UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

TAMPA DIVISION

SELSO PALMA ULLOA, *et al.*,	)	
	)	
	)	CASE NO.: 8:15-cv-02690-SCB-AAS
Plaintiffs,	)	
	)	
v.	)	
	)	
FANCY FARMS, INC.,	)	
	)	
	)	
Defendant.	)	
_____	)	

PLAINTIFFS' BRIEF ON JURISDICTION

COMES NOW PLAINTIFFS, by and through its undersigned counsel and pursuant to this Court's Order on Motion for Summary Judgment and Order on Motion for Partial Summary Judgment (ECF No. 74), hereby submit the following memorandum of law in response to the Court's inquiry to the basis of its jurisdiction over the breach of contract claims of the remaining Farmworker Plaintiffs. The Court has original jurisdiction over these claims under 28 U.S.C. §1331 because they necessarily raise substantial issues of federal law regarding the proper interpretation of 20 C.F.R. §655.135 in light of *Arriaga v. Florida-Pacific Farms, LLC*, 305 F.3d 1228 (11th Cir. 2002). Even if the Court determines it lacks original jurisdiction, it should nonetheless exercise supplemental jurisdiction on grounds of judicial economy, given the Court's familiarity with the facts and legal issues presented in these claims.

ARGUMENT

I. The Court has Independent Jurisdiction Under 28 U.S.C. §1331 Because the Farmworkers' Breach of Contract Claims Turn on a Substantial Question of Federal Law.

The Court has summarized the test for determining whether it may exercise independent jurisdiction under 28 U.S.C. §1331 where there is no express cause of action created by federal statute:

> [F]ederal jurisdiction over a state law claim will lie if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress. Where all four of these requirements are met, ... jurisdiction is proper because there is a serious federal interest in claiming the advantages thought to be inherent in a federal forum, which can be vindicated without disrupting Congress's intended division of labor between state and federal courts.

Marcus v. Med. Initiatives, Inc., No. 8:12-CV-2864-T-24, 2013 WL 718630, at *4 (M.D. Fla. Feb. 27, 2013), citing *Gunn v. Minton*, 568 U.S. 251, 258 (2013). The Farmworkers' claims satisfy four-prong test and therefore fall within the "special and small category" of cases arising under federal law, within the meaning of 28 U.S.C. §1331. *Gunn*, 568 U.S. at 258.

A. A Federal issue is Necessarily Raised in the Farmworkers' Contract Claims

The Farmworkers' breach of contract claims depend entirely on the Court's interpretation of 20 C.F.R. §655.135. Although the regulation unequivocally requires H-2A employers to contractually bar their foreign contractors from charging fees to the guest workers, it is unclear as to the extent, if any; this obligation is informed by *Arriaga* and its progeny, as argued by Fancy Farms. *See* ECF No. 68, at 3 ("employer liability for unauthorized recruitment fees charged by recruiters must be analyzed pursuant to agency principles of actual or apparent authority." (citing *Arriaga*)) Under this view, the regulation imposed no responsibility on H-2A

employers for recruitment fees beyond that already imposed by the FLSA pursuant to *Arriaga* and similar cases; so long as it did not directly assess or authorize the recruitment fees, the employer had no responsibility under 20 C.F.R. §655.135. Alternatively, as urged by the Farmworkers, the Department of Labor, undoubtedly aware of the *Arriaga*'s decision limiting employer responsibility for recruitment fees under the FLSA, sought to make certain employers were not completely relieved of responsibility for recruitment fees, even those it had not authorized. *See* 74 Fed. Reg. 45918 (Sept. 4, 2009) (the regulation was promulgated "to ensure that the employer's contractual obligations do not permit the passing of recruitment fees to foreign workers."). This interplay of 20 C.F.R. §655.135 and the FLSA, as interpreted by *Arriaga,* an issue to be decided exclusively under federal law, is the central matter to be resolved in the adjudication of the Farmworkers' claims. *Dunlap v. G&L Holding Grp., Inc.*, 381 F.3d 1285, 1290 (11th Cir. 2004) (in order for a party's state law claims to raise substantial federal issues, the federal law claims must be an essential element of the claim and the federal right forming the basis for the state law claim "must be such that the claim will be supported if the federal law is given one construction or effect and defeated if it is given another.")

