No. 21-2644

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Jose Ageo LUNA VANEGAS

Plaintiff-Appellant

v.

SIGNET BUILDERS, INC.

Defendant-Appellee

Appeal from the United States District Court

For the Western District of Wisconsin

No. 21-CV-54 - - The Honorable James D. Peterson, United States District Judge

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Response Brief of Defendant-Appellee

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 21-2644

Short Caption: Jose Ageo Luna Vanegas v. Signet Builders, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

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(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Signet Builders, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Fisher & Phillips LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature: Edward N. Boehm, Jr. Date: September 16, 2021

Attorney's Printed Name: Edward N. Boehm, Jr.

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

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(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature: Joshua H. Viau Date: September 16, 2021

Attorney's Printed Name: Joshua H. Viau

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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NA

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

NA

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

NA

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

NA

Attorney's Signature: s/ Ann Margaret Pointer Date: 09/28/2021

Attorney's Printed Name: Ann Margaret Pointer

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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Appellee **Signet Builders, Inc.** ("**Signet**"), files its Brief in support of the decision and judgment issued by the District Court and states as follows:

JURISDICTIONAL STATEMENT

Signet agrees that Appellant's jurisdiction statement is correct and complete.

STATEMENT OF THE ISSUE

Whether the District Court properly dismissed Plaintiff Jose Luna Vanegas' ("Luna Vanegas") unpaid overtime claim pursuant to Federal Rule of Civil Procedure 12(b)(6) because the work he performed as described in the Complaint was "agriculture" as defined by 29 U.S.C. § 203(f) and was exempt from overtime pursuant to the agricultural exemption of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 213(b)(12).

STATEMENT OF THE CASE

A. Procedural History

Luna Vanegas filed suit on behalf of himself and all similarly situated individuals against Signet on January 26, 2021, alleging claims for unpaid overtime under the Fair Labor Standards Act ("FLSA"). (Dkt.

1, A-11.) On March 12, 2021, Luna Vanegas filed a Motion for Conditional Certification of Class. (Dkt. 15.) Signet responded to Luna Vanegas' lawsuit on April 7, 2021, by filing a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6) seeking dismissal of Luna Vanegas' claims on the grounds that his work, as he asserted in his Complaint and incorporated documents, was exempt from the overtime provisions of the FLSA pursuant to the agricultural exemption at 29 U.S.C. § 213(b)(12) because of the FLSA definition of "agriculture" found in 29 U.S.C. § 203(f). (Dkt. 25 & 29.) Signet also filed its opposition to Luna Vanegas' Motion for Conditional Certification of Class. (Dkt. 27.) Luna Vanegas filed his opposition to the Motion to Dismiss on May 19, 2021, and Signet filed its Reply Brief on June 28, 2021. (Dkt. 39 & 48.)

On August 12, 2021, the District Court issued an Order granting Signet's Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6), denying the Motion for Conditional Certification as moot, and entering judgment in favor of Signet. (Dkt. 52, A-1.) Specifically, the District Court found that Luna Venegas' claims, as pleaded in the Complaint, demonstrated that he was exempt from the overtime provisions of the FLSA pursuant to the "secondary agriculture" exemption because his work of

constructing livestock containment structures was performed "on a farm" and was "incident to or in conjunction with" each respective farm's farming activities, which were raising livestock and poultry. *Id.*

On September 8, 2021, Luna Vanegas filed a notice of appeal to the District Court's order dismissing the case. (Dkt. 54.)

B. Statement of Facts

Luna Vanegas is a citizen of Mexico who was legally admitted to the United States on a temporary basis to perform agricultural labor pursuant to 8 U.S.C. § 1101(a)(15(H)(ii)(a) and 8 U.S.C. § 1188 ("H-2A"). (Dkt. 1,, A-11, ¶ 2.) Authorization for the "H-2A" program whereby U.S. employers may arrange to obtain issuance of visas for temporary foreign employees to work in the United States in agriculture was created by 8 U.S.C § 1101(a)(15)(H)(ii)(a). (*Id.* ¶ 8.) Luna Vanegas' temporary visa was obtained through Signet's application filed with the United States Department of Labor ("U.S. DOL"), Office of Foreign Labor Certification ("OFLC") and the Department of Homeland Security, United States Citizenship and Immigration Services ("USCIS") to participate in the H-2A program. (Dkt. 1, A-11, ¶¶ 11-18.)

Luna Vanegas worked for Signet under an H-2A visa to build "livestock confinement structures" on farms in several states in various years including in 2019. (Dkt. 1, A-11, ¶ ¶ 2, 11-18.) The visa applications under which Luna Vanegas and the other H-2A workers worked described the job duties as follows:

> On farms, unload materials, layout lumber, tin sheets, trusses, and other components for building livestock confinement structures. Lift tin sheets to roof and sheet walls, install doors, and caulk structure. Clean up job sites. Occasional use of forklift upon employer provided certification.

(Dkt. 1, A-11, ¶ 16.) Luna Vanegas admits that his work "consisted exclusively of constructing livestock confinement buildings as described in Defendant Signet's temporary employment certification applications" as approved by the U.S. DOL. (*Id.* at ¶ 28.) Accordingly, there is no question that Luna Venegas and the other potential class members performed work in connection with building livestock containment structures on farms where they would be used incident to or in conjunction with farming operations on the farms where they were built.

SUMMARY OF THE ARGUMENT

The District Court properly dismissed Luna Vanegas' Complaint, which asserts claims for unpaid overtime wages because his work and

the work of the other employees, as defined in 29 U.S.C. § 203(f), is expressly exempt from the overtime provisions of the FLSA. 29 U.S.C. §§ 201 *et seq.*; 29 U.S.C. § 213(b)(12). Despite Luna Vanegas' efforts to conflate the test to include a myriad of additional elements to be applied to independent contractors, his work meets the definition based on the allegations in his Complaint that he (1) worked only on farms and (2) worked only on the construction of livestock containment facilities for the farms on which he worked.[1] (Dkt. 1, A-11, ¶¶ 16, 19, 28.)

The exemption is provided for employees engaged in agriculture as defined in Section 203(f) of the FLSA, which defines agriculture, in

[1] Signet notes that the amicus curiae briefs filed in support of Luna Vanegas' appeal simply re-hash many of the same arguments made in his brief. They do include, however, several policy-based arguments and complaints about the H-2A's application to farm construction. These arguments should be made to Congress, not to this Court because the interested parties essentially argue that the legal application of the agricultural exemption to this work has negative societal and economic impacts. Congress has repeatedly rejected efforts to amend the FLSA to require overtime payments for work above specified hours in a workweek. *See, e.g.*, Fairness for Farm Workers Act, S.3131 proposed June 25, 2018 and H.R. 6230 proposed June 26, 2018 (respectively accessible at: https://www.congress.gov/bill/115th-congress/senate-bill/3131 and https://www.congress.gov/bill/115th-congress/house-bill/6230/text?r=36&s=1) (which would have amended the FLSA to require payment of overtime wages at one and one-half times the employee's regular rate by larger employers for workweeks of over 55 hours beginning in January 2019 with overtime due after 40 hours in a workweek beginning in January 2022. This effort to end the overtime exemption for employees engaged in "agriculture" within Section 203(f) of the FLSA was rejected by both Houses of Congress.

relevant part, as: "any practices (including any forestry or lumber operations) performed by a farmer *or* on a farm as an incident to or in conjunction with such farming operations …." (Emphasis added.) Luna Vanegas does not dispute that he worked exclusively to build livestock containment structures on farms that contracted with Signet for the construction of these livestock containment structures that the respective farms used to raise the farms' chickens. (Dkt. 1, A-11, ¶¶ 14, 16, 28.) These facts alone support the District Court's decision that the work performed by Luna Vanegas was properly treated as exempt pursuant to the definition of "secondary agriculture" in Section 203(f). Additionally, the governing U.S. DOL's implementing regulations addressing "Employment in practices on a farm" demonstrate that Luna Vanegas' work meets the definition of "agriculture":

> Employees engaged in building terraces or threshing wheat and other grain, *employees engaged in the erection of silos and granaries*, employees engaged in digging wells or building dams for farm ponds, employees engaged in inspecting and culling flocks of poultry, and pilots and flagmen engaged in the aerial dusting and spraying of crops are *examples of the types of employees of independent contractors* who may be considered employed in practices performed "on a farm."

29 C.F.R. § 780.136 (Emphasis added)(Regulations of the U.S. DOL Wage and Hour Division).

The District Court properly granted Signet's Motion to Dismiss on the grounds that his work meets the requirements of the definition of "secondary agriculture" and properly rejected Luna Vanegas' arguments that restrict the definition of "secondary agriculture" for independent contractors. Specifically, there is nothing in Section 203(f) or anywhere in the interpretive regulations that imposes additional requirements on independent contractors whose employees provide labor or services on farms in connection with the farming operations of those farms where the work is performed. The District Court properly rejected Luna Vanegas' arguments that two additional requirements are required for an independent contractor's employees to perform "secondary agriculture": (1) that the contractor's business must "be exclusively dedicated to agricultural practices;" and (2) that the activities must "be carried on as part of the agricultural function of the farm." Luna Vanegas' arguments are based on a "misunderstanding of the distinction drawn in [29 C.F.R.] § 780.136 between workers engaged in activity that is 'incident to and in conjunction with … farming operations,' and workers engaged in 'a separately organized activity.'" (Dkt. 52, A-1, pp. 5-6.) The question is not whether Signet is engaged in a separately organized productive

activity but whether Luna Vanegas' activities were directed toward the farmers' agricultural activities. See, *id.*

On appeal, rather than dispute the District Court's application of the clear language of Section 203(f), its interpretive regulations, and long-standing caselaw, Luna Vanegas doubles down on his improper attempt to amend the definition of "secondary agriculture" as it applies to independent contractors to include inquiries into (1) whether the contractors' practices on the farm are performed simultaneously with other agricultural functions of the farm, (2) whether the farm's agricultural workers are involved in the activity, (3) whether livestock farmers regularly build their own structures, (4) whether Signet ever builds non-farm buildings at other non-farm locations, (5) what are Signet's arrangements with general contractors, (5) whether it uses prefabricated parts, and (6) whether it competes with farmers. (Appellant's Br. 10-11.) As with the other factors previously argued by Luna Vanegas, these requirements are nowhere in FLSA Section 203(f) or in 29 C.F.R. § 780.136. Although Luna Vanegas purports to cite to various other portions of 29 C.F.R. Part 780, he has taken language out of context, the full provisions of which support the exemption Signet

asserts and the District Court found applicable to the work Luna Vanegas says he performed.

As a consequence of the attempted improper and unsupported restriction of the definition of "secondary agriculture," Luna Vanegas argues, for the first time on appeal, that dismissal on Signet's Motion to Dismiss was inappropriate because the Complaint itself does not include all of the facts necessary to establish Signet's affirmative defense that his work meets the definition of "agriculture." In addition to this argument being raised for the first time on appeal, this position is directly contradictory to Luna Vanegas' implicit agreement in the Joint Planning Report that application of the exemption is a question of law and that discovery would be needed only if the Court denied Signet's Motion to Dismiss. (Dkt. 34, pp. 4, 5) (included in the attached Supplemental Appendix at SA-1.)

