UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

COLUMBIA DIVISION

JOSE ROSILES-PEREZ, et. al.	)	
	)	Case No. 1:06-CV-0006
Plaintiffs,	)	
	)	Judge William J. Haynes
v.	)	Magistrate Judge Juliet Griffin
	)	
SUPERIOR FORESTRY SERVICE INC., et al.	)	
	)	
Defendants.	)	JURY DEMAND

PLAINTIFFS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION

Plaintiffs submit this memorandum of law in support of their motion to certify a class pursuant to Federal Rule of Civil Procedure 23(b)(3) and appoint class counsel pursuant to Rule 23(g). Plaintiffs seek Rule 23 certification of the claims in count I of their complaint, brought under the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801 -1871 ("AWPA").[1] Plaintiffs seek certification of a class consisting of:

> All non-supervisory workers admitted as H-2B temporary foreign workers pursuant to 8 U.S.C. § 1101(a)(15)(H)(ii)(b) and who were employed by Defendants at any time from January 2000 to the present.[2]

[1] Plaintiffs seek class certification under Rule 23 only with respect to the claims in count I. The claims in count II are brought under the Fair Labor Standards Act, and "certification" is governed by 29 U.S.C. § 216(b), rather than Rule 23. Plaintiffs' request for certification of those claims is addressed in a separately filed motion and memorandum.

[2] AWPA does not have its own statute of limitations. Hence, the class period is determined by application of the most closely analogous state statute of limitations. See *Sanchez v. Overmyer*, 845 F.Supp. 1178, 1179-80 (N.D. Ohio 1993). The applicable limitations period in this case is the six-year Tennessee statute for "actions on contracts not otherwise provided for." See *Reed v. Alamo Rent-a-Car*, 4 S.W.3d 677 (1999); *Sanchez*, supra, at 1179-80 (applying Michigan's six-year statute of limitations for contract action to farm workers' AWPA claims).

FACTUAL BACKGROUND

Plaintiffs and other members of the proposed class are migrant workers who lawfully entered the United States as H-2B temporary workers pursuant to 8 U.S.C. § 1101(a)(15)(H)(ii)(b) to work in Defendants' forestry labor contract business and who were employed by Defendants at various times since January 2000.

Defendants maintain a large guest worker labor force. App. 5 ¶¶7-10 & Exh. A.[3] The guest workers are assigned and work together in tree planting and thinning crews. Defendants maintain uniform time-keeping, record-keeping and compensation systems for all of their planting and thinning crews and all H-2B workers. App. 5 ¶10 & Exh. A. Defendants' AWPA violations are the result of common practices which have affected all H-2B workers, regardless of crew assignment, throughout the six-year AWPA limitations period. App. 7-11; App. 3 (documents Bates stamped Superior-0151 & 0161); App. 15 at 6-7 & Exh. B.

In count I of the complaint, Plaintiffs allege that Defendants systematically violated AWPA by, *inter alia*: (a) failing to pay them and similarly situated H-2B workers their wages owed promptly when due, including their mandated prevailing hourly and federal minimum wages for all hours worked, and federal overtime wages for all hours worked over 40 in a workweek; (b) violating the parties' working arrangement in numerous respects, including failing to pay Plaintiffs and other H-2B workers all of their wages when due and failing to reimburse all of them for expenses incurred for Defendants' benefit (*see Arriaga v. Florida Pacific Farms, LLC*, 305 F.3d 1228 (11th Cir. 2002)); and (c) failing to keep, make and preserve complete records of their and class

[3] References to "App.__" are to Plaintiffs' separate Appendix.

members' employment, and failing to provide all of them accurate, itemized statements of their earnings. App. 1 ¶¶39-50.

To remedy these violations, Plaintiffs seek to recover, for themselves and others similarly situated, the greater of actual and statutory damages, as provided for under the AWPA, and for appropriate injunctive relief.

