Escolastico De Leon-Granados v. Eller & Sons Trees

United States District Court for the Northern District of Georgia, Atlanta Division
September 28, 2006, Decided ; September 28, 2006, Filed
CIVIL ACTION NO. 1:05-CV-1473-CC

Reporter: 2006 U.S. Dist. LEXIS 73781
ESCOLASTICO DE LEON-GRANADOS, ISAIAS PROFETA DE LEON-GRANADOS and ARMENIO PABLO-CALMO on behalf of themselves and all others similarly situated, Plaintiffs, vs. ELLER AND SONS TREES, INC. and JERRY ELLER, Defendants.

Subsequent History: Motion granted by, in part, Motion denied by, in part, Motion granted by De Leon-Granados v. Eller & Sons Trees, Inc., 452 F. Supp. 2d 1282, 2006 U.S. Dist. LEXIS 74058 (N.D. Ga., 2006)
Affirmed by De Leon-Granados v. Eller & Sons Trees, Inc., 2007 U.S. App. LEXIS 20961 (11th Cir. Ga., Aug. 31, 2007)

Counsel: [*1] For Escolastico De Leon-Granados, Rene Villatoro-De Leon, Margarito Recinos-Villatoro, Isaias Profeta De Leon-Granados, Armenio Pablo-Calmo, on behalf of themselves and all others similarly situated, Plaintiffs: Alex R. Gulotta, LEAD ATTORNEY, Legal Aid Justice Center, Charlottesville, VA; Andrew H. Turner, LEAD ATTORNEY, Kelley Bruner, LEAD ATTORNEY, Mary C. Bauer, LEAD ATTORNEY, Southern Poverty Law Center, Montgomery, AL; George Brian Spears, LEAD ATTORNEY, Law Office of Brian Spears, Atlanta, GA; James M. Knoepp, LEAD ATTORNEY, Tim A. Freilich, LEAD ATTORNEY, Virginia Justice Center for Farm and Immigrant Workers, Falls Church, VA.

For Osmar Osiel De Leon-Lucas, Nelson Ignacio Hernandez-Lopez, Marcial Sales-Diaz, Samual Eduardo Tecun, Ruben Perez-Lucas, Rosanio Concepcion-Matias, Felix Morales-Antonio, Protasio Burgos-Maldonado, Cristian Emilio Lucano Gutierrez, Agustin Soto Rios, Plaintiffs: George Brian Spears, LEAD ATTORNEY, Law Office of Brian Spears, Atlanta, GA.

For Alberto Diaz-Diaz, Jose Ruiz-Rodriguez, Juan Aguilar-Vasquez, Aureliano Rivas-Lucas, Plaintiffs: Andrew H. Turner, LEAD ATTORNEY, Kelley Bruner, LEAD ATTORNEY, Mary C. Bauer, LEAD ATTORNEY, Southern Poverty [*2] Law Center, Montgomery, AL; George Brian Spears, LEAD ATTORNEY, Law Office of Brian Spears, Atlanta, GA; James M. Knoepp, LEAD ATTORNEY, Tim A. Freilich, LEAD ATTORNEY, Virginia Justice Center for Farm and Immigrant Workers, Falls Church, VA.

For Sergio Roldan, Plaintiff: Andrew H. Turner, LEAD ATTORNEY, Kelley Bruner, LEAD ATTORNEY, Mary C. Bauer, LEAD ATTORNEY, Southern Poverty Law Center, Montgomery, AL; Tim A. Freilich, LEAD ATTORNEY, Virginia Justice Center for Farm and Immigrant Workers, Falls Church, VA.

For Alejandro Luis-Morales, Jose Maria Tomas-Recinos, Plaintiffs: Andrew H. Turner, LEAD ATTORNEY, Kelley Bruner, LEAD ATTORNEY, Mary C. Bauer, LEAD ATTORNEY, Southern Poverty Law Center, Montgomery, AL; George Brian Spears, LEAD ATTORNEY, Law Office of Brian Spears, Atlanta, GA; Tim A. Freilich, LEAD ATTORNEY, Virginia Justice Center for Farm and Immigrant Workers, Falls Church, VA.

Herman Osbeli Recinos-Martinez, Plaintiff, Pro se.

For Eller and Sons Trees, Inc., Jerry Eller, Defendants: James Larry Stine, Wimberly Lawson Steckel Nelson & Schneider, Atlanta, GA.

Judges: CLARENCE COOPER, UNITED STATES DISTRICT JUDGE.

Opinion by: CLARENCE COOPER

Opinion

CLASS CERTIFICATION [*3] **ORDER**

This matter is before the Court on Plaintiffs' Renewed Motion for Certification of Class Action [Doc. No. 63], Defendants' Motion for Leave to File Memorandum of Law in Surreply to Reply in Support of Plaintiffs' Renewed Motion for Class Certification [Doc. No. 86], Plaintiffs' Motion for Leave to File Supplemental Brief in Response to Defendants' Letter of June 28, 2006 [Doc. No. 93], and Defendants' Motion for Leave to File Response to Plaintiffs' Supplemental Authority in Support of Its Renewed Motion for Certification of Class Action [Doc. No. 99].

I. BACKGROUND

The above-styled action, brought by Escolastico De Leon-Granados, Isaias Profeta De Leon-Granados, and Armenio Pablo-Calmo (collectively referred to herein as "Plaintiffs") on behalf of themselves and all others similarly situated, asserts claims under the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§

1801-1871 (2005) ("AWPA") and under the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1998) ("FLSA"). The lawsuit arises from the alleged underpayment of wages and recruiting and [*4] record-keeping violations during Plaintiffs' employment by Defendants Eller and Sons Trees, Inc. ("Eller and Sons") and Jerry Eller (collectively referred to herein as "Defendants") as migrant tree planting workers at various times from June 1999 through the date of filing of the present action.

Plaintiffs commenced this action on June 6, 2005, and initially moved for class certification regarding the AWPA claims on June 29, 2005. On October 18, 2005, the Court denied Plaintiffs' motion without prejudice, ordering a period of discovery on issues pertaining to class certification. The Court, however, granted the preliminary certification of a collective action under 29 U.S.C. § 216(b). The Court directed Plaintiffs to renew their motion for class certification on or before January 31, 2006. On January 31, 2006, Plaintiffs filed their Renewed Motion for Certification of Class Action. Pursuant to *Federal Rule of Civil Procedure 23*, Plaintiffs seek certification of a class action under *subsection (b)(3)* as to the AWPA claims set forth in Count I of their First Amended Complaint.

Plaintiffs generally allege in Count I that [*5] Defendants failed to reimburse agricultural employees who traveled to work from Mexico, Guatemala, and Honduras certain travel, recruitment, and visa processing expenses to the extent that those costs reduced the wages of Plaintiffs and all of Defendants' other H-2B guestworkers below the mandated minimum and prevailing wage rates. Plaintiffs also allege that Defendants illegally required them and other members of a proposed sub-class to post collateral in the form of the deed to their homes or lands with Defendants' hiring agent abroad. Plaintiffs' other allegations generally relate to Defendants' alleged underpayment of Plaintiffs' wages and Defendants' alleged failure to keep accurate records of the hours worked by Plaintiffs and other migrant farmworker employees.

