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**UNITED STATES DISTRICT COURT**
**DISTRICT OF NEVADA**

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| ABEL CÁNTARO CASTILLO on behalf of himself and those similarly situated,<br><br>Plaintiff,<br><br>vs.<br><br>WESTERN RANGE ASSOCIATION<br>Defendant. | CASE NO. 3:16-cv-00237-RCJ-CLB |

**PLAINTIFF'S REPLY IN SUPPORT OF CLASS CERTIFICATION**

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## I. INTRODUCTION

WRA says one thing to the Department of Labor ("DOL") – "we are a joint employer" – and the opposite to the Court, claiming "not really."[1] WRA tells DOL there is a description that sets forth job duties of all herders (Cert. at 13) and then argues to this Court that duties vary (Opp. at 13-36). WRA tells DOL herders are on call 24/7, and need to be in constant attendance on the herd (Cert. at 11), but tells this Court they are not on call, and can ignore the sheep for hours at a time. (Opp. at 16-37, esp. at 23, 28, 34). Indeed, WRA told DOL all H-2A workers it obtained would be doing open range herding – which is requirement to have the special H-2A rules apply – but WRA member Green Goat did not assign herders to do *any* work on the range.[2] WRA obtained benefits from DOL because it made those representations – it not only obtained H-2A visas, but it obtained them under the "special procedures" applicable only to qualifying open range herders, that relieved it of the responsibility to track hours worked, and set a lower AEWR than would have otherwise applied. Cert. Ex. 39 at WRA000806-807; 20 C.F.R. §§ 655.200, .210, .211 (2015). Now, when these representations prove less helpful to WRA, it wants to reject each of those assertions previously made under oath to DOL. Defendant's credibility does not survive this series of about-faces.

Despite Defendant Western Range's best efforts to create the appearance of differences – even contradicting its decade of sworn statements to DOL to do so – the extensive record here shows

[1] Compare Certification Brief ("Cert.") at nn.4-7 (collecting cites to WRA asserting it is a joint employer) *with* Opposition to Certification ("Opp.") at 39-40, suggesting WRA is not really a joint employer for anything other than obtaining H-2A visas.

[2] Excerpts from the Deposition of Blake Lambert 57:1-6, 94:4-16 (he does not operate on the range at all); 42-44 (Green Goat keeps their herd in fenced areas of 1-2 acres), attached as Ex. 1. WRA's H-2A applications all indicate they are for open range herders, and being on the range is part of the job description it uses. Cert. at 13 and exhibits cited therein. As such, Green Goat's herders are actually outside the class definition, and any differences between Green Goat and other WRA operations in Nevada are irrelevant. Plaintiff notes, however, that WRA and Green Goat obtained H-2A herders under the special procedures only applicable to open range herders, and thus appear to have made material misrepresentations to the Department of Labor. By representing that the herders would be on the range, WRA obtained an exemption from the obligation to track hours worked, and a lower AEWR than if it had accurately represented that the herders assigned to Green Goat would be working only in small enclosed fields rather than open range. Plaintiff would have noted that Green Goat was outside the class previously, but Mr. Lambert did not appear for deposition until after Plaintiff's class certification brief was filed.

a high degree of consistency with respect to the herders' job duties, their working conditions, and their hours worked. Each element of Plaintiff's claim can be proved with evidence that is common to the class. Indeed, in many instances where WRA has claimed ranches differ, an examination of testimony shows they do not; in other instances, WRA shows differences that are unrelated to the claims at issue here, and which do not affect the ability to resolve the claims here with common evidence. Finally, WRA's last minute collection of declarations from herders, who described consistent duties and similar hours, has served only to support the survey methodology of Plaintiff's expert, who needs only the same access that WRA has to current contact information for herders to complete a reliable survey. In sum, this case is well suited for class certification.

## II. H-2A REGULATIONS DO NOT WEIGH AGAINST CERTIFICATION

Defendant contends its application of the H-2A regulations is lawful. Plaintiff contends that Defendant has violated the H-2A regulations that WRA relies upon. Regardless of which interpretation of the regulation is correct, this presents a common question to be resolved for the class as a whole. WRA's reliance on *Llacua v. Western Range Assoc.*, 930 F.3d 1161 (10th Cir. 2019) is entirely misplaced. WRA claims that because there are H-2A regulations, a class action claim for breach of contract is "preempted." Opp. at 11. It provides no case or other authority supporting such a bald assertion. The numerous cases – class action and otherwise – brought by former H-2A workers against employers for failure to pay them as required by H-2A regulations belie the contention that DOL's authority to enforce regulations deprives workers of the opportunity to pursue legal redress on their own behalf. *See*, *e.g.*, *Garcia-Celestino v. Ruiz Harvesting, Inc.*, 280 F.R.D. 640, 645 (M.D. Fla. 2012) (certifying class of H-2A workers bringing claim for breach of contract created by the H-2A job order); *Vazquez v. Lamont Fruit Farm, Inc.*, No. 06-CV-582, 2011 WL 4572066 (W.D.N.Y. Sept. 30, 2011) (same); *Perez-Benites v. Candy Brand, LLC*, No. 07-CV-1048, 2011 WL 1978414, at *3 (W.D. Ark. May 20, 2011) (same).[3] The regulatory structure of H-

[3] See also *Rivera v. Peri & Sons Farms, Inc*., 735 F.3d 892, 899-900 (9th Cir. 2013) (holding in this putative class action that an allegation that the job clearance orders were the employment contracts of H-2A workers is sufficient to state a claim for breach of contract). Moreover, the claims at issues in *Llacua* were RICO and Anti-trust claims. It was in that context that the court noted that the regulatory overlay was significant, because associations such as WRA were

2A does nothing to establish that WRA complied with that structure, or to preclude Plaintiff from enforcing contractual rights created by it.

## III. PREDOMINANCE IS SATISFIED

### A. Common Questions Predominate in This Case

Defendant incorrectly conflates its ability to identify some differences between class members with the failure of predominance. Predominance is satisfied "when the common issues 'represent a significant aspect of the case and they can be resolved for all members of the class in a single adjudication.'" *Edwards v. First Am. Corp*., 798 F.3d 1172, 1182 (9th Cir. 2015) (quoting 7A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1777 (2d ed.1986)). To evaluate predominance, courts first consider "… the elements of the underlying cause of action." *Abdullah v. U.S. Sec. Assocs., Inc.*, 731 F.3d 952, 964 (9th Cir. 2013) (citation omitted). Thus, for the hodgepodge collection of minor variations that Defendant relies upon to defeat predominance, the purported differences would have to be relevant to determination of Plaintiff's claims. Yet WRA has not even attempted to show that differences in geographic location, size of band, or how often groceries are delivered, among other distinctions it fixes upon, would require different evidence be used to establish each class member's claim, or could establish any differences in the job duties or hours worked that the herders share. One can always identify differences of some sort. But differences which are not relevant to the elements of the cause of action will not impact the ability to resolve a cause of action on a class-wide basis. *Abdullah*, 731 F.3d at 964 (holding where "there are no ***relevant*** distinctions between the worksites," claim presented common question) (emphasis added). With respect to the elements of their contract claim, herders are similar: they all have the same joint employer relationship with WRA, all are subject to the same policy of paying a monthly salary regardless of hours worked, where that monthly salary does not cover their

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explicitly authorized to file applications on behalf of the association and member ranches – a factor relevant to whether member ranches and WRA could be held to be engaged in a "conspiracy" given that concerted action was authorized by H-2A regulations. But in *this* case Plaintiff does not dispute that WRA is specifically authorized to act as a joint employer of H-2A shepherds, and the fact of such authorization actually supports rather than undermines Plaintiff's claim. Plaintiff contends that WRA actually is the joint employer it claims to be, and as such, is liable for failing to comply with its contractual obligations to pay Nevada's minimum wage.

hours worked at Nevada's minimum wage, even at the lower end estimates of hours worked. All share very similar job duties which require them to work similar hours.[4] A detailed record laid out painstakingly in Plaintiff's opening brief establishes the high degree of consistency across the facts that are actually at issue with respect to Plaintiff's claims.[5]

