IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK
ROCHESTER AREA

EUSTACIO SALAZAR-MARTINE**Z**, on behalf of himself and all other similarly situated persons, Plaintiffs, v. FOWLER BROTHERS, INC., JOHN FOWLER, ROBERT FOWLER, JOHN D. FOWLER, and AUSTIN FOWLER, Defendants.	)	COMPLAINT CLASS ACTION CIVIL ACTION NO.:

I. PRELIMINARY STATEMENT

1. Plaintiff Eustacio Salazar-Martinez ("the Plaintiff") is a migrant agricultural worker recruited by defendants' authorized agents in Mexico in 2008 and 2009 to work on defendants' apple farms under the H-2A guestworker program in and around Wayne County, New York. Plaintiff files this action as a collective action under 29 U.S.C. §216(b) of the Fair Labor Standards Act ("FLSA"), and as a class action under the New York Labor Law and the common law of contracts.

2. Defendants violated the Fair Labor Standards Act and New York Labor Law by failing to pay the Plaintiff and the members of the collective action and class that the Plaintiff seeks to represent (collectively "Plaintiffs") at least the required minimum hourly wage and the promised or contracted wage when that wage was due under New York Labor Law for every compensable hour of labor performed in the first workweek that the Defendants employed those workers by failing to reimburse the pre-employment expenses of those workers as required by law.

3. Defendants also breached their employment contracts with Plaintiffs by failing to pay the Plaintiffs at least the required minimum hourly wage under the adverse effect wage rate ("AEWR") promulgated by the U.S. Department of Labor ("DOL") pursuant to 20 C.F.R. §§ 655.202(b)(9) and 655.207 (2008) and 20 C.F.R. §§ 655.104(l), 655.105(g), and 655.108(a)(2009) for every compensable hour of labor performed in the first workweek that the Defendants employed Plaintiffs by failing to reimburse their pre-employment expenses as required by law.

4. Plaintiffs seek their unpaid wages and liquidated damages under 29 U.S.C. § 216(b) and New York State Labor Law, and plaintiffs seek actual, incidental, consequential, and compensatory damages, pre- and post-judgment interest, and declaratory relief as alleged.

II. JURISDICTION

5. Jurisdiction is conferred upon this Court over all defendants named in this action pursuant to 28 U.S.C. §§1331 and 1337, 29 U.S.C. § 216(b), and 28 U.S.C. §1367(a).

6. This Court has the power to grant declaratory relief pursuant to 28 U.S.C. §§2201 and 2202.

III. VENUE

7. Venue over this action lies in this Court pursuant to 28 U.S.C. §§1391(b)(2), and 29 U.S.C. §216(b). In the six (6) year time period immediately preceding the date on which this action was filed, the defendants jointly and/or severally employed Plaintiffs in one or more of the counties specified in 28 U.S.C. § 112(d) for the first pay periods that the Plaintiffs were and/or are employed to perform any work at any time in those same workweeks. Therefore, a substantial part of the events or omissions giving rise to the claims

of the Plaintiffs occurred in one or more counties located in the judicial district of the U.S. District Court for the Western District of New York.

8. Venue over this action also lies in this Court pursuant to 28 U.S.C. §§1391(b)(1), and 29 U.S.C. §216(b). On the date on which this action was filed and in the six (6) year time period immediately preceding that date, the principal place of business and residence of the defendants were and are located in one or more of the counties listed in 28 U.S.C. § 112(d).

IV. NAMED PLAINTIFF

9. In the time period from August 1, 2008 to the present, the Plaintiff was jointly and severally employed by one or more of the Fowler defendants under the H-2A program as a manual worker or laborer as defined by § 190 of the New York Labor Law and a migrant seasonal employee who was housed in a farm labor camp by one or more of the Fowler defendants in and around Wayne County, New York and/or one or more other counties in New York listed in 28 U.S.C. § 112(d) as follows:

(a) Plaintiff Eustacio Salazar-Martinez ("Salazar") was jointly and severally employed by one or more of the Fowler defendants in the harvest of apples in the last summer and fall of 2008 and 2009 with an H-2A visa.

10. In order to obtain their employment with one or more of the Fowler defendants in any year(s) that they were employed by one or more of the Fowler defendants in the time period from 2003 through 2010, the Plaintiff, the class alleged in ¶25 below, and the members of the collective action alleged in ¶¶20-21 below that the Plaintiff seeks to represent were and/or jointly and severally recruited in Mexico and transported directly from

Mexico to New York by or at the direction of or by arrangements made by one or more authorized agents of the Fowler defendants to begin that same employment.

