and in particular the statutory mandate contained in 8 U.S.C. § 1188 and 8 U.S.C. § 1101(a)(15)(H)(ii)(a) by:

i. Authorizing permanent herder jobs that are not temporary or seasonal;

ii. Relying on data to calculate herder hours and the base-rate of pay that were arbitrarily derived; and

iii. Authorizing an illegally expansive definition of "herder" and "range" that locks current H-2A shepherds into a lower wage and adversely affects the wages of American workers.

VII. <u>SEVENTH CAUSE OF ACTION (2015 RULE)</u>

5 U.S.C. § 706(2)(D)

By Plaintiffs HAP, Salcedo, Doe, Llacua, Salcedo, and the 2015 Rule Class Against Government Defendants

115. 5 U.S.C. § 706(2)(D) requires that this Court shall "hold unlawful and set aside" agency action that is "without observance of procedure required by law."

116. For the reasons stated above, the DOL's actions in certifying labor certification applications and DHS's actions in issuing H-2A herder visa authorizations in accord with the 2015 Special Procedures violate 5 U.S.C. § 706(2)(A) by:

i. Creating permanent herder jobs that are not temporary or seasonal;

ii. Relying on data to calculate herder hours and the base-rate of pay that were arbitrarily derived; and

iii. Creating an illegally expansive definition of "herder" and "range" that locks current H-2A shepherds into a lower wage and adversely affects the wages of American workers.

VIII. EIGHTH CAUSE OF ACTION

Quasi-Contract Under the Laws of Several States

Plaintiffs Doe, Salcedo, and the WRA Wage Class Against Defendant Western Range Association

117. The WRA entered into service contracts with John Doe, Alfredo Salcedo, and the WRA Wage Class.

118. The wage terms in those service contracts was set at exactly the minimum wage established by the 2011 Shepherd TEGL or the 2015 Rule.

119. The minimum wages set under the 2011 Shepherd TEGL and the 2015 Rule are invalid and thus the wage terms in the service contracts are unenforceable.

120. Plaintiffs Doe, Salcedo, and the WRA Wage Class are therefore entitled to the difference between the unenforceable wage term and a reasonable wage.

121. In the alternative, Plaintiffs Doe, Salcedo, and the WRA Wage Class assert that they are entitled to damages in equity, including in unjust enrichment and *quantum meruit*. A benefit was conferred on the WRA when Plaintiffs Doe, Salcedo, and the WRA Wage Class were paid an illegal and unenforceable amount; that benefit was appreciated by the WRA as it paid an illegally low amount; and it is unjust for the WRA to be permitted to retain that benefit. Plaintiffs Doe, Salcedo, and the WRA Wage Class reasonably expected to be paid a legal wage and were not. As a result, the WRA should be disgorged of the benefit it retained and/or these Plaintiffs should be paid for the reasonable value of their services.

IX. NINTH CAUSE OF ACTION

Quasi-Contract Under the Laws of Several States

Plaintiff Rafael De La Cruz and the MPAS Wage Class Against Defendant Mountain Plains Agricultural Service

122. MPAS entered into service contracts with Plaintiff Rafael De La Cruz and the MPAS Wage Class.

123. The wage terms in those service contracts was set at exactly the minimum wage established by the 2011 Shepherd TEGL or the 2015 Rule.

124. The minimum wages set under the 2011 Shepherd TEGL and the 2015 Rule are invalid and thus the wage terms in the service contracts are unenforceable.

125. Plaintiff De La Cruz and the MPAS Wage Class are therefore entitled to the difference between the unenforceable wage term and a reasonable wage.

126. In the alternative, Plaintiff De La Cruz and the MPAS Wage Class assert that they are entitled to damages in equity, including in unjust enrichment and *quantum meruit*. A benefit was conferred on the MPAS when Plaintiff De La Cruz and the MPAS Wage Class were paid an illegal and unenforceable amount; that benefit was appreciated by the MPAS as it paid an

IN THE SUPREME COURT OF THE STATE OF NEVADA

ABEL CÁNTARO CASTILLO,

Appellant,

vs.

WESTERN RANGE ASSOCIATION,

Respondent.

______________________________________/

No. 85926

RESPONDENT WESTERN RANGE ASSOCIATION'S APPENDIX VOLUME 2, PART 4

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ATTORNEYS FOR RESPONDENT
WESTERN RANGE ASSOCIATION

illegally low amount; and it is unjust for the MPAS to be permitted to retain that benefit. Plaintiff De La Cruz and the MPAS Wage Class reasonably expected to be paid a legal wage and were not. As a result, the MPAS should be disgorged of the benefit it retained and/or these Plaintiffs should be paid for the reasonable value of their services.

THE PLAINTIFFS DEMAND A JURY FOR ALL CLAIMS SO TRIABLE

PRAYER FOR RELIEF

127. As to the 2011 Shepherd TEGL Claims Against DOL Defendants, Plaintiffs respectfully request that this Court:

    a. Grant appropriate injunctive relief.
    b. Declare the rule unlawful for the reasons stated above and in violation of the aforementioned sections of the APA, 5 U.S.C. § 706(1)-(2).
    c. Require DOL to promptly issue a wage determination that accords with the regulatory framework of the 2011 Shepherd TEGL.
    d. Award Plaintiffs their attorneys' fees and costs pursuant to the Equal Access To Justice Act;
    e. Grant such other and further relief as may be appropriate and to which Plaintiffs may be entitled, including further relief in the form of damages or an injunction deriving from said declaratory relief.

128. As to the 2015 Special Procedures Claims Against Government Defendants, Plaintiffs respectfully request that this Court:

    a. Grant preliminary and final injunctive relief.
    b. Declare the rule unlawful for the reasons stated above and in violation of the aforementioned sections of the APA, 5 U.S.C. § 706(1)-(2).

c. Enjoin the DHS from approving any H-2A visa petitions in accordance with the 2015 Rule.

d. Require DOL to promptly issue a rule that accords with the APA.

e. Award Plaintiffs their attorneys' fees and costs pursuant to the Equal Access To Justice Act;

f. Grant such other and further relief as may be appropriate and to which Plaintiffs may be entitled, including further relief in the form of damages or an injunction deriving from said declaratory relief.

129. As to the claim against the WRA, Plaintiffs request that this Court:

a. Certify the WRA Wage Classes.

b. Enter a judgment in favor of the Plaintiffs and against the WRA for appropriate money damages.

c. Grant such other and further relief as may be appropriate and to which Plaintiffs may be entitled, including further relief in the form of damages or an injunction deriving from said declaratory relief.

130. As to the claim against MPAS, Plaintiffs respectfully request that this Court:

a. Certify the MPAS Wage Class.

b. Enter a judgment in favor of the Plaintiffs and against the MPAS for appropriate money damages.

c. Grant such other and further relief as may be appropriate and to which Plaintiffs may be entitled, including further relief in the form of damages or an injunction deriving from said declaratory relief.

Respectfully submitted,

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Attorneys for the Plaintiffs

Certificate of Service

I hereby certify that on December 22, 2015, I served a true and correct copy of the forgoing on the individuals below pursuant to F.R.C.P. 5. All new parties that do not waive service will be served under F.R.C.P. 4.

Attorneys for Defendants
Erez Reuveni
Glenn Girdharry
Christopher J. Schulte

s/ Alexander Hood
Alexander Hood
Attorney for the Plaintiffs

Exhibit G

Hispanic Affairs Project, et. al. v. Perez, et. al
No. 15-cv-01785

Second Amended Complaint (Dkt. 23)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Case No. 15-cv-01562-BAH

HISPANIC AFFAIRS PROJECT,
RODOLFO LLACUA,
JOHN DOE,
RAFAEL DE LA CRUZ, and
ALFREDO SALCEDO,

Plaintiffs,

v.

THOMAS E. PEREZ, in his official capacity as United States Secretary of Labor;
UNITED STATES DEPARTMENT OF LABOR;
PORTIA WU, in her official capacity as Assistant Secretary, Employment and Training Administration, United States Department of Labor;
JEH JOHNSON, in his official capacity as United States Secretary of Homeland Security
UNITED STATES DEPARTMENT OF HOMELAND SECURITY,
WESTERN RANGE ASSOCIATION, and
MOUNTAIN PLAINS AGRICULTURAL SERVICE,

Defendants.

SECOND AMENDED COMPLAINT

Plaintiffs amend their complaint by written consent of the opposing parties, pursuant to Federal Rule of Civil Procedure 15(a)(2). All parties will meet and confer within the next week to provide a revised responsive pleading schedule for the Second Amended Complaint.

INTRODUCTORY STATEMENT

This case was originally filed to challenge the implementation of the Department of Labor's 2011 Shepherd TEGL. Since filing, DOL has published the 2015 Rule for herders, which became effective November 16, 2015, and which Plaintiffs challenge by amending their complaint. Plaintiffs oppose the 2015 Rule because, as implemented, it creates a two-tiered system for agricultural work and exploits a vulnerable class of mainly foreign shepherds who cannot out-lobby an industry that has captured the agency supposedly charged with protecting worker rights.

By DOL regulation, the minimum wage for most H-2A agricultural workers is the Adverse Effect Wage Rate (AEWR)—so named because Congress requires that it be high enough to ensure that agricultural employers do not rely on the influx of cheap foreign labor that would depress American wages and displace American workers from agricultural jobs. The AEWR for most H-2A agricultural workers is between $10 and $13 per hour, higher than the federal and most state minimum wages. Further, all H-2A visas must be "temporary or seasonal" in nature, as Congress did not design the H-2A visa program to create a permanent foreign workforce.

None of these rules, however, apply to an ever-expanding group of workers who fall under the DOL's new definition of "herder," which now includes those working with cattle, goats, sheep, and (for the first time) horses. First, under the 2015 Rule, these workers earn only $7.25 per hour—a minimum wage that Defendant Secretary Perez has admitted cannot provide "the essentials a family needs to survive" and whose inadequacy Secretary Perez has linked to a civil rights issue on the scale of the structural injustices addressed by Martin Luther King, Jr.[1] Worse still, the federal hourly minimum wage of $7.25 per hour has never before applied to foreign agricultural workers, who, as explained above, are almost always paid more than the minimum wage to protect against the displacement of American workers and the depression of American wages.

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[1] Tom Perez, *3 Out of 4 Americans Agree: It's Time To Raise the Wage*, *U.S. Dep't of Labor Blog* (Jan. 15, 2014), https://blog.dol.gov/2014/01/15/3-out-of-4-americans-agree-its-time-to-raise-the-wage/.