II. PRELIMINARY MATTERS

On March 31, 2006, Defendants filed a Motion for Leave to File Memorandum of Law in Surreply to Reply in Support of Plaintiffs' Renewed Motion for Class Certification. Defendants assert that a surreply is warranted because Plaintiffs, in their reply brief, make misstatements of applicable legal principles with respect to two (2) material issues and because Defendants have not previously [*6] had an opportunity to respond to the two (2) new issues. Plaintiffs filed a brief opposing Defendants' motion on April 13, 2006. Plaintiffs assert in their brief that this Court's Local Rules do not contemplate the filing of a surreply. Plaintiffs additionally take the position that Defendants have misstated the significance of the cases they cite in the proposed surreply. Insofar as the Court is of the opinion that Defendants have demonstrated adequate grounds for the filing of a surreply and Plaintiffs have responded substantively to the surreply, the Court **GRANTS** Defendants' Motion for Leave to File Memorandum of Law in Surreply to Reply in Support of Plaintiffs' Renewed Motion for Class Certification. Accordingly, the Court has considered the surreply brief and Plaintiffs' response to the brief in deciding the pending class certification motion.

On June 28, 2006, Defendants sent a two-page letter to the Court, offering for the Court's consideration an Eleventh Circuit opinion issued on March 29, 2006. Defendants quoted portions of two sentences from the decision and summarized the holding of the case. On July 10, 2006, Plaintiffs filed a Motion for Leave to File Supplemental [*7] Brief in Response to Defendants' Letter of June 28, 2006, and attached a ten-page brief. On July 13, 2006, Defendants filed a brief opposing Plaintiff's motion. As Defendants' letter is essentially a request that the Court consider supplemental authority, Defendants should have filed a document with the Court to bring the supplemental authority to the Court's attention rather than sending a letter. Typically, parties bring supplemental authority to the Court's attention either by filing a notice of supplemental authority or a motion for leave to file supplemental authority. Notwithstanding Defendants' failure to bring the supplemental authority to the Court's attention in the proper manner, the Court will, of course, consider the supplemental authority, as it is an opinion of the Eleventh Circuit bearing on the issue of class certification. However, insofar as Defendants did not extensively discuss the decision in their letter and the Court has the ability to independently review the opinion to determine its relevance, if any, to the above-styled action without the need for briefing from the parties, the Court **DENIES** Plaintiffs' Motion for Leave to File Supplemental Brief in [*8] Response to Defendants' Letter of June 28, 2006.

On August 30, 2006, Plaintiffs filed a document entitled "Supplemental Authority in Support of Plaintiffs' Renewed Motion for Certification of Class Action." The supplemental authority is a decision from the United States District Court for the Eastern District of Washington, certifying a class action brought under the APWA. On September 5, 2006, Defendants filed a Motion for Leave to File Response to Plaintiffs' Supplemental Authority in Support of its Renewed Motion for Certification of Class Action. Plaintiffs have not responded to this motion, and the Court thus deems the motion unopposed pursuant to Local Rule 7.1B. The Court accepts the Supplemental Authority in Support of

Plaintiffs' Renewed Motion for Certification of Class Action and **GRANTS** Defendants' Motion for Leave to File Response to Plaintiffs' Supplemental Authority in Support of its Renewed Motion for Certification of Class Action as unopposed.

III. STANDARD FOR CLASS CERTIFICATION

Class actions are authorized by *Federal Rule of Civil Procedure 23*. All class actions under *Rule 23* must meet the four prerequisites [*9] set forth in *Rule 23(a)* and at least one subsection of *Rule 23(b)*. See*Fed. R. Civ. P. 23*; see also Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1233 (11th Cir. 2000). Additionally, it must be established from the outset that the proposed class representatives have standing to pursue the claims as to which classwide relief is sought. Wooden v. Board of Regents of Univ. Sys. of Ga., 247 F.3d 1262, 1287 (11th Cir. 2001).

The party seeking to maintain the class action bears the burden of demonstrating that class certification is proper. Rutstein, 211 F.3d at 1233; Hudson v. Delta Air Lines, Inc., 90 F.3d 451, 456 (11th Cir. 1996). In determining whether plaintiffs have met their burden, the court's inquiry is limited to ascertaining whether the prerequisites of *Rule 23* are satisfied. Collins v. International Dairy Queen, Inc., 168 F.R.D. 668, 673 (M.D. Ga. 1996). The court considers any supplementary evidentiary materials the parties produce in addition to the complaint, but the court generally does not examine the merits of the case. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974) [*10] ("There is nothing in either the language or history of *Rule 23* that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."). Nevertheless, "evidence pertaining to the requirements embodied in *Rule 23* is often intertwined with the merits, making it impossible to meaningfully address the *Rule 23* criteria without at least touching on the 'merits' of the litigation." Cooper v. Southern Co., 390 F.3d 695, 712 (11th Cir. 2004) (citations omitted).

The court must perform a "rigorous analysis" in order to determine that the prerequisites of *Rule 23* are satisfied. General Tel. Co. of the Southwest v. Falcon, 457 U.S. 147, 161, 102 S. Ct. 2364, 72 L. Ed. 2d 740 (1982). The court has great discretion in certifying and managing a proposed class action. Heffner v. Blue Cross and Blue Shield of Alabama, Inc., 443 F.3d 1330, 1337 (11th Cir. 2006); Kilgo v. Bowman Transportation, Inc., 789 F.2d 859, 877 (11th Cir. 1986). Having applied the foregoing standard, the Court finds that Plaintiffs have met their burden of establishing [*11] the propriety of certifying a *Rule 23* class and sub-class.

IV. DISCUSSION

Plaintiffs seek in this action to represent a class consisting of:

> all those individuals admitted as H-2B temporary foreign workers pursuant to *8 U.S.C. § 1101(a)(15)(H)(ii)(b)*, who were employed in the Defendants' forestry operations from June 1999 until the present.(Pls.' First Am. Compl. P 34.) Plaintiffs also propose a sub-class, represented by Plaintiff Armenio Pablo-Calmo, consisting of:
>
> all those individuals admitted as H-2B temporary foreign workers pursuant to *8 U.S.C. § 1101(a)(15)(H)(ii)(b)*, who were employed in the Defendants' forestry operations from January 1, 2003 until the present who pledged collateral with the Defendants agents in order to obtain employment with the Defendants.(Pls.' First Am. Compl. P 35.) Plaintiffs contend that the requirements of *Rule 23(a)* and the predominance and superiority requirements of *Rule 23(b)(3)* are satisfied.

Defendants oppose class certification under *Federal Rule of Civil Procedure 23*, arguing primarily the following: (1) with [*12] respect to Plaintiffs' AWPA claims for improper recordkeeping resulting in improper payment of wages, individualized fact questions by far predominate over claims common to the class as a whole; (2) the procedures available under § 216(b) offer a superior method of adjudicating Plaintiffs' claims; and (3) the named Plaintiffs are not suitable class representatives. (Defs.' Opp'n to Pls' Renewed Mot. for Certification of Class Action at 1.)

