**UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF WISCONSIN**

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| JOSE AGEO LUNA VANEGAS,<br>On behalf of himself and all others similarly situated,<br><br>Plaintiff,<br><br>v.<br><br>SIGNET BUILDERS, INC.<br><br>Defendant. | CASE NO.: 3:21-CV-00054<br><br>COLLECTIVE ACTION COMPLAINT PURSUANT TO 29 U.S.C. §216(b) |

**AMENDED MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS COMPLAINT**

Pursuant to Federal Rule of Civil Procedure 12(b)(2) and (6), Signet Builders, Inc. ("Defendant" or "Signet"), by and through its undersigned counsel, hereby submits this Amended Memorandum in Support of its Motion to Dismiss wherein Signet moves to dismiss Plaintiff's Complaint for lack of personal jurisdiction and failure to state a claim upon which relief may be granted pursuant to Fed. R. Civ. P. 12(b)(6).

## I. INTRODUCTION

Plaintiff's Complaint, which asserts claims for unpaid overtime wages, fails to state a claim upon which relief can be granted because Plaintiff's work and the work of those other employees whom he seeks to represent via collective action is work that is expressly exempt from the overtime provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 201, et seq. pursuant to 29 U.S.C. § 213(b)(12). The exemption is provided for employees engaged in agriculture as defined in 29 U.S.C. § 203(f) ("Section 203(f)"). Specifically, Plaintiff's Complaint confirms that he worked exclusively on farms and was engaged in work related to the construction of livestock confinement structures on those farms. This work meets the definition of "secondary agriculture"

under Section 203(f) of the FLSA. In fact, the Complaint confirms that Plaintiff was a citizen of Mexico working in the U.S. on a temporary visa obtained through Signet's application to participate in the H-2A temporary agricultural labor program, which requires that the work for which labor is sought be agricultural pursuant to the FLSA "agriculture" definition. As Plaintiff acknowledges, the United States Department of Labor ("DOL") approved Signet's H-2A application with a full understanding of the nature of the work. Plaintiff's Complaint claims that his work did not meet the requirements of the agricultural exemption under 29 U.S.C. § 213(b)(12) of the FLSA because (1) he did not have contact with any livestock while working on the farm, and (2) the work was not performed on properties owned or controlled by Signet. Neither fact removes Plaintiff from the exemption. Accordingly, based on the statutory language, legislative history, current and prior interpretations and determinations of the DOL, and decades' worth of interpretive caselaw, this work squarely meets the definition of "agriculture" and is exempt from the overtime provisions of the FLSA.

The Court should also dismiss Plaintiffs' Complaint to the extent that it seeks to advance claims on behalf of former Signet employees who worked for the company outside of Wisconsin. Opt-in plaintiffs in a putative FLSA collective action have party-plaintiff status. Thus, the claims of any opt-in plaintiff are subject to the same threshold jurisdiction questions applicable to a named plaintiff. Accordingly, opt-in plaintiffs must establish personal jurisdiction, be it via general jurisdiction over Signet in Wisconsin or specific jurisdiction with respect to their individual claims.

Opt-in plaintiffs who did not work for Signet in Wisconsin cannot make this jurisdictional showing. No general jurisdiction (i.e. the power to hear any claim involving Signet) exists because Signet is not "at home" in Wisconsin. Despite its presence in Wisconsin, where it conducts business, Signet is incorporated in Texas and has its principal place of business in that state. It

therefore lacks contacts with Wisconsin that are "so continuous and systematic as to render it essentially at home" there. *Daimler AG v. Bauman*, 571 US 117, 139 (2014) (holding that California state courts lacked general jurisdiction over Mercedes-Benz even though the company was "the largest supplier of luxury vehicles to the California market"). Wisconsin thus lacks general jurisdiction over Signet. And because the claims of opt-in plaintiffs who never worked for Signet in Wisconsin lack any connection to the state, no specific jurisdiction exists either. In the absence of either general or specific jurisdiction, the Court should dismiss the Complaint to the extent it seeks to advance claims on behalf of Signet's employees who did not work in Wisconsin.

## II. BACKGROUND FACTS

### A. Jurisdictional Allegations:

In the Complaint, Plaintiff alleges the following:

1. "In 2019, Plaintiff worked for Defendant in Wisconsin for approximately three months and Indiana for approximately five months." (Dkt. 1, ¶ 2).

2. "During 2019 and 2020, Defendant, Signet filed various applications to employ temporary foreign workers through the H-2A program to perform labor *in a number of different states*." (Dkt.1, ¶ 14) (emphasis added).

3. "Between 2019 and 2020, Defendant obtained over ninety separate employment certifications, many with identical job descriptions, seeking admission of workers to construct livestock confinement buildings at sites *in various U.S. States including Wisconsin, Iowa, Indiana, and other U.S. states*." (Dkt.1, ¶ 16) (emphasis added).

4. "During 2019, Defendant employed hundreds of H-2A workers, including Plaintiff, and assigned them exclusively non-agricultural construction work at job sites *in at least ten different U.S. States*." (Dkt. 1, ¶ 25) (emphasis added).

5. "The class of similarly situated individuals consists of all H-2A workers employed by Defendant during 2019-2020 who were not paid at one and one-half their regular rate for hours worked in excess of 40 during a workweek." (Dkt. 1, ¶ 23).

In the Motion for Conditional Certification, Plaintiffs also confirmed their intent to certify a class that includes H-2A workers who worked for Signet outside of Wisconsin:

6. "Plaintiff requests Court directed notice to the following individuals: *All H-2A workers* employed by Signet Builders, Inc. in 2019-2020." (Dkt. 15, p. 1) (emphasis added).

Plaintiff failed to allege Signet's state of incorporation or its principal place of business in the Complaint. However, Signet is a Texas Corporation with a principal place of business in Austin, Texas.[1]

**B. Factual Allegations:**

**1. Plaintiff was employed through the H-2A temporary agricultural labor program, which requires certification by the U.S. Department of Labor that the work to be performed is agriculture as defined by the Fair Labor Standards Act because the work performed by Signet's employees is not "agricultural labor or services" under the Internal Revenue Code.**

Plaintiff 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, ¶ 2.) As Plaintiff correctly points out in paragraph 8 of the Complaint, authorization for the "H-2A" program whereby US employers may arrange to obtain visas for temporary foreign employees to work in agriculture is created by 8 U.S.C § 1101(a)(15)(H)(ii). (Dkt. 1, ¶ 8.) Provisions of 8 U.S.C. § 1188 also govern the H-2A program

[1] See ¶ 2 of Declaration of Natalie Farmer attached as an exhibit to Signet's Opposition to Plaintiff's Motion for Conditional Certification. *See also Topcon Agriculture Americas, LLC v. Cote Ag Technologies, LLC*, 391 F.Supp.3d 882, 884 (W.D. Wisc. 2019) (Observing that the court may consider "evidentiary submissions…in deciding a motion to dismiss on jurisdictional grounds.").

and delegate the responsibility for determining if the employees and proposed work meet applicable H-2A eligibility requirements to the Secretary of Labor. An employer in the United States may import H-2A workers to perform agricultural or labor services on a seasonal or temporary basis if the U.S. Department of Labor (DOL") certifies 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, ¶ 11.)

Employers like Signet that wish to utilize the H-2A program, must first file an application for temporary employment certification with the DOL. 20 C.F.R. § 655.130. (Dkt. 1, ¶ 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, ¶ 13.) The job order serves as the employment contract between the employer and the H-2A workers. 20 C.F.R. § 655.122(q). (Dkt. 1, ¶ 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, make a determination as to whether the Employer's job opportunity at issue qualifies under regulations issued by the ETA and the Wage and Hour Division of DOL, the latter being the agency statutorily created to enforce the FLSA, as referenced in 29 U.S.C. § 204, for the use of temporary foreign labor under the H-2A program. (Dkt. 1, ¶ 11.)

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:

> (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 ...

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

29 C.F.R. § 501.3(b)(2) and 20 C.F.R. § 655.103(c)(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 H-2A definition of agriculture, which adopts the definition of agriculture under the Fair Labor Standards Act ("FLSA") at 29 U.S.C. § 203(f).

