## UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI NORTHERN DIVISION

ERNESTO CARRILLORAMIREZ, JOSE DELGADO-PALOMERA, NESTOR DELGADO ZAMORANO, OSCAR PACHECŒANTANA, VICTOR SANCHEZJAIMES, JOEL TAPIA-RUIZ, and ADAN ESPARZAHARO Plaintiffs,	) ) ) ) ) ) CIVIL ACTION ) NO. 3:15-CV-00409CWR-FKB
V	) )
CULPEPPER ENTERPRISES, INC., KATHY CULPEPPER, NORTH AMRICAN LABOR SERVICES, INC. JON CLANCY, and CHERI CLANCY,	) ) ) )

## FIRST AMENDED COMPLAINT

Defendants.

## PRELIMINARY STATEMENT

1. Plaintiffs are Mexican workers who were ad**herit** to the United Statesnder the H-2B temporary foreign worker visa program. Plaintiffs were employed by Defendants Kathy Culpepper, doing business as Culpepper Enterprises, Inc., ("Culpepper Enterprises") and by Jon

Organizations Act, 18 U.S.C. §§ 1960, seq. ("RICO"); and for all Defendants' violations of the Fair Labor Standards Act, 29 U.S.C. §§ 201, et (#E/LSA") and Mississippi contract law.

- 2. Plaintiffs are lowwage temporary workers brought by Defendants to the United States on time work visas because of a claimed shortage of U.S. workers to fill Defendants' available jobs. For years, Plaintiffs have left their homes and families in Mexico and spent considerable money and effort to come to the United States to work for Defendants.
- 3. Defendants Kathy Culpepper, Jon Clancy, and Cheri Clancy, through their enterprise, defrauded the U.S. government and the plaintiffs by promispingr-after year wages they had no intention of paying. Defendants not only failed to pay the promised wages They also did not properly pay Plaintiffs even the federal minimum wage as required by the FLSA. Defendants also charged Plaintiffs an excessive unamfor employer arranged and controlled housing, far in excess of the reasonable cost of that hours incharged Plaintiffs for tools, protective gear, and uniforms. In addition, Defendants failed to pay Plaintiffs the proper FLSA overtime wage rate.
- 4. Defendants breached employment contracts with Plaintiffs. Furthermore, Defendants breached their contracts with the U.S. Department of Labor ("DOL"), which were entered into for the benefit of Plaintiffs and/or such benefit was the direct result of the performance within the contemplation of Defendants and DOL, including guaranteeing the wages Plaintiffs would be paid.
- 5. Plaintiffs seek an award of money damages, declaratory and injunctive relief, statutory and/or actual damages, liquidated damages for RICO claims, punitive damages, and prand postjudgment interest for the injunctive relief,

suffered due to Defendants' violations of the law. Plaintiffs seek declaratory and injunctive relief to ensure that they and others are not subjected to similar practices in the future.

## **JURISDICTION**

6. Jurisdiction is conferred upon this Court by 18 U.S.C. § 1964(c), this action arising under the RICO; 29 U.S.C. § 216(b), this action arising under the FLSA; and by 28 U.S.C. § 1331, this action arising under the laws of the United States. Jurisdiction over the contract claims is conferred by 2

- 12. Plaintiff Nestor DelgadoZamorano is an individual who maintains his permanent residence in Mexico. Mr. DelgadoZamorano was employed by Defendants pursuant to-28 H visa during the 2014 season.
- 13. Plaintiff Oscar PachecSantana is an individual who maintains his permanent residence in Mexico. Mr. PacheSantana was employed by Defendants pursuant to-28 H visa during the 2012, 2013, and 2014 seasons.
- 14. Plaintiff Victor SanchezJaimes is an individual who maintains his pernnane residence in Mexico. Mr. Sanchezimes was employed by Defendants pursuant to -28 H visa during the 2011, 2012, 2013 and 2014 seasons.
- 15. Plaintiff Joel TapiaRuiz is an individual who maintains his permanent residence in Mexico. Mr. TapiaRuiz was emplyed by Defendants pursuant to ar2Bl visa during the 2014 season.
- 16. Plaintiff Adan Esparzation is an individual who maintains his permanent residence in Mexico. Mr. Esparzation was employed by Defendants pursuant to a 2BH visa during the 2014 season.
- 17. Defendant Culpepper Enterprises, Inc. is an administratively dissolved Mississippi corporation that conducts business in this district. Defendant Culpepper Enterprises

