UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

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CIRILO UCHARIMA ALVARADO, Plaintiff, v. WESTERN RANGE ASSOCIATION, Defendant.	Case No. 3:22-cv-00249-MMD-CLB ORDER

I. SUMMARY

Plaintiff Cirilo Ucharima Alvarado, on behalf of himself and all others similarly situated, alleges that Defendant Western Range Association ("WRA" or "Defendant") unlawfully restrained trade in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, *et seq.* ("Sherman Act"). (ECF No. 1 ("Complaint").) Before the Court is Defendant's motion to dismiss or, in the alternative, motion to transfer venue.[1] (ECF No. 23.) As further explained below, because Plaintiff has plausibly alleged violations of the Sherman Act and no defenses apply, the Court will deny Defendant's motion to dismiss. The Court will also deny Defendant's alternative motion to transfer venue because on balance the relevant factors disfavor transferring this case to Utah.

II. BACKGROUND

The following allegations are adapted from the Complaint. Defendant is an association made up of member sheep ranches located in various states in the Western United States. (ECF No. 1.) Plaintiff is a Peruvian citizen who came to the United States on a temporary H-2A visa to work as a sheepherder on a WRA member ranch in Nevada from July 2020 to December 2020. (*Id.* at 5.) Plaintiff seeks to represent a class of "all

[1]Plaintiff responded (ECF No. 37), and Defendant replied (ECF No. 42).

persons who worked or applied to work as a sheepherder for the WRA or any of the member ranchers of the WRA." (*Id.* at 25.)

The H-2A visa program is an agricultural guest worker visa program administered by the Department of Labor ("DOL") that issues work visas to foreign workers to fill positions that employers cannot fill through the domestic labor market. (*Id.* at 6.) DOL regulations prescribe that employees must offer domestic 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." (*Id.*) The DOL has implemented "special procedures" governing the monthly wage floor for H-2A sheepherders. (*Id.* at 7.) This wage floor can be higher in individual states based on higher state-level minimum wage laws. (*Id.*) DOL's regulations allow membership organizations to fill out applications on behalf of their members. (*Id.* at 8.) On behalf of its members, WRA creates job orders for domestic sheepherders and files H-2A applications for foreign sheepherders. (*Id.* at 10, 15.)

Plaintiff alleges that WRA and its members conspired and agreed to fix the wages offered to both domestic and foreign sheepherders at or near the wage floor set by DOL for H-2A sheepherders. (*Id.* at 10-11, 27.) Plaintiff alleges that WRA instructs its members that they will all pay the minimum allowable wage, and WRA's members agree to offer and pay that wage. (*Id.* at 16-17.)

Plaintiff also alleges that WRA horizontally allocates the market for foreign H-2A sheepherders among its members by assigning them to ranches and not allowing them to seek employment elsewhere. (*Id.* at 23.) Plaintiff alleges that WRA and its members "conspired and agreed to avoid competing for labor, coercing sheepherders into agreements which remove sheepherders' ability to negotiate for better wages or wages commensurate with their experience, or to seek employment at other ranches." (*Id.* at 29.)

Plaintiff asserts two violations of Section 1 of the Sherman Act based on: (1) horizontal wage-fixing agreement; and (2) horizontal market allocation. (*Id.* at 26, 28.)

III. DISCUSSION

Defendant moves to dismiss both of Plaintiff's claims. The Court first addresses whether claim preclusion applies, whether Defendant is entitled to antitrust immunity, and whether all indispensable parties have been joined. The Court then addresses whether Plaintiff has plausibly stated a claim under the Sherman Act. Because the Court denies Defendant's motion to dismiss, the Court lastly addresses Defendant's alternative motion to transfer venue.

A. Claim Preclusion (Res Judicata)

Defendant argues that the doctrine of res judicata[2] requires dismissal because Plaintiff's claims have already been fully adjudicated and dismissed in a previous case against Defendant, *Llacua v. Western Range Ass'n*, 930 F.3d 1161 (10th Cir. 2019).[3] (ECF No. 23 at 14.) "The doctrine of res judicata [claim preclusion] provides that 'a final judgment on the merits bars further claims by parties or their privies based on the same cause of action.'" *In re Schimmels*, 127 F.3d 875, 881 (9th Cir.1997) (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)). Claim preclusion requires three elements: (1)

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[2]As Plaintiff noted, "res judicata" generally refers to claim preclusion and "collateral estoppel" refers to issue preclusion, but "res judicata" may be used to refer to both doctrines. (ECF No. 37 at 27 n.6.) However, Defendant appears to only raise claim preclusion because it only discusses the elements of claim preclusion in its motion. (ECF No. 23 at 14-18.) Moreover, in its reply, Defendant distinguishes res judicata from collateral estoppel when it names both doctrines and attempts to raise issue preclusion for the first time. (ECF No. 42 at 7-10.) This provides additional support that Defendant was referring specifically to claim preclusion when initially raising its res judicata defense.

Because Defendant raises issue preclusion for the first time in its reply, the Court need not consider such arguments. *See, e.g.*, *Vasquez v. Rackauckas*, 734 F.3d 1025, 1054 (9th Cir. 2013) ("[W]e do not consider issues raised for the first time in reply briefs."); *United States v. Bohn*, 956 F.2d 208, 209 (9th Cir.1992) (per curiam) (noting that courts generally decline to consider arguments raised for the first time in a reply brief). But in any event, the Court agrees with Plaintiff that Defendant's issue preclusion defense fails for the same reason its claim preclusion defense fails—because Defendant cannot satisfy the privity requirement. (ECF No. 37 at 35 n.12.) *See also Paulo v. Holder*, 669 F.3d 911, 917 (9th Cir. 2011) (noting that the privity requirement of issue preclusion is satisfied when "the party against whom [issue preclusion] is asserted was a party or in privity with a party at the first proceeding.").

