No. 18-10536

United States Court of Appeals
for the
Eleventh Circuit

SELSO PALMA ULLOA, ORLIN NAHUM SANCHEZ, MANUEL EDGARDO MEJIA, JOSE GUADALUPE, NATAN JOEL ORELLANA, JULIO CESAR GUTIERREZ, JORGE HUMBERTO VASQUEZ, JORGE ALBERTO DOMINGUEZ MADRID, FAREN OBED URRUTIN RAMIREZ, ERICK JOEL ULLOA AMAYA, MARVIN ALEXANDER BUEZO CABALLERO, BAYRON ALBERTO CHAVEZ MUNGUIA, CRISTIAN EDGARDO TINOCO BUESO, WALTER BRIZUELA, DILIO CRUZ VASQUEZ, OSMON HERALDO GOMEZ, ELDER DOMINGO MADRID, WILMAN NOEL MARTINEZ LARA, RENE ARDON VILLEDA, ALEX DANIEL ULLOA AMAYA, RENSO RENERIE CASTILLO BLANCO, DEBLIN OVIDIO LOPEZ HERNANDEZ, WILBER LISANDRO BENITEZ PORTILLO, JULIO CESAR SALMERON, OSCAR RENATO ANARIBA ULLOA,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA IN CASE NO. 8:15-cv-02690-SCB-AAS
HONORABLE SUSAN C. BUCKLEW, SENIOR U.S. DISTRICT COURT JUDGE

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Plaintiffs-Appellants,

– v. –

FANCY FARMS, INC.,

Defendant-Appellee.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to the Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, Plaintiffs-Appellants Selso Palma Ulloa, Orlin Nahum Sanchez Henriquez, Manuel Edgardo Mejia Perez, Jose Guadalupe Hernandez Enamorado, Natan Joel Orellana Mendez, Julio Cesar Gutierrez, Jorge Humberto Vasquez, Jorge Alberto Dominguez Madrid, Faren Obed Urrutia Ramirez, Erick Joel Ulloa Amaya, Marvin Alexander Buezo Caballero, Bayron Alberto Chavez Munguia, Cristian Edgardo Tinoco Bueso, Walter Antonio Brizuela Garcia, Dilio Cruz Velasquez, Osmon Geraldo Gomez Vasquez, Elder Domingo Madrid Saavedra, Wilman Noel Martinez Lara, Rene Ardon Villeda, Alex Daniel Ulloa Amaya, Deblin Ovidio Lopez Hernandez, Wilber Lisandro Benitez Portillo, Julio Cesar Salmeron Hernandez, Oscar Renato Anariba Ulloa, Marvin Alexander Castro Alvarez, Henry Bladimir Acosta Ruiz, Rufino Quintero Amaya, Jose Melvin Vasquez Dominguez, Edvin Pineda Tinoco, Jonatan Felipe Amaya Benitez, Celso Lara Rodriguez, Ruben Castro Castro, Evelio Hernandez Aguilar, Oscar Amilcar Guerra Bobadilla, Nery Joel Cano Cabrera, Marco Tulio Santos Garcia, Noel Antonio Diaz, Oscar Danilo Lopez Vasquez, Gilberto Matias Nolasco Lopez, Merlin Noe Alvarado Medrano, Manuel De Jesus Hernandez Amaya, Merlyn Raul Rodriguez Amaya, Eduardo Antonio Cano Rodriguez, Orlyn Gerardo Castro Diaz,

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All Nations Staffing, staffing agency of food services to which Nestor Molina is the principal

Bayron Alberto Chavez Munguia, Appellant/Plaintiff

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Burns, Patrick, business partner to Nestor Molina

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Jorge Humberto Vasquez, Appellant/Plaintiff

Jose Guadalupe Hernandez Enamorado, Appellant/Plaintiff

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STATEMENT REGARDING ORAL ARGUMENT

Appellants request oral argument. Appellants respectfully submit that oral argument will aid the Court because this appeal involves an issue of first impression in this Court involving the proper interpretation of a federal regulation, Assurances and obligations of H-2A employers, 20 CFR § 655.135(k) (2010). Oral argument will provide the Court and counsel the opportunity to clarify the issues and address questions the Court likely will have concerning this regulation.

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STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1367. The District Court had federal question subject matter jurisdiction over the case due to the inclusion of a claim under the Fair Labor Standards Act. On August 9, 2017, the District Court ruled that it also had federal question subject matter jurisdiction over Appellants' claim for breach of contract because it necessarily raised substantial issues of federal law regarding the proper interpretation of 20 CFR § 655.135. DE 77.

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. On January 10, 2018, the District Court entered a Final Judgment dismissing Counts I and II of Appellants' Amended Complaint. DE 96. Appellants filed their notice of appeal from the Final Judgment on February 9, 2018. DE 101. Accordingly, this appeal is timely under Rule 4(b) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

1. Whether the District Court erred in concluding that Appellee's proven failure to comply with 20 CFR § 655.135(k) did not proximately cause Appellants' damages, *i.e.*, the payment of improper recruitment fees.

2. Whether the District Court erred in concluding that Appellee was not required to comply with 20 CFR § 655.135(k) before it entered into a written contract with its recruiter.

3. Whether the District Court erred in concluding that, under the Fair Labor Standards Act, Appellee was not required to reimburse Appellants for recruitment fees Appellants paid to Appellee's hired recruiter in order to work for Appellee.

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

Plaintiffs-Appellants are 54 Honduran H-2A migrant workers who were illegally required to pay exorbitant recruitment fees in order to enter the United States and work as strawberry pickers for Defendant-Appellee Fancy Farms, Inc. ("Fancy Farms") during the 2013-2014 strawberry harvest. Fancy Farms is a Florida Corporation based in Plant City, Florida. DE 14 ¶ 1; DE 21 ¶ 7. Fancy Farms operates a large strawberry farm in Hillsborough County, Florida where it grows and harvests strawberries for commercial sale. DE 21 ¶ 7.

In 2013, Fancy Farms sought to import foreign workers through the H-2A temporary agricultural guest worker program in order to plant, cultivate, and harvest its 2013-2014 strawberry crop. DE 48, pp. 134-35. In early 2013, to locate and retain workers through the H-2A program, Fancy Farms engaged the services

of All Nation Staffing ("ANS"), its principals Nestor Molina ("Molina") and Patrick Burns ("Burns"), and its agents, for the purpose of recruiting and furnishing H-2A workers for the 2013-2014 strawberry harvest. Fancy Farms engaged ANS either directly or indirectly at least as early as February 2013. DE 61, p. 5; DE 61-1, p. 5; DE 61-2, p. 5; DE 62, pp. 9-11; DE 63, pp. 8-10.

In February 2013, Molina began informing Appellants in Honduras of the employment opportunity at Fancy Farms and recruiting them on Fancy Farms' behalf. DE 61, p. 5; DE 61-1, p. 5; DE 61-2, p. 5; DE 62, pp. 9-11; DE 63, pp. 8-10. During February 2013 to April 2013, Appellants and other prospective workers met with Molina and his agents throughout Honduras. *Id.* During those meetings, Molina informed Appellants that they could work in the United States as strawberry pickers for Fancy Farms in exchange for a recruitment fee. *Id.* After recruiting prospective workers, Molina began filing temporary labor certification applications (ETA Form 9142) and agricultural and food processing clearance orders (ETA Form 790) with the United States Department of Labor ("Department of Labor") on behalf of Fancy Farms. DE 89-3.

