IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

ESCOLASTICO DE LEON-GRANADOS, ISAIS PROFETA DE LEON-GRANADOS, and :

[1] The Court notes that the parties in this action have asserted voluminous facts in connection with the pending summary judgment motions totaling close to 400 pages, once responses to the facts have been considered. As such, specific facts pertaining to the specific legal issues presented will be addressed in Section V of the Order.

action lawsuit against Defendants Eller & Sons Trees, Inc. (referred to herein as "Eller and Sons Trees") and Jerry Eller (referred to herein as "Mr. Eller" or "Eller") (collectively referred to herein as "Defendants"). Eller and Sons Trees is a business located in Franklin, Georgia, that provides forest reforestation (tree planting) and forestry services such as brush clearing, boundary marking, and chemical spraying. Most of its employees are engaged in tree planting, predominantly in the southern United States during the months of December, January, and February. This is arduous work, and Eller and Sons Trees cannot find enough employees in the United States to perform the work. As a result, most of the workers come from outside of the United States. The vast majority come from Guatemala, although some come from Mexico, Honduras, and Colombia. Eller and Sons Trees obtains employees through the H-2B visa program, which allows the legal, temporary or seasonal employment of alien, nonimmigrant employees. Mr. Eller is the president, sole corporate officer, and owner of Eller and Sons Trees. As will be explained infra, he is active in the company's day-to-day operations and maintains significant control over the company.

The named Plaintiffs are three migrant farmworkers who were employed in Defendants' forestry operations at various times since June 1, 1999. Plaintiffs contend that they were denied protections due them under the Fair Labor Standards Act, 29 U.S.C. §§ 201-19 ("FLSA"), and under the Migrant Seasonal Agricultural Worker Protection Act, 29 U.S.C. §§ 1801-71 (1999) ("AWPA"), during the various times they were employed by Eller and Sons Trees.

In Plaintiffs' pending partial summary judgment motions, Plaintiffs seek determinations that Eller was an employer of the Plaintiff class, that Defendants violated certain of the AWPA's record keeping requirements, and that Defendants are liable for certain unreimbursed expenses. Defendants seek partial summary judgment on several different issues arising under the FLSA and AWPA and specifically seek determinations that (1) the FLSA does not apply to alleged violations committed in foreign countries; (2) Plaintiffs have no private right of action under the FLSA for alleged record keeping violations; (3) travel time before commencement of each day's work and after the end of work is not compensable under the FLSA; (4) reimbursement of visa expenses and costs incurred for travel

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[3] Insofar as both parties appear to agree that no claims will be pursued in this case pursuant to the FLSA for record keeping violations and that no claims will be pursued as to compensation for travel time before the commencement of work or after the end of work, the Court will not discuss these issues in this Order. To the extent that these claims were once asserted by Plaintiffs or were understood by Defendants as being asserted by Plaintiffs, the Court deems the claims abandoned and dismissed from the case.

omitted).

After examining the summary judgment motions that have been filed by the parties, the Court concludes that there is a substantial overlap of issues. In the interest of judicial economy, the Court has decided to consider the cross motions jointly. The Court has thoroughly considered all arguments made and evidence cited by the parties. Further, as the summary judgment standard requires, the Court construes the facts in the light most favorable to the nonmovant when the parties' factual statements conflict or inferences are required. Barnes v. Southwest Forest Indus., 814 F.2d 607, 609 (11th Cir. 1987).

Plaintiffs seek entry of partial summary judgment as to Mr. Eller's status as an "employer," as defined by the FLSA, 29 U.S.C. § 203(g), and as defined by the AWPA, 29 U.S.C. § 1802(5). Liability under the FLSA and AWPA is predicated on the existence of an employer-employee relationship.[4] Patel v. Wargo, 803 F.2d 632, 635 (11th Cir. 1986). Under Eleventh Circuit precedent, the determination of employment status under the FLSA and the AWPA is a question of law. Antenor v., 88 F.3d at 929. Thus, whether Mr. Eller was an employer of Plaintiffs, opt-in Plaintiffs, and the Rule 23(b)(3) class me

[4] Insofar as the FLSA and the AWPA use the same definition of the term "employ," see 29 U.S.C. § 203(g) and 29 U.S.C. § 1802(5), an entity that employs workers under one of these statutes necessarily employs the workers for purposes of the other statute. Antenor v. D & S Farms, 88 F.3d 925, 929 (11th Cir. 1996).

maintain that Plaintiffs were employed only by Eller and Sons Trees. For the reasons set forth below, the Court holds as a matter of law that Plaintiffs, opt-in Plaintiffs, and the Rule 23(b)(3) class members were employed by both Eller and Sons Trees and Mr. Eller.

"The overwhelming weight of authority is that a corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages." Patel, 803 F.2d at 637-38 (citations and internal marks omitted). The Eleventh Circuit has developed a disjunctive test to determine the FLSA liability of corporate officers. "To be personally liable, an officer must either be involved in the day-to-day operation or have some direct responsibility for the supervision of the employee." Id. at 638. Here, Mr. Eller was extensively involved in the day-to-day operation of Eller and Sons Trees and therefore was the employer of Plaintiffs, opt-in Plaintiffs, and the Rule 23(b)(3) class members along with the company.