[3]Defendant filed a request for judicial notice containing court filings and decisions from the *Llacua* litigation. (ECF No. 24.) Plaintiff does not object to this request because in any event these documents are "all matters of public record." (ECF No. 37 at 27 n.7.) The Court grants the request for those same reasons.

an identity of the claims; (2) a final judgment on the merits; and (3) the same parties or privity between the parties. *Headwaters, Inc. v. U.S. Forest Serv.*, 399 F.3d 1047, 1052 (9th Cir. 2005) (citations omitted). Plaintiff counters that claim preclusion does not apply because he was not in privity with or "adequately represented" by the *Llacua* plaintiffs. (ECF No. 37 at 30.) As further explained below, the Court agrees with Plaintiff.

"A person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims . . . in that suit." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). "'[I]n certain limited circumstances,' a nonparty may be bound by a judgment because [they were] 'adequately represented by someone with the same interests who [wa]s a party' to the suit." *Id.* at 894 (citation omitted). "Representative suits with preclusive effect on nonparties include properly conducted class actions." *Id.* (citation omitted). "[A] party's representation of a nonparty is 'adequate' for preclusion purposes only if, at a minimum: (1) The interests of the nonparty and her representative are aligned; and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the nonparty's interests." *Id.* at 900 (internal citations omitted). "Adequate representation may also require (3) notice of the original suit to the persons alleged to have been represented." *Id.* "In the class-action context, these limitations are implemented by Federal Rule of Civil Procedure 23's procedural safeguards." *Id.* at 900-901.

Here, it is undisputed that Plaintiff was not a named plaintiff in the *Llacua* action. (ECF No. 23-2 at 2.) Defendant argues that the class action exception to the general rule applies because Plaintiff "was completely represented by the plaintiffs in *Llacua* . . . who were also H-2A sheepherders alleging the same antitrust claims," and "one of the classes that the *Llacua* plaintiffs sought to certify was . . . for 'all persons who worked or applied to work as a shepherd for the WRA or any of the WRA member ranchers beginning on 9/1/11.'"[4] (ECF No. 23 at 18.) Plaintiff counters that *Llacua* was not a "properly conducted

[4]Defendant also suggests that Plaintiff can be bound by the *Llacua* decision because one of his attorneys also represented the *Llacua* plaintiffs. (ECF No. 23 at 18.)

class action," as it was never certified as a class under Rule 23. (ECF No. 37 at 30-31.) Plaintiff also analogizes this case to *Vazquez v. Jan-Pro Franchising Int'l*, Inc., 986 F.3d 1106 (9th Cir. 2021). (*Id.* at 31-32.) In *Vazquez*, the Ninth Circuit found that the district court "never certified a class and therefore never inquired whether [the named plaintiff] would adequately protect the interest of the other" people the defendant sought to preclude. *See* 986 F.2d at 1115.

In reply, Defendant argues that *Vazquez* is distinguishable because the *Vazquez* court also pointed out that the court in the prior suit had "explicitly recognized that it had no reason to, and was not, protecting the interests of non-parties," *id.* at 1116. (ECF No. 42 at 9.) Defendant argues that in contrast, the *Llacua* court had considered the effect its decision on a motion to stay would have on the "putative class," but Defendant merely points to a single line in the *Llacua* district court's decision in which it inconsequentially refers to the case as "a putative class action." (*Id.* at 10.) *See also Llacua v. W. Range Ass'n*, Case No. 15-cv-01889-REB-CBS, 2017 WL 4333996, at *1 (D. Colo. Mar. 7, 2017), *aff'd in part*, *rev'd in part and remanded*, 930 F.3d 1161 (10th Cir. 2019). The Court is not at all persuaded by Defendant's argument that the *Llacua* district court meant that it had taken care to protect non-party interests sufficient to find "adequate representation" here.

Defendant also points to non-binding case law in *Ramos v. U.S. Bank Nat. Ass'n*, Case No. 08-cv-1150-PK, 2009 WL 1475023 (D. Or. May 20, 2009), to argue that "even without class certification, 'representation' was adequate to invoke res judicata." (ECF No. 42 at 8.) The Court is not persuaded by the reasoning in *Ramos* because the *Ramos* court did not consider that "adequate representation" of potential absent class members of putative class actions under Rule 23(b)(3)—the type of putative class action in

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However, as Plaintiff argues and the Court agrees, the case law does not support Defendant's contention. *See S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 168 (1999) (finding no special representational relationship where later plaintiffs were aware of the earlier litigation and one of the same lawyers represented both plaintiff groups); *Vazquez*, 986 F.3d at 1115 (finding no privity where the same counsel representing the plaintiffs "also represented [the named plaintiff in the previous suit], asserted identical legal theories, and relied on similar evidence").

Ramos[5]—requires notice allowing them to opt out of the class action as mandated by Rule 23(c)(2). In *Besinga v. United States*, 923 F.2d 133, 135 (9th Cir. 1991), which involved a putative 23(b)(3) class that was never formally certified in a prior suit, the Ninth Circuit held that it "need not resolve the existence or adequacy of certification in [the prior suit] . . . because the [prior] decision cannot be given res judicata effect for another reason: no notice was provided to absent class members allowing them to opt out of the [prior suit's] class action as mandated for any (b)(3) class action by Rule 23(c)(2)."