On June 20, 2013, after Molina and Burns already had been working on Fancy Farms' behalf for several months and had already begun recruiting workers and filing clearance orders with the Department of Labor on Fancy Farms' behalf, Fancy Farms memorialized its established employer-employee relationship with

Molina and Burns in a written employment agreement. DE 51-1, p. 6. In that employment agreement, Molina and Burns specifically agreed that, among other things, they would be employees of Fancy Farms. *Id.*; *see also* DE 51, Ex. 1 ¶ 6.

Pursuant to federal regulations, the clearance orders filed with the Department of Labor are employment contracts between Appellants and Fancy Farms (the "Employment Agreements"). Content of job offers, 20 CFR § 655.122(q) (2010); DE 21 ¶ 10. Through the filings with the Department of Labor, Fancy Farms certified that the Employment Agreements described the actual terms and conditions of employment being offered and contained all material terms of Appellants' employment. *Id.* ¶ 12.

Federal regulations govern the essential terms of the Employment Agreements. *Id.* ¶ 9. The Department of Labor specifically promulgated regulations prescribing the terms of the Employment Agreements as part of its regulatory framework governing the implementation of the H-2A program. As required by the Department of Labor, in each Employment Agreement, Fancy Farms expressly agreed "to abide by the regulations as set forth at 20 CFR 655.135," thereby incorporating those federal regulatory requirements into the Employment Agreements. DE 89-3 (collection of clearance orders filed with the Department of Labor). Among other assurances, Fancy Farms attested that it abided by the obligation prescribed by 20 CFR § 655.135(k), which mandates:

> The employer has contractually forbidden any foreign labor contractor or recruiter (or any agent of such foreign labor contract or recruiter) whom the employer engages, either directly or indirectly, in international recruitment of H-2A workers to seek or receive payments or other compensation from prospective employees.

20 CFR § 655.135(k). Accordingly, Fancy Farms affirmatively represented to Appellants in the Employment Agreements – and assured the Department of Labor through filing the Employment Agreements – that it had contractually prohibited its recruiters from procuring such unlawful fees. *See* DE 89-3, p. 2 (Fancy Farms represented that it "has and will contractually forbid any foreign labor contractor or recruiter whom the employer engages in international recruitment of H-2A workers to seek or receive payments from prospective employees.").

Fancy Farms breached its express promise to Appellants that it would abide by 20 CFR § 655.135(k): Fancy Farms never contractually forbid ANS or its principals or agents from seeking or receiving payments of any kind from Appellants or other H-2A workers. DE 21 ¶ 16; DE 48, pp. 208-09; DE 51, Ex. 1 ¶ 7. It did not do so in February 2013, when it first engaged Molina's services and Molina began contacting Appellants on Fancy Farms' behalf. Nor did it do so when it memorialized that employment relationship with Molina and Burns on June 20, 2013.

As a result, unrestrained by any contractual obligations, Molina and Burns were free to extract exorbitant recruitment fees from Appellants – in excess of $3500 per worker – as a condition of hire, contrary to express regulations. DE 17-1 through DE 17-51. Molina and Burns charged the fees to Appellants as a condition of being selected for the job with Fancy Farms. *Id.*; *see also* DE 62, pp. 9-15. Left with no choice, Appellants agreed to pay. *Id.* In order to do so, many Appellants resorted to borrowing funds through an informal lending market, at interest rates of 25% or more. DE 17-1 through DE 17-51; *see also* DE 62, pp. 22-23. After paying the recruitment fees, Appellants were issued H-2A visas to work for Fancy Farms and they traveled to the United States to begin their employment. DE 62, p. 47.

While working for Fancy Farms, Appellants handpicked strawberries for 10 hours a day, 6 to 7 days a week, earning approximately $10 an hour. DE 17-1 through DE 17-51. Due to the exorbitant recruitment fees Appellants paid to Fancy Farms' agents, Molina and Burns, Appellants' wages fell well below minimum wage, and many have struggled to repay the loans and usurious interest they were compelled to take on in order to secure work in the United States.

Fancy Farms was fully aware that Molina and Burns had improperly charged Appellants recruitment fees. Carl Grooms ("Grooms"), Fancy Farms' owner, learned through Molina's references before he entered into a written contract with

Molina that Molina had a history of charging prospective workers "extra to come to the US" and that the workers "were not making enough money." DE 48-1, Ex. 1 (Grooms' Handwritten Notes from Molina's References). At least as early as October 2013, a number of Appellants approached their supervisors and complained of the illegal fees. DE 17-46 ¶ 7 (Appellant Dionicio Mencia Chaver informed three different Fancy Farms' supervisors of the illegal fees in October 2013); *see also* DE 17-23 ¶¶ 7-9 (Appellant Marvin Alexander Castro Alvarez informed Benjamin Dominguez, a crew leader at Fancy Farms, of the illegal fees in November 2013); DE 17-34 ¶¶ 7-9 (Appellant Noel Antonio Diaz notified two Fancy Farms crew leaders of the recruitment fees in November 2013). In January and February 2014, numerous Appellants also raised the issue of the recruitment fees with their immediate supervisors at Fancy Farms and directly with Grooms. *See* DE 17-1 ¶¶ 7-9; 17-7 ¶¶ 7-9; 17-9 ¶¶ 7-9; 17-10 ¶¶ 7-9 ; 17-16 ¶¶ 7-9; 17-18 ¶¶ 7-9 ; 17-19 ¶¶ 7-9; 17-20 ¶¶ 7-9 ; 17-21 ¶¶ 7-9; 17-27 ¶¶ 7-9 ; 17-36 ¶¶ 7-9 ; 17-37 ¶¶ 7-9 ; 17-40 ¶¶ 7-9 ; 17-43 ¶¶ 7-9 ; 17-44 ¶¶ 7-9; 17-47 ¶¶ 7-9; 17-50 ¶¶ 7-9.

In response, some of Appellants' supervisors at Fancy Farms acknowledged that the recruitment fees were improper and promised they would address the fees with Grooms. DE 17-9 ¶ 9; 17-19 ¶ 9. They also told the Appellants to just wait, do their best, and work hard. DE 17-7; 17-50. In one instance, Fancy Farms "told [Appellant] not to worry because [he] was going to start making money to [be]

able to pay back the money [he] borrowed" in order to pay the recruitment fee. DE 17-46.

Despite being on notice of the illegal recruitment fees, Fancy Farms never took any action or made any effort to reimburse Appellants for the fees. DE 17-1 through DE 17-51. By letter dated March 6, 2014, Appellants, through their attorney, formally requested redress for the payment of the illegal fees from Fancy Farms. DE 17-2, Ex. 1. To date, Fancy Farms has not reimbursed Appellants for any portion of the unlawful recruitment fees.

II. LEGISLATIVE AND REGULATORY BACKGROUND

The Immigration and Nationality Act of 1952 (as amended, the "INA"), permits agricultural employers to obtain work visas for and hire nonimmigrant foreign workers to perform temporary or seasonal agricultural work in the United States. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(a). Congress created the H-2A program to give agricultural employers who cannot find domestic workers to harvest their own crops access to foreign labor to meet their needs. Congress recognized that prior temporary labor programs inevitably enabled detrimental consequences for temporary workers absent adequate protections. In passing the H-2A program, Congress acknowledged the "inadequacy of . . . protections for farmworkers" provided by prior legislation and noted that it "had no intention of creating an

environment conducive to the violation of worker rights." H.R. Rep. No. 99-682, pt. 1 at 80, 93 (1986).