11. At all times relevant to this complaint, the Plaintiffs were and/or are H-2A agricultural guestworkers admitted into the United States to work for one or more of the defendants pursuant to the authority of the H-2A program codified at 8 U.S.C. §§ 1101(a)(15)(H)(ii)(A), 1184(c), and 1188(a)(1).

V. DEFENDANTS

12. At all times on and after January 1, 2003 that are relevant to this action, defendant Fowler Brothers, Inc. was and is a closely-held corporation in good standing duly formed on September 15, 2003 under and in accordance with the laws of the State of New York. Upon information and belief, defendants John Fowler, Robert Fowler, John D. Fowler, and Austin Fowler are officers of defendant Fowler Brothers, Inc., 10273 Lummisville Road, Wolcott, New York.

13. Upon information and belief, at all times relevant to this action after January 1, 2003, defendants John Fowler and Robert Fowler and their sons, John D. Fowler and/or Austin Fowler, respectively, were and are the sole owner(s) of Fowler Brothers, Inc. (hereinafter referred to collectively as the "Fowler defendants").

14. At all times relevant to this action after January 1, 2003, defendants John Fowler, Robert Fowler, John D. Fowler, and Austin Fowler had and have the power to hire and fire the Plaintiff and the members of the class and collective action.

15. At all times relevant to this action after January 1, 2003, defendants John Fowler, Robert Fowler, John D. Fowler, and Austin Fowler were and are the day to day managers with operational control over Fowler Brothers, Inc. Acting in that capacity,

defendants John Fowler, Robert Fowler, John D. Fowler, and Austin Fowler directed the Plaintiff and the members of the class and collective action as to where and when they to perform work in the harvest of apples for one or more of the defendants on a day-to-day basis, and allocated their respective work assignments.

16. At all times relevant to this action after January 1, 2003, defendants Fowler Brothers, Inc., John Fowler, Robert Fowler, John D. Fowler, and Austin Fowler were and are the joint employers of the Plaintiff and the members of the class and collective action as defined by federal and New York Labor Law.

17. At all times relevant to this action after January 1, 2003, defendants Fowler Brothers, Inc., John Fowler, Robert Fowler, John D. Fowler, and Austin Fowler were and are the joint employers of the Plaintiff and the members of the class and collective action as defined by the respective employment contracts between those same defendants and the Plaintiff and the members of the class and collective action pursuant to the terms of federal regulations set forth in 20 C.F.R. §§ 655.100(b)(2008), and 655.102-103(2008).

18. At all times relevant to this action after January 1, 2003, defendants Fowler Brothers, Inc., John Fowler, Robert Fowler, John D. Fowler, and Austin Fowler were and are engaged in the harvesting, packing, and production of apples and other fruit in and around Wayne County, New York for sale in interstate commerce.

19. For each calendar year in the time period starting with January 1, 2003 and continuing through and including 2010, the employment of the Plaintiff and the members of the class and collective action was and is part of an enterprise operated by Fowler Brothers, Inc. whose annual gross volume of sales or business done was not less than $500,000.00

(exclusive of excise taxes at the retail level that were separately stated) within the meaning of 29 U.S.C. § 203(s)(1)(A)(ii).

VI. FLSA STATUTORY COLLECTIVE ACTION ALLEGATIONS

20. Pursuant to the collective action procedure specified at 29 U.S.C. §216(b), the Plaintiff files this collective action for each similarly situated person employed by one or more of the Fowler defendants under the H-2A program at any time in the three (3) year time period immediately preceding the date on which such person files a Consent to Sue in this action pursuant to 29 U.S.C. §216(b).

21. This FLSA action is on behalf of those members of the FLSA collective action for at least the first workweek in that same three year time period the Plaintiff and the members of the FLSA collective action performed or will perform any work in New York for one or more of the Fowler defendants when that worker arrived or will arrive in New York after that worker's transportation from Mexico to New York pursuant to a labor certification and visa issued to one or more of the Fowler defendants and those same workers under the H-2A program.

22. The Fowler defendants jointly or severally employed or will employ the Plaintiff and/or an unspecified number of other alien workers under the H-2A program to perform manual labor in the form of agricultural labor in the production and harvest of apples for one or more of the Fowler defendants in at least the first workweek when the Plaintiff and his other co-workers arrived or will arrive in New York after their transportation directly from Mexico to New York.