The undisputed facts in this matter disclose that Mr. Eller has been the President of Eller and Sons Trees since 1992. As President, Eller has been empowered to perform and exercise all duties of the Chairman of the Board. Currently, Eller is listed as the Chief Executive Officer, Chief Financial Officer and Secretary of Eller and Sons Trees. In addition to holding several corporate office positions, Eller is the owner of Eller and Sons Trees and is the company's sole shareholder. Courts in the Eleventh Circuit have regarded such sole ownership as significant in imposing personal liability under the FLSA. Norton v. Groupware Int'l, Inc., No. 6:05-cv-1649-Orl-31DAB, 2007 WL 42955, at *3 (M.D. Fla. Jan. 4, 2007) ("It is undisputed that Dean is the sole shareholder and President of Groupware. Given his position, it seems clear that Dean qualifies as Norton's employer.").

Defendants also concede facts showing that Eller commingles his personal assets with those of Eller and Sons Trees. In this regard, Eller and his wife own the Franklin, Georgia, land and office buildings that Eller and Sons Trees uses. Eller personally co-financed the construction of his Franklin, Georgia, office building with Eller and Sons Trees. Eller maintains in an affidavit that he charges Eller and Sons Trees rent, but Eller testified unequivocally during his deposition that he does not receive rent from Eller and Sons Trees for the use of the Franklin, Georgia, land and facilities he owns personally. He clarifies in his affidavit that Eller and Sons Trees sometimes could not make payment. Likewise, Eller and Sons Trees employee and recruiting agent Ismael Recinos sometimes resides rent-free on land owned by Eller in his personal capacity. Eller has taken personal loans from Eller and Sons Trees on multiple occasions. Specifically, Eller has taken at least between $200,000.00 and $300,000.00 in loans from Eller and Sons Trees. Eller is the only individual who must authorize the personal loans he takes from Eller and Sons Trees. While Eller surmised during his deposition that records of the loans were maintained in the computer, no loan documents were created to memorialize the personal loans Eller most, significant decisions at Eller and Sons Trees, although he sometimes delegates certain decisions to be made by others. As President of Eller and Sons Trees, Eller is "charged with the general and active management of the business of the Corporation." (Pls.' Ex. 91.) Eller has the authority to unilaterally change the way workers are paid by Eller and Sons Trees, and he is ultimately responsible for making sure that workers are paid legally. Eller decides who is authorized to bid on contracts for forestry work on behalf of Eller and Sons Trees. Eller makes decisions about downsizing the operations of Eller and Sons Trees, and Eller has the ultimate responsibility for decisions about whether to sell Eller and Sons Trees, although he testified that he would discuss it with other people. In circumstances such as these, other courts have held a corporate officer liable as an employer. See Donovan v. Agnew, 712 F.2d 1509, 1511 (1st Cir. 1983) (holding corporate officers and board members liable where they were "actively engaged in the management, supervision and oversight of [the corporation's] affairs"); Recinos-Recinos v. Express Forestry, Inc.

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[5] In his affidavit, Eller attested that the company also found that workers would perform better having at least one day off in a week.

may take their chosen Sabbath day off work, but they cannot work on Saturdays because Eller's personal religious beliefs prohibit it. Eller ran daily staff and prayer

[6] In his affidavit, Mr. Eller states that "Mr. Recinos did not *necessarily* actively recruit workers but only assisted such workers with their necessary paperwork." (Eller Aff. ¶ 5.) This equivocal averment does not create a genuine disputed issue. Moreover, Defendants admit that Francisco Rubio, who worked as a supervisor for Eller and Sons

visa-processing agents abroad, through whom Eller and Sons Trees' H-2B forestry workers are processed. This evidence, too, supports holding Eller personally liable under the FLSA and the AWPA. See Reich, 998 F.2d at 329 (manager participating in hiring found to be employer); Donnovan, 747 F.2d at 972 (noting that the corporate officer personally selected the managers at every hotel); Schultz, 413 F.2d at 1300 (observing that president exercised hiring and firing authority over supervisory personnel); Hodgson v. Royal Crown Bottling Co., 324 F. Supp. 342, 347 (N.D. Miss. 1970) (holding that firing authority is indicative of employer status).