The common questions that Plaintiff addressed in his opening brief—which include whether WRA is the joint employer of herders, whether the proposed class members all have the same contract terms, whether herders were "engaged to wait," and how many hours they worked —can all be answered with evidence that is common to the class as a whole, and that a common methodology applied to records produced in discovery permit determination of damages. WRA in its reply failed to even address most of the common questions Plaintiff raised. Moreover, WRA has ignored the plethora of cases where courts have found that plaintiffs satisfied predominance despite some

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[4] In contrast, in *Dueker v. CSRT Expedited Inc.*, No. 18-cv-08751, 2020 WL 7222095 (C.D. Cal. Dec. 7, 2020), which Defendant relies upon, plaintiff's claim concerned time when truck drivers were in the truck's sleeper berth, while the truck was moving, within the state of California, but plaintiff failed to identify common evidence that could be used to establish the relevant facts, given that trucker time logs had significant inaccuracies, particularly with respect to references to "sleeper berth" time that was at issue; plaintiff's expert Woolfson's analysis was found to be unreliable, as he did not consider available GPS data that established truck location, among other issues; in the absence of common data and method for establishing facts for class as a whole individual analysis was required. *Id.* at *3, 7. Similarly, *In re Wal-Mart Wage and Hour*, No. 06-CV-00225, 2008 WL 3179315 (D Nev. June 20, 2008), which WRA cites repeatedly, plaintiffs alleged various ways that Walmart shorted the time of all hourly workers nationwide, including simply deleting hours worked over 40, deducting for meal breaks employees had not taken, or other alterations of time records. Plaintiffs sought to use statistical analysis of Walmart data to show there were instances when a meal break was deducted, when there was no record the employee punched out for a meal break, or that an employee was logged into a cash register during a time period when the employee was not being paid. However, the statistical evidence offered could not account for alternative explanations in the record, such as employees taking meal breaks, but forgetting to swipe in and out, or an employee failing to log out of the cash register, and permitting another employee to continue working under the prior worker's login information. Moreover, plaintiffs offered no statistical evidence which could be used to show which hours might have been worked, but later deleted or altered by management, and thus not paid. In short, plaintiffs failed to show that there was a workable way to establish violations with evidence common to the class. *Id.* at *1, 18, 19. In contrast, Plaintiff here relies upon common evidence. Moreover, Plaintiff has the benefit of guidance from the Supreme Court's *Bouaphakeo* decision on using statistical estimates to establish time worked.

[5] Plaintiff notes that nearly all cites, WRA cites to depositions without specifying any particular page, making it harder to check the accuracy of its assertions. As noted below, many of its assertions are contradicted by deposition testimony Plaintiff identifies by page and line number. Furthermore, WRA repeatedly asserts that "most" or "all" of its member ranches agreed with a proposition, without providing any citations, or providing citations only for 2-3 ranches – who do not constitute a majority. In sum, claims in WRA's brief cannot be accepted at face value.

irrelevant factual differences, and the settled law that individual damages issues do not defeat class certification. *See, e.g., Abdullah*, 731 F.3d at 964 (certifying class because the distinctions between worksites were not relevant to the claims made); *Whitehorn v. Wolfgang's Steakhouse, Inc*., 275 F.R.D. 193, 200 (S.D.N.Y. 2011) (proposed class members worked in different locations and positions, but relevant pay policy was identical, thus satisfying predominance); *Vaquero v. Ashley Furn. Indus. Inc.,* 824 F.3d 1150, 1154 (9th Cir. 2016) (holding that individual damage calculations alone cannot defeat class certification.).

B. WRA's Status as a Joint Employer Presents a Common Question that is Foundation of Plaintiff Claims

WRA expresses bewilderment over Plaintiff's discussion of WRA's status as a joint employer, and speculates baselessly as to why it was named a defendant at all. Opp. at 38-40. The answer is simple: WRA was named as defendant because it is the joint employer of all proposed class members, it entered into identical contractual relationships with each class member (pursuant to the H-2A regulations), and it has not paid them consistent with those contractual obligations, thus, it is the proper defendant. WRA's status as a joint employer is the first element of Plaintiff's claim, and WRA has consistently suggested that it is a joint employer "only" for H-2A purposes, and not really an employer of herders at all, certainly not for purposes of complying with Nevada minimum wage law. *Id.* Defendant's denial of joint employer status presents a common question that must be resolved for all class members, and must be resolved in the same way for all, thus showing predominance. Indeed, even if WRA were to now concede it is a joint employer, "the fact that an issue is conceded or otherwise resolved does not mean that it ceases to be an 'issue' for the purposes of predominance analysis." William B. Rubenstein, 2 Newberg on Class Actions § 4:51 (5th ed.)

WRA's opposition brief fails to identify any difference in how it hires, fires, and sets terms and conditions of employment for its herders. Additionally, WRA fails to respond to or rebut any of the extensive evidence Plaintiff presented showing that WRA does indeed exercise control as an employer over its herders. Indeed, Defendant cites inoperative guidance for evaluating joint employer status. Opp. at 39, citing 40 CFR 791.2. This was presumably intended as a reference to 29 C.F.R. § 791.2 (2021), but that regulation was rescinded earlier this year. *See* 86 Fed. Reg. 40939

(July 30, 2021); https://www.dol.gov/agencies/whd/flsa/2020-joint-employment (last visited Dec. 9, 2021).

Finally, WRA's argument that it did not really exercise control because it was only acting as required by DOL regulations fails; the argument is both false and irrelevant. The Ninth Circuit has clearly held that an exercise of control cannot be disregarded because it was due to government regulations or contractual obligations rather than unfettered discretion. *See Narayan v. EGL, Inc*., 616 F.3d 895 (9th Cir. 2010). In fact, control exercised pursuant to a contract or government regulation is itself affirmative evidence of an employment relationship. *Id*; *see also NLRB v. Deaton*, *Inc*., 502 F.2d 1221, 1226 (5th Cir. 1974) (reasoning that it cannot ignore or discount the items that are requirements imposed by federal regulations and finding them sufficient to establish employer relationship). Moreover, WRA engages in many employer behaviors that it is not required by DOL to undertake, including transferring herders between ranches, and deciding what vacation and health insurance herders will be offered. Cert. at 5-8.

C. Despite Defendant's Attempt to Suggest Differences, the Record Establishes that Herder's Duties and Hours Can Be Established With Common Evidence

1. Purported Differences in Geography, Topography, Tools, and Transportation Are Not Material as They Do Not Impact Herder Duties or Hours

Defendant details the locations where its members operate, and places great reliance on differences in geography and topography. Opp. at 14–16.[6] It also asserts that there are differences

[6] Defendant makes general reference to the unsigned, unsworn report of Dr. William Payne, its purported expert witness in its discussion of differences in geography and topography. However, Dr. Payne offers opinions on topics he admits he is not qualified to opine upon (interpreting DOL regulations and case law) and topics he admits he brings no expertise to that the Court or jury could not do equally well itself (reviewing testimony and summarizing it). Excerpts from the Deposition of William Payne ("Payne Dep.") 178:21-181:5, 189:25-193:10, attached as Ex. 2. Moreover, Dr. Payne is not a disinterested expert, but an individual with a keen personal interest in the outcome of this case which biases his opinions. As Dean of the College of Agriculture, Dr. Payne determined the University should purchase the Rafter 7 Merinos sheep ranch, and operate it as part of its support of the Nevada sheep industry. Payne Report, Opp. Ex. 3 at 3. He refers to this in personal terms, noting "I have invested millions of dollars. . . ." *Id*. at 5. Rafter 7 is a member of the Western Range Association, and if Plaintiff is successful in this case, Rafter 7 – that is Dr. Payne's College – would have to pay its herders higher wages going forward, and would also be responsible, under its indemnification agreement with WRA, to pay a share of any judgment obtained by Plaintiff in this case that includes herders who worked for Rafter 7. Thus, he has a direct financial interest in reaching the conclusions that he offered in his expert report. His testimony must be excluded under Fed. R. Evid. 702, and also for failure to comply with Rule 26(a)(2)(B). Plaintiff will file a separate

in the tools and method of transportation used. Opp. at 23-25. But WRA fails to establish that such differences result in any differences in the herders' job duties and hours worked, and in many instances has failed to show that there are actual differences at all. For example, while WRA cites Henry Vogler of Need More Sheep as saying every ranch is as different as night and day (Opp. at 15, citing Opp. Ex. 33), that language appears nowhere in Opp. Ex. 33. However, Mr. Vogler *was* asked about various differences, for example whether the size of the herd would impact the hours he would expect a herder would work, and he answered, "not a nickle's worth." Excerpts from the Deposition of Henry Vogler ("Vogler Dep.") 179:21-180:15, attached as Ex. 3.