23. This collective action by similarly situated persons under 29 U.S.C. §216(b) is based upon the willful failure of the Fowler defendants to reimburse Plaintiff and the

members of the collective action on or before their regular payday for their first workweek or on a date falling within a reasonable time period after their regular payday for that first workweek or such other payday as may be required by the FLSA and/or pay in advance to the Plaintiff and the members of the FLSA collective for certain transportation, visa expenses and fees, passport fees, lodging expenses, and visa processing and/or recruiting fees that the Plaintiff and the members of the FLSA collective he seeks to represent paid in Mexico before they performed any work in New York under the H2A program when those expenses and fees were primarily for the benefit of the named defendants.

24. As a result of this willful failure to reimburse and/or pay in advance in the manner, the wages that the Plaintiff and the members of the collective action received free and clear from the Fowler defendants on or before the regularly scheduled payday and/or within a reasonable time for at least the first workweek that the Plaintiff and the members of the collective action performed work in New York for one or more of the Fowler defendants were less than the minimum wage required by 29 U.S.C. §206 on a weekly basis for each hour or part of an hour of actual work that the Plaintiff and each such similarly situated person was, is, or will be employed to perform for one or more of the Fowler defendants in at least the first workweek that each such person was so employed.

VII. RULE 23(b)(3) CLASS ALLEGATIONS

25. All claims set forth in the First Claim for Relief, Second Claim for Relief, and Third Claim for Relief are brought by the Plaintiff on behalf of himself and all other similarly situated persons pursuant to Rule 23(b)(3) of the Federal Rules of Civil Procedure.

26. The Plaintiff seeks to represent a class consisting of all temporary foreign workers ("H-2A workers") who traveled directly from Mexico to New York to perform manual labor as a migrant seasonal agricultural employee of one or more of the Fowler defendants at any time in the time period in the six (6) year time period immediately preceding the date on which this action was filed and continuing thereafter until the date on which final judgment is filed in this action.

27. The class is so numerous and so geographically dispersed as to make joinder impractical. The precise number of individuals in the class is known only to the Fowler defendants. However, the class is believed to include over one hundred (100) individuals. The class is comprised of indigent migrant seasonal agricultural workers who maintain their permanent homes in or around central Mexico. The class members are not fluent in the English language and are unfamiliar with the American judicial system. The relatively small size of the individual claims and the indigence of the class members make the maintenance of separate actions by each class member infeasible.

28. There are questions of law and fact common to the class. These common legal and factual questions are, among others:

(a) Did the Fowler defendants violate the minimum wage, anti-deduction, and anti-kickback wage payment provisions of the Minimum Wage Order for Farm Workers and §§ 191, 193, 198-b, and § 681 of New York Labor Law by requiring the Plaintiff and the members of the class to make the payments described in ¶¶58-59, and 61-64, inclusive, below (hereinafter referred as the "Wage Kickbacks") without full reimbursement?

(b) Were each of the Wage Kickbacks "primarily for the benefit of" or "for the benefit of" one or more of the Fowler defendants within the meaning of 29 C.F.R. §§

531.3(d)(1), 532.32(a), and 532.32(c), and subdivision 1b of § 193 of the New York Labor Law?

(c) Did one or more of the Fowler defendants and/or one or more agent(s) of one or more of the Fowler defendants require the class to make the Wage Kickbacks by separate transaction where no law, rule, or regulation issued by any governmental agency permitted the Fowler defendants or their agents to require the Plaintiff and those H-2A workers to make such payments?

29. The claims of the Plaintiff are typical of the claims of the members of the class, and those typical, common claims predominate over any questions affecting only individual class members. The Plaintiff has the same interests as to other members of the class and will vigorously prosecute these interests on behalf of the class.

30. The Plaintiff will fairly and adequately represent the interests of the class.

31. The undersigned counsel Robert J. Willis and Dan Getman of Getman and Sweeney, PLLC for the Plaintiff are experienced litigators who have been named counsel for several class actions. Plaintiffs' counsel is prepared to advance litigation costs necessary to vigorously litigate this action and to provide notice to the class members under Rule 23(b)(3).

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

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

(b) Many members of the class are unaware of their rights to prosecute these claims and lack the means or resources to secure legal assistance;

(c) There has been no litigation already commenced against the Fowler defendants by the members of the class to determine the questions presented;

(d) It is desirable that the claims be hear in this forum because the Fowler defendants all reside in this district and the cause of action arose in this district;

(e) A class action can be managed without undue difficulty because the Fowler defendants regularly committed the violations complained of herein, and were required to maintain detailed records concerning each member of the class.