Here, because the type of class action sought in *Llacua* was similarly under Rule 23(b)(3),[6] and as far as the Court can tell, no such notice was given to the purported absent class members because the class had not been and was never formally certified, Plaintiff was not "adequately represented" by nor in privity with the *Llacua* plaintiffs. Accordingly, the Court finds that claim preclusion does not bar Plaintiff's claims against Defendant.[7]

B. Antitrust Immunity

Defendant argues that it is entitled to immunity from Plaintiff's antitrust claims under the *Noerr-Pennington* doctrine and the state-action immunity doctrine derived from *Parker v. Brown*, 317 U.S. 341 (1943). (ECF No. 23 at 23-24.) The Court addresses each immunity defense in turn.

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[5]In *Ramos*, the plaintiff's memorandum in support of class certification expressly addresses the class certification requirements under Rule 23(b)(3), and the prior suit presumably involved a putative 23(b)(3) class action as well. *See* Case No. 08-cv-1150-PK, 2010 WL 1787423 (D. Or. Mar. 8, 2010).

[6]In *Llacua*, the second amended complaint sought damages and alleged that "[t]here are questions of law or fact common to the classes that predominate over any individual issues that might exist," which indicate that the plaintiffs sought a 23(b)(3) class action. (ECF No. 23-2 at 35, 61.) *See also* Fed. R. Civ. P. 23(b)(3); *Besinga*, 923 F.2d at 135 ("Where individual damages are sought, generally a class action must be certified under 23(b)(3).").

[7]Because the Court finds that Defendant cannot satisfy the privity requirement of claim preclusion, the Court need not—and does not—address Defendant's arguments as to the other elements (ECF No. 23 at 16-17).

1. *Noerr-Pennington* Immunity

"The essence of the *Noerr-Pennington* doctrine is that those who petition any department of the government for redress are immune from statutory liability for their petitioning conduct." *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1006 (9th Cir. 2008) (citing *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 929 (9th Cir. 2006)). Defendant argues that "to the extent Plaintiffs' allegations of anti-competitive conduct involve the sharing of wage data with the DOL, such activity is expressly protected under the *Noerr-Pennington* doctrine and cannot be the basis for antitrust liability." (ECF No. 23 at 24.) Plaintiff counters that the doctrine does not apply because the Complaint does not allege that Defendant "violated the law by submitting H-2A applications or wage data to DOL" but alleges that "what was illegal was [Defendant's] decision to collude with its members and all agree to pay the minimum wage DOL set." (ECF No. 37 at 23.) The Court agrees with Plaintiff as explained below.

"An antitrust violation does not enjoy [*Noerr-Pennington*] immunity simply because an element of that violation involves an action which itself is not illegal." *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1263 (9th Cir. 1982). "When . . . the petitioning activity is but a part of a larger overall scheme to restrain trade, there is no overall immunity." *Id.* In *Clipper Exxpress*, the Ninth Circuit held that *Noerr-Pennington* immunity did not provide a defense where the plaintiff was "not challenging merely the petitioning activity"—protests filed with the Interstate Commerce Commission—but rather "challeng[ing] the defendants' entire course of conduct, which allegedly resulted in the price fixing and trade restraints." *Id.* at 1265.

Here, like in *Clipper Exxpress*, Plaintiff is not challenging Defendant's petitioning activity—the sharing of wage data with the DOL—but rather challenging Defendant's alleged overall scheme of fixing wages with its members "before they sent their H-2A applications to DOL." (ECF No. 37 at 25; ECF No. 1.) Even if part of Defendant's actions may have involved protected petitioning, that does not render Defendant's overall alleged agreement or conspiracy of wage-fixing immune, as the "reach of the *Noerr-Pennington*

doctrine is not that extensive." *See Clipper Exxpress*, 690 F.2d at 1265. The Court therefore finds that Defendant is not entitled to *Noerr-Pennington* immunity.

2. *Parker* State-Action Immunity

In *Parker*, the Supreme Court held that the Sherman Act did not "bar States from imposing market restraints as an act of government" because the Act was not "intended to restrict the sovereign capacity of the States to regulate their economies." *Chamber of Com. of the United States of Am. v. City of Seattle*, 890 F.3d 769, 781 (9th Cir. 2018) (internal quotation marks and citations omitted). Following *Parker*, the Supreme Court has extended immunity from federal antitrust laws to "nonstate actors carrying out the State's regulatory program," albeit only "under certain circumstances." *Id.* (quoting *FTC v. Phoebe Putney Health Sys. Inc.*, 568 U.S. 216, 224-25 (2013)).

"State-action immunity is the exception rather than the rule." *Id.* The doctrine is "disfavored" because it is at odds with "the fundamental national values of free enterprise and economic competition . . . embodied in the federal antitrust laws." *Id.* (internal quotation marks and citations omitted). The Supreme Court has thus only recognized state-action immunity "when it is clear that the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that is the State's own." *Id.* "The Supreme Court's narrow take on state-action immunity is all the more exacting when a non-state actor invokes the protective umbrella of *Parker* immunity." *Id.*

"The Supreme Court uses a two-part test . . . 'to determin[e] whether the anticompetitive acts of private parties are entitled to immunity.'" *Id.* at 781-82 (alteration in original) (quoting *Phoebe Putney*, 568 U.S. at 225). "First, 'the challenged restraint [must] be one clearly articulated and affirmatively expressed as state policy,' and second, 'the policy [must] be actively supervised by the State.'" *Id.* at 782. Under the "clear articulation" prong, the relevant question is whether the regulatory structure adopted by the state specifically authorizes the conduct alleged to violate the Sherman Act. *Id.* at 782 (citation omitted). The active supervision requirement, on the other hand, "demands . . . that state officials have and exercise power to review particular

anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Id.* at 787 (internal quotation marks and citations omitted).