Second, unlike other H-2A workers, who are paid the hourly AEWR for every hour they work, under the 2015 Rule, herders are paid only for 48 hours of work per week, even if they work many more hours in such a period. Worse still, DOL deems that herders work exactly these 48 hours per week based solely on an unaudited survey of self-reported data provided by employers that grossly underestimates the actual number of hours worked by shepherds. Third, the 2015 Rule creates an illegal, permanent H-2A workforce, rather than the "temporary or seasonal" workforce approved by Congress.

The 2015 Rule gives rise to multiple violations of the Administrative Procedure Act by both the DOL, which enforces the new wage rule and authorizes H-2A applications, and by the Department of Homeland Security, which approves H-2A visa petitions for herders.

While the 2015 Rule is illegal for the reasons stated above, the 2011 Shepherd TEGL is also illegal and continues to cause injury to H-2A herders who were subject to this rule. Further, as this Court has now noted, Plaintiffs "have persuasively pointed out the deficiencies in the [minimum] wage rate implemented under the authority of the 2011 [Shepherd] TEGL." Order, ECF # 38, at 9. The Court has also suggested that Plaintiffs are likely to succeed on the merits of their APA challenge related to the 2011 Shepherd TEGL, *id.* at 9-10, and that defects with that rule have been well-documented virtually since the rule was promulgated by DOL, *see, e.g.*, *id.* at 11.

The illegality of both the 2011 and 2015 Rules cause those who have worked as H-2A herders injury because almost all employers of H-2A herders, including the Western Range Association (WRA) and Mountain Plains Agricultural Service (MPAS), have a policy of only paying herders exactly the illegal minimum wage authorized by DOL. Plaintiffs John Doe and Alfredo Salcedo, as WRA employees, and Plaintiff De La Cruz, as an MPAS employee, were or

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are subject to this policy. Plaintiffs Doe, Salcedo, and De La Cruz therefore bring claims in quasi-contract for themselves and on behalf of a class of similarly situated H-2A shepherds for the difference between the illegally low wage they have been paid and a reasonable wage to be determined by the Court.

JURISDICTION AND VENUE[2]

1. This Court has jurisdiction over claims against the government defendants under 28 U.S.C. § 1346 for review of final agency action under the APA, 5 U.S.C. §§ 701-706. In addition, it has jurisdiction over all claims pursuant to 28 U.S.C. § 1331 because they arise under the laws of the United States, and it has jurisdiction under 28 U.S.C. § 1367 over the quasi-contract claims.

2. Finally and in the alternative, this Court has jurisdiction over the quasi-contract claims under 28 U.S.C. § 1332(d)(2) because these claims are brought as class actions in which the amount in controversy of each action exceeds the sum or value of $5,000,000, exclusive of interest and costs. There is also diversity of citizenship as between the WRA, a California corporation, and members of the class who are citizens of states other than California and/or foreign states, and as between MPAS, a Wyoming corporation, and members of the class who are citizens of states other than Wyoming and/or foreign states. Further, Defendants WRA and MPAS usually enter into three-year long contracts with H-2A shepherds and almost all of these contracts were entered into at exactly the illegal minimum wage set by the DOL. At a minimum

[2] Throughout this Complaint, Plaintiffs use shorthand similar to that employed by this Court to reference shepherd-related regulations published by DOL. *See Temporary Agricultural Employment of H-2A Foreign Workers in the Herding or Production of Livestock on the Range in the United States*, 80 Fed. Reg. 62,958 (Oct. 16, 2015) (to be codified at 20 CFR pt 655) ("2015 Rule"); *TEGL No. 32-10, Special Procedures: Labor Certification Process for Employers Engaged in Sheepherding and Goatherding Occupations Under the H-2A Program*, 76 Fed. Reg. 47,256 (Aug. 4, 2011) ("2011 Shepherd TEGL").

for the 2011 Shepherd TEGL, the difference in the value between what they were paid and what they should be paid is approximately $500 per month. Finally, the WRA currently employs over twelve-hundred shepherds and MPAS employs over eight-hundred shepherds, and both organizations have done so for years.

3. Venue is proper pursuant to 28 U.S.C. § 1391(b)(2) and (e)(1).

PARTIES

4. Plaintiff Hispanic Affairs Project (HAP) is a Colorado nonprofit corporation and organization open to H-2A shepherds, other members of the immigrant worker community, members of the Hispanic community in Western Colorado, former shepherds, and their supporters. Members live and work primarily in Western Colorado. Members include current H-2A shepherds who have labored under the 2011 Shepherd TEGL and 2015 Rule, and former herders who would legally work as herders again but for the low wages earned by workers in this industry. Through its work, HAP strives to improve the working and living conditions of its members and member communities. HAP seeks to protect its members' interest in ensuring DOL and DHS are enforcing the H-2A regulations, setting a rationally calculated wage floor, and operating in accordance with the Administrative Procedure Act. HAP has members, its central office, and staff in Montrose, Colorado. Plaintiff HAP brings claims related to the 2011 Shepherd TEGL only on behalf of its members who were H-2A herders subject to this rule.

5. Plaintiff John Doe, an employee of the Western Range Association, is a current Colorado-based H-2A shepherd who earned the illegal wage of $750 per month under the 2011 Shepherd TEGL and now earns the illegal minimum of $1206.31 per month under the 2015 Rule. Plaintiff John Doe is willing, qualified, and available for continued employment as a shepherd. He fears serious retaliation in the form of possible physical violence, adverse

employment action, removal from the United States, and blacklisting because of his decision to participate in this lawsuit. He is therefore participating using a pseudonym.[3]

6. Plaintiff Alfredo Salcedo is a Colorado-based herder who agreed to wage contract terms with the Western Range Association of $750 per month under the 2011 Shepherd TEGL and $1206.31 per month under the 2015 Rule and who was paid those amounts.

7. Plaintiff Rafael De La Cruz agreed to wage contract terms of $800 per month with Defendant Mountain Plains Agricultural Service under the 2011 Shepherd TEGL and was paid this amount.

8. Plaintiff Rodolfo Llacua is a former shepherd and U.S. Citizen residing in Grand Junction, Colorado. He has enjoyed working with sheep and other livestock for most of his life and worked for over ten years as a shepherd in the United States. He is able, willing, qualified, and available for employment as a shepherd, and his preference is to work as a shepherd. At the same time, he does not work as a shepherd anymore because of the low wages that shepherds make, including the new wages under the 2015 Rule. He is in direct competition with current H-2A shepherds for work in this labor market but is effectively excluded from it because the DOL's illegal wage rules allow for the importation of very cheap foreign labor.

9. Defendant Thomas E. Perez is the United States Secretary of Labor. The Secretary is responsible for all the functions of the DOL, including administration of the H-2A program for herders. Secretary Perez is sued in his official capacity, pursuant to 5 U.S.C. § 703.

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[3] Plaintiff John Doe is entitled to proceed anonymously. *See* ECF # 11.

10. Defendant United States Department of Labor is responsible for issuing prevailing wage determinations as a part of the process of granting labor certifications for the H-2A program and is charged with enforcing the 2011 Shepherd TEGL.

11. Defendant Portia Wu is Assistant Secretary, Employment and Training Administration (ETA). ETA is responsible for making annual wage determinations for shepherds and otherwise complying with the laws governing this class of workers. She is sued in her official capacity, pursuant to 5 U.S.C. § 703.

12. Defendants Secretary Perez, DOL, and Assistant Secretary Wu shall hereinafter collectively be referred to as the "DOL Defendants."

13. Defendant Jeh Johnson is the United States Secretary of Homeland Security. The Secretary is responsible for all functions of DHS and its component organizations, including the approval of H-2A visa petitions. Secretary Johnson is sued in his official capacity, pursuant to 5 U.S.C. § 703.

14. Defendant United States Department of Homeland Security is responsible for the approval of visa petitions for H-2A workers.

15. Defendants Secretary Perez, DOL, Assistant Secretary Wu, Secretary Johnson, and DHS shall hereinafter collectively be referred to as the "Government Defendants."

16. Defendant Western Range Association (WRA) is a California non-profit corporation with its principal place of business at 1245 E. Brickyard Road, Suite # 190, Salt Lake City, UT 84106. Defendant WRA is Plaintiff John Doe's employer. Defendant WRA has a policy of paying all of its employees exactly the minimum wage authorized by DOL: this means that almost all H-2A employees of Defendant WRA, including Plaintiffs Doe and Salcedo, earned the minimum of

$750 per month under 2011 Shepherd TEGL. Defendant WRA has continued with this policy by paying almost all employees $1206.31 under the 2015 Rule.

17. Defendant Mountain Plains Agricultural Service (MPAS) is a Wyoming non-profit corporation with its principal place of business at 811 N. Glenn Rd, Casper, WY 82601. Defendant MPAS has a policy of paying all of its employees exactly the minimum wage authorized by DOL: this means that almost all H-2A employees of Defendant MPAS, including Plaintiff De La Cruz, earned the minimum of $800 per month under 2011 Shepherd TEGL. MPAS has continued with this policy by paying almost all employees $1206.31 under the 2015 Rule.

STATEMENT OF FACTS

The H-2A Visa Program

18. The H-2A program takes its name from the statutory provision, 8 U.S.C. §1101(a)(15)(H)(ii)(a), which describes the visa category for nonimmigrant foreign workers who come to the United States to perform agricultural work on a temporary basis. In that statute, Congress has limited the definition of who qualifies as a recipient of an H-2A visa to "an alien . . . having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform agricultural labor or services . . . of a temporary or seasonal nature . . . ."

19. Defendant Department of Homeland Security authorizes visa petitions for H-2A herders, including shepherds.

20. Congress has also mandated that foreign workers can come to the United States only if the Secretary of Labor certifies that an employer seeking to use the H-2A program has given preference to U.S. workers over foreign workers for the available positions, and that, to the

extent foreign workers are employed, their employment will not adversely affect the wages and working conditions of U.S. workers. *See* 8 U.S.C. § 1188(a)(1)(A), (B); *id.* § 1188(b).

21. To obtain authorization to hire an H-2A worker, an H-2A employer prepares an Application for Temporary Employment Certification (hereinafter "H-2A Application").

22. An H-2A Application is an agreement between the employer and employee that in part governs herder working and living conditions, including herder salaries. The H-2A Application must ultimately be certified by the DOL.