VIII. STATUTORY AND REGULATORY STRUCTURE - H-2A PROGRAM

33. The H-2A program was created by 8 U.S.C. §§ 1101(a)(15)(H)(ii)(A), 1184(c), and 1188(a)(1), and was implemented pursuant to regulations found at 20 C.F.R. §§ 655.0-655.113(2008), 20 C.F.R. §§ 655.0-655.119 (2009), and 20 C.F.R. §§ 655.100-655.185 (2010). The H-2A program authorizes the lawful admission of temporary, non-immigrant workers to perform agricultural labor or services of a temporary nature.

34. Because of the lack of available documented workers in the areas of the operations of the Fowler defendants, Fowler Brothers, Inc. applied for temporary certification by the U.S. Department of Labor ("DOL") to employ temporary foreign workers through the H-2A program, including applications submitted seeking workers for employment in each year from 2003 through 2010.

35. Depending upon date of application, each such application must include a job offer that complies with the requirements of 20 C.F.R. §§ 655.102 and 653.501(2008), 20 C.F.R. §§ 655.104 (2009) and 653.501 (2009), and 20 C.F.R. §§ 655.122 and 653.501

(2010), and must include an agreement to abide by the assurances required by 20 C.F.R. § 655.103(2008), 20 C.F.R. § 655.105 (2009), and 20 C.F.R. § 655.135 (2010). 20 C.F.R. § 655.101(b)(2008), 20 C.F.R. § 655.105 (2009), and 20 C.F.R. § 655.131 (2010). The job offer, commonly referred to as a "clearance order" or "job order", is used to recruit both United States and foreign nationals for H-2A visas.

36. In the years from 2003 to and including 2010 for those years in which they were employed as H-2A workers by one or more of the Fowler defendants, the terms and conditions in the job order became the employment contract between one or more of the Fowler defendants, the Plaintiff, and the members of the class and collective action.

37. As a condition of receiving temporary labor certification for the importation of H-2A workers, agricultural employers like one or more of the Fowler defendants are required to pay the highest of the "adverse effect wage rate", or the federal or state minimum wage. 20 C.F.R. § 655.202(b)(9)(i)(2008), 20 C.F.R. §§ 655.104(l)(1), 655.105(g), and 655.108(a) (2009), and 20 C.F.R. §§ 655.120 and 655.122(l)(2010).

38. At all times during the time period from January 1, 2003 to the present, agricultural employers like one or more of the Fowler defendants who employed H-2A workers were and are required to "keep accurate and adequate records" of workers' earnings. 20 C.F.R. § 655.102(b)(7)(2008), 20 C.F.R. § 655.104(j)(1)(2009), and 20 C.F.R. § 655.122(j)(1).

39. In each of their H-2A contracts in at least calendar years 2003 through and including 2008 and for any H-2A contract for which they filed an H-2A certification application at any time after March 14, 2010, the Fowler defendants promised that each worker would earn at least the prevailing rate for the crop activity or at least the AEWR,

whichever was higher. Exhibits A-F attached at section entitled "Wage Rates, Special Pay Information and Deductions".

40. In each of their H-2A contracts contained in the H-2A labor certification applications that they made after January 29, 2009 and before March 15, 2010, the Fowler defendants promised that each worker would earn at least the prevailing rate for the crop activity or at least the AEWR, whichever was higher at the time of recruitment. Exhibits A-F attached at section entitled "Wage Rates, Special Pay Information and Deductions".

41. In each of their H-2A contracts in at least calendar years 2003 through the present, the Fowler defendants promised to "reimburse workers who complete 50 percent of the work contract period and who are not reasonably able to return the same day to their place of residence for the reasonable cost of transportation and subsistence from the place of recruitment to the place of employment." Exhibits A-F attached at section entitled "Transportation".

42. In each of their H-2A contracts in at least calendar years 2003 through the present, the Fowler defendants promised to abide by the assurance regulations at 20 C.F.R. § 655.103 (2008), 20 C.F.R. § 655.105 (2009), or 20 C.F.R. § 655.135(2010), and at 20 C.F.R. § 653.501 (2008), which govern the labor certification process for H-2A "employers" and "joint employers" as those terms are defined by 20 C.F.R. § 655.100 (2008), 20 C.F.R. § 655.100(c)(2009), and/or 20 C.F.R. 655.103(b)(2010). Exhibits A-F attached at section entitled "Other Conditions of Employment".