Congress delegated implementation of the H-2A certification program to the Department of Labor, which has promulgated regulations governing the H-2A program. These regulations not only direct the procedure for the certification of foreign labor, they also directly affect the workers' substantive rights and their employers' obligations. For example, employers seeking permission to hire H-2A workers must file an application with the Department of Labor to obtain the necessary certification. *See* Authority of the Office of Foreign Labor Certification Administrator, 20 CFR § 655.101 (2010); Application filing requirements, 20 CFR § 655.130 (2010). As part of the application process, the employer must declare in its submitted job orders, under penalty of perjury, that it has and will abide by specific requirements with respect to the terms of employment that the Department of Labor has deemed necessary to protect workers from adverse wages and working conditions. *See* 20 CFR §§ 655.130(a); 655.135. Unless the employer creates a separate, written employment contract with the H-2A workers, "the required terms of the job order and the certified Application for Temporary Employment Certification will be the work contract." 20 CFR. § 655.122(q).

The Department of Labor also specifically addressed the problem of recruitment fees charged to foreign workers. During the notice-and-comment

period for the regulations at issue, the Department of Labor commented that it was "adamant that recruitment of the foreign worker is an expense to be borne by the employer and not by the foreign worker." Temporary Agricultural Employment of H-2A Aliens in the United States, 73 Fed. Reg. 77158 (Dec. 18, 2008). It recognized that "workers who have heavily indebted themselves to secure a place in the H-2A program may be subject to exploitation in ways that would adversely affect the wages and working conditions of U.S. workers by creating conditions resembling those akin to indentured servitude, driving down wages and working conditions for all workers, foreign and domestic." *Id.* at 77159. Thus, it mandated that "the employer make, as a condition of applying for labor certification, and therefore, as a condition of lawful H-2A employment within the U.S., the commitment that the employer is contractually forbidding any foreign labor contractor or recruiter whom the employer engages in international recruitment of H-2A workers to seek or receive payments from prospective employees in exchange for access to job opportunities." *Id.* at 77159-60. To that end, the regulations require employers to contractually forbid recruiters from procuring unlawful recruitment fees from H-2A workers and to affirmatively attest their regulatory compliance in their applications and work contracts. *See* 20 CFR § 655.135.

The Department of Labor intended the anti-fee shifting provisions to be strictly enforced. In a guidance issued on May 6, 2011, the Department of Labor explained that preventing shifting recruitment costs to H-2A workers protects the integrity of the H-2A program and process. DE 57-23. The same guidance also expressly noted that "requiring employers to incur the costs of recruitment is reasonable, even when the fee is paid in a foreign country." *Id.* The Department of Labor concluded that employers who violate 20 CFR § 655.135(k) "are subject to the full range of sanctions and remedies . . . including but not limited to assessment of civil money penalties and recovery of unpaid wages" as well as "recovery of recruitment fees paid in the absence of contract clauses required by 20 CFR § 655.135(k)." *Id.*

III. THE COURSE OF PROCEEDINGS AND DISPOSITIONS IN THE COURT BELOW

On November 17, 2015 Appellants commenced this action against Fancy Farms for breach of the parties' Employment Agreements and for violating the Fair Labor Standards Act, 29 U.S.C. §§ 206, et seq. ("FLSA"). DE 1, p. 7. Appellants' complaint, as amended, alleged that Fancy Farms' application form to the Department of Labor where it agreed to abide by 20 CFR § 655.135 formed the work contract between the parties. DE 14. By failing to contractually forbid ANS or its agents from collecting recruitment fees, Fancy Farms failed to perform its obligations under the contract. *Id.* at 8. Appellants also alleged that Fancy Farms'

failure to reimburse Appellants for the recruitment fees resulted in their earnings falling below the minimum wage required by the FLSA. *Id.* at 7-8. Accordingly, Appellants sought the amount of their recruitment fees as damages, liquidated damages, and pre-judgment interest, as well as legal costs and fees. *Id.* at 8-9.

On July 24, 2017, the District Court granted in part Fancy Farms' motion for summary judgment and denied Appellants' motion for partial summary judgment (the "Summary Judgment Order"). DE 74. The District Court dismissed the FLSA claim and concluded that Fancy Farms was not required to reimburse Appellants for the recruitment fees Appellants paid Molina and Burns, Fancy Farms' hired recruiters. *Id.* at 10-11. The District Court rejected Appellants' argument that Fancy Farms, as Molina and Burns' employer, was responsible for the unlawful charging of recruitment fees under *respondeat superior*, and instead found that Molina and Burns acted without actual or apparent authority from Fancy Farms as a matter of law. *Id.* at 11. The District Court also dismissed the contract claims brought by Appellants who paid their fees prior to June 20, 2013, the date Fancy Farms formally hired Molina and Burns as employees. *Id.* at 14-15. The District Court found that Fancy Farms was not obligated to abide by 20 CFR § 655.135(k) prior to June 20, 2013 because it had not entered into a written contract with Molina and Burns until that date. Therefore, the District Court found that Fancy Farms did not cause the damages of those Appellants that paid before that date. *Id.*

Nevertheless, the District Court denied Fancy Farms' motion for summary judgment as to the Appellants who paid their fee on or after June 20, 2013, finding that those Appellants stated a claim for breach of contract. *Id.* at 15.

With respect to those Appellants who paid their fee on or after June 20, 2013, the parties stipulated that the District Court could rule without a bench trial based on the stipulated record. DE 83, pp. 4-5. On January 9, 2018, based upon the stipulated record and the parties' proposed findings of fact and conclusions of law, the District Court determined that Fancy Farms materially breached the Employment Agreements with the remaining Appellants by failing to comply with its regulatory obligations (the "Final Order"). DE 95, pp. 18-19. The District Court nevertheless declined to award any damages to the Appellants because it held that they failed to prove that Fancy Farms' conduct proximately caused the Appellants' damages, *i.e.*, the payment of the illegal recruitment fees. *Id.* at 19-20. According to the District Court, Appellants "failed to submit any evidence on this issue," and therefore failed to meet their burden on causation by a preponderance of the evidence. *Id.* at 20. On January 10, 2018, the District Court entered a Final Judgment dismissing all of Appellants' claims. DE 96.

IV. STANDARD OF REVIEW

This Court reviews the District Court's Summary Judgment Order dismissing the Appellants' FLSA claim and partially dismissing the Appellants'

contract claim *de novo*. *See Byars v. Coca–Cola Co.*, 517 F.3d 1256, 1263 (11th Cir. 2008) ("The propriety of the grant of summary judgment presents questions of law, which we review de novo."). The standard of review for the District Court's Final Order dismissing the Appellants' contract claim is "clearly erroneous" for factual findings and *de novo* for application of the law to the facts. *See Hargray v. City of Hallandale*, 57 F.3d 1560, 1567 (11th Cir. 1995).

SUMMARY OF THE ARGUMENT

Fancy Farms' Contractual and Regulatory Breach Proximately Caused Appellants' Damages.

