No. 17-1113

In the United States Court of Appeals for the Tenth Circuit

RAFAEL DE LA CRUZ, LEOVEGILDO VILCHEZ GUERRA, LIBER VILCHEZ GUERRA, ESLIPER HUAMAN, AND RODOLFO LLACUA,
on their own behalf and on behalf of all others similarly situated,

Plaintiffs-Appellants,

v.

WESTERN RANGE ASSOCIATION, MOUNTAIN PLAINS AGRICULTURAL SERVICE, MARTIN AUZA SHEEP CORPORATION, NOTTINGHAM LAND AND LIVESTOCK, LLLP, TWO BAR SHEEP CORPORATION, LLC, CUNNINGHAM SHEEP COMPANY, AND DENNIS RICHINS, DBA DENNIS RICHINS LIVESTOCK,

Defendants-Appellees.

On Appeal from a Final Judgment in the
U.S. District Court for the District of Colorado,
The Honorable, Robert E. Blackburn, Judge Presiding
Case No. 1:15-cv-01889-REB-CBS

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Defendants[1] spill considerable ink on the cases, currently pending in other federal courts, filed by foreign shepherds against the government and the Associations. They are correct that shepherds have several serious concerns about the shepherd H-2A program and their treatment by rancher employers. That should come as no surprise.

For several years, shepherds and advocates have observed that the labor market for shepherds is not functioning properly. In 2009, the *New York Times* described the life of one H-2A shepherd in stark terms:

> [He] earns $750 a month for working round the clock without a day off. He lives alone in the crude 5-foot-by-10-foot "campito" with no running water, toilet or electricity, save for a car battery he has rigged to a small radio. A sputtering wood-burning stove is his only source of heat in winter, a collection of faded telephone cards his only connection to home.[2]

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[1] Defendants are collectively referred to as "Defendants." The Western Range Association ("WRA") and Mountain Plains Agricultural Service ("MPAS") are collectively referred to as "Association Defendants" or "Associations." Martin Auza Sheep Corporation, Nottingham Land and Livestock, LLLP, Two Bar Sheep Corporation, LLC, Cunningham Sheep Company, and Dennis Richins are collectively referred to as "Rancher Defendants" or "Ranchers." Plaintiffs are referred to as "Plaintiffs."

[2] Dan Frosch, *In Loneliness, Immigrants Tend the Flock*, N.Y. Times, Feb. 21, 2009, *available at* http://www.nytimes.com/2009/02/22/us/22wyoming.html.

"Sheepherding," the *Times* went on, "has long occupied the bottom rung of migrant labor."[3]

Over the past few years, shepherds have used litigation in an attempt to root out some of the most problematic (and they allege, illegal) industry practices. As Defendants point out, shepherds have filed a lawsuit against federal agencies,[4] and they have brought another case in Nevada against employers there who, the plaintiffs allege, do not pay state minimum wage.[5]

But this case is about something entirely different. The Department of Labor and Department of Homeland Security may be responsible for the absence of sufficient agency oversight. But even in the absence of appropriate government regulation, the free labor market should ensure that no worker on American soil—and particularly no worker who is as skilled and important to his industry as a shepherd—labors for wages and working conditions like those experienced by shepherds. Through their concerted conduct, Defendants lock domestic shepherds out of the industry and deprive the marketplace of the competitive forces that would normally give shepherds the leverage to negotiate a better deal. This case

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[3] *Id.*

[4] *Hispanic Affairs Project et al. v. Perez*, No. 15-cv-01562-BAH (D.D.C.).

[5] *Castillo et al. v. Western Range Ass'n, et al.*, No. 16-cv-00237 (D. Nev.).

combats that behavior.

Considerable questions remain about the consequences of Defendants' concerted conduct. Plaintiffs contend that were the shepherd labor market characterized by the "independent centers of decisionmaking that competition assumes and demands," *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 190 (2010), wages and working conditions for shepherds (both foreign and domestic) would improve to something like those available to other ranch employees—who are often less skilled and less important to the success of the industry than shepherds.

Defendants obviously disagree. But that disagreement is not fodder for a motion to dismiss. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007), may raise the bar for pleading antitrust violations in federal court, but it does not deprive low-wage workers of the bargaining power inherent in a free labor market.