23. DOL can only certify an H-2A Application that complies with H-2A program requirements.

24. Obtaining DOL certification for an H-2A Application is a necessary precondition for an H-2A employer to bring an H-2A worker to the United States.

25. By regulation, H-2A employers must agree to pay H-2A workers at least the Adverse Effect Wage Rate (AEWR), the prevailing wage, the federal or state minimum or the agreed-upon collective bargaining rate (whichever is highest). *See* 20 C.F.R. § 655.120.

26. The AEWR is often the highest wage available for H-2A workers and generally accords them a minimum hourly wage of between approximately $10-13, depending on the state in which the worker is employed.

27. H-2A herders, however, do not receive the hourly AEWR mandated by DOL regulations. Instead, DOL has created what it calls "Special Procedures" that govern herder living and working conditions.

28. According to the DOL, the Special Procedures are exceptions from normal rules governing other classes of H-2A workers. Over the last thirty years, DOL has published various iterations of Special Procedures that apply to H-2A herders.

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29. The Special Procedures at issue here are the 2011 Shepherd TEGL and the 2015 Rule.

2011 Shepherd TEGL Wage Determination Methodology

30. The 2011 Shepherd TEGL dictates that shepherd minimum wages are determined based on annual prevailing wage surveys conducted by State Workforce Agencies (SWAs).

31. In conducting these prevailing wage surveys, SWAs are only allowed to rely on wages reported by domestic (i.e., non-H-2A) workers.

32. According to the 2011 Shepherd TEGL, SWAs are required to conduct these annual surveys between May 1 and June 1 of each calendar year.

33. The 2011 Shepherd TEGL then dictate that DOL review the SWA findings and publish annually in the Federal Register the shepherd wage floor applicable in each state.

34. As part of the DOL's annual review of the SWA surveys, DOL must determine if the survey is statistically valid.

35. DOL has stated that surveys with sample sizes of less than thirty workers are insufficient to support statistically reliable wage results.

36. If a state does not provide usable survey data in its prevailing wage survey, the 2011 Shepherd TEGL allows DOL to use several alternative methodologies to determine shepherd wages.

37. First, DOL can issue a prevailing wage rate for that State based on the wage floor findings submitted by an adjoining or proximate SWA for the same or similar agricultural activities to ensure that the wages of similarly employed workers are not adversely affected.

38. DOL can also consider aggregating survey data for sheepherding activities across states to create regional prevailing wage rates and/or can rely on data from the U.S. Department of

Agriculture's production or farm resource regions or other groupings of States the USDA used to conduct its Farm Labor Survey.

39. Under the 2011 Shepherd TEGL, however, one additional method is no longer available for DOL to determine herder wages. In particular, while DOL used to rely on prior surveys of herders to establish their current wages, in the 2011 Shepherd TEGL, DOL opted not to continue using this methodology.

40. DOL precluded use of prior state surveys to establish the current wages because reliance on this methodology caused herder wage stagnation.

Wage Floors Set By the DOL Until November 2015

41. Despite the requirement mandated in the 2011 Shepherd TEGL that DOL make annual determinations of shepherd wages, the last time DOL published a wage determination was in January 2013.

42. The January 2013 Wage Determination does not even apply to every state: some determinations date from July 2011.

43. DOL neither issued nor published in the Federal Register an annual wage determination in 2014 or 2015.

44. DOL certified H-2A Applications for shepherds in 2014 and 2015 at the wage floors set pursuant to DOL wage determinations for 2013 or 2011.

45. In 2013-2015, DOL received data from SWAs and other sources that could have been used for the purposes of making annual herder wage determinations for those years. Nevertheless, DOL has chosen to continue to rely on antiquated data and wage determinations as the basis for herder wages today.

46. DOL has also chosen to rely on statistically invalid data to make wage determinations for every state in which it currently uses a SWA prevailing wage survey (PWS) as the basis for determining herder wages.

47. Under the 2011 Shepherd TEGL, the basis for the shepherd wage floor in most states was as follows:

State(s)	Monthly Wage Floor	Basis for Wage	Date SWA Finding Made	Date of DOL Determination	# of Workers Surveyed
Nine States[4]	$750	Colorado PWS	May 16, 2012	January 8, 2013	Nine
Arizona Washington	$750	Wyoming PWS	April 15, 2011	July 26, 2011	Six
Nevada	$800	Nevada PWS	June 9, 2009	July 26, 2011	Seven
California	$1,422.55	California PWS	January 18, 2012	January 8, 2013	Ten
Oregon	$1,277	Settlement Agreement	January 24, 2011	July 26, 2011	N/A

48. As the above establishes, DOL did not comply with three regulatory mandates from the 2011 Shepherd TEGL to: (1) update its determination of shepherd wages annually, (2) rely on statistically valid data (of 30 herders or more) to determine wages, and (3) rely on current data.

THE 2015 SPECIAL PROCEDURES

49. DOL recently published a new version of special procedures for all herders, including herders of sheep, cattle, horses, and goats. DOL made this new rule effective on November 16, 2015.

50. This case now also concerns in part the new wage portion of the 2015 Rule. In particular, under this portion of the 2015 Rule, "the new monthly prevailing wage rate will be phased in

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[4] The nine states are Colorado, Idaho, Montana, New Mexico, North Dakota, Oklahoma, Texas, Utah, and Wyoming.

over two years and will be determined by using the base federal minimum wage of $7.25 per hour, multiplied by 48 hours per week, multiplied by 4.333 weeks in a month, multiplied by 80% for the first year, resulting in a new monthly wage of $1206.31 as of the effective date." Order, ECF # 38, at 3 (citing 80 Fed. Reg. at 63,014 n.62).[5]

51. Further, this case concerns the type of work for which H-2A visas can be authorized. For H-2A shepherds, DOL's and DHS's policy is that visa petitions will be issued for indefinite periods, with short breaks every three years for this permanent workforce. In contrast to shepherds, visa petitions for cattle-herders are issued for, at most, ten-month periods, even though it appears that ranchers are asking for visa authorizations for much shorter periods.

52. The visa and minimum-wage policies established by DOL and DHS violate the APA on multiple grounds, including the following:

53. **Illegal Visas for Permanent All-Purpose, Sheep-Ranch Support Staff**: Congress created the H-2A program for foreign workers to perform only "temporary or seasonal" agricultural work. 8 U.S.C. § 1101(a)(15)(H)(ii)(a). The 2015 Rule, however, creates a program that authorizes the employment of foreigners who serve not as shepherds but as permanent all-purpose sheep-ranch support staff. As contemplated under the 2015 Rule, these workers do not perform "temporary or seasonal" work, in violation of this Congressional mandate.

54. **Wages Based Exclusively On Erroneous, Employer-Provided Data**: In the 2015 Rule, DOL has persisted in relying on only employer-provided data to determine the number of herder hours worked. In particular, DOL has declared that all herders will be paid for only 48 hours work, based on an unaudited review of applications for H-2A herders that were filed by

[5] This minimum wage will increase in 2017 and 2018, but those wages are undermined by the same methodological problems affecting wage that will be in place in 2015-16.

employers. These applications contain near-identical cookie-cutter language about number of weekly hours worked, and it was irrational and arbitrary to rely on such inadequate data, especially in light of similar problems with data-collection from employers DOL has had in administering the H-2A shepherd program in the past.

55. **An Arbitrary, Industry-Option Minimum Wage**: DOL arbitrarily decided that herders, unlike all other foreign agricultural workers, should be paid the federal minimum wage, a rate that does not apply to any other foreign agricultural workers and makes little sense when divorced from the statutory and regulatory protections that are provided to earners of the federal minimum wage. DOL picked this wage because it was blessed by the ranching industry in comments submitted in response to the proposed rule published in April 2015.

56. **A New Definition of "Herder" and "Range" that is Illegally Expansive and Will Have An Adverse Effect on American Workers in Related Industries, Who Currently Earn Salaries Higher than the New H-2A Herders**: The new definition of herder, which entitles ranchers to require herders to "assist" in numerous jobs often performed by American workers who earn higher wages, will have an adverse effect on these workers' wages. Coupled with the DOL's new definition of "range," which encompasses ever-more territory that used be managed by workers paid a much higher rate, DOL will wipe out a domestic workforce that cannot compete with foreigners willing to work for much lower wages.

THE WESTERN RANGE ASSOCIATON'S AND MOUNTAIN PLAINS AGRICULTURAL SERVICE'S ILLEGAL CONTRACTS WITH SHEPHERDS

57. Defendants Western Range Association (WRA) and Mountain Plains Agricultural Service (MPAS) have employed hundreds of individual H-2A shepherds, including Plaintiffs John Doe, Salcedo, and De La Cruz.

58. WRA and MPAS entered into contracts with these Plaintiffs and those similarly situated to pay exactly the minimum monthly wage determined by DOL using the 2011 Shepherd TEGL. WRA and MPAS have continued with the same policy by paying exactly the minimum wage allowed under the 2015 Rule.

59. The minimum wages determined under the 2011 Shepherd TEGL and 2015 Rule are illegal and therefore the wage terms in the WRA and MPAS contracts are illegal and unenforceable.

60. Plaintiffs John Doe, Salcedo, De La Cruz, and those similarly situated are therefore each entitled to the difference between the illegal wage they were paid and a reasonable wage determined by this Court.

CLASS ACTION ALLEGATIONS FOR CLAIMS AGAINST THE GOVERNMENT DEFENDANTS REGARDING 2011 AND 2015 SPECIAL PROCEDURES

61. Plaintiffs assert Claims 1-7 as a Fed. R. Civ. P. 23 class action on their own behalf and on behalf of two classes for which Plaintiffs seek certification.

62. Pending any modifications necessitated by discovery, the Plaintiffs preliminarily define the "2011 Shepherd TEGL Class" as follows:

> ALL PERSONS WHO WORKED AS SHEPHERDS UNDER THE UNITED STATES DEPARTMENT OF LABOR'S 2011 SHEPHERD TEGL WITHIN THE RELEVANT STATUTE OF LIMITATIONS.

63. Pending any modifications necessitated by discovery, the Plaintiffs preliminarily define the "2015 Rule Class" as follows:

> ALL PERSONS WHO HAVE WORKED AS HERDERS UNDER THE UNITED STATES DEPARTMENT OF LABOR'S H-2A VISA PROGRAM AND WERE OR ARE SUBJECT 2015 RULE.

64. The classes are so numerous that joinder of all potential class members is impracticable. Plaintiffs do not know the exact size of the Class, but roughly 2,000-2,500 foreign shepherds come to the United States under H-2A visas each year.