A. Standing

To establish appropriate standing, only one named Plaintiff must possess the same interest as and suffer the same alleged injury as the class members. In re: Terazosin Hydrochloride Antitrust Litig., 220 F.R.D. 672, 683-84 (S.D. Fla. 2004). Having reviewed the allegations in Plaintiffs' First Amended Complaint and the evidence of record, the Court finds that the named Plaintiffs have standing to pursue the claims in Count I of the First Amended Complaint on behalf of the proposed class and that Plaintiff Pablo-Calmo possesses standing to pursue the AWPA claim regarding the posting of collateral on behalf of the proposed sub-class.

B. *Rule 23(a)*

Rule 23(a) sets forth four requirements that must be met before [*13] a case can proceed as a class action:

> 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.*Fed. R. Civ. P. 23(a)*. Courts commonly refer to the *Rule 23(a)* prerequisites as: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. Cooper v. Southern Co., 390 F.3d at 711 n. 6. The Court addresses each of these requirements in the context of this case in turn below.

1. Numerosity

The numerosity prerequisite of *Rule 23(a)* requires that the class and sub-class be so numerous that joinder of all members individually is "impracticable." *Fed. R. Civ. P. 23(a)(1)*. No specific numerical threshold is required. Rather, each case must be examined independently. General Tel. Co. v. E.E.O.C., 446 U.S. 318, 330, 100 S. Ct. 1698, 64 L. Ed. 2d 319 (1980). [*14] Generally, forty (40) or more members will satisfy the numerosity requirement. Cox v. American Cast Iron Pipe Co., 784 F.2d 1546, 1553 (11th Cir. 1986). Further, "impracticable" does not mean impossible. Rhodes v. Cracker Barrel Old Country Store, Inc., 213 F.R.D. 619, 674 (N.D. Ga. 2003). Plaintiff "'need only show that it would be extremely difficult or inconvenient to join all members of the class.'" In re Miller Indus., Inc. Secs. Litig., 186 F.R.D. 680, 685 (N.D. Ga. 1999) (quoting *In re Domestic Air Transp. Antitrust Litig., 137 F.R.D. 677, 698 (N.D. Ga. 1991)*). The size of the class, the geographical dispersion of the class, the ease of class member identification, the nature of the action, and the size of each class member's claim affect the practicability of joinder of the class members. Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030, 1038 (5th Cir. 1981); Reid v. Lockheed Martin Aeronautics Co., 205 F.R.D. 655, 666 (N.D. Ga. 2001).

According to the allegations of Plaintiffs' First Amended Complaint, the class is believed to include over 1,500 predominantly Guatemalan, [*15] Mexican, and Hungarian workers who planted trees and performed other forestry-related activities for Defendants. (Pls.' First Am. Compl. PP 2, 36.) Further, as pointed out in Plaintiffs' brief, Defendants' records show that 1,374 Guatemalan H-2B workers have been contracted just over the past three seasons, and it is undisputed that the overwhelming majority of these men posted their deeds with Defendants' labor contractors at the time of hire. The Court finds that joinder of all members of the proposed class and sub-class would be impracticable, as they are alleged to be geographically dispersed, relatively indigent, non-fluent in English, and unfamiliar with the American legal system. Further, the claims of the putative class members are alleged to be limited in size. (See Pl.'s First Am. Compl. PP 2-3, 36.) Defendants have not specifically challenged the class certification motion on the ground of numerosity. The Court finds that the numerosity requirement is met here for both the class and sub-class. See Recinos-Recinos v. Express Forestry, Inc., 233 F.R.D. 472, 478-79 (E.D. La. 2006) (finding that numerosity requirement was satisfied for similar reasons with [*16] respect to class of 300 migrant agricultural workers in almost identical action); Silva-Arriaga v. Texas Express, Inc., 222 F.R.D. 684, 688 (M.D. Fla. 2004) (finding that numerosity requirement was satisfied for similar reasons with respect to class of over 200 migrant agricultural workers); Rodriguez v. Carlson, 166 F.R.D. 465, 472 (E.D. Wash. 1996) (finding that numerosity requirement was satisfied for similar reasons with respect to class of 100 migrant workers).

2. Commonality

In order to maintain a class action, there also must be questions of law or fact common to the class and sub-class. *Fed. R. Civ. P. 23(a)(2)*. The commonality requirement "is not high, requiring only that resolution of the common questions affect all or a substantial number of the class members." Collins, 168 F.R.D. at 674. A single common question of law or fact is sufficient. Powers v. Stuart-James Co., 707 F. Supp. 499, 502 (M.D. Fla. 1989). In order to satisfy this requirement, the class action "must involve issues that are susceptible to class-wide proof." Murray v. Auslander, 244 F.3d 807, 811 (11th Cir. 2001). [*17]

Plaintiffs set forth the following common questions of fact with respect to members of the class: (1) whether Defendants violated their working arrangements with Plaintiffs and other putative class members by failing to furnish the terms and conditions of employment promised Plaintiffs in their contracts and required by federal law; (2) whether Defendants failed to reimburse Plaintiffs and other putative class members for visa processing and travel costs to the United States, incurred for the primary benefit of Defendant employers; (3) whether Defendants failed to pay Plaintiffs and other putative class members

their minimum, prevailing and overtime wages promptly when due; (4) whether Defendants, through their agents, knowingly provided the named Plaintiffs and other putative class members with false and misleading information about the work and its compensation; (5) whether Defendants made, kept and preserved accurate payroll records as required by the AWPA and its implementing regulations, with respect to the labor of Plaintiffs and the other putative class members; and (6) whether Defendants provided to Plaintiffs and other putative members of the class complete and accurate wage [*18] statements required by the AWPA and its implementing regulations on each payday. (Pls.' First Am. Compl. P 37; Pls.' Renewed Mot. at 4-6.) The common question of fact for the sub-class is whether Plaintiff Pablo-Calmo and other members of the proposed sub-class were required to post collateral, in the form of the deed to their land, with Defendants' recruiting agents abroad, in order to obtain work with Defendants. (Pls.' First Am. Compl. P 37; Pls.' Renewed Mot. at 5.)