Defendants admit that Eller was involved in wage and hour matters at Eller and Sons Trees. In this regard, it is undisputed that Eller set up the pay structure for tree planters at Eller and Sons Trees. Eller has attended AWPA and FLSA compliance seminars on behalf of Eller and Sons Trees and has been the officer in charge of certifying the company's compliance with the provisions of those laws. Such facts have been considered significant by other courts in examining the issue of employer status. See Stout v. Smolar, Civil Action No. 1:05-CV-1202-JOF, 2007 WL 2765519, at *5 (N.D. Ga. Sept. 18, 2007) (holding individual defendant liable where he, among other things, made inquiries into the business' obligations under the FLSA); Donohue v. Francis Servs., No. Civ.A. 04-170, 2005 WL 1155860, at * (E.D. La. May 11, 2005) (finding individual liable as FLSA employer where he was "responsible for setting pay policies and for assuring that the company complied with all state and federal wage laws"). The pay checks that class members received

v. Crawford Indus. Group, LLC, NO. 6:06-CV-46-ORL-KRS, 2007 WL 1521520, at *2 (M.D. Fla. May 23, 2007). Eller consults with the Regional Directors regarding the productivity problems of individual tree planters, and he also is involved in deciding which training materials will be distributed to improve the performance of Eller and Sons Trees field workers. Defendants concede that Eller established Eller and Sons Trees' policy about recording workers' compensable hours and trained Eller and Sons Trees supervisors in recordkeeping.

In sum, while Defendants have disputed numerous facts asserted by Plaintiffs, and often without basis or legitimate reason,[7] those disputes are rendered immaterial by the facts that Defendants have admitted. Here, any reasonable finder of fact would conclude that Jerry Eller employed Plaintiffs, as the undisputed facts demonstrate that he is the lone corporate officer and sole shareholder with operational control over a covered enterprise. See Patel, 803 F.2d at 637. He most certainly was involved in the day-to-day operation of his business, and that others were also occasionally involved in operational aspects of the business is not a persuasive reason to conclude that Eller was not the employer of Plaintiffs. Defendants' admissions render appropriate the entry of partial summary judgment for Plaintiffs on this issue, and the Court therefore holds that Jerry Eller was their employer as defined by the FLSA, 29 U.S.C. § 203(g), and by the AWPA, 29 U.S.C. § 1802(5).

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[7] In this regard, the Court completely agrees with the analysis by Plaintiffs set forth in their Reply Brief in Support of Plaintiffs' Motion for Partial Summary Judgment Finding Employer Status of Defendant Jerry Eller at pages 14 through 29, and the Court need not repeat that analysis herein. The Court will briefly mention that certain facts asserted by Plaintiffs are denied by Defendants based on certain averments in Jerry Eller's supplemental affidavit that arguably contradict his prior deposition testimony. However, the Court will not strike the supplemental affidavit, as requested by Plaintiffs, as the averments in the affidavit could be construed as providing additional information about the issues in question. The Court finds the absence of a "flat contradiction." Tippins v. Celotex Corp., 805 F.2d 949, 951, 953 (11th Cir. 1986).

period in this case.[8] The minimum wage must be received "free and clear" of improper deductions. 29 C.F.R. § 531.35 (providing that wages must be "free and clear" of improper deduction); see also Arriaga v. Florida Pacific Farms, L.L.C., 305 F.3d 1228, 1241 (11th Cir. 2002) ("The FLSA prevents improper deductions from reducing the wages of a worker below the minimum wage....").

Under the definition of wages in 29 U.S.C. § 203(m), an employer may regard as wages the reasonable cost of providing "board, lodging, or other facilities" and thus may count them toward satisfying its minimum wage obligations. 29 U.S.C. § 203(m). Thus, in certain limited circumstances, an employer who provides meals or housing for workers may be credited for the reasonable cost of those "facilities" when compliance with minimum wage requirements is assessed. 29 C.F.R. § 531.32(a). The FLSA does not itself define "other facilities," but the United States Department of Labor (referred to herein as the "Department of Labor") has promulgated regulations to clarify this provision. See 29 C.F.R. § 531.32(a). Under these regulations, an employer may claim a wage credit for "other facilities" only when they are "something like board or lodging." Id.

Facilities that are primarily for the benefit or convenience of the employer, however, are never "other facilities" within the meaning of 29 U.S.C. § 203(m) and consequently may never be treated as wages. 29 C.F.R. § 531.32(c). Therefore, an employer may not deduct from employee wages costs incurred primarily for the employer's benefit if the deductions drive wages below the minimum wage. Arriaga, 305 F.3d at 1236.

In Arriaga, the Eleventh Circuit held that, under the FLSA, transportation and visa expenses such as those incurred by Plaintiffs in this case must be reimbursed by an employer, as they are "an incident of and necessary to the employment." Id. at 1242. Arriaga involved domestic agricultural employers who hired

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[8] The federal hourly minimum wage rose to $5.85 per hour on July 24, 2007.

nonimmigrant aliens from Mexico as farm laborers to work on a seasonal basis pursuant to the H2-A visa program. Laborers who passed the interview process paid for their own travel to the United States, visa costs, and miscellaneous recruiting fees. After deducting these expenses from wages earned, the laborers' net income fell below the statutory minimum wage. In concluding that the expenses had to be reimbursed where failure to do so would drop the employees' wages below the minimum wage, the Arriaga court determined that the costs were "an inevitable and inescapable consequence of having foreign ... workers employed in the United States." Id.