IX. STATEMENT OF FACTS

43. The United States Department of Labor ("DOL") accepted the clearance orders of one or more of the Fowler defendants for the production and/or harvest of

apples in each year in the time period from 2003 through 2010 and circulated each of them to local job service offices in an effort to recruit U.S. workers to fill the positions offered. When those efforts failed, DOL certified shortages of labor and the United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security or its predecessor, the United States Immigration and Naturalization Services (USINS) of the Department of Justice, issued H-2A visas to the Plaintiff and/or other members of the class and collective action to fill the manpower needs described in the clearance orders of one or more of the Fowler defendants for those same apple production and harvest seasons.

44. Pursuant to those H-2A visas, for each apple harvest season that occurred in calendar years 2003 through and including 2010, the Fowler defendants imported and employed the Plaintiff and the members of the class and collective action under those same job order contracts to perform manual labor as migrant seasonal agricultural workers in the production and harvest of apples and/or other agricultural products.

45. A true and correct copy of the job order contracts for the apple harvest seasons in calendar years 2006 through and including calendar year 2010 to date is attached marked as Exhibits A through F.

46. In each calendar year from 2003 through and including 2010, each employment contract of the Fowler defendants under the H-2A program contained an "Employer's Certification" that stated: "this job order describes the actual terms and conditions of the employment being offered by me and contains all the material terms and conditions of the job." *See, e.g.*, Exhibits A-F attached.

47. In each calendar year from 2003 through and including 2010, the "Employer's Certification" in each employment contract of one or more of the Fowler defendants was signed by defendant John D. Fowler as "Director of New Business Development" or "Manager". *See, e.g.,* Exhibits A-F attached.

48. In each calendar year from 2003 through and including 2010, each employment contract of the Fowler defendants contained a "Declaration of Employer" swearing "under penalty of perjury the foregoing is true and correct." *See, e.g.,* Exhibits A-F attached.

49. The 2006 apple harvest season employment contract of one or more of the Fowler defendants promised to pay the applicable AEWR which was $9.16 per hour.

50. The 2007 apple harvest season employment contract of one or more of the Fowler defendants promised to pay the applicable AEWR which was $9.50 per hour.

51. The 2008 apple harvest season employment contract of one or more of the Fowler defendants promised to pay the applicable AEWR which was $9.70 per hour.

52. The 2009 apple harvest season employment contract of one or more of the Fowler defendants promised to pay the applicable AEWR which was $9.70 per hour for those workers recruited pursuant to the H-2A application of one or more of the Fowler defendants.

53. The 2010 apple harvest season employment contract of one or more of the Fowler defendants promised to pay the applicable AEWR which was $8.96 per hour for those workers recruited pursuant to the H-2A application of one or more of the Fowler defendants before March 15, 2010, and $10.16 per hour for those workers hired pursuant to the H-2A application of one or more of the Fowler defendants after March 14, 2010.

54. For each apple harvest season that occurred in calendar years 2003 through and including 2010, one or more of the Fowler defendants retained Angelica Nava ("Nava") as its agent in Mexico to:

(a) Identify and recruit any prospective H-2A employees that one or more of the Fowler defendants needed to meet their demand for manual workers to perform hand labor in the production and harvest of apples in and around Wayne County, New York in 2003 through 2010,

(b) Collect any fees that may be necessary to recruit, process, and/or transport the prospective H-2A employees of one or more of the Fowler defendants.

(c) track the status of the H-2A workers that one or more of the Fowler defendants preferred to employ,

(d) make adjustments to the status of the H-2A workers that one or more of the Fowler defendants preferred to employ based upon the information that Nava received from one or more person(s) who were working with her in Mexico and/or directly from the prospective H-2A employees themselves,

(e) provide all necessary visa processing services, including but not limited to, visa processing assistance at the U.S. Consulate in Monterrey, Mexico, for the prospective H-2A employees that one or more of the Fowler defendants preferred to employ after those prospective employees had been identified by one or more of the Fowler defendants for Nava,

(f) maintain all contacts with any government agency of the United States, including but not limited to the U.S. Consulate in Mexico, as part of providing the services described in this paragraph of the Complaint,

(g) provide all necessary recruitment for the timely replacement of prospective H-2A employees that one or more of the Fowler defendants preferred to employ if it were determined that any of those preferred employee(s) were not available for employment with one or more of the Fowler defendants in any particular season with the assistance of Nava,

(h) provide all necessary assistance to ensure that the prospective H-2A employees of one or more of the Fowler defendants were transported from Monterrey, Mexico to upstate New York to arrive in upstate New York in a timely fashion to begin their H-2A employment for one or more of the Fowler defendants.