ARGUMENT

A. Sherman Act Claims

1. Plaintiffs Plausibly Plead that the Association Defendants Set the Wages Offered by Member Ranches in Violation of the Sherman Act

(a) *Non-integrated joint ventures may not set wages for their members.*

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the

form of trust or otherwise, or conspiracy, in restraint of trade." 15 U.S.C. § 1. A combination is formed when "two or more entities that previously pursued their own interests separately combine to act as one for their common benefit." *Gregory v. Fort Bridger Rendezvous Ass'n*, 448 F.3d 1195, 1200 (10th Cir. 2006) (internal quotation marks omitted). Thus, an association of distinct competitors is an ongoing "combination" or "agreement" that potentially violates the Sherman Act whenever it restrains trade on behalf of its members.[6]

This is not to say that competitors cannot combine. If competitors, like the sheep ranches in this case, want to use a joint venture or association to act for their common benefit by, for example, setting price terms, they can integrate their businesses. *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006). But competitors cannot act concertedly through an association while bypassing integration, and the scrutiny from public regulators that often comes with it. *Id.* at 4 (integration had been

[6] *See, e.g.*, *Gregory v. Fort Bridger Rendezvous Ass'n*, 448 F.3d at 1200; *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1007 (3d Cir. 1994) (It is "uncontestable that [the defendant] is an association of competing [firms]. As such, when [the defendant] takes action it has engaged in concerted action so as to trigger potential section 1 liability."); *Weiss v. York Hosp.*, 745 F.2d 786, 814 (3d Cir. 1984) ("[A]s a matter of law, the medical staff is a combination of individual doctors and therefore that any action taken by the medical staff satisfies the "contract, combination, or conspiracy" requirement of section 1); 7 P. Areeda & H. Hovenkamp, Antitrust Laws ¶ 1477, p. 337 (3d 2006) ("Areeda ¶ 1477").

scrutinized by FTC). As courts have long recognized, "[t]he actions of a group of competitors taken in one name present the same potential evils as do the actions of a group of competitors who have not created a formal organization within which to operate." *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1007 (3d Cir. 1994).

This is also not to say that associations of ***non***-integrated competitors can never act on behalf of their members. Association conduct that affects member behavior—although necessarily a "contract, combination, or conspiracy"—only violates § 1 if it is an unreasonable "restraint of trade." *Gregory*, 448 F.3d at 1204. For example, the Associations likely do not "restrain[] trade" when they "assist [the ranchers] in locating and hiring foreign workers," Ass'n Br. 13, by "fil[ing] Temporary Employment Certification for H–2A workers," just as the regulations permit them to do. 20 C.F.R. § 655.131.

But there should be no dispute that when an association of competitors establishes price terms for its members, it commits a *per se* violation of § 1 of the Sherman Act.[7] *Anderson v. Shipowners Ass'n of Pac. Coast*, 272 U.S. 359 (1926). Competitive pricing, which is "central to the nervous system of the economy,"

[7] In this case, Plaintiffs alternatively allege that Defendants' conduct violates the "rule of reason." App. 65.

Nat'l Soc. of Prof'l Engineers v. United States, 435 U.S. 679, 692 (1978) (internal quotation marks and alterations omitted), depends on the "independent centers of decisionmaking that competition assumes and demands." *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. at 183. For this reason, this Court has explained that an association setting prices for its members is "exactly what the antitrust laws were designed to prohibit." *Gregory*, 448 F.3d at 1202. An association setting wages should be treated no differently.[8]

The Magistrate Judge misapplied these principles based on his conclusion that there is a legally relevant distinction between association conduct on behalf members and association "rules or cannons" that restrain member behavior. Opening Br. 40-44. As courts[9] and regulators[10] have long observed, this is a distinction without a difference.

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[8] After all, wages are simply the price for labor. "Just as competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher quality products and services, more choices, and greater innovation, competition among employers helps actual and potential employees through higher wages, better benefits, or other terms of employment." DOJ & FTC, Antitrust Guidance for Human Resources Professionals, Oct. 2016, *available at* https://www.justice.gov/atr/file/903511/download.

[9] *See, e.g.*, *American Needle, Inc. v. Nat'l Football League*, 560 U.S. 183 (2010); *Plymouth Dealers Ass'n of N. Cal. V. United States*, 279 F.2d 128 (9th Cir. 1960).

[10] *See, e.g.*, *United States v. Ariz. Hosp. & Healthcare Ass'n*, 07-1030 (D. Ariz.), *available at* https://www.justice.gov/atr/case/us-and-state-arizona-v-arizona-hospital-and-healthcare-association-and-azhha-service-corp.