Luna Vanegas' assertion that additional material facts must be adduced before the Court can adequately assess the validity of the affirmative defense relies on an unjustified and unsupported expansion of the analysis for applying the agricultural exemption to work performed by independent contractors. The portion of the exemption here requires

that Signet demonstrate that the work performed by Luna Vanegas was performed "*on a farm* or by a farmer" and was "incident to or in conjunction with" the farmer's farming operations. Signet's overall business, its relationship with other businesses, and the methods by which it accomplishes the tasks on the farm are not relevant. Because the Complaint admits that Luna Vanegas worked on "farm" to build livestock containment structures for use incident to or in conjunction with the farming activities of the farmer on that farm, his claims were properly dismissed.

ARGUMENT

A. Standard of Review

A District Court's grant of a motion to dismiss is subject to *de novo* review, taking well-pleaded allegations as true and drawing all reasonable inferences in favor of the plaintiff. *Bradbury v. Metropolitan Property and Cas. Ins. Co.*, 132 F.3d 36 (7th Cir. 1997). Under Federal Rule 12(b)(6), a complaint must be dismissed if the facts do not state a claim for relief that is plausible on its face. *Swanson v. Citibank*, 614 F.3d. 400, 403 (7th Cir. 2010) (*citing Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). A "plaintiff must do

better than putting a few words on paper that, in the hands of an imaginative reader, might suggest that something has happened to her that might be redressed by the law." *Id*. "A pleading that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action will not do.'" *Iqbal*, 556 U.S. at 678. Evaluating whether a "claim is sufficiently plausible to survive a motion to dismiss is 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Killingsworth v. HSBC Bank Nevada, N.A.*, 507 F.3d 614, 618 (7th Cir. 2007) (*quoting McCauley v. City of Chicago*, 671 F.3d 611, 616 (7th Cir. 2011)).

Here, Luna Vanegas' Complaint fails to plead facts legally sufficient to establish that he is not exempt from the overtime requirements of the FLSA because his work was in "agriculture." To make such a showing, he would have to plead facts to support a claim that he did not meet either prong of the FLSA definition – primary agriculture or secondary agriculture. By adopting the description of the work he performed in his Complaint and incorporated DOL – OFLC filings and then pleading only that he did not have any direct contact with livestock and that the farms on which he worked were not owned by

his employer, he failed to plead an actionable claim. His claims are subject to dismissal. *See Bland v. Edward D. Jones & Co., L.P.*, 375 F. Supp. 3d 962, 984–85 (N.D. Ill. 2019) (Granting Defendant Employer's motion to dismiss Plaintiffs' misclassification claims on the basis that the plaintiffs failed to plead facts that would allow the Court to plausibly infer that they were not exempt."). In *Bland*, the Court noted that "[g]enerally, affirmative defenses—such as an employee's classification as exempt in the FLSA context—do not justify dismissal under Federal Rule of Civil Procedure 12(b)(6)," but found an exception where Plaintiffs pleaded facts that put "Defendants' exemption defense in play by necessity." *Id.* Here, the District Court likewise granted Signet's Motion to Dismiss because Luna Vanegas' description of work in the Complaint fell squarely within the FLSA agricultural exemption. (Dkt. 52, A-1, p. 2.)

B. The Complaint allegations are sufficient to establish that Luna Vanegas' work meets the FLSA definition of "agriculture."

Rather than contest the legitimacy of the District Court's well-reasoned decision, which is supported by the text of Section 203(f) as well as the overriding majority of case law and regulatory guidance, Luna

Venegas now attempts to argue alternative grounds, not raised below, in support of reviving his meritless claim. Not only does Luna Vanegas contradict his previous admission that discovery was not necessary to decide whether his work was exempt (Dkt. 34, pp. 4, 5), but he seeks to expand the requirements for the "secondary agriculture" exemption to include elements that are absent from the statute, the interpretive regulations, and the applicable case law. Luna Vanegas' theories should be rejected because they were not raised in opposition to Signet's motion at the District Court and as a matter of law because they contradict the overwhelming weight of authority applying the FLSA Section 203(f) definition of "agriculture."

Absent an exemption, the FLSA requires employers to pay workers at a rate of at least one and one-half times their regular rate of pay for each hour they work beyond 40 in a workweek. 29 U.S.C. § 207(a)(1). But the FLSA exempts "any employee engaged in "agriculture" from this requirement. 29 U.S.C. § 213 (b)(12). The FLSA defines "agriculture" as follows:

> "Agriculture" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including

> commodities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.

29 U.S.C. §203(f). In *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755 (1949), the Supreme Court recognized two types of agricultural activity from the express language of the statute - primary and secondary:

> As can be readily seen, this definition [of agriculture] has two distinct branches. First, there is the primary meaning. Agriculture includes farming in all its branches. Certain specific practices such as cultivation and tillage of the soil, dairying, etc., are listed as being included in this primary meaning. Second, there is the broader meaning. Agriculture is defined to include things other than farming ... whether or not themselves farming practices, which are performed *either by a farmer or on a farm, incident to or in conjunction with "such" farming operations*.

Id. at 760-763. (Emphasis added.) For the broader, "secondary agricultural" activity to fall within the scope of the exemption, the Court stated that the activity had to meet two criteria: (1) it had to be performed *either* by a farmer *or* on a farm and (2) it had to be incidental to or in

conjunction with the farming operations of that farm. *Id.* at 766 and n. 15.

One of the implementing regulations of the "secondary agriculture" exemption expressly states that employees of independent contractors who build structures such as silos and granaries on a farm are engaged in "secondary agriculture" if the work is "performed as an incident to or in conjunction with the farming operations *on the particular farm*." 29 C.F.R. § 780.136 (emphasis added.) Despite this clear language that subjects Luna Vanegas' work, which he admits was performed on a farm, to the same standard as any other employees – regardless by whom they are employed – Luna Vanegas attempted to argue to the District Court that the "secondary agriculture" exemption could not apply to employees of independent contractors (1) whose overall businesses were not "exclusively dedicated to agricultural practices," and (2) do not engage in activities that are carried on as part of the agricultural function of the farm on which [they are] performed." The District Court properly rejected this argument because "these elements are found nowhere in § 203(f)." (Dkt. 52, A-1, p. 5.)

1. Luna Vanegas previously agreed that discovery was not necessary to decide Signet's Motion to Dismiss.

The cornerstone of Luna Vanegas' argument in this appeal – that granting Signet's Motion to Dismiss is premature because the agricultural exemption is a fact-specific inquiry requiring discovery – should be rejected because it contradicts the Complaint allegations and official documents incorporated into the Complaint and it contradicts the position that he took before the District Court. Luna Vanegas affirmatively agreed in the parties' Rule 26(f) Joint Planning Report that discovery was not necessary for resolution of Signet's Motion to Dismiss (Dkt. 34, pp. 4, 5.) Additionally, Luna Vanegas never argued that discovery was necessary in opposing Signet's Motion to Dismiss before the District Court.[2]

Not only did Luna Vanegas fail to raise this argument in his opposition to Signet's Motion to Dismiss to the District Court, but Luna

[2] In fact, Luna Vanegas' new argument is put right up front in the statement of issues, which asserts that "the application of [Signet's] defense requires an evaluation of all the facts and circumstances surrounding Luna Vanegas' work." (Appellant's Br. 1-2.) This position was not argued below and contradicts his Complaint allegations and the official documents cited in the Complaint. The question is whether his work of building livestock containment structures on farms (as alleged in the Complaint and official DOL-OFLC documents incorporated into the Complaint), meets the definition of "agriculture" in Section 203(f).

Vanegas expressly agreed in the Joint 26(f) Discovery Plan and Pre-Trial Conference Report that "the primary issues to be resolved are questions of law and that they will be more accurately able to estimate trial length after the Court rules on Defendant's Motion to Dismiss [and] the controlling legal issue in this case … is a question of law, the meaning and application of Section 203(f)." (Dkt. 34, pp. 4, 5.) The parties' agreement that the Motion to Dismiss involved a question of law on which discovery was not needed led to agreement by Luna Vanegas to stay discovery pending the ruling on the Motion to Dismiss: "the parties agree that discovery … should be stayed pending the Court's ruling on Defendant's Motion to Dismiss." (*Id.* at p. 5.) Further, the parties contemplated that, "[i]f the Motion to Dismiss . . . is denied, the parties will file a new scheduling report in which the subjects on which discovery may be needed are addressed."[3] (*Id.,* p. 8.) Consistent with the agreements in the Joint Planning Report, Luna Vanegas also did not

[3] Signet also indicated that it intended to seek to defer all District Court proceedings, including discovery, while it pursued interlocutory review if the Motion to Dismiss were denied and that it would be "able to estimate more accurately any issues remaining for trial, and length of trial following a definitive ruling on this controlling question of law." (Dkt. 34, p. 4.) Luna Vanegas did not object on the grounds that an interlocutory appeal would not resolve the controlling legal question without discovery.

oppose Signet's Motion to Dismiss on the grounds that discovery was necessary to decide the legal issue presented.

Having admitted that the issue to be resolved was a question of law (not facts) and that discovery was not necessary to decide the Motion to Dismiss, Luna Vanegas is barred from raising new, contrary arguments for the first time on appeal: "It is axiomatic that an issue not first presented to the district court may not be raised before the appellate court as a ground for reversal." *Economy Folding Box Corp. v. Anchor Frozen Foods Corp.,* 515 F.3d 718, 720 (7th Cir. 2008) (alteration in original), *quoting Christmas v. Sanders*, 759 F.2d 1284, 1291 (7th Cir. 1985). *See also Tuszkiewicz v. Allen-Bradley Co.*, 142 F.3d 440 (7th Cir. 1998), *citing Counts v. American Gen. Life & Accident Ins. Co.,* 111 F.3d 105, 108 (11th Cir.1997) (" '[a]n appellate court generally will not consider an issue raised for the first time on appeal ... [, especially] where the appellant pursued a contrary position before the district court" '), *quoting United States v. One Lear Jet Aircraft,* 808 F.2d 765, 773-74 (11th Cir.), *vacated on other grounds,* 831 F.2d 221 (11th Cir.1987), *on reh'g en banc,* 836 F.2d 1571 (11th Cir.), *cert. denied,* 487 U.S. 1204, 108 S.Ct. 2844 (1988); *Broaddus v. Shields*, 665 F.3d 846, 853-854 (7th Cir.

2011) ("[Appellant] cannot change horses in midstream. He chose his defense strategy in response to Mr. Shields' summary judgment motion and is bound by that choice on appeal.").

On appeal, Luna Vanegas argues that "[b]ecause the agricultural exclusion is an affirmative defense, Luna Vanegas was under no obligation to plead facts and circumstances to negate the defense. The limited facts in the complaint are simply insufficient to support the district court's conclusion that the exclusion applied to his work as a matter of law." (Appellant's Br. 7.) Specifically, Luna Venegas argues that further factual development is necessary because:

> [t]he full extent of the industrialization of Signet's construction activities, whether it builds non-farm as well as farm buildings, what its arrangements are with the general contractors who hire Signet, whether it uses prefabricated parts manufactured off the farm, and whether it competes with other independent construction contractors or with farmers are all questions that may bear on the application of the exclusion that cannot be definitively answered from the limited allegations in the complaint.

(*Id*. at 11-12; *see also id*. at 38-39.) Luna Vanegas is wrong about this analysis being necessary to determine the applicability of the "secondary agricultural" exemption because Signet's overall business is irrelevant to the inquiry (as noted herein below), just as he was wrong in attempting

to fashion a different test for the exemption in the District Court.[4] Nonetheless, Luna Vanegas failed to raise this argument below and is, therefore barred from making it here.