Plaintiffs present the following common questions of law with respect to members of the class: (1) whether Defendants' failure to pay Plaintiffs and other putative class members the minimum, prevailing and overtime wage as required by the H-2B temporary foreign labor program violated the AWPA's working arrangement provisions; (2) whether Defendants' failure to pay Plaintiffs and other putative class members the minimum, prevailing and overtime wage as required by the H-2B temporary foreign labor program violated the AWPA's wage payment provisions; (3) whether the Defendants' failure to reimburse Plaintiffs and other putative class members for visa processing and travel costs to the United States, incurred for the primary [*19] benefit of the Defendant employers, violated the AWPA's working arrangement provisions; (4) whether Defendants' failure to reimburse Plaintiffs and other putative class members for visa processing and travel costs to the United States, incurred for the primary benefit of the Defendant employers, violated the AWPA's wage payment provisions; (5) whether Defendants' failure to make, keep and preserve accurate payroll records with respect to the labor of Plaintiffs and the other putative class members violated the AWPA; (6) whether Defendants' failure to provide Plaintiffs and other putative class members with complete and accurate wage statements on each payday violated the AWPA; and (7) whether Defendants' violations of the AWPA were "intentional" within the meaning of that statute. (Pls.' First Am. Compl. P 37; Pls.' Renewed Mot. at 6-8.) The common questions of law for the sub-class are the following: (1) whether the requirement that Plaintiff Pablo-Calmo and other putative class members sign over collateral in order to obtain employment with Defendants was void as an agreement purporting to waive or modify Plaintiffs' rights under the AWPA; (2) whether the requirement that Plaintiff [*20] Pablo-Calmo and other putative class members sign over collateral in order to obtain employment with Defendants violated the AWPA's working arrangement provisions; and (3) whether Defendants' violations of the AWPA were "intentional" within the meaning of that statute. (Pls.' First Am. Compl. P 37; Pls.' Renewed Mot. at 7-8.)

Defendants appear to concede commonality, although they heavily dispute predominance, as discussed infra. In any event, the factual and legal issues mentioned above demonstrate that Plaintiffs easily meet the requirement of commonality. As an initial matter, the members of the proposed class and sub-class share a common factual circumstance of having worked for Defendants as H-2B temporary workers. See Recinos-Recinos, 233 F.R.D. at 479 ("the members of the proposed class share a common factual circumstance of having worked for defendants as H-2B temporary workers"). Moreover, with respect to the proposed class, there are common questions of fact and law arising from, inter alia, Defendants' alleged failure to pay Plaintiffs and other putative class members prevailing and overtime wages promptly when due, Defendants' alleged failure to [*21] reimburse workers travel, recruitment and visa-processing costs, Defendants' alleged failure to maintain complete and accurate payroll records, and Defendants' alleged failure to provide Plaintiffs and other putative class members the terms and conditions of employment promised to them in their contracts and as required by federal law. With respect to the proposed sub-class, there are common questions of law and fact arising from Defendants requiring that Plaintiff Pablo-Calmo and other putative class members sign over collateral to obtain employment with Defendants. Accordingly, the Court finds that the commonality requirement of *Rule 23(a)(2)* is satisfied.

3. Typicality

Rule 23(a)(3) requires that the "claims or defenses of the representative parties [be] typical of the claims or defenses of the class." *Fed. R. Civ. P. 23(a)(3)*. The test of typicality is whether (1) other members have the same or similar injury; (2) the action is based on conduct which is not unique to the named plaintiffs; and (3) other class members have been injured by the same course of conduct. "Typicality measures whether a sufficient nexus exists between the [*22] claims of the named representatives and those of the class at large." Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1279 (11th Cir. 2000). "A sufficient nexus is established if the claims or defenses of the class and the class representatives arise from the same event or pattern or practice and are based on the same legal theory." *Kornberg v. Carnival Cruise Lines, Inc., 741 F.2d 1332, 1337 (11th Cir. 1984)*. This requirement does not

mandate that all putative class members share claims based on identical factual circumstances. Cooper, 390 F.3d at 714 (11th Cir. 1984). As such, "[a] factual variation will not render a class representative's claim atypical unless the factual position of the representative markedly differs from that of other members of the class." *Kornberg, 741 F.2d at 1337*. When there is a strong similarity of legal theories, even substantial factual differences will not bar class certification. Murray, 244 F.3d at 811.

Plaintiffs contend that their claims are typical of those of the putative class. That is, Plaintiffs seek declaratory relief, injunctive relief, and damages [*23] with respect to Defendants' alleged failure to make, keep and preserve accurate payroll records, issue accurate wage statements, honor their working arrangement and pay wages when due with respect to labor performed during the tree planting season. Defendants argue that the named Plaintiffs' claims are not necessarily typical of those of the putative class because the named Plaintiffs worked under different supervisors during various seasons. According to Defendants, even supervisors who worked under a single Regional Director varied in how they ran their crews and kept track of time. As the members of the putative class worked under supervisors reporting to different Regional Directors, Defendants argue that the experiences of Plaintiffs and other workers could vary depending on which Regional Director their supervisor worked under.

Having considered the parties' respective positions and the evidence of record, the Court finds that the claims of the named Plaintiffs are typical of the other putative class members, although the underlying factual circumstances may differ with respect to some of the claims. Notably, Plaintiffs allege that Plaintiffs and other putative class members [*24] spent considerable sums of money to process their H-2B work visas and to travel from their homes to the United States. (Pls.' First Am. Compl. PP 23, 44-50.) Based on facts learned through class certification discovery, Plaintiffs contend that Defendants had a company-wide policy of shifting to workers travel and visa-processing costs without ever reimbursing them. (See Deposition of Ismael Olegario Recinos "Recinos Dep." at 30-36, 97, Pls.' Ex. 32; Defs.' Resp. To Pls.' 1st Request for Admissions, # 55-58, Ex. 36.) As such, Plaintiffs argue and intend to prove that these expenses reduced the wages of all Eller & Sons H-2B workers in approximately the same amount, regardless of the specific type of work to which the workers were assigned, regardless of the U.S. state to which they were deployed for work, and regardless of the supervisors under whom the workers labored. Plaintiffs allege that the failure of Defendants to reimburse them and the other workers for these expenses caused them to earn less than the required minimum and prevailing wages in their first week of work in each of the last six seasons in violation of the AWPA. (Pls.' First Am. Compl. PP 23, 44-50.) This claim [*25] certainly is proper for class treatment under *Rule 23*.