The federal district court in New Orleans recently certified a similar class of migrant forestry workers in *Recinos-Recinos v. Express Forestry, Inc.*, 233 F.R.D. 472 (E.D. La. 2006). AWPA actions are often well-suited to class certification, and many have been certified as class actions. *See, e.g., Recinos, supra*; *Martinez v. Mecca Farms, Inc.,* 213 F.R.D. 601 (S.D. Fla. 2002*)*; *Rodriguez v. Carlson,* 166 F.R.D. 465 (E.D. Wash. 1996); *Leyva v. Buley*, 125 F.R.D. 512 (E.D. Wash. 1989); *Rodriguez v. Berrybrook Farms, Inc.*, 672 F. Supp. 1009 (W.D. Mich. 1987) ("Berrybrook Farms"). This case should also proceed as a class action.

In section I of this Memorandum, we set forth the general legal standards governing class certification. In section II, we demonstrate that the proposed class in this case meets the requirements of Fed. R. Civ. P. 23(a). In section III, we demonstrate that the proposed class additionally meets the requirements, and should be certified under, Fed. R. Civ. P. 23(b)(3). In section IV, we address the appointment of class counsel under Fed. R. Civ. P. 23(g).

I. General Principles of Law Governing Motions For Class Certification Under Fed. R. Civ. P. 23.

Class certification is proper when a class meets the criteria of Rule 23(a) and also fits within one of the three subcategories of Rule 23(b). *Amchem Products, Inc. v.*

Windsor, 521 U.S. 591, 621 (1997); *Senter v. General Motors Corp.*, 532 F.2d 511, 522 (6th Cir. 1976).

Rule 23(a) establishes four "class-qualifying criteria," *Amchem*, 521 U.S. at 621, commonly referred to as numerosity, commonality, typicality and adequacy, providing as follows:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

All four of these prerequisites to class certification are met in the present case, as discussed below.

Once the court has determined that criteria of Rule 23(a) have been met, the class certification analysis turns, next, to the provisions of Rule 23(b), to assure that the proposed class also satisfies one of the three subsections of Rule 23(b). In this case, Plaintiffs seek certification under the third subsection, Rule 23(b)(3), which imposes requirements commonly referred to as "predominance" and "superiority," providing in relevant part as follows:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action.

Rule 23(b)(3)'s requirements of "predominance" and "superiority" are both met in this case.

A. Class Certification Does Not Delve Into the Merits.

In considering a motion for class certification, the court does not reach the merits. Class certification should be determined on the pleadings and in light of the procedural requirements of Federal Rule of Civil Procedure 23, accepting the substantive allegations of the complaint as true. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). *Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (9th Cir. 1975).

The facts alleged in Plaintiffs' complaint are plainly sufficient to support class certification. In addition, Plaintiffs have submitted a Combined Appendix with declarations and documentary evidence supporting this motion. Under even the most "rigorous analysis" of the Rule 23 requirements, *Sprague v. General Motors Corp.*, 133 F.3d 388, 397 (6th Cir. 1998), class certification is appropriate in this case.

II. The Proposed Class Satisfies the Requirements of Rule 23(a).

The four criteria established by Rule 23(a) -- numerosity, commonality, typicality and adequacy -- are each satisfied here.

A. The Class Clearly Meets the Numerosity Requirement.

Rule 23(a)(1) is satisfied when "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1).

This "impracticability" standard is met when joinder of all members of the class would be difficult or inconvenient. Whether joinder might be theoretically possible is not the question. "Impracticability" does not mean "impossibility." *Little Caesar Enterprises, Inc. v. Smith*, 172 F.R.D. 236, 242 (E.D. Mich. 1997); *Jordan v. Global*

Natural Resources, Inc., 102 F.R.D. 45, 51 (S.D. Ohio 1984) ("Satisfaction of the numerosity requirement does not require that joinder is impossible, but only that plaintiffs will suffer a strong litigational hardship or inconvenience if joinder is required."); *Berrybrook Farms,* 672 F. Supp. at 1013 ("[I]mpracticable" does not mean "impossible"); *Hively v. Northlake Foods, Inc.,* 191 F.R.D. 661, 666 (M.D. Fla. 2000).