("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."). It is undisputed that during Plaintiffs' first workweeks in Defendants' employ, they worked only in the United States. As the claim for unreimbursed expenses did not arise until after Plaintiffs were in the United States, no extraterritorial application of the FLSA is implicated, and the cases relied on by Defendants, including Reyes-Gaona v. North Carolina Growers Ass'n, 250 F.3d 861 (4th Cir. 2001), do not require a contrary conclusion.

Indeed, the authority cited by Defendants proves this point. Section 213(f) of the FLSA provides that the minimum wage and overtime provisions of the FLSA do not apply "to an employee whose services during the workweek are performed in a workplace within a foreign country." 29 U.S.C. § 213(f). Similarly, the cases cited by Defendants also address situations where the violation at issue occurred outside the United States. See, e.g., Roe v. Bridgestone Corp., 492 F. Supp. 2d 988, 1000 (S.D. Ind. 2007). Insofar as the FLSA violations claimed by Plaintiffs in this case occurred within the United States when Defendants failed to reimburse them, the cases Defendants cite demonstrate that no genuine extraterritorial application of United States law is required. Defendants' Motion for Partial Summary Judgment seeking a determination that the FLSA does not apply under the circumstances presented is denied.

A persuasive case that the Court also finds instructive in this regard was decided just this year. See Rivera v. Brickman Group, Ltd., No. 05-1518, 2008 WL 81570 (E.D. Pa. Jan. 7, 2008). In Rivera, a group of H-2B landscapers filed suit for minimum wage violations arising from their employer's failure to reimburse them for travel, visa, and passport expenses. The defendants argued, among other things, that the Immigration and Nationality Act (the "INA") did not require them to reimburse these costs and that the INA superceded the FLSA. The Court rejected this argument and applied Arriaga to determine that the H-2B plaintiffs were

United States visa and traveling to the United States as necessary costs for being able to come work for Eller and Sons Trees. Unless the workers already had passports, the workers had to pay the costs for passports as well as visas. All H-2B workers from Guatemala had to pay a $100 visa fee, in addition to processing fees. Honduran and Mexican workers also had to pay travel, passport, and visa costs. For the time period relevant to this lawsuit, the cost of a five-year passport for a Honduran H-2B forestry worker was $35.00. Thus, like the costs described in Arriaga, Plaintiffs' visa, passport, and travel costs were incidents of and necessary to their employment with Defendants.

Additionally, the passport, visa, and travel costs were not expenses Plaintiffs would have incurred in the ordinary course of life, such as board and lodging. See 29 C.F.R. § 531.32(a). Plaintiffs who did not have passports were required to obtain passports as a necessary first step to participating in the H-2B program, as non-immigrant temporary workers, such as H-2B workers, cannot enter the United States

Based on those facts that are undisputed in this case, the Court finds that the FLSA claimants seeking partial summary judgment incurred passport, visa, and travel costs that were primarily for the benefit of Defendants. Accordingly, like the many other courts that have followed Arriaga, the Court finds as a matter of law that Plaintiff's transportation, visa, and passport costs are expenses incurred primarily for the benefit of their employers.[10] See, e.g., Morante-Navarro v. T & Y Pine Straw, Inc., 350 F.3d 1163, 1166 n.2 (11th Cir. 2003); Castellano-Contreras, 488 F. Supp. 2d at 571-72 & n.5; Recinos-Recinos, 2006 WL 197030, at *14. To the extent that these expenses reduced Plaintiffs' and opt-in Plaintiffs' wages below the minimum wage, these workers are due to be reimbursed. Given this conclusion, the Court denies Defendants' Motion for Partial Summary Judgment seeking a determination that the reimbursement of visa expenses and costs incurred for travel from the home country to the United States to begin new work is not required for H-2B workers.

Defendants argue that they are entitled to a complete defense to liability, as provided in the Portal-to-Portal Act, 29 U.S.C. § 259. Section 10 of the Portal-to-Portal Act provides that an employer shall not be liable for failure to pay wages if the employer pleads and proves that its actions were "in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation" of the Administrator of the Wage and Hour Division of the Department of Labor. 29 U.S.C. § 259. To meet this burden, Defendants must

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[10] The Court notes that Defendants attempt to argue, without even colorable record support, that the workers at issue in this case were not hired until after they had traveled from their respective countries to the United States and arrived in Franklin, Georgia. The record evidence shows that Defendants considered Plaintiffs their employees during the recruitment process in their home countries. (See Defs.' Ex. 2 at 4-6; Eller Dep. at 129-131; Deposition of Eller and Sons Trees "Eller and Sons Trees Dep." at 49.) The evidence cited by Defendants to support their characterization of the workers as "job applicants" does not support the characterization. The Court, accordingly, rejects Defendants' argument.