On appeal, Defendants elaborate only slightly on the Magistrate Judge's reasoning by arguing (1) that Defendants' wage-fixing scheme violates § 1 only if the ranches have separately "agree[d] among themselves how to pay foreign shepherds" by, for example, holding a vote, Ass'n Br. 18; and (2) that using the Associations to set wages violates § 1 only if ranchers are prevented from departing from those wages with an "enforcement mechanism." Ass'n Br. 18. The Association Defendants put it like this: While Plaintiffs may have plead that "the Ranchers and other members have ceded control of wage decisions to the Associations," this is not enough to establish liability against either the Ranchers or the Associations because "Plaintiffs [have not] allege[d] that the Ranchers explicitly agreed to any limitation on their behavior." Ass'n Br. 14. That argument fundamentally misapprehends the antitrust laws.

First, if the Ranchers have ceded control of wage decisions to the Associations, they need not "agree" on anything else to fall within the concerted action requirement of § 1. An association is an ongoing "contract, combination, or conspiracy," and when an Association takes any action on behalf of its members, it satisfies "the concerted action requirement set forth in § 1 of the Sherman Act"—the only remaining question under § 1 being whether that conduct unreasonably

restrains trade. *Gregory*, 448 F.3d at 1203.

For this reason, the Supreme Court in *Anderson v. Shipowners Ass'n of Pac. Coast*, 272 U.S. 359 (1926), found concerted conduct without there being any evidence that the shipowners had entered into any agreement separate from the conduct of their association. It was enough that they had entered into a "combination to control the employment, upon [their] vessels, of all seamen upon the Pacific Coast," *Id.* at 361.

To be sure, one can imagine an association requiring a member vote or some other express member assent before taking any action. For this reason, many association cases involve a member vote. And in some cases, a plaintiff might need to show that such a vote occurred to establish that any particular challenged action was taken by the association, as opposed to an agent or member of the association falsely purporting to act on its behalf. *Nanavati v. Burdette Tomlin Mem'l Hosp.*, 857 F.2d 96, 117 (3d Cir. 1988) (explaining that an association triggers § 1 when it "acts as a body").[11] But Defendants have never suggested that it was renegade Association employees who set wages for their members, as opposed to the

[11] In determining whether an action is taken by the association, courts may of course rely on circumstantial evidence. *Alvord-Polk*, 37 F.3d at 1008 n.9 ("It would be incorrect to require an official board resolution, or other officially sanctioned activity, to impose liability on NDPA.").

Associations themselves. And because these actions were taken by the Associations, they inherently involved concerted conduct.

Second, Defendants suggest that an association's mere setting of wage offers cannot be concerted conduct absent an "enforcement mechanism" that prevents the competitor members from cheating—in this case, paying more than the minimum. *See, e.g.*, Ass'n Br. 18; Rancher Br. 26 (ranchers merely "fail[ed] to modify Association-completed forms").

At this stage, however, the presence of an "enforcement mechanism" is irrelevant. The question of the degree to which individual members are restrained from departing above the initial wage term set by the association may bear on damages—a cartel with a weak enforcement mechanism may not exert much of an influence on prices—but the absence of an enforcement mechanism does not affect liability.

As relevant to this case, it is abundantly clear that concerted conduct in setting initial price terms or "list prices" is a *per se* violation of § 1 whether or not firms are prevented from later charging a lower price. *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 656 (7th Cir. 2002) (Posner, J.) ("An agreement to fix list prices is . . . a *per se* violation of the Sherman Act even if most or for that

matter all transactions occur at lower prices."); *In re Yarn Processing Patent Validity Litig.*, 541 F.2d 1127, 1137 (5th Cir. 1976). And setting initial wage terms is no different. Indeed, conduct far less restrictive than setting initial wage terms violates the antitrust laws. It can be a § 1 violation for competitors to share information about wages—even where the competitors are free to set the initial wage term wherever they want. *See, e.g.*, *Todd v. Exxon Corp.*, 275 F.3d 191, 198 (2d Cir. 2001).