Plaintiffs further allege in this case that Defendants violated the AWPA by maintaining and providing false and inaccurate records of hours worked by them and the other putative class members. (Pls.' First Am. Compl. PP 28, 52.) According to Plaintiffs, the evidence obtained thus far reveals that the time records Defendants kept are false and inaccurate in that they consistently and dramatically overstate lunch breaks taken by workers during the planting day, consistently fail to credit workers for time spent performing work activities other than planting, indicate dramatic variation of work hours among workers on the same crew who worked together on the same schedule, and curiously show start, stop and break times occurring exactly on the hour for a large proportion of workers. With respect to these allegations, particularly, Defendants argue that it will be difficult for Plaintiffs to have claims that are typical of other putative class members because there were over 150 crews with 75 different crew leaders, who maintained records and recorded hours differently, despite the set policies that Eller and Sons had in place. Plaintiffs [*26] point out, however, that all the field supervisors produced for deposition testified to recording the work hours of their crew members as they were taught by the Eller and Sons central office. (See Deposition of Ogler Roeli Castillo Recinos "Castillo Recinos" Dep. at 82-83, Pls.' Ex. 35c; Deposition of Edy Otoniel Figueroa Garcia "Figueroa Garcia Dep." at 37, Pls.' Ex. 43; Deposition of Oziel Villatoro Matias "Villatoro Matias Dep." at 59-60, Pls.' Ex. 44; Recinos Dep. at 93-94; Deposition of Argelio Enai Castillo Villatoro "Castillo Villatoro Dep." at 59, Pls.' Ex. 42; Deposition of Henry Bagner Villatoro Villatoro "Villatoro Villatoro Dep." at 46-47, Pls.' Ex. 45.) Plaintiffs also present evidence that the Eller and Sons central office checks the daily score sheets once they are received and investigates perceived problems in work hours reported by the field supervisors. (Eller and Sons Dep. at 158-159, Pls.' Ex. 33b1.) Thus, although Defendants assert that Plaintiffs do not take issue with Defendants' company policies, it appears that Plaintiffs do take issue with the manner in which supervisors are allegedly taught to record hours by the Eller & Sons central office and with [*27] the alleged failure of the central office to inquire about and address the alleged problems with the time records. Plaintiffs' theory is that the "false recordkeeping practices were a widespread phenomenon resulting from company policy that workers were paid on a piece rate basis and that timekeeping records should reflect workers' piece rate earnings and avoid the appearance of overtime hours." (Pls.' Br. at 14.) Likewise, Plaintiffs contend that there was a widespread company practice of not recording the time

for work performed by workers before the planting day began, notwithstanding the company's uniform policy to the contrary. Plaintiffs' theory is that Defendants overlooked deviations from company policy. These are only examples of the alleged company practices Plaintiffs seek to challenge on behalf of themselves and those similarly situated. While some facts may differ with respect to various class members, Plaintiffs' legal theories will be the same. Whether Plaintiffs will ultimately prevail on these theories is not the Court's concern at this stage. See Eisen, 417 U.S. at 177-78. Accordingly, these claims, and the related claim that Defendants have failed [*28] to pay Plaintiffs and the putative class members hourly and overtime wages, (see Pls.' First Am. Compl. PP 30-32, 44-45), are also proper for class treatment, as the claims of the named Plaintiffs in this regard will be typical of those of the putative class members.

Plaintiffs allege that Defendants violated the AWPA by failing to pay workers for full-time employment, as Defendants allegedly certified they would do when they applied for the H-2B work visas necessary to obtain work visas for Plaintiffs and other putative class members. (Pls.' First Am. Compl. P 26.) Plaintiffs present evidence that the named representative Plaintiffs have collectively been paid for an average of just 24 hours per weekly pay period. (See Affidavit of Sarah P. Reynolds "Reynolds Aff." P 11, Pls.' Ex. 46.) Plaintiffs believe that other members of the putative class likewise have not been paid for full-time employment. Plaintiffs contend that the failure to pay them and other members of the putative class for full-time employment constitutes a violation of their working arrangement under the AWPA and that the failure constitutes a failure to pay them their wages owed promptly when due in violation [*29] of the AWPA. (Pls.' First Am. Compl. PP 48-50.) The Court believes that this claim, too, satisfies the typicality requirement.

Plaintiffs finally contend with respect to the proposed class that Defendants knowingly provided them and the other members of the putative class with false and misleading information regarding the terms and conditions of their employment. Specifically, Plaintiffs allege that Defendants knowingly provided them and other members of the putative class false and misleading information in the guarantees of prevailing and overtime wages to be paid for all hours worked in violation of the AWPA. The claims of Plaintiffs and of the other putative class members in this regard obviously arise from the same course of conduct and are based on the same legal theory.

As to the proposed sub-class, Plaintiffs allege that Defendants required workers to leave the deeds to their property with their recruiters to obtain employment with Defendants. (Pls.' First Am. Compl. PP 4, 24.) Defendants acknowledge that workers relinquished their deeds or deeds of their friends or family members, but Defendants dispute that this was a requirement they imposed. Defendants point to evidence [*30] in the record showing that the workers came up with the idea to leave their deeds as a way to address the consulate's concern that workers were not returning to their home country after they left to go work in the United States for Defendants. (Deposition of Eller and Sons "Eller and Sons" Dep. at 56-58.) Plaintiffs, however, have presented the affidavit of one of Defendants' former employees who attests that he was actually precluded from employment because he was not a property owner capable of posting deed collateral. (See Affidavit of Tecun-Lucas P 5, Pls.' Ex. 41.) Whether Defendants actually required workers to leave deeds to obtain employment and whether any such requirement violated the law are matters to be resolved on the merits, and the Court does not address the merits at the class certification stage. See Eisen, 417 U.S. at 177-78. However, Plaintiffs have come forward with sufficient allegations and evidence to show that this claim is also typical of claims of putative class members of the proposed sub-class, as the claim arises from an alleged common practice of Defendants and allegedly injured Plaintiff Pablo-Calmo, the named representative for [*31] this sub-class, and other putative members of the sub-class in a similar way.

In sum, the Court finds that the typicality requirement is satisfied as to the putative class and sub-class because the claims of the named Plaintiffs are similar in all relevant aspects to those of the other members of the putative class and the claims of Pablo-Calmo are similar in all relevant aspects to the claims of the putative sub-class. The above-mentioned claims are not unique to Plaintiffs but are alleged to arise from a common course of conduct that injured all of the H-2B workers who were employed by Defendants during the relevant time period in a similar fashion. As Plaintiffs argue in their brief, "[i]f the named Plaintiffs are to succeed on their own claims, they must establish that Defendants violated the AWPA in precisely the same manner as is alleged with regard to the other class members." (Pls.' Br. at 39.)

4. Adequacy of Representation

The final requirement of *Rule 23(a)* is that the representative parties fairly and adequately protect the interests of the class. See*Fed. R. Civ. P. 23(a)(4)*. The purpose of the adequacy requirement is [*32] to protect the legal rights of absent class members. Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 726 (11th Cir. 1987). The court must inquire into whether the plaintiffs' counsel is qualified to carry out the litigation, "whether the plaintiffs have interests antagonistic to those of the rest of the class," and whether the plaintiffs possess the "personal

characteristics and integrity necessary to fulfill the fiduciary role of class representative." Id. at 726 (quoting Griffin v. Carlin, 755 F.2d 1516, 1532 (11th Cir. 1985)). A party's claim of representative status is defeated only if there exists a fundamental conflict between the representative and the class, going to the specific issues in controversy. Pickett v. Iowa Beef Processors, 209 F.3d 1276, 1280 (11th Cir. 2000).

Plaintiffs assert they will fairly and adequately represent the interests of the class. They further assert that Plaintiffs' interests are in no way antagonistic to those of the other class members. Plaintiffs represent that their counsel is experienced in federal court litigation under the AWPA and will vigorously prosecute this action on behalf of [*33] the class. According to the declaration of attorney Mary Bauer, the Southern Poverty Law Center has sufficient funds available to finance the costs of the litigation. (Declaration of Mary Bauer "Bauer Decl." P 5, Pls.' Ex. 6.)

