UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
EL DORADO DIVISION

ROSALINO PEREZ-BENITES, LUIS ALBERTO ASENCIO-VASQUEZ, and PASCUAL NORIEGA-NARVAEZ, individually and on behalf of all others similarly situated, Plaintiffs, v. CANDY BRAND, LLC, ARKANSAS TOMATO SHIPPERS, LLC., CHARLES SEARCY, RANDY CLANTON, DALE MCGINNIS, and BROOKS LINESBY. Defendants.	**Case No.** 07-1048 COMPLAINT- CLASS ACTION

COMPLAINT – CLASS ACTION

PRELIMINARY STATEMENT

1. Representative Plaintiffs bring this civil action on behalf of a class of about 2700 Mexican migrant workers who harvested and packed tomatoes and performed other agricultural work for Defendants in and around Bradley County, Arkansas during 2002, 2003, 2004, 2005, 2006 and 2007.

2. Acting through their agents, Defendants recruited Plaintiffs to work on their Arkansas farms. Defendants, through their hiring agents, made binding promises regarding wages, hours and working conditions. In reliance upon and in consideration of these binding promises, Plaintiffs left their homes and spent a considerable money and effort to travel to Arkansas to work for the Defendants. Despite making such binding promises, Defendants consistently failed

JUN 01 2007

to pay the promised wage for all hours worked, and failed to reimburse Plaintiffs for expenses incurred for the benefit of the Defendants.

3. Defendants failed to pay Plaintiffs the hourly wages and overtime required by federal law throughout Plaintiffs' employment with Defendants.

4. In order to obtain these temporary positions with Defendants, all of the workers had to pay travel, visa, and hiring fees, some as much as $3,500. These sums were expended solely for the benefit of the Defendants. The Defendants' failure to reimburse the workers' money in their first week of work was a violation of the Fair Labor Standards Act, 29 U.S.C. § 201 et seq, (hereinafter "FLSA"). As a result of these expenditures, the workers earned substantially less than the minimum wage in their first week of work.

5. Plaintiffs and other class members are indigent migrant farm workers who came to the United States on temporary H-2A visas in an effort to earn money to better support themselves and their families. The Defendants took full advantage of Plaintiffs' and other class members' indigence, inability to speak or understand English, isolation, and lack of understanding of the laws of the United States regarding payment of wages, to grossly underpay Plaintiffs and other class members. Plaintiffs file this action to secure and vindicate their rights under the FLSA and state and federal contract law.

6. On behalf of themselves and other similarly situated farm workers, Plaintiffs seek restitution of unpaid wages, an award of money damages, and declaratory relief both to make themselves whole for damages they suffered due to Defendants' violations of law and to ensure that Defendants will not subject them and other H-2A workers to such illegal conduct in the future.

JURISDICTION

7. This Court has jurisdiction over the subject matter of this action pursuant to 29 U.S.C. § 216(b) (Fair Labor Standards Act), 28 U.S.C. § 1331 (federal question jurisdiction), and 28 U.S.C. § 1337 (actions arising under Acts of Congress regulating commerce).

8. This Court has supplemental jurisdiction over the claims arising under state law pursuant to 28 U.S.C. § 1367 because those claims are so related to the federal claims that they form part of the same case or controversy.

9. The Court is empowered to issue a declaratory judgment pursuant to 28 U.S.C. §§ 2201 and 2202.

VENUE

10. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b).

PARTIES

11. Defendant Candy Brand, LLC is an Arkansas limited liability corporation that conducts substantial business in Bradley County, Arkansas.

12. Defendant Arkansas Tomato Shippers, LLC is an Arkansas limited liability corporation that conducts substantial business in Bradley County, Arkansas.

13. Defendant Charles Searcy is an individual conducting substantial business in Bradley County, Arkansas.

14. Defendant Randy Clanton is an individual conducting substantial business in Bradley County, Arkansas.

15. Defendant Dale McGinnis is an individual conducting substantial business in Bradley County, Arkansas.

16. Defendant Brooks Linesby is an individual conducting substantial business in

Bradley County, Arkansas.

17. Plaintiffs Rosalino Perez-Benites, Luis Alberto Asencio-Vasquez and Pasqual Noriega-Narvaez [hereinafter "Representative Plaintiffs"] are citizens of Mexico who maintain their permanent homes in Mexico.