Below, Luna Vanegas urged a different, but equally inapplicable test: An independent contractor's employees perform "secondary agriculture" only if (i) the contractor's business is "exclusively dedicated to agricultural practices," and (ii) the activities are "carried on as part of the agricultural function of the farm." (Dkt. 39, p. 7.) Neither of Luna Vanegas' proposed tests is supported by the plain language of the FLSA or the interpretive regulations. But setting that aside, Luna Vanegas's decision "to change horses in midstream" and to raise a new argument on appeal for the first time is prohibited and should not be considered. *See, Wheeler v. Hronopoulos*, 891 F.3d 1072, 1073 (7th Cir. 2018) (Generally, "[f]ailing to bring an argument to the district court means that you waive that argument on appeal.").

[4] As noted in Appellant's brief and in Signet's Motion to Dismiss, the only facts that Luna Vanegas alleged in opposition to whether he met the Section 203(f) definition of agriculture in his Complaint are that he did not have any contact with livestock on the farm property and that Signet did not own the farms on which he worked. (Dkt. 1, A-11, ¶¶ 16, 19.) Although true, these facts are wholly irrelevant to whether he was exempt from overtime in this case because neither party contends that his work constitutes "primary agriculture" under Section 203(f).

As this Court explained in a 2020 decision affirming the grant of a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), "litigants are required to present to the district court both factual and legal arguments in support of their positions" or else risk waiver of those arguments. *Soo Line R.R. Co. v. Consol Rail Corp.*, 965 F.3d 596, 601-602 (7th Cir. 2020), *reh'g denied* (Aug. 11, 2020), *cert denied*, 141 S. Ct. 1068, 208 L.Ed 2d 531 (2021). Although the Court is "more conducive to forgiving waiver" of "pure questions of law," even that occurs "sparingly and in rare instances." *Id.* This appeal does not fit into one of those "rare instances"; Luna Vanegas asks forgiveness for, at best, a waived question of both fact and law. But Luna Vanegas was obligated to raise this argument once presented with Signet's Motion to Dismiss. This Court "routinely decline[s] to consider new arguments on appeal from dismissals at the pleading stage," particularly where, as here, Luna Vanegas was "represented by able counsel." *Id.* There simply is no basis for the Court to overlook Luna Vanegas' waiver in this case.

Luna Vanegas also repeats another argument that was properly rejected by the District Court to support his new argument that additional facts are necessary to determine whether the exemption

applies – that the definition of "agriculture" is "not a fixed concept, but one that changes over time as a result of economic development." (Appellant's Br. 18.) Luna Vanegas relies upon (but misconstrues) a passage in *Farmers Reservoir* in which the Court described how certain work that was previously agricultural in nature could become non-agricultural over a period of time. (*Id.*) But as the District Court properly surmised, this passage referenced work that was once performed by farmers on farms that is now performed off farms, which is captured by the FLSA's "carefully considered definition" of "secondary agriculture," which asks whether the work is performed "by a farmer or on a farm as an incident to or in conjunction with [such] farming operations." *Farmers Reservoir*, 337 U.S. at 762. (Dkt. 52, A-1, p. 7.)

2. <u>The FLSA definition of "secondary agriculture" does not require that the activity be performed simultaneously with the farmers' own agricultural activities by the farmers' employees.</u>

In yet another new argument on appeal, Luna Vanegas asserts that his work cannot meet the definition of "secondary agriculture" because the building of livestock confinement structures may not be performed simultaneously with the actual raising of livestock or poultry: "practices on a farm that are antecedent to or subsequent to the agricultural

function of a farm are not, strictly speaking, 'part of the agricultural function' of a farm and are generally not exempt." (Appellant's Br. 8.) Luna Vanegas provides no statutory or applicable case law support for his assertion. This claim is an untimely attempt to interpose yet another non-existent factor into the statutory definition of second agriculture. There is no support within the statute for the proposition that whether an activity meets the "secondary agriculture" definition turns on when the activity is performed.

In addition to the fact that this argument cannot be raised for the first time on appeal, that an activity must be temporally conjunctive with the primary agricultural activities of the farmer in order to be "secondary agriculture" is not supported by the statutory language, caselaw, or interpretive regulations.[5] To borrow from the District Court's rejection of Luna Vanegas' arguments that examine the nature of Signet's overall business, "these elements are found nowhere in § 203(f)." (Dkt. 52, A-1,

[5] Luna Vanegas' new argument also relates to the notion that any analysis of Signet's business itself is relevant. As properly relied upon by the District Court, for Section 203(f) and 29 C.F.R. § 780.136, the appropriate inquiry is into the work performed by the employee whose work at issue, not the overall work of the employer. (Dkt. 52, A-5, pp. 5-6.) Luna Vanegas is trying to convince this Court to apply the analysis when looking into whether an employee performing work *off the farm* is employed by the farmer in the farmers' own farming operations. Such analysis is irrelevant here.

p. 5.) The fact that "construction work must be performed and completed *before* any other agricultural activity can possibly occur since it is only after construction workers have finished their work that a barn or other enclosure can be put to some use" is not part of the analysis. (Appellant's Br. 35.) Is Luna Vanegas saying that building an additional enclosure would be "agriculture," but building the farm's first animal enclosure would not be "agriculture"? Once Luna Vanegas admits, which he has, that the work was on farms and that it was in connection with the operation of those farms' farming activities (raising poultry or other livestock), it does not matter if the building is the first or last building constructed or if the work is maintenance on an old farm building. The work is "secondary agriculture" because it is "incident to *or* in conjunction with" that farm's farming activities. 29 U.S.C. § 203(f) (emphasis added.) Indeed, the statute plainly utilizes the conjunction "or" rather than "and" between "incident to" and "in conjunction with," clearly showing that the timing of the activity is not required to be temporally in conjunction with the activity itself. Black's Law Dictionary defines "incident to" as: "anything which is usually connected with another, or connected for some purposes, though not inseparably." BLACK'S LAW DICTIONARY (11th ed.

2019). Although perhaps less clear, but nonetheless persuasive, the phrase "in conjunction with" as defined by Merriam-Webster, does not necessarily have a temporal element: "in combination with; together."[6]

Not only is this temporal requirement nowhere in the statute itself or the implementing regulations, but the cases relied upon by Luna Vanegas do not support this additional element for defining "secondary agriculture." Specifically, Luna Vanegas' reliance on the decisions in *Maneja v. Waialua Agriculture Co., Ltd,* 349 U.S. 254 (1955) (processing crops after harvest) and *Holly Farms Corp. v. N.L.R.B.*, 517 U.S. 392, 408 (1996) (chicken catcher-haulers employed by the processing company) are inapplicable because the analysis cited focusses on whether the work is more akin to processing or manufacturing than agriculture. Because Section 203(f)'s secondary prong refers to work performed "by a farmer or on a farm," by definition, a non-farmer independent contractor cannot apply the "secondary agriculture" exemption to off-farm work. The question in each case was whether the employees were employed in the context of each employer's manufacturing or processing functions rather

[6] *See* "In conjunction with," MERRIAM-WEBSTER *available at* https://www.merriam-webster.com/dictionary/inconjunctionwith (Feb. 2, 2022).

than the on-farm farming functions. Processing functions that change the nature of the commodity from its natural state are considered manufacturing rather than agricultural functions and do not meet the Section 203(f) definition of "agriculture." 29 C.F.R. 780.147. Neither the decision in *Maneja* or *Holly Farms* refers to the timing of the processing activities as compared to the growing or raising activities as relevant to the analysis. The timing is coincidental.

In *Maneja*, the Court held that the operation and maintenance of the train tracks and the train that hauled the sugar cane from the fields to the mill dock – *after* it was harvested - was held to be "agriculture" under the FLSA. It was only the grinding of the sugar cane that changed its essential nature that was not agricultural. *Maneja*, 349 U.S. at 264. But there is nothing in the language of Section 203(f) that says work on the farm to enable the farm to produce the sugar – a primary agricultural activity – would not be "agriculture." If Luna Vanegas' work was on structures that would be used to process chickens, for example, that would likely not be related to the "raising" of chickens and, therefore, may be considered related to non-farming activities. That was not the case here. The work performed by the farmers – raising chickens - that

intersects with the work performed by Signet – building the structures where the chickens will be raised - is work that is "farming," not a separate manufacturing business (as in the sugar mills context). *Id.;* 29 C.F.R. § 780.147.

Similarly, Luna Vanegas' reliance on *Holly Farms* in which the Court found live-haul crew chicken catcher-haulers non-exempt under the National Labor Relations Act, 29 U.S.C. § 151 et seq. is misplaced. First, there is no discussion that the timing of the activity prohibited application of the FLSA exemption. Instead, the Court relied on the fact that although the workers performed *some* work on the farm (catching chickens), the majority of their work, hauling and unloading chickens, took place off the farm, they travelled to multiple farms each day, were "functionally integrated" with the processing plant, and, therefore, the work was more related to Holly Farms' separate processing operations than to the farming operations. *Id.* Unlike the live-haul crew chicken catcher-haulers in *Holly Farms*, the building of chicken houses to be used in conjunction with raising chickens on the farms occurs only on the farms of Signet's clients and is an incident to or in conjunction with poultry raising – not processing. The *Holly Farms* chicken catcher-

haulers were found to be not exempt because their work was related not to the farmers' raising of chickens but to the slaughter and processing of the chickens. 29 C.F.R. § 780.144. Furthermore, the chicken catcher-haulers in *Holly Farms* did not perform *all of their job duties on the farm* of the farmers who raised the chickens. They also drove to and between the farms to pick up chickens and to take them back to the slaughter house and unloaded them as part of the chicken slaughtering and processing process. In other words, that work included off the farm work and was functionally related to the slaughtering and processing of the chickens. Such is not the case here where all of the work performed by Luna Venegas and the other H-2A workers is (1) performed on a farm[7] and (2) relates only to the raising or growing of the livestock on that farm where the animal enclosure is built. Accordingly, the reasoning in *Holly Farms* does not support Luna Vanegas' attempt to impose a non-existent and unintended temporal element to the detailed definition of "secondary agriculture" contained in the FLSA.

There are numerous references in the implementing regulations of the FLSA that likewise contradict Luna Vanegas' argument that his

[7] Luna Vanegas concedes that he performed no off-farm work. (Dkt. 1, A-11, ¶ 28.)

work must be performed simultaneously with primary agricultural functions to meet the definition of "secondary agriculture." For example, 29 C.F.R. § 780.136 includes several examples of practices performed "on a farm" - "building terraces,…erection of silos and granaries,…digging wells or building dams for farm ponds," that are not performed simultaneously with primary agricultural tasks but nonetheless are "secondary agriculture" when the "work on each farm pertains solely to the farming operations on that farm." Additionally, 29 C.F.R. § 780.110, which lists "operations included in 'cultivation and tillage of the soil'" under Section 203(f) includes "grading or leveling land or removing rock or other matter to prepare the ground for a proper seedbed or building terraces on farmland to check soil erosion," all of which occur prior to growing crops. The regulations explaining "performance of operations on a farm but not by the farmer" further include examples of preparatory activities that meet the definition of agriculture as long as they are performed incident to or in conjunction with that farmer's farming operations:

> Logging or sawmill operations on a farm undertaken on behalf of the farmer or on behalf of the buyer of the logs or the resulting lumber by a contract logger or sawmill owner are not within the scope of agriculture unless it can be shown that

> these logging or sawmill operations are clearly incidental to farming operations on the farm on which the logging or sawmill operations are being conducted. *For example, the clearing of additional land for cultivation by the farmer or the preparation of timber for construction of his farm buildings would appear to constitute operations incidental to "such farming operations.*"

29 C.F.R. § 780.203 (Emphasis added). This all demonstrates that temporal proximity is not a factor to be considered in applying the definition of "secondary agriculture" to work performed by employees of independent contractors or the farmers themselves.