Furthermore, while not relevant at the motion to dismiss stage, the alleged concerted conduct here includes "enforcement mechanisms." It may be true that there is no express rule prohibiting member ranchers from paying above the wage offered by the Associations, but there are other informal and formal pressures against cheating from the cartel. For example, there does not appear (and Defendants have never identified) any mechanism for ranches to instruct the Associations to offer a wage different than the wage term entered by the Associations on job orders and H-2A applications. And, more formally, federal law expressly prohibits ranchers from paying wages that exceed the amounts offered on job orders presented to domestic workers. 20 C.F.R. § 155.131. This is classic cartel behavior. Combinations often structure their conduct around

regulations that deter cheating. Christopher R. Leslie, *Trust, Distrust, and Antitrust*, 82 Tex. L. Rev. 515, 606 (2004).

(b) ***Plaintiffs have plausibly plead that Association Defendants set the wage terms offered by their members, including Rancher Defendants.***

Further, there should be no doubt that Plaintiffs have plead that Association Defendants set wages for rancher members. As if the pleading standard were reversed and they could move to dismiss a § 1 claim based on the mere plausibility that their conduct is legal, Defendant Associations argue that Plaintiffs have not plead direct evidence in support of this allegation. They suggest that even though Plaintiffs have plead direct evidence that the Associations ***filled in*** the wage terms on the job orders and H-2A applications, that on its own is not direct evidence that Association Defendants ***set*** those wages. Ass'n Br. 12.

Fair enough. Plaintiffs suppose it is ***theoretically*** possible for the Association Defendants to have filled in the wage terms but not to have set those wage terms—in other words, not to have made the decisions about what wages to offer. But for that to have occurred, the rancher members would have each had to communicate their desired wage rate to the Associations. That may seem possible, but it is not likely, and it is absolutely not enough to satisfy ***Defendants'*** burden under *Twombly*. More likely, and indeed more plausible given the allegations, is

that the ranches have each ceded discretion over the amount of the offered wages to the Associations. Indeed, Defendants have not once raised the possibility that any member ranch independently communicated to the Associations its desired wage term.

Even if Plaintiffs only plead (1) that Association Defendants fill out H-2A applications and job orders for members (including filling in the wage term on those forms) and (2) that all wage rates for all ranches are set at precisely the government-set minimum in each state, there would be ample circumstantial evidence to support the allegation that the Associations set those wage rates. Consider in *Twombly* how the Supreme Court would have ruled if the defendant telecommunications companies had all announced their perfectly parallel decisions about regional markets through an association of telecommunications firms. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). There would almost certainly have been enough circumstantial evidence that the companies had established those markets through a concerted process to plausibly plead a Sherman Act claim. *Cf. In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 628 (7th Cir. 2010) (using a trade association to exchange pricing information supports plausibility of plaintiffs' § 1 claims).

But as Plaintiffs explained at length in their Opening Brief, there is far more before the Court here than the Associations filling in the wage rate term in job orders and H-2A applications. Opening Br. 28-31 (Second Amended Complaint), 34-35 (Third Amended Complaint). The WRA's job orders and H-2A applications do not even distinguish between ranches when describing the applicable wage rate, strongly suggesting that the Association sets those rates across all the ranches, without the ranches first communicating their desired rates to the Association. *See, e.g.*, App. 195, 294. And a federal court has explained that the WRA sets the wage offered across all H-2A shepherds through pre-employment contracts and a "standard form agreement" from which it does not "allow the member ranches or workers to deviate." *Ruiz v. Fernandez*, 949 F. Supp. 2d 1055, 1066-68 (E.D. Wash. 2013). Both Association Defendants have communicated to members that they should adjust wages in lockstep with increases in the government set wage-floor. App. 43, ¶ 99; Opening Br. 15.

The Third Amended Complaint bolsters these allegations by citing to pre-employment contracts—obtained through investigation in Peru that followed the filing of the Second Amended Complaint—that specify that both Association Defendants expressly set wages without regard to ranch at precisely the wage floor

in each state. Opening Br. 34-35.

More important than all this evidence, perhaps, is Defendants' continuing acknowledgment that the Association Defendants set the wage term in the job orders and H-2A certifications by treating the government-set wage floor as a wage ceiling. On appeal before this Court, the Rancher Defendants appear to acknowledge that Plaintiffs have alleged—at the very least—that Rancher Defendants "fail to modify Association-completed forms." Rancher Br. 26. And in briefing before the District Court, the MPAS explained that it (and not its members) "offer[s] the" wage floor by "follow[ing] the lead of USDOL." ECF Doc. 135 at 5.