55. At all times relevant to this action, Angelica Nava ("Nava") is and has been a labor contractor or contratista who operated and continues to operate Rio Verde, San Luis Potosí, Mexico to provide labor consulting, recruiting, hiring, referral, transfer, and transportation services for H-2A agricultural employers such as one or more of the Fowler defendants.

56. At all times relevant to this action, Nava's principal place of business was located in and around the State of San Luis Potosí, Mexico.

57. In calendar years 2003 through 2010, the Fowler defendants did not pay Nava or anyone associated with Nava for any services that Nava provided to any of the prospective H-2A employees of one or more of the Fowler defendants.

58. For each season that the Plaintiffs traveled directly from Mexico to New York to work for one or more of the Fowler defendants under the H-2A program, Plaintiffs were required to pay visa, applicable visa reciprocity/interview fees, and visa processing

fees to the agents of one or more of the Fowler defendants agents in Mexico, including but not limited to Angelica Nava, to secure an offer of employment with one or more of the Fowler defendants.

59. For each season that the Plaintiffs traveled directly from Mexico to New York to work for one or more of the Fowler defendants under the H-2A program, on or at before their arrival in Monterrey to apply for their H-2A visas, the Plaintiffs paid to Angelica Nava and/or other agent(s) of one or more of the Fowler defendants the visa fee, any applicable visa reciprocity/interview fees, and visa processing fees in excess of $400 as a condition of being considered for any position of employment as an H-2A worker for one or more of the Fowler defendants.

60. For each instance that Angelica Nava or person(s) acting on her behalf collected that same payment by plaintiffs, the collection of each such payment(s) was within the scope of the agency relationship that Angelica Nava had with one or more of the Fowler defendants.

61. For each season that the Plaintiffs traveled directly from Mexico to New York to work for one or more of the Fowler defendants under the H-2A program, Plaintiffs incurred various expenses for the cost of inbound transportation from the place where they were recruited to Monterrey, Mexico to apply for H-2A visas, from Monterrey, Mexico to the border of the United States and Mexico at Laredo, Texas, and from Laredo, Texas to upstate New York.

62. Although the Plaintiffs reported to Monterrey for the processing of their H-2A visa applications on the dates dictated by one or more of the Fowler defendants and/or one or more agent(s) of the Fowler defendants such as Angelica Nava, the processing of

those H-2A visas was delayed for one or more days. The Plaintiffs incurred expenses for lodging in Monterrey during the period that they were waiting for their H-2A visa applications to be processed by the U.S. Consulate.

63. For one or more season(s) the Plaintiff and some members of the class and collective action were required to purchase, at their own expense, a new passport in order to obtain an H-2A visa to work for one or more of the Fowler defendants.

64. For each season that the Plaintiffs traveled directly from Mexico to New York to work for one or more of the Fowler defendants under the H-2A program, for each season that they participated in a contract with one or more of the Fowler defendants the Plaintiffs paid $6.00 for the issuance of the Customs and Border Patrol Form I-94 required to enter the United States to work for one or more of the Fowler defendants.

65. The Wage Kickbacks paid by the Plaintiffs were primarily for the benefit and for the benefit of the Fowler defendants within the meaning of 29 C.F.R. §§ 531.3(d)(1), 531.32(a), 531.32(c), and 778.217 and subdivision 1b of § 193 of the New York Labor Law.

66. The Wage Kickbacks by the Plaintiffs were *de facto* deductions from the weekly wages due each of those same H-2A manual workers on each such worker's first regular payday after their arrival in New York to begin their H-2A employment with one or more of the Fowler defendants which each such worker was required to pay in a separate transaction before each such worker's regular payday.

67. None of the de facto wage deduction payments or Wage Kickbacks was or is made in accordance with any law or any rule or regulation issued by any governmental agency nor were they permitted as a deduction from wages under any such provision of law, rule, or regulation.

68. The Wage Kickbacks were made before the receipt of the first workweek's paycheck from one or more of the Fowler defendants by the Plaintiffs in each contract period that they worked when they came directly from Mexico to New York to begin H-2A employment by one or more of the defendants.

69. For each year in the years from 2003-2010, inclusive, the Fowler defendants failed to reimburse the Plaintiffs for the Wage Kickbacks to the extent that those costs reduced the first workweek's wages of the Plaintiffs below the federal minimum wage and the minimum wage required for farm workers under New York Minimum Wage Order for Farm Workers, §§ 190-1.3(d)(3)-(5), 190-1.3(e) , and 190-2.1 in each of those same years. With this failure to reimburse, the Fowler defendants also breached their contract of employment with the Plaintiff and the H-2A workers that the Plaintiff seeks to represent in each of those same years to comply with all applicable employment-related laws.