A party proves causation in a breach of contract claim by demonstrating by a preponderance of the evidence that (i) the damages arose naturally from the breach or (ii) the breaching party had reason to foresee that the claimed damages would probably result. Appellants claim as damages the recruitment fees they paid to Fancy Farms' recruiters, Molina and Burns. Those damages arose directly and foreseeably from Fancy Farms' breach of the Employment Agreements with the Appellants. Those Employment Agreements incorporate the obligation on employers set forth at 20 CFR § 655.135(k), which required Fancy Farms to contractually prohibit the collection of recruitment fees.

In the Final Order, the District Court erroneously found that the post-June 2013 Appellants failed to present *any* evidence of causation, and thus because the evidence on causation did not weigh in favor of either side, the contract claim

failed. In so ruling, the District Court erred by improperly disregarding the evidence of causation Appellants did, in fact, present.

There is no doubt that breaches of 20 CFR § 655.135(k) will cause damages in the form of improper recruitment fees. The Department of Labor required H-2A employers to attest to their compliance with 20 CFR § 655.135(k) in their employment contracts. Consequently, the District Court was required to consider the regulation's purpose within the larger H-2A regulatory scheme. The District Court failed to do so. The express purpose of 20 CFR § 655.135(k) is to prevent the unscrupulous practice of passing the cost of recruitment fees to workers. In promulgating the regulation, the Department of Labor recognized that employers like Fancy Farms have the power to restrain hired recruiters by contractually forbidding them from charging recruitment fees. A breach of 20 CFR § 655.135(k) will, naturally, result in the recruitment fees the regulation was designed to prevent. Thus, at the time Fancy Farms entered into the contract and promised Appellants it would abide by 20 CFR § 655.135(k), it was foreseeable that its failure to contractually prohibit its recruiters from charging recruitment fee would result in recruiters doing exactly that – charging the recruitment fees Appellants claim as damages.

There is no debate that the contract with the recruiters did not prohibit charging recruitment fees. No evidence was presented that Molina or Burns

disregarded any other aspects of their contracts. Instead, it would have been reasonable to infer that the inclusion of the clause prohibiting recruitment fees would have prevented them from charging such fees. Indeed, the Department of Labor promulgated 20 CFR § 655.135(k) with the express expectation that requiring the inclusion of such a clause in contracts between owners and recruiters would, in fact, prevent recruiters from charging recruitment fees. Thus, the existence of this regulation and the well-established regulatory intent behind it is evidence that the recruitment fees were a direct and foreseeable consequence of a failure to include the required clause in Fancy Farms' contracts with the recruiters. In addition, Fancy Farms' owner also testified that he was aware of the problem of recruiters charging unlawful recruitment fees at the time Fancy Farms began its international recruitment and entered into its contract with Appellants. Thus, it was reasonably foreseeable that Fancy Farms' breach of 20 CFR § 655.135(k) would result in Appellants being charged recruitment fees – the precise harm the regulation was meant to eliminate.

Through the evidence presented to the District Court, Appellants met their burden on causation, especially given the absence of any contrary evidence from Fancy Farms. In concluding that Appellants presented *zero* evidence to demonstrate that either Molina or Burns would have disregarded an express provision of their contracts with Fancy Farms, the District Court did not even

consider Appellants' evidence as "evidence" and erroneously dismissed Appellants' contract claim.

<u>Fancy Farms' Obligation under 20 CFR § 655.135(k) Arose When it First Engaged Its Recruiter.</u>

An employer's regulatory duty under 20 CFR § 655.135(k) arises whenever an employer "engages" a foreign labor contractor or recruiter "either directly or indirectly in international recruitment of H-2A workers." In the Summary Judgment Order, however, the District Court found that 20 CFR § 655.135(k) did not apply until Fancy Farms memorialized its pre-existing employer-employee relationship with Molina and Burns *in writing* on June 20, 2013. On that basis, the District Court dismissed the contract claims of all Appellants who paid their recruitment fees before June 20, 2013. The District Court's interpretation of 20 CFR § 655.135(k) undercuts the plain text and purpose of the regulation, which was designed to broadly protect workers any time an employer "engages" a recruiter "either directly *or indirectly*." Its application is not limited to circumstances where an employer directly hires a recruiter in writing. On the record before the District Court, Fancy Farms engaged a recruiter at least as early as February 2013, which is when Molina began contacting Appellants in Honduras on Fancy Farms' behalf. In fact, prior to June 20, 2013, Molina represented to the Department of Labor in clearance orders he filed on Fancy Farms' behalf that he

was Fancy Farms' employee. Accordingly, the District Court erred in adopting an unsupportable interpretation of Fancy Farms' obligations under 20 CFR § 655.135(k), and it inappropriately resolved the disputed factual issue of when Fancy Farms "engaged" its recruiter, within the meaning of the regulation, on summary judgment.

Fancy Farms Was Required to Reimburse Appellants for the Unlawful Recruitment Fees.

Under FLSA, traditional principles of agency law determine when an employer is required to reimburse its workers for any unlawful recruitment fees paid. An employer will be responsible for reimbursing such fees if the recruiter had actual or apparent authority to collect the fees. There is substantial evidence in the record that ANS, Molina, and Burns had apparent authority to collect fees on Fancy Farms' behalf, including the undisputed fact that Molina and Burns were Fancy Farms' own employees and were not merely independent contractors. Additionally, ANS was Appellants' sole point of contact for the employment opportunity with Fancy Farms, and Appellants paid the recruitment fee as an express condition of hire for the job with Fancy Farms.

In concluding that, as a matter of law, Appellants could not reasonably believe ANS, Molina, and Burns had apparent authority to collect fees on Fancy

Farms' behalf, the District Court improperly resolved the disputed issue of apparent authority against Appellants on summary judgment.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE DISTRICT COURT ERRED IN DISMISSING THE POST-JUNE 2013 APPELLANTS' BREACH OF CONTRACT CLAIMS IN THE FINAL ORDER

In the Final Order, the District Court addressed the contract claims of the 11 Appellants who paid the unlawful recruitment fees after June 20, 2013, the date Fancy Farms entered into a written agreement that formalized Fancy Farms' pre-existing relationship with its employees, Molina and Burns. DE 95, pp. 14-21. The District Court correctly held that a contract existed between Appellants and Fancy Farms via the clearance orders filed with the Department of Labor, and that Fancy Farms' uncontested failure to contractually forbid ANS, Molina, or Burns from charging recruitment fees amounted to a material breach of the parties' contracts. *Id.* at 18-19. Yet, the District Court erred in finding that Fancy Farms' material breach, *i.e.*, its proven violation of 20 CFR § 655.135(k), did not cause Appellants' damages in the form of recruitment fees. *Id.* at 19-21. Specifically, the District Court held that the *only* way Appellants could meet their burden on causation was to show "that had Fancy Farms contractually forbidden Molina, Burns, and their agents from seeking or receiving recruitment fees from prospective workers, Molina would not have charged the Remaining Plaintiffs a

recruitment fee." *Id.* at 19. Ultimately, the District Court found that "the evidence before the Court does not weigh in favor of either side on the issue of causation" (*id.* at 21), and held that because Appellants had the burden of proof, the contract claim failed. This finding was an error.