65. The named Plaintiffs therefore estimate that the classes are composed of well more than 2,500 persons.

66. In failing to legally implement its 2011 Shepherd TEGL and promulgating the illegal 2015 Rule, DOL has acted or refused to act on grounds that apply generally to each of the classes, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.

67. There are questions of law or fact common to the class that predominate over any individual issues that might exist for each class. Common questions of law and fact include whether or not the DOL's implementation of the 2011 Shepherd TEGL and the 2015 Rule violate the Administrative Procedure Act.

68. The class claims asserted by the Plaintiffs are typical of the claims of all of the potential class members. All of the class members are pursuing the same claim for an injunction to prevent DOL from adhering to the 2011 Shepherd TEGL or 2015 Rule in a manner violative of the Administrative Procedure Act.

69. The named Plaintiffs will fairly and adequately protect and represent the interests of the class.

70. The named Plaintiffs are represented by counsel experienced in class action litigation representing workers.

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71. The prosecution of separate actions by the individual potential Class Members would create a risk of inconsistent or varying adjudications with respect to individual, potential Class Members that would establish incompatible standards of conduct for Defendants.

72. Each Class Member is seeking identical injunctive relief. Thus, the interest of potential Class Members in individually controlling the prosecution or defense of separate actions is slight. In addition, public policy supports the broad remedial purposes of class actions.

73. The Plaintiffs are unaware of any members of the putative class who are interested in presenting their claims in a separate action.

74. The Plaintiffs are unaware of any pending litigation commenced by members of the Class concerning the instant controversy.

75. It is desirable to concentrate this litigation in this forum given this Court's familiarity with the regulations governing H-2A herders.

76. This class action will not be difficult to manage due to the uniformity of claims among the Class Members.

CLASS ACTION ALLEGATIONS FOR WAGE CLAIM AGAINST THE WRA

77. Plaintiffs Doe and Salcedo assert Claim 8 pursuant to Fed. R. Civ. Proc. 23 on behalf of themselves and the "WRA Wage Class."

78. Pending any modifications necessitated by discovery, the "WRA Wage Class" is defined as follows:

> ALL PERSONS WHO ENTERED INTO CONTRACTS AS H-2A SHEPHERDS WITH THE WRA DURING ANY TIME WHICH H-2A SHEPHERD MINIMUM WAGES WERE ESTABLISHED BY DOL USING THE H-2A SPECIAL PROCEDURES WITHIN THE RELEVANT STATUTE OF LIMITATIONS

79. The members of the putative class are so numerous that joinder of all potential class members is impracticable. Plaintiffs Doe and Salcedo do not know the exact size of the class since that information is within the control of the Defendant. However, according to the DOL's 2014 statistics, the WRA recruited approximately 1200 shepherds.

80. There are questions of law or fact common to the classes that predominate over any individual issues that might exist, including whether or not the 2011 Shepherd TEGL and the 2015 Rule are legally valid.

81. The class claims asserted by Plaintiff Doe and Salcedo are typical of the claims of all of the potential Class Members because all potential Class Members were paid at or near the illegal minimum wage or wages established under the 2011 Shepherd TEGL. A class action is superior to other available methods for the fair and efficient adjudication of this controversy because numerous identical lawsuits alleging similar or identical causes of action would not serve the interests of judicial economy.

82. Plaintiffs Doe and Salcedo will fairly and adequately protect and represent the interests of the class. Plaintiff Doe and Salcedo's wage rate in their contracts with the WRA are illegal for the same reasons as the Class Members.

83. Plaintiffs Doe and Salcedo are represented by counsel experienced in litigation on behalf of low-wage workers and in class actions.

84. The prosecution of separate actions by the individual potential Class Members would create a risk of inconsistent or varying adjudications with respect to individual potential Class Members that would establish incompatible standards of conduct for Defendants.

85. Plaintiffs Doe and Salcedo are unaware of any members of the putative class who are interested in presenting their claims in a separate action.

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86. Plaintiffs Doe and Salcedo are unaware of any pending litigation commenced by members of the Class concerning the instant controversies.

87. It is desirable to concentrate this litigation in this forum because separate claims in this case will establish the legality, or lack thereof, of the 2011 Shepherd TEGL or the 2015 Rule and any declaration regarding those claims will be dispositive of the claims of this class.

88. This class action will not be difficult to manage due to the uniformity of claims among the Class Members and the susceptibility of the claims to class litigation and the use of representative testimony and representative documentary evidence.

89. The contours of the class will be easily defined by reference to Defendant's records and government records.

CLASS ACTION ALLEGATIONS FOR CLAIM AGAINST MPAS

90. Plaintiff Rafael De La Cruz asserts Claim 9 pursuant to Fed. R. Civ. Proc. 23 on behalf of himself and the "MPAS Wage Class."

91. Pending any modifications necessitated by discovery, the "MPAS Wage Class" is defined as follows:

> ALL PERSONS WHO ENTERED INTO CONTRACTS AS H-2A SHEPHERDS WITH MPAS DURING ANY TIME WHICH H-2A SHEPHERD MINIMUM WAGES WERE ESTABLISHED BY DOL USING THE H-2A SPECIAL PROCEDURES WITHIN THE RELEVANT STATUTE OF LIMITATIONS

92. The members of the putative class are so numerous that joinder of all potential class members is impracticable. Plaintiff does not know the exact size of the class since that information is within the control of the Defendant. However, according to the DOL's 2014 statistics, the MPAS recruited over eight-hundred shepherds.

93. There are questions of law or fact common to the classes that predominate over any individual issues that might exist, including whether or not the 2011 Shepherd TEGL and 2015 Rule are legally valid.

94. The class claims asserted by Plaintiff De La Cruz are typical of the claims of all of the potential Class Members because all potential Class Members were paid at or near the illegal minimum wage or wages established under the 2011 Shepherd TEGL or 2015 Rule. A class action is superior to other available methods for the fair and efficient adjudication of this controversy because numerous identical lawsuits alleging similar or identical causes of action would not serve the interests of judicial economy.

95. Plaintiff will fairly and adequately protect and represent the interests of the class. Plaintiff's wage rate in his contract with the MPAS is illegal for the same reasons as the Class Members.

96. Plaintiff is represented by counsel experienced in litigation on behalf of low-wage workers and in class actions.

97. The prosecution of separate actions by the individual potential Class Members would create a risk of inconsistent or varying adjudications with respect to individual potential Class Members that would establish incompatible standards of conduct for Defendant.

98. Plaintiff De La Cruz is unaware of any members of the putative class who are interested in presenting their claims in a separate action.

99. Plaintiff De La Cruz is unaware of any pending litigation commenced by members of the Class concerning the instant controversies.

100. It is desirable to concentrate this litigation in this forum because separate claims in this case will establish the legality, or lack thereof, of the 2011 Shepherd TEGL or the 2015 Rule and any declaration regarding those claims will be dispositive of the claims of this class.

101. This class action will not be difficult to manage due to the uniformity of claims among the Class Members and the susceptibility of the claims to class litigation and the use of representative testimony and representative documentary evidence.

102. The contours of the class will be easily defined by reference to Defendant's records and government records.

I. FIRST CAUSE OF ACTION (2011 SHEPHERD TEGL)

5 U.S.C. § 706(2)(A)

By Plaintiffs HAP, Salcedo, Doe, De La Cruz, and the 2011 Shepherd TEGL Sub-Class Against DOL Defendants

103. 5 U.S.C. § 706(2)(A) requires that this Court shall "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

104. For the reasons stated above, the DOL's actions in certifying labor certification applications violate 5 U.S.C. § 706(2)(A) by:

i. failing to publish and require employers to pay annual adjustments in the applicable shepherd wage rates;

ii. approving wages that are based on data that are three to six years old:

iii. approving wages that are based on data that are statistically invalid; and

iv. approving wages that adversely affect similarly situated American workers.

II. SECOND CAUSE OF ACTION (2011 SHEPHERD TEGL)

5 U.S.C. § 706(2)(C)

By Plaintiffs HAP, Salcedo, Doe, De La Cruz, and the 2011 Shepherd TEGL Sub-Class Against DOL Defendants

105. 5 U.S.C. § 706(2)(C) requires that this Court shall "hold unlawful and set aside" agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

106. For the reasons stated above, the DOL's actions in certifying labor certification applications in 2013, 2014 and 2015 violated 5 U.S.C. § 706(2)(C) and in particular the statutory mandate contained in 8 U.S.C. § 1188 by:

i. failing to publish and require employers to pay annual adjustments in the applicable shepherd wage floors;

ii. approving wages that are based on data that are three to six years old:

iii. approving wages that are based on data that are statistically invalid; and

iv. approving wages that adversely affect similarly situated American workers.

III. THIRD CAUSE OF ACTION (2011 SHEPHERD TEGL)

5 U.S.C. § 706(2)(D)

By Plaintiffs HAP, Salcedo, Doe, De La Cruz, and the 2011 Shepherd TEGL Class Against DOL Defendants

107. 5 U.S.C. § 706(2)(D) requires that this Court shall "hold unlawful and set aside" agency action that is "without observance of procedure required by law."

108. For the reasons stated above, the DOL's actions in certifying labor certification applications in 2013, 2014 and 2015 violated 5 U.S.C. § 706(2)(C) and in particular the statutory mandate contained in 8 U.S.C. § 1188 by:

i. failing to publish and require employers to pay annual adjustments in the applicable shepherd wage floors;

ii. approving wages that are based on data that are three to six years old:

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iii. approving wages that are based on data that are statistically invalid;

iv. approving wages that adversely affect similarly situated American workers; and

v. failing to explain the basis for any of these decisions and/or changes in policy.

IV. FOURTH CAUSE OF ACTION (2011 SHEPHERD TEGL)

5 U.S.C. § 706(1)

By Plaintiffs HAP, Salcedo, Doe, De La Cruz, and the 2011 Shepherd TEGL Class Against DOL Defendants

109. 5 U.S.C. § 706(1) requires that this Court "shall compel agency action unlawfully withheld or unreasonably delayed."

110. For the reasons stated above, DOL has unlawfully withheld and unreasonably delayed action in violation of 5 U.S.C. § 706(1) by failing in its duty to make an annual publication of prevailing wage surveys.

