U.S. Department of Labor

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Issue Date: 28 October 2019

Case No.: 2017-TAE-00003

In the Matter of

ADMINISTRATOR, WAGE AND HOUR DIVISION, U.S. DEPARTMENT OF LABOR
Plaintiff

v.

SUN VALLEY ORCHARDS, LLC
Respondent

DECISION AND ORDER AFFIRMING IN PART AND MODIFYING IN PART THE ADMINISTRATOR'S FINDINGS

This matter arises under the H-2A provision of the Immigration and Nationality Act ("INA" or "the Act"), as amended, 8 U.S.C. §§ 1101(a) and 1188(c), and the U.S. Department of Labor's ("DOL") implementing regulations found at 20 C.F.R. Part 655, subpart B, and 29 C.F.R. Part 501 ("the H-2A regulations" or "the [governing] regulations").

PROCEDURAL HISTORY

The Administrator, Wage and Hour Division, U.S. Department of Labor ("Administrator") filed a Notice of Determination on June 22, 2016, alleging multiple violations of the H-2A program against Sun Valley Orchards, LLC's ("Respondent"). See JX 10 (December 23, 2006 Order of Reference and Summary of Violations). The Administrator assessed back pay and civil money penalties ("CMPs") totaling $564,026. See Administrator's Brief at 91.

On December 23, 2016, the Administrator issued an Order of Reference, which referred the matter to the Office of Administrative Law Judges ("OALJ"). On January 11, 2017, the undersigned received the assignment of this case. On January 18, 2017, the undersigned issued an Initial Notice of Hearing and Pre-Hearing Order scheduling the hearing to begin on February 16, 2017 in Cherry Hill, New Jersey. At a February 2, 2017 telephonic pre-hearing conference, the Parties petitioned the undersigned for a revised hearing schedule. A February 7, 2017 Order granted the Parties' joint motion for a revised hearing schedule, and scheduled the hearing to begin on July 18, 2017.

On May 23, 2017, by facsimile, Respondent's counsel filed an Emergency Motion for Revised Schedule proposing to move the filing of motions for summary decision deadline to June 9, 2017. By facsimile dated May 24, 2017, the Administrator filed her Opposition to Respondent's Motion for a Third Extension to the Summary Decision Deadline. Respondent submitted, by facsimile on May 24, 2017, Respondent's Reply in Further Support of Emergency Motion for Revised Schedule.

A May 25, 2017 Order Granting Respondent's Emergency Motion for Revised Schedule afforded the parties a one-week extension to file motions for summary decision. Further, the Order advised the parties that no other deadlines would change and the hearing remained scheduled for July 18, 2017 in Cherry Hill, New Jersey. The undersigned received both the Administrator's Motion for Partial Summary Decision and Respondent's Motion for Summary Decision on June 2, 2017.

On June 6, 2017, by facsimile, the Administrator filed a Joint Motion to Extend by One Week Certain Pre-Hearing Deadlines. The parties jointly requested that the undersigned set June 16, 2017 as the deadline to file summary decision oppositions, extend the deadline for pre-hearing disclosures and exchanges to June 19, 2017, and extend the deadline for the pre-hearing statements to June 23, 2017. A June 8, 2017 Order granted the parties' joint motion to extend the foregoing deadlines. A July 7, 2017 Order denied the parties' motions for summary decision.

On July 18, 2017, the hearing commenced in Cherry Hill, New Jersey. At the conclusion of the hearing, on July 21, 2017,[1] the undersigned directed the parties to meet and confer regarding a briefing schedule. On September 25, 2017, by facsimile letter, the parties filed a Joint Motion to Set Post Hearing Briefing Schedule. An October 5, 2017 Order granted the parties' joint motion and extended the deadline to submit post-hearing briefs to December 15, 2017. Both parties submitted briefs on December 15, 2017.

ISSUES

1. Did Respondent violate 20 C.F.R. § 655.122(g), (p), and (q) by making false promises about kitchen access and failing to disclose meal charges?
    a. If so, did the Administrator properly assess $128,285 in back wages?
    b. If so, did the Administrator properly assess $198,450 in civil money penalties ("CMPs")?
2. Did Respondent violate 20 C.F.R. § 655.122(p) through Agustin Hernandez's sale of drinks and other items at a profit or in violation of state law?
    a. If so, did the Administrator properly assess $80,762.69 in back wages?

[1] At the hearing, the undersigned admitted the following exhibits: Administrative Law Judge's Exhibit ("ALJX") 1; Joint Exhibits ("JX") 1–JX 10; Prosecuting Party's Exhibits ("PX") 1; PX 2; PX 3; PX 15–PX 15-2; PX 16; PX 16-1; PX 17-1; PX 17-2; PX 17-3; PX 19; PX 20; PX 21; PX 22; PX 23; PX 24; PX 25; PX 28; PX 29; PX 30; PX 32; PX 33; PX 34; PX 35; PX 36; PX 37; PX 39; PX 41; and PX 42; Respondent's Exhibits ("RX") 1; RX 2; RX 5; RX 7; RX 9; and RX 12–RX 19.

3. Did Respondent violate 20 C.F.R. § 655.122(i) by discharging certain workers prior to such workers meeting the three-fourths wages guarantee?
   a. If so, did the Administrator properly assess $142,728.22 in back wages?
   b. If so, did the Administrator properly assess $1,350.00 in CMPs?
4. Did Respondent violate 29 C.F.R. § 501.5 by attempting to cause workers to waive the three-fourths guarantee at 20 C.F.R. § 655.122(i)?
   a. If so, did the Administrator properly assess $1,350.00 in CMPs?
5. Did Respondent violate 20 C.F.R. § 655.122(d) by providing inadequate housing?
   a. If so, did the Administrator properly assess $3,600.00 in CMPs?
6. Did Respondent violate 20 C.F.R. § 655.122(h)(4) through providing substandard transportation and unlicensed drivers?
   a. If so, did the Administrator properly assess $7,500.00 in CMPs?

See Administrator's Brief at 91 (revising back wages owed); see, *e.g.*, JX 10 page 160 (the Administrator's originally submitted "Summary of Violations" table).

STIPULATIONS OF FACT

The Parties agree to the following stipulations, provided in full:[2]

1. Respondent, a New Jersey farm, employs both foreign nationals working on H-2A visas ("H-2A workers") as well as a number of non-H-2A employees, including non-H-2A employees engaged in corresponding employment ("domestic workers").[3] The workers' duties include picking asparagus, peppers, and other crops.

2. Respondent was founded as a limited liability corporation in 2012 and is owned by Russell Marino Jr.; Joseph Marino, Harry Marino; and Russell Marino, Sr.

3. Respondent took over the farming operation formerly known as Marino Brothers, Inc.

4. Marino Brothers, Inc. did business under the trade name "Sun Valley Orchards."

5. Russell Marino, Sr.; Sebastien Marino; and Harry Marino owned Marino Brothers, Inc.

6. Marino Brothers, Inc. employed Agustin Hernandez ("Hernandez") and Russell Marino, Jr. (among others).

7. To obtain workers for the period of April 13, 2015 to October 10, 2015 (the "2015 growing season"), Respondent filed two applications for Temporary Employment Certification ETA Form 9142 ("TEC") and two Agricultural and Food Processing Clearance Orders (ETA Form 790) ("job orders").

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[2] The undersigned has made minor grammatical changes to the Parties' stipulations.

[3] Where necessary and appropriate, the undersigned will use the term "farmworkers" to denote both H-2A workers and non H-2A domestic workers.

8. Respondent filed a job order for the period of April 13, 2015 to October 10, 2015. The Department of Labor subsequently approved this job order. JX 1 contains a true and accurate copy of that job order.

9. Respondent also filed a TEC for this same time period. The Department subsequently approved this TEC. JX 2 is a true and accurate copy of that TEC.

10. Respondent also filed a job order for the period of June 1, 2015 to October 10, 2015. The Department subsequently approved this job order. JX 3 is a true and accurate copy of that job order.

11. Respondent also filed a TEC for the period of June 1, 2015 to October 10, 2015. The Department subsequently approved this TEC. JX 4 is a true and accurate copy of that TEC.

12. After the Department of Labor approved these TECs and job orders, Respondent hired H-2A workers.

13. During 2015, Respondent qualified as an employer within the definition of 20 C.F.R. § 655.103(b).

14. During 2015, Hernandez was not an employer within the definition of 20 C.F.R. § 655.103(b).

15. JX 5 is a chart listing the ninety-six H-2A workers and fifty-one domestic workers that Respondent employed during the 2015 growing season.

16. In the job orders, Respondent promised to pay these employees $11.29 per hour or at a piece rate, whichever was higher.

17. JX 6 is a true and accurate copy of Respondent's employee roster for the 2015 growing season.

18. During the 2015 growing season, Hernandez supervised Respondent's H-2A and domestic workers and selected the drivers to transport Respondent's H-2A and domestic workers from the housing facility to the agricultural fields.

19. During the 2015 growing season, Respondent's H-2A workers, and many of its domestic workers, lived at Respondent's housing facility, which is located at 1321 Route 45 South, Swedesboro, NJ 08085.

20. This housing facility was built before April 3, 1980, and includes (among other things) bedrooms, a bathroom facility, and (in an adjacent building with a separate entrance) a kitchen.

21. During the 2015 growing season, Respondent paid for the utilities for this kitchen (including gas, electricity, and water), and provided various appliances for the kitchen, including stoves, freezers, a microwave, and refrigerators.

22. During the 2015 growing season, 139 of Respondent's H-2A and domestic workers purchased meals prepared in Respondent's kitchen and paid Hernandez between $75 and $80 a week for these meals.

23. During the 2015 growing season, many of Respondent's H-2A and domestic workers paid Hernandez for soft drinks, energy drinks, and snacks, among other things.

24. During the 2015 growing season, to the parties' knowledge, Respondent withheld no money from any H-2A or domestic worker's paychecks for meals, drinks, or any other items.

25. Other than payments to Hernandez, to the parties' knowledge, none of the H-2A workers or domestic workers paid Respondent for meals, drinks, or any other items.

26. During the 2015 growing season, Hernandez did not have a license to sell beer or cigarettes.

27. The chart at JX 7 lists workers who last worked at Respondent on or before May 7, 2015.[4]

28. Jose D. Islas Larraga last worked for Respondent on June 9, 2015.[5]

29. On or about August 8, 2015, Respondent terminated the employment of Miguel A. Elizondo Soto, Luis A. Luna Gonzalez, Jose L. Silva Lopez, Dario Morales Acosta, and Rodrigo Raya Tapia. These workers' last day of work occurred on or before August 4, 2015.

30. Respondent asked workers whose work ended before the end of the season to complete a worker departure form.

31. The top half of this form was in English and the bottom half was in Spanish.

32. The workers were instructed to retain the bottom half and to return the top half.

33. JX 8 contains true and accurate copies of the English portions of the worker departure forms signed by Respondent's workers around the time that their work was ending.

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[4] The parties dispute whether the workers' employment ended because Respondent constructively discharged or terminated them, or because they voluntarily quit.

[5] The parties also dispute the reasons that this worker stopped working for Respondent.

34. Attached, as JX 9 is a true and accurate copy of a worker departure form, including English and Spanish portions, dated August 8, 2015.

35. Worker departure forms were distributed to H-2A workers who departed before the end of the season around the time that these workers' work ended.

36. During the 2015 growing season, the Wage and Hour Division of the U.S. Department of Labor, including Wage Hour Investigators ("WHI") John Crudup and Jose Perez, investigated Respondent to determine (among other things) whether the farm was in compliance with H-2A regulations.

37. During their investigation, [the Administrator] inspected the housing facility and five of Respondent's buses, interviewed Respondent's workers and drivers, and met with Respondent's owners and with Hernandez.

38. On June 22, 2016, the Administrator issued a determination letter alleging that Respondent violated certain H-2A regulations and assessing $369,703.22 in back wages and $212,250.00 in CMPs against Respondent.

39. On July 20, 2016, Respondent filed a timely hearing request.

40. On December 23, 2016, the Administrator filed an Order of Reference referring the matter to OALJ. The Administrator also amended the determination letter by adjusting the amounts sought to $376,697.61 in back wages and $212,250.00 in CMPs, and added additional findings and bases for the Administrator's back wage and CMP assessment.

41. Attached, as JX 10 is a true and accurate copy of the Order of Reference, which includes true and accurate copies of the underlying determination letter and hearing request referenced in paragraphs 38-40.

42. During the course of discovery in this matter, the Administrator took depositions of six H-2A workers. In accordance with 29 C.F.R. § 18.55(a), the Parties stipulate that true and accurate transcripts or videos of the depositions, or portions thereof, may be used at the hearing to the extent that doing so would be admissible under the applicable rules of evidence as if the deponent were present and testifying at the hearing.

See ALJX 1 ("Joint Stipulation of Agreed Facts").