Defendant relies upon conclusory assertions from Kerri Wright (SNWA) and Sierra Knudson (K & N Ranch) that they would "expect" there to be differences in duties from ranch to ranch. Opp. at 16, 24 n.17. However, Ms. Wright repeatedly testified that she had no understanding of how other WRA member ranches operated. *See, e.g.*, Excerpts from the Deposition of Kerri Wright ("Wright Dep.") 147:9-18, 147:24-148:5, 160:2-4, attached as Ex. 4. Ultimately, she acknowledged that she was just guessing that there were differences, and that she could not identify a single duty that actually differed from ranch to ranch. Wright Dep. at 181:8-23, Ex. 4. Ms. Knudson testified that she does not know what tools other ranches use, and does not know of any tools that would be different except those used for shearing and docking sheep, since her ranch had goats that were not sheared or docked.[7] Excerpts from the Deposition of Sierra Knudson ("Knudson Dep.") 140:1-141:15, attached as Ex. 5. Ms. Knudson went on to testify that she did not know if herders' hours, duties, or housing were actually different from ranch to ranch. Knudson Dep. at 141:16-143:4, Ex. 5. Similarly, WRA relies upon testimony from F.I.M. Corp. that there were differences in "the terrain, the feed," – but does not cite to any testimony from F.I.M. that differences in the terrain and

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motion to exclude this expert.

[7] Notably, multiple ranchers testified that shearing and docking each took just a few days out of the year for each herder, and thus any differences related to shearing or docking are of no import. Excerpts from the Deposition of Tom Filbin ("Filbin Dep.") 81:17-24 (shearing takes between two days and a week), attached as Ex. 6; Excerpts from the Deposition of Ira Wines 51:1-14 (shearing takes about 4 days), attached as Ex. 7; Excerpts from the Deposition of Hank Dufurrena 72:11-13 (shearing takes 1-2 days), attached as Ex. 8; Espil Dep. at 89:9-21 (docking takes about a half day for each band, four days total), Cert. Ex. 28.

feed resulted in any different herder duties or hours worked. Opp. at 16. WRA quotes Executive Director Youree as saying that "[a]ll herders are provided with somewhat different tools." Opp. at 24. However, the only place in Ms. Youree's deposition that language appears is in a question about whether herders were provided housing that would have flush toilets or showers, and Ms. Youree replied that might vary, noting that even when camping there were "tools that you can have a warm shower available." Excerpts from the Deposition of Monica Youree ("Youree Dep.") 219:25-220:10, attached as Ex. 9. This testimony has nothing to do with herders' duties or hours worked.

Finally, Defendant's attempt to show that transportation differed from ranch to ranch serves only to show the high degree of similarity. WRA asserts that Eureka Livestock, Gary Snow Livestock, and Silver Creek Ranch all provided horses to their herders, while Need More Sheep said that horses were provided to herders that need them. Opp. at 25. While WRA cites to testimony from Bonnie Little saying that there was one herder who "did not always have a horse" (Opp. at 24), that was Ms. Little's correction to her declaration in which she said without qualification that herders were supplied with horses; she confirmed that herders at her ranch commonly used horses, but noted that one herder did not always have a horse. Little Dep. at 112:9-115:9, Opp. Ex. 25; Little Declaration ¶ 19, Cert. Ex. 44. In the face of essentially uniform testimony from ranchers that they provided horses to their herders, WRA identified *one* herder who walked rather than using a horse. Opp. at 25. But in addition to the paucity of evidence supporting WRA's claim that "transportation utilized by the herders also varies greatly," an even greater deficiency in WRA's claim is that it makes no link between any purported difference between herders that use burros or mules as opposed to horses, or those who walk with respect to their job duties and hours worked. Distinctions that are not relevant to resolving the claims made do not preclude a finding of predominance, where the relevant issues can be resolved with common proof, such as the common questions here. *Abdullah*, 731 F.3d at 964.

2. Evidence Shows a High Degree of Consistency in Hours and Duties

Both the herder declarations and rancher testimony discussed by Defendant in its opposition show a high degree of consistency with respect to the duties and hours worked by herders – at least as consistent as in cases in which class certification has been upheld. *See, e.g., Tyson Foods, Inc. v.*

*Bouaphakeo*, 577 U.S. 442, 455, 457 (2016).

As Plaintiff argued in his motion, open range herders are the quintessential occupation in which workers are "engaged to wait." Cert. at 32-34. Defendant has not addressed this argument, which presents one of several significant questions that should be resolved for the class as a whole. Indeed, Defendant's Rule 30(b)(6) designee, Monica Youree, acknowledged, when asked about the justification for the modified H-2A procedures applied only to herders that, "It's the need for a shepherd to be with the herd." Youree Dep. 213:3-8, Ex. 9. She further testified that herders are responsible for responding to threats from predators and any health emergencies experienced by sheep, both of which could occur any time of the day or night. Youree Dep. 217:5-23, Ex. 9 (endorsing comments WRA submitted to DOL in 2015, Cert. Ex. 7 at WRA0912).

In light of the claim that herders are "engaged to wait" – that they are required to be on location and available throughout the term of their employment, even if they are not always engaged in active duties – it is not surprising that Plaintiff Cántaro Castillo testified that he was on duty 24 hours per day, responsible for sheep at all times. *See* Opp. at 17-18 quoting (out of sequence snippets) Cántaro Castillo at 51:6-11, 44:7-14, Opp. Ex. 4. His testimony made clear that he did sleep, eat, and engage in other activities, but remained responsible for the sheep, even then. Opp. Ex. 4, 44:8-10, 44:17-18, 51:6-52:1. Thus, his testimony about hours worked (which he said applied to his coworkers as well, as they were also responsible for sheep at all times), is not inconsistent with the other testimony from herders who described only their hours actively engaged in duties, rather than the time period for which they were required to be on location and available to respond.

The declarations submitted by Western Range include six declarations produced by El Tejon in 2017 and nine declarations[8] Western Range obtained and produced quite recently. Of the El

[8] Seven declarations were initially filed as exhibits to WRA's Opposition, in addition to six herder declarations previously disclosed by former defendant El Tejon. Opp. Exs. 11-23. Subsequently, WRA filed a Notice of Supplement to Opposition to Plaintiff's Motion for Class Certification, filing two new Spanish-language declarations of herders who worked in Nevada as Exhibits 50 and 51. At that time WRA also filed a declaration of a herder who did not work in Nevada and did not describe his hours worked or duties; Plaintiff omits that declaration from this discussion as irrelevant. *See* Opp. Ex. 49.

Tejon herders, five testified they worked 8 hours/day (56 hrs/week)[9] and one said 7-8 hours/day (49-56 hrs/week).[10] The nine recent declarants testified to hours ranging from 35/week to 56/week.[11] Taking the midpoint for herders who provided a range rather than one number, the average number of hours worked by these 15 declarations obtained by the current employer of each herder is 49.17 hours per week. Ex. 10. With a range from 35 to 56 hours, the top estimate is 1.6 times the lowest estimate. Significantly, in *Bouaphakeo* where average times from representative testimony, including expert observation, was used to establish the time at issue, the Supreme Court noted that the variance in daily time estimates was "upwards of ten minutes" on averages of 18 minutes for one department, 21.25 minutes for another. 577 U.S. at 450, 456. For a 20 minute estimate, a 10 minute variance would mean a range of 15 to 25 minutes – in which the high estimate is 1.67 times the low end estimate. Moreover, the *Bouaphakeo* Court pointed to *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 691 (1946), which accepted representative testimony to establish time at issue when the range was from 2 minutes to 12 minutes per day – in which the upper estimate was 6 times the low-end estimate. In short, while Plaintiff maintains that he should ultimately prevail on his "engaged to wait" theory, if he does not, even Western Range's cherry-picked declarants demonstrate that representative testimony can be used to establish hours worked, and that the result is within the range of variance that the Supreme Court has held is consistent with class certification.