Defendants have recruited and employed hundreds of H-2B workers during each year covered by the class period. App. 1 ¶ 22; Declaration of Marni Willenson (App. 5) ¶¶ 7-10 & Exh. A. When class size reaches such substantial proportions, the numerosity and impracticability requirements of Rule 23(a)(1) are "usually satisfied by the numbers alone." *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir. 1996). With so many H-2B workers employed by defendants, numerosity is not legitimately contestable in this case.[4]

B. <u>There are Multiple Common Issues of Law and Fact.</u>

Rule 23(a)(2) is satisfied when "there are questions of law or fact common to the class." This requirement of "commonality" is not a demanding one. *See generally*, *Newberg on Class Actions*, §3.10 (3d ed. 1992) (noting that the commonality requirement "is easily met in most cases"); *Meiresonne v. Marriott Corp.*, 124 F.R.D. 619 (N.D. Ill. 1989) ("Commonality is not a demanding requirement. It calls only for the existence of at least one issue of fact or law common to all class members.")

The test for commonality "is qualitative rather than quantitative, that is, there need be only a single issue common to all members of the class." 1 Newberg, *supra* §

[4] Defendants do not deny that they have employed well over 1500 H-2B workers in non-supervisory positions during the class period as alleged in the Complaint. App. 1 ¶34. Rather curiously, they profess to be "without sufficient knowledge to admit or deny" that statement, App. 2 ¶34, even thought they have employee data that can be used to determine the size and composition of the class, *see* App. 14 at 2-4.

3.10, at 3-50; *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988) ("[T]he mere fact that questions peculiar to each individual member of the class remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible").

In the present case, the degree of factual and legal commonality is extensive. Common questions of fact in this case include the following:

a. Whether Defendants failed to pay the Plaintiffs and other class members their minimum, prevailing and overtime wages promptly when due;

b. Whether Defendants failed to maintain complete and accurate records regarding the class members' work; and

c. Whether Defendants failed to provide the class members with complete and accurate wage statements.

Since Defendants have maintained uniform time-keeping, record-keeping and compensation systems for all H-2B workers (*see, supra*, at 2) their liability will be resolved for all class members based on common evidence. *See, e.g.*, First Aff. of Rosiles-Perez (App. 7) ¶¶ 14, 15, 17; First Aff. of Santiago-Salmoran (App. 8) ¶¶ 14-17, 19-21; First Aff. of Montero-Barradas (App. 10) ¶¶ 13-15; First Aff. of Cervantes-Espejo (App. 11) ¶ 14; First Aff. of Morales-Carrillo (App. 9) ¶¶ 13, 14, 17; First Aff. of Aldana-Moreno (App. 13) ¶¶ 13, 14, 16, 18; First Aff. of Hernandez-Hernandez (App. 12) ¶¶ 15, 17.

In addition to these common questions of fact, there are several, significant common questions of law applicable to all class members. These include:

a. Whether Defendants' failure to pay the class members the prevailing wage and overtime pay as required by the H-2B temporary foreign labor program violated the AWPA's wage payment provisions. 29 U.S.C. §1822(a); 29 C.F.R. §500.81;

b. Whether Defendants' failure to pay the class members the prevailing wage and overtime pay as required by the H-2B temporary foreign labor program violated the AWPA's working arrangement provisions. 29 U.S.C. §1822(c); 29 C.F.R. §500.72;

c. Whether Defendants' failure to maintain complete and accurate records regarding the work of the class members was a violation of the AWPA. 29 U.S.C. §1821(d)(1); 29 C.F.R. §500.80(a);

d. Whether the Defendants' failure to provide the class members with complete and accurate wage statements was a violation of the AWPA. 29 U.S.C. §1821(d)(2); 29 C.F.R. § 500.80(d); and

e. Whether Defendants' violations of the AWPA were "intentional" within the meaning of that statute. 29 U.S.C. §1854(c).

C. <u>The Claims of the Named Plaintiffs Are Typical of the Class as a Whole.</u>

The third class-qualifying criterion set out in Rule 23(a) is "typicality." Rule 23(a)(3) is satisfied when "claims or defenses of the representative parties are typical of the claims or defenses of the class." A plaintiff's claim "is typical if it arises from the same … practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *In re Am. Med. Sys.,* 75 F.3d at 1082.