have acted in actual reliance on and in actual conformity with this guidance. 29 C.F.R. §§ 790.14(a); 790.16(a). In their briefing on these summary judgment issues, Defendants claim to have relied on Employment and Training Administration Guidance Letter 23-01 and 20 C.F.R. § 655.731(c)(9)(iii)(c) in refusing to pay relocation expenses. Contrary to this assertion, however, Defendants have not pointed to any evidence of record demonstrating that Defendants actually relied on Guidance Letter 23-01 or 20 C.F.R. § 655.731(c)(9)(iii)(c). Tellingly, in discovery, Plaintiffs specifically sought from Defendants information and documents concerning what they relied on in asserting this defense to liability. Defendants did not mention or produce Guidance Letter 23-01 or 20 C.F.R. § 655.731. Pursuant to Federal Rule of Civil Procedure 37(c)(1), any evidence of such reliance on this Guidance Letter or 20 C.F.R. § 655.731 likely would be inadmissible, in any event. Fed. R. Civ. P. 37(c)(1) ("If a party fails to provide information ... as required by Rule 26(a) or (e), the party is not allowed to use that information ... to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless."). Even if Defendants had properly presented evidence of such reliance, such reliance would offer no safe harbor under 29 U.S.C. § 259 because Guidance

Next, arguing that Plaintiffs cannot show that Defendants "willfully" violated the FLSA, Defendants seek a ruling that the FLSA two-year statute of limitations

[11] Relying on the affidavit of Mr. Oxent

(E.D.N.C. 2004). In light of this letter, applicable.

Plaintiffs and opt-in Plaintiffs have suffered damages as a consequence of Defendants' actions. In their first workweeks, they not only failed to receive the minimum wage, they actually had negative incomes. As established by the evidence of record and the Affidavit of Dr. Dwight D. Steward, in particular, FLSA violations did occur. Based on Dr. Steward's testimony and the stipulations the parties have entered into that cover almost all of the amounts of incurred expenses claimed by the Plaintiffs and opt-in Plaintiffs, the Court finds that Plaintiffs and opt-in Plaintiffs are due to be reimbursed unpaid minimum wages in the amount of $26,945.43.

Plaintiffs and opt-in Plaintiffs are also entitled to liquidated damages as a matter of law, as Defendants cannot show that their refusal to reimburse was in good faith and objectively reasonable. To avoid liquidated damages, the employer carries a substantial burden to prove that it had "an honest intention to ascertain what [the FLSA] requires and to act in accordance with it." Dybach v. State of Florida Dep't of Corrections, 942 F.2d 1562, 1566 (11th Cir. 1991) (internal quotation marks omitted and alteration in original); Barcellona v. Tiffany English Pub, Inc., 597 F.2d 464, 467 (5th Cir. 1979). In addition to this subjective test, the employer must also prove that its belief that its policy complied with the FLSA was objectively reasonable. Dybach, 942 F.2d at 1567. If the employer fails to come forward with plain and substantial evidence to satisfy both the good faith and reasonableness requirements, the court is required to award liquidated damages. See Williams v. Tri-County Growers, Inc., 747 F.2d 121, 129 (3d Cir. 1984). Based on the evidence that this Court has already reviewed and discussed herein, the Court finds that Defendants have not met the requisite substantial burden, and the Court accordingly awards Plaintiffs and opt-in Plaintiffs an amount equal to their unpaid minimum wages as liquidated damages. See 29 U.S.C. § 216(b).

In sum, Plaintiffs are entitled to partial summary judgment in the amount of $53,890.86 with respect to that part of Plaintiffs' and opt-in Plaintiffs' FLSA claims related to unreimbursed expenses during their first workweeks.

Defendants move the Court for summary judgment seeking a determination that failure to pay relocation costs is not a violation of the AWPA. Plaintiffs, on behalf of themselves and the Rule 23(b)(3) class members they represent, request entry of partial summary judgment against Defendants with respect to liability based on Defendants' alleged failure to reimburse expenses incurred primarily for Defendants' benefit and convenience, to the extent that those expenses dropped the wages of the H-2B guestworkers they employed below the H-2B prevailing wage or, alternatively, below the federal minimum wage. Here, the Court likewise concludes that Defendants are not entitled to summary judgment and that Plaintiffs and the Rule 23(b)(3) class members are entitled to summary judgment on their AWPA claims related to travel, visa, and passport expenses. The Court further finds that

Inc., 96 F. Supp. 2d 578, 612 (W.D. Tex. 1999).

In the instant case, the named Plaintiffs and the Rule 23(b)(3) class members they represent are temporary foreign workers brought to the United States under the H-2B guestworker program. 8 U.S.C. § 1101(a)(15)(H)(ii)(b). In order to obtain H-2B certification, a prospective H-2B employer must certify to the Department of Labor that the alien's employment would not adversely affect wages of similarly situated workers in the United States. 8 C.F.R. § 214.2(h)(6)(iv)(A)(1). As a consequence, employers of H-2B workers must pay them an hourly prevailing wage rate determined by the State Employment Security Agency in the area where the work will be performed. This prevailing wage rate must be checked by the Department of Labor certifying officer to ensure that the offered wages and working conditions do not adversely affect domestic workers. 20 C.F.R. § 655.3. In addition to benefitting the H-2B workers themselves, these prevailing wage rates protect domestic workers by ensuring that an employer's hiring of foreign guestworkers does not drive down local wages. See Feller v. Brock, 802 F.2d 722 (4th Cir. 1986).