FINDINGS OF FACT[6]

Bathroom Conditions

The bathrooms at Respondent's dormitories lacked sufficient hot water.[7] Two of the sinks were completely broken.[8] The bathrooms contained windows without screens, which

[6] For the sake of readability only, the undersigned has grouped the findings of fact in alphabetical order, and used footnote citations.

allowed entry to pests.[9] Relatedly, when workers first arrived, there were no bathrooms in the fields.[10]

Beer Sales

Hernandez sold beer to the farmworkers; however, he did not have a license from the State of New Jersey to do so.[11] Hernandez did not keep a record of the amount of beers sold to the farmworkers. As a result, WHI Perez created the reconstruction at PX 2, which attempted to calculate Hernandez's "estimated profit."[12] The evidence of record reasonably establishes that the workers bought three and three-quarter cans of beer per week; however, some workers bought more per week and some did not buy any beer at all.[13] To determine the price of beers, WHI Perez went to Costco and obtained a price of $20.99 for a thirty-pack of Coors Light.[14] The Administrator reasonably estimated that the wholesale price for a can of beer was seventy cents.[15] WHI Perez went to Costco, because Elia Pinon, Hernandez's wife, told him that she and Hernandez bought their beer at another wholesaler, Sam's Club.[16] Hernandez sold Corona,

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7 See Tr. at 30, 60 (Maldonado's testimony), 103–04 (Gustavo Perez's testimony), 330 (WHI Perez's testimony); PX 7 at 189 (Silva Lopez recalling that, at times, he took cold showers); PX 11 at 288 (Garcia Dominguez stating on deposition that there was only enough hot water for ten people to shower before it ran out). *Cf.* Tr. at 203, 215 (Hernandez's testimony that workers had to "wait a little bit" for hot water).

8 See Tr. at 200–01 (Hernandez's testimony).

9 See Tr. at 202–03 (Hernandez's testimony).

10 See Tr. at 17–19, 76 (Maldonado's testimony), 91 (Gustavo Perez's testimony), 139 (Cheguez's testimony); PX 9 at 216 (Cinta Tegoma's deposition testimony that workers had the option to "hold" their waste or "run towards the trees"); PX 11 at 274 (Dominguez's deposition testimony that bathrooms were not available).

11 See ALJX 1 at ¶ 26 (Joint Stipulation of Agreed Facts).

12 Tr. at 581, 637–38 (WHI Perez's testimony); Appendix C to the Administrator's brief titled "Revised Back Wage Computations as to Illegal Beer Sales at a Profit."

13 See, *e.g.*, PX 13 at 345–47 (Dario Morales Acosta testifying that he bought around two and one-half beers per week, but other workers likely bought more); PX 3 at 80–82 (Cervantes Ramirez recalling that he purchased six beers per week with three other coworkers); PX 5 at 142 (Miguel Angel Elizondo Soto stating that he bought two beers a week); PX 11 at 281–83 (Garcia Dominguez recalling that he purchased seven beers a week, but some workers bought three to five beers per night); Tr. at 25–26 (Maldonado, who only worked for Respondent for two weeks, bought a twelve-pack of beer each week); PX 7 at 180–82 (Silva Lopez remembering that he bought one or two beers a day for three days a week, and that some workers bought more beer than he did). *Cf.* PX 9 at 219; Tr. at 98, 269 (Cinta Tegoma and Gustavo Marquez Perez, respectively, testifying that they did not purchase any beer; Pedro Zavala Almanza only ever purchased one beer).

14 See Tr. at 450–51.

15 See Tr. at 374, 451–52, 627.

16 See Tr. at 505–06.

Coors Light, Budweiser, Modelo, and Coors Light.[17] Thus, it was reasonable for WHI Perez to determine the per-can cost through comparison of Coors Light sold at a wholesale club, here Costco. The Administrator decided to reimburse those farmworkers who bought beer for the amount of Hernandez's profit, which it reasonably determined was $1.30 per can (the beers cost seventy cents and Hernandez sold the beers for $2).[18] Perez provided a reasonable calculation that Respondent owed each worker $18.20 per week in back wages.[19]

Buses

Respondent used buses to transport the farmworkers from its dormitory to the fields; one field was a fifteen-minute drive from the dormitory area.[20] Hernandez chose bus drivers from amongst its farmworkers.[21] Of the five buses WHI Perez inspected, three had worn, unsafe tires.[22] One bus had a broken rear turn signal.[23]

Deductions from Pay

The farmworkers never paid in cash for either the meals or the beverages Hernandez sold.[24] Hernandez would take workers' checks to the bank to cash them and then return the money to the workers, minus any money owed for meals and beverages.[25] Russel Marino, Jr. told Hernandez to keep track of the farmworkers' payments in this way.[26]

Drivers

Hernandez selected bus drivers from within Respondent's pool of workers.[27] Hernandez would allow any such worker to drive if the worker had a Mexican driver's license or driving

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17 See Tr. at 359–60 (WHI Perez discussing the contents of Hernandez's refrigerator, as shown in PX 32, pages 1076 and 1078–79); Tr. at 580 (discussing the contents of PX 32, page 1077, showing a can of Coors Light).

18 See Appendix C to Administrator's Brief.

19 See Tr. at 626–27; PX 2.

20 See Tr. at 204–05. *C.f.* 31–32 (Maldonado recalling that the trips were thirty-minutes each way).

21 See Tr. at 31, 104.

22 See Tr. at 402–06, 607–08; PX 29 pages 1058–63 (showing three tires that are clearly unsafe for road use due to the condition of the tires as bald and cracked).

23 See Tr. at 405; PX 29 at 1057 (showing that bus number 205 has a broken right rear turn signal).

24 See Tr. at 42 (Maldonado's testimony), 100 (Gustavo Perez's testimony), 186–87, 211 (Hernandez's testimony that workers never paid Respondent).

25 See Tr. at 100, 189, and 338–40.

26 See Tr. at 187.

27 See Tr. at 205.

experience.[28] In response to WHI Perez's request, none of the five workers WHI Perez observed driving the buses could provide him with a U.S. driver's license.[29] Hernandez only provided drivers' licenses to WHI Perez for three of the five drivers WHI Perez observed.[30] Two had Mexican driver's licenses, one had an expired Mexican driver's license, and two had no licenses.[31] Russel Marino, Jr. told WHI Perez that he could not control who drives the bus on any given day.[32]

Hard Work

The farmworkers engaged in "hard work."[33] The workers worked twelve hours per day with only one one-hour break.[34] Some of the workers had prior experience working in a bent over posture.[35]

Hernandez's Working Relationship with Respondent

Hernandez has worked for Respondent or its predecessor companies for twenty-seven years.[36] His father worked for Respondent, his son currently drives a bus for Respondent, and his wife works in Respondent's kitchen.[37] Hernandez receives all of his pay from Respondent; Respondent provides him with an hourly pay rate plus commission for the amount of product that is packaged.[38] For example, if the farmworkers packaged more asparagus, Hernandez would receive more money in the form of a commission.[39]

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28 See Tr. at 205–06.

29 See Tr. at 390–401.

30 Tr. at 400.

31 Tr. at 390–401; PX 30 at 1064–72.

32 See Tr. at 456.

33 See Tr. at 17 (Maldonado's testimony), 219 (Hernandez stating that cutting asparagus "is the toughest work we have), 256 (Almanza's testimony), 726 (Russel Marino, Jr. recalling that the workers at the May 2015 meeting complained of the difficulty of the work required).

34 See Tr. at 17 (Maldonado's testimony), 90–91 (Gustavo Perez's testimony), 139 (Cheguez's testimony) 257 (Almanza's testimony).

35 See, *e.g.*, Tr. at 125 (Gustavo Perez stating that he had experience harvesting beans and chili pepper which required "the same" posture as harvesting asparagus).

36 See Tr. at 171.

37 See id.

38 See Tr. at 230.

39 Id.

In 2015, Hernandez helped facilitate Respondent's engagement in the H-2A program.[40] Hernandez operated the meal plan that fed the farmworkers. Although Hernandez utilized Respondent's kitchen to do so, he paid the cooks, and bought groceries and certain appliances, as needed, to cook the meals.[41] Hernandez's wife, Elia Pinon, worked in the kitchen.[42] After Respondent decided to utilize the H-2A program in 2015, Respondent told Hernandez that he could keep charging for meals but that Hernandez—not Respondent—would be responsible for paying the kitchen staff's wages.[43]

Concerning kitchen access, Russel Marino, Jr. told Hernandez to "accommodate the guys however he had to."[44] Respondent paid the kitchen's utility bills.[45] Respondent did not pick the menu or otherwise tell Hernandez how to run the kitchen or set prices.[46] Hernandez told Respondent how much he planned to charge for the meals.[47] Respondent told Hernandez to keep track of the workers' payments for the meal plan.[48] Respondent took Hernandez to a meeting with the Department to ensure he understood the regulatory parameters concerning meal plans.[49] Respondent told Hernandez "for years" to keep his receipts, "because you cannot make a profit on the men."[50] Hernandez charged workers seventy-five to eighty dollars per week to participate in the meal plan and kept track of the workers' participation.[51] Hernandez also sold beverages, including beer, to the farmworkers.[52] Respondent did not receive money from Hernandez or otherwise tell him how much to sell the drinks.[53] Hernandez kept a "store" in Respondent's kitchen, where he would sell drinks, snacks, and beer.[54]

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40 See Tr. at 171–74, 806–07 (Russel Marino, Jr. recalling that in 2015, he asked Hernandez how many workers from the H-2A program he would need).

41 See Tr. at 177–78, 229, 244, 252, and 793.

42 Tr. at 171; PX 19.

43 See Tr. at 177.

44 Tr. at 743.

45 See Tr. at 793.

46 See Tr. at 247, 808.

47 See Tr. at 187–88.

48 See Tr.at 186–87.

49 See Tr. at 738, 742–43.

50 See Tr. at 808.

51 See Tr. at 179–80.

52 See Tr. at 194–95, 638.

53 See Tr. at 737.

54 See Tr. at 51; PX 32 pages 1075–76, 1082 (showing items associated with a company store, including a cash register, stacks of instant soup, a coffee urn, a Coca-Cola branded glass door refrigerator stocked with sodas

When workers arrived at the camp, Hernandez said that he would orient them about housing, the "rules of the camp," keeping the bathrooms clean, hours of work, pay, kitchen access, and cost of meals.[55] Hernandez told the workers when to work; the workers did not have a choice as to their hours.[56] Russel Marino, Jr. only "sometimes" was present for the workers' orientation.[57] "Several times a day," Russel Marino, Jr. would check in with Hernandez concerning the farm's "day-to-day happenings."[58] Russel Marino, Jr. did not explain the meal cost because "that's in the contract."[59] When the farmworkers paid Hernandez, the workers signed a form to indicate they "agreed that they received the meal and" paid for the meal plan; Respondent's name appears at the top of the form.[60]

Hernandez also maintained the sleeping quarters and bathroom facilities at Respondent's dormitory site.[61] Hernandez was responsible for transporting the farmworkers from the dormitory area to the fields.[62] Respondent tasked Hernandez with ensuring that the workers had water in the fields.[63] Workers paid Hernandez for meals, drinks, housing, and transportation; they did not pay Respondent directly.[64]

Kitchen Access

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and Monster energy drinks, and a wire display rack stocked with chips and other snack foods), PX 32 page 1079 (showing the contents of a refrigerator full of beer).

55 See Tr. at 61 (Maldonado stating that Hernandez was "in charge" and he never spoke with anyone from the Marino family); 174–75 (Hernandez's testimony); 773 (Russel Marino, Jr. stating that Hernandez "primarily" oriented the workers); 825 (Russel Marino, Jr. stating that the workers complained to Hernandez because Russel Marino, Jr. does not speak Spanish and "that's the chain of command"); PX 3 at 101 (Carlos Cervantes Ramirez stating on deposition that Hernandez was "in charge").

56 See Tr. at 17 (Maldonado's testimony), 90–91 (Gustavo Perez's testimony), 139 (Cheguez's testimony), 257 (Almanza's testimony), PX 3 at 68–69 (deposition of Cervantes Ramirez); *cf.* JX 1; JX 3 (ETA Forms 790 telling the workers to "anticipate" working seven hours each weekday and five hours on either Saturday or Sunday (JX 1 says Saturday and JX 3 says Sunday), and informing the workers that they "may be requested to work 12+ hours per day . . . but will not be required to do so").

57 PX 15 at 401.

58 Tr. at 719.

59 PX 15 at 403–04 (Russel Marino, Jr. stating that everything he said was true as of 2015).

60 PX 17 at 764 (Hernandez's deposition testimony, discussing PX 17-2 at 799 (the meal payment form)); Tr. at 182–86 (Hernandez testifying he would use the form at PX 17-2—a document Respondent created in its office—to keep track of the workers who engaged in Respondent's meals program).

61 See Tr. at 199–205.

62 See Tr. at 204–05.

63 See Tr. at 213.

64 See Tr. at 211, 233.

Although the dormitory-area had a kitchen, workers did not have access to the kitchen. The workers could not make their own meals.[65] Except for a refrigerator Hernandez added to keep cool the beverages he sold, Respondent owned the kitchen, all of its major appliances, and paid for all utilities.[66] The workers never asked to use the kitchen facilities.[67] Cheguez testified that the farmworkers "were sure that they were going to say no because . . . we couldn't . . . do our own cooking there."[68] The kitchen was large, but not large enough for "many workers to cook simultaneously."[69]

Layoffs and Three-fourths Guarantee

In August 2015, Respondent's pepper crop became diseased and Respondent had to lay off forty-four workers due to lack of work.[70] Hernandez chose "troublemakers" to lay off because no workers initially volunteered for the layoff.[71] The "troublemakers" were those employees who refused to work on the weekend.[72] Russel Marino, Jr. did not know the names of

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65 See Tr. at 20–21 (Maldonado testifying "[s]ince they didn't have another kitchen to prepare our food, we had to consume the food that they sold us"), 93–94 (Gustavo Perez's testimony), 159 (Cheguez's testimony), 175–76 (Hernandez recognizing that the kitchen was not large enough "for everyone to cook" or to store food in the kitchen's refrigerators), 263–64 (Almanza's testimony that he could not cook in the kitchen, so he bought his own "stove"), 283 (Almanza's testimony that he never observed any of the farmworkers in the kitchen), 333, 337 (WHI Perez concluding that workers did not have access to the kitchen for the purpose of cooking their own meals), 500 (WHI Perez stating that workers had asked Hernandez to use the kitchen), 589–90 (WHI Perez discussing Pinon's statement at PX 19 page 809, that workers were not allowed to access the kitchen to cook their own food; sometimes Pinon gave workers permission to reheat food, but only under supervision); *cf.* Tr. at 771–73 (Russel Marino, Jr. recalling that in 2015, Respondent provided cooking "facilities" and kitchen access to the farmworkers "free of charge" and that Hernandez never prevented anyone from cooking in the kitchen), Tr. at 455 (WHI Perez recalling that Russel Marino, Jr. and Joseph Marino told him that workers had access to the kitchen facilities). Hernandez sold soft drinks, beer, and general provisions out of Respondent's kitchen. See Tr. at 190, 194, 357–60; PX 32 pages 1050, 1076, and 1078–79.