The 15 herder declarations also provide highly consistent description of herder duties, with all of them describing going out to the sheep first thing in the morning, making sure all are there, spending several hours with the sheep, returning to the sheep camp for lunch, and spending additional time with the sheep in the afternoon, before ensuring they will bed down in the right spot

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[9] Cesario Yauri Garcia (Opp. Ex. 18, ¶ 22); Elias Maximo Ascanoa Alania (Opp. Ex. 19, ¶20); Elmer Alcides Cantaro Oteo (Opp. Ex. 20, ¶ 21); Filomeno Leonardo Lapa Pomahuali (Opp. Ex. 21, ¶ 20); William Archi Lozano (Opp. Ex. 23, ¶ 16).

[10] Gilmar Jhonny Melo Castillo (Opp. Ex. 22, ¶ 14).

[11] Celso Sosa Tumialan (35-40 hours/week; Opp. Ex. 12, ¶ 11); Armando Macha Damian (35-48 hours/week; Opp. Ex. 11, ¶ 13); Erasmo Vera Arteaga (35-48 hours/week; Opp. Ex.13, ¶¶ 8(a)-(f)); Oscar Taipe (47-48 hours/week; Opp. Ex. 15, ¶ 13); Marcial Jorge Motta (55 hours/week; Opp. Ex.14, ¶¶ 9(a)-(h)); Raul Ulloa (35 hours/week; Opp. Ex. 17, ¶ 13); Francisco Rivera Sanchez (42 hours/week; Opp. Ex. 16, ¶ 13); Jose Jesus Salazar Saldaña (42-56 hours/week; Opp. Ex. 50, ¶ 10); Louis Armando Diaz Naba (56 hours/week; Opp. Ex. 51, ¶ 10).

and returning to camp.[12] Opp. Exs. 11-23, 50-51. Notably the language in these declarations is highly similar, particularly for those who worked with the same member ranch, and all were current employees when the declarations were obtained. Such "happy camper" declarations from current employees are likely to be obtained under circumstances where the employee cannot speak freely. *Shaw v. AMN Healthcare, Inc.*, 326 F.R.D. 247, 269 (N.D. Cal. 2018) ("the Court is reluctant to place significant weight on declarations of current AMN employees to deny class certification given the "risk of bias and coercion" inherent in such testimony."); *Mevorah v. Wells Fargo Home Mortg., Inc.*, No. 05-1175, 2005 WL 4813532, at *4 (N.D. Cal. Nov. 17, 2005) ("[W]here the absent class member and the defendant are involved in an on-going business relationship, such as employer-employee, any communications are more likely to be coercive.").[13]

As discussed below at 18-20, WRA used alternative contact information for herders that it had not provided to Plaintiff in order to obtain declarations, depriving Plaintiff of the opportunity to obtain a larger sample for his expert survey of herders. With the same information, Plaintiff's expert can complete his survey. Even with this unlevel playing field, the evidence supports a finding that herders' duties and hours are sufficiently similar that common questions predominate.

The WRA member ranch testimony it cites provides no better support for its claim that duties of herders within Nevada differed from each other. Defendant's bald assertion, Opp. at 22, that the majority of ranchers testified the job description was inaccurate is unsupported by a single citation. In fact, in testimony collected in Plaintiff's Cert. at 13 n.46, the ranchers all agreed that the written job description that WRA attested to in the H-2A applications was accurate, with several noting an

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[12] In describing their duties, a couple of herders mentioned that they do not participate in lambing. It is not established that hours worked during lambing season differ from hours the rest of the year, but if so, that can be accommodated in damages estimates. In any event, lambing season only lasts 1-2 months out of the year. Leinassar Decl. ¶ 11 (about two months), Cert. Ex. 48; Excerpts from the Deposition of Pauline Inchauspe ("Inchauspe Dep.") 64:17-65:9 (about 1 month), attached as Ex. 11; Filbin Dep. 58:17-23 (45 days to two months), Ex. 6; Powers Decl. ¶¶ 11-12 (2 months), Cert. Ex. 26; Wright Dep. 47:14-19 (two months), Cert. Ex. 5; Vogler Decl. ¶¶ 9-10 (about six weeks), Cert. Ex. 50; Borda Decl. ¶ 11 (2 months), Cert. Ex. 45; Little Decl. ¶ 17 (20-30 days), Cert. Ex. 44; Dufurrena Decl. ¶ 6 (6 weeks), Cert. Ex. 53; Ratliff Decl. ¶ 8 (about 2 months), Cert. Ex. 47; Estill Decl. ¶ 8 (about 2 months), Cert. Ex. 36; Olagaray Decl. ¶¶ 11-12 (about 2 months), Cert. Ex. 35.

[13] Further, the nine declarations produced by WRA between October 27 and December 6, 2021 were produced too late for Plaintiff to have the opportunity to depose these herders.

exception for ancillary duties, such as not drenching their sheep or not using vaccinations, but all endorsed the job description overall.[14]

The one area in which a few ranchers disputed the job description was with respect to the requirement to be on call 24/7. Opp. at 22-23 (citing Borda and Etcheverry depositions). Overwhelmingly, ranchers acknowledged they did expect the herders to be on location where the sheep were or at their sheep camp a short distance away, ready to respond in case of emergencies. *See* Cert. at 16 n.57 (including Etcheverry Dep., Cert. Ex. 25 at 43:21-45:5). Moreover, Dennis Richins, former Executive Director for Western Range, testified that open range herders are on call 24/7. Richins Dep. 185:2-7, Cert. Ex. 5. And Western Range's comments to DOL, endorsed by current Executive Director Youree, were that herders had to be available at all hours of the day and night, even though they were not expected to be actively performing duties 24 hours/day. Youree Dep. 213:3-8, 217:5-23, Ex. 9. As a practical matter, the herders do not have the meaningful ability to leave their positions on the range. Thus, whether or not the ranchers have instructed their herders to be available 24/7, the structure of the job does not give them any alternative.[15]

None of the testimony quoted by Defendant in an attempt to show different duties among Nevada herders actually supported such a conclusion. Mr. Leinassar testified that one herder who transferred in from California described a very different operation (Opp. at 18), but he specifically testified that this individual had not worked *range* sheepherding. Excerpts from the Deposition of Kristofor Leinassar 103-105, attached as Ex. 12. However, this case concerns *only* ranches engaged in open range sheepherding, as all of the H-2A paperwork attests, and as all deposed ranches testified they used.[16] Ms. Wright said "lots of things that can change the duties and the workday"

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[14] Defendant also cited to testimony from Executive Director Monica Youree suggesting the description while generally correct varies ranch to ranch (Opp. at 22). However, that language appears in her deposition at 207:25-209:16 (see Opp. Ex. 7) and was a response to a question regarding WRA's written comments to DOL, *not* a question about the job description. Moreover, Ms. Youree did not identify any differences in duties or hours worked.

[15] Moreover, *if* it were true that those two ranches did not require herders to be on call, then they would not be eligible for the special H-2A procedures that are only available when workers are needed to be on call 24/7, out on the range with the livestock. Cert. Ex. 39 at WRA000806-807; 20 C.F.R. §§ 655.200, .210, .211 (2015).