B. <u>The Farmworkers' claims are disputed by Fancy Farms.</u>

Fancy Farms clearly disputes the Farmworkers' breach of contract claims. It acknowledges that it did not contractually forbid All Nations Staffing or its principals, Nestor Molina and Patrick Burns, from seeking or receiving payments of any kind from the Plaintiffs and other prospective workers for the 2013- 2014 strawberry season. *See* ECF No. 14, Amended Complaint, at 6, ¶16; ECF No. 21, Answer and Affirmative Defenses, ECF No. at 6, ¶16; ECF No., Deposition of Carl Grooms, April 17, 2017, pages 201, 208-09. Nonetheless, Fancy Farms claims that it has no liability for this apparent failure to comply with the plain language of 20

C.F.R. §655.135, as incorporated in the Farmworkers' employment contracts. Citing *Arriaga* and *Ramos-Barrientos v. Bland*, 661 F.3d 587, 600 (11th Cir. 2011), Fancy Farms asserts that "employer liability for unauthorized recruitment fees charged by recruiters must be analyzed pursuant to agency principles of actual or apparent authority." *See* ECF No. 68, at 3. Fancy Farms argues that it therefore could not have violated 20 C.F.R. §655,135, given the Court's finding that the foreign recruiters lacked actual and apparent authority to exact recruitment fees from the H-2A workers, ECF No. 74, at 11. This federal law issue is at the heart of the dispute between the parties.

C. <u>The Questions Regarding the Interpretation of 20 C.F.R. §655.135 are Substantial</u>

In order to for the Court exercise federal question jurisdiction, the federal issue must be of importance to the federal system as a whole. *Gunn*, 568 U.S. at 258. The issue of the proper interpretation of 20 C.F.R. §655.135 is an issue of law and is one of first impression. *Marcus*, 2013 WL 718630 at *4 ("cases that require the resolution of pure issues of federal law provide the strongest basis for finding federal question jurisdiction.")

A "crucial factor" in determining if a substantial federal question exists is whether the dispute involves a "nearly pure issue of law." *Adventure Outdoors, Inc. v. Bloomberg*, 552 F.3d 1290, 1299 (11th Cir. 2008). A substantial federal issue is one "that could be settled once and for all and thereafter would govern…numerous cases." *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 700 (2006). The issue is also most likely to be substantial if it the meaning of the federal statute or regulation raises "an important issue of federal law that sensibly belongs in a federal court." *Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing*, 545 U.S. 308, 315 (2005). Case should be dismissed for want of a substantial federal issue only when the federal issue is frivolous or foreclosed by prior cases which have

settled the issue one way or another. *Mitchell v. Osceola Farms Co.*, 447 F.Supp.2d 1307, 1312 (S.D. Fla. 2006). Here, the Farmworkers present a purely legal issue of first impression.[1]

There is no significant factual dispute between the parties. Fancy Farms admits that it failed to contractually prohibit the foreign recruiters from charging recruitment fees, as promised in the Farmworkers' employment contracts (which incorporated by reference 20 C.F.R. §655.135). The undisputed evidence is that Farmworkers' paid recruitment fees to Nestor Molina or his agents. The amount of the fees paid is also uncontested.[2]

The sole substantive issue remaining to be decided is a purely legal one: the meaning of 20 C.F.R. §655.135. The Court must decide if Fancy Farms is liable for its failure to comply with the plain language of the regulation or, as the Defendant asserts, it is not liable because the regulation's terms are modified by *Arriaga* so that the farm's liability is limited by agency principles of actual or apparent authority. *See* ECF No. at 3. *See Perez v. Jacobsen Manufacturing, Inc.*, No. 8:16-cv-830-T-30, 2016 WL 3344671, at *3 (M.D. Fla. June 15, 2016) (a substantial question under federal law is one that is "the central issue" in the case).

As the Court has observed, this issue has not previously been addressed by the courts. *See* ECF No., at 13. If the Court agrees with Fancy Farms' proposed interpretation, it will substantially reduce the scope of the protections bestowed on guest workers by 20 C.F.R.

[1] In deciding whether federal question jurisdiction exists, it is irrelevant whether the Court might ultimately reject the Farmworkers' contentions as to the proper interpretation of 20 C.F.R. §655.135. *Medical Center BPB, Inc. v. Humana, Inc.*, No. 15-81150-CV-Middlebrooks, 2015 WL 12815285, at *3 (S.D. Fla., Oct. 15, 2015) (once it has been determined that the party's federal claims are not insubstantial on their face, no further consideration of the merits of the claim is relevant).

[2] Because of the dearth of factual issues, the Farmworkers believe that if the Court retains jurisdiction, the remaining claims can be determined on the basis of the current evidentiary record, supplemented by a modest number of stipulations from the parties, thereby obviating the need for a trial.

§655.135. The Court's resolution of this question will determine the rights of thousands of H-2A workers Florida and elsewhere.[3]

D. The Plaintiffs' Rights Under 20 C.F.R. §655.135 can be Vindicated Without Disrupting Congress' Intended Division of Labor Between State and Federal Court.