Of course, even if the Associations mechanically set the wage term at the minimum wage—which seems to be what the MPAS is suggesting happens—that would violate § 1 because it would still involve a combination of competitors setting wages. And the Association Defendants would have a hard time arguing that this mechanically-set wage term is even what the ranches would instruct the Associations to offer if they were acting independently given that so many ranchers pay slight premiums over the minimum. Opening Br. 33-34.

Twombly may have raised the bar for pleading § 1 Sherman Act claims

involving the parallel conduct of competitors. But it does not alter substantive antitrust law, and it does not prevent courts from exercising their common sense in determining whether competitors might have engaged in concerted conduct. The Court should not allow Defendants' indignation to distract from the straightforward question at the core of Plaintiffs' wage-fixing claims: is it plausible the Association Defendants set the wage terms provided in job orders and H-2A applications that the Rancher Defendants use to hire shepherds? If the answer to that question is yes—and Plaintiffs think it clearly is—then their claims should advance to discovery.

2. Plaintiffs Plausibly Plead that the WRA Divides the Market for Foreign H-2A Shepherds by Assigning Shepherds to Member Ranches

Plaintiffs claim that the Associations illegally manipulate wages. Part of this scheme, as plead in the Second Amended Complaint, is the WRA's efforts, on behalf of its members, to divide the shepherd labor market. By preventing shepherds from shopping between ranches for better working conditions or higher wages, the WRA commits a *per se* violation of § 1 in the same way an association of gas stations would commit such a violation if it assigned customers to gas stations every morning. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609 (1972); *United States v. Suntar Roofing, Inc.*, 897 F.2d 469, 473 (10th Cir. 1990).

The Second Amended Complaint and its attachments allege that the WRA offers jobs to shepherds without regard to differences between the ranches. App. 37, ¶ 75; App. 46, ¶ 114. The WRA interviews and hires shepherds, App. 197, and then assigns them to employer ranches. *Ruiz*, 949 F. Supp. 2d at 1066. The Third Amended Complaint adds additional facts, including citing to the WRA's pre-employment handbook—obtained in discovery after the filing of the Second Amended Complaint—which explains that WRA shepherds are "assigned a place of work (ranch) that [they] will not be able to change or transfer." App. 557, ¶ 131. While it might be permissible for a staffing agency to similarly assign workers to employers, the WRA is not an independent entity. It is an ongoing "contract, combination, or conspiracy" among competitors, 15 U.S.C. § 1, that commits a *per se* violation by dividing the market.

Whether these allegations are just another component of Plaintiffs' wage-fixing claim or a separate market-division violation makes no difference. The facts were properly alleged in the District Court as part of Plaintiffs' Sherman Act claim and therefore are not forfeited. *See Skinner v. Switzer*, 562 U.S. 521, 530 (2011) ("[A] complaint need not pin plaintiff's claim for relief to a precise legal theory.")

3. These Straightforward Principles Apply Equally to Employers of Low-Wage H-2A Shepherds

(a) ***The Fact that Some Ranchers Pay More than Others Does Not Alter the Analysis***

These principles are blackletter antitrust law. But Defendants continue to think that they somehow do not apply in the H-2A labor market. For example, Defendants continue to suggest that there can be no wage fixing because shepherds do not all receive the same wage.

This argument suffers from a fatal flaw. The Sherman Act declares concerted pricing *per se* illegal whether or not the scheme results in the "establishment of uniform prices." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940). "[P]rices are fixed within the meaning of the [Sherman Act] if the range within which purchases or sales will be made is agreed upon, if the prices paid or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices." *Id.* Prices are fixed if they are set through concerted as opposed to independent conduct. *Id.* In other words, the Associations setting the offered wage rates is enough to establish wage fixing, even if the amounts offered vary by state and the amounts paid deviate from the offered wage and vary by employer.

But even leaving this blackletter principle aside, there are several problems

with Defendants' arguments. As for the argument about differential minimum wages between states, Defendants argue that it would make no sense for employers in higher wage states like California to enter into a conspiracy to pay exactly the minimum wage because employers in lower wage states like Colorado would always have the competitive advantage of being able to produce lamb and wool with lower labor costs. Rancher Br. 27. This argument ignores, first, that ranches (acting through concerted conduct) have every incentive to stabilize wages as much as possible even if state-level wage floors prevent nationwide standardization. Furthermore, even if wages differ across states, a scheme to standardize wages based on the state wage floor would still necessarily have the effect of standardizing wages within each state, thus eliminating intrastate competition over shepherds.