V. FIFTH CAUSE OF ACTION (2015 RULE)

5 U.S.C. § 706(2)(A)

By Plaintiffs HAP, Salcedo, Doe, Llacua, Salcedo, and the 2015 Rule Class Against Government Defendants

111. 5 U.S.C. § 706(2)(A) requires that this Court shall "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

112. For the reasons stated above, the DOL's actions in certifying labor certification applications and DHS's actions in issuing H-2A herder visa authorizations in accord with the 2015 Special Procedures violate 5 U.S.C. § 706(2)(A) by:

i. Authorizing the creation of permanent herder jobs that are not temporary or seasonal;

ii. Relying on data to calculate herder hours and the base-rate of pay that were arbitrarily derived; and

iii. Authorizing an illegally expansive definition of "herder" and "range" that locks current H-2A shepherds into a lower wage and adversely affects the wages of American workers.

VI. SIXTH CAUSE OF ACTION (2015 RULE)

5 U.S.C. § 706(2)(C)

By Plaintiffs HAP, Salcedo, Doe, Llacua, Salcedo, and the 2015 Rule Class Against Government Defendants

113. 5 U.S.C. § 706(2)(C) requires that this Court shall "hold unlawful and set aside" agency action that is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."

114. For the reasons stated above, the DOL's actions in certifying labor applications and DHS's actions in authorizing H-2A visa petitions violates 5 U.S.C. § 706(2)(C) and in particular the statutory mandate contained in 8 U.S.C. § 1188 and 8 U.S.C. § 1101(a)(15)(H)(ii)(a) by:

i. Authorizing permanent herder jobs that are not temporary or seasonal;

ii. Relying on data to calculate herder hours and the base-rate of pay that were arbitrarily derived; and

iii. Authorizing an illegally expansive definition of "herder" and "range" that locks current H-2A shepherds into a lower wage and adversely affects the wages of American workers.

VII. SEVENTH CAUSE OF ACTION (2015 RULE)

5 U.S.C. § 706(2)(D)

By Plaintiffs HAP, Salcedo, Doe, Llacua, Salcedo, and the 2015 Rule Class Against Government Defendants

115. 5 U.S.C. § 706(2)(D) requires that this Court shall "hold unlawful and set aside" agency action that is "without observance of procedure required by law."

116. For the reasons stated above, the DOL's actions in certifying labor certification applications and DHS's actions in issuing H-2A herder visa authorizations in accord with the 2015 Special Procedures violate 5 U.S.C. § 706(2)(A) by:

i. Creating permanent herder jobs that are not temporary or seasonal;

ii. Relying on data to calculate herder hours and the base-rate of pay that were arbitrarily derived; and

iii. Creating an illegally expansive definition of "herder" and "range" that locks current H-2A shepherds into a lower wage and adversely affects the wages of American workers.

VIII. <u>EIGHTH CAUSE OF ACTION</u>

Quasi-Contract Under the Laws of Several States

Plaintiffs Doe, Salcedo, and the WRA Wage Class Against Defendant Western Range Association

117. The WRA entered into service contracts with John Doe, Alfredo Salcedo, and the WRA Wage Class.

118. The wage terms in those service contracts was set at exactly the minimum wage established by the 2011 Shepherd TEGL or the 2015 Rule.

119. The minimum wages set under the 2011 Shepherd TEGL and the 2015 Rule are invalid and thus the wage terms in the service contracts are unenforceable.

120. Plaintiffs Doe, Salcedo, and the WRA Wage Class are therefore entitled to the difference between the unenforceable wage term and a reasonable wage.

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121. In the alternative, Plaintiffs Doe, Salcedo, and the WRA Wage Class assert that they are entitled to damages in equity, including in unjust enrichment and *quantum meruit*. A benefit was conferred on the WRA when Plaintiffs Doe, Salcedo, and the WRA Wage Class were paid an illegal and unenforceable amount; that benefit was appreciated by the WRA as it paid an illegally low amount; and it is unjust for the WRA to be permitted to retain that benefit. Plaintiffs Doe, Salcedo, and the WRA Wage Class reasonably expected to be paid a legal wage and were not. As a result, the WRA should be disgorged of the benefit it retained and/or these Plaintiffs should be paid for the reasonable value of their services.

IX. NINTH CAUSE OF ACTION

Quasi-Contract Under the Laws of Several States

Plaintiff Rafael De La Cruz and the MPAS Wage Class Against Defendant Mountain Plains Agricultural Service

122. MPAS entered into service contracts with Plaintiff Rafael De La Cruz and the MPAS Wage Class.

123. The wage terms in those service contracts was set at exactly the minimum wage established by the 2011 Shepherd TEGL or the 2015 Rule.

124. The minimum wages set under the 2011 Shepherd TEGL and the 2015 Rule are invalid and thus the wage terms in the service contracts are unenforceable.

125. Plaintiff De La Cruz and the MPAS Wage Class are therefore entitled to the difference between the unenforceable wage term and a reasonable wage.

126. In the alternative, Plaintiff De La Cruz and the MPAS Wage Class assert that they are entitled to damages in equity, including in unjust enrichment and *quantum meruit*. A benefit was conferred on the MPAS when Plaintiff De La Cruz and the MPAS Wage Class were paid an illegal and unenforceable amount; that benefit was appreciated by the MPAS as it paid an

illegally low amount; and it is unjust for the MPAS to be permitted to retain that benefit. Plaintiff De La Cruz and the MPAS Wage Class reasonably expected to be paid a legal wage and were not. As a result, the MPAS should be disgorged of the benefit it retained and/or these Plaintiffs should be paid for the reasonable value of their services.

THE PLAINTIFFS DEMAND A JURY FOR ALL CLAIMS SO TRIABLE

PRAYER FOR RELIEF

127. As to the 2011 Shepherd TEGL Claims Against DOL Defendants, Plaintiffs respectfully request that this Court:

a. Grant appropriate injunctive relief.

b. Declare the rule unlawful for the reasons stated above and in violation of the aforementioned sections of the APA, 5 U.S.C. § 706(1)-(2).

c. Require DOL to promptly issue a wage determination that accords with the regulatory framework of the 2011 Shepherd TEGL.

d. Award Plaintiffs their attorneys' fees and costs pursuant to the Equal Access To Justice Act;

e. Grant such other and further relief as may be appropriate and to which Plaintiffs may be entitled, including further relief in the form of damages or an injunction deriving from said declaratory relief.

128. As to the 2015 Special Procedures Claims Against Government Defendants, Plaintiffs respectfully request that this Court:

a. Grant preliminary and final injunctive relief.

b. Declare the rule unlawful for the reasons stated above and in violation of the aforementioned sections of the APA, 5 U.S.C. § 706(1)-(2).

c. Enjoin the DHS from approving any H-2A visa petitions in accordance with the 2015 Rule.

d. Require DOL to promptly issue a rule that accords with the APA.

e. Award Plaintiffs their attorneys' fees and costs pursuant to the Equal Access To Justice Act;

f. Grant such other and further relief as may be appropriate and to which Plaintiffs may be entitled, including further relief in the form of damages or an injunction deriving from said declaratory relief.

129. As to the claim against the WRA, Plaintiffs request that this Court:

a. Certify the WRA Wage Classes.

b. Enter a judgment in favor of the Plaintiffs and against the WRA for appropriate money damages.

c. Grant such other and further relief as may be appropriate and to which Plaintiffs may be entitled, including further relief in the form of damages or an injunction deriving from said declaratory relief.

130. As to the claim against MPAS, Plaintiffs respectfully request that this Court:

a. Certify the MPAS Wage Class.

b. Enter a judgment in favor of the Plaintiffs and against the MPAS for appropriate money damages.

c. Grant such other and further relief as may be appropriate and to which Plaintiffs may be entitled, including further relief in the form of damages or an injunction deriving from said declaratory relief.

Respectfully submitted,

s/Alexander Hood________
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Attorneys for the Plaintiffs

Certificate of Service

I hereby certify that on December 22, 2015, I served a true and correct copy of the forgoing on the individuals below pursuant to F.R.C.P. 5. All new parties that do not waive service will be served under F.R.C.P. 4.

Attorneys for Defendants
Erez Reuveni
Glenn Girdharry
Christopher J. Schulte

s/ Alexander Hood
Alexander Hood
Attorney for the Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

ABEL CÁNTARO CASTILLO et al., Plaintiffs, vs. WESTERN RANGE ASSOCIATION et al., Defendants.	3:16-cv-00237-RCJ-VPC **ORDER**

This is a putative employment class action alleging breach of contract and wage-and-hour violations. Now pending before the Court are four Motions to Dismiss, (ECF Nos. 117, 118, 121, 124), and a Motion for Leave to File Excess Pages, (ECF No. 128).

I. FACTS AND PROCEDURAL BACKGROUND

Plaintiffs Abel Cántaro Castillo, Alcides Inga Ramos, and Rafael De La Cruz are Peruvian citizens lawfully admitted to the United States under the Department of Labor's ("DOL") H-2A guestworker visa program, pursuant to 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a), 1188(a)(1), and 20 C.F.R. Part 655, Subpart B. Cántaro alleges he was employed as a shepherd by Defendants Western Range Association ("WRA"), El Tejon Sheep Company, and Melchor Gragirena from October 2007 to June 2014. (Second Am. Compl. ¶ 13, ECF No. 111.) Inga alleges he was employed as a shepherd by Defendants Mountain Plains Agricultural Services

("MPAS") and Estill Ranches from April 2012 to February 2013.[1] (*Id.* at ¶ 15.) And De La Cruz alleges he was employed as a shepherd by MPAS from March 2009 to "late 2014."[2] (*Id.* at ¶ 14.) Plaintiffs filed this action on May 3, 2016, claiming breach of contract and violations of state labor laws, based primarily on their respective employers' failure to pay minimum wages under Article 15, Section 16 of the Nevada Constitution.

On April 13, 2017, the Court dismissed the First Amended Complaint ("FAC") with leave to amend for lack of subject matter jurisdiction. (*See* Order, ECF No. 107.) The Court found that this case, although related to federal statutes and regulations, consists solely of state-law causes of action and does not raise a substantial question of federal law. The Court also found that Plaintiffs had failed to allege that the case meets the requirements of diversity jurisdiction under the Class Action Fairness Act ("CAFA"). (*See id.* at 12–17.)

On May 15, 2017, Plaintiffs filed their Second Amended Complaint ("SAC"), which includes additional and more detailed allegations regarding the amount-in-controversy requirement under CAFA. (ECF No. 111.) The SAC also adds a new Plaintiff—Rafael De La Cruz.