During the 2019 and 2020 seasons (and in every season since 2013), Signet filed several applications for workers to construct livestock confinement buildings at various sites in several

U.S. states including Wisconsin, Iowa, Indiana, and Wisconsin.[2] (Dkt. 1, ¶¶ 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. The job order under which Plaintiff worked in 2019 described Plaintiff's job duties as labor to be performed "on farms," where the workers would "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, ¶ 16.)

Signet is not the only farm construction labor provider 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 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 labor request was denied by OFLC, and that denial was reversed. In 2008, Alewelt, Inc. applied for and was initially denied certification to use H-2A workers to perform construction work on farms. Alewelt filed a Request for *de novo* Hearing and Notice of Appeal and Request to Submit Additional Information following the OFLC's denial of its H-2A certification for twenty (20) employees to be engaged in the construction of livestock temperature control facilities. Before the hearing was conducted, DOL and Alewelt entered into a stipulation before a Judge of the DOL

[2] Approved job orders are a matter of public record and are maintained and searchable at https://seasonaljobs.dog.gov.

Office of Administrative Law Judges in which the parties agreed that "the work activity that gave rise to Case No. 2008-TLC-13 is agricultural employment…." This stipulation is memorialized in the Order of Dismissal of the case published as 2008-TLC-0013 (26 Feb. 2008).[3] The parties agreed to dismiss the case on these grounds. Thus, the only time the U.S. DOL questioned whether construction work on a farm meets the FLSA definition of agriculture under the H-2A program, applying the FLSA definition, DOL ultimately agreed that the work meets the definition.[4]

## III. LEGAL STANDARD

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. In reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court accepts as true all of Plaintiff's well-pleaded factual allegations and draws

[3] The court can take judicial notice of a recorded judgment, *Henson*, 29 F.3d at 284, or the decision of another court or agency, including the decision of an administrative law judge. *Jones v. Int'l Ass'n of Bridge Structural Ornamental & Reinforcing Iron Workers*, 864 F. Supp. 2d 760, 773 (E.D. Wis. 2012).

[4] *See*, *Alewelt, Inc.*, 2008-TLC-00013 (26 Feb. 2008)(Order of Dismissal of *de novo* appeal concerning the eligibility for certification under the H-2A program for "employment opportunities for workers involved in the construction of livestock temperature control facilities (livestock confinement structures)" that contains a stipulation by US DOL because the parties "concur that the work activity that gave rise to [the case] is agricultural employment….") (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

all reasonable inferences in Plaintiffs' favor. *Killingsworth v. HSBC Bank Nevada, N.A.*, 507 F.3d 614, 618 (7th Cir. 2007). 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.'" *Id*. (*quoting McCauley City of Chicago*, 671 F.3d 611, 616 (7th Cir. 2011)).

When the requirements for stating complaint allegations sufficient to state a plausible claim for relief are applied based on *Twombly* and *Iqbal* combined with the analysis of the FLSA exemption set forth in *Encino Motorcars, LLC v. Navarro*, 584 U.S. ___ , 138 S. Ct. 1134, 200 L.Ed.2d 433 (2018) and FLSA "hours worked" in *Sandifer v. United States Steel*, 134 S. Ct. 870, 187 L.Ed.2d (2014), *aff'g,* 678 F.3d 590 (7th Cir. 2012), Plaintiff clearly has not set forth a claim upon which relief can be granted. In *Encino Motorcars,* the Supreme Court rejected the notion that exemptions to the Fair Labor Standards Act application should be narrowly construed. The *Encino* Court said:

> We reject this principle as a useful guidepost for interpreting the FLSA. Because the FLSA gives no "textual indication" that its exemptions should be narrowly construed, "there is no reason to give [them] anything rather than a fair (rather than 'narrow') interpretation." Scalia, Reading Law, at 363. The narrow-construction principle relies on the flawed premise that the FLSA 'pursues'" its remedial purpose '"at all costs.'" (Citations omitted); see also *Henson v. Santander Consumer USA Inc*., 582 U.S. ___, ___ (2017)*(*slip op., at 9*).*…" Those exemptions are as much a part of the FLSA's purpose as the overtime-pay requirement."

*Encino,* 138 S.Ct. at 1142. Moreover, the *Encino* Court points out "Legislation is, after all, the art of compromise, and the limitations expressed in statutory terms often the price of passage". *Encino,* 138 S. Ct. at 1142 quoting *Henson,* 582 U.S. ___ slip op., at 9.

Here, Plaintiff's Complaint fails to plead facts legally sufficient to establish that Plaintiff 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 that he did not meet either prong

of the FLSA definition – primary agriculture and secondary agriculture. By pleading only that he did not have any direct contact with livestock and that the farm on which he worked was not owned by his employer, he has failed to plead an actionable claim, and 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, "Plaintiffs have not provided details about the type of environment in which they worked, what they did on a day to day basis, or any other details that would allow the Court to plausibly infer that they were not exempt.").[5] *See also, Tamayo v. Blagojevich*, 526 F.3d 1074, 1086 (7th Cir. 2008) ("A plaintiff pleads himself out of court when it would be necessary to contradict the complaint in order to prevail on the merits. If the plaintiff voluntarily provides unnecessary facts in her complaint, the defendant may use those facts to demonstrate that she is not entitled to relief." (internal quotations omitted)); *Kresal v. RFID Glob. Sols., Inc.*, No. CIV.A. WMN-11-1395, 2012 WL 1701770, at *6 (D. Md. May 14, 2012) ("While this prohibition against shifting the burden onto Plaintiff to anticipate defenses would typically preclude granting a motion to dismiss on the basis of the exempt status of a plaintiff's position, in this instance, the material submitted by Plaintiff with his Amended Complaint provides clear and convincing evidence that he was indeed an exempt employee.").

## IV. ARGUMENT AND AUTHORITY

### A. Plaintiff's Complaint fails to state a claim upon which relief can be granted because it includes no facts that would support finding that Plaintiff was not subject to the agricultural exemption from the FLSA overtime requirements.

[5] 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 Rule 12(b)(6)." *Id.* at *982. However, it found an exception where Plaintiffs plead facts that put "Defendants' exemption defense in play by necessity." *Id.*

Plaintiff's Complaint alleges that Signet "failed to pay Plaintiff and Prospective Class Members for their work hours in excess of 40 per week at a rate not less than one and one half times their regular rate, in violation of the FLSA, 29 U.S.C. § 207 and 29 C.F.R. § 708.11.". (Dkt. 1, ¶ 22.) While the FLSA generally requires time and one half ("overtime pay") for hours worked over forty (40) in a week ("overtime hours"), the FLSA expressly exempts "agriculture" from the overtime requirements. 29 U.S.C. § 213(b)(12).

"The agricultural exemption was meant to apply broadly and to embrace the whole field of agriculture, but it was meant to apply only to agriculture; thus the critical issue is what is and what is not included within that term." *Rodriguez v. Whiting Farms, Inc.*, 360 F.3d 1180, 1185 (10th Cir. 2004). Section 3(f) of the FLSA, 29 U.S.C. §203(f) 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.

Plaintiff's Complaint alleges that Plaintiff's work was "neither performed in the employment of a farmer nor was it performed incidentally to – or in conjunction -- with the farming operations of any farmer." (Dkt. 1, ¶ 20.) But, the Complaint cites two factual bases for Plaintiff's contention that his work was not subject to the agricultural exemption: (1) that Plaintiff had no contact with livestock on the farms (Dkt. 1, ¶¶ 16, 19, 28), and (2) that Plaintiff did not perform work on properties owned or controlled by Signet. (Dkt. 1, ¶¶ 16, 28.) Based on the express language of FLSA Section203(f) and other compelling interpretations thereof, neither of these facts legally removes Plaintiff's work from the definition of secondary agriculture. While the fact that Plaintiff

did not have any actual contact with the livestock on the farm on which he worked may be relevant to application of the primary agricultural exemption, this fact is not dispositive and is inapplicable in this case. Plaintiff's work could (and does) still meet the Section 203(f) definition under the secondary agriculture prong of the definition. Similarly, neither the primary or secondary definitions of agricultural requires that Signet own the farms on which the agricultural labor was performed.

The Supreme Court first addressed the scope of the agricultural exemption in *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755 (1949). The Court stated that the determinative issue in analyzing the scope of the exemption was not whether the work "is necessary to agricultural production ... [but whether it] can itself be termed agriculture." *Id*. at 759-760, 69 S.Ct. at 1277. The Court concluded that the exemption recognized two types of agricultural activity - primary and secondary:

> Whether a particular type of activity is agricultural depends, in large measure, upon the way in which that activity is organized in a particular society ... The question is whether the activity in the particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity ... 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, incidently to or in conjunction with "such" farming operations.