3. The FLSA's "secondary agriculture" definition does not require that the farmers' own employees work in concert with those of the independent contractor.

In yet another thinly-veiled attempt to insert additional elements into the definition of "secondary agriculture," Luna Venegas contends – again, for the first time in this appeal – that the fact that "farmers of a given type 'ordinarily' rely on independent business operations to carry out a particular kind of work, with no involvement by the farm's agricultural workers, is considered a strong indication that the work is performed incident to and in conjunction with the operation of the independent business, not the operation of the farm even if the work is necessary for the success of the farming operations." (Appellant's Br. 9.)

First, this statement unabashedly twists the applicable analysis to a zero-sum game that the work can only be "incident to or in conjunction with" either the work of the farmer or of the independent contractor, but not both. The applicable test does not require any inquiry into whether the work is "incident to or in conjunction with" the business of the independent contractor. The question is only whether the tasks being performed "by the farmer or on the farm" are "incident to or in conjunction with" that farmer's farming operations.

Second, the cases relied upon by Luna Vanegas for this distortion of the definition of FLSA "agriculture," like the cases relied upon for the notion that the activity must be conducted simultaneously with the farming activity, were actually decided on other statutorily supported grounds. *See Hodgsdon v. Idaho Trout Processors Co.,* 497 F.2d 58, 60 (9th Cir. 1974) (employees of cooperative organized to "clean, process, freeze, pack and market" trout not within the secondary meaning of agriculture because "their work is performed entirely on the land of Trout Processors' plant," and not on the farm, and they are not employed by the farmers); *Marshall v. Gulf &W. Indus., Inc.,* 552 F.2d 124, 126 (5th Cir. 1977) (denial of the agricultural exemption upheld for packing house

work performed off the farm because the farmer's packing entity was determined to be distinct and independent from the farming activity.) In both of the foregoing cases, the issue was whether the off-farm work being performed by separate entities owned in part by the farmers whose commodities were being processed were entitled to the secondary agriculture exemption for work performed off the farm. Work performed off the farm must be performed "by the farmer" to meet the definition of "secondary agriculture." Because it is undisputed in this case that Luna Vanegas worked only on farms, the overall business of his employer is not relevant. (Dkt. 52, A-1, p. 4.) What is relevant is whether his work was incident to or in conjunction with the farming activities of the farm on which the work was performed. And like the construction of silos and granaries referenced in 29 C.F.R. § 780.136, the construction of livestock containment structures is incident to the raising of poultry on the farm where the structure is built.[8]

[8] Luna Vanegas makes the same error in his proposed application of the Supreme Court decisions in *Maneja* and *Michell v. Budd,* 350 U.S. 473 (1956). (Appellant's Br. 28-29.) The determination of whether the mill workers in *Maneja* were engaged in "secondary agriculture" involved work that fundamentally changed the nature of the agricultural commodity and was therefore manufacturing rather than agriculture. Likewise, the issue in *Mitchell* involved whether the bulking of tobacco was manufacturing rather than agriculture. *Mitchell,* 350 U.S. at 475 ("The bulking process substantially changes the physical properties and chemical content of the

Luna Vanegas' citation to 29 C.F.R. § 780.146 in support of this proposition is likewise confusing and does not support this position. This interpretive regulation addresses the fact that manufacturing is not agriculture and that the construction of manufacturing facilities on a farm "would not make the manufacturing … a farming operation." *Citing Maneja*, 349 U.S. 254. The nature of the construction is not at issue in this case. It is undisputed that Luna Vanegas was building livestock containment structures in which there would be no manufacturing and no processing of livestock. (Dkt. 1, A-11, ¶ 16.) Because whether the structures were being built for processing is not at issue, 29 C.F.R. § 780.146 is inapplicable.

4. <u>The District Court correctly rejected Luna Vanegas' argument that he was not exempt because Signet was an independent business.</u>

Vanegas' reliance on *Farmers Reservoir & Irrigation, Co. v. McComb*, 337 U.S. 755, 760-761 (1949) for the contention that whether an activity is agricultural pursuant to the "secondary agriculture" definition depends on whether the activity "is carried on as part of the

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tobacco.") The functions in *Maneja* and *Mitchell* were both held to be processing or manufacturing pursuant to 29 C.F.R. § 780.144, which is inapplicable here.

agricultural function or is separately organized as an independent productive activity" is misplaced. The workers in *Farmers Reservoir* never came onto the farm. Their employer was denied application of the agricultural exemption because they did not perform any functions on the farmers' properties. An independent contractor whose employees are performing work on someone else's farm is engaged in an activity on behalf of that other farmer. Therefore, the nature of Signet's overall business structure is not relevant. Rather application of the exemption depends upon the nature of the work performed and where it is performed and for what farm it is performed. *Herman v. Cont'l Grain Co.*, 80 F. Supp. 2d 1290, 1295 (N.D. Ala. 2000) ("…the *facts* surrounding the work performed by an employee are determinative of whether that employee is engaged 'in agriculture' in either its primary or its secondary sense"); *Wirtz v. Jackson & Perkins Co.*, 312 F.2d 48, 50 (2nd Cir. 1963) ("nothing in the language or history of the Fair Labor Standards Act [suggests] that Congress intended the availability of the agricultural exemption to turn upon the technicalities of corporate organization within which farming operations or practices performed incidental thereto were conducted…"); *Walling v. Snyder Min. Co.*, 66 F. Supp. 725, 731 (D. Minn. 1946) ("The

character of the work performed by the employees… rather than by the[ir] titles… is the controlling factor…").

The correct question is whether the activities being conducted by the non-farmer's employees are incident to or in conjunction with that farmers operations – with no analysis of the employer's business required. Much like a farmer's own employees who work on the farmer's gravel pit that is operated separately from the farm and is not operated to provide building or other materials for use in conjunction with the farmer's own farming operations, the work must be carried on as part of the farming operations of the person or entity that is also the farmer – not manufacturing or separate non-farming quarrying operations of the person or entity that is also the farmer. *See* 29 C.F.R. § 780.142 ("Practices performed on a farm in connection with nonfarming operations performed on or off such farm do not meet the requirement.")

While there is no dispute that Luna Vanegas' work occurred on a farm, meeting the first prong of the definition of "secondary agriculture," the District Court correctly relied upon the implementing regulations of the FLSA, one of which states that employees of independent contractors who build structures such as silos and granaries on a farm are engaged

in "secondary agriculture" so long as that work is "performed as an incident to or in conjunction with the farming operations on the particular farm." 29 C.F.R. § 780.136.

A recent decision from the Eighth Circuit in *Bills v. Cactus Family Farms, LLC*, 5 F.4th 844 (8th Cir., July 15, 2021) reiterates the legal principle that employees of independent contractors can be engaged in "secondary agriculture" on farms. The employee at issue in *Bills* was an Animal Care Auditor for Cactus Farms. He spent 80% of his working time on independent farms contracted to feed and care for livestock owned by Cactus Farms to conduct load assessments so the livestock could be transported without injury. In analyzing whether Bills' work met the definition of "secondary agriculture," the court noted that "it is undisputed that Bills is not a farmer" and that "his load assessments were conducted on a farm." *Id.* at 847. "Thus the only question we must resolve is whether Bills' load assessments were 'an incident to or in conjunction with such farming operations.'" *Id.*, *citing* 29 U.S.C. § 203(f). In finding that Bills' work met the definition of "secondary agriculture," the court rejected his argument that 29 C.F.R. § 780.144 prohibited application of the exemption because he was "not subordinate to the

independent contract growers since he was hired and contracted by Cactus Farms rather than by the farmers." *Id.* Similarly, Luna Vanegas' employer is irrelevant to the inquiry as to whether his work was "incident to and in conjunction with the farming operations" on the farms where he worked. The farmers simply could not raise chickens without containment structures, which are integral to the raising of the chickens.

The District Court also correctly refused to be persuaded by the non-binding Ninth Circuit decision in *N.L.R.B v. Monterey County Building and Construction Trades Council*, 335 F.2d 927 (9th Cir. 1964), which has not been cited in any known FLSA agricultural exemption case, for the proposition that construction work by independent contractors cannot meet the definition of "secondary agriculture." (Dkt. 52, A-1, pp. 8-9.) As noted, *Monterey* is "inconsistent with the reasoning in *Maneja* and with the regulations applying the secondary agriculture exemption, and they are against the weight of the authority on the issue." *Id.*, *citing Bayside Enters., Inc. v. NLRB,* 429 U.S. 298, 303 n. 13 (1977); *Sariol v. Florida Crystals Corp.,* 490 F.3d 1277 (11th Cir. 2007); *Holtville Alfalfa Mills v. Wyatt,* 230 F.2d 398 (9th Cir. 1955).

Luna Vanegas attempts to distinguish the decisions in *Bayside, Sariol, and Holtville Farms* on the grounds that those decisions actually turned on other issues, including whether the employer was a farmer itself in *Bayside* and that the work at issue in *Sariol* and *Maneja* was temporally integrated with the farmers' farming activities. As established above, temporal integration is not required to meet the definition of "secondary agriculture." Ironically, given that Luna Vanegas' entire theory is mistakenly based on the distinctions between agriculture and processing in *Maneja* and *Holly Farms*, he contradicts his own argument by distinguishing the decision in *Holtville Alfalfa Mills* on the very same grounds – that the issue involved whether the truck drivers at issue who hauled chopped alfalfa were engaged in processing or agriculture. (Appellant's Br. 48-49.)

To the contrary, the decisions in these cases are directly on point regarding the application of the "secondary agriculture" definition to non-farmer independent contractors like Signet. The court in *Sariol* expressly rejected the exact argument that Plaintiffs posit here – that independent contractors who conduct their own separate operations should be barred from claiming the agricultural exemption. *Sariol,* 490

F.3d at 1280. The plaintiff in *Sariol* not only worked for an entity organized independently from the farm itself, but he also serviced equipment on the farm that was owned by both the farm and other independent non-farmer entities who assisted with the farming operations. Similarly, in *Holtville,* the court did not identify the employer's business of harvesting, dehydrating, and processing alfalfa as vital to the analysis. Rather, the off-farm work of dehydrating and processing alfalfa was held not to be "secondary agriculture" because the work was performed off the farm and was manufacturing despite that the employer was also engaged in the primary agricultural activity of harvesting the alfalfa on the farm. *Holtville,* 230 F.2d at 400.