[16] The only exception is Green Goat, which, as noted above did not do anything on the range,

(Opp. at 18-19), but her example that some days they have to move the sheep farther than other days is not a difference in the duties sufficient to reject class certification. Ms. Knudsen's testimony that sheep and goats differ, with no docking or shearing of goats, and that goats walk faster than sheep (Opp. at 21), similarly makes no meaningful difference. As noted above at n.7, docking and shearing take just a few days out of the year. Ms. Knudsen did not identify any way in which duties differed simply because goats might walk faster than sheep. Indeed, when asked about duties, she acknowledged her herders had duties consistent with the official description that everyone else endorsed. Knudsen Dep. at 42:9-43:8, Cert. Ex. 29. Mr. Filbin testified that Rafter 7 is concerned with improving genetics and producing quality wool, not just meat. Opp. at 22 (citing Filbin Dep. Opp. Ex. 34). However, his testimony, at 110-11, discusses how merino *wool* is different, superior, indeed the best in world – without ever identifying any differences in the herders' job duties. After all, the herders are not responsible for the genetic analysis and breeding program that makes Rafter 7 distinctive. Finally, Mr. Leinassar provided more detail about what is involved in lambing, without establishing differences between ranches. Opp. at 23.[17]

D. WRA's Claimed Differences in Management Policies Are Irrelevant or Nonexistent

WRA alleges there are numerous differences in "management policies" across the various member ranches, Opp. 25-37, but fails to establish that such variations result in any differences in the herders' job duties and hours worked, or are otherwise inconsistent with class-wide resolution of the claims in this case. Differences for difference's sake will not defeat class certification. *Abdullah*, 731 F.3d at 964. Notably, WRA makes no claim of variation in the common management policies that underlie this claim: all herders are subject to the same contract terms, are paid on a monthly salaried basis, no one tracks their hours worked, and no effort is made to ensure they are

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and is not within the proposed class in this case.

[17] Also, to the extent there are differences in lambing that do not arise during the rest of the year, it is notable that lambing is only one to two months out of the year. Leinassar Decl. ¶ 11 (about two months), Cert. Ex. 48; Inchauspe Dep. at 64:17-65:9 (about 1 month), Ex. 11; Filbin Dep. at 58:17-23 (45 days to two months), Ex. 6; Powers Decl. ¶¶ 11-12 (2 months), Cert. Ex. 26; Wright Dep. at 47:14-19 (two months), Ex. 4; Vogler Decl. ¶¶ 9-10 (about six weeks), Cert. Ex. 50; Borda Decl ¶ 11 (2 months), Cert. Ex. 45; Little Decl. ¶ 17 (20-30 days), Cert. Ex. 44; Dufurrena Decl ¶ 6 (6 weeks), Cert. Ex. 53; Ratliff Decl ¶ 8 (Ellison) (about 2 months), Cert. Ex. 47; Estill Decl ¶ 8 (about 2 months), Cert. Ex. 36; Olagaray Decl ¶ 11-12 (about 2 months), Cert. Ex. 35.

paid at least Nevada's minimum wage. Cert. at 3, 11-12. Rather, WRA focuses on purported differences that have no bearing on Plaintiff's claims, and certainly not on their job duties or hours worked: the size of the bands, the number of herders employed by each ranch, the frequency of food deliveries, and details of housing conditions. WRA draws no connection between any such differences and the claims in this case. Every employment class certified that includes more than one location has included locations with different numbers of employees; that is no reason to deny certification here. As to the size of bands, the only evidence as to the difference in herder hours that could make is: "not a nickle's worth." Vogler Dep. at 179:21-180:15, Ex. 3. Indeed, even if the frequency of food delivery or condition of housing could impact any of Plaintiff's claims, WRA has not shown any significant difference in the frequency of food delivery (every 4 days vs. every 6-7), in the types of trailers or "sheep camps" that serve as housing for herders for most or all of the year, or in the tents used by some herders in more inaccessible areas during summer months. Opp. at 25, 30, 32.

**Herd Safety:** All ranchers agreed that a core responsibility of herders is keeping the herd safe to the extent possible. Cert. at 14. And all provided trained dogs to assist in doing so.[18] While many ranches also gave herders guns to assist in carrying out this responsibility, and some did not, see, e.g., Opp. at 33-34, the difference in the tools available to perform this duty do not change the herders' duty. Similarly, payment of small bounties for killing predators merely serves to underscore how core the responsibility for herd safety is. While one rancher said that once herders are asleep they are not expected to respond, *id.*, herders are also evaluated on how successfully they protect the herd, thus providing them an incentive to be responsive. Cert. at 17 n.57, 19 n.60.

**Lambing/Kidding:** As WRA noted, some ranches have their sheep lamb out on the range, while others bring them to the home ranch or to another sheltered location. Opp. at 28-29. What

[18] Borda Decl. ¶¶ 15-16, Cert. Ex. 45; Little Decl. ¶ 19, Cert. Ex. 44; Ratliff Decl. ¶ 11, Cert. Ex. 47; Estill Decl. ¶ 11, Cert. Ex. 36; Etcheverry Decl. ¶ 11, Cert. Ex. 46; Leinassar Decl. ¶ 21, Cert. Ex. 48; Snow Decl. ¶ 11, Opp. Ex. 46; Olagaray Decl. ¶ 19, Cert. Ex. 35; Vogler Decl. ¶ 16, Cert. Ex. 50; Powers Decl. ¶ 14, Cert. Ex. 26; Inchauspe Decl. ¶ 11, Cert. Ex. 49; Gragirena Decl. ¶ 16, Cert. Ex. 34; Excerpts from the Deposition of John Espil 101:20-25, attached as Ex. 13; Knudsen Dep. 44:7-8, Ex. 5; Wright Dep. 69:5-11, Ex. 4. *See also* Dufurenna Decl. ¶ 10 (only sheep dogs, not guard dogs), Cert. Ex. 53.

WRA did *not* show was that the difference in physical location leads to different herder duties or hours worked. Indeed, when asked about different lambing options, such as using lambing sheds vs. lambing jugs, and whether those differences would affect the number of hours per day that herders are working, a rancher answered "I wouldn't think so." Vogler Dep. at 177:16-23, Ex. 3.

**Trips to Town and Use of Alcohol:** The ability of herders to leave their posts on the range to engage in activities of their choosing whenever they were not actively engaged in herding is highly relevant to the question of whether they were "engaged to wait" (and thus all their hours on the range are compensable). Cert. at 22. WRA cites four ranchers all saying the same thing: they would provide herders with transportation to town when necessary for doctor visits, banking, and similar needs. Opp. at 36-37. That does not establish any differences from ranch to ranch in herders' ability to use "on call" time for their own purposes. While ranchers spoke about their willingness to take herders into town for occasional needs, herders were dependent upon the ranchers for such transportation, and *no* ranchers claimed that the herders could leave their posts at will, whenever not engaged in active duties, or even that such trips were frequent. Cert. at 18-19, n.59. To the extent that WRA created that impression with its citation to Ms. Wright's testimony about herders getting their drivers' licenses, that is belied by her further testimony that most of the time herders did not have a vehicle with them and they would have to specially request a vehicle to drive themselves into town, that Ms. Wright was not the person who herders would call to request permission to go into town, and that Ms. Wright had not inquired and could not estimate how often that happened. Wright Dep. 74:18-75:25, 55:16-56:5, Ex. 4.

Restrictions on herders' use of alcohol while out on the range is similarly evidence that even when not actively engaged in work duties, that they were engaged to wait, and expected to be completely sober at all times to facilitate their ability to respond. The fact that Mr. Etcheverry permitted small amounts of alcohol for consumption reflected his confidence that his herders would not overindulge to the point they could not respond to the sheep as needed, not any difference in the expectation that herders would be available when needed.

**Pay and Bonuses:** Unremarkably, not every herder is paid exactly the same monthly salary.

While ranchers all started new herders at the AEWR,[19] and some never varied from that, it was common, as Mr. Wines testified, to pay a higher rate to a small number of herders who had long tenure. Opp. at 35 (quoting Wines). However, it is perfectly normal for there to be variation in pay rates across a class of workers; such variation does not defeat class certification. *See, e.g.*, *Gretler v. Kaiser Found. Health Plan, Inc.*, No. EDCV 18-02175, 2019 WL 8198308, at *2 (C.D. Cal. Mar. 18, 2019) ("it appears that class members worked different amounts and had different salaries, which might affect their recovery. [] Even considering these issues, the Court concludes that the commonality requirement is met"); *Morton v. Valley Farm Transp., Inc.*, No. C 06-2933, 2007 WL 1113999, at *3 (N.D. Cal. Apr. 13, 2007) (while drivers earned different hourly rates, class certification was granted as wage rates and other individual issues went toward determining *damages* but did not mean the drivers were not "similarly situated").