- 18. Defendant Kathy Culpepper is an individuadoes business as and is the President, VicePresident, and Registered Agent of Defendant Culpepper Enterprises. Kathy Culpepper also serves as a Director of Defendant Culpepper Enterprises.
  - 19. Defendants Culpepper Enterprises and Kathy Culpepper collectively will be

- 27. At all times relevant to this action, the NALDsefendants acted as agents for the Culpepper Defendants and acted within the scope of their agency.
- 28. At all times relevant to this action, Plaintiffs were employees of Defendants within the meaning of the FLSA, 29 U.S.C. § 203(e)(1).
- 29. At all times relevant to this action, Plaintiffs were employed by Defendants within the meaning of the FLSA, 29 U.S.C. § 203(g).
- 30. At all relevant times, Plaintiffs were "persons" within the meaning of that term as defined by RICO, 18 U.S.C. § 1961(3).
- 31. At all relevant times, DefindantsKathy Culpepper, Jon Clancy, and Cheri Clancy (collectively, "the Individual Defendants") were "persons" within the meaning of that term as defined by RICO, 18 U.S.C. § 1961(3).
- 32. At all relevant times, Defendantsalthy Culpepper, Jon Clancy, and Cheri Clancy were an association-fact, and therefore an enterprithe RICO enterprise, within the meaning of 18 U.S.C. § 1961(4).

#### <u>FACTS</u>

Defendants' Participation in the H-2B Visa Program

- b. March 1 to December 15, 2013 ("2013 Culpepper 9142B Form" and
- c. March 15 to December 15, 2014 ("2014 Culpepper 9142B Form").
- 36. Each of these temporary labor certification applications contained an attestation pursuant to 20 C.F.R. § 655.20 that Defendant Culpepper Enterprovuld abide by applicable regulatory requirements pertaining to the El temporary work program and federal and state laws, including the requirement that Defendant Culpepper Enterprises pay Plaintiffs at least the H-2B prevailing wage.
- 37. The 2012 Culppeper 9142B Form indicated that Defendant Culpepper Enterprises's offered basic rate of pay to the 2BH workers was \$10.26 per hour, and the overtime rate of pay was \$15.39 per hour.
- 38. The 2013 Culpepper 9142B Form indicated that Defendant Culpepper Enterprises's offered basic rate of pay to the workers was \$8.25 per hour, and the overtime rate of pay was \$12.38 per hour.
- 39. The 2014 Culpepper 9142B Form indicated that Defendant Culpepper Enterprises's offered basic rate of pay to the 24B workers was \$11.11 per hour, and the overtime rate of pay was \$16.67 per hour.
- 40. Each of these temporary labor certifications listed Defendant Jon Clancy and NALS as Defendant Culpepper Enterprises's agent. E&eeB (2012 Culpepper 9142B Form); Ex. C (2013 Culpepper 9142B Form); Ex. D (2014 Culpepper 9142B Form.

<sup>&</sup>lt;sup>3</sup> In 2013, Culpepper Enterprises, Inc. requested and was dyraenterication to import 28 H2B workers. See Ex. C (2013 Culpepper 9142B Form).

<sup>&</sup>lt;sup>4</sup> In 2014, Culpepper Enterprises requested and was granted certification to impo@E38 H workers. See Ex. D (2014 Culpepper 9142B Form).