18. At all times relevant to this action, Representative Plaintiffs and the other class members were H-2A foreign guestworkers within the meaning of 8 U.S.C. § 1101(a)(15)(H)(ii)(a) and were admitted to the United States to work for Defendants.

CLASS ACTION ALLEGATIONS

19. Plaintiffs bring this action on behalf of themselves and all other similarly situated workers defined as "all those individuals admitted as H-2A guestworkers who were employed by the Defendants in their Arkansas tomato harvesting and packing operations from June 1, 2002 to the present." With respect to Count I, Plaintiffs bring this action as a collective action under the FLSA. A collective action is appropriate because the employees described are similarly situated to the named Plaintiffs. 29 U.S.C. § 216(b); Hoffman-La Roche, Inc. v. Sperling, 493 U.S. 165, 170 (1989).

20. Plaintiffs bring Count II of this action as a class action pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure.

21. Certification of a class of persons who may receive relief pursuant to Count II is appropriate pursuant to Fed. R. Civ. P. 23(b)(3) because:

(a) The class is so numerous that it is impractical to bring all its members before this Court. On information and belief, the class is believed to include well over 2700 individuals.

(b) There are questions of law and fact common to the class;

(c) The Representative Plaintiffs' claims are typical of those in the class;

(d) The Representative Plaintiffs will fairly and adequately protect the interest of the class;

(e) Plaintiffs have retained counsel experience in matters of this type; and

(f) Questions of law common to the members of the class predominate over the questions affecting only individual members and a class action is superior to other available methods for the fair and efficient adjudication of the controversy. Testimony and evidence about Defendants' recruitment, hiring, and employment practices will affect and apply to the claims of other class members. Purely individual questions will be restricted to damages questions should liability be established. If no class action is certified, it will make it impractical for individual class members to pursue relief, or may lead to a large number of separate lawsuits, all of which would rely on the same kind of proof and take roughly the same amount of time, causing an unnecessary burden on the courts.

22. A class action under Rule 23(b)(3) is superior to other available methods of adjudicating this controversy, *inter alia*:

(a) The common issues of law and fact, as well as the relatively small size of the individual class members' claims, substantially diminish the interest of members of the class in individually controlling the prosecution of separate actions;

(b) Many members of the class are unaware of their rights to prosecute these claims and lack the means or resources to secure legal assistance; the class is comprised principally of indigent migrant farmworkers who maintain their residences in locations throughout Mexico. The class members are not fluent in the English language—the majority speak Spanish as their primary language.

(c) There has been no litigation already commenced against the Defendants by the

members of the class to determine the questions presented;

(d) It is desirable that the claims be heard in this forum since the Defendants have significant contacts with this District; and

(e) A class action can be managed without undue difficulty since the Defendants have regularly committed the violations complained of herein, and Defendants are required to maintain detailed records concerning each member of the class.

(f) Representative Plaintiffs will fairly and adequately represent the interest of the class. Representative Plaintiffs' interests are in no way antagonistic or adverse to the other class members.

23. Plaintiffs' counsel are experienced in actions by H-2A workers to enforce their rights under their employment contracts and have handled numerous class actions in federal courts. Plaintiffs' counsel are prepared to advance litigation costs necessary to vigorously litigate this action and to provide notice to the class members under Rule 23(b)(3)

STATUTORY AND REGULATORY STRUCTURE

24. An agricultural employer in the United States may import foreigners to perform labor of a temporary nature if the U.S. Department of Labor certifies that (1) there are insufficient available workers within the United States to perform the job, and (2) the employment of aliens will not adversely affect the wages and working conditions of similarly-situated U.S. workers. 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a) and 1188(a)(1). Foreign workers admitted in this fashion are commonly referred to as "H-2A workers."

25. Agricultural employers seeking the admission of H-2A workers must first file a temporary labor certification application with the U.S. Department of Labor. 20 C.F.R. §§ 655.101(a)(1) and (b)(1). This application must include a job offer, commonly referred to as a

"clearance order" or "job order," complying with the applicable regulations, which is used in the recruitment of both U.S. and H-2A workers. 20 C.F.R. § 655.101(b)(1). These regulations establish the minimum benefits, wages, and working conditions that must be offered in order to avoid adversely affecting similarly-situated U.S. workers. 20 C.F.R. §§ 655.101(a)(2), 655.102(b) and 655.103. Among these terms are the following:

a. Payment to all workers of at least the applicable adverse effect wage rate for every hour or portion thereof worked during a pay period. 20 C.F.R. §§ 655.102(b)(9)(i) and (ii);

b. Compliance with the assurances required of applications for H-2A workers by 20 C.F.R. § 655.103, including an assurance that the employer would not intimidate, threaten, blacklist, discharge, or in any manner discriminate against workers testifying in any proceeding related to the H-2A program; and

c. Compliance with all federal, state, and local employment laws and regulations. 20 C.F.R. § 655.103(b).