337 U.S. at 760-763. 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 farming operations. *Id.* at 766 and n. 15.[6]

In *Maneja v. Waialua Agricultural Co.*, 349 U.S. 254 (1955), the Court again addressed the scope of the agricultural exemption. The Court held that certain employees of a corporate sugar plantation were exempt from the FLSA's wage and hour provisions while others were not exempt even though, unlike the *Farmers Reservoir* employees, all of the *Waialua* employees worked both for a farmer and on a farm. The Court held that employees who operated the farm's railroad to transport work crews, equipment, and supplies to and from the fields and sugar cane to the processing plant and those who repaired the mechanical implements used in farming on the farm were exempt because their tasks were incidental to the farm's primary agricultural activities. Employees who worked in the corporation's sugar processing plant and who maintained the worker's village where non-farm employees also lived were not exempt because their jobs were not incidental to the farm's primary agricultural activities. *Id.* at 262-263. *Waialua* narrowed the second prong of the test for secondary agriculture. For secondary agricultural activity to be exempt it had to be performed by a farmer on a farm and it had to be incidental to the farming operations performed either by the farmer for whom it was done or on the farm where it was performed.

While *Farmers Reservoir* and *Waialua* established that the agricultural exemption is not available to nonfarmers performing secondary agricultural tasks *off* the farm or to farm employees

[6] In *Farmer's Reservoir,* the Court decided whether work off the farm by employees an irrigation company that provided water only to its farmer stockholders was within the definition of "agriculture." Although the Court agreed that the work performed by the employees of the irrigation company was necessary to each farmer's operation, the Court concluded that such work by employees of the irrigation company was not within the definition of "agriculture." The irrigation company employees did not work *on* the farms of its members. In fact, they merely opened the head gates to allow water from the irrigation company's canals onto the lands of the farmers while on the irrigation company's land, not on the farmers' lands. *Id*. at 763. Unlike Signet's workers, the employees in *Farmer's Reservoir* did not perform any work on a farm.

performing secondary agricultural tasks on a farm that are not incidental to the farm's own farming operations, neither case addressed the applicability of the exemption to independent contractors and their employees who perform primary agricultural tasks on the farms of client farmers and secondary agricultural tasks incidental to their clients' farming operations off their clients' farms. Those issues were addressed by the Fifth Circuit in *Wirtz v. Osceola Farms Co.*, 372 F.2d 584 (5th Cir.1967). In *Osceola Farms,* the Court found that the principles established in *Farmers Reservoir* and *Waialua* did not prohibit the recognition of the need for independent contractors to perform certain secondary agricultural tasks off the farms of their client farmers without losing their right to the agricultural exemption. *Osceola Farms* was an independent contractor that provided farm laborers to harvest sugar cane from the fields of client farmers. The Fifth Circuit held that the drivers who transported the farm laborers to and from client's farms and who transported meals from off-farm locations to the laborers to eat in the fields were exempt because their work was incidental to the primary agricultural task of harvesting performed by the laborers. *Id.* at 589. It is therefore axiomatic that independent contractors whose employees are engaged in secondary agriculture are exempt from the FLSA overtime provisions pursuant to Section 203(f) when they are working on the farm. As set forth below, the applicability of the secondary agriculture definition to independent contractors whose employees do work on the farm "as an incident to or in conjunction with such farming operations is similarly supported by the legislative history, interpretive regulations and caselaw.

**1. <u>Congress exempted the whole field of agriculture including all practices by a farmer or on a farm as an incident to or in conjunction with such farming practices</u>.**

The intent of Congress in enacting the agricultural exemption is not subject to speculation. It is clearly defined in the language of FLSA Section 203(f). *See Farmers Reservoir Co.*, 337 U.S.

at 765. "The exemption was meant to embrace the whole field of agriculture," and its coverage is "coterminous with the sum of those activities necessary in the cultivation of crops, their harvesting, and their 'preparation for market, delivery to storage or to market or to carriers for transportation to market.'" *Maneja*, 394 U.S. at 260.

Accordingly, under the express language of FLSA Section 203(f), an individual will be deemed an agricultural laborer if he falls within any one of the following categories: (1) the worker performs primary farming activities; (2) the worker performs work on a farm as an incident to or in conjunction with the farming operations of the farm; or (3) the worker is employed by a farmer and he performs practices incidental to or in conjunction with his employer's farming operations. If the individual falls within either category 1 or 2, it is irrelevant whether his employer is a farmer. The employee is considered to be engaged in "agriculture" because of the nature of his work. Only if the employee does not fall within category 1 or 2 does the status of his employer matter. Plaintiff and the other Signet H-2A workers were performing work on a farm as an incident to or in conjunction with the farming operations on a farm. Therefore, Signet's status with respect to the farm on which Plaintiff worked is of no consequence to the analysis.

**a. Congressional debate relating to the definition of agriculture supports application of the exemption to employees of independent contractors.**

While it is clear from the language of the statute itself, the contemporaneous legislative history removes any doubt that Congress intended that the definition of an agricultural laborer would include employees of nonfarmers so long as the employee's work involved primary farming activities or occurred on a farm and was incidental to the farming operations of the farm, i.e., secondary agriculture. During the Senate discussions of the FLSA, Senator Black described the scope of the agricultural exemption as follows:

> The bill specifically and unequivocally excludes certain industries and certain types of business from its scope and effect. It specifically excludes workers in agriculture of all types. There is contained in the measure, perhaps, the most comprehensive definition of agriculture which has been included in any one legislative proposal. We have placed together in the bill definitions of agricultural work which have been fixed from time to time in other legislative enactments, and in addition that we have drawn liberally from Mr. Webster's definition of agriculture.

81 Cong. Rec. 7648 (1937).

Despite the comprehensiveness of the agricultural exemption, Senator Tydings was concerned about an unintended "loophole" in the bill, which at that time limited the secondary farming exemption to "any practices ordinarily performed by a farmer as an incident to such farming operations." 81 Cong. Rec. 7653 (citation omitted.) Thus, Senator Tydings posed the following scenario:

> What I am thinking of is that quite often the threshing crew is not a part of the farmer's organization. There are men who make a business of going around with threshing and baling machines with enough help to come upon a farm and make a contract with the farmer to thresh his wheat. I should like to know if in such a case it is the Senator's opinion that the threshing crew would be exempt, or whether they would be under the operation of the hours provision of the bill.

*Id*. Senator Tydings further explained his understanding that "farming in all its operations, from the time the grain is put into the ground until it leaves the farm, is to be exempted from the provisions of the measure." Senator Tydings expressed concern that the independent wheat thresher would not be exempt. Senator Borah believed the threshers would be exempt, noting that "[w]heat is not worth very much unless it is threshed." *Id.*

The debates focused on various examples posed by Senators. Senator Overton questioned Senator Black regarding cotton. The following colloquy occurred:

> MR. OVERTON: I assume after the cotton is matured and is being picked the picking would be considered part of an agricultural pursuit, would it not?
>
> MR. BLACK: Certainly, it would be so considered.

> MR. OVERTON: I am going just one step further. After the cotton is picked it has to be ginned. Suppose a farmer has a gin on his own farm and gins his own cotton-not the cotton of others-is that a process in the agricultural handling of cotton?
>
> MR. BLACK: As defined by this bill, yes; unquestionably.

81 Cong. Rec. 7657. Senator Black used an example of a farmer erecting a shirt manufacturing operation on his farm as an example of an operation that would not be incidental to agriculture. 81 Cong. Rec. 7658. Subsequently, the issue raised by Senator Tydings regarding the independent wheat thresher came up again. Senator Bone espoused a position opposite to that taken by Senators Tydings and Borah:

> [I]f a man operates a threshing outfit, and goes from one farm to another farm, such a man is an independent contractor. He is not a farmer. That is not an operation incident to farming, because the man is engaging in a cold-blooded business operation, going from one farm to another, precisely as a huckster goes around and sells tinware to farmers …. He does not own a farm. He has not any connection with it except to take his threshing apparatus there and thresh the wheat and then get off the land.