- 41. Defendant Kathy Culpepper signed each of these temporary labor certification applications as the "Owner/President" of Culpepper Enterprises. Exet (2012 Qulpepper 9142B Form); Ex. C (2013 Culpepper 9142B Form); Ex. D (2014 Culpepper 9142B Form).
- 42. Defendant Jon Clancy signed each of these temporary labor certification applications as the agent of Culpepper Enterprises. Exect (2012 Culpepper 9142B Form); Ex. C (2013 Culpepper 9142B Form); Ex. D (2014 Culpepper 9142B Form).
  - 43. Defendants Kathy Culpepper and Jon Clancy used the mail and/or wires to

conditions of employment, including an enforceable guarantee of wages no less than the federal minimum and H2B prevailing wages.

- 48. The DOL-approved labor certifications is formed valid and enforceable contracts between Defendants and DOL, which were entered into for the benefit of Plaintiffs and/or such benefit was the direct result of the performance within the contemplation of the Culpepper Defendants, operating as peopler Enterprises, and DOL cluding the guarantee that Plaintiffs would not be paid less than the federal minimum and between Plaintiffs wages.
  - 49. Defendants and DOL both owed Plaintiffs a legal obligation and/or duty.
- 50. Defendant Culpepper Enterprises and DQL's legal obligation and/or duty to Plaintiffs connect Plaintiffs with the contracts between Defendant Culpepper Enterprises DQL.
- 51. The Culpepper Defendantsponsored Plaintiffs' H2B visas in order to fill their claimed labor shortages. Plaintiffs'-2HB visas allowed them to work only for the Culpepper Defendants, operating as Defendant Culpepper Enterprises

# Defendants Underpaid Their H2B Employees by Charging Them Recruitment and Travel Fees

- 52. Plaintiffs spent considerable sums of money to obtain the work visas and travel from their hometowns in Mexico to the United States to work for Defendants in Mississippi. Plaintiffs incurred these costs, which were primarily for the benefit of their employers.
- 53. Prospective H2B workers must undertake a lething process to obtain an-12B visa sponsored by the Culpepper Defendants, operating as Culpepper Enterprises. Prospective workers must interview with Defendant Cheri Clancy in Mexico, pay her hundreds of dollars to be included on the recruitment list, testito the city of Monterrey

- 56. Upon information and belief, Defendants used the mails and wires in furtherance of the scheme to defraud Plaintiffs about the promised wages.
- 57. The majority of Plaintiffs maintain their permanent residences in and around the city of Tepic, in the Pacific coast state of Nayarit, Mexico, where they learned of the job opportunity with Defendants. Plaintiff Victor Sanchæzimes maintains his permanent residence in Tijuana, in the state of Baja California, Mexico.
- 58. The Culpepper Defendants contracted with the SI Defendants to act as the Culpepper Defendants' agents to assist them in obtaining the Plaintiffs.
- 59. The Culpepper Defendants chose to recruit workers in Mexico and sec218 e H visas by utilizing the NALS Defendants their exclusive representative.
- 60. The Culpepper Defendants required prospectiveBHworkers to go through Defendant Cheri Clancy, their designated representative, to seek employment through program with the Culpepper Defendants.
- 61. Defendant Cheri Clancy, the Culpepper Defendants' designated representative, charged prospective PBB workers, including the Plaintiffs, a recruitment fee each year of several hundred dollars per worker to have their names included on the list of workers requested by the Culpepper Defendants. This money was never reimbursed to the Plaintiffs.
- 62. The Plaintiffs paid the recruitment fees described in paragraph leftiance on the false promises Defendant Cheri Clancy made about the wages the Plaintiffs would earn while employed by the Defendants.
- 63. Plaintiffs were required to travel from in and around Tepic, in the stTJ 16.61 0 Td1he set to Mon6.61 0 Tdrre1 T45( w)-, in the northeastern Mexico stTJ 16.6-12-03Td1Missasie.2euws.eatn, eor th