STATEMENT OF FACTS

26. Because of the lack of available farm workers in the area of their operations, Defendant Candy Brand, LLC filed application(s) for temporary foreign workers through the H-2A program each year from 2002 through 2007.

27. Pursuant to the applications described in paragraph 28, Defendant Candy Brand LLC received H-2A Alien certifications for and imported approximately the following numbers of workers each year: two hundred (200) foreign workers in 2002, three-hundred and forty-eight (348) foreign workers in 2003, four-hundred and forty-eight (448) foreign workers in 2004, five-hundred and seventy-seven (577) foreign workers in 2005, five-hundred and seventy-seven (577)

foreign workers in 2006. Defendant Candy Brand LLC has received certification to import, has imported, and/or or will soon import, five-hundred and seventy-seven (577) foreign workers in 2007.

28. Defendant Candy Brand LLC filed these applications for temporary foreign workers, received certifications, and imported foreign workers on behalf of all other Defendants.

29. Representative Plaintiff Rosalino Perez-Benites worked for Defendants in 2005 and 2006 pursuant to an H-2A visa.

30. Representative Plaintiffs Luis Alberto Asencio-Vasquez and Pasqual Noriega-Narvaez worked for Defendants in 2006 pursuant to H-2A visas.

31. At all times relevant to this action, Defendants jointly employed Representative Plaintiffs and other class members for purposes of the FLSA.

32. At all times relevant to this action, Defendants jointly employed Representative Plaintiffs and other class members for purposes of compliance with their employment contracts within the meaning of 29 U.S.C. § 655.100.

33. The terms of the work contract under which Representative Plaintiffs and all other class members were employed by Defendants were determined by:

(a) The terms offered in the "clearance orders" submitted by Defendants to the United States Department of Labor to obtain permission to import foreign workers;

(b) The terms of work set forth in the regulations governing the visas of Representative Plaintiffs and other class members, 20 C.F.R. § 655; and

(c) The individual work contracts provided to Representative Plaintiffs and other class members by Defendants.

34. Representative Plaintiffs and other class members work contract offered, *inter alia*, the following terms of work:

(a) Wages equal to the higher of the minimum wage, the adverse effect wage rate, or the prevailing wage rate;

(b) Maintenance and provision of detailed, complete, and accurate records of worker pay and work time; and

(c) Compliance by Defendants with all federal, state, and local employment-related legislation.

35. The terms and conditions of employment offered by Defendants induced Representative Plaintiffs and other class members to travel from their homes in Mexico to Arkansas to work for Defendants. Representative Plaintiffs and other class members accepted the terms and conditions of employment and reasonably relied upon representations made to them in Mexico by Defendants and/or their agents.

36. Representative Plaintiffs and other class members traveled from their homes in Mexico to Defendants' work sites in Arkansas, where they performed the agricultural work described in the clearance order, including harvesting and packing tomatoes.

37. In order to get to Defendants' farm and commence work under the above contract, Representative Plaintiffs and other class members had to pay various fees and expenses each year, including, but not limited to, hiring fees, visa fees, bus fare, and subsistence from their home towns in Mexico to Arkansas.

38. The expenses described in paragraph 37 were primarily for the benefit of the Defendants as employers of Representative Plaintiffs and other class members.

39. As recruiters of Mexican citizens in Mexico for work in the United States, Defendants and/or their agents were required to directly bear some of the costs described in paragraph 37, pursuant to the laws of Mexico.

40. As a matter of practice and/or policy, Defendants did not reimburse Representative Plaintiffs and other class members for the expenses described in paragraph 37.

41. As a result of the expenses described in paragraph 37 and Defendants' practice and/or policy not to reimburse those expenses, Representative Plaintiffs and other class members did not earn the minimum wage or overtime premium mandated by the FLSA in their first workweek.

42. Representative Plaintiffs and other class members completed work for Defendants in the fields and in the packing sheds.