81 Cong. Rec. 7569.

To clarify this issue, Senator McGill proposed an amendment to add the words "or on a farm" after the word "farmer," as well as the phrase "including delivery to market" after the word "operations." 81 Cong. Rec. 7888. Senator McGill explained the purpose of the amendment as follows:

> [T]he purpose of the amendment is to broaden the definition of "employee" as applied to agriculture. I can readily see how some have construed the language of the bill to mean that one who operates a threshing machine outfit and employs a crew and is employed by a farmer to thresh his wheat might be included under the provisions of the bill. Likewise, those who are engaged in harvesting and delivering to market might be included.

Senator McGill was then questioned by Senator George as follows:

> MR. GEORGE: Is it the purpose of the amendment to exempt those who thresh grain?

MR. McGILL: Those who thresh grain, who harvest grain and deliver it to market.

MR. GEORGE: Would the amendment also apply to the harvesting of any other crop?

MR. McGILL: It would apply to any commodity produced on a farm.

MR. GEORGE: Would it apply to peanut pickers who pick in the fields?

MR. McGILL: Yes.

MR. GEORGE: And who move peanuts to the market?

MR. McGILL: Yes; that is my understanding.

MR. GEORGE: I should like to ask the Senator from Alabama if that is his interpretation of the amendment.

MR. BLACK: That is my interpretation of the amendment, and it is my belief that the bill as originally drawn covers what is now contained in the language of the amendment; but some Senators who were doubtful about it wished to draw a clarifying amendment.

MR. GEORGE: I am sure it does not in fact do so, because the picking of peanuts and the harvesting of grain in my part of the country are done purely by contract with outsiders, who in a great many cases have no farm interest. What I want to get at is whether, in the opinion of the Senator from Alabama, the language of the amendment of the Senator from Kansas includes any field crop that is threshed, as in the case of grain, or picked, as in the case of peanuts in the field.

MR. BLACK: Unquestionably.

MR. McGILL: I may say to the Senator from Georgia and other Senators that **it is my object to make the language of the amendment broad enough to include all work done on a farm, so long as it is incidental to agricultural purposes**.

MR. GEORGE: And so long as it is merely preparatory and necessarily preparatory to the marketing of the field crop. Is that true?

MR. McGILL: That is true; and the language would also include all labor performed in making delivery to market.

81 Cong. Rec. 7888 (emphasis added). The amendment was approved and was included in the final version of the bill. There can be no doubt that had the question been posed to Senator McGill

as to whether the amendment would include within the FLSA definition of "agriculture" the construction of livestock containment structures by an entity that was not the farmer of the farm where the structures would be used as an incident to and in conjunction with that farm, his answer would have been "yes."[7]

**b. The earliest and subsequent interpretive guidance provides that the employees of independent Wage and Hour Division contractors constructing livestock containment structures on a farm meet the definition of secondary agriculture.**

Interpretive guidance has likewise recognized the importance of the legislative debate regarding the definition of "agriculture" under the FLSA:

> The legislative history makes it plain that this language was particularly included to make certain that independent contractors such as threshers of wheat, who travel around from farm to farm to assist farmers in what is recognized as a purely agricultural task and also to assist a farmer in getting his agricultural goods to market in their raw or natural state, should be included within the definition of agricultural employees.

29 C.F.R. § 780.128 (*citing Bowie v. Gonzalez*, 117 F. 2d 11 (1st Cir. 1941)).

Similarly, in the earliest Wage Hour Division interpretation of the application of Section 203(f) and the exemption applicable based on the definition of "agriculture," the Department of Labor Wage and Hour Administrator recognized that construction on a farm by third parties of

[7] It is also notable that Congress has repeatedly rejected efforts to amend the FLSA to require overtime payments for work above specified hours in a work week. *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 within the last three (3) years.

structures for use on that farm is within the definition Section 203(f) definition of "agriculture" because such activity is "incidental to and in conjunction with such farming operations."

In an Administrator's Interpretative Bulletin issued in 1939 and published in 1941 Wage and Hour Manual (BNA), "Administrator's Opinion-Scope of Exemptions, Agriculture, Area of Production and Seasonal Operations," (the Wage Hour Interpretative Bulletin No. 14) issued Aug. 21, 1939 at pages 314-328 (attached as Exhibit A), the Wage Hour Administrator acknowledged, after saying that employees of an independent contractor who thresh wheat on a farm "are not subject to the wage and hour provisions of the [Fair Labor Standards] Act while they are so engaged on the farm where the wheat is grown:"

> So, to [sic] employees of an independent contractor who inspect and cull flocks of poultry on a farm are exempt while they are working on the farm where such poultry is raised. **Similarly, employees erecting a silo on a farm are exempt while they are working on such farm**.

*Id*., at ¶ 11, (emphasis added). At the earliest time after the FLSA was enacted, there was no requirement that the contractor or the contractor's employees be engaged in caring for the animals on the farm for the contractor's employees engaged in construction of a silo on the farm for the farm to be exempt. In that connection the Administrator said that work that is "incident to or in conjunction with farming operations," should be subordinate to an established part the farming operation at that farm. For example, if a farmer canned tomatoes that came both from his own farm and the farm of others, such operations would not seem to be "incident to or in conjunction with his farming operations." *Id*. Otherwise, regarding practices that are performed on a farm, even though not performed by a farmer, "the practices" within that definition include those that are "substantially the same" as those performed by the farmer himself on his own farm in connection with that farm. *Id*., at ¶ 11. The exception would be that employees of someone other than the farmer would not be engaged in "agriculture" when they were working off the farm. As

explained, with the exception of "off-farm work," such as transporting commodities off the farm:

> With that exception, practices described in paragraph 10, even if performed by employees of someone other than the farmer, are excluded from the wage and hour coverage of the Act, so long as they are performed on the farm and "as an incident to or in conjunction with such farming operations.

*Id*. The current regulations in 29 C.F.R. Part 780, §§ 780.128-780.158 continue to recognize that such practices that are within the definition of "agriculture," are the same whether they be performed on the farm by an independent contractor and its employees or by the farmer himself so long as they are related to or connected with the farming operations of that farm. *See, e.g.*, the express recognition that arises from the current statement in Section 780.141 that "[t]he construction by an independent contractor of granary on a farm is not connected with 'such' farming operations if the farmer for whom it is built intends to use the structure for storing grain produced on other farms." In the more generally applicable description of the meaning of the term "Employment in practices on a farm" at Section 780.136, the current regulations expressly say:

> Employees engaged in building terraces or threshing wheat or 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 flagman 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."

Whether such employees are engaged "agriculture" depends, of course, on whether the practices are performed "as an incident to or in conjunction with" the farming operations on the particular farm. Regarding whether certain activities are carried on as part of the agricultural function or as a separately organized productive activity, the regulations note that the issue "must be determined with reference to the purpose of the farmer for whom the practice is performed." 29 C.F.R. § 780.142. "For example, if a farmer operates a gravel pit on his farm, none of the practices performed in connection with the operation of such gravel pit would be within Section 3(f)." *Id.*

Obviously, any independent contractor that employs individuals who are engaged in the erection of silos, granaries and other buildings, the digging of wells, the building of dams, the inspection of flocks of poultry on farms, and the aerial dusting and spraying of crops will not limit the scope of its business operations only to work on the particular farm where its employees are engaged to work at any particular time. The fact that a farm building construction company has other farmer clients does not remove its employees from "agriculture" as the Alewelt stipulation recognized. See pages 7 and 8 and fn. 4, supra. As an example of a circumstance where the work of independent contractors on a farm would not be deemed performed for the farmer but as part of a non-farming operation, the interpretative regulations say "that the work of employees of a utility company in trimming and cutting trees for power and communication lines is part of a nonfarming enterprise outside the scope of "agriculture." 29 C.F.R. § 780.143. The question then based on the interpretations by the DOL must be based on whether those operations that are carried on, on a farm at a particular time, are in keeping with the operation of that farm as a farm rather than as a separate operation that may for example transport fruits, vegetables, and other commodities produced by other farmers. The fact that the independent contractor whose employees work on a farm are exempt in connection with such work when they are engaged in practices on that farm, for that farm, cannot be based on whether that particular independent contractor, including a construction company, is engaged in construction on other farms for those farms at the same time or it has employees working on only one particular farm. The issue for the application of the exemption is whether the construction work on the farm is for the farming operations of the farm where the structure is built.