66 Tr. at 745, 778, 793; ALJX 1 at ¶ 21.

67 See Tr. at 592.

68 Tr. at 159.

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69 Tr. at 744 (Russel Marino, Jr.'s testimony). See Tr. at 501 (WHI Perez agreeing it would be "close quarters" if 150 people attempted to use the kitchen at once), 175–76 (Hernandez's testimony that the kitchen was not large enough "for everyone to cook in the kitchen" or to store food in the kitchen's refrigerators).

70 Tr. at 207, 238.

71 See Tr. at 208 (Hernandez's testimony); *cf.* Tr. at 779 (Russel Marino, Jr. testifying that "troublemakers" were not selected because Respondent had no troublemakers).

72 Id.

the laid-off workers.[73] Of the workers who left in August 2015, Respondent only failed to fulfill its three-fourths requirement concerning four such workers.[74]

Russel Marino, Jr. said that Lisa Justice, Respondent's payroll manager,[75] ensured that Respondent fulfilled the three-fourths guarantee for any laid off worker.[76] WHI Perez understood the H-2A regulations to mean that the employer is required to pay three-fourths of the hours offered, "based on the beginning and ending date" of the worker being available for work at the site.[77] Perez said that the "clock" starting running the day after the employee arrived at the property.[78]

Litter at the Dormitory

PX 33, page 1094, is a photograph of a pile of discarded cans of soda and beer.[79] The pile of discarded cans is located "directly across from the dormitory housing."[80] PX 33, pages 1095 through 1102, are more photographs of the discarded cans.[81] The photographs show discarded cans of Budweiser, Modelo, Monster, and Coors Light.[82] The dormitory area also had garbage cans without tight fitting lids; many without lids at all.[83]

Mattresses

PX 28, page 1056, shows mattresses on the floor with "worker belongings" on top of and beside the mattresses.[84] The mattresses were made-up with blankets.[85] During the course of his

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73 Tr. at 216.

74 See Tr. at 642–44.

75 Tr. at 681

76 See Tr. at 779.

77 Tr. at 610–11.

78 Tr. at 610–11, 634–35; PX 1 (WHI Perez's calculations concerning which workers are owed back pay due to Respondent's three-fourths violation).

79 See Tr. at 374–76, 603–04.

80 Tr. at 375.

81 See id.

82 See PX 33 pages 1095–1102.

83 See Tr. at 324.

84 Tr. at 324, 329–30.

85 PX 28 page 1056.

investigation, WHI Perez learned that workers slept on mattresses placed on the floor.[86] WHI Perez did not know how the mattresses came to rest on the floor.[87] He "assumed" that each worker had his or her own mattress.[88] WHI Perez did not recall if he observed any bunkbeds with missing mattresses.[89]

May 2015 Argument

In May 2015,[90] a meeting occurred between Respondent—represented by Hernandez, Russel Marino, Jr., and Joseph Marino—and nineteen of the farmworkers.[91] The nineteen workers were upset at the working and living conditions, and wanted to share their concerns with Respondent.[92] During the May 2015 meeting, Russel Marino, Jr. became angry with the workers.[93] A number of the nineteen workers left the argument thinking that Respondent had

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86 Id.

87 See Tr. at 492.

88 See Tr. at 494–95.

89 See Tr. at 599; see also Tr. at 493.

90 Neither party proffered evidence as to when in May 2015 the argument occurred; however, the argument had to occur before the May 7, 2015 email from Warren Wicker of National Agriculture Consultants, which informed the Department of the departure of the nineteen workers.

91 See, *e.g.*, Tr. at 407, 538–41, 723–27, 766, 809–11, 826–31.

92 See, *e.g.*, Tr. at 33–40 (Maldonado's testimony that he and his coworkers were upset about the working conditions and so wanted to talk to Russel Marino, Jr.), 106–07 (Gustavo Perez's testimony that he and a group of his coworkers decided to talk to Russel Marino, Jr. because "of the conditions we were in, because we didn't have a place to cook, because of the bathrooms, because of the way the installations were, and because of the way [Hernandez] treated us"), 117 (Gustavo Perez saying that he first complained to Hernandez concerning the working conditions "about a week" after he began working for Respondent), 122 (Gustavo Perez stating his concern that he did not receive proper training), 138–39 (Cheguez recalling that Hernandez was a "bad" supervisor, and threatened the workers with deportation, and always required the workers to work faster), 148 (Cheguez recalling that the workers "wanted to work" but Respondent did not treat them well), 160 (Cheguez agreeing that the goal of the conversation was to work at a more "comfortable pace"); PX 5 at 125 (Elizondo Soto recalling Hernandez's threats to send the workers "back to Mexico"). *Cf.* Tr. at 220–24 (Hernandez recalling that workers thought the work was too hard and that they did not complain about housing), 726 (Russel Marino, Jr. testifying that the workers could not perform the job because it was too hard and was for "real men"), 810 (Joseph Marino stating that the workers felt the work was too hard).

93 See, *e.g.*, Tr. at 39, 65, 81–83 (Maldonado recalling that Russel Marino, Jr. said that the workers "could leave" if they did not like the conditions and that Russel Marino, Jr. "practically fired [Respondent's H-2A workers]" during the argument, and that he felt like he "needed to leave"; he left due to problems "with [his] boss"), 107–08 (Gustavo Perez stating that, during the May 2015 argument, Russel Marino, Jr. was very upset and cursed at the farmworkers; Gustavo Perez believed he could not continue working for Respondent), 129–30 (Gustavo Perez remembering that Russel Marino, Jr. said that the workers were not "working out for him" and then apologized after the conversation), 147 (Cheguez remembering that Russel Marino, Jr. "scream[ed] and yell[ed] in an arrogant way"), 222 (Hernandez stating that Russel Marino, Jr. "was a little bit upset"), 728 (Russel Marino, Jr. remembering thinking that Respondent had exhausted all of its options, and "we're [either] going to let these guys go, or we're going to send them on their way, however we had to do it"); PX 3 at 101 (Cervantes Ramirez recalling that, during the argument, Russel Marino, Jr. said that the workers were fired); PX 9 at 232, 258 (Cinta Tegoma recalling that

fired them.[94] Joseph Marino testified on deposition to his lack of awareness of what was said during the argument; however, at the hearing, he recalled, "part of what [Russel Marino, Jr.] said."[95] Joseph Marino's conflicting statements show a lack of credibility and his testimony merits little weight.

Meals

JX 1 is the ETA Form 790 Job Order, which requested forty workers for the period of April 13, 2015 to October 10, 2015. On December 12, 2014, Russel Marino, Jr. signed the Job Order.[96] The Job Order at JX 1 states:

> Employers will furnish free cooking and kitchen facilities to those workers who are entitled to live in the employer's housing so that workers may prepare their own meals . . . . Once a week the employers will offer to provide (on a voluntary basis by the workers) free transportation to assure workers access to the closest store where they can purchase groceries.[97]

JX 3, the ETA Form 790 Job Order concerning the period June 1, 2015 to October 10, 2015, contained the same or substantially similar language.[98]

Respondent hired a company called National Agricultural Consultants to help complete the 2015 H-2A job orders.[99] Russel Marino, Jr. said that he conducted research and sought advice from other farmers concerning Respondent's participation in the H-2A program.[100]

Upon arrival at Respondent's dormitory, Hernandez informed the farmworkers about the existence of a meal plan, which cost between $75 and $80 per week.[101] Russel Marino, Jr.

Russel Marino, Jr. tried to hit him and that Russel Marino, Jr. did not give him the option of staying because he "was fired"); PX 11 at 305 (Hector Mishel Garcia Dominguez stating that he left Respondent's employ not for personal reasons, but because Russel Marino, Jr. "decided that we were not worth for the job [sic])."

94 See, *e.g.*, Tr. at 39–40, 65 (Maldonado stating that Russel Marino, Jr. had "practically fired us"), 80–81 (Maldonado saying that he understood he "needed to leave" due to the argument), 107, 125–29 (Gustavo Perez recalling that Russel Marino, Jr. said "we weren't necessary" during the argument, that he did not have the opportunity to continue working for Respondent due to the conversation, and that Hernandez told him he "must leave").

95 Tr. at 826–29.

96 See JX 1.

97 Id.

98 See JX 3.

99 See Tr. at 740–41; PX 40 (Respondent's Form I-129, "Petition for a Nonimmigrant Worker," which contains the signatures of Theresa Ward from National Agricultural Consultants and Russel Marino, Jr.).

100 Tr. at 713.

testified that in 2015 Respondent indeed furnished the "facilities" to allow the farmworkers to cook their own meals.[102] Although in both 2015 and 2016, Respondent provided meals "at cost" to the farmworkers, Russel Marino, Jr. recognized that the 2015 job order failed to mention that fact.[103]

Non-alcoholic Beverages and Other Items Sold to the Farmworkers

Hernandez sold a variety of items to the farmworkers, including soda, energy drinks, beer, Gatorade, cookies, toilet paper, and soup.[104] The Administrator decided to enforce back wages and CMPs against Respondent only for the beverages it sold to the farmworkers; the Administrator did not enforce back wages and CMPs for any violations resulting from the selling of cookies, toilet paper, and soup. Hernandez sold the beverages in the fields and out of Respondent's kitchen.[105] The Administrator had to reconstruct the amount of non-alcoholic drinks sold because Hernandez either destroyed or otherwise could not produce his records as to the workers' purchase of drinks in the summer of 2015.[106] The preponderant evidence of record demonstrates that each farmworker purchased from Hernandez, on average, four non-alcoholic drinks per day.[107] By contrast, the Administrator considered a 4.4 drinks-per-day figure. The Administrator applied a price of $1.25 per drink, even though the Administrator determined that was likely a conservative estimate.[108]

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[101] See Tr. at 20 (Maldonado's testimony), 92 (Gustavo Perez saying that he had no choice but to pay Hernandez for the meal plan, even though he would have rather prepared his own food), 140–41 (Cheguez's testimony of same), 176 (Hernandez stating that workers who did not wish to participate in the meal plan had to "eat outside or to order a delivery meal"), 178–80 (Hernandez discussing PX 17-1 and PX 17-2, where Hernandez tracked the workers who participated in the meal plans), 262 (Almanza's testimony), 334 (WHI Perez's testimony). WHI Perez did not learn why the meal plan cost $75 some weeks and other weeks cost $80. See Tr. at 600.

[102] Tr. at 772.

[103] Tr. at 763.

[104] See Tr. at 22–27, 96–97, 193–97, 266–67, and 502.

[105] See Tr. at 189–94, 266–67, 360.

[106] See Tr. at 209 (Hernandez's testimony), 361 (WHI Perez stating that Hernandez generally "did not have purchase receipts for drinks," even though he had such receipts for meals).

[107] See Tr. at 360–61 (WHI Perez testifying that that Hernandez said he sold four soft drinks per day per worker), 143 (Cheguez testifying that he purchased "three to four" soft drinks per day), 97 (Gustavo Marquez Perez stating that he purchased between eight and nine soft drinks per day), 269 (Almanza recalling that he purchased three to four soft drinks per day), Tr. at 21–23 (Maldonado testifying that he purchased eight soft drinks per day); PX 3 at 72 (Cervantes Ramirez saying that he bought three to four soft drinks per day); PX 5 at 132–33 (Elizondo Soto testifying that he bought five or six soft drinks per day); PX 9 at 217 (Cinta Tegoma recalling that he bought four soft drinks per day); PX 11 at 276–77 (Garcia Dominguez saying that he bought four or five soft drinks every day); PX 13 at 341 (Morales Acosta testifying that he purchased three or four soft drinks per day).

[108] See PX 2; Tr. at 195–96 (Hernandez testifying that workers paid between $.75 and $1.00 for soda, and $1.50 for Monster and Red Bull); PX 19, page 809 (Pinon stating on an "Employee Personal Interview Statement" on the Department's letterhead that she charged $1.00 for soda and Gatorade, and $2.00 for Monster).