In making its decision, the District Court failed to cite or even consider the governing causation standard under Florida contract law. In order to meet their burden on causation, Appellants had to prove by a preponderance of the evidence that their damages arose naturally from Fancy Farms' breach *or* that the damages were in the contemplation of both parties at the time they made their contract. *See TDS Inc. v. Shelby Mut. Ins. Co.*, 760 F.2d 1520, 1531 n.11 (11th Cir. 1985) (under Florida contract law, "to be recoverable, damages for breach of contract 'must arise naturally from the breach, or have been in the contemplation of both parties at the time they made the contract, as the probable result of a breach'"). Although damages are recoverable if a party establishes *either* that the damages arise naturally from the breach, *or* that the parties contemplated the damages at the time the contract was made – here, Appellants proved both.

The District Court erroneously disregarded the evidence that showed that Appellants' damages in recruitment fees both (i) arose naturally from Fancy Farms' breach and (ii) were reasonably contemplated by the parties at the time they entered into their contract.

A. Appellants' Damages Naturally Resulted from Fancy Farms' Breach

Under Florida contract law, one way a party can prove causation is to show that the damages "arise naturally from the breach." *TDS*, 760 F.2d at 1531 n.11; *see also Royster Co. v. Union Carbide Corp.*, 737 F.2d 941, 948 (11th Cir. 1984) (contract plaintiff can prove damages by showing that the "damages flowed as the natural and proximate result of defendant's wrongful conduct"). Here, Appellants claim as damages the recruitment fees ANS and its principals and agents charged in the absence of any contractual prohibition from Fancy Farms forbidding them from doing so. These damages were a natural result of Fancy Farms' breach of its contractual and regulatory obligations.

"When federal regulations require contracts to include a uniform covenant and prescribe its language interpreting the covenant requires interpreting the regulations themselves." *Feaz v. Wells Fargo Bank, N.A.*, 745 F.3d 1098, 1105 (11th Cir. 2014). Here, the Department of Labor required all H-2A employers to attest to their compliance with 20 CFR § 655.135(k) as part of its implementation of the H-2A program. An employer cannot participate in the H-2A program unless he or she makes the requisite contractual assurances, and the Department of Labor will reject any applications that do not contain the necessary contractual language. *See* Notice of deficiency, 20 CFR § 655.141(a) (2010); DE 89-1, pp. 56-61. "Such

mandatory covenants must be interpreted to achieve the purpose and policy behind the regulatory requirements behind those provisions." *Feaz*, 745 F.3d at 1105.

In promulgating 20 CFR § 655.135(k), the Department of Labor recognized that H-2A employers like Fancy Farms can prevent foreign recruiters from charging recruitment fees through contractual provisions with their recruiters. The Department of Labor specifically targeted employers in order to protect workers such as Appellants from the outlawed practice of charging prohibited fees. As the Department of Labor stated, charging recruitment fees "is precisely th[e] type of activity that the employer assurances are meant to prevent . . ." 73 Fed. Reg. at 77160. It naturally follows that violations of 20 CFR § 655.135(k) will result in the charging of the very recruitment fees the regulation was designed to stop – and that Fancy Farms' failure to comply with that regulation directly resulted in Appellants being charged those fees in this case.

In a prior order, the District Court recognized that Appellants' breach of contract claim differed from a run-of-the-mill contract claim in that it was premised on the interpretation of a federal regulation and necessarily raised substantive issues of federal law. DE 77, pp. 3-4. Yet, in dismissing the breach of contract claim, the District Could failed to even consider the regulation's purpose and the natural consequences that the Department of Labor expressly recognized would flow from a failure to include a provision prohibiting fees in a contract

provision. By finding that Appellants failed to present any evidence on the issue of causation, the District Court wrongly found that the Department of Labor's express regulatory purpose and intent was not evidence.

In regulatory contexts a party's failure to comply with a regulation is the presumptive cause of the harm the regulation is intended to eliminate. *See, e.g.*, *Am. Dredging Co. v. Lambert*, 81 F.3d 127, 129-30 (11th Cir. 1996) (noncompliance with anti-collision regulation is presumptive cause of any resulting collisions); *In re Sabin Oral Polio Vaccine Prods. Liability Litig.*, 984 F.2d 124, 128 (4th Cir. 1993) ("the causal connection[s] between the regulatory violations and plaintiffs' injuries are logical, sensible and direct"); *Apanovich v. Wright*, 226 F.2d 656, 661 (1st Cir. 1955) (where the very risk the regulations were designed to prevent occurred, "there can in the nature of things be no difficulty of proximate causation"); *Gray v. Derderian*, 400 F. Supp. 2d 415, 431 (D.R.I. 2005) (violation of a fire safety regulation was "sufficient to support a finding of proximate cause" because "it is logical that violations of these laws and regulations would result in an increased possibility of fire and increased hazard to the general public").

In holding that Fancy Farms' uncontested violation of 20 CFR § 655.135(k) was not the proximate cause of Appellants' damages because Appellants "failed to submit any evidence on this issue" (DE 95, p. 20), the District Court plainly erred in failing to consider *irrefutable* evidence that the harm Appellants suffered was

caused by Fancy Farms' breach: the United States government's express conclusion that failure to comply with the provision incorporated into Appellants' contract with Fancy Farms would cause the precise harm that Appellants suffered in this case.

B. It Was Reasonably Foreseeable that Fancy Farms' Breach Would Result in Appellants' Damages

The second way a party can prove causation under Florida contract law is to demonstrate that "the breaching party had a reason to foresee that the claimed damages would probably result." *Am. Univ. of the Caribbean, N.V. v. Caritas Healthcare, Inc.*, 484 F. App'x 322, 329 (11th Cir. 2012). "Concerning foreseeability, Florida law does not require that the parties have contemplated the precise injuries which occurred; rather, damages are recoverable so long as the actual consequences of breach of the contract could have reasonably been expected to flow from the breach." *TDS*, 760 F.2d at 1531 n.11.

It was reasonably foreseeable that Fancy Farms' failure to abide by 20 CFR § 655.135(k) would result in the harm that the regulation was designed to prevent. *See, e.g.*, *Gray*, 400 F. Supp. 2d at 431 ("By definition, fire is a foreseeable consequence of a violation of a fire prevention regulation."). The Department of Labor has stated that employers who fail to fulfill their assurances should reasonably expect to face the full range of civil monetary penalties, including "recruitment fees paid in the absence of contract clauses required by 20 CFR §

655.135(k)." DE 57-23, p. 4. Thus, it was well within the parties' reasonable contemplation that Fancy Farms' breach of 20 CFR § 655.135(k) would foreseeably result in damages in the form of any recruitment fees paid in the absence of the required contractual provision.

Indeed, Fancy Farms was well aware of the need to restrain recruiters from collecting fees before it engaged ANS, Molina, and Burns to assist with recruiting in early 2013. Handwritten notes Grooms, Fancy Farms' owner, maintained show that he knew from Molina's references that Molina charged workers "extra to come to the US" and that the workers "were not making enough money." DE 48-1, Ex. 1. At his deposition, Grooms acknowledged that he knew recruiters charged recruitment fees "to extort money from the workers" because he had "heard it in other cases." DE 48, p. 202:13-14. Grooms admitted that he was aware of the practice prior to starting his own H-2A recruitment process and prior to retaining ANS, Molina, and Burns. *Id.* at p. 204:11-21 (Grooms noting that he had heard of improper recruitment fees from "newspapers, magazines, farm entities, [and the] FFVA [Florida Fruit & Vegetable Association]," and that it was "a big deal").