If ever were there reason to give "*Skidmore* deference," under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1934) to an Opinion of the Administrator of the Wage and Hour Division, the

determination by the US Department of labor that Signet's employees' construction of animal enclosures on farms is within the definition of Section 203(f) agriculture merits that deference, given the thoroughness of the Administrator's study of the text of Section 203(f) and its legislative history when it adopted the Interpretative Bulletin No. 14 in 1939 and given the continued consistency of the Administrator's analysis and statements of applicability in 29 C.F.R. Part 780 and decisions of the Courts that have examined the application of Section 203(f) in the context of cases under the FLSA.

**c. Subsequent court decisions applying the legislative and administrative guidance likewise support the conclusion that the employees of independent contractors constructing livestock containment structures on a farm meet the definition of secondary agriculture.**

Subsequent case law applying the agricultural exemption to employees of independent contractors, so long as the work is performed on the farm and is incident to or in conjunction with those farming operations, similarly shows that the exemption applies to such work regardless of their employer's interest in ownership in the farm. "The absence of any contractual relationship on [the employees'] part with the producers simply does not suggest that they are not within the agriculture exemption." *Jimenez v. Duran,* 287 F. Supp. 2d 979, 991 (N.D. Iowa 2003) (Finding employees of contractor hired by farmer to vaccinate, debeak, and crate chickens on farm were exempt under the FLSA's secondary agriculture exemption). *See also, Bills v. Cactus Fam. Farms, LLC*, 470 F. Supp. 3d 948, 961 (N.D. Iowa 2020) (Finding animal care auditor for pork production company who spent most of his time working on farms with a contractual relationship to his employer was exempt under the FLSA's secondary agriculture exemption.)*; Sariol v. Fla. Crystals Corp.*, 490 F.3d 1277, 1279–80 (11th Cir. 2007) (Rejecting argument that independent contractors make up their own separate operations and should therefore be barred from claiming agricultural

exemption). *See also, Holtville Alfalfa Mills v. Wyatt*, 230 F.2d 398, 401-402 (9th Cir. 1955) (Employees of an employer other than the farmer whose work involved repairing equipment on the farm where the equipment was used in connection with harvesting operations of that farm were engaged in FLSA "agriculture."); *Tipton v Associated Milk Producers, Inc.*, 398 F. Supp. 743, 746- 747 (N.D. Tex. 1975) (Employee of non-farmer whose "primary duties were to install and repair the refrigeration equipment used by the dairy farmers to cool and preserve their milk" that "was usually performed on the farms of the dairymen who purchased the equipment" or needed service of their refrigeration equipment" was "agriculture," and the employee was not entitled to overtime.); *Boyls v. Wirtz*, 352 F2d 63 (5th Cir. 1965) (Affirming district court holding that a pilot and flagman of a non-farmer aerial crop duster were exempt from FLSA overtime because they performed their work on the farm of their employer's farmer clients).

**2. Plaintiff's employment building livestock containment structures on the farm does not constitute work that is "separately organized" as an independent productive activity as opposed to part of the agricultural function.**

To the extent that Plaintiff argues that Signet's business constitutes a "separately organized" independent productive activity as opposed to part of the agricultural function, such argument is without merit and does not preclude dismissal here. See *N.L.R.B v. Monterey County. Bldg. & Const. Trades Counsel* 335 F.2d 927 (9th Cir. 1964). Plaintiff will likely rely on *Monterey County* to support a claim that in the circumstances of his employment, his work would be subject to FLSA overtime. This inference would be incorrect.

In *Monterey County*, the Ninth Circuit decided the issue of whether the National Labor Relations Board ("NLRB") had jurisdiction to issue a cease and desist order against a union for engaging in recognitional picketing and secondary boycotts. *Id.* At 928. The respondent labor organization argued that the employees involved were "agricultural laborers' and accordingly were

exempt from the provisions of the National Labor Relations Act ("NLRA"). Although the NLRA does not define the term "agricultural laborer," Congress supplied the definition by adding a rider to the annual appropriation that in effect provides for the use of the FLSA definition of "agriculture." *Id.*

The employees at issue in *Monterey County* were employed by two construction contractors who were involved in the construction and building of poultry raising buildings and equipment on a farm. *Id.* The employees worked for contractors retained by the company that manufactured the poultry raising equipment. The NLRB had concluded that the employees were not agricultural laborers because (1) at the time of its determination, the workers were employed on a tract of land that was not yet a farm, and (2) the construction appeared to be a "major independent construction in itself and not part of the agricultural function." *Id.*at 930. The Ninth Circuit defined the issue as "whether the activity in the particular case is carried on as part of the agricultural function or is separately organized as an independent productive activity." *Id., citing Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755 (1949).

The Ninth Circuit rejected the union's argument that the activity at issue was all part and parcel of the family poultry farming operation and instead focused on its belief that the analysis turned on the two construction companies that were "organized separately from any farming or poultry operation and are engaged in a productive activity which is independent from any farming or poultry operations." *Id.* at 931. This decision has not been subsequently cited in any cases under the FLSA for the proposition that construction of livestock containment facilities on a farm is not agricultural labor. Furthermore, the case is factually distinguishable from the case at hand because Signet is not a general construction company – it only performs construction work on farms that are integral to the raising of livestock on the farms. Therefore, Signet's business is itself

agricultural.[8] Moreover, it does not appear that the Ninth Circuit was apprised of the legislative history, including the Congressional colloquy cited above or DOL Wage and Hour Division interpretations regarding the operation of the definition or other cases discussed in this memorandum.

The *Monterey County* decision also contradicted the Ninth Circuit's previous decision in *Holtville Alfalfa Mills, Inc. v. Wyatt*, 230 F.3d 398 (9th Cir. 1955), in which it held that the maintenance man who repaired equipment on the farms of the Cooperative's members was exempt pursuant to Section 203(f) of the FLSA because his work was o the farms of the members. In this case, decided before *Monterey County*, the Court cited the Supreme Court's decision in *Maneja*, 349 U.S. 263, for the point that "[e]mployees who repair the mechanical implements in farming are also included" in the agricultural exemption. *Holtville*, 230 F.2d at 404, n. 3. Notably, the *Maneja* decision held those workers who were engaged as "mechanics, electricians, welders, carpenters, plumbers, and painters" on the sugar farm were engaged in secondary agriculture. *Maneja*, 349 U.S. at 257. There is no indication that these employees conducted any activities that would be deemed primary agriculture or that they performed functions other than the trades for which they were hired. *Id.*

Similarly, any reliance on *Holly Farms Corp. v. N.L.R.B.*, 517 U.S. 392 (1996) in which the Court found live-haul crew chicken catchers non-exempt, under the NLRA, is misplaced. The

[8] The determination in *Monterey County* can also be distinguished on the basis for defining agriculture. Rather than expressly stated in the statute, supported by legislative history and interpretive regulations, the NLRB definition of agriculture stems from a Congressional rider on funding for the NLRB that prohibits the funds to be utilized for enforcing the NLRA on agricultural labor as defined by FLSA Section 3(f). *Monterey County*, 335 F.2d at 929. The definition in the NLRA context by nature of the rider, restricts, rather than expands the definition of agriculture and is contrary to the Supreme Court's recent direction in *Encino Motorcars*, that FLSA exemptions are to be construed broadly. *See, N.L.R.B. v. Scott Paper Co.*, 440 F.2d 625, n. 3 (1st Cir. 1971); *Encino Motorcars*, 138 S.Ct. at 1142.

Court found that the NLRB's determination that although the workers performed work on the farm, their work was more related to Holly Farms' processing operations than to farming operations was not unreasonable. *Id.* They also drove to the farms to place the chickens on the farms, and unlike the live-haul crew chicken catchers in *Holly Farms*, the building of chicken houses to be used in raising chickens on the farms occurs on the farms of Signet's clients and is an incident to and in conjunction with poultry raising. How could it not be? It is certainly not an incident to or in conjunction with the slaughter and processing of chickens, which is a separate and distinct business activity, as was the case in *Holly Farms*. Furthermore, the chicken-catchers in *Holly Farms* did not perform all of their job duties on the farm of the farmers who raised the chickens. Indeed, the chicken catchers were the same employees who drove to the farms to pick up chickens and to take them back to the slaughter house 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 is (1) performed on a farm and (2) relates only to the raising / growing of the livestock on that farm where the animal enclosure is built.