Hernandez could not provide all receipts for the beverages sold because Russel Marino, Jr. told him he did not need to keep such receipts.[109] PX 36, page 1141, is a July 2015 receipt for thirty-six cans of Coke, which Pinon and Hernandez purchased for thirteen dollars. Pinon said that she and Hernandez purchased the sodas and energy drinks from a Sam's Club in Deptford, New Jersey.[110] When determining the prices of soda and Gatorade WHI Perez perused the website for the Deptford, New Jersey Sam's Club.[111]

Respondent's Business, Generally

The same family has owned Respondent's farm for four generations.[112] Respondent is owned in equal parts by Joseph Marino, Russel Marino, Jr., Russel Marino—their father—and Harry Marino—their uncle.[113] Russel Marino, Jr. and Joseph Marino perform most of the day-to-day operations. (Id.) In 2014, Respondent's I-129 petition stated a "gross annual income of $7,500,000."[114]

Labor is "essential" to Respondent's business.[115] Although Respondent always used migrant labor, after 2014, Respondent decided to participate in the H-2A program.[116] In May 2015, the farmworkers picked asparagus. The asparagus harvest occurs within a six to eight week period.[117] The workers perform other tasks during the asparagus harvest.[118] In May 2015, Respondent needed the workers' labor and did not want them to leave.[119] It cost Respondent $1,000 to bring in each H-2A worker.[120] Respondent replaced the nineteen workers who left after the May 2015 argument with other H-2A workers.[121]

Rides

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109 See Tr. at 370–71.

110 See Tr. at 448–49; PX 19.

111 See Tr. at 647.

112 Tr. at 714–15.

113 See Tr. at 787–88.

114 Tr. at 822–24.

115 Tr. at 715.

116 See Tr. at 787–88.

117 See Tr. at 774.

118 See Tr. at 774–75.

119 Id.

120 See Tr. at 730.

121 See Tr. at 730–31.

JX 1 is the ETA Form 790 Job Order, which requested forty workers for the period of April 13, 2015 to October 10, 2015. It states, "[o]nce a week the employers will offer to provide (on a voluntary basis) free transportation to assure workers access to the closest store where they can purchase groceries."[122] However, Respondent either charged its farmworkers for transportation or did not offer such transportation.[123] Russel Marino, Jr. admitted the Respondent did not "formally" tell the farmworkers about transportation, but said "when the bus was getting ready to leave to go into the town, they said, okay, whoever wants to go, get on the bus, we're going to the town just like your contract says that every one of you have a copy of."[124]

Screens

The screens on the windows of Respondent's dormitory were ripped or missing.[125] The windows of Respondent's bathroom were also missing screens.[126] Some garbage cans did not have lids and WHI Perez noted the presence of flies around such lidless garbage cans.[127]

Water

Water was available to workers during mealtime.[128] The water had "a bad taste to it."[129] Hernandez recognized that, in the past, the water had a bad taste to it; however, Respondent replaced the filter and fixed the problem.[130] At first, the water in the fields was either missing or

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122 JX 1.

123 See Tr. at 27–28 (Maldonado testifying that Respondent charged its workers $10 for transportation costs for each shopping trip), 100–02 (Gustavo Perez's testimony), 146 (Cheguez recalling that Respondent charged $10 for transportation costs per shopping trip), 266 (Almanza stating that Respondent did not provide free transportation and charged the farmworkers $10 per trip), 303 (Almanza stating that the Marinos told him to talk to Hernandez about rides to the store), 337, 501–02 (WHI Perez stating that his investigation revealed that Respondent charged the farmworkers between $10 and $15 for rides to town).

124 Tr. at 765.

125 See Tr. at 201–03 (Hernandez's testimony); PX 28, pages 1049–55; Tr. at 323–28 (WHI Perez recalling the presence of flies in the dormitory).

126 See Tr. at 331; PX 28 pages 1046–47.

127 See Tr. at 332.

128 See Tr. at 281 (Almanza's testimony), 567 (WHI Perez's testimony), 719–20 (Russel Marino, Jr.'s testimony).

129 See Tr. at 23, 52 (Maldonado testifying that the water's taste made him buy beverages from Hernandez), 262 (Almanza's testimony), PX 9 at 216 (Cinta Tegoma testifying on deposition that water was not present in the fields).

130 See Tr. at 233–34.

dirty.[131] At the time of WHI Perez's first visit, water was available in the fields, and the water did not have a smell.[132] Respondent provided the farmworkers with potable water, although not at all times.

Worker Departure Forms

Following the May 2015 argument about the working and living conditions at Respondent's farm, Hernandez handed out worker departure forms to the nineteen farmworkers who participated in that conversation.[133] The worker departure forms were written in both English and Spanish.[134] The worker departure forms stated that the workers were voluntarily leaving due to personal issues, like a sick or dying loved one.[135] The worker departure forms misrepresented the true reason for the workers' departure.[136] The worker departure forms stated that Respondent offered the farmworkers workers additional work for the remainder of the contract, but Respondent offered no such work.[137] Before handing the worker departure forms to the farmworkers, Russel Marino, Jr. signed the forms; he stated at his deposition that the purpose of the worker departure forms was to "protect against . . . this lawsuit."[138]

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131 See Tr. at 19 (Maldonado's testimony), Tr. at 91 (Gustavo Perez stating that water was only "sometimes" available in the fields); 139–40 (Cheguez's testimony), PX 5 at 134 (Elizondo Soto's deposition), PX 3 at 73 (Cervantes Ramirez's testimony that water would run out by the afternoon); PX 9 at 216 (Tegoma's deposition testimony that water was not available in the fields). But *cf.* Tr. at 213 (Hernandez testifying that workers had access to water "everyday"); PX 11 at 274 (Dominguez stating that the fields had water).

132 See Tr. at 546, 553.

133 See Tr. at 108–10 (Gustavo Perez's testimony), 149 (Cheguez's testimony), 225 (Hernandez's testimony), 272–74 (Almanza's testimony); see, *e.g.*, JX 9.

134 See Tr. at 38, 776; see, *e.g.*, JX 8 at 89–150; JX 9.

135 See Tr. at 37 (Maldonado's testimony), 108–110 (Gustavo Perez's testimony), 149 (Cheguez's testimony), 225 (Hernandez's testimony), 272–74 (Almanza testifying that Hernandez gave the workers a form "and asked us to sign the paper because "there was no other choice" and "we couldn't do anything about it"), 409–10 (WHI Perez's testimony), 732–33 (Russel Marino, Jr. saying that he gave the workers "the option to check off the box that said they were returning home because of personal reasons"), and 769 (Russel Marino, Jr. recalling that he brought forms for the workers to sign stating that they were "resigning").

136 See Tr. at 39–40 (Maldonado's testimony that he left due to the problems he had "with my boss" who told him "we should leave" after the May 2015 argument), 109–10 (Gustavo Perez recalling that Hernandez told Respondent's workers to sign next to the box indicating that the workers needed to return to Mexico for personal reasons because "that was the best option so that we wouldn't have [visa] problems and they wouldn't either"), 149–50, 155–56 (Cheguez's testimony that Russel Marino, Jr. had already filled out the forms prior to distribution to the farmworkers so that the workers' "didn't have any problems when we returned back"; Cheguez signed the form "out of fear"), and 418–19 (WHI Perez's testimony that, based on his investigation, the forms "falsely reported that workers were leaving for personal reason when they were, in fact, leaving because they were terminated or for other circumstances").

137 See Tr. at 280 (Almanza's testimony), 150 (Cheguez stating that he wished to continue working because he had a six-month contract).

138 PX 15 at 475 (Russel Marino, Jr.'s deposition).

Russel Marino, Jr. testified that Theresa Ward, a manager with National Agricultural Consulting, created the form.[139] National Agricultural Consultants sent the false notification to the Department.[140] Ward advised Russel Marino, Jr. that the option was:

> the right thing to do for them for their future employment. Because fieldwork may not have been for them, they may have been able to do warehouse working or something else. And I didn't want to, you know, put a little mark on their form, saying that, okay, this guy can't -- I had to fire this guy. I didn't want to say that, not that I was firing them anyway. But I gave them the option to personal reasons [sic] for that reason just so in the future they wouldn't have any problem getting picked off a list for future work.[141]

Russel Marino, Jr. noted that the worker departure forms did not allow the farmworkers the possibility to suggest that the workers were fired.[142] He recognized, however, that "[a]s a technicality, I guess" the workers did not resign; "they were terminated."[143]

NARRATIVE FINDINGS OF FACT

Respondent is a large, family owned, agricultural producer located in southern New Jersey. Although Respondent always used migrant labor, 2015 was the first year that it decided to engage with the H-2A program. The job orders Respondent issued informed putative H-2A farmworkers that Respondent would provide the workers with kitchen access. Upon arrival at Respondent's dormitories, however, Respondent informed the farmworkers that rather than kitchen access, they could purchase a meal plan costing between $75 and $80 each week. Kitchen access was unavailable or otherwise denied. Along with the meal plan, Respondent sold the farmworkers drinks, including beer.

The farmworkers engaged in hard work, including, *inter alia*, the harvesting of asparagus and peppers. Potable water and clean bathroom facilities were only sporadically available, especially in the fields. The farmworkers were upset with these conditions and wanted Respondent to address their concerns. An argument occurred sometime in May 2015 between nineteen farmworkers and owners Russel Marino, Jr. and Joseph Marino and Respondent's foreman, Hernandez. This argument led directly to Respondent's firing of the nineteen workers. Respondent provided the affected farmworkers with worker departure forms that

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139 See Tr. at 730–31, 776–80; JX 8.

140 See Tr. at 409–10 (WHI Perez's testimony), 748 (Russel Marino, Jr. stating that he did not give the workers laid off in August 2015 a "choice" to stay because "work slowed down"), 753–54 (Russel Marino, Jr. discussed the contents of PX 39 at 1191, an August 21, 2015 email, sent by National Agricultural Consultants, copying Russel Marino, Jr., to the Department stating that the form listed "workers returned [home] for personal reasons").

141 Tr. at 733; see 781.

142 Tr. at 734.

143 Tr. at 748.

mischaracterized the reasons for their leaving as needing to return home to care for a sick or dying loved one. In August 2015, Respondent laid off another cohort of workers and had that group sign similar forms.

Respondent provided inadequate housing to the farmworkers. The dormitory included dirty bathrooms without hot water and screens on the windows, other windows with broken or missing screen, and uncovered garbage cans. Respondent transported the workers from the dormitory area to the fields in unsafe vehicles with unlicensed drivers.

After a full investigation, the Administrator found various violations of the Act, and assessed $351,775.90 in back wages and $212,250.00 in CMPs.

POSITIONS OF THE PARTIES

The Administrator's Brief

The Administrator argued that Respondent violated § 655.122(g), (p)(1), and (q), because it did not disclose the existence of the meal plan on the job order it provided to prospective H-2A workers; it otherwise did not provide kitchen access to the workers. See Administrator's Brief at 22 (citing JX 1 at 2). Respondent also allegedly made impermissible deductions to the farmworkers' pay when it charged for meals. Id. The Administrator wrote that, to fulfill its duties under the job order, Respondent must have actually "furnish[ed]" kitchen access; the fact that Respondent did not affirmatively deny kitchen access to any employees' request is not enough. See Administrator's Brief at 24–25 (citing 20 C.F.R. § 655.122(g)).

As a corollary, the Administrator argued that because Respondent did not provide its farmworkers with kitchen access, it was responsible for providing workers with meals free of charge. See Administrator's Brief at 26. Additionally, because Respondent did not disclose the required meal charges, it violated § 655.122(g). It violated § 655.122(q) because it omitted from the job offer "one of the 'provisions required' by § 655.122(g), namely disclosure of the meal charges." (Id.) That Hernandez operated the meal plan does not absolve Respondent from liability, because Respondent was still the party responsible for disclosing the meal charges, which it failed to do. Allowing an employer to deflect liability in this way would open a loophole, which would "eviscerate" other aspects of the program's requirements, such as "prohibitions on excessive meal charges (§ 655.173(a)) and charges that include a profit (§ 655.122(p)(2)), and the obligation to provide [farmworkers] free housing (§ 655.122(d))." Id. n.16.

The Administrator continued, stating Respondent violated the regulations through the actions of its "agent Hernandez." See Administrator's Brief at 27. In order not to violate the regulations, the job order must have disclosed any "deductions" Hernandez made for the meal plan. See id. (citing § 655.122(q)). The law allegedly makes no distinction between a deduction from wages and "shifting to the employee a cost that the employer could not lawfully directly deduct from wages." See id. (citing In re: Weeks Marine, Inc., ARB No. 12-093, 2015 WL 2172482, at *4 (Apr. 29, 2015)).

The Act's protections for migrant laborers do not exempt agricultural employers from common law agency principles. Therefore, the Administrator argued, Hernandez's act of charging workers for the meal plan was equivalent to Respondent charging its workers for the meal plan. See Administrator's Brief at 29 (citing Castillo v. Case Farms of Ohio, Inc., 96 F. Supp. 2d 578, 593 (W.D. Tex. 1999); Restatement (Third) of Agency ("Restatement") § 6.01) ("This section states the basic principle that when an agent enters into a contract on behalf of a disclosed principal, the principal and the third party are parties to the contract."). The Administrator stated that because Hernandez had either "actual authority," "apparent authority," or both, to act on Respondent's behalf to charge Respondent's farmworkers for the meal plan, Respondent violated "20 C.F.R. § 655.122(g), (p)(1) and (q) by constructively deducting the meal charges from workers' wages, without having disclosed the meal plan charges in the Job Orders." See Administrator's Brief at 30.

Section 2.01 of the Restatement posits that actual authority exists "when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." See Administrator's Brief at 29. Due to the kitchen's size, Respondent's "longstanding practice" was to require farmworkers to purchase meal plans from Hernandez. See Administrator's Brief at 30 (citing Tr. 176–77, 186–87, 738, 742–43, 808). Respondent showed its authority over Hernandez by having Hernandez attend Departmental training sessions concerning meal plans, and following up with Hernandez to ensure compliance. See Administrator's Brief at 30–31 (citing PX 15 at 401–03; Tr. 51, 174–75, 773 (orientation), 187 (follow-up), 776).