Thus, Appellants' damages in recruitment fees were not only the *ipso facto* foreseeable result of Fancy Farms' breach given the Department of Labor's clear regulatory purpose of preventing recruitment fees, Fancy Farms was also actually

aware of the regulation's purpose at the time it represented its compliance with 20 CFR § 655.135(k).

C. Appellants Met Their Burden on Causation By a Preponderance of the Evidence

In concluding that Appellants presented *zero* evidence of causation, the District Court clearly erred in failing to even consider that that the above-detailed evidence was, in fact, "evidence" and effectively assigned it *zero* weight. DE 95, p. 20.

To meet their burden on causation, Appellants needed only to "tip[] the scales" and show that it was "more likely so than not so" that Fancy Farms' breach caused Appellants' damages. *Multitex Corp. of Am. v. Dickinson*, 683 F.2d 1325, 1330 (11th Cir. 1982). The evidence presented by Appellants, which Fancy Farms failed to negate with any valid evidence, more than carried Appellants' burden.

II. THE DISTRICT COURT ERRED IN DISMISSING THE PRE-JUNE 2013 APPELLANTS' BREACH OF CONTRACT CLAIMS IN THE SUMMARY JUDGMENT ORDER

In the Summary Judgment Order, the District Court erroneously dismissed the contract claims of Appellants who paid the unlawful recruitment fees before June 20, 2013, on the basis that Fancy Farms' breach could not have caused the damages of those Appellants. DE 74, pp. 14-15. The District Court's ruling rested on its finding that Fancy Farms was not required to contractually prohibit ANS, Molina, or Burns from collecting recruitment fees before June 20, 2013, the date

Fancy Farms entered into a written contract with its employees, Molina and Burns. *Id*. The District Court's finding – made on a summary judgment record, and therefore subject to *de novo* review – was erroneous.

The evidence in the record before the District Court established that Fancy Farms' obligations under 20 CFR § 655.135(k) arose far earlier than June 20, 2013. Indeed, Fancy Farms was required to discharge its duty under 20 CFR § 655.135(k) at least as early as February 2013, which is when Fancy Farms "engaged" Molina "either directly or indirectly" to contact prospective recruits in Honduras and advertise the employment opportunity. 20 CFR § 655.135(k). To the extent that there was a factual dispute over when Fancy Farms first engaged ANS and its principals, the District Court improperly resolved that factual issue against Appellants, the non-movants, on summary judgment, and its decision should be reversed.

A. Fancy Farms' Obligation Under 20 CFR § 655.135(k) Arose When Fancy Farms First Engaged an International Recruiter

An employer's duty under 20 CFR § 655.135(k) applies whenever an employer "engages" a foreign labor contractor or recruiter "either directly or indirectly, in international recruitment of H-2A workers." Nothing in the broad language of the regulation suggests that an employer's duty arises only when an employer formally hires an international recruiter as an employee *in writing*. In

this case, while Fancy Farms memorialized an employer-employee relationship with Molina and Burns on June 20, 2013, it plainly *engaged* Molina and Burns much earlier – as early as February 2013 (and likely earlier), when Molina began contacting Appellants in Honduras on Fancy Farms' behalf. DE 61, pp. 3-8; DE 61-1, pp. 3-9; DE 61-2, pp. 3, 5-8; DE 62, pp. 9-20; DE 63, pp. 6-7.

In limiting the reach of 20 CFR § 655.135(k) to relationships memorialized by written agreements, the District Court overlooked basic canons of statutory construction, including the precepts that the statute or regulation at issue must be construed as a whole and with fidelity to its express language and purpose, and should not be given an interpretation that would lead to absurd results. *See, e.g.*, *Villarreal v. R.J. Reynolds Tobacco Co.*, 839 F.3d 958, 969 (11th Cir. 2016) ("in interpreting a statute a court should always turn first to one, cardinal canon before others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *U.S. v. Ballinger*, 395 F.3d 1218, 1237 (11th Cir. 2005) ("statutory language must be read in the context of the purpose it was intended to serve. Congress does not write statutes for the words – it writes them for the meaning. Accordingly, words must be read to have a purpose, and from their purpose they cannot be delinked . . . so as to avoid an unjust or absurd conclusion.").

The plain language of 20 CFR § 655.135(k) supports a broad interpretation of the term "engage." The ordinary meaning of "engage" encompasses employment relationships, but also informal relationships. Black's Law Dictionary defines "engage" as "to employ *or* involve oneself to take part in; to embark on." *Engage*, BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis added). Merriam-Webster online defines "engage" as "to begin and carry on an enterprise or activity; to do or take part in something." *Engage*, MERRIAM-WEBSTER.COM DICTIONARY (last updated Apr. 22, 2018). Moreover, the regulation expressly applies when an employer "engages" a recruiter "either directly *or indirectly*," belying any notion that the regulation applies only where the employer and recruiter have a written contractual relationship. 20 CFR § 655.135(k) (emphasis added).

Affirming the District Court's decision would lead to results counter to the regulation's express purpose and create harmful incentives for employers utilizing recruiters in international recruitment of migrant workers. Under the framework established by the District Court, in order for an aggrieved party to show a breach of 20 CFR § 655.135(k), it would first need to show the existence of a written employer-recruiter contract. DE 74, p. 14 ("Absent a deficient grower-recruiter contract, Plaintiffs have no valid claim.").

The regulation would simply cease to apply to workers recruited (and abused) by recruiters that are "indirectly" engaged by employers. It would not protect workers from recruiters who work exclusively in foreign countries on the employer's behalf and for the employer's benefit, prior to ever meeting or forming a contractual relationship with the employer. Indeed, it is entirely conceivable that employers may work with recruiters solely through oral agreements; or that employers may enter into written agreements with their recruiters only *after* the recruiters have furnished workers at the employers' direction (as plainly happened here). Under the District Court's interpretation, all of these circumstances are left unregulated by 20 CFR § 655.135(k), notwithstanding that regulation's explicit application to "indirect" relationships, and notwithstanding the broad policy against recruitment fees announced by the Department of Labor in promulgating that regulation.

Thus, the District Court's ruling incentivizes employers to avoid a contractual relationship with its recruiters altogether, or delay the formation of a contractual relationship well into the recruitment process, in order to avoid triggering the obligations of 20 CFR § 655.135(k). These are exactly the scenarios the Department of Labor intended to avoid when it imposed an affirmative obligation on employers to create contracts with its recruiters and contractually forbid them from procuring unlawful fees whenever it "engages" recruiters "either

directly or indirectly in international recruitment of H-2A workers." 20 CFR § 655.135(k).

Accordingly, the District Court erred in holding that Appellants could not assert a breach of contract claim until the date Fancy Farms entered into a written contract with Molina and Burns, as this interpretation denigrates the plain meaning and purpose of the federal regulation incorporated into the parties' Employment Agreements.