Plaintiffs' interpretation and the most Plaintiff-favorable interpretation of the ruling by the Ninth Circuit in *Monterey County* would effectively exclude the activities of all non-farmers, no matter how related the activities were to agriculture, which is expressly contradicted by the plain language of the statute, legislative history, the interpretive regulations issued by DOL Wage and Hour Division since August 1939, and case law applying the agricultural exemption in FLSA cases.

Plaintiff's interpretation ignores extensive contemporaneous legislative history demonstrating that independent businesses, which perform work on farms related to the farming

operations of that farm are within the agricultural exemption. It also ignores court decisions holding that construction companies that perform activities on a farm that are related to and necessary for the farm's farming operations are covered by the exemption, despite their motivation to benefit their nonagricultural profit-seeking enterprises. *Maneja*, 349 U.S. at 261-263; *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298, 303 n. 13 (1977) (discussing interpretative bulletin of Wage and Hour Division of Department of Labor); *Boyls*, 352 F2d 63; *Tipton*, 398 F. Supp. At 746- 747.

**3. Through his employment via the H-2A program, Plaintiff's work is necessarily agricultural and not subject to the overtime provisions of the FLSA.**

Section H-2A was created by the Immigration Reform and Control Act ("IRCA") of 1986, at which time Congress separated what had been temporary foreign labor programs authorized by 8 U.S.C § 1101(a)(15)(H)(ii) for both agricultural employees and nonagricultural employees into two separate programs for these temporary workers, both of which are administered in part by the United States Department of Labor, Wage and Hour Division ("WHD"), and the Employment and Training Administrations Office of Foreign Labor Certification in the case of the agricultural labor program. The first H-2A regulations under IRCA were published in June 1987. There is, to the undersigned's knowledge, no formal regulation of the Labor Department that defined the meaning of "agriculture" for application of the temporary foreign labor program for agricultural workers until the IRCA 1987 regulations were issued as proposed regulations in May 1987 and then issued as interim final regulations in June 1987.

After notice of possible revisions to existing H-2 regulations under which temporary foreign agricultural workers could be employed, was published at 31 Fed. Reg. 14840 (Nov. 23, 1966), final revised regulations were published by the Labor Department in 32 Fed. Reg. 4569 et seq. (March 28, 1967). These 1967 regulations governing the H-2 agricultural labor program for

temporary foreign workers did not contain a definition of the scope of agriculture for which such workers would be made available.

Revised H-2 temporary agricultural labor regulations were proposed by the United States Department of Labor in 1977 at 42 Fed. Reg. 4670 (Jan. 25, 1977). At that time DOL proposed that H-2 agricultural employers would be required to furnish to the worker at or before each payday one or more written statements that showed "[t]he] worker's total earnings for the pay period, broken out by straight-time and overtime…." 42 Fed. Reg. at 4671-4672. Notably, when the Department of Labor published the final H-2 temporary agricultural labor regulations on March 10, 1978, it had dropped the obligation to maintain records of workers' overtime earnings, saying the following:

> The proposed regulations added a requirement not found in the initial Department's prior regulations that earnings statements, provided by employers to workers, include a breakout of straight time and overtime work. Employers opposed the proposals; worker representatives were silent on it. In view of the fact that agricultural work is exempt from the overtime provisions of the Fair Labor Standards Act, and in view of the fact that the Employment Standards Administration, rather than the Employment and Training Administration, has responsibility for enforcing the Fair Labor Standards Act and has published regulations with respect to overtime matters, the proposal has been withdrawn.

43 Fed. Reg. 10306, 10309 (March 10, 1978.) (Emphasis applied) There was then no obligation to maintain records on any "overtime" work performed because agricultural work was "exempt from the overtime provisions of the Fair Labor Standards Act…." *See also*, 20 C.F.R. § 655.202 (b)(8)(i) at 43 Fed. Reg. at 10315 as adopted in 1978.

The post-IRCA regulations published in proposed form in May 1987 contain the first proposed definition of "agricultural" employment that would be eligible for H-2A certification. 52 Fed. Reg. 16769–16803 (May 5, 1987). Regulations were published adopting the same definition by both the DOL's Employment and Training Administration ("ETA"), of which OFLC

is now part, and the Wage and Hour Division. In commentary, explaining the proposed regulations, DOL announced that the definitional section of the ETA regulations "included a new definition for 'agricultural labor or services of temporary or seasonal nature,' consistent with the INA." Continuing, the DOL said "[a]s mandated by the INA, 'agricultural labor or services' consists of 'agricultural labor' as defined in Section 3121(g) of the Internal Revenue Code of 1954 (29 U. S. C., § 3121(g)); 'agriculture' as defined in Section 203(f) of the Fair Labor Standards Act of 1938 (29 U.S.C., § 203(f))." 52 Fed. Reg. at 16770 (May 5, 1987).

The proposed Wage and Hour regulations also provided definitions of these terms used in the regulations in proposed 29 C.F.R. § 501.10 discussed at 52 Fed. Reg. at 16796.

In the course of proposing these new H-2A regulations, then Secretary of Labor, William E. Brock, several times explained that in connection with adopting the H-2A provisions of the IRCA now at 8 U.S.C. § 1188that Congress was well familiar with the existing operation of the H-2 program, having held many hearings and participated in extensive Congressional debate over this law that was adopted as consensus legislation. For example, at 52 Fed. Reg. 20504, speaking of the incorporation of the duty avoid adverse effect on United States workers, the Secretary said "it is clear that Congress was intimately conversant with the DOL regulatory requirements …." The notion that overtime obligations would apply with respect to employment permitted under the definition of "agriculture" under the Fair Labor Standards Act was not discussed as a change or as a matter open to question. There was no discussion whatsoever that there would be any FLSA covered "agriculture" under the H-2A program that would be subject to overtime.

Then, as now, the proposed H-2A regulation simply pulled the definition of "agricultural labor" from the Internal Revenue Code and the definition of "agriculture" from the FLSA and renumbered the C.F.R. sections to fit within the Department of Labor regulatory code outline or

numbering system. Looking at what was proposed and then adopted for the definition of "agricultural labor or services" as Wage Hour regulation 29 C.F.R. § 501.10(f), the provisions of the Internal Revenue Code were proposed as subparts 501.10(f)(i)(1)-(5). 52 Fed. Reg. at 16799. 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 buildings and other facilities that were to be used on that farm. On the other hand, in the proposed H-2A Section 501.10(f)(1)(ii) definition, the term "agriculture" was defined as under the Fair Labor Standards Act that includes "any practices… performed by a farmer or on a farm as an incident to or in conjunction with such farming operations…." 52 Fed. Reg. at 16800.

The proposal definitions in the May 5,1987 Federal Register were adopted and published as Interim Final Regulations at 52 Fed. Reg. 20496-20533 (June 1, 1987). Although there have been several changes to these H-2A regulations since 1987, the definitional eligibility provisions under the FLSA and the IRC have remained the same.

In addition, there were post 1987 statutory revisions to the H-2A program that at least arguably reflect Congressional satisfaction with the continuing application of the FLSA overtime exemption to work eligibility certified under the H-2A program. For example, in 1999 by Pub. L. 106-78, Title VII, Section 748, § 113 Stat. 1167 (Oct. 22, 1999), Congress adopted a statutory requirement that the US Department of Labor must issue its certification at least 30 days in advance of the "date of need" rather than by 20 days in advance of the "date of need" so that agricultural employers would have more time to complete the remainder of the processes for obtaining workers' H-2A visas that involve obtaining visa authorization at that time from the Immigration and Naturalization Service (INS) and then issuance of H-2A visas from the appropriate consulate or embassy.

As DOL stipulated in the Alewelt, Inc., 2008-TLC-0013 (26 Feb. 2008) case, the creation, implementation, and revisions to the H-2A program clearly indicate that its creators contemplated that work approved as FLSA agricultural work by the DOL would be considered agricultural work exempt from the overtime provisions of the FLSA and that both Congress and the U.S. Department of Labor agree that such work is overtime exempt as being within the Section 203(f) definition of "agriculture."