43. When working in the packing shed(s), Representative Plaintiffs and other class members were not engaged in practices performed by a farmer or on a farm as an incident to or in conjunction with such farming operations pursuant to 29 U.S.C. § 203(f) and subsequent defining regulations.

44. As a matter of practice and/or policy, Defendants did not pay Representative Plaintiffs and other class members overtime wages for hours in excess of forty hours a workweek, for weeks in which they worked in the packing shed(s).

45. As a matter of practice and/or policy, Defendants did not pay Representative Plaintiffs and other class members at least the adverse effect wage rate for each hour worked, for workweeks in which they worked in the fields.

46. As a matter of practice and/or policy, Defendants failed to provide Representative Plaintiffs and other class members adequate written hours and earnings statements each payday, for workweeks in which they worked in the fields.

47. At all times relevant to this action, Defendants employed Representative Plaintiffs and other class members within the meaning of 29 U.S.C. § 203(g).

48. At all times relevant to this action, Defendants were employers of Representative Plaintiffs and other class members within the meaning of 29 U.S.C. § 203(d).

49. At all times relevant to this action, Representative Plaintiffs and other class members were employees of Defendants within the meaning of 29 U.S.C. § 203(e)(1).

50. At all times relevant to this action, Defendants employed Representative Plaintiffs and other class members in the production, packing, and harvesting of vegetables for sale in interstate commerce.

51. At all times relevant to this action, Defendants were employers covered by the FLSA.

52. At all times relevant to this action, Plaintiffs were involved in the production of goods for sale in interstate commerce and subject to the protections of the FLSA.

53. At all times relevant to this action, Defendants acted directly or indirectly in the interest of the employer in relation to Representative Plaintiffs and other class members.

54. All conditions precedent to this action have been satisfied.

55. All actions and omissions alleged herein were undertaken by Defendants either directly and/or through their agents.

56. The Defendants' failure to pay wages in compliance with the FLSA was willful.

COUNT I: FAIR LABOR STANDARDS ACT
(29 U.S.C. § 216(b) COLLECTIVE ACTION)

57. This count sets forth a claim for declaratory relief and damages for the Defendants' violations of the minimum wage and overtime provisions of the Fair Labor Standards Act ("FLSA"). This count is brought by Representative Plaintiffs on behalf of a class of other similarly situated workers consisting of all those individuals admitted as H-2A

guestworkers who were employed by the Defendants in their Arkansas tomato harvesting and packing operations from June 1, 2002 to the present.

58. Pursuant to 29 U.S.C. § 216(b), each Representative Plaintiff consented in writing to be a plaintiff in this FLSA action. Their written consents are attached to this complaint.

59. Defendants violated the rights of Representative Plaintiffs and other similarly situated workers by failing to pay each worker the applicable minimum wage for every compensable hour of labor performed in a workweek, in violation of 29 U.S.C. § 206(a).

60. Defendants violated the rights of Representative Plaintiffs and other similarly situated workers by systematically failing to pay each worker at least an average of one-and-a-half times the applicable wage for all hours worked above forty during overtime-eligible workweeks. 29 U.S.C. § 207(a).

61. The violations of the FLSA in this count resulted, in part, from the Defendants' failure to reimburse Representative Plaintiffs and other similarly situated workers for expenses primarily benefiting the Defendants, prior to their first week of work, as described herein. When these expenses were deducted from Representative Plaintiffs' and other similarly situated workers' first week's pay, they brought their earnings below the applicable minimum and overtime wages for the first workweek.

62. As a result of the Defendants' violations of the FLSA set forth in this count, each Representative Plaintiff and other similarly situated workers are entitled to recover the amount of his or her unpaid minimum and overtime wages and an equal amount as liquidated damages, pursuant to 29 U.S.C. §216(b).

COUNT II - BREACH OF EMPLOYMENT CONTRACT
(CLASS ACTION)

63. This count sets forth a claim by Representative Plaintiffs on behalf of themselves and other class members for damages arising from Defendants' breaches of the workers' employment contracts, as embodied in the annual clearance orders, from 2002 until the present.

64. The terms and conditions of employment contained in the clearance orders described in paragraphs 33 and 34 constituted enforceable employment contracts between Defendants and the H-2A workers, the terms of which are principally supplied by federal regulations 20 C.F.R. §§ 653.501, 655.102, and 655.103.