- the U.S. Consulate. An interview with a visa coeffi at a U.S. Consulate or Embassy is a prerequisite to a prospective-24B worker beginning work for the sponsoring employer. The Plaintiffs paid approximately \$115 per person each year for their trips to Monterrey and for lodging during their stays in Monterrey, which was never reimbursed to them.
- 64. Following the approval of their ½B visas by the U.S. Consulate, Plaintiffs traveled by bus from Monterrey, Mexico to the Jackson, Mississippi area to begin work for Defendants.
- 65. Plaintiffs were required to pager oneway travel from Monterrey, Mexico to the housing complex arranged and controlled by Defendants outside Jackson, Mississippi, and to pay a border crossing fee when they entered the United States. The Plaintiffs paid approximately \$155 per person et year in travel and border crossing expenses to travel from Monterrey, Mexico to Defendants' chosen housing site outside Jackson. This money was never reimbursed to Plaintiffs.
- 66. The Plaintiffs paid the travel and border crossing expenses described in paragraphs63 and 65n reliance on the false promises Defendant Cheri Clancy made about the wages the Plaintiffs would earn while employed by the Defendants.
- 67. The travel and border crossing expenses Plaintiffsurred to come work for Defendants, as set our paragraphs 63 and 65, were primarily for the benefit of Defendants within the meaning of the FLSA, 29 C.F.R. §§ 531.32(c) and 778.217.
- 68. Defendants did not reimburse Plaintiffs for the travel and border crossing expenses they incurred to come to the \text{\text{tbSwork}} for Defendants, as set out in paragraphs 63 and 65, above.

74. In 2012, in reliance on false attestations made in the temporary labor

- 81. Plaintiffs shared apartments with other Culpepper Enterprises Morkers.

  Two-bedroom apartments were shared by five workers, with one worker sleeping in the living room. Defendants managed specific details of the Plaintiffs' housing, including assigning them to live in specific apartments and to the specific apartments and the specific apartments.
- 82. Every two weeks, Defendants deducted approximately \$120 per worker in 2013 and \$130 per worker in 2014 from Plaintiffs' paychecks for housing. The housing deduction was made from each worker's check irrespective new future of paychecks in a given month.

83.

89. The amounts deducted (or made via *de fac*deductions) from Plaintiffs' paychecks of these tools of the trade, protective gear, and uniforms were primarily for the benefit or convenience of Defendar 29 C.F.R. § 531.3(d)(2).

90.

- 97. The RICO exterprise is engaged in interstate commerce in that its activities and transactions related to the international and interstate movement of workers affect interstate commerce and frequently require travel and communications across state and international lines.
  - 98. The members of the RICO enterprise function as a continuing unit.
- 99. The Individual Defendants conducted or participated in, and/or conspired to conduct or participate in the affairs of the RIO@eeeprise through a pattern of numerous acts of racketeering activity in violation of 18 U.S.C. § 1962(c) and 18 U.S.C. § 1962(atled edly their common goal to recruit, contract, transport, and employ foreign workers to work as landscapers in the United States, and particularly in Mississippi.
- 100. By conducting or participate in the affairs of the RICOnterprise and/or by conspiring to conduct or participate in the affairs of the RICO enterptise ugh a pattern of mail and wire fraud and fraud in foreign labor recruitmentamely, by knowingly providing false attestations to DOand false statements to Plaintiffs about the payment of the Harman prevailing wages Defendants Kathy Culpepper and Jon Clancy violated the RICO, 18 U.S.C. §§ 1962(c)and (d)
- 101. Specifically, the Individual Defendants conducted or participated in and/or conspir(i)-2(42(n, a)4(nd/)-2(or)3( c)4(r)3(t)-2(i)-2(0 Td (0 Td (0 Td -102(l)-22(y).58(a)6(ls)1(e)6( s)<sup>2</sup>

#### **Predicate Acts**

#### Mail and Wire Fraud: 18 U.S.C. §§ 1341 and 1343

- 102. As set forth in the preceding paragraphs, the Individual Defendants, through the RICO Enterprise, made and/or conspired to make material misrepresentations to the Plaintiffs and to the U.S. Department of Labor regarding the hourly and overtime wages Plaintiffs would receive.
- 103. As set forth in the preceding paragraphs, the Individual Defendants, though the RICO enterprise, used the mails and wire communications, including communications via telephone, fax, internet, and/or email, on numerous occasions to further these fraudulent schemes.
- 104. These willful, knowing, and intentional acts constitute mail and final violation of 18 U.S.C. §§ 1341 and 1343.