To satisfy the requirement of typicality, class members' claims need not be identical. It is sufficient if they are substantially similar. *Senter*, 532 F.2d at 525 ("To be typical, a representative's claim need not always involve the same facts or law, provided there is a common element of fact or law."); *Id* at 524 ("Factual identity between the plaintiff's claims and those of the class he seeks to represent is not necessary."); *Binion v. Metropolitan Pier and Exposition Authority*, 163 F.R.D. 517, 525 (N.D.Ill.,1995) ("Typicality does not require that the claims or defenses of the class representatives be

identical or perfectly coextensive with the claims or defenses of the members; substantial similarity is satisfactory") (internal quotation omitted).

Plaintiffs complaint alleges, and the documents in the Appendix provide evidence, that all members of the proposed class, comprised of non-supervisory H-2B workers, performed the same or similar jobs, were subjected to the same or similar terms and conditions of employment and have suffered the same AWPA violations, including Defendants' use of false and misleading recruiting information; Defendants' failure to keep and provide accurate wage statements and records; and Defendants' failure both to pay wages due and pay them when due as required by the AWPA. App. 1 ¶¶ 39-50; App. 7 ¶¶ 6-9, 11-19; App. 8 ¶¶ 4-11, 13-17, 19-21; App. 15 at 6-7 & Exh. B. By succeeding in proving their own claims, the named Plaintiffs will establish that defendants also violated the AWPA in the same manner with respect to all other class members. The same facts and legal theories underlie all class members' claims. The typicality requirements of Rule 23(a)(3) have accordingly been satisfied. *Cf. Recinos-Recinos, supra* (typicality requirement similarly satisfied in AWPA forestry case).

D. Plaintiffs Will Fairly and Adequately Represent the Class. Rule 23(a)(4).

Rule 23(a)(4) is satisfied when "the representative parties will fairly and adequately protect the interests of the class." This adequacy of representation requirement tends to merge with the commonality and typicality requirements of Rule 23(a)(2) and (3). *Amchem*, 521 U.S. 591, 626 n.20 (1996); *In re Am. Med. Sys.,* 75 F.3d at 1083.

In *Senter,* the Sixth Circuit articulated two criteria for determining adequacy of representation: "1) The representative must have common interests with unnamed

members of the class, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *Senter*, 532 F.2d at 525 (citation omitted); *In re Am. Med. Sys*., 75 F.3d at 1083. Both these criteria are satisfied in this case. The interests of the named Plaintiffs are not antagonistic to those of the class, there are no disabling conflicts among the members of the class, and Plaintiffs' counsel are experienced and accomplished in class action litigation. Declaration of Mary Bauer (App. 4); Declaration of Marni Willenson (App. 5); Declaration of Joshua Karsh (App. 6).[5]

III. The Requirements of Rule 23(b)(3) Have Been Met.

In addition to satisfying the prerequisites of Rule 23(a), a proposed class must also fit within one of the three subcategories of Rule 23(b). Plaintiffs move for class certification pursuant to Rule 23(b)(3).

As discussed below, this case easily satisfies both prongs of that subsection: that (1) "questions of law or fact common to members of the class predominate over any questions affecting only individual members" and (2) a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3).

A. Common Questions Predominate.

Plaintiffs seek to remedy common legal grievances related to Defendants' uniform time-keeping and payroll practices which are shared by all non-supervisory H-

[5] Since the amendment of Rule 23 in 2003, some courts have addressed adequacy of representation by counsel under Rule 23(g) rather than Rule 23(a)(4). Compare *In re Cree, Inc. Secs. Litig.,* 219 F.R.D. 369, 373 (M.D.N.C. 2003) (addressing adequacy of counsel under Rule 23(g)) with *LeBeau v. U.S,* 222 F.R.D. 613, 618 (D.S.D. 2004) (continuing to consider adequacy of counsel under Rule 23(a)(4)).

2B workers employed be Defendants and included within the class definition. Shared claims predominate over questions, if any, affecting only individual members of the putative class, and these common questions should be resolved on a classwide basis.

B. A Class Action is Superior to Other Methods of Adjudication.

A class action is also clearly superior to any other method, and very likely the only feasible method, of adjudicating the claims presented by Plaintiffs' complaint.