Plaintiffs state that the H-2B prevailing wage rates applicable to Plaintiffs and Rule 23(b)(3) class members varied between $5.15 per hour (for Minnesota and Maine in 1999) and $11.37 per hour (for Montana in 2004-2007) for the years at issue here. Defendants' ETA-750 Applications for Alien Labor Certification listed the prevailing wage that H-2B workers would receive for their work with Defendants. Moreover, it is undisputed that the prevailing wage rates for each season were listed on the required disclosures Defendants provided workers under the AWPA. Mr. Eller distributed these disclosures to workers at recruiting meetings in Guatemala.

This required prevailing wage is precisely the wage protected by section 1822(a) of the AWPA. See De Leon-Granados v. Eller and Sons Trees, Inc., 497 F.3d 1214, 1219 (11th Cir. 2007) ("The workers are entitled to recover the prevailing wage rate under the AWPA and only the minimum wage rate under the FLSA."); (see also Pls.' Ex. 130 [U.S. Department of Labor Field Assistance Bulletin No. 2007-1]).

Accordingly, and as recognized by the Eleventh Circuit in this very case, the AWPA wage payment provision stated in Section 1822(a) incorporates the H-2B prevailing wage requirement.

Further, the Court finds that the H-2B prevailing wage is incorporated into the working arrangement between Eller and Sons Trees and its workers under 29 U.S.C. § 1822(c). Defendants provided each worker with a disclosure indicating the prevailing wage rates they would be paid in different states in the coming tree planting season. By promising workers these wages, Defendants became obligated to pay them under the AWPA. See Castillo, 96 F. Supp. 2d at 612; Martinez v. Shinn, No. C-89-813-JBH, 1991 WL 84473, at *17 (E.D. Wash. May 20, 1991); Villalobos, 1991 WL 311902, at *7.

Defendants argue that their disclosure of their non-reimbursement policy to their employees and that the purported approval of their AWPA disclosure letters by the Department of Labor brings them in compliance with the AWPA and prevents them from having a duty to reimburse the expenses incurred for their benefit. Defendants are misapplying the law and are not fairly representing the facts. Contrary to Defendants' suggestion, there is no evidence that Defendants' AWPA disclosure letters were regularly submitted to or approved by the Department of Labor. Furthermore, even if the AWPA disclosure letters weretetters w to their employees, they cannot be liable for that practice. This argument presents a closer question, when considering the basis for Plaintiffs' and the Rule 23(b)(3) class members' claims under a breach of contract theory. Nevertheless, after carefully considering the arguments of the parties, the Court rejects Defendants' suggestion that they should essentially be able to enter into a contract that would allow them to violate the law, so long as the other contracting parties agree.[12] As Plaintiffs argue, if Defendants disclosed a policy of paying workers only $3.00 per hour, for example, the mere fact of disclosure would not make this an acceptable pay rate under the AWPA. In this same vein, Defendants cannot transform the minimum wage violations arising from non-reimbursement of employee expenses into acceptable practice merely by announcing them to employees.

While Plaintiffs have admitted that no one at Eller and Sons Trees promised or informed them that they would be provided reimbursement for travel and visa expenses to come work for Defendants under the H-2B program, employees cannot waive their rights to the protections under the AWPA, including the right to be paid wages when due. See 29 U.S.C. § 1856; see also Villalobos v. North Carolina Growers Ass'n, 252 F. Supp. 2d 1, 10 (D.P.R. 2001); Maldonado v. Lucca, 636 F. Supp.

[12] In fact, Defendants only disclosed their non-payment of transportation expenses to their employees starting in the year 2000. Hence, for 1999, Defendants' argument on this point is simply incorrect. (Pls.' Ex. 110 at 1-5.) Further, while Defendants disclosed that employees would be responsible for their own transportation costs, their disclosures do not include the costs of passports, visas, recruitment fees, and I-94s. (Pls.' Ex. 110.)

V.B. of this Order and need not repeat that analysis here.

The evidence of record shows that Defendants violated § 1822 of the AWPA by failing to reimburse workers for the passport, visa, and travel costs they incurred for Defendants' primary benefit. Where an employer is required to pay a prevailing wage higher than the federal minimum wage, an employer is precluded from making deductions for its own benefit that reduce employee pay below the mandated prevailing wage. Avila-Gonzalez v. Barajas, No. 2:04-CV-567, 2006 WL 643297, at *2 (M.D. Fla. Mar. 2, 2006). Here, as stated supra, class members incurred significant costs that were primarily for the benefit or convenience of Defendants. Because these costs had the same legal effect as a deduction from employees' wages, Arriaga, 305 F.3d at 1236, Plaintiffs and the Rule 23(b)(3) class members did not receive the promised prevailing wage during their first workweeks of employment.

The Court accepts Plaintiffs' position that the costs incurred by workers, as discussed with respect to the FLSA claims supra, are representative of those incurred by the other class members. The evidence of record makes clear that Defendants required all H-2B guestworkers employed by them to pay their own passport, travel, visa, and other expenses. All of the H-2B workers employed by Defendants incurred similar, although not identical, expenses in obtaining work with Eller and Sons Trees. As explained supra, Defendants failed to pay the required minimum wage under the FLSA. As such, they necessarily also failed to pay Plaintiffs and the Rule 23(b)(3) class members the higher H-2B prevailing wage required by the AWPA.