#### Fraud in Foreign Labor Contracting: 18 U.S.C. § 1351

- 105. As set forth in the preceding paragraphs, the Individual Defendants, through the RICO enterprise, knowingly and with intent to defraud recruited, tendicand hired Plaintiffs and/or caused another person to recruit, solicit, and hire Plaintiffs outside the United States, for the purpose of employment the United States by means notaterially false or fraudulent pretenses, representations, or promisegarding the hourly and overtime wages Plaintiffs would receive.
- 106. These willful, knowing, and intentional acts constitute fraud in foreign labor contracting in violation of 18 U.S.C. § 1351.

#### Pattern of Related Racketeering Acts

- 107. The Individual Defendats engaged in the racketeering activity described in this Claim repeatedly starting in 2012 and continuing at least through 2014 with respect to dozens of workers.
- 108. Upon information and belief, the Individual Defendants have sought næ H workers for employment at Culpepper who manyesentlybe subjected, through the RICO enterprise to similar racketeering activities.
- 109. The Individual Defendants, through the RICO enterprise, rely on the racketeering acts described in this Complaint to conduct their regulainess activities.
- 110. The Individual Defendants' racketeering acts have or had similar purposes: to profit from the fraudulent recruitment of Plaintiffs and othe? Blworkers for employment on Mississippi Department of Transportation contracts in Mississippis.
- 111. The Individual Defendants' acts yielded similar results and caused similar injuries to Plaintiffs, including Plaintiffs' payment of recruitment fees and expenses, the difference between the fraudulentlyromised wages and the wages Plaintiffs were paid, and the exorbitant cost of the employerrovided housing.
- 112. As set forth in the preceding paragraphs, the racketeering acts have or had similar participants: the Individual Defendants and their agents.
- 113. As set forth in the preceding paragraphs, the vidual Defendants, through the RICO enterprise, directed their racketeering activities at similar individuals and entities:

  Plaintiffs and other H2B workers, and federal and state government agencies.
- 114. The Individual Defendants' acts have or had saminethods of commission, such as common recruitment tactics, relatively consistent practices with respect to collecting payments

from Plaintiffs and other +2B workers, and use of similar employment practices and policies with respect to Plaintiffs and other 2B workers.

#### Injury

- and intentional acts discussed in this section, Plaintiffs have suffered injuries to their property and/or business, including but not limited to this erence between the fraudulenthyomised regular and overtime wage rates and the wages Plaintiffs were paid, the recruitment fees and travel and border crossing expenses the Plaintiffs paid in reliance upon the Defendants' misrepresentations about the Plaintiffs' wages, and other pecuniary losses and/or losses to real or personal property
- 116. Plaintiffs are entitled to an award of damages in an amount to be determined at trial, including but not limited to:
  - a. compensation for Plaintiffs' injuries to their property and/or business;
  - a. trebling of the damages set forth in subparagraph (a),;saupoda
- b. attorneys' and experts' fees and costs associated with this action, as authorized by 18 U.S.C. § 1964(c).