De La Cruz has previously been a plaintiff in multiple other cases involving Defendants WRA and MPAS. The first was filed on August 8, 2015, in the U.S. District Court for the District of Colorado. *See Hispanic Affairs Project et al. v. Perez et al.*, No. 1:15-cv-1785-RM-MJW (D. Colo.) (filed Aug. 8, 2015). The case was primarily brought against Thomas E. Perez, former U.S. Secretary of Labor; the U.S. Department of Labor; and Portia Wu, former Assistant

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1 In the First Amended Complaint, Inga also alleged that John Estill, owner and manager of Estill Ranches, was jointly liable for the claims asserted in this lawsuit. However, Mr. Estill is no longer named as a defendant in the Second Amended Complaint.

2 The Second Amended Complaint also alleges that De La Cruz was employed, during the time period relevant to this action, by the Double-U-Livestock ranch. However, Double-U-Livestock is not named as a defendant.

Secretary of Labor for the Employment and Training Administration, as an action under the Administrative Procedure Act ("APA") challenging the implementation of the DOL's 2011 and 2015 Special Procedures for H-2A Shepherds. This case will be referred to as "the APA Action."

The second prior case was filed on September 1, 2015, also in the District of Colorado. *See Llacua et al. v. Western Range Association et al.*, No. 1:15-cv-1889-REB-CBS (D. Colo.) (filed Sept. 1, 2015). In *Llacua*, De La Cruz brought class claims against, *inter alia*, WRA and MPAS. (Defendant Estill Ranches was also named as a defendant in *Llacua*, but was voluntarily dismissed from the action on March 31, 2016.) In their second amended complaint, the *Llacua* plaintiffs asserted the following claims against WRA and MPAS: (1) restraint of trade in violation of 15 U.S.C. §§ 1 *et seq.* (the Sherman Antitrust Act); (2) violations of the Racketeer Influenced and Corrupt Organizations (RICO) Act; (3) failure to pay Nevada minimum wages (against MPAS only); and (4) breach of contract or quasi-contract. This case will be referred to as "the Antitrust Action."

On September 22, 2015, as the result of a joint motion by all parties, the APA Action was transferred to the U.S. District Court for the District of Columbia. The complaint was subsequently amended twice, joining several defendants and adding class claims in quasi-contract (i.e., unjust enrichment and quantum meruit) against WRA and MPAS to recover back wages. Thereafter, on September 9, 2016, the D.C. court ordered that the claims in quasi-contract be severed and transferred back to the District of Colorado where the action was originally filed. The court noted that the Antitrust Action was already pending in Colorado, having been "brought by some of the same plaintiffs here, and litigated by the same attorneys, against the same defendants . . . ." *Hispanic Affairs Project v. Perez*, 206 F. Supp. 3d 348, 377 (D.D.C.), *on reconsideration in part*, 319 F.R.D. 3 (D.D.C. 2016). The court then stated:

> Therefore, even though the back pay claims at issue here are different in nature and involve different questions of law, they would come to the same conclusion—

> whether, and how much, the plaintiffs are entitled to damages to compensate for lost wages due to allegedly unlawful activity on the part of the Association Defendants or invalid administrative rules issued by DOL. Consequently, the administration of justice is best served by transferring these back pay claims against the Association Defendants to the District of Colorado so that they may be adjudicated at the same time as the plaintiffs' pending antitrust claims.

Id. at 377–78. The quasi-contract claims asserted in the APA Action were thus transferred to the District of Colorado on March 22, 2017.

Meanwhile, on March 7, 2017, the Colorado court granted a motion to dismiss the Antitrust Action. The court dismissed the plaintiffs' federal-law claims, arising under the Sherman Act and RICO Act, and then declined to exercise supplemental jurisdiction over the remaining state-law claims. Plaintiffs appealed the dismissal of the Antitrust Action to the Tenth Circuit, and that appeal is now pending. *See Llacua et al. v. Western Range Association et al.*, No. 17-1113 (10th Cir. 2017) (filed March 29, 2017).

On June 27, 2017, the portion of the APA Action that was transferred back to the District of Colorado was administratively closed subject to reopening for good cause, pursuant to District of Colorado Local Civil Rule 41.2. The parties had jointly moved for administrative closure based on the APA claims pending in the District of Columbia and the appeal of the Antitrust Action pending in the Tenth Circuit. The parties stated: "The Parties disagree about precisely how either the Tenth Circuit appeal or the D.C. action will affect the pending claims but are in agreement that it makes sense to litigate those issues after a decision from one of these other courts, which the Parties expect within a year." (*See Perez*, No. 1:15-cv-1785 (D. Colo.), ECF No. 37 at 2.) Following the administrative closure, De La Cruz voluntarily dismissed his claims without prejudice. (*See Perez*, No. 1:15-cv-1785 (D. Colo.), ECF No. 44.)

Finally, on July 7, 2017, summary judgment was granted in favor of the government agency defendants in that portion of the APA Action still pending in the District of Columbia.

See Hispanic Affairs Project v. Acosta, 263 F. Supp. 3d 160 (D.D.C. 2017). That decision is currently on appeal at the D.C. Circuit. *See Hispanic Affairs Project et al. v. Acosta et al.*, No. 17-5202 (D.C. Cir.) (filed Sept. 11, 2017).

De La Cruz joined the instant action on May 15, 2017, by way of the SAC. He seeks to represent classes of current and former H-2A program employees of MPAS. The claims alleged by De La Cruz include (1) failure to pay Nevada minimum wages, (2) promissory estoppel, (3) unjust enrichment and quantum meruit, (4) breach of contract or quasi-contract, and (5) failure to pay separated employees wages when due. (Second Am. Compl. 41–45, ECF No. 111.)

Defendants now move again to dismiss the SAC under Federal Rules of Civil Procedure 12(b)(1) and 12 (b)(6).

II. MOTIONS TO DISMISS

a. Diversity Jurisdiction Under CAFA

Following Plaintiffs' amendment of their pleading, the Court remains unsatisfied that the requirements of diversity jurisdiction under 28 U.S.C. § 1331(d) (CAFA) are met.

CAFA provides federal jurisdiction over class actions that meet the following criteria: (1) the class has more than 100 members; (2) the parties are minimally diverse; and (3) the amount in controversy exceeds $5 million. "As the proponent of federal court jurisdiction, it is well-established that the plaintiff bears the burden of showing that there is no legal certainty that he or she cannot recover the applicable jurisdictional amount." 14AA Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3702 (4th ed. 2015). "It is plaintiff's burden both to allege with sufficient particularity the facts creating jurisdiction, in view of the nature of the right asserted, and, if appropriately challenged . . . to support the allegation." *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 287 n.10 (1938). Where allegations regarding the amount in controversy are contested by an opposing party, "both sides submit proof and the court decides, by a preponderance of the evidence, whether the amount-in-controversy requirement has been satisfied." *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547, 554 (2014). A party asserting jurisdiction under CAFA cannot establish jurisdiction "by mere speculation and conjecture, with unreasonable assumptions." *Ibarra v. Manheim Investments, Inc.*, 775 F.3d 1193, 1197 (9th Cir. 2015). However, CAFA's amount-in-controversy requirement may be satisfied by "evidence combined with reasonable deductions, reasonable inferences, or other reasonable extrapolations." *Pretka v. Kolter City Plaza II, Inc.*, 608 F.3d 744, 754 (11th Cir. 2010).

In its prior order dismissing this case, the Court concluded that it is Plaintiffs' burden to establish the legal possibility that they and their proposed classes might recover more than $5 million. (Order 13–14, ECF No. 107.) The Court also noted that Plaintiffs may not aggregate the value of their claims against WRA, El Tejon, and Gragirena, with the value of their claims against MPAS and Estill Ranches. (*Id.* at 14–15.) Now, the SAC accounts for the analysis in the Court's dismissal order by including more detailed allegations concerning the possible damages that putative class members stand to recover in the form of back wages. For the class of workers allegedly employed by WRA, Plaintiffs allege an amount in controversy of $25,990,220.21. (Second Am. Compl. ¶ 8.) For the class of workers allegedly employed by MPAS, Plaintiffs allege an amount in controversy of $7,319,415.10. (*Id.* at ¶¶ 9–11.) These estimates are based on the number of workers employed by WRA and MPAS, respectively, in Nevada during the time period relevant to this action, according to disclosure data made available online by the DOL. (*See id.* at 4–6.) For example, from that data Plaintiffs were able to determine that WRA certified 173 H-2A shepherds to work for Nevada ranches in 2014.

Out of necessity, Plaintiffs make certain factual assumptions in order to satisfy the requirements of CAFA jurisdiction. However, the Court cannot find these assumptions reasonable. First, Plaintiffs assume that every certified worker in each certification year represents a new and unique class member. For example, Plaintiffs allege that MPAS certified 43 Nevada shepherds in 2014, 33 shepherds in 2015, 32 shepherds in 2016, and 26 shepherds in 2017. (Second Am. Compl. 6.) On this basis alone, Plaintiffs conclude that the MPAS class is comprised of over 100 members. But this conclusion ignores the fact that the DOL's disclosure data does not specify whether any certified shepherd is continuing on from a previous year. In reality, it appears to have been a very common occurrence for H-2A shepherds to return to work for the same employer in subsequent years. Indeed, such was the case for Cántaro and De La Cruz, who both worked multiple consecutive years for their respective employers. Also, the disclosure data itself does not provide an employee count, but merely the total number of H-2A certifications. And the Court cannot accept the foregone conclusion that every certification represents an actual employee.

The inaccuracy of Plaintiffs' calculations is highlighted in a factual challenge raised by El Tejon and Gragirena. In the SAC, Plaintiffs allege, based on the DOL disclosure data, that "El Tejon and Gragirena employed approximately 48 herders during the two-year statutory period for Plaintiffs' wage claims." (*Id.* at ¶ 140.) However, according to the declaration of Melchor Gragirena, "[f]or the two years preceding the filing of the complaint in this case, May 3, 2016, there are only twelve (12) individuals including Cántaro, whom [sic] could be members of a class action, that were employed as shepherds for El Tejon." (Gragirena Decl. ¶ 6, ECF No. 117-1 at 28.) In fact, dating back to May 2010, "El Tejon has only employed twenty-six (26) different shepherds, including Plaintiff [Cántaro]." (*Id.* at ¶ 4.)