Under 8 U.S.C. § 1101 (a)(15)(H)(ii)(a), created by the Immigration Reform and Control Act of 1986, Pub.L.99-603, 100 Stat. 3411, the definition of work for H-2A eligibility, must include "agriculture as defined in section 203(f) of title 29," i.e., as defined in the Fair Labor Standards Act, 29 U.S.C. § 203(f), a law administered by the U.S. Department of Labor as provided by 29 U.S.C. § 204. Thus, neither the National Labor Relations Board nor the definition of individuals "employed as an agricultural laborer" as provided in the National Labor

Relations Act, 29 U.S.C. 152(3) has any role in the administration of the H-2A program or the definition of FLSA "agriculture" within the meaning of 29 U.S.C. § 203(f). While the *Monterey* decision is an anomaly and may be based on facts that are not fully explained, such as that the employees sent from the Union hiring hall did not work only on farms during workweeks and did perform both agricultural labor and non-agricultural labor, the decision is contrary decisions under the FLSA and H-2A program and an earlier N.L.R.A. decision of the Court of Appeals for the Ninth Circuit in *Dofflemeyer v. N.L.R.B.*, 206 F.2d 813 (9th Cir. 1953). *Monterey* is not a basis upon which to find that the work performed by Luna Vanegas was not within the FLSA Section 203(f) definition of "agriculture" for purposes of applying the FLSA Section 213(b)(12) exemption from overtime or his eligibility for an H-2A visa.

Luna Vanegas' proposed requirement that the independent contractor be engaged in "primarily agricultural tasks" would impose the primary agricultural exemption requirement on independent contractors and exclude many functions performed by non-farmers that are clearly incident to or in conjunction with the farming operations of the farms where the work is performed. Employees of a refrigeration company that

repaired and installed refrigeration equipment on dairy farms are examples of such employees who can be engaged in secondary "agriculture." *Tipton v. Associated Milk Producers, Inc.*, 398 F. Supp. 743 (N.D. Tex. 1975). It would also seemingly preclude farmers themselves from asserting the exemption for tasks they themselves perform. For example, a farmer constructing chicken houses with his own employees would be barred from treating them as exempt. Fortunately, a number of cases provide for the exemption for employees of companies whose services are not necessarily primary agriculture. *See e.g., Brennan v. Sugar Cane Growers Coop. of Fla.,* 486 F.2d 1006, 1010–11 (5th Cir. 1973), *reh'g denied,* (1974), (finding camp cooks and attendants performing work on a farm exempt); *Boyles v. Wirtz*, 352 F.2d 63 (5th Cir. 1965) (employees of independent contractor crop dusting company exempt for on-farm work).

C. The U.S. Department of Labor has repeatedly determined that the work performed by Luna Vanegas and other H-2A workers employed by Signet and other construction companies to build livestock containment structures on farms is "secondary agriculture."

Tellingly, Luna Vanegas' brief completely ignores the fact that he was employed by Signet pursuant to the H-2A agricultural guest worker

program, which requires the U.S. DOL affirmatively to determine that Signet demonstrated the work for which Luna Vanegas was hired would meet the definition of "agriculture" pursuant to one of two definitions set forth in the statute, 8 U.S.C. § 1101(a)(15)(H)(ii)(a), specifically including the FLSA definition, which is the only definition under which his work would qualify. See 20 C.F.R. § 655.103(c). Responsibility for administering the H-2A program, including determining if the employees and proposed work meet applicable H-2A eligibility requirements, is statutorily delegated to the U.S. Secretary of Labor pursuant to 8 U.S.C. § 1188, not, for example, to the National Labor Relations Board. In addition to determining that the work for which labor is sought meets the definition of "agriculture," the U.S. DOL must also certify that: (1) there are insufficient available workers within the United States to perform the job; and (2) the employment of aliens will not adversely affect the wages and working conditions of similarly situated U.S. workers. 8 U.S.C. §§ 1101(a)(15)(H)(ii)(a) and 1188(a)(1). (Dkt. 1, A-11, ¶ 11.)

Employers like Signet that wish to utilize the H-2A program must first file an application for temporary employment certification with the DOL-OFLC. 20 C.F.R. § 655.130. (Dkt. 1, A-11, ¶ 12.) The temporary

employment certification application must include a job offer, commonly referred to as a "clearance order" or "job order," that complies with the applicable regulations, including the minimum benefits, wages, and working conditions that must be offered. 20 C.F.R. §§ 655.0(a)(2), 655.121, 655.122, and 655.135. (Dkt. 1, A-11, ¶ 13.)

A Certifying Officer in the Office of Foreign Labor Certification ("OFLC") of the DOL's Employment and Training Administration ("ETA") reviews applications for temporary labor certification. The Certifying Officer must, based on the information provided in the ETA-9142A and ETA-790, make a determination as to whether the employer's job opportunity at issue qualifies for H-2A employment as "agricultural" under regulations at 20 C.F.R. § 655.100-185 issued by the ETA-OFLC. (Dkt. 1, ¶ 11.) the Wage-Hour Division of the DOL is the agency within the DOL that is authorized to enforce these H2-A requirements under regulations issued at 29 C.F.R. § 501.0-501.47 and the FLSA itself under 29 U.S.C. § 204.

To receive approval to bring in foreign labor under the H-2A program, the work for which workers are sought must be *agricultural*

labor or services of a temporary or seasonal nature, which is defined as follows:

> (b) Definition of agricultural labor or services. For the purposes of this part, agricultural labor or services, pursuant to 8 U.S.C. 1101(a)(15)(H)(ii)(a), is defined as: agricultural labor as defined and applied in sec. 3121(g) of the Internal Revenue Code of 1986 at 26 U.S.C. 3121(g); *agriculture as defined and applied in sec. 3(f) of the Fair Labor Standards Act of 1938 (FLSA) at 29 U.S.C. 203(f)*; the pressing of apples for cider on a farm; or logging employment. An occupation included in either statutory definition shall be agricultural labor or services, notwithstanding the exclusion of that occupation from the other statutory definition. For informational purposes, the statutory provisions are listed below.

20 C.F.R. § 655.103(c) and 29 C.F.R. § 501.3(b) (emphasis added).

> *Agriculture*. For purposes of paragraph (c) of this section, agriculture means farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in 1141j(g) of title 12, the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. *See sec. 29 U.S.C. 203(f), as amended (sec. 3(f) of the FLSA, as codified).* Under 12 U.S.C. § 1141j(g) agricultural commodities include, in addition to other agricultural commodities, crude gum (oleoresin) from a living tree, and the following products as processed by the original producer of the crude gum (oleoresin) from which derived: gum spirits of turpentine and

> gum rosin. In addition as defined in 7 U.S.C. 92, gum spirits of turpentine means spirits of turpentine made from gum (oleoresin) from a living tree and gum rosin means rosin remaining after the distillation of gum spirits of turpentine.

20 C.F.R. § 655.103(c)(2) and 29 C.F.R. § 501.3(b)(2) (emphasis added). Therefore, one way in which an employer can qualify for the H-2A program is to seek workers for jobs that meet the FLSA definition of agriculture, which adopts the definition of "agriculture" under the Fair Labor Standards Act ("FLSA") applicable here to 29 U.S.C. § 213(b)(12) and as defined at 29 U.S.C. § 203(f). During the 2019 and 2020 seasons (and in every season since 2013), Signet has filed several applications for workers to construct livestock confinement buildings at various sites in several U.S. states including Wisconsin, Iowa, Indiana, and Wisconsin. (Dkt. 1, A-11, ¶¶ 14-16.) The application process includes the completion of the DOL-ETA Form 790 (https://foreignlaborcert.doleta.gov/pdfs/ETA-790-instructions-addendums.pdf), which must include a description of the job duties to be performed and a statement of the rate and method for paying the employees. 20 C.F.R. §§ 655.121 and 655.122.

Signet's applications in 2019, in each year prior since 2013, have been approved based on Signet's demonstration that the work to be

performed met the definition of "agriculture" under the FLSA.[9] Accordingly, the U.S. DOL has repeatedly determined that the work at issue meets the FLSA definition of "agriculture," and Administrative Law Judge Decisions of the United States Department of Labor, Board of Alien Labor Certification Appeals confirm DOL's conclusion that the work performed by Luna Vanegas is "agriculture." See, *Signet Construction, LLC,* 2022-TLC-00044, slip op. at 3 by US DOL ALJ of the Board of Alien Labor Certification Appeals (Dec. 23, 2021)(finding the US DOL's H-2A Certifying Officer's denial of a brief extension of the work eligibility period of Signet's workers because of a delay in the arrival of construction materials because of the pandemic was an arbitrary and capricious denial where the ALJ had noted that "[t]o obtain an

[9] The FLSA definition is the only way in which Signet's work on farms would qualify under the H-2A program because the Internal Revenue Code definition does not apply to non-farmers. The plain text of 26 U.S.C. § 3121(g) shows that none of these provisions would be a basis upon which an entity other than the farmer or a farm operator would be permitted to employ individuals engaged in construction, even of buildings and other facilities that are to be used on that farm. Therefore, the only definition of "agriculture" under which Signet qualifies for eligibility to use the H-2A program for its on-farm construction workers is the definition under the FLSA that includes "any practices… performed by a farmer *or* on a farm as an incident to or in conjunction with such farming operations…." Title 29 U.S.C. § 203(f), expressly does not say that such work must be performed by employees of the farmer or farm operator and in fact expressly provides the alternatives that such work be performed "by a farmer <u>or</u> on a farm." (Emphasis added.)

immigration benefit under the H-2A program [the original DOL determination of eligibility for the H-2A visa certifications] an employer has the burden to prove that it qualifies.")[10]

Signet is not the only farm construction business that utilizes the H-2A program. There are numerous others in the industry that apply for and receive certification to utilize temporary foreign labor under the H-2A program as evidenced by searching for "construction labor" at https://seasonaljobs.dol.gov. Signet is aware of only one time in which a farm construction company's request for on-farm construction laborers was denied by OFLC under the H-2A program, and that denial was reversed. In fact DOL stipulated that the request was for "agricultural labor." *Alewelt, Inc.,* 2008-TLC-00013 by US DOL ALJ of the Office of Administrative Law Judges (Feb. 26, 2008)(entering a stipulation by the US Department of Labor that Alewelt's intended employment of H-2A visa holders to be "involved in the construction of … livestock confinement structures" was "agricultural employment" so that the proposed work was eligible for employment under the H-2A temporary

[10] This case can be found at the following official U.S. DOL site at: https://www.oalj.dol.gov/DMSSEARCH2/caseStatus2.jsp

foreign worker program allowing H-2A visa holders to come into the United States to perform such agricultural work.).[11]

Because Signet and other construction companies that build livestock containment structures on farms have demonstrated that the work meets the FLSA definition of "agriculture," the DOL has certified the employment of foreign workers such as Luna Vanegas under the H-2A program, including in the jobs for which he now seeks overtime, claiming that the work he and others performed was not in FLSA "agriculture." These official DOL findings that the described work meets the definition of "agriculture" further demonstrate that the work of Luna Vanegas constitutes "secondary agriculture" and that the District Court properly dismissed his Complaint for failure to state a claim.

CONCLUSION

In this appeal, Luna Vanegas seeks to increase the burden substantially on the statutory requirements of the FLSA agricultural exemption by inserting a myriad of additional requirements for work to

[11] Order and Stipulation reported by the US Department of Labor, Office of Administrative Law Judges, at the official US DOL OALJ website case site location: https://www.oalj.dol.gov/DECISIONS/ALJ/TLC/2008/EMPLOYMENT_and_TRAIN_v_ALEWELT_INC_2008TLC00013_(FEB_26_2008)_093948_CADEC_SD.PDF?_ga=2.260926349.1068401780.1617743214-567268337.1592928955

meet the standard of "incident to or in conjunction with" the primary agricultural activities of the farmer on whose land the work is performed. This proposed expansion is not supported by the statutory language, the regulatory guidance, nor the cases upon which Luna Venegas relies for this proposed vast expansion of the definition.