Apparent authority exists when "a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." See Administrator's Brief at 30–32 (Restatement § 2.03). The Administrator argued that Respondent's workers held a reasonable belief that Hernandez had apparent authority to act on Respondent's behalf for several reasons. First, Russel Marino, Jr. told the workers that Hernandez would feed them "three squares a day". In addition, the workers recorded their payment for the meal plan using a form bearing Respondent's name. Finally, "Hernandez was the intermediary between workers and [Respondent] and [Hernandez] was their supervisor in every aspect of their lives." See Administrator's Brief at 32 (citing PX 7 at 173; PX 15 at 401–03; PX 17-2 at 799–800, Tr. at 51, 61, 172–75, 182, 211, 236–37, 773, 825).

The H-2A regulations prohibit profiteering, because such actions would improperly reduce workers' wages. See Administrator's Brief at 33 (citing 20 C.F.R. § 655.122(p)(2)). An H-2A employer or "any affiliated person" may deduct wages, but "all deductions must be reasonable." 20 C.F.R. § 655.122(p)(1), (2).

> The wage requirements of § 655.120 will not be met where undisclosed or unauthorized deductions, rebates, or refunds reduce the wage payment made to the employee below the minimum amounts required under this subpart, or where the employee fails to receive such amounts free and clear because the employee kicks back directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee.

20 C.F.R. § 655.122(p)(2). The term "'affiliated person' includes but is not limited to . . . any person acting in the employer's behalf or interest (directly or indirectly), or who has an interest in the employment relationship." See Administrator's Brief at 33 (quoting WHD Bulletin No. 2012-3). If a prohibited charge "reduce[s] the wage payment . . . below the minimum amounts required," an employer owes back wages to any effected farmworkers. See Administrator's Brief at 33 (citing 20 C.F.R. § 655.120 § 655.122(l), (p)(2); 29 C.F.R. § 501.16(a)(2)).

The governing regulations prohibit any charge or deduction that either: (1) "includes a profit to the employer or to any affiliated person," 20 C.F.R. § 655.122(p)(2); or (2) involves items sold in violation of any federal, state, or local law, see 29 C.F.R. § 531.31 (which § 655.122(p)(2) incorporates by reference). See Administrator's Brief at 33–34. The Administrator continued that it is Respondent's duty to prove that the products sold did not include a profit or were otherwise reasonable. See Administrator's Brief at 33 (citing Ortiz v. Paramo, No. 06-3062, 2008 WL 4378373, at *6 (D.N.J. Sept. 19, 2008)).

The Administrator argued that Hernandez fits the definition of an affiliated person. See Administrator's Brief at 34–35. As such, the regulations prohibit Hernandez from profiteering from Respondent's workers; neither Respondent nor Hernandez kept receipts to determine whether Hernandez obtained any profit. Id. (citing Tr. at 209, 361, 371, 452–53). Hernandez also sold beer without a license. See Administrator's Brief at 36 (citing N.J. Stat. Ann. § 33:1-2(a) (requiring a license to sell beer in New Jersey)).

The Administrator asserted that Respondent owes $209,047.69 in back pay to the summer 2015 workers. See Administrator's Brief at 38. The $209,047.69 figure represents the full amount of improper charges made to Respondent's farmworkers for meals and drinks. Back pay for the full amount charged is appropriate, the Administrator asserted, because the regulations require disclosure of meal costs regardless of whether an employer profited, so absent a full back pay requirement, an employer would have no incentive to disclose meal costs. See Administrator's Brief at 38–39 (citing In re Global Horizons, Inc., No. 2010-TAE-00002, slip op. at 2 (OALJ Dec. 13, 2011). The job order Respondent issued told the prospective farmworkers that Respondent would pay either $11.29 per hour or the piece rate, whichever is greater. The piece rate or $11.29 per hour became the "minimum amount[] required" under 20 C.F.R. §§ 655.120, 122(l), and (p)(2). Therefore, Administrator argued, "any improper charges to workers pushed their wages below the promised rate." See Administrator's Brief at 38 n.21.

Concerning drinks, because Hernandez did not keep records as to the costs of and profits from the drinks he sold to Respondent's workers, such costs should not offset the back pay award. See Administrator's Brief at 39–40 (citing various cases arising under the Fair Labor Standards Act ("FLSA")). Calculating back wages for drinks is appropriate here, the Administrator continued, because the water in the fields tasted bad, the work was long and hard, and the workers "had no practical alternative." See Administrator's Brief at 40–41.

When an H-2A employer fails to keep records of deductions, the Anderson v. Mt. Clemens Pottery Co. burden-shifting framework applies. See Administrator's Brief at 44 (citing Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680 (1946); Hart v. Rick's Cabaret Int'l, Inc., 73

F. Supp. 3d 382, 390 (S.D.N.Y. 2014)). The Administrator argues here that, because the workers had no legal obligation to document such expenses, and were otherwise unable to document the expenses while working in the fields, the burden should fall on Respondent to account for all charges incurred. See Administrator's Brief at 44–45 (citing Tr. 22, 77–78, 209).

The Mt. Clemens standard requires the Administrator to produce sufficient evidence to show the amount of the improper charges or deductions "as a matter of just and reasonable inference." See Administrator's Brief at 45 (citing Weeks Marine II, slip op. at 19). At that point, the burden switches to Respondent to negate the reasonableness of any inferences drawn from the Administrator's evidence. See id. (citing Hart, 73 F. Supp. 3d at 390). If the Respondent is unable to negate the reasonableness, a court may award damages, though approximate. See Administrator's Brief at 45–46 (citing Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 688 (1946)); In re Greater Mo. Med. Pro-Care Providers, Inc., ARB No. 12-015, 2014 WL 469269 (ARB Jan. 29, 2014), at *16). Because the Administrator's evidence is reasonable, and Respondent is unable to negate that reasonableness, the undersigned should uphold the back wage calculations for drinks Respondent sold in 2015. See Administrator's Brief at 46.

The Administrator also calculated that Respondent owed $128,285 in back wages to 139 workers for the unlawful meal deductions. See Administrator's Brief at 46–48. The Administrator discussed the calculations leading to the $128,285 back wage figure. PX 2 is a document the Administrator created to show Respondent's summer 2015 weekly payroll records. Based on these records, the Administrator determined that Respondent employed 148 separate workers during the 2015 growing season for at least one week. See Administrator's Brief at 46. Except for three weeks where Respondent charged $80 per week, the Administrator determined that Respondent charged $75 per week for the meals. See Administrator's Brief at 47 (citing Tr. at 443.) The Administrator reduced the back wages for those workers who did not pay for the meal plan. See Administrator's Brief at 47 (citing Tr. at 444–45.) The Administrator noted that the parties stipulated that the meal plan cost between $75 and $80 per week and that 139 workers paid for the meal plan each week. See Administrator's Brief at 47. The Administrator called the $128,285 back wage figure a "conservative reconstruction of the back wages owed." See Administrator's Brief at 48.

The Administrator further determined that Respondent owed $71,790.08 in back wages for improper soft drink charges. See Administrator's Brief at 48–51 (citing PX 2 at 32, 61). Respondent's farmworkers allegedly purchased an average of 4.42 drinks per day and paid $1.25 per drink, on average, for a total of $38.68 per week. See Administrator's Brief at 48 (citing Tr. at 427–28, 439, 443, 624). Hernandez's testimony allegedly supports the Administrator's determination that workers paid on average $1.25 per drink. See Administrator's Brief at 51 (comparing Tr. at 195–96, with PX 19 at 809). Hernandez did not keep records of the number of drinks the farmworkers purchased, and the Administrator said that Hernandez's estimate of three to four drinks per day was low and less credible than the workers' testimony. See Administrator's Brief at 49 (citing Tr. at 195, 209; Appendix A to Administrator's Brief).

The Administrator also sought back wages for $8,972.61 for the beer Hernandez sold to the farmworkers. See Administrator's Brief at 51–54. Hernandez allegedly sold beer for two

dollars, $1.30 of which was profit. See Administrator's Brief at 51. The Administrator also argued that "almost all" workers bought beer. See Administrator's Brief at 52 (citing Tr. at 98, 145; PX 3 at 83; PX 7 at 202; PX 19 at 308; PX 9 at 223). The workers bought beer at an average rate of three and three-quarter cans per week. See Administrator's Brief at 52 (citing PX 7 at 180-81; PX 13, 345; PX 5 at 142; Tr. 25–26; PX 3 at 80–82; PX 11 at 281; Appendix C to Administrator's Brief). A local wholesaler sold beer at seventy cents per can. See Administrator's Brief at 53–54 (citing PX 27 at 1044; PX 32 at 1077; Tr. at 189, 625–27).

In addition to back wages, the Administrator assessed $198,450 in CMPs for unlawful deductions for undisclosed meals and drinks sold at a profit or in violation of state law, and explained how it assessed such penalties. See Administrator's Brief at 54–59. At the time of the assessment, the governing regulations allowed the Administrator to assess $1,500 in civil money penalties for "[e]ach failure to pay an individual worker properly or to honor the terms or conditions of a worker's employment." See Administrator's Brief at 54 (quoting 29 C.F.R. § 501.19(a),(c)(2016). The regulations also enumerate the following paraphrased mitigating factors:

> (1) previous history of violations, (2) number of workers affected by the violations, (3) the gravity of the violations, (4) efforts made in good faith to comply, (5) explanation from the person charged with the violations, (6) commitment to future compliance, and (7) the extent to which the violator achieved a financial gain or the potential financial loss or potential injury to the workers.

§ 501.19(b).

The Administrator argued that she reasonably considered the evidence of record and applied the foregoing mitigation factors concerning the allegedly unlawful deductions for the meal plan and drinks. See Administrator's Brief at 55 (citing District Director Rachor's testimony at Tr. at 849–54). Due to the "seriousness of the violation", concerning the false statement in the job order about kitchen access, the Administrator initially assessed a $1,500 CMP for each of the 147 affected workers. The Administrator did not assess a second set of CMPs for each worker for the purported drink violations. See Administrator's Brief at 56. Rather, the Administrator used her discretion to apply one CMP for all violations §§ 655.122(g), (p), and (q). The Administrator reduced the CMP based on mitigation factor one, because Respondent did not have a history of H-2A violations. See Administrator's Brief at 56–57. Thus, the Administrator assessed a $1,350 CMP for the 147 affected farmworkers. The Administrator discussed why she did not apply the remaining mitigation factors. See Administrator's Brief at 57–58 (noting that the violation injured a large volume of workers, involved false statements to employees and so constituted a serious violation, was committed knowingly, and caused financial loss to the farmworkers).

The Administrator imposed additional CMPs and back pay because Respondent allegedly "terminated or constructively discharged" twenty-four workers, leaving them with a "wage shortfall." See Administrator's Brief at 59. The twenty-four workers allegedly discharged in

violation of the three-fourths guarantee[144] included four workers terminated in August 2015 without cause, nineteen workers discharged in May 2015, and one worker for whom Respondent failed to notify government agencies of the reasons for his departure in June 2015.[145] See Administrator's Brief at 60–61. Concerning the first set of workers, Respondent has conceded it violated the three-fourths guarantee and owes that cohort $4,386.18 in total back pay. See Administrator's Brief at 63 (citing PX 1; Tr. at 426, 639, 642–44). The regulations only relieve employers from the three-fourths guarantee when a worker "voluntarily abandons employment" or is "terminated for cause," and the employer also timely and properly notifies the appropriate federal agencies. See Administrator's Brief at 62 (citing § 655.122(n)).

The Administrator argued that, despite what Respondent communicated to the Department on the worker departure forms, Respondent terminated the nineteen workers that left in May 2015. See Administrator's Brief at 63–64 (citing Tr. 39, 65, 80–81, 107–08, 125, 129; PX 3 at 101; PX 9 at 232–33, 258; PX 11 at 305). The Administrator asserted that Respondent could not defend itself through its "false notifications to government agencies" concerning the worker departure forms the workers signed stating that they had sick or injured family members. See Administrator's Brief at 64 n.43 (citing See JX 8 at 89–95, 102, 106, 107; PX 3-1 at 115; see also JX 8 at 98–100).

Even if Respondent did not terminate the nineteen workers in May 2015, the Administrator argued in the alternative that Respondent constructively discharged the workers. See Administrator's Brief at 64–68. Respondent constructively discharged the workers based on the "intolerable work and living conditions that they faced." See Administrator's Brief at 64 (citing Chertkova v. Conn. Gen. Life Ins. Co., 92 F.3d 81, 89 (2d Cir. 1996)). Constructive discharge operates under an objective standard: "Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" See Administrator's Brief at 65 (quoting Pa. State Police v. Suders, 542 U.S. 129, 141 (2004)). The Administrator said that the asparagus picking conditions were unendurable, because Respondent required the pickers to work in a crouched position for ten to twelve hours most days without rest. See Administrator's Brief at 65 (citing Tr. 17, 90–91, 139, 238–39, 257; PX 3 at 68–71). The field conditions were also intolerable as, in May 2015, the fields lacked bathrooms or were in disrepair. See Administrator's Brief at 66 (citing Tr. 18–19, 91, 139; PX 3 at 91; PX 9 at 216, 220) and Administrator's Brief at 67 (citing PX 5 at 142–43; Tr. at 39, 103, 163). At times, the fields also lacked drinking water. See Administrator's Brief at 66 (citing Tr. 19, 139; PX 5 at 19; PX 9 at 216; PX 3 at 73).