Additionally, in this period since 1952 when the H-2 program for temporary authorization to employ nonimmigrant foreign workers in agriculture was made part of the Immigration and Nationality Act, the FLSA has been amended multiple times. Under the 1938 FLSA, work meeting the Section 203(f) definition of "agriculture" was exempt from both minimum wage and overtime requirements. 52 Stat.1060, 1067 (sections 12 (a)(b)) (June 25, 1938). Through multiple FLSA amendments, including specifically those passed in 1966, the minimum wage requirements were extended to most employees engaged in "agriculture" - all except those employed by very small farmers, but through multiple amendments of the minimum wage requirements, Congress has retained the exemption of all FLSA "agriculture" from overtime requirements. 29 U.S.C. § 213(b)(12).

As enacted in 1938, all agricultural employment within the meaning of Section 203(f), that has never been amended except in 2008 by Pub. L. 110-246, Sec. 1610, to change the citation to the numbered Section of Title 12 of the U.S. Code, which is the Agricultural Market Act, when the Title 12 Code section was renumbered in 2008, was exempt from both minimum wage and overtime requirements.[9] 52 Stat.1060, 1067 (sections 13 (a)(b)). Over time, most FLSA

[9] Pub. L. 110-246, Sec. 1610. This failure to not have amended the operative Section 203(f) language addressing the scope of "secondary agriculture," such as the construction work performed by Signet employees, is effectively a Congressional stamp of approval on Wage-Hour

agricultural employment became subject to the FLSA Section 6 minimum wage requirements. Nearly all agricultural employment except for employment by an employer that uses under 500-man days "agricultural labor" in any calendar year became subject to the minimum wage. See current 29 U.S.C. § 213(a)(6). All agricultural employment remains exempt from the overtime requirements by virtue of 29 U.S.C. § 213(b)(12). Given that so many cases that hold the FLSA definition of "agriculture" includes work by employees of someone other than the farmer on a farm where the employees have conducted any kind of service or work at that farm, for the benefit of that farm, were decided before these FLSA, INA, and in 1986 IRCA statutory changes, the sequence of changes to the FLSA, allowing agricultural employment such as that performed by Signet's construction employees to remain exempt from the overtime requirements of the Act, the failure to amend Section 203(f),except as indicated in 2008, and the creation of IRCA all support the conclusion of the correctness of the FLSA cases and Wage-Hour regulations as interpreting the FLSA properly to exclude such work from the FLSA overtime requirements and diminish the validity of any inference, based on the *N.L.R.B. v. Monterey County Building & Construction Trades Council* case, as far as establishing that in this circumstance of the Signet employment, plaintiffs and others' work would be subject to payment of FLSA overtime requirements. *See also, Brennan v. Sugar Cane Growers Cooperative of Florida,* 486 F.2d 1006, 1010 (5th Cir. 1974) (approving district court's statement that "it considered as 'most significant,' the classification by the Secretary of Labor of all West Indian Workers as 'agricultural workers' for purposes of entry into this country pursuant to their H-2 visas.").[10]

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Division and the overwhelming majority of the Federal Courts' applications of the FLSA overtime exemption to the work of employees of independent contractors insofar as they perform work "on a farm as an incident to or in conjunction with such farming operations."

[10] This decision, which was issued under the H-2 programs, before the H-2A program existed as it currently exists or had formally adopted the FLSA definition of "agriculture" further noted that

**B. The claims of H-2A workers who worked for Signet outside of Wisconsin are barred for lack of personal jurisdiction.**

**1. There is no general jurisdiction of Signet in Wisconsin**

In any case, "[t]he plaintiff has the burden of establishing personal jurisdiction". *Tamburo v. Dworkin*, 601 F.3d 693, 700 (7th Cir. 2010). "Personal jurisdiction may be either general or specific." *Felland v. Clifton*, 682 F.3d 665, 673 (7th Cir. 2012) (observing that the "threshold for general jurisdiction is quite high"). A court may assert general jurisdiction "over foreign…corporations to hear any and all claims against them when their affiliation with the State are so 'continuous and systematic' as to render them essentially at home in the forum state." *Matlin v. Spin Master Corp.*, 2018 WL 3496088, *2 (N.D. Ill. July 20, 2018) (internal citations omitted). A corporate defendant is "at home" in the states where the corporation has its principal place of incorporation and where it has its principal place of business. *Id.* There is no general personal jurisdiction of Signet in Wisconsin because Signet is incorporated in Texas and has its principal place of business in that same state. As a result, for the Court to have personal jurisdiction over opt-in plaintiffs in this case, there must be specific jurisdiction over their claims. This requires an examination of the connection between the individual claims of an opt-in and Wisconsin, the forum state.

**2. Opt-in plaintiffs in an FLSA collective action are party plaintiffs whose individual claims must connect to the forum.**

FLSA collective actions are not Rule 23 class actions, and opt-in plaintiffs are not unnamed class members. *See Roy v. FedEx Ground Package Sys., Inc.*, 353 F.Supp.3d 43, 59-60 (D. Mass.

"this issue is not controlling," but lends at least arguable support to the district court's conclusion that the [employees at issue] are exempt as agricultural workers under the FLSA. *Id.*at n. 4.

2018). Instead, individuals who opt-in to a collective action have party plaintiff status. *Id*. Their individual claims thus must connect to the forum, no different than if they were the named plaintiff.

Section 16(b) of the FLSA provides that "[n]o employee shall be a *party plaintiff* unless he gives his consent in writing to become such a party and such consent is filed with the court." 29 U.S.C. § 216(b) (emphasis added). Consistent with that provision, the FLSA defines an action's commencement date as to "any *individual claimant*" as the date "his written consent to become a *party plaintiff* is filed." 29 U.S.C. § 256(a) (emphasis added); *see also Halle v. W. Penn Allegheny Health Sys. Inc*., 842 F.3d 215, 225 (3d Cir. 2016) ("[E]very plaintiff who opts in to a collective action has party status.") (*quoting* Wright & Miller, 7B Fed. Prac. & Proc. Civ. § 1807 (3d ed. 2018)); *Mickles v. Country Club Inc*., 887 F.3d 1270, 1273 (11th Cir. 2018) (noting that nothing more than written consent is necessary "to become a party plaintiff").

An opt-in plaintiff's party-plaintiff status comes with "the same status in relation to the claims of the lawsuit" as a named plaintiff. *Prickett v. DeKalb Cty*., 349 F.3d 1294, 1297 (11th Cir. 2003). After opting in, "there is no statutory distinction between the roles or nomenclature assigned to the original and opt-in plaintiffs." *Campbell v. City of Los Angeles*, 903 F.3d 1090, 1104 (9th Cir. 2018). An opt-in plaintiff's status is, therefore, quite dissimilar from that of an unnamed class member in a Rule 23 case. In the Rule 23 context, a certified class "has independent legal status" and each class member is represented by the court-approved representative and bound by any judgment (unless they "opt out"). *Roy*, 353 F.Supp.3d at 59-60 (internal citations omitted). In an FLSA collective action, by contrast, only those who "opt in" have legal status, and the action itself is "more accurately described as a kind of mass action, in which aggrieved workers act as a collective of individual plaintiffs with individual cases." *Id*.; *Campbell*, 903 F.3d at 1105 (internal citations omitted).

With party-plaintiff status comes party-plaintiff burdens. When multiple individuals join their claims together, their respective individual claims must connect to the defendant's activities in the chosen forum in order for a court to assert power over the defendant as to those claims. S*ee Bristol-Myers Squibb Co. v. Superior Ct. of Cal., San Francisco Cty*., 137 S.Ct. 1773, 1781 (2017).

**3. Analysis of specific personal jurisdiction in FLSA collective actions following *Bristol-Myers Squibb***

*Bristol-Myers Squibb* ("BMS") was a landmark decision regarding the scope and exercise of specific personal jurisdiction. In that case, a "mass" of plaintiffs – most of whom were not California residents – filed a products liability suit against BMS in California state court. *Id*. at 1778. BMS, meanwhile, was incorporated in Delaware and headquartered in New York. Id. at 1777. BMS filed a motion to quash service of summons on each nonresident's suit for lack of personal jurisdiction, but the California Superior Court denied the motion on grounds that BMS' "extensive activities in the State gave California courts general jurisdiction." *Id*. at 1778. The California Court of Appeal subsequently found that general jurisdiction was lacking, while also holding that California courts had specific jurisdiction over the nonresidents' claims. *Id*.