Individual actions, individually controlled by individual Plaintiffs, would burden both the Court and the class. The limited formal education, economic resources and English proficiency of most Plaintiffs, and their residency in Mexico would make individual actions impractical and serve as a deterrent to individual class members' enforcement of their rights. Rule 23(b)(3)(A). No other litigation concerning the issues raised by Plaintiffs' complaint has been commenced by or against class members. Rule 23(b)(3)(B). Concentration of the claims in a single forum is desirable, and this forum is appropriate. Rule 23(b)(3)(C). And the benefits of class treatment of the claims in Plaintiffs' complaint are substantial. Class litigation is no less manageable, Rule 23(b)(3)(D), in this case than in other cases in which the claims of migrant workers have been certified under Rule 23. *See generally, Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990) (class consisting of 1,349 workers); *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225 (7th Cir. 1983); *Alvarez v. Joan of Arc*, 658 F.2d 1217 (7th Cir. 1981); *Recinos, supra*; *Hernandez v. Kovacevich "5" Farms*, 2005 WL 2435906 (E.D. Cal. 2005) (AWPA class of more than 500 field laborers); *Martinez v. Mecca Farms, Inc.*, 213 F.R.D. 601 (S.D. Fla. 2002); *Saur v. Snappy Apple Farms, Inc.*, 203 F.R.D. 281 (W.D. Mich. 2001); *Rodriguez v. Carlson*, 166 F.R.D. 465

(E.D. Wash. 1996); *Leyva v. Buley*, 125 F.R.D. 512 (E.D. Wash. 1989); *Berrybrook Farms,* 672 F. Supp. 1009 (W.D. Mich. 1987); *Haywood v. Barnes*, 109 F.R.D. 568 (E.D.N.C. 1986).

IV. Plaintiffs' Counsel Will Fairly and Adequately Represent the Interests of the Class.

"In accordance with amended Rule 23(c)(1)(B) and new Rule 23(g), effective December 1, 2003, a court certifying a class must appoint class counsel. Fed.R.Civ.P. 23(c)(1)(B), 23(g)." *Coleman v. GMAC*, 224 F.R.D. 64, 99 (M.D. Tenn. 2004).

As set forth in the attached declarations, Plaintiffs' counsel are skilled litigators with significant experience both in class actions and migrant worker litigation and have committed resources sufficient to represent the class. App. 4-6. They will fairly and adequately represent the interests of the class and should be appointed class counsel.

CONCLUSION

For all the reasons stated above, with respect to the claims set forth in count I of Plaintiffs' complaint, Plaintiffs respectfully request that the Court enter an Order:

a) Certifying a class consisting of "all non-supervisory workers admitted as H-2B temporary foreign workers pursuant to 8 U.S.C. § 1101(a)(15)(H)(ii)(b) and who were employed by Defendants at any time from January 2000 to the present"; and

b) Appointing counsel for the Plaintiffs as counsel for the class.

Respectfully submitted,

s/ Joshua Karsh
One of the Attorneys for Plaintiffs

Joshua Karsh
Pro Hac Vice
Hughes, Socol, Piers, Resnick & Dym

70 W. Madison St., Ste. 4000
Chicago, IL 60602
312 580-0100
312 580-1994 (fax)

Tim A. Freilich
Pro Hac Vice
Legal Aid Justice Center
1000 Preston Ave., Ste. A
Charlottesville, VA 22903

Marni Willenson
Pro Hac Vice
Willenson Law Group, LLC
4308 N. Ridgeway Ave.
Chicago, IL 60618
312 546-4137
312 261-9977 (fax)

Mary C. Bauer
Kristi Graunke
Pro Hac Vice
Immigrant Justice Project
Southern Poverty Law Center
400 Washington Ave.
Montgomery, AL 36104
334 956-8200
334 956-8481 (fax)

James M. Knoepp
Pro Hac Vice
Virginia Justice Center for Farm and Immigrant Workers
6066 Leesburg Pike, Ste. 520
Falls Church, VA 22041
703 778-3450
703 778-3454 (fax)

C. David Briley
Tennessee PBR 18559
Briley Law Group, PLLC
511 Union St., Ste. 1610
Nashville, TN 37219
615 986-2684
615 986-7869 (fax)

Attorneys for Plaintiffs