From another perspective, it is possible to imagine that Colorado ranches would in theory lose out on the best and most experienced shepherds by paying so much less than California ranches. But any competitive harm to Colorado ranches is largely mitigated by the WRA's market division scheme, which would prevent more than half of shepherds from ever shopping between ranches in different states. App. 34, ¶ 59 (WRA hired 55% of shepherds).

As for some shepherds receiving more than the offered wage, Defendants point out that some job orders include the proviso that the employer may "offer a bonus," App. 151, to contend both that the wage was not standardized across shepherds and ranches and that the ranches "offer[ed] to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H–2A workers." 20 C.F.R. § 655.122(a).

The fact that some ranchers ended up paying some shepherds more than the minimum wage does not affect Plaintiffs' wage-fixing claims. Opening Br. 49. The wage is fixed because it is set through concerted conduct, not because it is standardized. If anything, the slight differential between offered and paid wages supports Plaintiffs' claims because it helps to illustrate that shepherds are not fungible and that ranchers have to compete to hang on to their best workers. Ass'n Br. 19 ("experienced workers got raises").

Furthermore, Defendants continue to fail to justify the practice of paying some H-2A shepherds more than the wages offered to domestic shepherds. The fact that some ranches referred to the speculative possibility of "bonuses" in their job orders does not license their payment of higher monthly pay rates to H-2A shepherds than the monthly pay rates offered in job orders. The clear purpose of

§ 655.122 is to ensure that domestic workers have access to the same jobs on the same terms available to H-2A workers. While it may be permissible for employers to pay H-2A workers sporadic bonuses, many ranches seem to be paying a standard, regular salary that exceeds the offered rate. App. 567-73, ¶¶ 175-222. If ranches were acting consistently with their self-interest, they would seek to minimize their individual liability under the H-2A regulations and instruct the Associations to advertise that higher wage to domestic shepherds. Instead, they admit to illegally deviating from the offered wage, while maintaining the benefits of participating in the concerted conduct involving offered wages.

(b) ***The H-2A Regulatory Scheme Does Not Affect Plaintiffs' Claims.***

Perhaps because they have no other choice, Defendants now acknowledge that the H-2A rules do not authorize them to engage in concerted conduct. Ass'n Br. 21-23; *see Marquis v. U.S. Sugar Corp.*, 652 F. Supp. 598, 601 (S.D. Fla. 1987). Instead, they argue that the regulations "play an important role in the analysis." *Id.*

The H-2A regulations are complex and multifaceted, and they clearly allow for associations of employers to help their members with the administrative tasks involved in hiring foreign guest workers. But those regulations do not supplant

the free market. In fact, just the opposite. The H-2A program depends on competition among employers to ensure that wages do not stagnate and that jobs remain available for domestic workers. *Id.* Nothing in those regulations allows Association Defendants to set wages for their members.[12] And nothing less than implied preemption of the Sherman Act would legally excuse such a scheme.

(c) ***The Continued Ability to Attract Foreign H-2A Workers for the Program Does Not Excuse the Conspiracy***

On appeal, Defendants also return to an argument that was central to their early briefing before the District Court: Defendants should have no incentive to ever offer more than the minimum because H-2A shepherds continue accepting those wages. *See, e.g.*, Ass'n Br. 19 ("The federal government sets the lowest wage that may be offered to H-2A workers. Assuming a sufficient supply of labor at this wage, no rancher should be inclined to offer more.").

This argument is nonsensical, but telling. Price-fixing cartels can only

[12] Both Plaintiffs and Association Defendants have cited to 20 C.F.R. § 655.131(b) regarding the Associations' authority to submit "master applications." Opening Br. 47; Ass'n Br. 22. It appears that, in fact, 20 C.F.R. § 655.215 might apply to the WRA's "master applications." That regulation applies different rules regarding the need for a "master application" to apply to no more than two contiguous states and a single date of need, but it is not meaningfully different from § 655.131(b). It does not contemplate the association offering shepherding jobs without regard to differences between ranches, and it certainly does not license the WRA to set wages for competing members.

function if consumers continue to pay the fixed price. But the fact that consumers continue to pay that price does not mean that the cartel members would offer that price if they were acting independently. Gas stations would likely continue to attract plenty of customers if they fixed their prices at $3.00 a gallon. But that would not excuse their conduct.