Defendants contend that the named Plaintiffs are unsuitable class representatives, as they have made false statements during their depositions regarding the hours they worked and have invoked the *Fifth Amendment* privilege against self-incrimination to refuse to answer questions about whether they have worked for other employers in the United States. Defendants likewise assert that Plaintiffs' counsel is not adequate within the requirements of *Rule 23* because their willingness to advance costs is not without limitations. In that regard, Defendants present the declaration of former named Plaintiff Maragarito Recinos-Villatoro, [1] who declares that Andrew Turner, counsel of record for Plaintiffs, told him that if he did not continue in the lawsuit that he would have to reimburse the Southern Poverty Law Center for the cost of his travel, lodging, and other costs that were paid by them in connection with his deposition. (Declaration of Margarito Recinos-Villatoro [*34] "Villatoro Decl." P 3, Defs.' Ex. 5.) Mr. Recinos-Villatoro further declares that a woman who said she worked for the Southern Poverty Law Center called him after he withdrew the lawsuit and told him that Eller and Sons and the Southern Poverty Law Center had settled the lawsuit and that he could get money but that he would have to sign papers to do so. (Id.) The Court addresses these arguments below.

The Court rejects Defendants' argument that the named Plaintiffs are not suitable representatives because they have provided testimony that is unworthy of credence. [*35] Defendants assert that the named Plaintiffs provided unbelievable testimony regarding the hours they worked. Defendants point out, for example, that Isaias Profeta De Leon-Granados testified that he regularly worked until 7:00 p.m. during December through February but that he did not work in the dark. (Deposition of Isaias Profeta De Leon-Granados "Profeta De Leon-Granados Dep." at 22-23.) Defendants assert in a conclusory fashion that the testimony is difficult to believe, since the sun sets approximately between 5:00 pm and 5:30 pm during winter months in the southeastern United States where Plaintiffs were planting trees. However, in the absence of any evidence regarding when the sun sets and at what times it becomes "dark" outside, the Court is not willing to discredit the testimony of Isaias Profeta De Leon-Granados such as to declare him an unsuitable class representative, particularly since people could subjectively assess "dark" differently. [2]

[*36] Defendants next emphasize that, while Plaintiffs allege that Defendants made improper deductions from their pay for tools and transportation, the named Plaintiffs were unable to identify any such deductions on their pay stubs. (Profeta De Leon-Granados Dep. at 24-27; Deposition of Escolastico De Leon-Grandos at 18-22; Deposition of Armenio Pablo-Calmo "Pablo-Calmo Dep." at 24-25.) They each testified, however, that they had been told by their supervisors that the deductions were being made. (Profeta De Leon-Granados Dep. at 25; Escolastico De Leon-Granados Dep. at 19; Pablo-Calmo Dep. at 24-25.) In the Court's view, these issues need to be more fully developed before the named Plaintiffs' testimony is labeled "unbelievable" or "incredible." Thus, at this stage, the Court is not willing to find that the named Plaintiffs are inadequate as representatives based simply on questions about their deposition testimony that might be explained with additional discovery.

A more compelling argument made by Defendants is that the named Plaintiffs are unsuitable representatives because they invoked the *Fifth Amendment* privilege against self-incrimination when asked during their depositions whether [*37] they had worked in the United States for employers other than Defendants after leaving

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[1] Mr. Recinos Villatoro withdrew from the lawsuit on January 25, 2006, because of the threats and the pressure that he felt from the company Eller and Sons through his relative Ismael Recinos, the contractor for Eller and Sons, and from the community and because of the fears he had for his own safety and the safety of his family. (See Second Affidavit of Magarito Recinos Villatoro "Second Villatoro Affidavit" PP 4, 8, 12, 14, Pls.' Ex. 61.)

[2] The Court also notes that the business records of one of Defendants' customers indicate that the H-2B workers would load up trees after 3:30-4:00 pm and continue planting when it was too dark to see the trees. (See E-mail of Jeff Morris, dated Dec. 18, 2002, Pls.' Ex. 57.) Thus, the testimony of Plaintiffs that they would work around and after sunset is not wholly incredible.

employment with Defendants. Defendants argue that this information is relevant because of the claim that Defendants are liable to Plaintiffs and the putative class members for Defendants' alleged failure to reimburse visa costs and transportation expenses that Plaintiffs allege were incurred primarily for the benefit of Defendants. Defendants maintain that the employment history of the named Plaintiffs is relevant to the determination of whether the expenses were incurred primarily for the benefit of Defendants.

Plaintiffs counter that binding Eleventh Circuit authority requires that pre-employment expenses incurred primarily for the benefit of the employer be reimbursed during the first week of the employee's employment. See Arriaga v. Florida Pac. Farms, L.L.C., 305 F.3d 1228, 1237 (11th Cir. 2002) ("Workers must be reimbursed during the first workweek for pre-employment expenses which primarily benefit the employer, to the point that wages are at least equivalent to the minimum wage."); accord Marshall v. Root's Restaurant, 667 F.2d 559, 560 (6th Cir. 1982) (requiring [*38] restaurant to reimburse waitresses during first workweek for costs incurred by waitresses to purchase uniforms required for employment). Accordingly, Plaintiffs argue that the only relevant time period as it pertains to Plaintiffs' employment history is their first week of work in the United States subsequent to their arrival on H-2B visas. Because Plaintiffs are willing to answer any and all questions regarding their first week of work in each season, and all other weeks of employment by Defendants, and because Plaintiffs contend that questions regarding any other time period are improper and should not be asked in the first instance, Plaintiffs contend that their assertion of the *Fifth Amendment* privilege is irrelevant. In brief, Defendants reply that, although the law relied on by Plaintiffs addresses when expenses incurred primarily for the benefit of the employer must be paid, the law does not address the determination of whether expenses are incurred primarily for the benefit of an employer.

As the parties are aware, this is a legal issue that the Court must fully consider and resolve on the merits at an appropriate time in the litigation. However, if the issue is resolved in [*39] favor of Defendants, the Court understands that the interests of the named Plaintiffs in protecting themselves under the *Fifth Amendment* may become antagonistic to the interests of the putative class members, who may be adversely impacted by any adverse inference drawn based on the named Plaintiffs' assertion of the *Fifth Amendment* privilege. See, e.g., Arango v. U.S. Dep't of Treasury, 115 F.3d 922, 926 (11th Cir. 1997) ("the *Fifth Amendment* does not forbid adverse inferences against civil litigants … who assert the privilege against self-incrimination"); United States v. Two Parcels of Real Prop., 92 F.3d 1123, 1129 (11th Cir. 1996) ("the trier of fact may take an adverse inference against the parties to a civil action refusing to testify on *Fifth Amendment* grounds"). Nevertheless, as this is a legal issue going directly to the merits of Plaintiffs' claim that the Court should decide before prematurely deeming the named Plaintiffs inadequate, the Court will not at this time deny class certification based on the named Plaintiffs' assertion of the privilege, particularly since there is a possibility that the named Plaintiffs could be substituted. [*40] [3] Notwithstanding the foregoing, the Court is mindful that "basic consideration of fairness requires that a court undertake a stringent and continuing examination of the adequacy of representation by the named class representatives at all stages of the litigation where absent members will be bound by the court's judgment." Shroder v. Suburban Coastal Corp., 729 F.2d 1371, 1374 (11th Cir. 1984). Accordingly, the Court will adhere to this obligation and revisit this issue at its earliest opportunity after the legal issue is resolved.