B. The Timing of Fancy Farms' Engagement of its Recruiter Presents Issues of Fact that Preclude Summary Judgment

The timing of Fancy Farms' engagement of ANS is a material disputed fact that precludes summary judgment. "Summary judgment is appropriate only when there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." *Whatley v. CNA Ins. Cos.*, 189 F.3d 1310, 1313 (11th Cir. 1999); *see also Bowen v. Manheim Remarketing, Inc.*, 882 F.3d 1358, 1368 (11th Cir. 2018) ("Summary judgment is appropriate only if a case is so one-sided that one party must prevail as a matter of law."). The District Court was required to "view all evidence and make all reasonable inferences in favor of the party opposing summary judgment." *Whatley*, 189 F.3d at 1313. The District Court failed to do so, and its Summary Judgment Order should be reversed.

Well before Fancy Farms entered into a written contract with Molina and Burns on June 20, 2013, Fancy Farms had engaged in extensive communications with them about the recruitment of temporary workers – as evidenced by the fact that Molina, working on Fancy Farms' behalf, had already started recruiting prospective workers specifically to work at Fancy Farms as early as February 2013, and filed clearance orders with the Department of Labor on Fancy Farms' behalf prior to June 20, 2013. DE 61, pp. 3-8; DE 61-1, pp. 3-9; DE 61-2, pp. 3-8; DE 62, pp. 9-20; DE; 63, pp. 6-7; DE 89-3.

For example, Appellant Evelio Hernandez Aguilar testified that he first learned of the job opportunity at Fancy Farms in February 2013 when one of Molina's agents approached him and informed him that he could work as a strawberry picker at Fancy Farms. DE 62, pp. 9-11. In March 2013, Mr. Aguilar, along with about 60 other prospective recruits, attended a meeting with Molina in San Juan, Intibucá. *Id.* at 13-15. Molina told the prospective workers about the work at Fancy Farms, showing them videos of the farm and describing the farm work that they would be expected to perform at Fancy Farms. *Id.* At the meeting, Molina and his agents informed Mr. Aguilar and the other prospective workers present that they needed to pay $3500 in order to be eligible for the job opportunity at Fancy Farms. *Id.* at 10-11.

Appellant Alex Daniel Ulloa Amaya similarly testified that he attended a meeting in Comayagua, Honduras with Molina between February and March 2013. DE 63, pp. 8-12. At that meeting, Molina informed him and approximately 20 other prospective workers that they could work as strawberry pickers at Fancy Farms for a fee. *Id.* at 10-12. Molina provided the prospective workers with specific information about Fancy Farms, including information about the company, where it was located, how many hours they would be working, and how much they would be paid per hour. *Id.* at 11. Appellants Jorge Alberto Dominguez Madrid, Jose Melvin Vasquez Dominguez, and Marvin Alexander Buezo Caballero also testified that they met with Molina in Honduras in or around February 2013 and Molina informed them of an overseas employment opportunity at Fancy Farms. *See generally* DE 61; 61-1; 61-2. That Molina expressly informed Appellants of an opportunity *at Fancy Farms* – rather than another farm seeking temporary workers – disclaims any doubt that he had been engaged by Fancy Farms at that time; at a very minimum, this evidence creates an issue of fact that rendered summary judgment inappropriate.

Prior to June 20, 2013, in clearance orders Molina filed with the Department of Labor, Molina and Grooms represented to the Department of Labor that Molina was Fancy Farms' employee and Grooms attested that he took full responsibility

for the accuracy of Molina's representations. DE 89-3, pp. 1, 3 (Molina signed the clearance order as an "employee of Fancy Farms Inc.").

Indeed, Fancy Farms' own evidence corroborated Appellants' evidence and supported a factual finding that Fancy Farms engaged ANS at least as early February 2013. For example, Carl Grooms stated that his son, Dustin Grooms, had corresponded with Molina via email some time prior to meeting him in person in May 2013. DE 48, p. 139.

The District Court overlooked all of this evidence – including Appellants' testimony and interrogatory responses, and the corroborative evidence submitted by Fancy Farms – and instead credited only the evidence in the record that purportedly favored Fancy Farms. DE 74, p. 14. This was improper. Any credibility determinations required to parse the parties' competing accounts are improper made on summary judgment. *See Harris v. Ostrout*, 65 F.3d 912, 917 (11th Cir. 1995) ("Even if the district court believes that all the evidence presented by one side is of doubtful veracity, it is not proper to grant summary judgment on the basis of such credibility choices."). Given the ample evidence demonstrating that Molina recruited prospective workers on Fancy Farms' behalf in February 2013, reasonable inferences permit the conclusion that Fancy Farms engaged ANS, within the meaning of the regulation, at least as early as February 2013. Fancy Farms' obligation under 20 CFR § 655.135(k) therefore arose at that time. The

District Court's holding to the contrary was in error, and its Summary Judgment Order should be reversed.

III. THE DISTRICT COURT ERRED IN DISMISSING APPELLANTS' FLSA CLAIMS

The District Court erroneously dismissed Appellants' FLSA claims on summary judgment and held that Fancy Farms was not required to reimburse Appellants for the illegally procured recruitment fees. DE 74, pp. 7-11. In dismissing the FLSA claim, the District Court relied on this Court's decision in *Arriaga v. Florida Pacific Farms, LLC*, 305 F.3d 1228 (11th Cir. 2002), and concluded "because the undisputed facts establish that no words or conduct on the part of Fancy Farms could reasonably have led Plaintiffs to believe that Fancy Farms authorized Molina (or anyone else) to demand and collect recruitment fees on its behalf, there is no evidence to support the creation of actual or apparent authority to demand or collect those fees." DE 74, p. 9. However, the District Court disregarded the legal and factual significance of Fancy Farms' undisputed employer-employee relationship with Molina and Burns and improperly resolved the fact-intensive issues of actual or apparent authority against Appellants on summary judgment.

A. <u>Reimbursement of Recruitment Fees Under FLSA</u>

FLSA is a statute of broad remedial purpose. *See Rutherford Food Corp. v. McComb*, 331 U.S. 722, 727 (1947). Congress enacted the minimum wage

provision of FLSA to protect workers from substandard wages and to prevent labor conditions detrimental to the maintenance of the minimum standard of living necessary for the health, efficiency, and general well-being of workers. *See Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 739 (1981). Accordingly, the Supreme Court of the United States "has consistently construed the Act liberally to apply to the furthest reaches within congressional direction in order to effectuate the broad remedial and humanitarian purposes of the Act." *Tony and Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 296 (1985).

Under FLSA, "employers must provide workers' weekly wages in cash or in facilities, free and clear of improper deductions, at a rate no lower than the minimum wage." *Arriaga*, 305 F.3d at 1235 (citing Fair Labor Standards Act, 29 U.S.C. § 206(a)(1) (2016)). Here, the illegal recruitment fees Appellants were required to pay at the direction of Fancy Farms' own employees amounted to impermissible deductions that drove Appellants' pay below the FLSA minimum wage. Fancy Farms was required to reimburse Appellants for the recruitment fees in order to avoid FLSA liability.

Arriaga expressly recognized that under FLSA, "principles of agency law" could hold employers responsible for the charging of recruitment fees. *Id.* at 1245. "The rules as to the liability of a principal for authorized acts, are applicable to unauthorized acts which are apparently authorized." *Id.* (quoting RESTATEMENT

(SECOND) OF AGENCY § 159 (AM. LAW INST. 1958)). Apparent authority "arises where a principal allows or causes others to believe the agent possesses such authority, as . . . where the principal by his actions or words holds the agent out as possessing it. The doctrine rests on the premises that one who allows another to serve as his agent must bear the loss which results to a third party from the party's dealings in reliance on that agent's supposed authority." *Cavic v. Grand Bahama Dev. Co.*, 701 F.2d 879, 886 (11th Cir. 1983).