On review, the U.S. Supreme Court reversed, noting that for a court to exercise specific jurisdiction, the "suit must arise out of relate to the defendant's contacts with the forum." *Id*. at 1780. Said differently, there must be "affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum State." *Id*. In holding that the non-resident had no specific jurisdiction over BMS to continue their claims, the court wrote:

> The State Supreme Court found that specific jurisdiction was present without identifying any adequate link between the State and nonresidents' claims. As noted, the nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California. The mere fact that *other* plaintiffs were prescribed, obtained, and

> ingested Plavix in California – and allegedly sustained the same injuries as did the nonresidents – does not allow the State to assert specific jurisdiction over the nonresidents' claims. As we have explained, 'a defendant's relationship with a third party, standing alone, is an insufficient basis for jurisdiction.' This remains true even when third parties (here, the plaintiffs who reside in California) can bring claims similar to those brought by the nonresidents…What is needed – and what is missing here – is a connection between the forum and the specific claims at issue.

Id. at 1781 (emphasis in original) (citations omitted).

Following *Bristol-Myers*, numerous district courts have applied its holding to FLSA collective actions.[11] For example, the Northern District of Ohio held that:

> The Court finds that *Bristol-Myers* applies to FLSA claims, in that it divests courts of specific jurisdiction over the FLSA claims of non-Ohio plaintiffs against [Defendant]. The federal overtime claims of non-Ohio Inspectors against [Defendant] have less of a connection to the State of Ohio than the non-California plaintiffs' claims had to the State of California in *Bristol-Myers*. Only 14 of [Defendant's] employees live and work in Ohio. The other 424 employees live and work outside of Ohio and their claims have no connection whatsoever to this State.

*Maclin v. Reliable Reports of Tex., Inc*., 314 F.Supp.3d 845, 850 (2018). The Western District of Tennessee held:

> Because Defendant is not subject to general jurisdiction in Tennessee, the exercise of personal jurisdiction in this case requires each opt-in plaintiff to demonstrate that her claim arose from or is sufficiently related to Defendant's conduct/activity within Tennessee. The record does not demonstrate that any of the putative out-of-state plaintiffs' wages were in any way related to Defendant's activities in Tennessee. This Court, thus, does not have personal jurisdiction over any out-of-state potential plaintiffs.

[11] *See McNutt v. Swift Trans. Co. of Arizona*, 2020 WL 3819239, *9 (W.D. Wa., July 7, 2020) (holding that "personal jurisdiction is lacking over the claims of Swift employees who did not live or work in Washington"); *Weirbach v. Cellular Connection*, 478 F.Supp.3d 544, 552 (E.D. Pa. 2020) (holding that the court lacked specific personal jurisdiction over the claims out of out-of-state plaintiffs); *Roy v. FedEx Ground Package Sys., Inc*., 2018 WL 2324092, *5 (D. Mass. May 22, 2018) (same); *Wiggins v. Jedson Engineering, Inc.*, 2020 WL 6993858, *3 (E.D. Tenn. Aug. 27, 2020); *Chavira v. OS Restaurant Servs., LLC*, 2019 WL 4769101, *6 (D. Mass. Sep. 30, 2019); *Pettanato v. Beacon Health Options, Inc.*, 425 F.Supp.3d 264, 278-279 (S.D. N.Y. 2019); *Greinstein v. Fieldcore Servs. Solutions, LLC*, 2020 WL 6821005, *4 (N.D. Texas Nov. 20, 2020).

*Canaday v. Anthem Cos. Inc*., 2020 WL 529708, at *5 (W.D. Tenn. Feb. 3, 2020) (citations omitted). In a 2021 opinion, the Western District of New York observed:

> [C]ourts are now required, in accordance with *Bristol-Myers*, to scrutinize the relationship of the specific factual contacts of each non-resident plaintiff, who has opted-in to a §216(b) [FLSA] collective action, to the forum court, specifically, opt-in plaintiff's place of employment, in order to assure that the assertion of the forum court's personal, i.e. specific jurisdiction over these claims comports with due process…

*Goldowsky v. Exeter Finance Corp*., 2021 WL 695063, *4 (W.D. N.Y. Feb. 23, 2021). Plaintiff may argue that *BMS* does not apply in the FLSA setting, and admittedly some courts have reached that result, but to reach this result one must effectively ignore the actual wording of BMS. *BMS* twice states that for each claim "there must be an 'affiliation between the forum and the underlying controversy, principally, [an] activity or an occurrence that takes place in the forum State." *BMS*, 137 S.Ct. at 1780, 1781 (citations omitted).

**4. No out-of-state putative class member can demonstrate specific personal jurisdiction over his claims against Signet.**

A federal court may exercise personal jurisdiction over a nonresident defendant "whenever the person would be amenable to suit under the laws of the state in which the federal court sits (typically under a state long-arm statute), subject always to the constitutional due process limitations encapsulated in the familiar 'minimum contacts' test." *KM Enters., Inc. v. Global Traffic Tech., Inc*., 725 F.3d 718, 723 (7th Cir. 2013). A plaintiff must demonstrate that the defendant falls within Wisconsin's long-arm statute, Wis. Stat. § 801.05, which confers 'jurisdiction to the fullest extent allowed under the due process clause." *Bednar v. Co-op Credit Union of Montevido*, 2015 WL 1962116, *2 (W.D. Wis. April 30, 2015). If the plaintiff makes this showing, the burden shifts to defendant to show that exercising jurisdiction over them offends due process. *Id*.

Wisconsin's long-arm statute extends personal jurisdiction "[i]n any action claiming injury to person or property within or without this state **arising out of an act or omission within this state** by the defendant." Wis. Stat. § 801.05(3) (emphasis added). To the extent that any Signet employee who worked for the company outside of Wisconsin suffered an injury (which Signet disputes), that injury did not arise "out of an act or omission" within Wisconsin. Put differently, those individuals did not experience a "local act that caused a local injury." *Bednar*, 2015 WL 1962116 at *2. Accordingly, Wisconsin's long-arm statute does not create jurisdiction over the claims of out-of-state putative class members.

Neither does specific jurisdiction arise under due process analysis which examines the relationship between the forum, the defendant, and the claim at issue. *See Walden v. Fiore*, 571 U.S. 277, 283-84 (2014). For a court to exercise specific personal jurisdiction, a claim must "arise out of or relate" to the defendant's "contacts with the forum." *Bristol-Myers*, 137 S.Ct. at 1780; *see also Burger King v. Rudzewicz*, 471 U.S. 462, 472-73 (1985) (holding that specific jurisdiction exists over a defendant who "purposefully directs" activities at the forum "and the [claim] results from alleged injuries that arise out of relate to those [in-forum] activities") (quotes omitted). Specific jurisdiction thus "is confined to adjudication of issues deriving from, or connected with, the very controversy that establishes jurisdiction." *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011).

The claims of Signet employees who never worked for the company in Wisconsin have no connection to Wisconsin whatsoever. These individuals did not work within the State, they were not paid within the State, and they suffered no alleged injury in the State. Their claims thus do not "relate" to Signet's Wisconsin conduct and operations. *Burger King*, 471 U.S. at 472-73. Without

that affiliation, this Court lacks personal jurisdiction over Signet as to those claims.[12] As a result Plaintiffs' Complaint must be dismissed for this additional reason.

## V. CONCLUSION

Based on the foregoing, Defendant respectfully requests that Plaintiff's Complaint be dismissed in its entirety for failure to state a claim upon which relief can be granted.

Respectfully submitted this 7th day of April 2021.

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[12] To the extent that Plaintiff argues that it is premature for the Court to rule on issue until an out-of-state Signet employee attempts to opt-in, Signet notes that other district courts have rejected that argument. *See Rafferty*, 2019 WL 2924988 at *2 (granting, prior to the conditional certification stage, defendant's Rule 12(b)(2) motion to dismiss "the FLSA claims of any putative collective members not arising from employment by Denny's in Ohio"); *Hutt v. Greenix Pest Control, LLC*, 2020 WL 6892013, **6-7 (N.D. Nov. 24, 2020) (Granting motion to dismiss "with respect to any non-Ohio putative class member"); *Canaday*, 2020 WL 529708 *5 ("Plaintiff's Motion for Conditional Certification is denied in party with respect to out-of-state *potential plaintiffs*.") (emphasis added).

**CERTIFICATE OF SERVICE**

I hereby certify that on April 7, 2021, I electronically filed the foregoing ***Amended Memorandum in Support of Defendant's Motion to Dismiss*** with the Clerk of Court using the ECF system, which sent notice of the foregoing to counsel of record as follows:

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