#### COUNT II

#### FAIR LABOR STANDARDS ACT

- 117. All the foregoing allegations are incorporated by reference as if set forth fully herein.
- 118. Pursuant to 29 U.S.C. § 216(b), the Plaintiffs have consented in writing to be Plaintiffs in this FLSA action. Their written consents are catted hereto as Ex. A.
- 119. This count sets forth a claim for declaratory relief and damages for each Defendant's violation of the minimum wage and overtime provisions of LEAF

- 120. Defendants violated the FLSA, 29 U.S.C. § 206(a), by failing to pay Plaintiffs a least \$7.25, the federal minimum wage, for every compensable hour of labor they performed during each workweek they were employed.
- 121. Defendants' violations of the FLSA resulted, in part, from Defendants' failure to reimburse Plaintiffs for certain premptyment expenses they incurred which were primarily for Defendants' benefit, reducing Plaintiffs' wages below the minimum wage for the first workweek.
- 122. Defendants' violations of the FLSA also resulted, in part, from Defendants' unreasonable deductions from Patiffs' wages for housing. 29 C.F.R. § 531.3(b).
- 123. Defendants' violations of the FLSA also resulted, in part, from Defendants' deductions from Plaintiffs' wages for tools, protective gear, and uniforms that were primarily for the benefit or convenience **D**fefendants. 29 C.F.R. § 531.3(d)(2).
- 124. Defendants violated the FLSA, 29 U.S.C. § 207(a), by failing to pay Plaintiffs the proper overtime wage rate.
- 125. Defendants' failure to pay Plaintiffs their federally mandated minimum and overtime wages was a willful violation of the FLSA within the meaning of 29 U.S.C. § 255(a).
- 126. As a consequence of Defendants' violations of the FLSA, Plaintiffs are entitled to recover their unpaid minimum and overtime wages, plus an additional equal amount in liquidated damages, the costs suit, and reasonable attorneys' fees pursuant to 29 U.S.C. § 216(b).

#### COUNT III

#### BREACH OF EMPLOYMENT CONTRACT

- 127. All the foregoing allegations are incorporated by reference as if fully set forth herein.
- 128. This count sets forth a claim for damages resulting from Defendants' breaches of their employment contracts with Plaintiffs.

- 129. The terms and conditions provided in the temporary labor certification (ETA Form 9142B), its accompanying attestations, and the law and regulations applicable-122B the H program constituted the employment contracts between Plaintiffs and Defendants.
- 130. Plaintiffs satisfactorily performed all employment duties and responsibilities required of them under the employment contracts with Defendants.
- 131. Defendants breached the employmeon tracts with Plaintiffs by compensating the Plaintiffs below the applicable-2-B prevailing wages and required overtime premium for their work.
  - 132. Defendants' breach of the employment contracts caused Plaintiffs substantial

- 5. Granting judgment in favor of Plaintiffs against each Defendant, jointly and severally, for breach of the employment contracts with air fiffs, and awarding each Plaintiffs actual and consequential damages, punitive damages, and prejudgment interest;
- 6. Granting judgment in favor of thirdarty beneficiary Plaintiffs against Defendants, jointly and severally, for breach of the employmement acts with the U.S. Department of Labor, and awarding each Plaintiffis actual and consequential damages, punitive damages, and prejudgment interest;
- Awarding Plaintiffs the cost of this action;
- 8. Awarding Plaintiffs a reasonable attorney's fee; and
- 9. Granting such relief as this Court deems just and equitable.

Dated this 1sday of Septembe2015.

Respectfully submitted,

/s/ Daniel Werner
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- \* Admitted pro hac vice.
- \*\* A dmission pro hac vice pending

## ATTORNEYS FOR PLAINTIFFS

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I further certify that the attached has been deposited in a U.S. Mail receptacle for delivery by first class mail, properly addressed and with postage of the:

Kathy Culpepper 901 lby Street Collins, MS 39428

CulpeppeEnterprises, Inc. 901 lby Street Collins, MS 39428

Jon Clancy 3900 Red Hill Road Vancleave, MS 39565

Cheri Clancy 3900 Red Hill Road Vancleave, MS 39565

North American Labor Services, Inc. 3900 Red Hill Road Vancleave, MS 39565

/s/ Daniel Werner

this 1st day of September, 2015.