The District Court properly granted Signet's Motion to Dismiss. The District Court's decision and judgment dismissing Luna Vanegas' claims should be affirmed.

Respectfully submitted this 3rd day of February 2022.

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CERTIFICATE OF COMPLIANCE WITH RULE 32

This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure and Circuit Rule 32(c) because excluding the parts of the document exempted by Fed.R.App.P.32(f), this document contains 10,336 words.

I hereby certify that this brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and Cir.R. 32(b), and the type-style requirements of Fed.R.App.P 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using Microsoft Word for Microsoft 365 in 14pt. size Century Schoolbook font.

Dated this 3rd day of February, 2022.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on February 3, 2022, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered users of CM/ECF and that service will be accomplished by the CM/ECF system.

Dated this 3rd day of February 2022.

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CIRCUIT RULE 30 (d) STATEMENT

Pursuant to Circuit Rule 30(d), counsel certifies that all materials required by Circuit Rule 30(a)-(b) are included within the required Short Appendix A that is attached to this brief.

Dated this 3rd day of February 2022.

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No. 21-2644

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Jose Ageo LUNA VANEGAS

Plaintiff-Appellant

v.

SIGNET BUILDERS, INC.

Defendant-Appellee

Appeal from the United States District Court
For the Western District of Wisconsin
No. 21-CV-54 - - The Honorable James D. Peterson, United States District Judge

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Supplemental Appendix of Defendant-Appellee

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No. 21-2644

TABLE OF CONTENTS FOR REQUIRED SHORT APPENDIX

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

JOSE AGEO LUNA VANEGAS,
on behalf of himself and all
others similarly situated,

Case No. 21-cv-54

Plaintiff,

v.

SIGNET BUILDERS, INC.,

Defendant.

JOINT 26(f) DISCOVERY PLAN AND PRE-TRIAL CONFERENCE REPORT

Plaintiff, Jose Ageo Luna Vanegas, by his attorneys Legal Action of Wisconsin, Inc. and Iowa Legal Aid and Defendant, Signet Builders, Inc., by its attorneys, Fisher & Phillips, LLP, respectfully submit the following report pursuant to Fed. R. Civ. P. 26(f) and the Court's Standing Order Governing Preliminary Pretrial Conferences. Counsel for the parties conferred on May 5, 2021 in anticipation of the Rule 16 scheduling conference set for May 12, 2021 at 1:00 pm. All parties have had the opportunity to review and consent to the filing of this Joint Rule 26(f) Pretrial Report.

1. Nature of Case.

Plaintiff has brought this claim on behalf of himself and all those similarly situated alleging that his former employer, Signet Builders, Inc., violated the Fair Labor Standards Act (FLSA) by failing to pay overtime compensation pursuant to the 29 U.S.C. §207. Plaintiff contends his work and that of his co-workers is not "agriculture" under the FLSA, 29 U.S.C. §

203(f), and thereby is not exempted from the Act's overtime provisions by 29 U.S.C. § 213(b)(12).

Plaintiff seeks to represent all other H-2A workers employed by Signet Builders, Inc. in 2019 and/or 2020 in a collective action.

Defendant has filed a Motion to Dismiss (Dkt. #25), alleging that Plaintiff and his co-workers were, in fact, employed in "agriculture" within the meaning of the FLSA 29 U.S.C. § 203(f) and were therefore exempt from the Act's overtime requirements. Defendant further contends that under *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S.Ct. 1773, 1778 (2017) (hereafter "*BMS*") and its progeny, the Court lacks personal jurisdiction over the claims of any H-2A visa-holder workers who did not work for Defendant in the State of Wisconsin.

2. Related Cases.

There are no pending related cases.

3. Issues of Jurisdiction or Venue.

Both parties agree that this Court has jurisdiction over Plaintiff's claims and that venue for Plaintiff's claims is appropriate in the Western District of Wisconsin.

Defendant contends this Court does not have personal jurisdiction over the claims of H-2A visa-holder workers who did not work for the Defendant in the State of Wisconsin. (See Dkt. #27, pp. 11-12 and #29, pp. 34-40).

4. Material Factual and Legal Issues to Be Resolved:

Plaintiff believes that the following legal issues, among others, exist: (1) whether Plaintiff can establish the requirements to proceed as a collective action lawsuit; (2) whether Plaintiff and those the Court considers to be similarly situated, are engaged in agriculture within the meaning

of the FLSA and are thereby exempt from the Act's overtime requirements; and, (3) the extent of the named Plaintiff's and putative class members' damages, if any.

Defendant believes that the following legal issues exist and suggests that its issue (1) is the first issue to be resolved in this case: (1) whether the work performed by the Plaintiff and any others who are permitted to opt into this action and who choose to do so was work that was "agriculture" within the meaning of 29 U.S.C. § 203(f) because such work was performed on multiple separate farms "as an incident to and in conjunction with such farming operations" of the respective separate farms; (2) whether the Court may exercise personal jurisdiction over the claims of H-2A visa-holder workers who did not work for the Defendant in the State of Wisconsin.

5. Simplification of Issues.

The parties will work cooperatively to simplify the issues where appropriate.

6. Advance Rulings from the Court.

The parties will attempt to bring to the Court's attention at the earliest possible time any issues relating to admissibility of evidence on which an advance ruling would be helpful.

7. Amendments to Pleadings.

Defendant filed an Amended Brief in Support of Motion to Dismiss on April 7, 2021. (Dkt. #29). Plaintiff believes that additional amended pleadings may be appropriate pending the Court's adjudication of Defendant's Motion to Dismiss (Dkt. # 25). Plaintiff also does not oppose allowing Defendant to amend its memorandum in opposition to the Plaintiff's Motion for Conditional Certification.

8. Identity of New Parties to Be Added.

Plaintiff has filed a motion for conditional certification to proceed as collective action under Section 216(b) of the FLSA. As a result, other 2019 and 2020 H-2A employees of Defendant

may opt-in to this matter. One such worker has already done so (Dkt. # 20). In the event that the Court grants Plaintiff's Motion for Conditional Certification and for Approval of Notice to Proposed Class, Plaintiff has asked the Court for a six-month period following issuance of the notice within which potential class members are permitted to join the case. Plaintiff is scheduled to submit his reply brief to Defendant's Opposition to Conditional Certification on May 19.

The Defendant denies that conditional certification is appropriate, but to the extent that the Court grants Plaintiff's motion, Defendant has asked for either a 4-week or 60-day notice period. (Dkt. #27, p. 15). Defendant contends that any notice to potential class members contain adequate notice that their success in their claim that the work performed by Signet's employees does not meet the FLSA Section 203(f) definition of "agriculture," which heretofore has been recognized by the US Department of Labor, OFLC, may jeopardize their future employment eligibility for H-2A visas permitting them to work in on-farm construction for Signet and other on-farm construction companies because Signet and these other specialty farm construction firms are not farmers or farm operators and do not meet any of the other H-2A visa criteria under the Internal Revenue Code, 26 U.S.C. § 3121(g) or 20 C.F.R. § 655.103(c).

9. Estimated Trial Length.

The parties agree the primary issues to be resolved are questions of law and that they will be more accurately able to estimate trial length after the Court rules on Defendant's Motion to Dismiss (Dkt. #25). If Defendant's Motion to Dismiss (Dkt. #25) is denied, Defendant will seek to defer all proceedings (i.e. discovery, filing of Answer, etc.) while it pursues interlocutory review. Thus, Defendant asserts that they will be able to estimate more accurately any issues remaining for trial, and length of trial following a definitive ruling on this controlling question of law.

10. Discovery Plan and Schedule.

The parties submit the following proposed discovery plan and schedule in accordance with Fed. R. Civ. P. 26(f)(3)(A)-(F).

A. Rule 26(a) Initial Disclosures

The parties agree that the controlling legal issue in this case (other than the separate legal issue over the Court's jurisdiction of any claims that might be raised by persons who did not work in the State of Wisconsin) is a question of law, the meaning and application of Section 203(f). Thus, the Parties request that discovery, including Rule 26(a) initial disclosures, should be stayed pending the Court's ruling on Defendant's Motion to Dismiss (Dkt. #25).

B. Expert Disclosures

If the Motion to Dismiss (Dkt. #25) is denied, parties will confer on expert disclosure deadlines.

C. Completion of Discovery

i. Dates for Commencing and Completion of Discovery

The parties agree that the outcome of this case will be based on decisions regarding controlling questions of law and individual backpay damages, if any.

The Parties agree to stay discovery until the Court rules on Defendant's Motion to Dismiss (Dkt. #25). An additional stay of discovery may be necessary pending any interlocutory review. Absent a tolling of the statute of limitations of the claims of the putative FLSA class members, Plaintiff intends to oppose any motion which would prevent workers from receiving accurate and timely notice of their right to participate in a collective action. If a request for appeal is denied, Plaintiff believes that discovery can be completed within eight (8) months of the filing of Defendant's Answer.

Plaintiff maintains a timely decision on the certification notice is necessary to provide workers with timely notice of the opportunity to participate. Defendant maintains that conditional certification is inappropriate in this case and in any event no decision on conditional certification should be rendered before the Court rules on the controlling question of law set forth in Defendant's Motion to Dismiss. If Defendant's Motion to Dismiss is denied, Defendant intends to seek interlocutory review pursuant to 28 U.S.C. § 1292 with a stay of discovery but will agree to disclose class information pursuant to any Court Order.

The parties will meet to confer and discuss their respective positions on discovery within 10 days of any denial of a request for interlocutory review pursuant to 28 U.S.C. § 1292. If discovery is delayed, parties are cognizant of their obligation to preserve relevant information and may conduct some discovery prior to resolution of legal issues if concerns regarding possible evidence spoilage arise.

ii. FLSA Decertification, Dispositive Motions, and Trial Readiness

If, for whatever reason, proceedings are not delayed due to interlocutory appeal, the parties anticipate motions for FLSA decertification (if applicable) within four months of Defendant's answer, dispositive motions prior to the close of discovery, and a trial date to be set upon issuance of any Order denying a dispositive motion, to the extent a trial is needed.

iii. Alternate Means of Deposition

The parties agree to discuss the possibility of alternate means of deposition after the Court rules on the Defendant's Motion to Dismiss (Dkt. #25). Plaintiff's counsel aver that Plaintiff resides in Mexico and has limited ability to travel to the United States. The prevalence of COVID-19 in both the United States and Mexico currently further complicates the ability of counsel and parties to travel. Courts have noted that if a plaintiff demonstrates hardship or burden that

outweighs any prejudice to the defendant, Fed. R. Civ. P. 26(c)(2) authorizes a Court to order that plaintiff's depositions be taken by alternative means or in an alternative location other than the forum.