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144 "The employer must guarantee to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total period beginning with the first workday after the arrival of the worker at the place of employment or the advertised contractual first date of need, whichever is later, and ending on the expiration date specified in the work contract or in its extensions, if any." 20 C.F.R. § 655.122(i)(1).

145 The name of the lone worker is Jose Islas Larraga. See Administrator's Brief at 73–74. Respondent owes back pay to Islas Larraga in the amount of $2,751.94 because, contrary to the regulatory requirements, Respondent never provided notice that Islas Larraga no longer worked for Respondent. Id. (Tr. 419, 436; PX 39 at 1189-1216 (Islas Larraga absent from full set of notifications)).

The Administrator next described her back wages calculations and argued that such calculations were "reasonable." See Administrator's Brief at 68. The Administrator relied on Respondent's payroll records at PX 1 and PX 2, and noted that the undersigned admitted both exhibits as "summaries of voluminous records pursuant to Federal Rule of Evidence 1006 and 29 C.F.R. § 18.1006." See Administrator's Brief at 68 n.47 (citing Tr. at 584–85, 968).

First, the Administrator determined the "total period," § 655.122(i)(1), on which Respondent based its three-fourths guarantee. The Administrator determined the start date of the first weekly pay period in which a worker was paid in 2015. See Administrator's Brief at 69 (citing Tr. at 428; PX 1.) The Administrator calculated the length of the workdays (seven hours on weekdays and five hours on weekends), and used the length of the workdays to determine the ending date of the guarantee period (October 10, 2015). See Administrator's Brief at 69 (citing Tr. 420, 523; see JX 1 at 1, 9 11; JX 3 at 42, 50). The Administrator then found the number of weeks (expressed as hours) from the start of the first pay period to the end of the guarantee period. See Administrator's Brief at 69 (citing Tr. at 428; PX 1).

To yield the data contained in the "total workday hours between first pay period and contract end" column of PX 1, the Administrator multiplied the "weeks" column and the "job offer hours per week" column; the Administrator then subtracted the "federal holiday(s) hours" column from this product. See Administrator's Brief at 70. The Administrator created the three-fourths guarantee column by multiplying the "total workday hours between first pay period and contract end" column by three-fourths. Id. The "variance" column shows the difference between the "3/4 guarantee" column and the "hrs wrked" column. Id. To determine the amount of back pay owed, the Administrator multiplied the figure in the "variance" column by $11.29, the minimum hourly wage the Respondent pledged to pay its farmworkers in 2015. See Administrator's Brief at 70. In this way, the Administrator calculated both the number of hours for each worker that Respondent violated the three-fourths guarantee and the back pay due. See id. Because Respondent did not keep any records of hours offered to the employees, in violation of § 655.122(j), the Administrator argued that the undersigned should not use hours offered as a relevant factor. See Administrator's Brief at 71–72 (citing In re: Global Horizons, Inc., No. 2005-TAE-00001 slip op. at 40–41, 63, 77, 88–92) ("Global Horizons III").

The Administrator also assessed a $1,350 CMP for Respondent's alleged violation of the three-fourths guarantee concerning twenty-four of the affected farmworkers. See Administrator's Brief at 74–75 (citing Tr. at 856–57 (allowing a ten percent reduction for Respondent's lack of H-2A history, but finding that reductions were not warranted for the number of workers involved, the gravity of the situation, the commitment for future compliance, or financial gain to the Respondent), 935–37). Mitigation factors four and five do not apply, because Respondent's hours tracking program did not track hours offered and because Respondent continues to deny liability for some of the three-fourths guarantee issues. Id.

The Administrator assessed an additional $1,350 CMP for Respondent's alleged violation of 29 C.F.R. § 501.5, which "prohibits any 'person' from 'seek[ing] to have' any H-2A worker waive rights pursuant to 20 C.F.R. part 655, subpart B," including the three-fourths guarantee at § 655.122(i). See Administrator's Brief at 75–78. The Administrator referred to this as a "coercion violation." See Administrator's Brief at 78. Respondent provided the workers who

left in May and August worker departure forms stating that the workers "resign[ed]" their jobs. See Administrator's Brief at 76 (citing Tr. 83, 108–110, 149, 225, 274, 732, 768–69). Respondent allegedly violated 29 C.F.R. § 501.5 by first requiring the workers to sign worker departure forms stating that they resign; second, by having the workers falsely state that they have ill or deceased relatives. See Administrator's Brief at 76. Russel Marino, Jr. stated at deposition that the purpose of the worker departure forms was to protect against litigation. See Administrator's Brief at 77 (citing PX 15 at 475). Respondent's agent, National Agricultural Consultants, also sent false notifications to the Department. See id. (citing PX 39 at 1191–95, 1198–1200; Tr. 409, 748, 753–54). The Administrator stated that Respondent is responsible for its agent's actions. See Administrator's Brief at 77 (citing JX 2 at 31, 39–41; JX 4 at 70; 20 C.F.R. § 655.135). On page 754 of the hearing transcript, the Respondent allegedly conceded the August workers were terminated without cause. Id. The Administrator considered all seven mitigation factors, and applied only the first one due to Respondent's lack of past noncompliance. See Administrator's Brief at 77–78 (citing Tr. at 858–61.)

The Administrator assessed $3,600 in CMPs for five alleged violations of 20 C.F.R. § 655.122(d)(1)(i), which concerns housing violations. See Administrator's Brief at 78–86. Specifically, the Administrator assessed the following CMPs:

> $900 for the unscreened bathroom windows; $900 for the faulty dormitory screen windows and doors; $900 for the uncovered garbage cans; $450 for the hot water shortage; and $450 for the unclean mattresses on the floor.

See Administrator's Brief at 84 (citing JX 10 at 160; Tr. 861–63, 938–39).

Because Respondent's dormitories were built prior to 1980, the applicable regulations are the Employment and Training Administration Housing Standards codified at 20 C.F.R. §§ 654.404–654.417. Section 654.408(a) mandates that "all outside openings . . . be protected with screening of not less than [sixteen] mesh." See Administrator's Brief at 78 (citing 20 C.F.R. § 655.122(d)(l)(i)). The Administrator argued that Respondent violated this requirement because its dormitory contained ripped or missing window screens. See Administrator's Brief at 78–79 (citing Tr. at 202–03, 324, 330–31; PX 28 at 1046–47). The ETA regulations require that "[a]ll screen doors . . . be tight fitting, in good repair, and equipped with self-closing devices." 20 C.F.R. § 654.408(b). The Administrator averred that Respondent violated this requirement, as well; some screens were ripped and some doors did not close. See Administrator's Brief at 80–82 (citing PX 28 at 1048–52; Tr. 324–28). Respondent is obliged to maintain housing in compliance with federal standards throughout the growing season. See Administrator's Brief at 81 (citing JX 2 at 30–31, 39; JX 4 at 69–70, 78).

Concerning garbage receptacles, the ETA regulations require that Respondent maintain "fly-tight, clean containers in good condition" near the dormitory. 20 C.F.R. § 654.414(a). The Administrator argued that the condition of Respondent's refuse containers violated the regulations. It even kept open piles of refuse near the dormitory. See Administrator's Brief at 82 (citing Tr. at 324, 329, 332, 603–04; PX 28 at 1053–55; PX 33 at 1094).

Another alleged violation of 20 C.F.R. § 655.122(d)(1)(i) stemmed from Respondent's failure to provide its workers with adequate hot water for bathing and handwashing. See Administrator's Brief at 82–83. Section 654.412(a) requires Respondent to provide its workers with bathing and hand washing facilities with both hot and cold water. Two of the sinks in the bathroom were broken and workers went without hot water at times. See Administrator's Brief at 83 (citing Tr. 30, 103–04, 199–201, 330; PX 7 at 189; PX 11 at 288).

Finally, the Administrator alleged that Respondent failed to provide certain farmworkers with clean mattresses. See Administrator's Brief at 83–84 (citing 20 C.F.R. § 654.416(a)–(b)). The Administrator found that two workers were sleeping on mattresses on the ground in an unsanitary location. See id. (Tr. 324, 329–30; PX 7 at 187–88; PX 28 at 1056).

For each of the five housing violations, the Administrator considered all of the mitigation factors enumerated at § 501.19(b) to reduce the penalty below the $1,500 maximum. See Administrator's Brief at 84–86 (citing Tr. at 862–66, 937–45). The Administrator applied the first, sixth, and seventh mitigating factors. See Administrator's Brief at 84–85. Specific to the bathroom, dormitory screen, and garbage violations, the Administrator further reduced the CMP because there was no evidence that any worker contracted a communicable disease due to the cited issues. See Administrator's Brief at 85 (citing Tr. at 864). For the hot water and mattress violations, the Administrator also applied mitigation factors three, four and the final factor. Id. (citing Tr. at 865–66, 941). Additionally, mitigation factor two applied to the mattress violation, and mitigation factor five applied to the hot water violation. Id. (citing Tr. at 456, 865, 937, 941).

The Administrator assessed a $7,500 CMP for Respondent's alleged unsafe transportation of farmworkers in violation of § 655.122(h)(4). See Administrator's Brief at 86–90. Twenty C.F.R. § 655.122(h)(4) requires "[a]ll employer-provided transportation" to "comply with all applicable Federal, State or local laws and regulations." The Administrator first cited Respondent for the use of unlicensed drivers. The laws of the State of New Jersey prohibit driving on "public highways" without a driver's license. See Administrator's Brief at 86 (citing N.J. Stat. Ann. § 39:3-10). Additionally, the H-2A regulations require drivers to hold a "valid permit qualifying the driver to operate the type of vehicle driven by him in the jurisdiction by which the permit is issued." Id. (citing 29 C.F.R. § 500.105(b)(1)(iii) (incorporated by reference in 20 C.F.R. § 655.122(h)(4)). New Jersey also prohibits the transportation of migrant farmworkers by drivers who are not licensed in the United States or Canada. See Administrator's Brief at 86–87 (citing N.J. Admin. Code § 13:21-13.2). Here, the Administrator avers that of the five drivers interviewed by WHI Perez, two had Mexican driver's licenses, one had an expired Mexican driver's license, and two had no licenses, whatsoever. See Administrator's Brief at 87 (citing 383–400; PX 30 at 1064–66, 1070–71).

In addition to the purported driver's license issue, the Administrator alleged that CMPs are due because Respondent operated vehicles with worn tires and one vehicle had a broken rear tail light. See Administrator's Brief at 88–89 (citing Tr. 404–06; PX 29 at 1057). This broken tail light showed that Respondent was in violation of both federal laws and state laws. See id. (citing 29 C.F.R. § 500.105(b)(3)(ii); 49 C.F.R. § 393.11; N.J. Stat. Ann. § 39:3-61(a)). Three of the buses had worn tires. See Administrator's Brief at 88–89. The Administrator argued that the

tires fell below minimum federal and state standards. Such standards prohibits the operation of vehicles with "tires which have been worn so smooth as to expose any tread fabric or which have any other defect likely to cause failure." Id. (citing 29 C.F.R. § 500.105(b)(3)(v); N.J. Admin. Code § 13:21-13.11(b)). The Administrator said that the investigator used "a common sense instrument," a pen, to illustrate the depth of the tread. See Administrator's Brief at 89.

The Administrator argued that it was reasonable for the Administrator to impose CMPs, as follows: $750 for each of three bald tires, $900 for each of five unlicensed drivers, and $750 for the broken rear turn signal. See Administrator's Brief at 89–90 (citing JX 10 at 160; Tr. 867, 870–72). The Administrator reduced the CMPs in light of the seven mitigation factors at § 501.19(b). See id. The Administrator applied the first, second, sixth, and seventh mitigation factors to each of the transportation violations; it did not apply the fourth or fifth factors. Id. The Administrator found the third mitigation factor applicable to the tire and rear turn signal issues, but not to the unlicensed drivers. Id.

The Respondent's Brief

In its "statement of the case," Respondent recognized that the Administrator assessed "nearly $600,000" in back wages and CMPs for the 2015 growing season. See Respondent's Brief at 4. Three-fourths of the back wages relate to allegations of Employer's failure to comply with the requirements at 20 C.F.R. § 655.122(g) (*i.e.*, meal charges); $135,000 in back wages relates to the allegations of Employer's violations of the three-fourths guarantee. The remaining assessment involves various CMPs. Id. Respondent professed its "innocence" to such "charges" and asked the undersigned "to dismiss the claims outright or, at the very least, significantly reduce the amounts requested." Id. Respondent noted that the penalties "dwarf those" assessed in the Global Horizons cases, 2005-TAE-0001 and 2010-TAE-0002, which involved "rampant wage theft" and employers receiving kickbacks from the workers. Id. Respondent asked the undersigned to "look past the overheated and intentionally outrageous rhetoric from the Administrator and consider the testimony of the workers themselves and the pure facts of the case, and then to dismiss these claims and allow this farm to put this nightmare behind it and go back to producing food." See Respondent's Brief at 7.

Concerning meals, Respondent argued that many of the farmworkers never asked to use the kitchen facilities, and Respondent never denied them permission. See Respondent's Brief at 7–8 (citing 50–51, 176, 213–14). Respondent argued that the hearing testimony was "inconsistent" as to the number of workers who could cook at once or whether it was feasible to cook in shifts. Id.