Thus, Fancy Farms cannot avoid liability for the illegal recruitment fees simply because they were purportedly unauthorized. "Even when an agent's act is unauthorized, the principal is liable if the agent had the apparent authority to do the act and that apparent authority was reasonably relied upon by the third party dealing with the agent." *Id.* Apparent authority can arise based on the "acts or omissions by the principal." *Id.*

Thus, *Arriaga* established that FLSA requires employers to reimburse workers for unlawful recruitment fees if the recruiter possessed actual or apparent authority from the employer to collect the fees. The existence of apparent authority is inherently a fact-specific inquiry. *See Cavic*, 701 F.2d at 887 n.4.

B. ANS Had Apparent Authority to Collect Fees on Fancy Farms' Behalf, and Fancy Farms is Liable under the FLSA

The District Court relied on *Arriaga* and *Ramos-Barrientos v. Bland*, 661 F.3d 587 (11th Cir. 2011) in finding that Fancy Farms was not required to

reimburse Appellants for the recruitment fees they paid in order to work for Fancy Farms because there were no facts that could reasonably show actual or apparent authority. DE 74, pp. 8-10. However, this Court's *Arriaga* and *Ramos-Barrientos* decisions do not foreclose FLSA liability, and in fact support Appellants' position that on this record Fancy Farms was required to reimburse Appellants for the recruitment fees Appellants paid directly to Fancy Farms' own employees.

In *Arriaga*, the defendant-employer contracted out the work of recruiting H-2A workers in Mexico to Florida Fruit and Vegetable Association ("FFVA"), who in turn contracted the work of recruiting the workers to an individual (Cervantes), who then relied on contacts within Mexico to actually locate and solicit the workers. 305 F.3d at 1233-34. "The growers, FFVA, and Cervantes had no knowledge that referral fees were being requested or paid, and none of them made any payments to the contact persons." *Id.* at 1234. On the facts of that particular record, this Court found that persons *three times removed* from the employer did not possess "actual or apparent authority" to charge recruitment fees on the employer's behalf. *Id.* at 1234, 1245.

Similarly, in *Ramos-Barrientos*, the defendant-employer retained International Labor Management Corporation ("International Labor") to assist it with the recruitment process. 661 F.3d at 590. International Labor then contracted out the work of recruiting to separate organizations, Manpower of the Americas

(“Manpower”) and then Consular Services (“Consular”). *Id.* at 591. The workers obtained their employment either directly through the employer, who did not charge fees, or through Manpower and Consular, who unbeknownst to the employer charged recruitment fees. *Id.* at 593. In that case, this Court held that Manpower and Consular, organizations that did not have any sort of employment relationship with the employer, did not possess actual authority to charge the fees. *Id.* at 601. The Court did not address the existence of apparent authority as the argument was not raised. *Id.*

The facts before this Court in this case could not be more different than those in *Arriaga* and *Ramos-Barrientos*, and the District Court plainly erred in finding that as a matter of law Molina and Burns lacked apparent authority to charge Appellants recruitment fees. Unlike in *Arriaga*, the recruiters charging the illegal fees were Fancy Farms’ own employees. Molina and Burns were not merely independent contractors, or “contact persons” three times removed from the hired recruiter. They were unquestionably Fancy Farms’ hired employees – as Fancy Farms’ owner expressly admitted. *See* DE 51, p. 2 (Aff. of C. Grooms) (“After agreeing to hire Molina and Burns as *employees* . . .”) (emphasis added); DE 89-3 (Molina represented to the DOL that he was Fancy Farms’ employee). Indeed, that relationship was memorialized in a *written employment agreement* between Fancy Farms, Molina, and Burns. DE 51-1, p. 6.

Here, the record is replete with evidence that Appellants reasonably believed ANS, Molina, and Burns had apparent authority to collect fees on behalf of Fancy Farms. Fancy Farms gave ANS, Molina, and Burns complete and exclusive control over the international recruitment process. Unlike the workers in *Ramos-Barrientos* who could obtain employment directly through the employer and bypass recruiters, Molina and his agents were Appellants' *sole* contact for the employment opportunity with Fancy Farms. DE 62, pp. 24, 26-27, 30, 39, 41, 43, 58-60, 69-71; DE 63, pp. 25, 34; DE 89-3. Molina and his agents charged the recruitment fees as a condition of hire, and workers who could not or refused to pay were unable to obtain a job with Fancy Farms. DE 62, pp. 10, 18, 32-34, 81-82; DE 63, pp. 15-16, 28, 33-34, 35. *See Rivera v. Brickman Grp., Ltd.*, No. 05-1518, 2008 WL 81570, at *14 (E.D. Pa. Jan. 7, 2008) (employer was responsible for recruitment fees charged by its representative where workers "had little choice but to go through the [employer's] designated workers' representative"). As a result, Appellants reasonably believed that Molina and his agents had apparent authority to charge the recruitment fees on Fancy Farms' behalf. *See Borg-Warner Leasing, a Div. of Borg-Warner Acceptance Corp. v. Doyle Elec. Co.*, 733 F.2d 833, 836 (11th Cir. 1984) (summary judgment improper; the trier of fact could reasonably find apparent authority where a third party was the plaintiff's only point

of contact); *Rivera*, 2008 WL 81570, at *13 (FLSA liability for recruitment fees was warranted where "going through a workers' representative was mandatory").

Fancy Farms was also aware through the imputation of knowledge held by its employees – first Molina and Burns, and subsequently its own field supervisors – that Molina and Burns were charging recruitment fees to H-2A workers as a condition of hire, in contrast to the employer in *Arriaga* who had "no knowledge" of the recruitment fees charged by far-removed "contact persons." *Arriaga*, 305 F.3d at 1234. Fundamental tenets of agency law impute the knowledge of an employee to his or her employer acting within the scope of his or her employment. *See Samsson Constr., Inc. v. U.S. Dep't of Labor*, No. 17-11844, 2018 WL 480685, at *2 (11th Cir. Jan. 19, 2018) (employee's knowledge of a regulatory violation imputed to his employer); *Chang v. JPMorgan Chase Bank, N.A.*, 845 F.3d 1087, 1096 (11th Cir. 2017) ("an agent's knowledge will be imputed to the principal unless the agent's interest is 'entirely adverse' to the principal's interest").

In concluding that Appellants could not reasonably believe ANS, Molina, and Burns had apparent authority to collect fees on Fancy Farms' behalf, the District Court improperly resolved the disputed issue of apparent authority against Appellants on summary judgment.

CONCLUSION

For the foregoing reasons, Plaintiffs-Appellants respectfully request that this Court (i) reverse the District Court's Summary Judgment Order and reinstate the FLSA claim and the breach of contract claim of Appellants who paid prior to June 20, 2013 and (ii) reverse the branch of the District Court's Final Order holding that Appellants failed to prove proximate causation on the breach of contract claim.

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Respectfully submitted,

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Dated: May 2, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 2018, I caused the foregoing to be filed through this Court's CM/ECF appellate filer system, which will send a notice of electronic filing to all registered users including the following lead counsel of record for Defendants-Appellees:

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