70. As a proximate result of this alleged breach of contract by one or more of the Fowler defendants, the Plaintiffs have suffered damages in the form of lost wages in excess of $100 per person.

71. For each year in the years from 2003-2010, inclusive, the Fowler defendants failed to reimburse the Plaintiffs for the Wage Kickbacks to the extent that those costs reduced the first workweek's wages of the Plaintiff and those H-2A workers below the AEWR in each of those same years. With this failure to reimburse, the Fowler defendants also breached their contract of employment with the plaintiffs to pay at least the AEWR for all hours worked.

72. As a proximate result of this same breach of contract by one or more of the Fowler defendants, the Plaintiffs have suffered damages in the form of lost wages in excess of $100 per person.

73. For each year in the years from 2003-2010, inclusive, the Fowler defendants did not prohibit Nava or anyone associated with Nava in Mexico from charging and collecting a visa processing fee in addition to the money that was required to pay the U.S. Consulate in Monterrey, Mexico for the visa fee and any applicable visa reciprocity/interview fee.

74. The Fowler defendants did not instruct Nava or anyone associated with Nava operating in Mexico to prohibit Nava or anyone associated with Nava operating in Mexico from charging and collecting any visa processing fee in addition to the money that was required to pay the U.S. Consulate in Monterrey, Mexico for the visa fee and any applicable visa reciprocity/interview fee.

75. Upon information and belief, before 2003, one or more of the Fowler defendants were on notice of their obligations under the FLSA and the New York Labor Law with respect to their duty to reimburse the Plaintiffs for the Wage Kickbacks through: (a) their status as previous defendants in litigation in the year 2000 under the FLSA in which it was alleged that one or more of the Fowler defendants required payment of kick-back of wages and/or *de facto* wage deductions that were the same or similar to the Wage Kickbacks that are alleged in this complaint, (b) their participation in one or more conferences and/or training sessions in which the requirements of *Arriaga v. Florida Pacific Farms, LLC*, 305 F.3d 1228 (11th Cir. 2002)("*Arriaga*"), were discussed, (c) their receipt of written materials,

newsletter(s), bulletin(s). or other information concerning the requirements and application of *Arriaga*.

X. FIRST CLAIM FOR RELIEF (FLSA)

76. Paragraphs 4 through 24, and 33-75, inclusive, above are realleged and incorporated herein by reference by the plaintiff and members of the FLSA collective action.

77. The Fowler defendants did not pay the Plaintiffs at the rate required by 29 U.S.C. § 206(a) for their work for the Fowler defendants based upon the Wage Kickbacks that the Fowler defendants required those workers to pay in order to work for one or more of the Fowler defendants and the Fowler defendants' failure to reimburse those workers for those same Wage Kickbacks when those Wage Kickbacks were primarily for the benefit of the Fowler defendants.

78. As a result of these willful actions of the Fowler defendants in reckless disregard of the right of the Plaintiffs to timely payment of the minimum wage rate required by the FLSA, the Plaintiffs have suffered damages in the form of unpaid wages at the minimum rate required by the FLSA and liquidated damages that may be recovered under 29 U.S.C. §216(b).

XI.. SECOND CLAIM FOR RELIEF (NY LABOR LAW §681 AND MINIMUM WAGE ORDER FOR FARM WORKERS)

79. Paragraphs 4 through 19 and 25-75, inclusive, above are re-alleged and incorporated herein by reference by the Plaintiffs against the Fowler defendants under § 681 of the NYLL and §§ 190-1.2, 190-2.1, and 190-5.1 of New York's Minimum Wage Order for Farm Workers.

80. The Fowler defendants willfully violated their statutory duty to the Plaintiffs when those same named defendants willfully did not pay the minimum wage required by §§ 190-1.2, 190-2.1, and 190-5.1 of New York's Minimum Wage Order for Farm Workers when those wages were due to each member of that same class for the first workweek of their work for one or more of the Fowler defendants based upon the Wage Kickbacks and de facto wage deductions that the Fowler defendants required those workers to pay in order to obtain employment under the H-2A program with one or more of the Fowler defendants.

81. As a result of those same willful actions or omissions of the Fowler defendants, the Plaintiffs have suffered damages in the form of unpaid wages and liquidated damages that may be recovered under § 681 of the NYLL.