WRA histrionically suggests that bonus payment differences are "dramatic" and require individual analysis. Opp. at 36. While it is true that some ranchers provide bonuses and others do not, no mini-trials on individual earnings will be required. First, Plaintiff contends that bonuses cannot be used to offset the required payment of minimum wage, presenting another common legal question suitable for resolution for the class as a whole. Minimum wages are due on the regular payday, not made up in a year-end bonus. See, e.g., Dep't of Labor Field Operations Handbook, Wage and Hour Division, § 30b04 (minimum wages due on regular payday), § 30b07(b) (even if a bonus is permitted to offset minimum wages due, the minimum wage provision is violated if the bonus payment is not received by the regular payday). More significantly, a bonus which would not be considered a part of the regular rate may not be used to offset the minimum wage *at all*. FOH § 30b07(a). Bonuses which are discretionary, and which there is no actual obligation to pay, are not

[19] *See* Decl. of Bonnie Little, ¶ 8, Cert. Ex. 44; Decl. of Ted Borda, ¶¶6-7, Cert. Ex. 45; Dufurrena Decl. ¶¶4-5, Cert. Ex. 53; Ratliff Decl., ¶¶4-5, Cert. Ex. 47; Powers Decl., ¶¶6-7, Cert. Ex. 26; Estill Decl., ¶¶4-5, Cert. Ex. 36; Etcheverry Decl. ¶¶5-6, Cert. Ex. 46; Leinassar Decl., ¶¶8-9, Cert. Ex. 48; Olagaray Decl., ¶¶7-8, Cert. Ex. 35; Snow Decl., ¶¶5-6, Opp. Ex. 46; Vogler Decl., ¶¶6-7, Cert. Ex. 50; Inchauspe Decl., ¶¶4-5, Cert. Ex. 49; Espil Dep. 48:16-49:6, Ex. 13 (testifying that he always paid at least the state AEWR, dependent on which state the herder was in); Knudsen Dep. 21:25-22:25, Ex. 5; Wright Dep. 28:8-29:2, Ex. 4 (testifying that when they hired new herders, WRA would inform the ranch what the minimum wage rate would be); Gragirena Decl. ¶5, Cert. Ex. 34 (El Tejon paid herders the California AEWR, even when they worked in Nevada).

included in the regular rate and cannot be used to offset the minimum wage. 29 C.F.R. § 778.208 (2011). Thus, any bonus payments made are irrelevant, as they were not contractually obligated or pursuant to a formal bonus plan, but purely discretionary decisions made by the ranchers. WRA has offered no authority to the contrary. However, if WRA ultimately prevails on this common question, and the bonus payments made do count towards satisfaction of the minimum wage obligation, Dr. Steward noted, "'[a]ny calculation of a herder's pay could be adjusted to include such bonuses as the court may direct me.'" Cert. at 36 n.79 (quoting Steward Report ¶ 15).

Any differences in precise salary levels or amounts of bonuses paid should not defeat a finding of predominance because "'damage calculations alone cannot defeat certification.'" *Leyva v. Medline Indus. Inc.*, 716 F.3d 510, 513 (9th Cir. 2013) (quoting *Yokoyama v. Midland Nat'l Life Ins. Co.*, 594 F.3d 1087, 1094 (9th Cir. 2010)). Indeed, "damages determinations are individual in nearly all wage-and-hour class actions." *Leyva*, 716 F.3d at 513. Therefore, "'[t]he amount of damages is invariably an individual question and does not defeat class action treatment.'" *Leyva*, 716 F.3d at 513 (quoting *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975)).

E. Given Record, Calculation of Hours/Damages is Common Question, Resolvable with Standard Measures Used in Wage and Hour Cases

Despite WRA's protestations to the contrary, the resolution of how hours worked may be determined is a common question, and the calculation of the resultant damages may be resolved using a common methodology and evidence. As discussed in Plaintiff's motion, the question of hours worked can be resolved on a class-wide basis via the common question of whether herders were "engaged to wait," which would entitle herders to pay for their work 24 hours a day, seven days a week—or, alternatively, for their work 24/7, subtracting sleep time. *See* Cert. at 32-34 (discussing engaged to wait case law). WRA does not respond to this argument anywhere in its 42-page Opposition. Whether or not the herders were "engaged to wait" is a yes-or-no question, the answer to which would apply equally to each herder. *Id.* If they were engaged to wait, their "hours worked" would be finally determined for all, and damages calculations would be simple.

If the answer to whether herders were engaged to wait is "no," calculation of hours worked and the resultant damages can then rely on Dr. Petersen's expert survey. As set forth in Plaintiff's

opening brief, when employers do not maintain records of hours worked, the use of a representative sample such as Dr. Petersen's survey is a well-established practice dating back to the Supreme Court's 1946 decision in *Mt. Clemens*, 328 U.S. at 687-88 and affirmed in *Bouaphakeo*, 577 U.S. 442. WRA does not—and cannot—argue that *Mt. Clemens* and *Bouaphakeo* are inapplicable here. Instead, WRA attacks Dr. Petersen's survey on two grounds: a) that, because of an insufficient number of survey responses, Dr. Petersen is unable to use his current results to make class-wide inferences, and b) that herder declarations are more reliable than survey results. Opp. at 2-3. Both of these criticisms widely miss the mark.

Dr. Petersen's report and deposition testimony clearly state that his work demonstrated the feasibility of a survey to resolve the question of hours worked with a larger sample size once WRA provides more recent contact information. Petersen Report ¶ 4, Cert. Ex. 55. WRA even quotes Dr. Petersen's deposition testimony to that effect in its own Opposition brief: "My opinion is that we can use this survey instrument on a broader group of herders *with more recent contact information* to get a large enough sample to be able to determine class wide inferences." Opp. at 3 (quoting Petersen Dep. 82:11-14, Opp. Ex. 2, emphasis added). It is hardly surprising that the use of the contact information provided by WRA in response to Interrogatory No. 2 yielded only 11 full or partial survey responses, as 312 individuals had only out-of-service or wrong numbers, and for another 57, no one ever answered the phone, despite repeated calls; only 14 respondents were actually reached. Petersen Report, Ex. C, Cert. Ex. 55. As Dr. Petersen has explained, where a valid telephone number was provided and herders were reached, the herders had a very high rate of response to the survey, leading Dr. Petersen to the obvious conclusion that, with the provision of more recent and accurate contact information, he will be able to reach enough herders for an adequate sample size. This more recent contact information, including that for workers employed after 2018, is the subject of a long-standing discovery dispute, as addressed in Plaintiff's motion. Cert. at 23, n.67.

While fully aware that Dr. Petersen's full survey was not completed due to the lack of up-to-date contact information that WRA had been assiduously resisting producing, WRA disingenuously demands "IF NOT NOW–WHEN?" (Opp. at 3), implying that Plaintiff's expert survey will never be able to produce a reasonable class-wide inference of hours worked. Yet it is due solely to WRA's

own actions of *withholding the information* that Dr. Petersen needs that allows WRA to cast aspersions on the completeness of Dr. Petersen's work. Since this topic was addressed in Plaintiff's opening motion, WRA's conduct in withholding this contact information has been revealed to be even more indefensible. WRA's expert witness, Dr. Payne, recently testified that counsel for WRA had been interviewing herders in an effort to obtain declarations. Payne Dep. 51:10-52:19, Ex. 2. As of the date of filing, WRA has produced nine declarations from herders working in Nevada, with all testifying about their work in Nevada post-2018, including one who began work in 2018 but was not listed in WRA's response to Interrogatory No. 2 (Opp. Ex. 14), and two who did not even begin working until 2020 (Opp. Exs. 16, 51), and were of course omitted from WRA's Interrogatory 2 response. Having affirmatively offered testimony about post-2018 activities, WRA has now waived its objection to producing any herder contact information post-2018. Moreover, the declarations produced to date have been from herders who are current employees – reached in the United States, at phone numbers not included in WRA's Response to Interrogatory No. 2, and, with one exception, not even included in the herder files. Webber Decl. ¶ 2, Ex. 14. Plaintiff requested the most current contact information in his interrogatory, and WRA plainly had more up to date contact information that it used for its own purposes, but did not provide to Plaintiff.[20] In an adversarial system, a "fair opportunity to defend … necessarily contemplates allowing that party to conduct its own investigation, rather than limited it to whatever the opposing party selectively produces." *United States v. Wei Lin*, No. 12-CR-00012-1, 2013 WL 12170304, at *2 (D. N. Mar. I. June 24, 2013). WRA cannot be allowed to benefit from this asymmetry of information and selectively produce information only from herders who help its case. Plaintiff must be given the same access to herders, who are potential declarants, that WRA enjoys. The Court should pay no heed to WRA's disingenuous arguments that Dr. Petersen will be unable to complete a larger survey while it continues to improperly withhold the information Dr. Petersen needs to complete that survey. A

[20] Indeed, the parties met and conferred in an attempt to forestall a motion to compel, and Defendant was only willing to provide the telephone numbers at which it had reached the herders from whom it produced declarations – numbers which differed from those WRA had produced to Plaintiffs previously. While Plaintiff appreciates these numbers, there are numerous additional herders currently in Nevada for whom WRA has not provided similarly updated contact information.

reliable survey is well within reach, if WRA is required to produce contact information it plainly possesses.