To the extent that depositions are necessary, the Defendant prefers to depose the Plaintiff in-person, particularly if the Plaintiff will be present in the United States during the discovery period. Defendant may be willing to travel to take depositions in Mexico in view of the fact that one or more of its counsel would otherwise likely have to travel to Wisconsin. If any Plaintiff is outside of the United States for the entirety of the discovery period, the parties agree to discuss whether the depositions of the Plaintiff may be taken by alternative means such as telephone, video conference, or some other remote means. Signet agrees to confer with counsel for the Plaintiff regarding the location of any depositions that may be necessary and whether they are taken by "remote means" or in person.

iv. Electronically-Stored Information

The parties agree to disclose and produce any relevant documents and information in the manner required by the Federal Rules of Civil Procedure, including Rules 26 and 34. At this time, the parties do not anticipate any undue burden, excessive expense, or any other special issues related to the disclosure or discovery of electronic information, but agree to promptly address any issues that arise during the course of discovery. If information responsive to discovery requests exists in electronic form, the parties will produce such information in a form adequate and reasonable to satisfy each party's discovery requests. To the extent that either party makes discovery requests that either specifically seek ESI, or which necessarily involve a substantial amount of ESI retrieval and review, the parties agree to discuss sharing any ESI-related costs and/or methods of reducing ESI related costs.

v. Admissions and/or Stipulations.

The parties will work cooperatively to make those appropriate stipulations regarding authenticity of documents in order to avoid unnecessary proof.

vi. Advance Rulings from the Court.

The parties will attempt to bring to the Court's attention at the earliest possible time any issues relating to admissibility of evidence on which an advance ruling would be helpful.

vii. Subjects on which discovery may be needed.

If the Motion to Dismiss (Dkt. #25) is denied, the parties will file a new scheduling report in which the subjects on which discovery may be needed are addressed.

viii. Any issues about claims of privilege or protection.

Counsel for Signet have engaged in multiple discussions with corporate counsel and executive management of Signet regarding the scope of FLSA Sections 203(f) and 213(b)(12), H-2A eligibility provisions of 20 C.F.R. § 655.103(c) and the Internal Revenue Code, 26 U.S.C. § 3121(g) criteria and ask that Signet be permitted to provide a Rule 26(b)(5) privilege log, to the extent that any discovery request seeks privileged material, pursuant to the "categorical approach" and form set forth in Manufacturers Collection Co., LLC v. Precision Airmotive, LLC, 2014 WL 2558888, at *3-4 (N.D. Tex. June 6, 2014). Plaintiff recognizes that there are circumstances under which categorical privilege logs are appropriate and thus have no objection to Defendants making this request should those circumstances arise.

At this time, the parties do not anticipate any other special issues related to the disclosure or discovery of privileged or work-product information. All parties should comply with Rule 26(b)(5) with respect to trial preparation materials. The parties agree that in the case of privileged documents inadvertently produced to the opposing party, any and all copies of documents in any

format that contain privileged information or legal work product shall be immediately returned to the producing party if the documents appear to have been inadvertently produced or if there is notice of the inadvertent production within seven (7) days of the producing party discovering the occurrence of an inadvertent production. The parties further agree that the recipient will not use the inadvertently produced information, in any way, in the furtherance of the recipient's case. The parties also agree that the recipient may not assert that privilege or work-product protections were waived by the producing party because of the inadvertent production; however, the recipient may challenge and/or seek a court order denying the assertion of the privilege or work-product protection.

ix. Limitations on Discovery

If Defendant's Motion to Dismiss (Dkt. #25) is denied, the Defendant intends to pursue interlocutory appeal under 28 U.S. Code § 1292. If the Court grants interlocutory appeal, the Defendant will request a stay of discovery pending any potential appellate court ruling on the controlling issue of law. The parties do not otherwise propose any changes to the limitations on discovery which are set forth by the Federal Rules or local rules at this juncture. However, the parties may seek some relief as to this issue depending upon the Court's rulings on the Motion to Dismiss and Motion for Conditional Certification.

11. Possibility of Prompt Resolution

The parties view the possibility of prompt resolution of this case as minimal. The parties agree that the Court's disposition of the pending Motion to Dismiss (Dkt. #25) is central to any informal resolution of this matter. As the case progresses, the parties remain open to continued dialogue regarding the possibility of settlement. While the parties do not believe mediation would

be helpful at this point, the parties will continue to evaluate whether it would be useful after the court rules on the Motion to Dismiss and Motion for Conditional Certification.

Dated this 10th day of May, 2021.

Respectfully submitted by,

Counsel for Defendant

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Board of Alien Labor Certification Appeals
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Washington, DC 20001-8002

(202) 693-7300
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Issue Date: 23 December 2021

BALCA Case No.: 2022-TLC-00044

ETA Case No.: H-300-21236-540803

In the Matter of:

SIGNET CONSTRUCTION, LLC,
Employer.

Appearances: Kyle Farmer
Austin, TX
For the Employer

Gema Hall
Washington, DC
For the Certifying Officer

Before: Evan H. Nordby
Administrative Law Judge

DECISION AND ORDER

Employer Signet Construction, LLC ("Employer") timely appealed the Certifying Officer's ("CO") April 21, 2020, denial of an extension request for 18 workers under the H-2A non-immigrant program. The H-2A program permits employers to hire foreign workers to perform temporary agricultural work within the United States on a seasonal or other temporary basis. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(a); 20 C.F.R. Part 655, Subpart B. Employers who seek to hire foreign workers through this program must first apply for and receive a labor certification from the Department. 8 U.S.C. § 1188(a)(1); 8 C.F.R. § 214.2 (h)(5)(A).

I was assigned this case on December 8, 2021. Employer requested a *de novo* hearing in its appeal letter, and I ordered the parties to confer as to scheduling a hearing. However, the Employer elected to waive its hearing request and convert its appeal to a request for administrative reiew. The parties agreed on a December 20, 2021 deadline for briefing, which I set by order dated December 17, 2021. The parties timely filed briefs.

OALJ received the Appeal File ("AF") on December 20, 2021. This decision and order is based on the written record and is issued within five business days of the receipt of the AF. 20 C.F.R. § 655.171(a).

For the reasons below I reverse the decision of the CO and grant the requested extension.

I. Facts

On September 17, 2021, the Certifying Officer ("CO") certified Employer's H-2A Application for Temporary Employment Certification (Form ETA-9142A) for 18 "Farm Laborer/workers", also classified as Construction Laborers, to construct the Cedar Grove Finisher Barn at 36926 266th St, Platte, SD. (AF 43-46, 94) Employer indicated that its temporary need was "seasonal" (AF 154), and that the period of intended employment was November 1, 2021 to December 15, 2021. (AF 42.)

On November 30, 2021, Employer requested an extension of its period of intended employment through January 14, 2022. (AF 17) Employer explained the basis for its request by submitting a letter dated November 30, 2021 from Trenton Van Roekel, Construction Manager for NuAge Builders, the builder on the Cedar Grove Finisher Barn project. (AF 19) Van Roekel indicated two reasons for a delay in the start of the project: both "building material shortages industry wide . . . since the beginning of the year" and "[d]elay in getting the permit from the state of [South Dakota]." Van Roekel wrote that "[t]he new expected start date for this project is December 6th, 2021, and we expect it to be finished by January 14[], 2022."

By letter dated December 3, 2021, the CO denied the extension request. The CO cited the Employer's August 26, 2021 need statement, which characterized the need as seasonal based on bad winter weather. The CO emphasized the portion of the initial application that argued for a seasonal need: Employer had pointed out that "there are far more days with snow and ice in January and February than there are [in] other times of the year." (AF 13). The CO, in turn, wrote:

> The Employer did not explain how its season has shifted. By the Employer's own admission, performing the job duties in the application is unsafe due to temperature. Moreover, the employer states the job opportunity is "directly tied to the weather" and now the employer is requesting an extension of a portion of the workers that covers the coldest months of the year.
>
> The Employer's seasonal need and the ability for workers to perform the job duties listed are unclear.

(AF 14). Notably, the CO mentioned but did not rely on the pandemic-related delays in material deliveries that prompted the Employer's request. The CO did not discuss the foreseeability, or lack thereof, of those delays – or mention at all the delayed permitting by the state of South Dakota. This appeal followed.

II. Analysis

BALCA reviews CO certification decisions in the H-2A program under an arbitrary and capricious standard. *See J and V Farms, LLC*, 2016-TLC-00022 (Mar. 4, 2015); *see also Brook Ledge Inc.*, 2016-TLN-00033, slip op. at 5 (May 10, 2016) (three-judge panel citing *J and V Farms*

with approval in H-2B case).[1] Under an arbitrary and capricious standard, the reviewer ensures that the decision-maker below examined "the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Three Seasons Landscape Contracting Service*, 2016-TLN-00045, slip op. at 19 (June 15, 2016) (quoting *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation and internal quotation marks omitted)). "If the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise, then it is arbitrary and capricious." *Id.*

The reviewing judge "is to assure that the agency has given reasoned consideration to all the material facts and issues. This calls for insistence that the agency articulate with reasonable clarity its reasons for decision, and identify the significance of the crucial facts." *Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841 (D.C. Cir. 1970) (footnotes omitted). The "question is not what we would have done, nor whether we agree with the agency action. Rather, the question is whether the agency action was reasonable and reasonably explained." *Americans for Clean Energy v. Env't Prot. Agency*, 864 F.3d 691, 726–27 (D.C. Cir. 2017) (quoting *Jackson v. Mabus*, 808 F.3d 933, 936 (D.C. Cir. 2015)). The judge "may not supply a reasoned basis for the agency's action that the agency itself has not given." *State Farm*, 463 U.S. at 43 (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

To obtain an immigration benefit under the H-2A program, an employer has the burden to prove that it qualifies. *See Intergrow East, Inc.* 2019-TLC-00073 (Sept. 11, 2019) (citing 20 C.F.R. § 655.161(a)). An employer requesting an extension of more than two weeks of an H-2A certification must show the request is "related to . . . factors beyond the control of the employer." 20 C.F.R. § 655.170(b). The request must also be "supported in writing, with documentation showing that an extension is needed and that the need could not have been reasonably foreseen by the employer." *Id.* Section 655.170(b) further provides that a CO may not approve a long-term extension request that would result in a total contract period of 12 months or more absent "extraordinary circumstances." *Id*.

Employer submitted a letter from the builder addressing the reasons for the delayed start of the specific project for which the H-2A workers were certified and brought to work, as well as more general trade press articles supporting the builder's explanation. Moreover, the builder cited two reasons: building material delays *and* a permitting delay from the state of South Dakota.

[1] As Judge Clark noted in *J and V Farms*, *see* slip op. at 3, the prior H-2A regulations specified that the decision of the ETA was to be reviewed for "legal sufficiency." 20 C.F.R. § 655.112(a) (2008). Legal sufficiency was not defined by the regulations, had been interpreted to mean arbitrary and capricious review. *E.g. Bolton Springs Farm*, Case No. 2008-TLC-28, slip op. at 6 (ALJ May 16, 2008). The March 15, 2010 regulations removed the reference to legal sufficiency but did not substitute any other standard of review, and no comment was provided to explain the change. *See* 75 Fed. Reg. 6884, 6931 (Feb. 12, 2010). Under the current regulations, most ALJs in the BALCA context, including myself, have continued to apply the arbitrary and capricious standard of review. *E.g. J.M. Yanez Const., Inc.*, 2019-TLN-00072 (Apr. 1, 2019); *Catnip Ridge Manure Application Inc.*, Case No. 2014-TLC-00078, slip op. at 3 (ALJ May 28, 2014); *T.A.F. Shearing Co./Alejandro R. Colqui*, Case No. 2012-TLC-00095, slip op. at 1 (ALJ Sept. 19, 2012). Additionally, ETA has said that the "substance of [the appeals regulation] has remained the same since 1987." 74 Fed. Reg. 45906, 45921 (Sept. 4, 2009).