65. Representative Plaintiffs and other class members accepted the terms in the clearance order as communicated to them in Mexico by Defendants and their agents. Based on this agreement and accepting the Defendants' offer of employment, Representative Plaintiffs and other class members left their families and traveled from Mexico to the Arkansas and presented themselves for work.

66. Defendants breached their employment contracts with Representative Plaintiffs and other class members by providing terms and conditions of employment that were materially different from those described in its clearance orders, including the following:

a. The workers were not paid at least the applicable adverse effect wage rate for their labor;

b. Defendants failed to comply with the minimum wage and overtime provisions of the FLSA, an employment-related law, as required by the contract;

c. Defendants failed to keep accurate and adequate records with respect to the workers' earnings as required by 20 C.F.R. § 655.102(b)(7); and

d. Defendants failed to the furnish workers with hours and earnings statements accurately setting out the data required by 20 C.F.R. § 655.102(b)(8).

67. Defendants' breaches of their employment contracts with Representative Plaintiffs and other class members have caused these workers grave financial and other serious injuries.

68. Defendants are liable to Representative Plaintiffs and other class members for the actual, incidental, and consequential damages which arose naturally and according to the usual course of things from Defendants' breaches, as provided by Ark. Stat. Ann. § 16-22-308 (2007) and the federal common law of contracts, including unpaid wages, damages arising from the delay, and pre-judgment interest.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter an order:

A. Permitting this case to proceed as a 29 U.S.C. § 216(b) collective action with respect to the claims set forth in Count I;

B. Certifying this case as a class action in accordance with Rule 23(b)(3) of the Federal Rules of Civil Procedure with respect to the claims set forth in Count II;

C. Declaring that the Defendants willfully violated the minimum wage and overtime provisions of the FLSA as set forth in Count I;

D. Granting judgment in favor of Representative Plaintiffs and other similarly situated workers and against the Defendants on their claims under the FLSA as set forth in Count I, and awarding each of these Representative Plaintiffs and other similarly situated workers who opt-in to this action his or her unpaid minimum and overtime wages and an equal amount in liquidated damages;

E. Granting judgment in favor of the Plaintiffs and the other class members against the Defendants under Count II and awarding each of the Plaintiffs and other class members their respective actual, incidental and consequential damages;

F. Enjoining Defendants from further failure to comply with the regulations governing the H-2A program.

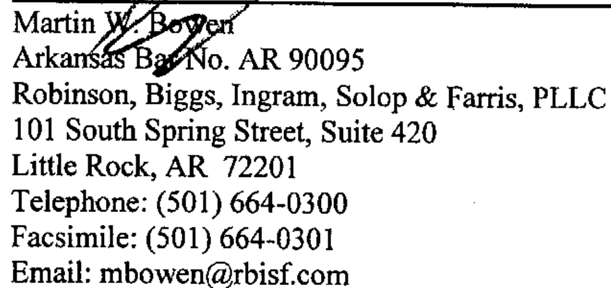
G. Awarding Plaintiffs the costs of this action;

H. Awarding Plaintiffs pre- and post-judgment interest as allowed by law;

I. Awarding Plaintiffs reasonable attorneys' fees pursuant to 29 U.S.C. § 216 and Ark. Code Ann. § 16-22-308 (2007).

J. Granting such further relief as is just and equitable.

Respectfully submitted this 31 day of May 2007.



Martin W. Bowen
Arkansas Bar No. AR 90095
Robinson, Biggs, Ingram, Solop & Farris, PLLC
101 South Spring Street, Suite 420
Little Rock, AR 72201
Telephone: (501) 664-0300
Facsimile: (501) 664-0301
Email: mbowen@rbisf.com

Jennifer Rosenbaum
Tenn. B.P.R. No. 022557
Pro Hac Vice Motion Pending
Arlen Benjamin-Gomez
Member of the Bar of New York State
Pro Hac Vice Motion Pending
Immigrant Justice Project
Southern Poverty Law Center
400 Washington Avenue
Montgomery, Alabama 36104
Telephone: (334) 956-8200
Facsimile: (334) 956-8481

Edward Tuddenham
Texas Bar No. 20282300
Pro Hac Vice Motion Pending
228 W. 137th St.
New York, NY 10030
Telephone: (512) 413-4863
Fax: 512-532-7780
ATTORNEYS FOR PLAINTIFFS