Here, Defendant only makes conclusory arguments that *Parker* immunity applies because: "Plaintiff alleges the DOL bases its rates on regular wage surveys and the states each set their own minimum wage rates"; "[s]uch determinations by the DOL and states are clear, affirmative expressions of policy, actively supervised by the relevant state governments via minimum wage enforcement agencies"; and Defendant "has complied with these state and federal regulations." (ECF No. 23 at 24.) Plaintiff responds that he is not challenging Defendant's "compliance" with DOL's wage floor but challenging its "collusion with its members to fix wages at that level, something DOL neither requires nor oversees." (ECF No. 37 at 26.)

As Plaintiff argues and the Court agrees, "there is no government policy requiring (or even permitting) applicants to collude to fix wages at the floor"—the "challenged restraint" here—nor does the DOL actively supervise Defendant's interactions with its members. (ECF No. 37 at 25-26.) Moreover, as Plaintiff notes, the state-action immunity doctrine immunizes conduct furthering *state* policies actively supervised by *states*, not federal policies actively supervised by a federal agency such as the DOL. (ECF No. 37 at 26 n.5.) To the extent that Defendant's immunity argument rests on state minimum wage laws, it is insufficient to meet the clear articulation test as state minimum wage laws do not carry out a policy of displacing competition. *See Chamber of Com.*, 890 F.3d at 782-83 ("The state, in its sovereign capacity, must 'clearly intend[ ] to displace competition in a particular field with a regulatory structure . . . in the relevant market."). And the Court agrees with Plaintiff that state minimum wage enforcement agencies may actively supervise whether a company has failed to pay a minimum wage, but they do not "investigate whether a group of competitors has . . . agreed to each pay all their employees the minimum wage." (ECF No. 37 at 26.) Accordingly, the Court finds that Defendant has not satisfied either the "clear articulation" or "active supervision" prongs of the test and is therefore not entitled to state-action immunity under *Parker*.

C. Indispensable Parties

Federal Rule of Civil Procedure 19 provides that "a district court may dismiss an action if an absent party is determined to be 'indispensable.'" *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1458 (9th Cir. 1994) (citing Fed. R. Civ. P. 19(b)). "In applying Rule 19, the district court must first determine if an absent party is 'necessary.'" *Id.* (citing Fed. R. Civ. P. 19(a)). To determine whether a party is "necessary" to an action, [t]he court must consider whether complete relief is possible among those parties already in the action and whether the absent party has a claim to a legally protected interest in the outcome of the action." *Id.* (citation omitted). "If a party is deemed to be necessary, the court must then determine if the party can be joined[;] [i]f the party cannot be joined, the court finally must determine whether the party is indispensable so that in 'equity and good conscience' the action should be dismissed." *Id.* (citations omitted).

Defendant argues that the Complaint must be dismissed for Plaintiff's failure to join an indispensably party—the DOL—because "Plaintiff's claims are nothing more than an untimely challenge to the DOL's regulations establishing wage rates for H-2A sheepherders."[8] (ECF No. 23 at 24-25.) Plaintiff counters that he is not challenging DOL's wage floor but instead challenging Defendant's "collusion with its members to offer the minimum wage legally permitted regardless of sheepherder skill and experience or ranch location," and therefore, there is no relief DOL can grant Plaintiff nor does it have any legally protected interest that would be impeded. (ECF No. 37 at 35.) The Court agrees with Plaintiff.

[8]Defendant also argues that Plaintiff cannot sustain its action by suing only one party because a Sherman Act claim requires alleging "a contract or conspiracy among two or more persons or entities." (ECF No. 23 at 26.) The Court finds this argument unpersuasive because Plaintiff has in fact alleged a contract or conspiracy among two or more entities and need not necessarily sue all parties to the alleged conspiracy. *See Ward v. Apple Inc.*, 791 F.3d 1041, 1048 (9th Cir. 2015) ("[A] plaintiff is 'not required to sue all of the alleged conspirators inasmuch as antitrust coconspirators are jointly and severally liable for all damages caused by the conspiracy.'"); *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 330 (1955) (holding that joinder of alleged antitrust coconspirators was not mandatory "since as joint tort-feasors they were not indispensable parties"); *Georgia v. Penn. R.R.*, 324 U.S. 439, 463 (1945) ("In a suit to enjoin a conspiracy not all the conspirators are necessary parties.").

Defendant cites to *Thomas v. Devilbiss*, 408. F. Supp. 1357 (D. Ariz. 1973) to support its argument. (ECF No. 23 at 25.) In *Devilbiss*, the court found that the Secretary of the Interior was an indispensable party because any relief sought would be "amending the Secretary's rule" and the suit is "in actuality against the Secretary and his administrative regulations." *See* 408 F. Supp. at 1360. This case is distinguishable from *Devilbiss* because Plaintiff is not challenging DOL's wage floor or any of its regulations. As Plaintiff argues and the Court agrees, "DOL's presence is not necessary to end [Defendant's] unlawful scheme." (ECF No. 37 at 36.) Accordingly, the Court finds that DOL is not a necessary nor indispensable party and will not dismiss the action for failure to join an indispensable party.