Yet, Defendants' continued intuition that low-wage immigrant workers are fungible and worth no more than the minimum wage—whatever it may be—may help to illustrate why acting concertedly to set shepherd wages at the minimum seemed appropriate to them. Ironically, in their day-to-day employment of shepherds, many ranchers have come to understand that some shepherds are especially skilled and experienced and are worth higher wages. Ass'n Br. 19 ("experienced workers got raises"). And yet, Defendants continue to assert that it is perfectly appropriate for all shepherds to be offered the minimum.

4. Plaintiffs Plead that Rancher Defendants were Consciously Committed to the Scheme

(a) ***Plaintiffs plead conscious commitment because Rancher Defendants surrendered responsibility for setting offered wages.***

Defendant Ranchers are correct that mere membership in an association does not trigger liability for the association's antitrust violations. Contrary to

Defendants' and the Magistrate Judge's suggestions, Plaintiffs have never argued otherwise.[13]

Plaintiffs' theory of liability against Rancher Defendants is that they "consciously committed" to the scheme by knowingly and purposefully delegating wage-setting decisions to the Association Defendants. This is not a case where the association promulgated a rule requiring all members (witting or unwitting) to give the Associations authority over wage setting. *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1048 (9th Cir. 2008). It is not a case where the members passively received list prices illegally distributed by the association. *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 232 (9th Cir. 1974). And it is not a case about the association engaging in concerted conduct that has little impact on most association members. *Moore v. Boating Indus. Associations*, 819 F.2d 693, 712 (7th

[13] Indeed, even the quotation from oral argument in the District Court quoted by the Magistrate Judge and the Rancher Defendants to argue that Plaintiffs have pressed an "association standard" does not say what the Magistrate Judge and the Rancher Defendants argue that it says. Plaintiffs' counsel explained that the ranchers were, in Plaintiffs' view, on the hook for their Associations' antitrust violations because they joined the associations and "allow[ed] the association to set the [wage]," and the Magistrate Judge responded "[y]ou're saying simply by virtue of the fact that they joined the association . . . they consciously committed to join the scheme." A. 1322. That is, in fact, not what Plaintiffs' counsel said. He said the Rancher Defendants committed to join the scheme because they joined the association ***and*** allowed the association to set the wage.

Cir. 1987).

Rather, this case is about decisions on the part of each Rancher Defendant to allow Association Defendants to set wage offers. On the part of the Rancher Defendants, that reflects both actual knowledge of the concerted conduct—namely the association setting wage rates—and active participation in the form of allowing the Associations to set offered wages. *Id.*

The Rancher Defendants argue that they were "passive and ignorant of the scheme." Rancher Br. 26. If Defendants are suggesting they were passive beneficiaries of the Association wage fixing because they did not know the Association was setting wages for them, the Court should reject the contention as implausible. Defendants are sophisticated businesspeople who plausibly knew that the Association was a joint venture and that the Association filled in the wage term on the job orders and H-2A applications. Furthermore, the fact that some Rancher Defendants ultimately paid some shepherds more than the offered wage, Opening Br. 33, shows they knew that the wages set by the Associations were not market wages and were not even the wages that the Ranchers intended to pay.

If Defendants suggestion, on the other hand, is that they did not understand that the purpose of the scheme was to suppress shepherd wages and reduce

shepherd bargaining power, the Court should reject the argument as irrelevant. There is no requirement that the Ranchers have nefarious intent to consciously commit to the wage-fixing scheme. Even conspiracies with benevolent purposes violate the antitrust laws if they involve concerted conduct that falls within § 1. *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 436 (1990). So long as the Rancher Defendants consciously committed to the Associations' setting wage offers on their behalf, they are on the hook for the Association Defendants' violations.

(b) ***There is no "group pleading" problem with Plaintiffs' Second Amended Complaint.***

Rancher Defendants also argue that Plaintiffs claims against them have included impermissible "group pleading." In this context, the "group pleading" doctrine is designed to ensure that plaintiffs allege plausible claims against each individual defendant and that each individual defendant has sufficient notice of the nature of those claims consistent with Rule 8. *Robbins v. Oklahoma*, 519 F.3d 1242, 1248 (10th Cir. 2008). Claims that refer generally to a group of defendants fail if they are insufficiently specific to satisfy the plausibility and notice requirements for each defendant.