Finally, WRA's suggestion that its collection of herder declarations is more reliable than Dr. Petersen's survey fails. First, Dr. Petersen's survey is highly reliable because it follows proper survey methodology scientific principles. These include random selection of participants,[21] the use of a standardized and disclosed survey instrument[22] (which follows the Bureau of Labor Statistics' methodology),[23] and the administration of the survey by a disinterested third party, not counsel, as discussed in more detail below. Such formal, properly conducted surveys have been recognized by courts as appropriate evidence to rely upon in cases such as this. Cert. at 23 (collecting cases).

By contrast, WRA's collection of herder declarations is an inferior alternative to Dr. Petersen's survey, most importantly because the declarations were elicited by counsel with no documented methodology or evidence of efforts to neutrally collect reliable information. *See Dukes v. Wal-Mart, Inc.*, 222 F.R.D. 189, 197 (N.D. Cal. 2004) (finding a "survey" consisting of declarations elicited by counsel, prepared in the midst of litigation, and using biased questioning was not the product of "reliable principles and methods" or the type of evidence "reasonably relied upon by experts") (quoting Fed. R. Evid. 702, 703).[24] In *Dukes*, the court also rejected the arguments that

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[21] Dr. Petersen's Report states that the pilot survey responses were effectively random since the ability to obtain a response was dependent on the herder having a functioning telephone number. Petersen Report ¶ 28, Cert. Ex. 55. *Compare* Diamond, Shari Seidman, "Reference Guide on Survey Research," in Federal Judicial Center (2011), *Reference Manual on Scientific Evidence: Third Edition*, p. 382; *Nelson v. Am. Standard, Inc.*, No. 7-CV-10, 2009 WL 4730166 at *3 (E.D. Tex. 2009) (limiting discovery to randomly selected class members because "the fundamental precept of statistics and sampling is that meaningful differences among class members can be determined from a sampling of individuals."). By contrast, it is unknown how herders were selected by WRA's counsel to submit declarations.

[22] According to the American Association for Public Opinion Research, survey methods should be "fully disclosed and reported in sufficient detail to permit replication." "Best Practices for Survey Research," American Association for Public Opinion Research, https://www.aapor.org/Standards-Ethics/Best-Practices.aspx#best12. By contrast, it is unknown whether WRA's counsel utilized a standard questionnaire in conducting interviews with herders to produce declarations, and if so, whether the questions themselves were biased. *See Dukes v. Wal-Mart, Inc*., 222 F.R.D. 189, 197 (N.D. Cal. 2004)

[23] Dr. Petersen utilized the 24-hour time accounting methodology utilized by the US Bureau of Labor Statistics American Time Use Survey. Petersen Report ¶ 43, Cert. Ex. 55.

[24] Moreover, while WRA's expert, Dr. Payne, had not reviewed many of the declarations

the scientific standards for surveys should not apply there because the declarations were not intended to comprise a "scientific survey," and that experts routinely rely on the statements (including declarations) of others, holding that "it is only 'reasonable' for an expert to rely on the statements of others if the statements or declarations were collected through methods calculated to elicit reliable information." *Dukes*, 222 F.R.D. at 197-98.

Many courts recognize the inherent coercive potential where an employer-defendant seeks declarations from employee-class members, and thus give little weight to employer-obtained declarations. *Mevorah,* 2005 WL 4813532, at *4; *Shaw,* 326 F.R.D. at 269. Indeed, as one expert admitted "'typically it's difficult for an attorney to collect the information in a neutral environment so that they truly get a neutral set of information back.'" *Dukes*, 22 F.R.D. at 197 (quoting expert deposition testimony). Thus, the suggestion that WRA's herder declarations are more reliable than Dr. Petersen's survey is inconsistent with legal authority. In contrast, "inferring the hours an employee has worked from a study…has been permitted by the Court so long as the study is otherwise admissible." *Bouaphakeo*, 577 U.S. at 460 (citing *Mt. Clemens*, 328 U.S. at 687). Dr. Petersen testified that with a larger sample size, he will be able to offer a scientifically reliable estimate of hours worked, so the admissibility standard will be met. Given such a study, the Supreme Court instructed that class certification could only be denied on this ground "if [the court] concluded that no reasonable juror could have believed that the employees spent roughly equal time [on the activities at issue]." *Id*. at 459.

Once a representative sample of herders is used to project average hours worked for the whole class, the calculation of damages via a common methodology applied to common data is straightforward. Where a common methodology is applied to a common data set, courts have found this to be yet another common question showing predominance, even though the data set incorporates information about individuals that varies from person to person (e.g. their pay rate or dates of employment). *Leyva*, 716 F.3d at 513-514 (finding that the district court abused its

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WRA now relies upon prior to submitting his report setting forth his opinions, if the WRA-collected declarations are not the product of "reliable principles and methods" then they cannot properly be relied upon by Dr. Payne either. *Dukes*, *id.*

discretion in concluding that individual questions predominated over common questions where the defendant's computerized payroll and time-keeping database would enable the court to accurately calculate damages and related penalties for each claim). While the pay and other employment records here were not produced as computerized data, the information is available and can be input by Plaintiff's damages expert to perform computerized calculations.

As an illustration, using the stated Nevada AEWR in place from 2010 – 2015 of $800/month, damages calculations would look like this (different rows reflecting different potential findings of fact as to hours worked):

| **Monthly Salary** | **Hours/30-Day Month** | **Hourly Pay Rate** | **Less than Min. Wage?** | **Damages Calculation (per month)** |
|---|---|---|---|---|
| $800 | Engaged to Wait:[25] 720 | $1.11 | Yes | (720 x 7.25[26]) – 800 = $4,420 |
| $800 | Preliminary Survey:[27] 360 | $2.22 | Yes | (360 x 7.25) – 800 = $1,810 |
| $800 | DOL Estimate:[28] 205.7 | $3.89 | Yes | (205.7 x 7.25) – 800 = $691.33 |
| $800 | WRA claim:[29] 171.4 | $4.67 | Yes | (171.4 x 7.25) – 800 = $442.65 |

Using the stated Nevada AEWR in place from 2020 of $1683/month, damages calculations would look like this:

[25] Under an engaged to wait theory, herders would be compensated for their work 24 hours per day, seven days per week, equaling 720 hours in a 30-day month.

[26] For purposes of these illustrative calculations, Plaintiff uses $7.25, which was the Nevada minimum wage for most of the 2010-2015 period for those who were offered health insurance, which WRA offered to class members until late 2013. Once the health insurance program ended, the applicable minimum wage was $8.25, and damages increase.

[27] Although Dr. Petersen's sample size is not yet large enough to make class-wide inferences, for purposes of this illustrative chart Plaintiff uses 12 hours/day as one possible outcome, very close to his preliminary findings of 11.39 hours per day when on the range and 13.49 hours per day when lambing. A survey previously done of Colorado herders found they worked an average of 11.57 hours/day (81 hours/week). 80 Fed. Reg. 62958-01 (Oct. 16, 2015) at 14.

[28] In creating the new AEWR regulation, DOL used 48 hours/week as an *estimate* from which to work, in the absence of other nationwide data, although it acknowledged a survey of Colorado herders had yielded averages of 81 hours per week for over 605 respondents. 80 Fed. Reg. 62958-01 (Oct. 16, 2015) at 14. As noted above, the declarations WRA has collected to date support an average of over 49 hours/week. Ex. 10.