Respondent's farmworkers paid Hernandez, not Respondent. Hernandez took a loss on the meal plans early in the season and recouped it later. See Respondent's Brief at 8 (citing Tr. at 234–37). Hernandez used any surplus from the meal plan to purchase food, pay the kitchen staff, and to buy additional appliances for the kitchen. Id. Respondent did not "profit based on what the workers did or did not pay [Hernandez]." Id.

Respondent continued that the Administrator's case relies on the position that the inaccurate job order misled Respondent's farmworkers. See Respondent's Brief at 9–12.

Respondent countered that some of the workers still would have worked if the job order had described the meal charge and otherwise did not object to the meal plan. See Respondent's Brief at 9 (citing Tr. at 62). The Administrator allegedly failed to show that "all" of the farmworkers would have made a different decision if Respondent had disclosed the meal plan in the job order. See Respondent's Brief at 10 (emphasis in the original).

Respondent argued that the regulations do not disclose a remedy for "non-disclosure of meal charges." Id. Respondent attempted to distinguish the current case from the Global Horizons case, where "the employer itself collected the meal charge, purchased the food, and provided the meals to the [farmworkers]." See Respondent's Brief at 10 (citing 2010-TAE-00002 (Dec. 17, 2010) (Order on Part. Summ. Dec. at 8)). Respondent quoted from Global Horizons for the principle that an employer profiting from meal charges is equivalent to paying the employees below-market wages. Id. Because Respondent did not profit from the meal charges, and Respondent did not reduce the farmworkers' wages below market level, the rationale applied in Global Horizons does not control. See Respondent's Brief at 10–11. Here, Respondent neither deducted money from the farmworkers' paychecks, nor did the farmworkers pay Respondent for meals. See Respondent's Brief at 11. Thus, "the integrity of the wage setting process remain[ed] perfectly intact." See Respondent's Brief at 12. Respondent again compared the current case to Global Horizons, where the administrative law judge granted summary decision in favor of the employer because "there [was] no indication that the Company in fact exploited the workers . . . by overcharging for meals." See Respondent's Brief at 12–13 (citing Global Horizons, at 9). Because Respondent "had nothing at all to do with the preparation and sale of the food," and because Respondent did not profit from the meal plan, Respondent argued that Global Horizons did not provide controlling authority. See Respondent's Brief at 13.

The Administrator's argument that Hernandez acted as Respondent's agent "makes no sense," according to Respondent. See Respondent's Brief at 13–16. Agency theory does not apply to a breach of Respondent's contract with the government and the farmworkers. See Respondent's Brief at 13 (citing Young v. Bethlehem Area Vo-Tech Sch., 2007 U.S. Dist. LEXIS 13531, *39 (E.D. Pa. Feb. 28, 2007) for the principle that *respondeat superior* does not apply in breach of contract claims)). Hernandez and Respondent were not the farmworkers' joint employers, either. See Respondent's Brief at 14–15 (discussing Ramos Ortiz v. Paramo, Civ. Action 06-3062, 2008 U.S. Dist. LEXIS 72387 (D.N.J. Sept. 19, 2008). Because Hernandez did not fit under the regulatory definition of the term "employer," 20 C.F.R. § 655.103(b), the Administrator allegedly could not show that Respondent "received any payments from workers for meals nor for anything else." See Respondent's Brief at 16. Such payments went to Hernandez "in his individual capacity." Id. Respondent did not direct Hernandez to collect the money, did not approve of Hernandez's actions, and Respondent did not "even [know] that this was happening." Id. Thus, the Administrator is unable to attribute any "employer-agent theory" of liability to Hernandez.

Respondent continued that Hernandez's meal plan was "reasonable." See Respondent's Brief at 16–18 (citing 80 FED. REG. 9482 (Feb. 23, 2015)) for the principle that the "DOL-allowed daily meal charge for H-2A workers is $83.02 per week). Repayment of "100% of the meal charges is not warranted" here because it "vastly overstates any claimed 'harm' to the

workers in 2015."[146] See Respondent's Brief at 16. Additionally, Respondent argued that but for the meal plan, the workers would still have to pay their own money and spend their own time preparing their food. Id. According to the U.S. Department of Agriculture, the weekly cost of food ranges from $43.10 to $86.30. Id. Respondent requested "credit for the full amount" of what the workers would have paid if they prepared their own food. See Respondent's Brief at 17–18.

Respondent continued that "absolutely nothing in the H-2A regulations" supports the Administrator's decision to charge CMPs and back pay concerning the drinks and beer sold to the farmworkers. See Respondent's Brief at 19. Respondent said that water was available "at all times" in the fields. Id. (citing Tr. at 236–37, 265). The water was tested for potability early in 2015 and passed inspection. Id. (citing Tr. at 717–18). Hernandez sold soft drinks and beer to the farmworkers, but no money transferred to Respondent; Respondent did not run a company store. See Respondent's Brief at 19–20 (citing Tr. at 162, 561). "Nothing about [Hernandez's] drink sales had any impact on [Respondent's] bottom-line, either profit or loss." See Respondent's Brief at 20. Respondent emphasized that WHI Perez said that "the workers weren't purchasing the drinks from [Respondent]." Id. (citing Tr. at 561.) WHI Perez, according to Respondent, was unable to explain why the Administrator required Respondent to remit the full costs of non-alcoholic drinks, but only Hernandez's profit from the beer. Id. (citing Tr. at 566.) Respondent reiterated that the H-2A regulations do not require free soft drinks and asked the undersigned to dismiss all back pay and CMPs based on the drinks Hernandez sold to the farmworkers. See Respondent's Brief at 21.

Respondent called WHI Perez's back wage calculations "creative." See Respondent's Brief at 21–22. The Administrator allegedly had an "unreliable estimate" of the amount paid to Hernandez for the drinks, because the estimate relied on "post hoc recollections." Id.; see Respondent's Brief at 22 n.6 ("Investigator Perez's use of spreadsheets and calculations implies a degree of precision that is not supported by the underlying information on which his calculations rest."). The Administrator also relied on prices obtained from Costco, even though the record establishes that Hernandez shopped at Sam's Club. See Respondent's Brief at 22 (citing Tr. at 430, 508–09, 627). Additionally, the Administrator used prices for Coors Light when "nobody bought" it. See Respondent's Brief at 22–23.

The Respondent recognized that the Administrator assessed two separate three-fourths guarantee violations against Respondent. One violation involved the group of nineteen workers who left in May 2015; one involved a group who Respondent "let go in August after wet weather and bacteria ruined the pepper harvest." See Respondent's Brief at 23.

Concerning the former group, Respondent argued that voluntary abandonment of work voids the three-fourths guarantee. See Respondent's Brief at 23–28. As Respondent put it, the workers decided together that harvesting asparagus was "more difficult than they wished, [and] stopped working *en masse*." See Respondent's Brief at 23. Because the asparagus harvest

[146] Respondent further requested application of the doctrines of estoppel and laches, because the Administrator knew of the meals situation on July 21, 2015, but did not "raise any concerns" until early 2016. See Respondent's Brief at 18–19.

would otherwise be ruined, Joseph Marino and Russel Marino, Jr. pleaded for the workers to stay. Id. Respondent noted witness testimony that the asparagus crop was difficult to harvest. See Respondent's Brief at 24–25 (citing Tr. at 49, 50, 122–16, 723–27, 809–12). Additionally, Respondent never told the nineteen workers they "must" leave work and that the workers were terminated without cause. See Respondent's Brief at 25–26 (citing Tr. at 66–67) (emphasis in the original). For purposes of calculating the three-fourths guarantee, the regulations "draw[] a crucial distinction between a worker terminated without cause and a worker voluntarily abandoning employment." See Respondent's Brief at 26. The latter employee does not deserve back pay for violations of the three-fourths guarantee. Id. Respondent argued that the workers in question voluntarily abandoned their employment. Id. It was "simply preposterous" that Respondent would fire the workers, since asparagus requires such a quick harvest. Id.

Additionally, the Administrator is allegedly unable to establish the objective standard constituting constructive discharge. See Respondent's Brief at 26–27 (citing Stucke v. City of Philadelphia, 685 Fed. Appx. 150, 155 (3d Cir. Apr. 12, 2017); Duffy v. Paper Magic Group, 265 F.3d 163, 169 (3d Cir. 2001)). Because a "reasonable person" would not have felt compelled to resign, the Respondent argued that Respondent did not constructively discharge the nineteen-workers. See Respondent's Brief at 27. As proof, Respondent asserted that the "vast majority" of farmworkers that worked under the same conditions did not feel "so compelled to walk off the job." Id. (citing Tr. at 65, 817–18).

Concerning the group that left Respondent's employ in August 2015, Respondent said that the Administrator did not account for the hours Respondent offered this cohort. See Respondent's Brief at 28–30. Twenty C.F.R. § 655.122(i) requires only that an employer offer the worker employment; it does not require the employee to have actually worked to meet the three-fourths guarantee. See Respondent's Brief at 28. The P.E.T. Tiger technology Respondent used to track the farmworkers' work would not capture if a worker were sick, injured, or otherwise declined work because the worker was not "scanned in" to start the day. See Respondent's Brief at 29 (citing Tr. at 683–84, 833–34). WHI Perez allegedly did not ask Respondent about hours that it offered the farmworkers. Id. (citing Tr. at 554–58, 649). Respondent argued that the three-fourths guarantee did not apply to Islas Larraga because he had "absconded" from the job mid-season, and so voluntarily quit. See Respondent's Brief at 29–30.

Respondent next discussed the $1,350 CMP for Respondent's alleged attempt to have the workers waive their rights on the worker departure forms. See Respondent's Brief at 30–31. Respondent explained that Theresa Ward of National Agriculture Consultants told Russel Marino, Jr. that workers were concerned that if they could not perform a job and abandoned employment, it would reflect badly on their ability to secure future employment. See Respondent's Brief at 30 (citing Tr. at 731–33, 812). Hernandez provided the blank worker departure forms to the workers. Id. (citing Tr. at 225, 227). Respondent conceded that the workers did not have sick or deceased family members, as the form indicates, but said, "that decision was between the group of workers and between the workers and their contact back in Mexico." See Respondent's Brief at 31. Respondent did not coerce the workers to give up any right, because "none of the forms purport to surrender a right held by any of the workers." See id.

Respondent continued that the undersigned should reduce the $3,600 CMP for the housing violations. See Respondent's Brief at 31–33. Respondent allegedly made "immediate repairs and corrections," but WHI never followed up to account for those remedies. See Respondent's Brief at 32 (citing Tr. at 497–99). Hernandez inspected housing conditions twice per week and Russel Marino, Jr. said that workers could raise concerns about housing and then Respondent would make the necessary repairs. Id. (citing Tr. at 176, 782). As to the $450 mattress violation, District Director Rachor allegedly "conceded" that the requirement was to provide a bed, "not to prevent workers from moving mattresses from a provided bed onto the floor." See Respondent's Brief at 33 (citing Tr. at 923; 20 C.F.R. § 654.416(a)). Respondent emphasized that the New Jersey Department of Labor certified the dormitory for 136 workers and the housing population never exceed 118 during the 2015 season. Id. (citing Tr. at 803–04; RX 2 at 13).

Respondent further stated that the alleged transportation violations do "not support the full CMP assessment pursued by the Administrator in this case." See Respondent's Brief at 33–34. Respondent allegedly "resolved" the driver's license issue through the addition of internal protocols. See id. Concerning the tire tread, Respondent argued that the Administrator merely used "eyeball measurement" to determine that the tire was "bald." See Respondent's Brief at 34. WHI Perez reviewed the pictures he took and purportedly "admitted that there were 'tread marks' on the tires in question." See Respondent's Brief at 34 (citing Tr. at 533–36). Because Respondent has generally addressed and remediated the issues for which the Administrator seeks CMPs, Respondent requested the undersigned to "set[] any remaining CMPs at a reasonable level commensurate with the facts of the case." Id.

DISCUSSION

The modern H-2A visa program arose out the 1986 amendment to the INA. See generally Staff of House Comm. On Education and Labor, 102d Cong., 1st Sess., Report on the Use of Temporary Foreign Workers in the Florida Sugar Cane Industry 3-4 (Comm. Print 1991). The Administrator enforces the attestations an employer makes in a temporary agricultural labor certification application, as well as the regulations that implement the H-2A program. See 29 C.F.R. §§ 501.1, 501.5, 501.16, 501.17. An "employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers." 20 C.F.R. § 655.122(a). Thus, the H-2A regulations prohibit any discrimination between H-2A workers and domestic workers. Id. The Administrator may penalize an employer who fails to abide by the governing H-2A regulations through the imposition of monetary penalties, debarment from filing other H-2A certification applications, and instituting proceedings for specific performance, injunctive, or other equitable relief. See In re: Global Horizons, Inc., 2006-TLC-00013, slip op. at 4 (ALJ Nov. 30, 2006).

The Administrator may assess CMPs against a violating employer for each violation of the work contract or the governing regulations. 29 C.F.R. § 501.19(a) (2010). In determining the amount of such penalty, "the WHD Administrator considers the type of violation committed and other relevant factors[,]" including:

1. Previous history of violation or violations of the H-2A provisions of the Act and these regulations;
2. The number of workers affected by the violation or violations;
3. The gravity of the violation or violations;
4. Efforts made in good faith to comply with the H-2A provisions of the Act and these regulations;
5. Explanation of person charged with the violation or violations;
6. Commitment to future compliance, taking into account the public health, interest or safety, and whether the person has previously violated the H-2A provision of the Act; and
7. The extent to which the violator achieved a financial gain due to the violation, or the potential financial loss or potential injury to the workers.