This Court has recognized, however, that "group pleading" doctrine is

context specific. *Id.* Defendants point to several cases where the plaintiff's claims were dismissed because they were insufficiently specific about which defendant had performed what action and when. *See, e.g.*, *Tara Woods Ltd. P'ship v. Fannie Mae*, 731 F. Supp. 2d 1103, 1114 (D. Colo. 2010), aff'd, 566 F. App'x 681 (10th Cir. 2014). But in those cases, the complaint was deficient because it was vague about facts that bore on the defendants' specific and individualized legal rights and obligations, *id.*, not because it happened to refer to the defendants as a group in describing the background of the case.

The Second Amended Complaint may refer frequently to the Rancher Defendants as a group, but it makes specific allegations about the individual defendants regarding the conduct that Plaintiffs allege establishes conscious commitment—namely, the decision to delegate to the Association Defendants the authority to set offered wages. App. 36, ¶ 74; App. 42, ¶ 93. The Second Amended Complaint even attaches job orders and H-2A certifications for each of the Rancher Defendants prepared by the WRA or the MPAS. App. 148-332. The inclusion of those documents should place each of the individual defendants on notice about the precise nature of the claims against them and allow the Court to assess the plausibility of Plaintiffs' claims. *Quality Auto Painting Ctr. of Roselle, Inc. v. State*

Farm Indem. Co., 870 F.3d 1262, 1279 (11th Cir. 2017) (rejecting argument that plaintiffs had used "group pleading" and noting that "complaints as they stand include sufficiently tailored allegations for us to conclude the plausibility of the claim of tortious interference in each state").

B. RICO Claims

Defendants continue to ignore Plaintiffs' theory of RICO liability. Plaintiffs allege three RICO claims—one against Defendant Richins based on an enterprise including Richins and the WRA, one against the WRA, based on an enterprise including the WRA and its members, and one against MPAS, based on an enterprise including the MPAS and its members.

For all the reasons the Magistrate Judge articulated in his Report and Recommendation in December 2016, ECF Doc. 158 at 26-32, Plaintiffs have plausibly plead a RICO claim against Richins. That claim was sufficiently plead in the Second Amended Complaint, and thus it should proceed to discovery even if the Court affirms denial of Plaintiffs' motion for leave to amend. Opening Br. 54-55.

Association Defendants contend that Plaintiffs' RICO claims against the Association Defendants fail for lack of distinctiveness because those claims are based on the Associations' "normal work of helping [their] members find willing

shepherds and process the H-2A paperwork to lawfully hire them." Ass'n Br. 26 (citing *Yellow Bus Lines, Inc. v. Drivers Chauffeurs & Helpers Local*, 883 F.2d 132, 141 (D.C. Cir. 1989)).

But that ignores the nature of Plaintiffs' RICO Act claims. When participating in the racketeering conduct at issue here, the Associations and their members act as separate entities. The Associations help to facilitate the fraud via the H-2A applications, but the cost savings inure to the benefit of the members. This is not something that either the Associations or their members could (or would) have done without the other. *See George v. Urban Settlement Servs.*, 833 F.3d 1242, 1250 (10th Cir. 2016).

C. Motion to Amend

Finally, in reviewing the District Court's denial of Plaintiffs' motion for leave to amend, the Court should consider the Magistrate Judge's conclusion that granting Plaintiffs' motion would not cause undue prejudice and that Plaintiffs did not unduly delay in filing their motion for leave. ECF Doc. 158 at 31. While that same Magistrate Judge had earlier warned Plaintiffs against filing a Third Amended Complaint, Ass'n Br. 28, after reviewing the Third Amended Complaint, he found sufficient basis to allow the amendment.

While Plaintiffs did not initially intend to file a Third Amended Complaint,

information they obtained after the filing of their Second Amended Complaint, including through an investigative trip to rural Peru, helps to place Plaintiffs' claims in further context. App. 522 (Motion to Amend). Under these exceptional circumstances, amendment is not only proper but also efficient. *Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1204 (10th Cir. 2006). It makes sense to allow these Plaintiffs in this case to place all relevant information before the District Court to support their claims.

CONCLUSION

For these reasons, this District Court's orders should be reversed and the case should be remanded for further proceedings.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH WORD VOLUME LIMITATION

This reply brief complies with type-volume limitations because it contains 6,277 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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Date: November 7, 2017 s/ David H. Seligman
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I hereby certify that with respect to the foregoing document:

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Date: November 7, 2017 s/ David H. Seligman
Attorney for the Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2017 I electronically filed the foregoing using the court's CM/ECF system which will send notification of such filing to all Defendants-Appellees that have appeared:

Date: November 7, 2017

s/ David H. Seligman
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