The CO's denial letter focused entirely on the question of seasonal need, and asserted that the Employer had not shown how its seasonal need had shifted or if the workers were still needed. However, on my review, it *is* apparent from the Employer's documentation how its seasonal need has shifted, contrary to the CO's denial. In its initial application, the Employer explained that there are more days with snow and ice in January and February than in other months, which would present a safety hazard, but did not represent that construction was impossible or that there were *no* snow- and ice-free days on which construction could proceed. Given the delay, clearly the Employer would rather extend its H-2A workforce and manage the safety and weather issues to complete the project – perhaps with more days off for weather than in its preferred construction season, the fall – than lose its workforce and not complete this six-week project. The denial's assertions that the Employer could not perform the work due to weather, or is changing its tune, "runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43.

In briefing, discussing the snow and ice issue, the CO notes that "Employer did not address how it would handle these significant safety concerns during the requested period, which extends work into January 2022." CO Br. at 4. Obviously the Employer continues to have obligations under the Occupational Safety and Health Act to ensure the safety of its employees working during inclement weather. But the governing H-2A regulation does not require such details in a written explanation supporting an extension application. All that the regulation requires is that there be an explanation in writing, accompanied by documentation showing that an extension is needed and that the need could not have been reasonably foreseen. 20 C.F.R. § 655.170. This is an example of the agency relying on factors which were not intended for it to consider. *See State Farm*, 463 U.S. at 43.

Having already approved this Employer's application based on attempted recruitment and a certified need, the failure to grant a relatively brief extension now would result in the materials eventually arriving to an empty worksite – by the agency's own prior findings. At a minimum, that contradiction should be addressed. In not doing so, the agency "entirely failed to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43.

In briefing, the CO argues that "BALCA has consistently upheld the CO's recent decisions to deny applications based on temporary need, waivers of the filing deadlines, and extension requests since employers should have considered pandemic-related effects when filing their applications in 2021 for temporary foreign workers." CO Br. at 6. But the reasons offered by counsel for the CO in the agency's brief to me, based on foreseeability of delays, are additional reasons absent from the CO's denial letter.

"It is a 'foundational principle of administrative law' that judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'" *Dep't of Homeland Sec. v. Regents of the Univ. of California*, ___ U.S. ___, 140 S. Ct. 1891, 1907 (2020) (citation omitted).

> [T]he Court has often rejected justifications belatedly advanced by advocates[;] we refer to this as a prohibition on post hoc rationalizations, not advocate rationalizations, because the problem is the timing, not the speaker. The functional reasons for requiring

> contemporaneous explanations apply with equal force regardless whether post hoc justifications are raised in court by those appearing on behalf of the agency or by agency officials themselves.

Id. at 1909. This principle "promotes 'agency accountability,' . . . by ensuring that parties and the public can respond fully and in a timely manner to an agency's exercise of authority, [and] instills confidence that the reasons given are not simply "convenient litigating position[s]." *Id.* (citations omitted). "Permitting agencies to invoke belated justifications, on the other hand, can upset 'the orderly functioning of the process of review,' forcing both litigants and courts to chase a moving target." *Id.* (citations omitted).

I therefore need not consider the additional reasons for affirming the denial that were offered in the CO's brief. However, I have considered them in deciding the proper remedy. I am convinced that the remedy here is to reverse the denial of the extension rather than remand for further consideration, as I am empowered to do by the regulation. *See* 20 C.F.R. § 655.171.

I find the foreseeability argument unpersuasive on this record, largely because the cases cited in the CO's brief are factually distinguishable. In *Texas Mariculture – Carancahua Bay LP*, 2022-TLC-00014 (Oct. 29, 2021), the employer's requested four-month extension would have resulted in a contract period exceeding 12 months, and the ALJ found that the employer did not prove the required extraordinary circumstances. *Id.*, slip op. at 3. Moreover, the ALJ observed that "if Employer is able to shift its need for labor by four months, this calls into question whether Employer's need is truly seasonal." *Id.*, slip op. at 3 & n.4 (*citing* 20 C.F.R. § 655.103(d)). Each of these factors provided independent bases, on the facts of that case, for denying the requested extension as neither arbitrary nor capricious.

In *Rite Stuff Foods, Inc*., 2021-TLN-00059 (July 30, 2021), the employer filed its application for certification five weeks late, and requested a waiver of the late filing broadly citing the pandemic. *See id.*, slip op. at 2-3. While "pandemic health issue[s]" are an enumerated good-cause reason for granting a waiver, *see* 20 C.F.R. § 655.17(b), the ALJ found that the employer did not establish good cause with supporting evidence for an application five weeks late. *Id.* And in any event, he noted that the employer could simply reapply with a date of need corresponding to 75 days from its date of application. *Id.* (citing 20 C.F.R. § 655.15(b)).

In *NV Produce Inc.*, 2021-TLC-00242 (Sept. 30, 2021), the employer failed to submit documentation supporting its statement that the arrival of its workers from their country of origin had been unforeseeably delayed due to the pandemic. *Id.*, slip op. at 4. Also, as the work itself was vegetable farming, which has a natural growing and harvesting season, the CO found the employer did not prove that its "seasonal" need could be shifted by the 45 days requested. *Id.*, slip op. at 2-4. *See also Mary's Alpaca, LLC,* 2021-TLC-00038, slip op. at 4 (Jan. 8, 2021) (employer's assertions were unsupported). [2]

[2] The decisions in *Cape Cod Caribbean Café and Bakery, Inc.*, 2022-TLN-00023 (Dec. 13, 2022) and *Underwood Brothers, Inc.*, 2022-TLN-00025 (Dec. 9, 2021), cited by the CO, are not yet published and available in the OALJ online decision database. I could not review them.

In general, as of the date of this order about 18 months in, pandemic related delays *are* foreseeable. But the CO's position begs the question. Under the standard argued by the CO in the brief (and was at issue in *Texas Mariculture*), no pandemic-related delay could qualify an employer because *in general* pandemic-related delays are foreseeable. At this point in the pandemic, presumably employers are building in a degree of delay to their scheduling, including in projecting the period of need in their initial applications for certifications for seasonal workers.[3] An extension that nevertheless becomes necessary, due to a greater degree of delay than anticipated, should still be able to be shown to meet the "could not have been reasonably foreseen" standard. The regulatory standard is, after all, whether the need was "reasonably" foreseeable, not whether it was foreseeable *at all*.[4]

In my view the correct standard for foreseeability is employer- and job-specific. Employers apply to bring in a specific number of H-2A workers for a defined period of time and a particular list of job duties at a particular worksite or set of sites. *See generally* 20 C.F.R. Part 655. The extension standard should follow from the initial certification standard: was the specific need – i.e., reason for an extension and approximate length of extension requested – incurred by the applying employer for the job duties performed by the workers at the subject worksite reasonably foreseeable, or not reasonably foreseeable? Predicting the future is inherently an inexact science; as of the date of this order, a new variant of the SARS-CoV-2 virus is upending expectations that appeared settled as recently as two weeks ago.

Here, the work is a specific agricultural construction project, the construction of the Cedar Grove Finisher Barn, which is dependent on the arrival of materials for that project. The CO's brief argues that the extension application "did not provide any further details regarding the raw materials needed, or specify if any materials had arrived, when they are anticipated to arrive, and how the delivery delay has affected the work schedule for this particular project." CO Br. at 4. While an accurate statement, the governing H-2A regulation does not require such details in a written explanation supporting an extension application.

As noted above, Employer submitted a letter from the builder addressing the reasons for the delayed start of the specific project for which the H-2A workers were certified. Moreover, the builder cited two reasons: building material delays *and* a permitting delay from the state of South Dakota. Even if the Employer, with 20-20 hindsight, might have built in even more time for material delivery during the pandemic, the permitting delay due to the state's inaction provides a separate basis for the extension. The CO's denial letter did not discuss the state's delay.

Finally, the requested extension period has already begun as of the date of this order, and the project is projected to be complete by mid-January 2022. Time is of the essence.

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[3] At least, seasonal H-2A employers may be factoring in delays to the extent their seasons are not closely tied to planting or harvesting of crops and are therefore less flexible.

[4] Regulatory preambles provide some of the most probative interpretive guidance, though of course the plain language of the regulation ultimately controls. For a discussion of the utility of preambles, *see generally* Kevin M. Stack, *Preambles as Guidance*, 84 Geo.Wash. L. Rev. 1252 (2016). Unfortunately, the preamble to the 2010 H-2A Final Rule sheds no light on the meaning of "could not have been reasonably foreseen." *See* Temporary Agricultural Employment of H-2A Aliens in the United States, 75 Fed. Reg. 6883, 6931 (Feb. 12, 2010).

III. Order

For these reasons, I REVERSE the decision of the Certifying Officer. It is ORDERED that the requested extension is GRANTED.

For the Board:

EVAN H. NORDBY
Administrative Law Judge

SERVICE SHEET

Case Name: **In_re_Signet_Construction__**

Case Number: **2022TLC00044**

Document Title: **Decision and Order**

I hereby certify that a copy of the above-referenced document was sent to the following this 23rd day of December, 2021:

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Issue Date: 26 February 2008

Case No.: **2008-TLC-00013**

In the Matter of:

ALEWELT, INC.,
Employer

ORDER OF DISMISSAL

This matter arises under the temporary agricultural labor or services provision of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii)(a) and its implementing regulations found at 20 C.F.R. Part 655, Subpart B. On February 12, 2008, by facsimile, Alewelt, Inc. ["Alewelt"], filed a timely "Request for de Novo Hearing and Notice of Appeal and Request to Submit Additional Information." In it, Alewelt sought an expedited, de novo review of the Department of Labor's February 5, 2008 denial of temporary alien agricultural labor certification (H-2A) for 20 employment opportunities for workers involved in the construction of livestock temperature control facilities (livestock confinement structures). The case was docketed by this office and assigned to the undersigned administrative law judge on February 13, 2008. The Administrative Record was received on February 20, 2007.

On February 19, 2008, the undersigned conducted a telephonic conference call in which counsel for both Alewelt and the Department participated. During the call, the parties agreed to stipulate to the facts of the case and allow the matter to proceed to a hearing conducted on the written record, if feasible. However, later the same day, counsel for the Department contacted the undersigned's law clerk and stated that the parties had reached a dispositive agreement, and a joint motion for dismissal would be forthcoming. On February 20, 2008, the parties jointly filed a Stipulation of Dismissal which stated, in its entirety:

> The parties, by their representatives, stipulate that this proceeding be dismissed with prejudice on the following grounds:
>
> 1. They concur that the work activity that gave rise to Case No. 2008-TLC-13 is agricultural employment and that Alewelt, Inc. is subject to the requirements for certification as a farm labor contractor.
> 2. Accordingly, all issues raised by this case have been resolved.
>
> WHEREFORE, the parties respectfully request that Case No. 2008-TLC-13 be dismissed.

As the parties agree that this case presents no issue for resolution, the joint request by the Department of Labor and Alewelt, Inc. for dismissal will be granted. Accordingly,

ORDER

IT IS HEREBY ORDERED that the joint request by the Department of Labor and Alewelt, Inc. for dismissal is **GRANTED**, and this matter is hereby **DISMISSED**.

A

PAMELA LAKES WOOD
Administrative Law Judge

Washington, D.C.