D. Sherman Act Wage-Fixing Claim

Having found that Defendant's proffered defenses and procedural arguments for dismissal fail, the Court now addresses whether Plaintiff has plausibly alleged a violation of the Sherman Act as to the alleged horizontal wage-fixing scheme.[9] "To establish a section 1 violation under the Sherman Act, a plaintiff must demonstrate three elements: (1) an agreement, conspiracy, or combination among two or more persons or distinct business entities; (2) which is intended to harm or unreasonably restrain competition; and (3) which actually causes injury to competition, beyond the impact on the claimant, within a field of commerce in which the claimant is engaged (i.e., 'antitrust injury')." *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 811 (9th Cir. 1988).

"The crucial question prompting Section 1 liability is whether the challenged anticompetitive conduct stems from lawful independent decision or from an agreement, tacit or express." *In re Dynamic Random Access Memory (DRAM) Indirect Purchaser Antitrust Litig.*, 28 F.4th 42, 46 (9th Cir. 2022) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007)) (internal quotation marks and brackets omitted). A Section 1 claim

[9]Because Defendant moves to "dismiss [only] the 'wage-fixing' claim" for failure to state a claim and makes specific arguments only as to the alleged wage-fixing scheme, the Court will only address whether Plaintiff has sufficiently alleged his first claim and not his second claim regarding horizontal market allocation. (ECF No. 23 at 19-23.)

therefore "must contain sufficient factual matter, taken as true, to plausibly suggest that an illegal agreement was made." *Id.* (citing *Twombly*, 550 U.S. at 556). For plaintiffs relying on allegations of parallel conduct, to state a plausible Section 1 claim, the plaintiffs "must include additional factual allegations that place that parallel conduct in a context suggesting a preceding agreement." *Id.* at 46-47 (citing *Twombly*, 550 U.S. at 557). In other words, the plaintiffs "must allege something more than conduct merely consistent with agreement in order to 'nudge[ ] their claims across the line from conceivable to plausible.'" *Id.* at 47. (citing *Twombly*, 550 U.S. at 570).

Defendant broadly argues that Plaintiff's allegations are merely conclusory and more specifically argues that the alleged parallel conduct is insufficient to state a conspiracy or agreement. (ECF No. 23 at 19-20.) Plaintiff's first claim of horizontal wage-fixing alleges that the "WRA and its members conspired and agreed to fix the wages offered to sheepherders predominantly at the minimum DOL wage floor." (ECF No. 1 at 26-27.) The Court finds that Plaintiffs have adequately established parallel conduct by alleging that WRA's members contemporaneously offer wages to sheepherders largely at the minimum allowable wage, which is supported by factual allegations of a review of recent and current job orders for domestic sheepherders posted by Defendant and H-2A applications for foreign sheepherders submitted by Defendant. (ECF No. 1 at 11-12, 15.)

To "place that parallel conduct in a context suggesting a preceding agreement," Plaintiff alleges "direct evidence of the agreement." (ECF No. 37 at 16.) Plaintiff alleges that in a 2021 deposition, former Executive Director of the WRA, Dennis Richins, testified that: (1) "the WRA filled out the wage portion of the job orders, and that it always put in the minimum required by law"; (2) WRA members would receive "a letter saying what the wage would be" and that "WRA members understand and agree that this is the wage they will pay"; and (3) "he understood that all of the job orders for H-2A sheepherders offered the minimum wage, and that all of the WRA's members agreed to offer the same fixed minimum wage." (ECF No. 1 at 17; ECF No. 37 at 16-17.)

Defendant argues in its reply that this testimony "can still arguably be considered merely circumstantial evidence" because "direct facts are explicit and require no inferences." (ECF No. 42 at 11.) Defendant contends that Richins's testimony taken as true "requires an additional inference that the 'letter saying what the wage would be' would have been tantamount to [WRA] and its members agreeing to certain wages, as opposed [to] WRA merely informing its members about the minimum wage [floor] each member was required to pay pursuant to the DOL regulations." (*Id.*) However, accepted as true, the Court finds that Richins's alleged testimony suggests more than mere informing about the minimum allowable wage; it is the type of "further circumstance pointing toward a meeting of the minds" that plausibly alleges at least a tacit agreement between WRA and its members. *See Twombly*, 550 U.S. at 557.

Plaintiff additionally alleges that "the WRA handbook outlines the 'wage rate' that WRA instructs its members to pay to sheepherders"; "[t]he wage rate established in the WRA handbook is the same as the [minimum allowable wage] offered to predominantly all H-2A sheepherders"; "the WRA handbook similarly establishes that members will use the minimum wage as the rate they use to pay to their sheepherders"; and "WRA members further agree with the WRA and each other, orally and otherwise, that this wage will be offered." (ECF No. 1 at 16.) These allegations, in addition to allegations that WRA members do in fact largely adhere to the prescribed minimum wage and do not seek additional information from sheepherders (*e.g.*, years of experience) in order to set an individualized wage (ECF No. 1 at 17-18), suggest that the WRA handbook wage rate was not "purely advisory" and gave rise to some sort of agreement. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, 781 (1975) (finding a bar association's fee schedule constituted price-fixing where its members all "adhered to the fee schedule" and did not ask "for additional information in order to set an individualized fee").

Defendants argue that the fact that members can and do sometimes offer higher than the minimum allowable wage undermines Plaintiff's entire Complaint. (ECF No. 23 at 20.) Plaintiff counters that such "higher wages" are paid in the form of unreported

bonuses that are infrequent and not the industry standard, and even if members "occasionally depart" from the agreed-upon wage, it does not render the initial agreement lawful nor diminish the effect of depressing wages overall. (ECF No. 37 at 20-21.) The Court agrees with Plaintiff that these minor departures from the agreed-upon wage do not defeat Plaintiff's allegations of an unlawful agreement or overall wage-fixing scheme. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222 (1940) ("[P]rices are fixed . . . 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. They are fixed because they are agreed upon.").