At the very least, Plaintiffs' reliance on the disclosure data has led to a gross overestimate in the size of the El Tejon class. And in the face of El Tejon's factual challenge to the disclosure data's reliability—which shows Plaintiffs' estimate to be roughly two to four times too high—it is not reasonable to accept Plaintiffs' conclusory allegation that the MPAS class has over 100 members. (Second Am. Compl. ¶ 156 ("However, according to publicly available data from the USDOL (namely, the aforementioned 'Disclosure Data'), Defendant MPAS employed over 100 Nevada shepherds during the statutory period for Plaintiff De La Cruz's wage claims.").) The same problem does not arise with the WRA class, because there the disclosure data establishes that over 100 shepherds were consistently certified in Nevada in each individual year.[3] (*Id.* at 4–5.) However, to reach 100 class members in the MPAS class, it is necessary to add together the disclosure data's certification figures from at least three years. As El Tejon has demonstrated with competent evidence (i.e., Gragirena's declaration), in many cases the same person—a single class member—was certified and recertified from year to year. Plaintiffs have adduced no evidence in response. As a result, the Court finds Plaintiffs have not made sufficient allegations to establish that the MPAS class has over 100 members.

Next, to satisfy the amount-in-controversy requirement, Plaintiffs assume that every certified Nevada shepherd actually worked every hour of every day of every year during which he or she was certified. As an initial matter, this runs contrary to some of Plaintiffs' own allegations regarding the hours they worked in Nevada. For example, Plaintiffs allege that Cántaro worked roughly half of each year in California, but that "[t]his case only concerns the time Mr. Cántaro, or others similarly situated, worked in Nevada." (Second Am. Compl. ¶¶ 47–48.) Furthermore, Gragirena has submitted a declaration stating that all of El Tejon's shepherds spend half of every year in California, like Cántaro. (Gragirena Decl. ¶ 9.) Therefore, the

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3 Of course, even the WRA class size estimate is questionable, because it assumes that every labor certification WRA obtained was actually used, which is not necessarily the case. Ultimately, the DOL's labor statistics are merely statistics, and are an inferior substitute for facts founded upon real evidence.

assumption that all class members worked 365 days per year in Nevada is problematic in light of the fact that this clearly was not the case for one of the three named plaintiffs.

Moreover, the assumption that all class members are entitled to hourly compensation for twenty-four hours a day, seven days a week, and fifty-two weeks a year stands in sharp contrast to signed declarations provided by H-2A shepherds currently employed by El Tejon. Of course, as individuals, Plaintiffs allege they are entitled to twenty-four hours' worth of compensation for every day of work. Moreover, Plaintiffs allege knowledge that "all or almost all of the other shepherds" they worked with were subject to the same schedule and working conditions. (Second Am. Compl. ¶¶ 51–53, 73–75.) Cántaro and De La Cruz also allege, generally, that during every week of their employment, they worked "well over 40 hours per week, and [were] on duty in [their] workplace 24 hours per day, seven days per week pursuant to the terms of the job order and Defendants' requirement that [they] remain near the flock and guard them from predators." (*Id.* at ¶¶ 52, 74.) In contrast, however, El Tejon has submitted declarations from six current H-2A shepherds, who all provide detailed daily work schedules, and all attest that, in fact, they regularly perform work for an average of about eight hours per day. (*See* Yauri Garcia Decl. ¶¶ 18–22, ECF No. 117-1 at 35–36; Ascanoa Alania Decl. ¶¶ 17–20, ECF No. 117-1 at 41–42; Cantaro Otea Decl. ¶¶ 18–21, ECF No. 117-1 at 17–48; Lapa Pomahuali Decl. ¶¶ 17–20, ECF No. 117-1 at 54–55; Melo Castillo Decl. ¶¶ 11–14, ECF No. 117-1 at 60–61; Archi Lozano Decl. ¶¶ 13–16, ECF No. 117-1 at 66–67.)

The D.C. court's summary judgment in the APA Action also tends to undermine Plaintiffs' assertion that the putative class members must be paid for every hour of every day simply because they were expected to be "on call." *See Hispanic Affairs Project v. Acosta*, 263 F. Supp. 3d 160, 192–95 (D.D.C. 2017). The court dismissed the plaintiffs' challenge to the DOL's 2015 Rule regarding H-2A Shepherds, and thus upheld the methodology by which the

DOL had calculated the national AEWR under the Rule. The DOL had based its calculations on an estimated 48-hour workweek. Therefore, by crediting the DOL's estimate of 48 hours of compensable time per week, while recognizing that the workers are expected to be on constant call, the D.C. court clearly rejected the notion that on-call hours are equivalent to working hours in the H-2A shepherd context.

Of course, the question of the actual number of hours worked by the Plaintiffs and class members in this case is a factual one, not well-answered at the pleadings stage. However, when a party's assertion of the amount in controversy is challenged by competent evidence,

> the Supreme Court has said that 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 [asserted] theory of damages exposure.

Ibarra, 775 F.3d at 1198 (citations omitted), citing *Dart*, 135 S. Ct. at 554. "The parties may submit evidence outside the complaint, including affidavits or declarations, or other summary-judgment-type evidence relevant to the amount in controversy . . . ." *Id.* at 1197 (citations omitted). Here, El Tejon has challenged Plaintiffs' allegations of hours worked with multiple declarations providing specific details regarding job duties and work schedules. In response, Plaintiffs have submitted no evidence, but have merely relied on the unsworn and comparatively vague assertions in the SAC. On the one hand, the Court has declarations signed under penalty of perjury, stating when the declarants start and end their day, what they do during their work hours, what they do during their downtime, how much sleep they are regularly able to get, and when and how often they are able to eat meals, among other details. On the other hand, the Court has the unverified SAC, broadly asserting that Plaintiffs worked every hour of every day, based only on the terms of their contracts and the general requirement that they "remain near the flock."

Therefore, based on the motions and evidence presented, the Court concludes that the preponderance lies with Defendants. It is apparent to the Court that Plaintiffs rely on certain unreasonable assumptions and inferences in alleging that the requirements of CAFA are satisfied. Moreover, and more significantly, Defendants have presented evidence in the form of signed declarations which demonstrate the unreasonableness of Plaintiffs' class-wide assumption that every shepherd is entitled to 24/7 compensation for every day of every year, and Plaintiffs have proffered no evidence in response. Under Ninth Circuit precedent, CAFA's requirements should be tested "by consideration of real evidence and the reality of what is at stake in the litigation, using reasonable assumptions." *Ibarra*, 775 F.3d at 1198. Accordingly, Plaintiffs have not persuaded the Court that the requirements of CAFA are met here, and this action must be dismissed for lack of subject matter jurisdiction.

b. No Individual Liability for Gragirena

The Court also notes that in the SAC, Melchor Gragirena is named as a defendant in his capacity as the owner and manager of El Tejon. (Second Am. Compl. ¶¶ 18, 35, ECF No. 111.) In 2008, however, the Nevada Supreme Court made it clear that "individual corporate managers are not personally liable, as employers, for unpaid wages." *Boucher v. Shaw*, 124 Nev. 1164, 1170 (2008). While Plaintiffs attempt to distinguish *Boucher* by pointing out that it was decided under NRS Chapter 608, and not the Minimum Wage Amendment ("MWA"), their argument is unpersuasive. The underlying principle of *Boucher*'s ultimate conclusion is that "[u]nder Nevada corporate law, individual liability does not extend to officers, directors, or stockholders of a corporation except as otherwise provided by specific statute." *Id.* (internal quotation marks and brackets omitted). Like NRS Chapter 608, the MWA does not specifically provide for personal liability of corporate officers, nor does it indicate an intent to extend such liability for unpaid wages to business owners and managers like Gragirena. Therefore, the Court concludes that the

Nevada Supreme Court's pronouncement that "individual management-level corporate employees . . . cannot be held liable as employers for the unpaid wages of employees under Nevada's wage and hour laws," has equal force in cases arising under the MWA.

Plaintiffs also argue that this Court should not follow *Boucher* because the Nevada Supreme Court overturned it in *Terry v. Sapphire Gentlemen's Club*, 336 P.3d 951, 953 (Nev. 2014), *reh'g denied* (Jan. 22, 2015). But *Terry* simply did not address the question raised in *Boucher*. The question in *Terry* was whether a corporate entity's workers should be classified as employees or independent contractors for purposes of Nevada's wage-and-hour laws. There was no individual corporate-officer defendant in *Terry*. In contrast, the central issue in *Boucher* was the integrity of the corporate veil—an entirely separate question. That the economic realities test should be used to determine whether a person or entity is an "employer" under Nevada law has little bearing on whether it is appropriate to pierce the corporate veil and extend personal liability to individual managers. Other courts in this District have recognized that *Boucher* is still applicable post-*Terry*, and this Court agrees. *See, e.g.*, *Guy v. Casal Inst. of Nevada, LLC*, No. 2:13-cv-2263, 2015 WL 56048, at *2 (D. Nev. Jan. 5, 2015) (Gordon, J.); *Greene v. Jacob Transportation Servs., LLC*, No. 2:09-cv-466, 2017 WL 471565, at *4 (D. Nev. Feb. 3, 2017) (Navarro, C.J.).[4] Accordingly, the claims against Gragirena are subject to dismissal.

c. Improper Claim-Splitting

Lastly, MPAS argues that De La Cruz is engaging in claim-splitting and his claims in this case should be dismissed. The Court agrees. To determine whether a lawsuit is duplicative and

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4 Plaintiffs highlight *Kariuki v. Shac, LLC*, No. 2:14-cv-1118, 2016 WL 6069927 (D. Nev. Oct. 13, 2016) (Mahan, J.), as an example of one court in this District which, after citing *Terry*, declined to grant summary judgment for individual manager defendants in an action to recover minimum wages. However, the *Kariuki* opinion does not discuss nor even mention *Boucher*, and thus lacks persuasive authority here.

must be dismissed, courts "examine whether the causes of action and relief sought, as well as the parties or privies to the action, are the same." *Adams v. Cal. Dep't of Health Servs.*, 487 F.3d 684, 689 (9th Cir. 2007), *overruled on other grounds by Taylor v. Sturgell*, 553 U.S. 880, 904 (2008). The most important criterion to consider 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)).

> It is clear that a motion to dismiss based on improper claim-splitting need not—indeed, often cannot—wait until the first suit reaches final judgment. Thus, in the claim-splitting context, the appropriate inquiry is whether, assuming that the first suit were already final, the second suit could be precluded pursuant to claim preclusion.