In weighing the exercise of federal question jurisdiction, the Court must consider whether it is potentially "open[ing] the doors of the federal courts in this circuit' whenever an H-2A worker claims his employer has breached its obligations under 20 C.F.R. §655.135. *Adventure Outdoors, Inc.*, 522 F.3d at 1302. There is no such danger in this case.

The Farmworkers are not seeking federal jurisdiction for every case where an H-2A employer fails to contractually prohibit its foreign recruiters for charging fees to prospective H-2A employees. Federal question exists in this case, and will be lacking in subsequent cases, because the central legal issue in this case is one of first impression. Indeed, as the Supreme Court has stated, federal question jurisdiction should be reserved for issues "that could be settled once and for all and thereafter would govern…numerous cases." *Empire Healthchoice Assurance, Inc.*, 547 U.S. at 677. By clearly announcing that its exercise of federal question jurisdiction in this case is based on its presentation of a question of first impression, subsequent efforts to invoke federal question jurisdiction for similar violations should fall short, assuming the Court decides this legal question --- the only substantive one remaining before it. A narrow finding of federal question jurisdiction should not result in *any* subsequent cases before this or other federal courts for an employer's violation of 20 C.F.R. §655.135.

[3] In fiscal year 2015, the Department of Labor certified nearly 18,000 H-2A workers for employment in Florida, more than in any other state. *See* United States Department of Labor, Office of Foreign Labor Certification, Annual Report 2015, at 45. Available at https://www.foreignlaborcert.doleta.gov/pdf/OFLC_Annual_Report_FY2015.pdf.

II. In its Discretion, the Court Should Exercise Supplemental Jurisdiction Over the Farmworkers' Breach of Contract Claims

If the Court decides it lacks independent jurisdiction under 28 U.S.C. §1331, it nonetheless can and should can exercise its authority to hear the Farmworkers' breach of contract contentions as supplemental claims under 28 U.S.C. §1367.

While the general rule is to dismiss state law claims if all of a plaintiff's federal claims are dismissed prior to trial, *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), this rule is not absolute. Considerations of judicial economy warrant the exercise oh supplemental jurisdiction in this case.

As noted above, the sole remaining issues are federal in nature; no novel or complex questions of state law are involved. Significantly, resolution of the remaining claims requires an analysis of two federal statutes, the Fair Labor Standards Act and the H-2A provisions of the Immigration and Nationality Act, as implemented through the Department of Labor's regulations.[4] The county court judge assigned this case will almost certainly be wholly unfamiliar with intricacies of the H-2A program. While a county court judge may have experience adjudicating straightforward wage claims, she is unlikely to have ever had to apply *Arriaga* and the subsequent case law concerning the payment of pre-employment expenses by H-2A workers.

If this matter is dismissed and refilled in county court, the parties may well need to recreate a good portion of the evidentiary record in this case, including depositions of parties in the U.S. and Honduras, interrogatories and hundreds of pages of documents.

[4] The Supreme Court once characterized the rules governing the agricultural guest worker program as a "somewhat complicated statutory and regulatory framework." *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 596 (1982).

By contrast, the Court has taken the time to familiarize itself with the unusual and complex set of facts and substantial questions of law raised by this case, as reflected in the Court's thorough (and accurate) recitation of the relevant facts in its most recent order. In its adjudication of the competing summary judgment motions, the Court has studied and applied a substantial body of statutory and federal case law. Indeed, in large part due to the Court's familiarity with the factual and legal issues involved, the Farmworkers believe that the remaining issues can be resolved through this tribunal without a trial. There is no possible that a county court judge will be able to adjudicate these claims in as economic and efficient manner.

CONCLUSION

The only substantive matters remaining in this case are purely issues of federal law involving the meaning of 20 C.F.R. §655.135 in light of *Arriaga*. These issues are of first impression and once and for all should settle the rights of the over 150,000 H-2A workers employed each year across the United States. These are "important issue[s] of federal law that sensibly belong[s] in a federal court." *Grable*, 545 U.S. at 315. Because this case should decide the legal issues going forward, there is no threat of similar claims under 20 C.F.R. §655.135 overwhelming the federal courts. For these reasons, independent federal jurisdiction exists for the Court to resolve the breach of contract claims of the remaining Farmworker Plaintiffs.

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Dated: August 7, 2017

Respectfully submitted,

/s/ Andrea Ortega

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this **7th** day of August, 2017, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system. I also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List in the manner specified.

/s/ Andrea Ortega

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