Defendants also argue that "[t]he allegation that the wages offered by [WRA] members 'align' with the mandated wage rate . . . is still consistent with lawful conduct and competitive market behavior." (ECF No. 23 at 20.) But it can be simultaneously true that Defendant and its members are complying with DOL's minimum wage regulations *and* violating antitrust laws by agreeing together to only offer the minimum allowable wage. As to market behavior, Defendant asserts that "uniform wages at the minimum wage are precisely the expected economic outcome." (*Id.* at 21.) But the Court finds also economically plausible both Plaintiff's refutation of that, particularly in light of the variance in skill and experience of sheepherders, and Plaintiff's assertion that Defendant and its members "had an incentive to fix wages at that level" to gain higher profits. (ECF No. 37 at 17; ECF No. 1 at 17-18.)

Accordingly, even considered within the context of a regulatory scheme that authorizes WRA to "coordinate with members" to submit applications and act as "joint employers of H-2A shepherds," as Defendant urges the Court to do (ECF No. 42 at 13),[10]

[10]Defendant cites to the Tenth Circuit's *Llacua* decision as containing "unambiguous precedential language" that is applicable here, but the allegations regarding Richins's testimony and WRA's handbook were not before the *Llacua* court when it ultimately found the *Llacua* allegations did "not give rise to a plausible inference of an improper agreement." (ECF No. 42 at 12-13; *compare* ECF No. 1 *with* ECF No. 23-2 (*Llacua* complaint).)

the Court finds Plaintiff's allegations, particularly those of Richins's testimony and the WRA handbook, taken together, "contain sufficient factual matter . . . to plausibly suggest that an illegal agreement was made" and to "nudge [the claim] across the line from conceivable to plausible." *See In re Dynamic*, 28 F.4th at 46-47. Having found no basis for dismissal of Plaintiff's claim, the Court therefore denies Defendant's motion to dismiss.

E. Motion to Transfer Venue

The Court next addresses Defendant's alternative motion to transfer venue under 28 U.S.C. § 1404. (ECF No. 23 at 26.) 28 U.S.C. § 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice a district court may transfer any civil action to any other district or division where it might have been brought." A district court has discretion "to adjudicate motions for transfer according to an individualized, case-by-case consideration of convenience and fairness." *Jones v. GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000) (quoting *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988)). The party seeking to transfer venue bears the burden of showing circumstances warrant a transfer. *See Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 279 (9th Cir. 1979).

As a threshold matter, Defendant makes a conclusory assertion that "venue is improper in Nevada" but makes no specific argument as to improper venue. (ECF No. 23 at 26.) Moreover, as Plaintiff notes, Defendant files its motion to transfer venue under 28 U.S.C. § 1404, which only applies where venue is proper in the original court. In any event, venue is proper in Nevada, as Defendant does not dispute that Plaintiff was placed by Defendant at a member ranch in Nevada and that Defendant transacts business in Nevada. (ECF No. 1 at 2; ECF No. 37 at 39.) Defendant appears to dispute that a substantial part of the events or omissions giving rise to the claims occurred in Nevada, but in the same paragraph states that "Nevada is not the sole forum where this action may be decided," conceding that Nevada is indeed a proper forum. (ECF No. 23 at 27.)

1. Whether Venue is Proper in Utah

To transfer venue, Defendant must first show that the district to which it seeks to have the action transferred is one in which the action might have been brought. Defendant argues that venue is proper in Utah because it "conducts business in Utah," Plaintiff himself alleges that '[WRA] has its principal place of business in Utah,'" and Plaintiff's claims of collusion "necessarily involve conduct of [WRA] and its members in all states, including Utah." (ECF No. 23 at 28.) While it is true that Plaintiff alleged in the Complaint that Defendant has its principal place of business in Utah (ECF No. 1 at 5), Plaintiff states that he was mistaken at the time and points to evidence showing that Defendant's principal place of business has actually been in Idaho since December 2015 when its headquarters moved there from Utah. (ECF No. 37 at 36-37.) Defendant filed a Certificate of Interested Parties with the Court that indicates its principal place of business is "in Idaho, formerly Utah." (ECF No. 25 at 1.) In addition, Plaintiff proffers Defendant's "Statement of Change of Business Mailing Address" to its Idaho address, dated December 2, 2015 (ECF No. 37-3), and an "Annual Report" dated June 23, 2022 that Defendant filed with the Idaho Secretary of State, containing its Idaho address (ECF No. 37-4). In its reply, Defendant does not acknowledge or dispute this evidence and instead continues to emphasize that Plaintiff alleged Utah as its principal place of business. (ECF No. 42 at 15.)

The Court may consider facts and evidence outside of the pleadings when determining venue and does so here. *See Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1137 (9th Cir. 2004); *see also* Judge Virginia A. Phillips & Judge Karen L. Stevenson, *Rutter Group Prac. Guide: Fed. Civ. Proc. Before Trial, Calif. & 9th Cir. Editions*, Ch. 4-K "Convenience" Transfers (28 USC § 1404(a)) ("Affidavits or declarations are required to establish whatever facts are involved: e.g., the residence of the parties, the location of witnesses, physical evidence, etc."). The Court therefore finds that based on the undisputed evidence before it, Plaintiff's principal place of business is not in Utah and may not be a basis for finding venue in Utah. However, because Defendant has shown

that it conducts business in Utah, as it has member ranches in Utah (ECF No. 23-1 at 3), the Court finds this action could have been brought in Utah for those reasons. *See* 15 U.S.C. § 22 ("Any suit . . . under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business.").