XII. THIRD CLAIM FOR RELIEF (§§ 191, 193, 198, and 198-b NYLL)

82. Paragraphs 4 through 19, and 35-75, inclusive, above are re-alleged and incorporated herein by reference by the Plaintiffs against the Fowler defendants under New York Labor Law, Article Six, including §§ 191, 193, 198, and 198-b of the New York Labor Law (NYLL).

83. The Fowler defendants willfully violated their statutory duty to the Plaintiffs when those same named defendants willfully did not pay all wages due when those wages were due to the Plaintiffs for the first workweek of the work of the Plaintiffs based upon the required Wage Kickbacks and the failure of the Fowler defendants to fully reimburse any such workers for those Wage Kickbacks on or before the first regular payday for each of those same workers.

84. As a result of these willful actions or omissions of the Fowler defendants, the Plaintiffs have suffered damages in the form of unpaid wages and liquidated damages that may be recovered under § 198 of the NYLL.

XII. FOURTH CLAIM FOR RELIEF (Contract AEWR wage)

85. Paragraphs 4 through 19, and 25-75, inclusive, above are realleged and incorporated herein by reference by the Plaintiffs.

86. One or more of the Fowler defendants breached their contract with the Plaintiffs to pay all wages due when those wages were due at the AEWR or contract rate on the first regular payday for the work performed by the Plaintiffs when one or more of those same Fowler defendants did not pay all those same wages based upon the Wage Kickbacks that the Plaintiffs were required to pay.

87. As a result of the actions and omissions of the Fowler defendants, the Plaintiffs have suffered damages in the form of unpaid wages.

XIV. FIFTH CLAIM FOR DECLARATORY RELIEF

88. Paragraphs 4 through 75, inclusive, above are re-alleged and incorporated herein by reference by the Plaintiffs against the Fowler defendants.

89. The parties named in this action are in dispute as to their respective rights, privileges, obligations, and liabilities under the Fair Labor Standards Act, the New York Labor Law, the New York Minimum Wage Order for Farm Workers, and the common law of contracts, and require declaratory relief as to what those respective rights, privileges, obligations, and liabilities are.

WHEREFORE Plaintiff respectfully requests that the Court:

(a) Declare the each of the named defendants has violated the rights

Plaintiffs under New York Labor Law, the New York Minimum Wage Order for Farm Workers, and the Fair Labor Standards Act;

(b) Pursuant to Rule 23(b)(3), Fed.R.Civ.P., and 29 U.S.C. § 216(b), certify the plaintiffs as the representatives of the class and collective action alleged in the Complaint with respect to the First Claim for Relief, the Second Claim for Relief, the Third Claim for Relief, and the Fourth Claim for Relief alleged in this Complaint;

(c) Enter judgment on the First Claim for Relief against each of the Fowler defendants, jointly and severally, and in favor of the Plaintiff and each member of the class for compensatory damages plus an additional equal amount in liquidated damages equal to 100% of the amount of unpaid wages pursuant to 29 U.S.C. § 216(b) or alternatively for pre- and post-judgment interest at the full amount allowed by law;

(d) Enter judgment on the Second Claim for Relief and Third Claim for Relief against each of the Fowler defendants, jointly and severally, and in favor of the Plaintiff and each member of the class for unpaid back wages, plus an additional amount in liquidated damages equal to 25% of the amount of unpaid wages pursuant to §§ 198 and 681 of the New York Labor Law, plus any pre-judgment or post-judgment interest that may be allowed by law;

(e) Enter judgment on the Fourth Claim for Relief against each of the Fowler defendants, jointly and severally, and in favor of the Plaintiffs or unpaid back wages plus compensatory damages, including but not limited to pre- and post-judgment interest at the full amount allowed by law;

(f) Award such other relief as may be just and proper in this action.

This the 10th day of May 2010.

/s/Dan Getman
GETMAN & SWEENEY, PLLC
9 Paradies Lane, New Paltz, NY 12561
Tel: (845) 255-9370 / Fax: (845) 255-8649
dgetman@getmansweeney.com

/s/Robert J. Willis
Attorney at Law
NC Bar #10730
(mailing address)
P.O. Box 1269
Raleigh, NC 27602
tel: (919) 821-9031
fax: (919)821-1763

(street address)
5. W. Hargett Street
Suite 404
Raleigh, NC 27601
Application to appear Pro Hac Vice
pursuant to LR 83.1(b) pending