In sum, the undisputed facts show that all of Defendants' H-2B workers incurred passport, visa, and transportation costs. Further, Defendants admit that they did not reimburse these costs. For the same reasons that the Court determined Defendants willfully violated the FLSA, the Court likewise finds that Defendants' violations of the AWPA were intentional and a part of Defendants' normal business practices. See Alvarez v. Joan of Arc, Inc., 658 F.2d 1217, 1224 (7th Cir. 1981);

Stewart v. Everett, 804 F. Supp. 1494, 1498 (M.D. Fla. 1992). As such, as a matter of law, Defendants' failure to comply with th

(F) the net pay; and

(2) provide to each such worker for each pay period, an itemized written statement of the information required by paragraph (1) of this subsection.

See 29 U.S.C. § 1821(d); see also

Defendants contend that the pay documents demonstrate compliance with the AWPA.

Plaintiffs maintain, pointing to evidence in the record, that the payroll documents fail to show an accurate number of piecework units completed by Eller and Sons workers in the corresponding workweek. Plaintiffs specifically point to the following errors in this regard: (1) although planting works were normally paid by the tree planted, Eller and Sons supervisors estimated the number of trees that were in the seedling bundles the workers planted, using educated guesses to derive piece rate totals; (2) some supervisors awarded trees workers did not actually plant to their workers' piece rate accounts as a kind of bonus; (3) supervisors attributed trees a worker planted on one work day to that worker's piece rate tally for the following work day; and (4) Eller and Sons supervisors compensated the performance of non-planting work – properly compensable on an hourly basis – not by recording hours worked but by adding fictitious trees, not actually planted, to the piece rate totals of workers performing this work.

Plaintiffs also maintain, pointing to evidence in the record, that the payroll within the meaning of the AWPA, Defendants aptly point out that over the 7-year limitations period that applies in this action, Defendants had roughly 4,000 employees from approximately 250 crews reporting to well over 75 different crew leaders throughout the planting seasons. A season itself consisted of at least three months of planting, but generally six months for some crews. There were roughly 5 to 6 days of planting a week. For each day of planting or spraying, the crew leaders kept the aforementioned daily sheets. The number of daily sheets relevant to this action exceeds 50,000. Yet, the daily sheets that Plaintiffs rely on to support entry for partial summary judgment total close to only 100.

Plaintiffs move for entry of partial summary judgment also based, in part, on the deposition testimony of 15 of the 16 crew leaders who were deposed in the action. Some crew leaders or field supervisors did admit to making mistakes in record keeping, on occasion, and to taking actions that would run afoul of the AWPA's record keeping provisions, such as compensating workers who helped load seedlings for planting by adding trees, which those workers did not actually plant, to their piece rate records of trees planted on the daily sheets. Still, the Court cannot conclude on this evidence, alone, that the violations were so widespread so as to warrant a finding of liability with respect to the class.

Unlike many other cases where partial summary judgment has been granted to plaintiffs as to record keeping violations, the violations in this case are not undisputed or blatantly widespread. See Cardenas v. Farms, No. IP 98-1067-C T/G, 2000 WL 1372848, at *13 (S.D. Ind. Sept. 19, 2000) (granting partial summary judgment where "[t]he record contain[ed] no evidence that the [defendants] made, kept or preserved pay records or pay statements for each Worker Plaintiff" and where the defendants "fail[ed] to provide to each worker for each pay period an itemized statement of the information required in § 1821(d)(1)); Elizondo v. Podgorniak, 70 F. Supp. 2d 758, 777 (E.D. Mich. 1999) (granting plaintiffs summary judgment where defendants admitted that they did not make, keep, or preserve the number of hours plaintiffs worked); Cruz v. Vel-A-Da, Inc., No. 3:90CV7087, 1993 WL 659255, at *4 (N.D. Ohio Jan. 8, 1993) (granting summary judgment where the defendants admitted that their records listed the labor of multiple individuals under a single worker's name and where the defendants failed to provide the information required in § 1821(d)(1) to each worker for each pay period). The Court therefore takes great caution before finding the existence of liability on a class-wide basis.

Plaintiffs do rely on the report of an expert witness, Jorge J. Rivero, to support their position that the record keeping violations in this case were widespread. However, Defendants challenge whether Mr. Rivero's expert report should be considered. Four months after briefing on this partial summary judgment motion concluded, Defendants moved the Court to exclude Mr. Rivero as an expert witness and to strike his expert report. Defendants specifically urge in that motion that the Court should not consider the report in adjudicating this pending summary judgment motion. After reviewing Defendants' Motion to Strike and the briefing related thereto, the Court has determined that an evidentiary hearing should be held to determine the admissibility of Mr. Rivero's testimony. Further, because the present record, without considering Mr. Rivero's testimony, does not demonstrate that Plaintiffs are entitled to summary judgment, the Court finds that Plaintiffs' Motion for Partial Summary Judgment Finding Violations of AWPA Recordkeeping Requirements should be denied without prejudice at least until such time as this Court can conduct the hearing pursuant to Daubert v. Merrell Dow Pharms., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993) and determine whether Mr. Rivero's expert report is admissible.