2. Interests of Justice and Convenience

Next, Defendant must demonstrate that the interests of justice and convenience of the parties and witnesses weigh in favor of transferring this action to Utah. In deciding a motion to transfer venue under § 1404(a), the district court may consider: (1) the location where the relevant agreements were negotiated and executed; (2) the state that is most familiar with the governing law; (3) the plaintiff's choice of forum; (4) the respective parties' contacts with the forum; (5) the contacts relating to the plaintiff's cause of action in the chosen forum; (6) the differences in the costs of litigation in the two forums; (7) the availability of compulsory process to compel attendance of unwilling non-party witnesses; and (8) the ease of access to sources of proof. *See Jones*, 211 F.3d at 498-99 (citing *Stewart*, 487 U.S. at 29-31; *Lou v. Belzerg*, 834 F.2d 730, 739 (9th Cir. 1987)).

a. Interests of Justice and Judicial Economy

Defendant first argues that transfer may be appropriate "where, as here, there was an earlier filed action in another district, and transfer to that district where the previous action was litigated and adjudicated would promote the interests of justice and judicial economy." (ECF No. 23 at 28.) Defendant specifically refers to the *Llacua* action and contends that "[w]hile the Utah [District] Court was not the adjudicating forum in the *Llacua* action, it would nevertheless be guided by the Tenth Circuit Court's precedent" and thus judicial economy favors transferring to Utah to adjudicate claims that are "nearly identical" to those brought in *Llacua*. (*Id.* at 28-29.) Defendant also cites to *Lens.com, Inc. v. 1-800 CONTACTS, Inc.*, Case No. 2:11-cv-00918-GMN-RJJ, 2012 WL 1155470 (D. Nev. Apr. 4, 2012) to support its judicial economy argument. (*Id.*) Plaintiff counters that since *Llacua* was litigated in the District of Colorado, not Utah, judicial economy would not be served

"by transferring this action to a court that had no involvement with the case WRA says is most relevant." (ECF No. 37 at 40.) The Court agrees with Plaintiff.

The court in *Lens.com* found that there were similar evidentiary and factual questions between its case and a prior inactive suit in Utah, so the case "may benefit from transfer to the District of Utah if a judge who has already been involved in the other litigation is assigned the case." *See* 2012 WL 1155470 at *3. However, the court added that "[e]ven then however, the court will be conducting an entirely new legal analysis on the facts and issues," and "[t]here will be no opportunity for consolidation of the actions or shared discovery that would truly result in judicial economy." *Id.* The court ultimately found that judicial economy "[did] not weigh in favor of transfer but that [it] would not preclude a transfer if there are other factors that favor it." *Id.* Here, because the *Llacua* litigation has ended, there would similarly be no opportunity for consolidation or shared discovery nor would there be any judge in the District of Utah that has already been involved in this litigation, which occurred in the District of Colorado. Accordingly, the Court finds Defendant's judicial economy argument unpersuasive and considers the remaining factors.

b. Location of Agreements

Defendant argues that "any agreement negotiated or executed that Dennis Richins was privy to, would have occurred in Salt Lake City, Utah, where Plaintiff alleged [WRA] maintained its principal place of business and where Mr. Richins resides and did during his tenure as executive director of [WRA]." (ECF No. 23 at 29.) As discussed above, because Defendant's principal place of business is not in Utah, the Court disregards that portion of the argument and similarly does so for the remaining factors below. Plaintiff counters that "[t]his is an antitrust lawsuit; not a breach of contract lawsuit[;] [t]hus, this element does not weigh for or against transfer." (ECF No. 37 at 43 (citing *Lens.com*, 2012 WL 1155470, at *4)). The Court agrees with Plaintiff and finds this factor neutral. *See Lens.com*, 2012 WL 1155470, at *4; *Flynn v. Liner Grode Stein*, 3:09-cv-00422-PMP,

2010 WL 4121886, at *5 (D. Nev. Oct. 15, 2010) ("This is not a contract action, and thus there were no agreements negotiated or executed [in] either [state].").

c. Governing Law

Plaintiff brings claims solely under federal law. Both Plaintiff and Defendant agree that the districts of Nevada and Utah are equally knowledgeable regarding federal law, and thus this factor is neutral. (ECF No. 23 at 29; ECF No. 37 at 43.)

d. Respective Parties' Contacts with Forum and Contacts Relating to Cause of Action in the Chosen Forum

Defendant argues the fact "that Plaintiff's employer was allegedly in Nevada does not weigh in favor of maintaining this action against [Defendant] in Nevada, because the [C]omplaint alleges illegal agreements across Utah and other states in which [Defendant] has members." (ECF No. 23 at 30.) Defendant also notes that former WRA Executive Director Dennis Richins is still a resident of Utah. (*Id.*) Plaintiff argues that Defendant "has greater connection to Nevada, where its vice president, a director, and counsel are all located," while it has only one current director in Utah (as of the time this action commenced). (ECF No. 37 at 42, 43; ECF No. 37-4.) And Plaintiff "has no contacts with Utah, and his involvement in this case stems from his placement at a WRA ranch in Nevada." (*Id.* at 43.)