With respect to Defendants' argument regarding the inadequacy of Plaintiffs' counsel, the Court finds that, notwithstanding the communications between Margarito Recinos-Villatoro and the [*41] staff of the Southern Poverty Law Center, the Southern Poverty Law Center adequately represents the proposed class and sub-class and is competent to pursue this litigation. As to the communications, attorney Andrew H. Turner has submitted an affidavit in which he avers that the Southern Poverty Law Center is a 501(c)(3), tax exempt, non-profit organization, which has policies against charging any clients for legal representation or for any costs of fees associated therewith. (Affidavit of Andrew H. Turner "Turner Aff." P 2, Pls.' Ex. 60.) He further avers that he never told Mr. Recinos-Villatoro that he had to reimburse costs to the Southern Poverty Law Center. (Id. PP 3, 6-7.) According to Mr. Turner, the retainer agreement that Mr. Recinos-Villatoro signed with the Southern Poverty Law Center clearly states, "SPLC agrees that it will provide legal services free and at no charge to me. SPLC will be responsible for paying litigation costs and attorney expenses incurred during the course of my representation." [4] (Id. P 5.) Mr. Turner further avers that, prior to Mr. Recinos-Villatoro's formal withdrawal from the case, he

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[3] As the adequacy of the named Plaintiffs may be challenged in the future, depending on the Court's ruling on the legal issue, the Court encourages Plaintiffs in the meantime to determine if there are other members of the class who might fairly and adequately represent the class.

[4] Plaintiffs offer to submit the retainer agreement to the Court under seal, but the Court finds that such action is not necessary.

did call Mr. Recinos-Villatoro, together with paralegal [*42] Sarah Reynolds, to inform him that counsel for Defendants had contacted him to indicate that he would be crafting a settlement offer in preparation of mediation in the case. (Id. P 7.) He further states that the purpose for the call was to ensure that Mr. Recinos-Villatoro wished to withdraw his claims, even in light of a probable exclusion from a possible settlement. (Id.) Upon being informed that Mr. Recinos-Villatoro still desired to withdraw, Mr. Turner filed Mr. Recinos-Villatoro's withdrawal from the lawsuit within a few days of the conversation. (Id. P 8.) There obviously are major discrepancies between Mr. Recinos-Villatoro's declaration and the affidavit of Mr. Turner. However, the existence of these discrepancies does not mandate an evidentiary hearing, as it would be impractical and an inefficient use of time and resources to require Mr. Recinos-Villatoro to travel from Guatemala to appear before the Court, particularly when there are several other factors establishing that the Southern Poverty Law Center will fairly and adequately protect the interests of the class.

[*43] The Southern Poverty Law Center has served as class counsel in eighteen cases over the course of the past thirty years. (See Affidavit of Rhonda Brownstein "Brownstein Aff." P 6, Pls.' Ex. 62.) Attorneys at the Southern Poverty Law Center have been class counsel in actions before the Supreme Court of the United States, the Eleventh Circuit, the Fifth Circuit, the Eastern District of Louisiana, the Middle District of Alabama, the Northern District of Alabama, and the Western District of Kentucky. (Id.) Mary Bauer, one of the attorneys for Plaintiffs in this action, is the director of the Southern Poverty Law Center's Immigrant Justice Project. (Bauer Decl. P 3.) For the past seven years, she has focused primarily on cases involving the employment rights of immigrant workers. (Id.) Some of the cases she has handled include large collective action cases under the FLSA, and she has also litigated numerous cases under the AWPA. (Id. P 4.) The Southern Poverty Law Center has sufficient funds and will advance all appropriate costs of the litigation. (Id. P 6.) Accordingly, while the averments of Mr. Recinos-Villatoro are concerning and taken seriously by the Court, the [*44] Court finds that the Southern Poverty Law Center "is qualified, experienced, and will competently and vigorously prosecute this suit." *Singer v. AT&T Corp., 185 F.R.D. 681, 690 (S.D. Fla. 1998)*. If circumstances so warrant, the Court will revisit the question of counsel's adequacy as this action progresses.

C. *Rule 23(b)(3)*

Having satisfied the prerequisites set forth in *Rule 23(a)*, Plaintiffs next must satisfy *Rule 23(b)(3)*.

1. Predominance

Federal Rule of Civil Procedure 23(b)(3) permits a class action if common questions of law or fact predominate over individual questions. "That common questions of law or fact predominate over individualized questions means that 'the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, must predominate over those issues that are subject only to individualized proof.'" Rutstein, 211 F.3d at 1233 (quoting Kerr v. City of West Palm Beach, 875 F.2d 1546, 1558 (11th Cir. 1989)). "Where, after adjudication of the classwide issues, plaintiffs must still introduce a great deal of individualized [*45] proof or argue a number of individualized legal points to establish most or all of the elements of their individual claims, such claims are not suitable for class certification under *Rule 23(b)(3)*." Klay v. Humana, 382 F.3d 1241, 1255 (11th Cir. 2004) (citation omitted).

Unsurprisingly, Plaintiffs take the position that the class claims in this case predominate over any question affecting the individual members of the putative class. Defendants argue, on the other hand, that individual questions predominate over common questions of law or fact with respect to Plaintiffs' allegations regarding inaccurate records of hours worked and resulting improper pay. Defendants assert that the claims of Plaintiffs and the other putative class members must be addressed on an individualized basis because of the many variations of the practices of the various crews. Defendants also contend that their assertion of the Motor Carrier Act affirmative defense will require individualized proof and weighs against class certification.

The common questions here represent a significant aspect of the case. The common questions here include, inter alia, the following: (1) whether Defendants [*46] violated the AWPA's arrangement and wage payment provisions by not reimbursing Plaintiffs and other putative class members their visa and travel expenses; (2) whether Defendants knowingly provided false and misleading information about the terms and conditions of employment; (3) whether Defendants failed to make, keep, and preserve accurate payroll records as required by the AWPA and its implementing regulations, with respect to the labor of Plaintiffs and other putative class members; and (4) whether Defendants' compensation practices violated the provisions of the AWPA. Defendants emphasize that the evidence presented by the parties thus far indicates that different supervisors recorded workers' time differently. However, Plaintiffs' argument is that the evidence reveals company-wide practices, such as failing to pay prevailing wages and overtime and failing universally to keep accurate records. Further, while "[a]ffirmative defenses should be considered in making class certification decisions," Smilow v. Southwestern Bell