The Court likewise finds that Defendants' Motion for Partial Summary Judgment seeking a determination that their payroll information meets the AWPA's requirements as to 29 U.S.C. § 1821(d)(2) is likewise due to be denied at this time. Subsection (d)(2) specifically requires that the pay stubs distributed to workers contain the information required by subsection (d)(1). If the information required by subsection (d)(1) is inaccurate, as Plaintiffs maintain and have shown with some of the evidence in the record, then the pay stubs provided to the employees are likewise inaccurate and do not comply with § 1821(d)(2). See Sanchez, 845 F. Supp. at 1190. Nevertheless, before ruling as a matter of law that Defendants did or did not comply with § 1821(d)(2) with respect to the Plaintiff class, the Court will consider the admissibility of Plaintiffs' proposed expert testimony.

Defendants next move the Court for a summary judgment determination that damages under the AWPA are limited to $500,000, since this case has been certified as a class action. This summary judgment request presents solely a legal issue about which the parties disagree.

Section 1854(c)(1) of Title 29 of the United States Code provides the following regarding the damages cap typically imposed when a class action is certified in an action brought under the AWPA:

> If the court finds that the respondent has intentionally violated any provision of this chapter or any regulation under this chapter, it may award damages up to and including an amount equal to the amount of actual damages, or statutory damages of up to $500 per plaintiff per violation, or other equitable relief, except that (A) multiple infractions of a single provision of this chapter or of regulations under this chapter shall constitute only one violation for purposes of determining the amount of statutory damages due a plaintiff; and (B) if such complaint is certified as a class action, the court shall award no more than the lesser of up to $500 per plaintiff per violation, or up to $500,000 or other equitable relief.

29 U.S.C. § 1854(c)(1).

Having considered the arguments made by the parties with respect to the proper interpretation of § 1854(c)(1), the Court agrees with Plaintiffs' analysis, which mirrors the analysis of the one other court to have considered this specific issue, Wales v. Jack M. Berry, Inc., 192 F. Supp. 2d 1291, 1305 (M.D. Fla. 2000). Finding that the statute is ambiguous and based on the legislative history presented by Plaintiffs, the Court concludes that the cap of $500,000.00 mentioned in § 1854(c)(1)(B) applies only to statutory damages and that there is no limit on the amount of actual damages that the Court can award. Defendants' request for summary judgment as to this issue is therefore denied.

Defendants next seek summary judgment on Plaintiffs' claim that Defendants violated the AWPA by failing to guarantee Plaintiffs pay for at least 40 hours' work each week. As shown below, this request for summary judgment is also due to be denied.

In order to obtain permission to secure visas for H2-B workers, Mr. Eller files an ETA-750 form with the Department of Labor certifying the need for nonimmigrant alien labor. In the space marked "Total Hours Per Week," Mr. Eller puts "40." The ETA-750 form is prepared by Mr. Eller and submitted to the Department of Labor for approval but is not furnished to the workers. The disclosure provided to the workers states that their supervisors will determine the number of hours they work each week.

Defendants' request for summary judgment is based on a contract theory. In this regard, Defendants urge

Accordingly, in this case, Defendants "promise[d] [ ] full-time employment" in their clearance orders submitted to the Department of Labor. (See Defendants' Reply to Plaintiffs' Opposition to Defendants' Motion for Partial Summary Judgment at 28.) Defendants interpreted full-time employment as "40" hours and indicated that "40" hours would be the workers' "Total Hours Per Week." This promise of 40 hours became a term of Defendants' deal with Plaintiffs. In other words, this promise of 40 hours became a term of the work arrangement, which is actionable through 29 U.S.C. § 1822(c).

Defendants next seek summary judgment on Plaintiffs' claim that requiring some of them to leave deeds or other collateral as a condition of accepting employment with Defendants in the United States violated 29 U.S.C. § 1856 because it resulted in "forced labor and / or trafficking into servitude." (First Am. Compl. ¶ 25.) The court denies this request for summary judgment, as the Court finds that a genuine issue of material fact remains concerning whether Plaintiffs initiated the practice of leaving deeds as collateral or whether Defendants established this practice as a new work requirement.

Defendants finally seek a determination from this Court that a two-year statute of limitations period applies to Plaintiffs' AWPA claims. This Court has already ruled that the six-year statute of limitations period provided in O.C.G.A. § 9-3-24 applies to the AWPA claims. See DeLeon-Granados v. Eller and Sons Trees, Inc., 452 F. Supp. 2d 1282, 1284 (N.D. Ga. 2006). The Court will not revisit that ruling here, as the Court continues to agree with the reasoning underlying the ruling. Accordingly, the Court denies Defendants summary judgment with respect to this issue.