Because the alleged antitrust practices would have similar consequences in Utah and Nevada, the contacts relating to the cause of action in the chosen forum do not weigh for or against transfer. *See Lens.com*, 2012 WL 1155470, at *5 (same analysis). As for the respective parties' contacts with the forum, Plaintiff was placed at and worked at a WRA ranch in Nevada. Defendant has member ranches in both Nevada and Utah. That Defendant's *former* executive director resides in Utah is irrelevant for this factor because he is no longer a principal or agent of Defendant. WRA has slightly more officers and directors working in Nevada than Utah. Because Plaintiff and Defendant both appear to have more contacts in Nevada, this factor weighs against transfer.

e. Differences in Costs of Litigation

Defendant argues that "the cost of litigation will be significantly reduced if this action is transferred because the Utah District Court has binding precedent from the Tenth Circuit Court of Appeals relating to the same parties and issues." (ECF No. 23 at 30.) As Plaintiff notes and the Court agrees, "[t]his is just a reformulation of WRA's losing res judicata arguments." (ECF No. 37 at 43.) Moreover, the Court has already addressed why Defendant's similar judicial economy arguments do not favor transfer to Utah.

The costs of litigation include the costs of travel for witnesses and counsel. Defendant has identified one potential third-party witness in Utah, Dennis Richins (ECF No. 23 at 31.) As potential witnesses, Plaintiff points to current executive director, Monica Youree, who is located in Idaho—about equidistant to Nevada and Utah; other WRA officers and employees, slightly more of whom reside in Nevada than Utah; and third-party witnesses from the Nevada ranch where Plaintiff worked. (ECF No. 37 at 42.) All of WRA's attorneys and half of Plaintiff's attorneys are in Nevada, and none are in Utah. Because Plaintiff has identified many witnesses and counsel in Nevada, while Defendant has identified only one potential witness in Utah, this factor does not weigh in favor of transfer.

f. Compulsory Process to Compel Unwilling Witnesses

Defendant argues that based on Plaintiff's Complaint, Dennis Richins is "perhaps the most significant non-party witness." (ECF No. 23 at 31.) Plaintiff counters that "Richins' admission about WRA's wage-fixing activities is no doubt important, but more relevant testimony can be elicited from WRA's current leadership." (ECF No. 37 at 42.) While Richins's location in Utah may pose potential problems, since he is a non-party witness residing outside of this Court's jurisdictional subpoena power, *see* Fed. R. Civ. P. 45(c)(1)(A), presently there is no indication that Richins would be unwilling to participate in the instant litigation. Moreover, any inconvenience would be minimal given the proximity of Nevada and Utah, and Plaintiff has plans to also call current WRA officers

and directors in Nevada whose attendance can be compelled by this Court. *See* Fed. R. Civ. P. 45(c)(1)(B)(i). This factor therefore does not weigh in favor or against transfer.

g. Ease of Access to Sources of Proof

Defendant argues that Plaintiff's antitrust claim "was already litigated up through the Tenth Circuit," so "ease of access to sources lies in the Tenth Circuit." (ECF No. 23 at 31.) Again, the Court finds this argument unpersuasive for the same reasons as Defendant's judicial economy arguments. Plaintiff argues that "any documentary sources of proof are likely either housed electronically or physically at WRA's headquarters in Idaho," so "it should not be any less convenient to produce them in Nevada than in Utah." (ECF No. 37 at 42.) The Court agrees with Plaintiff and finds this factor neutral.

h. Plaintiff's Choice of Forum

"Although great weight is generally accorded [a] plaintiff's choice of forum," that choice is given less weight when an individual represents a class. *See Lou*, 834 F.2d at 739. "In judging the weight to be accorded [the plaintiff's] choice of forum, consideration must be given to the extent of both [the plaintiff's] and the [the defendant's] contacts with the forum, including those relating to [the plaintiff's] cause of action." *Id.* (citing *Pacific Car & Foundry Co. v. Pence*, 403 F.2d 949, 954 (9th Cir. 1968)). "If the operative facts have not occurred within the forum and the forum has no interest in the parties or subject matter, [the plaintiff's] choice is entitled to only minimal consideration." *Id.*

Defendant argues that the Court should not "reward" Plaintiff's "forum shopping" and that Plaintiff's choice of forum should be given "little or no deference" because he is representing a class of mostly "Peruvian citizens and/or residents." (ECF No. 23 at 32.) Plaintiff responds that "while Nevada is no longer [Plaintiff's] residence, Nevada is connected to the activities alleged in the complaint," and thus, "his choice is still entitled to some deference." (ECF No. 37 at 43.) Plaintiff also counters that "if anyone here is forum shopping, it is WRA—by seizing on [Plaintiff's] mistaken allegation that the association is headquartered in Utah." (ECF No. 37 at 41.) The normal deference afforded to Plaintiff's choice of forum is reduced here because he is representing a class and no

longer resides in Nevada. But because at least some of the operative facts in the Complaint have occurred within Nevada, and Plaintiff and Defendant both have contacts with Nevada, as previously discussed, Plaintiff's choice of forum is still entitled to some deference. The Court also finds the parties' mutual accusations of forum shopping weigh in neither party's favor. This factor therefore weighs slightly against transfer.

Accordingly, because the Court finds that most of the *Jones* factors are neutral and several weigh against transferring this case to Utah, the Court denies Defendant's alternative motion to transfer venue.

IV. CONCLUSION

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of the motions before the Court.

It is therefore ordered that Defendant's motion to dismiss or in the alternative motion to transfer venue (ECF No. 23) is denied.

DATED THIS 21st Day of March 2023.

MIRANDA M. DU
CHIEF UNITED STATES DISTRICT JUDGE