Mobile Sys., Inc., 323 F.3d 32, 39 (1st Cir. 2003) (citation omitted), "[c]ourts traditionally have been reluctant to deny class action status [*47] under *Rule 23(b)(3)* simply because affirmative defenses may be available against individual members," id.; see also Hoxworth v. Blinder, Robinson & Co., 980 F.2d 912, 924 (3d Cir. 1992). Notably, in other actions whether the Motor Carrier Act affirmative defense or a like affirmative defense has been asserted, the assertion of that defense has not precluded *Rule 23* certification. See, e.g., Aguayo v. Oldenkamp Trucking, 2005 U.S. Dist. LEXIS 22190, No. CV F 04-6279 ASI LJO, 2005 WL 2436477 (E.D. Cal. Oct. 3, 2005); Scott v. Aetna Servs., Inc., 210 F.R.D. 261 (D. Conn. 2002); Kelley v. SBC, Inc., 1998 U.S. Dist. LEXIS 18643, No. 97-CV-2729 CW, 1998 WL 928302 (N.D. Cal. Nov. 13, 1998). In any event, should the Court later determine that the affirmative defense predominates over the many common questions in this case, there are several procedural mechanisms available to the Court that could sufficiently address that situation. See Smilow, 323 F.3d at 39-40. By way of example, the Court can decertify the class, create a sub-class of class members to whom the affirmative defense might potentially apply, or exclude those class members from the class altogether. In light [*48] of the foregoing, the Court concludes that the predominance of the common questions of liability is not negated by any of the issues that might require individualized determination.

2. Superiority

To satisfy *Rule 23(b)(3)*, it must also be shown that class treatment is a superior form of relief. The court must evaluate whether a class action is superior by examining four factors: (1) the interest of each class member in individually controlling the prosecution or defense of separate actions; (2) the extent and nature of any litigation concerning the controversy already commenced by or against the class; (3) the desirability of concentrating the litigation of the claims in the particular forum; and (4) the difficulties likely to be encountered in the management of a class action. *Fed. R. Civ. P. 23(b)(3)(A)-(D)*. The superiority requirement directs the Court's attention to "the relative advantages of a class action suit over whatever other forms of litigation might be realistically available to the plaintiffs." Klay, 382 F.3d at 1268. "Issues of class manageability encompass the 'whole range of practical problems that may [*49] render the class action format inappropriate for a particular suit.'" Andrews v. American Tel. & Tel., Co., 95 F.3d 1014, 1023 (11th Cir. 1996) (citation omitted).

Applying the superiority factors mentioned above, the Court first finds that there is no indication that any member of the proposed class or sub-class would prefer or be able to prosecute his or her own claim. Second, the Court is not aware of any other litigation concerning this controversy commenced by the class members. Third, class treatment of the claims under the AWPA would provide tremendous value to the class members in that it would allow them to avoid bringing separate lawsuits. The putative members of the class actually have little incentive to bring actions on their own, particularly given their relative indigency and the limited size of their claims. See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617, 117 S. Ct. 2231, 138 L. Ed. 2d 689 (1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."). Moreover, many of [*50] the putative class members are geographically dispersed, lack proficiency in the English language, and are not familiar with the American legal system. Fourth, while management of a class action might be somewhat difficult because of the individualized damages determinations that will be required, the individual damages issues are not complex enough to preclude class certification. See Haywood v. Barnes, 109 F.R.D. 568, 583 (E.D.N.C. 1986) ("The fact that the potential amount of damages might vary individually with the number of violations does not preclude class certification where common questions of law and fact as to liability clearly predominate. This argument has been rejected time and again by the courts in a multitude of factual settings.").

Defendants submit that the FLSA's procedures for a collective action under § 216 offer a superior method of proceeding. According to Defendants, most of the remedies Plaintiffs seek, including minimum wages, overtime pay and reimbursement of visa and transportation costs, are grounded in the FLSA. As such, Defendants argue that the FLSA has its own mandatory procedures for collective actions to which Plaintiffs must adhere [*51] to pursue those claims. Defendants, however, have cited no supporting authority for this position. By contrast, Plaintiffs have cited a persuasive case in which AWPA claims almost identical to the AWPA claims in this case were certified under *Rule 23*, while a FLSA collective action on different counts was simultaneously certified. See Recinos-Recinos, 233 F.R.D. at 472. Further, Plaintiffs convincingly argue that a § 216 collective action will not adequately address the AWPA claims of the migrant workers. First, while the FLSA claims are governed by a three-year statute of limitations, the AWPA claims are governed by a six-year statute of

limitations. [5] Second, a majority of the members of the proposed AWPA class were never identified as eligible for distribution of FLSA class-notice under § 216(b). Third, because the putative class members move frequently and are inaccessible through traditional mail, the opt-in procedure of § 216(b) is often unworkable.

[*52] Therefore, having considered the four criteria listed in *Rule 23(b)(3)* and all arguments presented by the parties, the undersigned finds that class treatment is a superior form of relief.

V. CONCLUSION

For the foregoing reasons, Plaintiffs' Renewed Motion for Certification of Class Action [Doc. No. 63] is **GRANTED**; Defendants' Motion for Leave to File Memorandum of Law in Surreply to Reply in Support of Plaintiffs' Renewed Motion for Class Certification [Doc. No. 86] is **GRANTED**; Plaintiffs' Motion for Leave to File Supplemental Brief in Response to Defendants' Letter of June 28, 2006 [Doc. No. 93] is **DENIED**; and Defendants' Motion for Leave to File Response to Plaintiffs' Supplemental Authority in Support of Its Renewed Motion for Certification of Class Action [Doc. No. 99] is **GRANTED** as unopposed.

The Court hereby **CERTIFIES** a class as to Count I of the First Amended Complaint defined as:

> all those individuals admitted as H-2B temporary foreign workers pursuant to *8 U.S.C. § 1101(a)(15)(H)(ii)(b)*, who were employed in the Defendants' forestry operations from June 1999 until the present.

The Court [*53] hereby **CERTIFIES** a sub-class as to Count I of the First Amended Complaint defined as:

> all those individuals admitted as H-2B temporary foreign workers pursuant to *8 U.S.C. § 1101(a)(15)(H)(ii)(b)*, who were employed in the Defendants' forestry operations from January 1, 2003 until the present who pledged collateral with the Defendants agents in order to obtain employment with the Defendants.

Additionally, pursuant to *Federal Rule of Civil Procedure 23(g)*, the Court **APPOINTS** the Southern Poverty Law Center as class counsel.

In order to fulfill the requirements of *Rule 23(c)(2)(B) of the Federal Rules of Civil Procedure*, the Court **ORDERS** the parties to confer and jointly draft a proposed notice of class certification no later than **Monday, October 16, 2006**.

The Court will hold a telephone conference in this case on **Wednesday, October 23, 2006, at 4:00 pm** to discuss the notice of class certification and the Request for International Judicial Assistance.

SO ORDERED this 28th day of September, 2006.

s/ CLARENCE COOPER

UNITED STATES DISTRICT [*54] JUDGE

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[5] The statute of limitations issue, which the parties have disputed at length in discovery motions, is discussed fully in this Court's discovery order, which is being filed contemporaneously with the instant Order.