Hartsel Springs Ranch of Colorado, Inc. v. Bluegreen Corp., 296 F.3d 982, 987 n.1 (10th Cir. 2002).

De La Cruz has alleged minimum wage and contract claims against MPAS in two other actions arising from the same transactional nucleus of facts. In the portion of the APA Action transferred back to the District of Colorado by the D.C. court, the case was administratively closed and De La Cruz voluntarily dismissed his claims. However, in the Antitrust Action, the court dismissed the federal-law claims and then declined to exercise supplemental jurisdiction over the Nevada state minimum wage claims. An appeal of that dismissal is now pending at the Tenth Circuit. De La Cruz has not dismissed his state-law claims in the Antitrust Action, and a reversal by the Tenth Circuit would naturally have the effect of reviving not only the dismissed federal-law claims, but the entire complaint—supplemental state-law claims included.

De La Cruz initially elected to assert his claims for unpaid Nevada minimum wages in the District of Colorado, and that effort has not yet reached its final conclusion. If his state-law claims are resurrected there by a successful appeal, then a subsequent disposition in that court on the merits of his state-law claims would have a preclusive effect in this case. A plaintiff does not have the right to maintain two separate actions involving the same subject matter at the same time and against the same defendant. *See Adams*, 487 F.3d at 688. For that reason, De La Cruz's claims are subject to dismissal for claim-splitting.

III. MOTION FOR LEAVE TO FILE EXCESS PAGES

Rather than file four separate responses to Defendants' four motions to dismiss, Plaintiffs opted to file a single combined response in excess of the 24-page limit imposed by Local Rule 7-3(b). Under the circumstances, good cause exists to permit Plaintiffs to exceed their page limit.

CONCLUSION

IT IS HEREBY ORDERED that the Motions to Dismiss the Second Amended Complaint (ECF Nos. 117, 118, 121, 124) are GRANTED. This action is DISMISSED WITHOUT PREJUDICE AND WITHOUT LEAVE TO AMEND.

IT IS FURTHER ORDERED that the Motion for Leave to File Excess Pages (ECF No. 128) is GRANTED.

The Clerk of the Court is hereby instructed to close the case.

IT IS SO ORDERED.

ROBERT C. JONES
United States District Judge
February 13, 2018

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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ABEL CANTARO CASTILLO on behalf of himself and those similarly situated, Plaintiff, vs. WESTERN RANGE ASSOCIATION Defendant.	CASE NO. 3:16-cv-00237-RCJ-CLB **PLAINTIFF'S STATUS CONFERENCE REPORT (Re: Non-Party Member Ranches' Motion to Quash) <u>Doc# 229</u>** **Hearing Date: January 15, 2021** **Hearing Time: 11:00 A.M.**

Plaintiff respectfully submits this Status Conference Report pursuant to the Court's January 4, 2021, Minute Order. This Report specifically outlines what resolutions, if any, have been made, and what issues remain outstanding for the Court's consideration. The parties were unable to reach agreement.

At approximately 11:30 AM today, the parties determined they could not reach agreement, and counsel for the WRA Member Ranches stated he would soon send a draft joint report to the Court. As of 2:14 PM today, nothing had been received, and thus Plaintiff sent a proposed joint report to counsel for the WRA Member Ranches and WRA, with blank space provided for any separate additional statement from each party. Plaintiff heard no response, and sent a reminder at approximately 3:30 PM. Counsel for the WRA Member Ranches did not send a draft joint report until 4:29 PM. Counsel for Plaintiff disagreed with the accuracy of several representations contained therein. However, there was no time left to confer and create a common report. Plaintiff sent a draft report to the WRA Member Ranches and WRA at 5:15 PM which placed each party's position in a separate section, and sought consent to file. At 5:52 PM, counsel for the WRA Member Ranches notified Plaintiff that WRA Member Ranches and WRA would file a report without Plaintiff.

Plaintiff's Position

Pursuant to Dkt. 240, Minutes of Proceedings, Plaintiff, the subpoenaed WRA member ranches represented by Jerry Snyder and Louis Test,[1] and Western Range Association met and confered in order to reach a compromise regarding the pending Motion to Quash. *See* Dkt. 229. Counsel for the Plaintiff, the subpoenaed WRA member ranches, and Defendant Western Range Association (WRA), met and conferred via telephone on January 5 and January 11, 2021, each time for approximately 45 minutes. Counsel also exchanged emails on the subject.

During these negotiations, the parties explored whether a template declaration could be agreed upon to address the subjects of the pending subpoena, to be completed by each subpoenaed WRA member ranch, and whether such declarations could obviate the need for deposition testimony

[1] Bonnie Little; Borda Land and Sheep Co., LLC; Ellison Ranching Co.; Estill Ranches; Eureka Livestock, LLC; F.I.M. Corp., Inc.; Green Goat Restoration; John Espil Sheep Co., LLC; Need More Sheep Co., LLC; John Olagaray; Rafter Seven Merinos, Inc.; and Silver Creek Ranch, Inc.

or document production. Ultimately, no agreement was reached.

After extensive back and forth, Plaintiff determined that he cannot be assured the declarations will provide usable testimony from the WRA member ranches. Based on the declaration drafts, emails, and discussions, Plaintiff was concerned that the WRA member ranches would claim lack of knowledge or provide conclusory responses on many significant points. In a deposition context, Plaintiff would normally use documents to refresh recollections, and probe conclusory responses for more detailed answers. Plaintiffs communicated these concerns to the WRA member ranches, and offered an alternative compromise: if a ranch were to complete a declaration first, any follow up deposition would be capped at 4 hours. Plaintiff observed that the process of preparing the declaration would double as deposition preparation, and therefore would not add to the overall time associated with the deposition, with the accompanying guarantee that the deposition would be capped at 4 hours. The ranches rejected that proposal, and suggested instead that the WRA member ranches complete declarations, and if, after receipt of the declarations Plaintiff sought deposition testimony, that new depositions be noticed, new objections lodged, and new briefing completed. Plaintiff rejected that proposal as causing unnecessary delay and additional work.

It is Plaintiff's position that certain information which only the subpoenaed ranches possess is extremely relevant to this case. For example, Defendant WRA does not track the location of herders by state, nor does WRA have payroll records for WRA herders. *See* Opposition to Motion to Quash, Dkt. 230 at 1. As Plaintiff alleges that every herder who worked partially or fully in Nevada from May 3, 2010 to the present was not paid the Nevada minimum wage, the ranches' records and testimony regarding payroll records and location by state is critical to establishing damages for the putative class. Additionally, WRA has alleged that herder activities and responsibilities vary ranch-by-ranch, despite all H-2A workers being approved based on the same job description. *See* Dkt. 206 at 9, n. 5 ("The hours and potential duties differ, as do the manner in which the herding is performed"); TEGL No. 32-10(b)(2), Special Procedures: Labor Certification Process for Employers Engaged in Sheepherding and Goatherding Occupations Under the H-2A Program, 76 Fed. Reg. 47,256 at 47,258 (job description for herders under TEGL special procedures). Therefore, particularized records and testimony from the ranches regarding the supervision of herders and any instructions given to herders about their responsibilities are extremely relevant to test the accuracy of WRA's allegation.

Furthermore, everyone agrees that, consistent with the regulations governing H-2A workers, WRA member ranches were not required to, and did not, keep any records of hours worked by H-2A herders. The regulations governing H-2A herders relieve employers of tracking hours worked *only* for a "herder in constant attendance to the herd," such that their hours are listed as "on call for 24 hours per day, 7 days a week." 20 C.F.R. § 655.200(b)(3); 20 C.F.R. § 655.201; *see also* TEGL No. 32-10(b)(2), Special Procedures: Labor Certification Process for Employers Engaged in Sheepherding and Goatherding Occupations Under the H-2A Program, 76 Fed. Reg. 47,256 at 47259 (Aug. 4, 2011). If an employer reported that an H-2A worker was going to be working 40 or 48 or any other number of hours per week, rather than 24/7, the application to certify an H-2A worker under the herding regulations would be rejected. TEGL No. 32-10(C)(1) ("If an application filed for a sheepherder…does not include the requirements of being on call 24 hours per day, 7 days per week, the Chicago NPS may not process the employer's application…."). Nonetheless, the ranches' draft declaration purports to testify as to the weekly hours worked by herders. These assertions would require follow up questions and cross-examination to probe the source and reliability of the ranches' knowledge. As the herders are left alone with the herd for days or weeks at a time, the capacity of the ranches to testify, based on personal knowledge, as to the hours worked by herders is highly suspect. Nor does the standardized and conclusory template declaration which the WRA member ranches have proposed lend itself well to probing the particularities of each ranch's expectations for their herders' behavior. Another reason why deposition testimony, not a declaration, is needed to elicit WRA member ranch testimony regarding herders' hours worked, is that questioning is required to establish what the deponent is including as "hours worked." There is a legal definition of compensable work which may not correspond to the lay witness testimony offered via declaration. Thus, closer questioning is required. To allow the WRA member ranches to assert their chosen number is correct, without the benefit of cross examination by Plaintiff *or* Defendant, would unfairly undermine Plaintiff's ability to present relevant evidence in this case. Notably, WRA member ranches agree to indemnify WRA if WRA is ultimately held liable in a case such as this, and thus the WRA member ranches are not disinterested third parties. *Ruiz v. Fernandez*, 949 F.Supp.2d 1055, 1072 (2013) (in the standard contract WRA uses, the member ranch is required to indemnify and hold harmless Western Range for wage claims made by sheepherders under the contract).

Oddly, both the WRA Member Ranches and WRA suggest Plaintiff sought, through this declaration, to preclude WRA from cross-examining the ranch declarants. Far from it. Plaintiff made clear from the outset that a deposition where both parties could ask questions was his preference, but we would seek to accommodate the WRA Member Ranches desire to use a declaration instead. It appears that both parties agree that deposition with the opportunity to cross-examine is the better course of action.

For these reasons, it is Plaintiff's position that topics noticed in the deposition subpoenas are both critically relevant and do not lend themselves well to testimony via declaration. Being unable to reach a compromise, Plaintiff requests that the hearing on the motion to quash go forward as scheduled.

As the parties have been unable to reach an agreement, they have not obviated the need for a hearing on the motion scheduled for Friday, January 15, 2021. The parties request that the hearing go forward as scheduled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2021, a true and correct copy of the foregoing was served via the United States District Court CM/ECF system on all parties or persons requiring notice.

By: */s/ Christine E. Webber*
Christine E. Webber