[29] In submitting H-2A petitions, WRA commonly claims herders work 40 hours/week, though no one was aware of the basis for that claim. Cert. Ex. 40 at WRA009977; 80 Fed. Reg. 62958-01 at *62995.

| Monthly Salary | Hours/30-Day Month | Hourly Pay Rate | Less than Min. Wage? | Damages Calculation (per month) |
|---|---|---|---|---|
| $1683 | Engaged to Wait: 720 | $2.34 | Yes | (720 x 9) – 1683) = $4,797 |
| $1683 | Preliminary Survey: 360 | $4.68 | Yes | (360 x 9) – 1683) = $1,557 |
| $1683 | DOL Estimate: 205.7 | $8.18 | Yes[30] | (205.7 x 9) – 1683) = $168.3 |
| $1683 | WRA claim: 171.4 | $9.81 | No | (171.4 x 9) – 1683) = no damages |

Only the combination of the highest pay rate, and the lowest number of hours defendant has claimed yields payment of the required minimum wage. At the DOL estimate of 48 hours per week, a salary of $1,851 per month is required to satisfy minimum wage, a rate that pay records show is quite rare. Class certification does not depend on a finding that Plaintiff will win under every scenario, for every member of the class, but on the contention that a jury can decide the hours worked for all herders, and can award damages pursuant to expert calculations incorporating the jury's findings of hours worked. *See, e.g.*, *Bernstein v. Virgin Am., Inc.*, No. 15-cv-02277, 2017 WL 7243203, at *5-6 (N.D. Cal. Mar. 27, 2017).

F. Class Certification is Proper Even if Some Few Herders Have Not Been Harmed

WRA argues that a class is "overbroad" if it includes "those who have not been harmed." Opp. Cert. at 38, (quoting *In re AutoZone, Inc., Wage & Hour Emp. Pracs. Litig.*, 289 F.R.D. 526, 545 (N.D. Cal. 2012), aff'd, 789 F. App'x 9 (9th Cir. 2019)). But Defendant has submitted neither argument nor evidence to suggest that there are herders who were "properly paid" for "all time the employees worked and were subject to their employers' control." Opp at 38. Moreover, even if WRA were able to show that there were some class members who were paid an amount equal to the Nevada minimum wage, the Ninth Circuit has noted that "even a well-defined class may inevitably contain some individuals who have suffered no harm as a result of a defendant's unlawful conduct." *Torres v. Mercer Canyons, Inc.* 835 F.3d 1125, 1136 (9th Cir. 2016). Thus, the inclusion of some uninjured members in a class will not defeat class certification. *Id.*; *see also In re Lidoderm Antitrust Litigation*, No. 14-md-02521, 2017 WL 679367, at *11 (N.D. Cal. Feb. 21, 2017) (same,

[30] In 2020, the minimum wage for those to whom health insurance was not offered (nearly all the majority of the putative class members) was $9/hour.

collecting cases); *Shaw,* 326 F.R.D. at 269.[31] As *Shaw* noted, where there was evidence of a common policy that applied to all class members with respect to the payments at issue, and all class members are subject to the same core duties that tend to give rise to uncompensated work, the fact that some class members may not have worked uncompensated time was not sufficient to defeat predominance and this inquiry is more suitable for determining damages which occur well past the class certification stage. *Id*. Here, all class members were subject to the same policy of being paid a monthly salary without regard to the number of hours worked, even though such payments routinely resulted in herders earning less than minimum wage. Even if WRA were able to identify some class members who had unusually high salaries, such that they were paid minimum wage for all hours worked, such outliers would not be a basis to deny class certification—especially when they will be easily identified and shown to have zero damages, so they will not gain any unearned benefit from being within the class definition.

## IV. MR. CÁNTARO CASTILLO ADEQUATELY RESPRESENTS THE INTERESTS OF ALL CLASS MEMBERS.

Defendant incorrectly argues that Plaintiff Cántaro Castillo is not a proper class representative. Adequacy of representation looks at conflicts of interest and whether the named representative will act vigorously on behalf of the class. *See Fisher v. TheVegasPackage.com, Inc*., No. 19-cv-01613, 2021 WL 1318315 (D. Nev. April 8, 2021); *Staton v. Boeing Co*., 327 F.3d 938 (9th Cir. 2003). WRA fails to identify any conflict of interest regarding Mr. Cántaro Castillo's representation. The fact that Mr. Cántaro Castillo quit his job does not make his interest in this case adverse to other herders; indeed, many wage and hour cases are brought by individuals who quit their jobs – sometimes because they didn't like being cheated of their wages.

WRA claims Mr. Cántaro Castillo "broke his contract" by quitting, but Plaintiff contends that

[31] The Ninth Circuit held earlier this year that where the uninjured class members constituted 28% of the class, that would defeat predominance. *Olean Wholesale Groc. Coop., Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774, 791–93 (9th Cir. 2021), reh'g en banc granted, 5 F.4th 950 (9th Cir. 2021). The grant of rehearing en banc automatically vacated this ruling, but even if it were in place, there is no suggestion that more than a quarter of the class members here may have been paid what they were due under Nevada's minimum wage, and the *Olean* court made clear it was not adopting a brightline numerical limitation on the percentage of uninjured class members permitted in finding that 28% clearly exceeded any threshold. *Id.*

WRA first broke the contract, with him and every other H-2A herder in Nevada, by not paying the Nevada minimum wage when it was higher than the AEWR. Such disputes are to be expected in a case asserting breach of contract, and do not provide a basis to suggest Mr. Cántaro Castillo is an inadequate representative or has any interests that differ from those of other class members. WRA also claims that Mr. Cántaro Castillo stayed in United States without valid immigration status after he quit, but that is pure speculation,[32] and it is also irrelevant to whether Mr. Cántaro Castillo shares the interests of all current and former herders. *See Ruiz Torres v. Mercer Canyons, Inc*., No. 14-cv-03032, 2014 WL 6389445, at *1-2 (E.D. Wash. Nov. 14, 2014) (denying discovery of the immigration status of class representative, since immigration status did not impact his ability to bring the claims at issue).[33] WRA fails to cite any authority in support of its attack on adequacy of representation.

## V. CONCLUSION

For the foregoing reasons, as well as those set forth in Plaintiff's opening motion, class certification should be granted.

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*/s/Christine E. Webber*
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(Admitted Pro Hac Vice)

[32] Defendant relies upon the Declaration of Monica Youree (Opp. Ex. 5), its Executive Director, throughout its brief, and in particular with respect to her opinion as to the adequacy of Mr. Cántaro Castillo as a class representative. However, the declaration is not based upon personal knowledge, contains numerous assertions about which Ms. Youree is not competent to testify (e.g. ¶¶ 7, 8, assertions about herder hours and duties not based on personal knowledge), and is replete with both hearsay (e.g. ¶¶ 6, 10, 17 offering conclusion based upon review of deposition or declaration testimony in the record or discussions with various individuals), and with legal opinions that Ms. Youree is not competent to offer (e.g. ¶¶ 6, 9, offering her interpretation of DOL regulations, and ¶¶ 15-16, offering her opinion on adequacy of representation and similarity of interests between named plaintiff and proposed class). See Fed. R. Evid. 602, 701, 802. No weight should be given to this declaration.

[33] See also, *EEOC v. Global Horizons, Inc*., 287 F.R.D. 644, 650 (E.D. Wash. 2012) (class member's immigration status was undiscoverable simply for the purpose of challenging their credibility); *Sandoval v. Rizzuti Farms, Ltd*., No. CV-07-3076, 2009 WL 2058145, at *2 (E.D. Wash. July 15, 2009) (barring discovery of plaintiff's immigration status because it was irrelevant to the federal and state law claims); *Montoya v. S.C.C.P. Painting Contractors, Inc*., 530 F.Supp.2d 746, 751 (D. Md. 2008) (denying discovery on plaintiff's immigration status sought for opposition to class certification in FLSA case).

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CERTIFICATE OF SERVICE

I hereby certify that on December 9, 2021, a true and correct copy of the foregoing was served via the United States District Court CM/ECF system on all parties or persons requiring notice.

By: */s/ Christine E. Webber*
Christine E. Webber