29 C.F.R. §501.19(b).

A party has a right to a *de novo* hearing before an administrative law judge, who may affirm, deny, reverse, or modify in whole or in part the decision of the Administrator. See, *e.g.*, Three D. Farms, LLC d/b/a Three D Farms, 2016-TAE-00003 (Aug. 18, 2016); Seasonal Ag Services, Inc., 2014-TAE-00006, slip op. at 12 (Dec. 5, 2014).

I. The Administrator properly found violations of 20 C.F.R. § 655.122(g), (p), and (q) concerning improper deductions Respondent's agent, Hernandez, made concerning meals, non-alcoholic beverages, and alcoholic beverages. Back pay and the imposition of CMPs, therefore, are warranted.

Twenty C.F.R. § 655.122(g) requires an employer to provide H-2A workers either "three meals a day or [to] furnish free and convenient cooking and kitchen facilities." If the employer requires workers to pay for their meals, the employer must state the charge on the job offer. (Id.) The regulations also require the employer to provide a prospective H-2A worker a copy of the work contract prior to the worker's application for a visa. § 655.122(q). The work contract must contain, *inter alia*, terms concerning whether the employer will provide meals or kitchen access, as stated in § 655.122(g). Here, Respondent filed two job orders. The first concerned the period April 13, 2015 to October 10, 2015; the second concerned June 1, 2015 to October 10, 2015. See JX 1; JX 3 (respectively). Section 14 of the job order requires the employer to "describe how [it] intends to provide either [three] meals to each worker or furnish free and convenient cooking and kitchen facilities." In both JX 1 and JX 3, Respondent informed the Department—as well as prospective H-2A workers—that it "will furnish free cooking and kitchen facilities . . . so that workers may prepare their own meals." Russel Marino, Jr. signed both forms in his role as Respondent's "owner/manager." (Id.) Despite Respondent's assurances, however, the workers who arrived at Respondent's New Jersey dormitory were greeted with news that Respondent planned to feed them not with free kitchen access, but through a meal plan costing each worker $75 to $80 per week.[147] In this way, Respondent immediately breached a material

[147] See Tr. at 20 (Maldonado's testimony), 92, 140–41 (Gustavo Perez saying that he had no choice but to pay Hernandez for the meal plan, even though he would have rather prepared his own food), 176 (Hernandez stating that workers who did not wish to participate in the meal plan had to "eat outside or to order a delivery meal"), 178–80 (discussing PX 17-1 and PX 17-2, where Hernandez tracked the workers who participated in the meal plans), 262

term of the job order; the contract that cemented the working relationship between Respondent and farmworkers who traveled often thousands of miles to work in Respondent's fields.

Respondent's counterargument that none of the workers requested access to Respondent's kitchen facilities and some did not object to the meal plan, see Respondent's Brief at 7–9, is unavailing. The express terms of the job orders at JX 1 and JX 3—the employment contracts between the farmworkers and Respondent—were clearly not in line with the realities facing the farmworkers upon arrival at Respondent's dormitory. Respondent, therefore, violated 20 C.F.R. §§ 655.122(g), and (q).

Respondent also attempts to deflect liability concerning its violation of the regulations concerning proper deductions from the farmworkers' pay. See 20 C.F.R. § 655.122(p) ("The job offer must specify all deductions not required by law which the employer will make from the worker's paycheck . . . . A deduction is not reasonable if it includes a profit to the employer or to any affiliated person."). Respondent argues that all deductions from pay, if any, occurred due to the actions of Hernandez, not Respondent. Therefore, to the undersigned must first determine whether Hernandez acted as Respondent's agent, and second if any deductions occurred.

A. At all relevant times, Hernandez acted as Respondent's agent.

Hernandez held both actual authority and apparent authority over the farmworkers. The actions of Hernandez, therefore, are legally equivalent to the actions of Respondent. See Restatement (Third) Of Agency Intro. (2006). Contrary to Respondent's assertion, see Respondent's Brief at 13–16, common law agency principles do apply to violations arising under the INA. See Castillo v. Case Farms of Ohio, Inc., 96 F. Supp. 2d 578, 593 (W.D. Tex. 1999) (citing Montelongo v. Meese, 803 F.2d 1341, 1349 (5th Cir.1986)); Escobar v. Baker, 814 F. Supp. 1491, 1503–04 (W.D. Wash. 1993); Bueno v. Mattner, 829 F.2d 1380, 1384 (6th Cir. 1987). The Restatement (Third) of Agency, therefore, is instructive as to the definitions of actual authority and apparent authority.

Hernandez acted with Respondent's actual authority. "An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal's manifestations to the agent, that the principal wishes the agent so to act." Restatement (Third) Of Agency § 2.01 (2006). An agent's belief is reasonable where it is "grounded in a manifestation of the principal." Restatement (Third) Of Agency § 2.02 cmt. c (2006).

Here, Respondent had a legal duty to feed the farmworkers it hired and housed in its dormitory. Although Respondent promised kitchen access to the farmworkers, see JX 1 and JX 3, it tasked Hernandez with operation of the meal plan that ultimately fed the farmworkers. Although Hernandez utilized Respondent's kitchen to do so, he paid the cooks, bought the groceries, and appliances as needed to cook the meals. See Tr. at 177–78, 229, 244, 252, and 793. For its part, Respondent owned the kitchen, all of the major appliances therein, and paid for

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(Almanza's testimony), 334 (WHI Perez's testimony). Respondent never explained to WHI Perez why the meal plan cost $75 some weeks and other weeks cost $80. See Tr. at 600.

the kitchen's utilities. See ALJX 1 at ¶ 21. After Respondent decided to utilize the H-2A program in 2015, Respondent told Hernandez that he could keep charging for meals but that Hernandez—not Respondent—would be responsible for paying the cooks' wages. See Tr. at 177. Respondent spoke with Hernandez concerning the amount he intended to charge the farmworkers for meals, and Respondent took Hernandez to a meeting with the Department to ensure he understood the regulatory limits of the meal plan. See Tr. at 187–88, 738, and 742–43. Russel Marino, Jr. told Hernandez "for years" to keep his food and beverage receipts, "because you cannot make a profit on the men." See Tr. at 808. Russel Marino, Jr. told Hernandez to keep track of the farmworkers' payments through deductions of their pay. Respondent also allowed Hernandez to choose the drivers that operated Respondent's busses, which transported the farmworkers from the dormitory to the fields. See Tr. at 205, 390–401. Hernandez has worked for Respondent for twenty-seven years, and receives an hourly rate plus commission based on the amount of crops harvested. See Tr. at 171, 230. Finally, the parties stipulated that during the 2015 growing season, Hernandez supervised the farmworkers. See ALJX 1 at ¶ 18. The preponderant evidence establishes, therefore, that, in all of his duties—and especially concerning the operation of the meal plan—Hernandez acted with Respondent's actual authority. Hernandez also reasonably believed that the Respondent wished him to operate the meal plan; Respondent's statements to Hernandez and actions in taking him to a meeting with the Department demonstrate that Hernandez's belief was reasonable. Hernandez, therefore, acted with the actual authority of the Respondent, and served as Respondent's agent at all relevant times.

Assuming, *arguendo*, Hernandez did not act under Respondent's actual authority, he acted with Respondent's apparent authority. Put another way, the farmworkers reasonably believed that Hernandez was Respondent's agent. Therefore, his actions are imputed to Respondent. See Restatement (Third) Of Agency § 2.03 cmt. c. Restatement (Third) Of Agency § 2.03 defines apparent authority as, "the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations." At all relevant times, Hernandez supervised the farmworkers. See ALJX 1 at ¶ 18. When workers arrived at the camp, Hernandez said that he would orient them about housing, the "rules of the camp," keeping the bathrooms clean, hours of work, pay, kitchen access, and cost of meals.[148] When the farmworkers paid Hernandez, the workers signed a form to indicate they "agreed that they received the meal and" paid for the meal plan; Respondent's name appears on the top of the form.[149] Russel Marino, Jr. only "sometimes" attended the workers' orientation. (PX 15 at 401.) "Several times a day" Russel Marino, Jr. would check in with Hernandez—not the workers—concerning the operation of the farm. (Tr. at 719.) If workers

[148] See Tr. at 61 (Maldonado stating that Hernandez was "in charge" and he never spoke with anyone from the Marino family); 174–175 (Hernandez's testimony); 773 (Russel Marino, Jr. stating that Hernandez "primarily" oriented the workers); 825 (Russel Marino, Jr. stating that the workers complained to Hernandez because Russel Marino, Jr. does not speak Spanish and "that's the chain of command"); PX 3 at 101 (Cervantes Ramirez stating on deposition that Hernandez was "in charge").

[149] PX 17 at 764 (Hernandez's deposition testimony, discussing PX 17-2 at 799 (the meal payment form); Tr. at 182–86 (Hernandez testifying he would use the form at PX 17-2—a document Respondent created in its office—to keep track of the workers who paid for meals).

had problems, they would tell Hernandez because, according to Russel Marino, Jr., that was the "chain of command." (Tr. at 825.) Hernandez told the workers when to work; the workers did not have a choice as to their hours. (Tr. at 17, 90–91, 139, 257; PX 3 at 68–69.) Hernandez also chose the drivers who transported the workers from the dormitory to the fields. See Tr. at 205, 390–401. When work slowed, Hernandez chose the "troublemakers" in determining which workers to lay off. (Tr. at 208.) Finally, Hernandez maintained the sleeping quarters and bathroom facilities at Respondent's dormitory site. (Tr. at 199–205.) In all of these aspects, the farmworkers held reasonable beliefs that Hernandez had authority to act on Respondent's behalf. Because Hernandez acted under Hernandez's apparently authority, he worked as Respondent's agent, and any legal effect of his actions are imputed to Respondent.

B. Respondent unlawfully deducted or otherwise profited from the farmworkers' payments for meal and beverage costs; its agent, Hernandez, also sold beer in violation of state law. Back pay, therefore, is required for the meals, non-alcoholic drinks, and beer the farmworkers purchased.

As Respondent's agent, Hernandez was an "affiliated person." See WHD Bulletin No. 2012-3 ("The term 'affiliated person' includes but is not limited to agents. . . . any person acting in the employer's behalf or interest (directly or indirectly), or who has an interest in the employment relationship."). The regulations therefore prohibit Hernandez from charging any deduction not listed on Respondent's job order. See 20 C.F.R. § 655.122(p)(2). The regulations separately prohibited Hernandez from profiting off any items sold in violation of any law. See id. (specifically incorporating the FLSA regulations at 29 C.F.R. Part 531). To determine whether an employer has met the FLSA's minimum wage requirements, 29 C.F.R. § 531.27 credits an employer for "the reasonable cost . . . of board, lodging, or other facilities customarily furnished . . . to his employees when the cost of such board, lodging, or other facilities is not excluded from wages paid to such employees." The regulations define the term "facilities customarily furnished" and exclude from that definition "[f]acilities furnished in violation of any Federal, State or local law." § 531.31. "Items such as alcohol and cigarettes constitute 'other facilities' under the law." Ortiz v. Paramo, No. CIV. 06-3062 RBK/AMD, 2009 WL 4575618, at *3 (D.N.J. Dec. 1, 2009) (citing Leach v. Johnston, 812 F. Supp. 1198, 1204 (M.D. Fla. 1992), disapproved of on other grounds by Aimable v. Long and Scott Farms, 20 F.3d 434, 441 (11th Cir.1994)). Therefore, Hernandez and Respondent were unable to make deductions not contemplated by the job order; they were also unable to profit from the selling of any illegal facilities. Concerning the latter prohibition, the parties stipulate that Hernandez sold beer to the farmworkers without a license to do so in violation of New Jersey law. See ALJX 1 at ¶ 26; N.J. Stat. Ann. § 33:1-2(a) (mandating that a license is required to sell beer)). Thus, Respondent was unable to profit from the sale of beer, an illegal activity, warranting the remittal of back pay in the amount of Hernandez's profit.

The undersigned must also determine whether Respondent made impermissible deductions when it collected money for the meal plan and non-alcoholic beverages, which were not included in the job order.

1. Respondent's failure to provide kitchen access or otherwise to disclose meal charges constituted violations of 20 C.F.R. § 655.122(g), (p), and (q).

> The Administrator properly assessed $128,285 in back wages for the meals the farmworkers purchased.

Because Respondent made deductions of the farmworkers' pay for the meals and non-alcoholic beverages, Respondent is required to provide back pay to the effected farmworkers. See § 655.122(p)(1) (requiring the job offer to include *any* deduction "not required by law which the employer will make form the worker's paycheck); Global Horizons, Inc., OALJ Case No.: 2010-TAE-00002, slip op. at 2 n.7 (ALJ Dec. 13, 2011) (recognizing that, although the meals deduction of $6.00 per day was a "favorable rate[]," it does not "negate the violation, as the deductions thwarted the regulatory scheme."). That Hernandez did not allow the farmworkers to pay him in cash, but took money out of their pay, does not establish that a deduction did not occur. Regardless of the mechanism by which Hernandez deducted the meal and drink purchases, deductions of the farmworkers' pay—constructive or actual—still occurred, and so Respondent is required to reimburse the farmworkers. See In re: Weeks Marine, Inc., ARB No. 12-093, 2015 WL 2172482, at *4 (Apr. 29, 2015) (citing Arriaga v. Fl. Pacific Farms, 305 F.3d 1228, 1236 (11th Cir. 2002); Salazar-Martinez v. Fowler Bros., 781 F. Supp. 2d 183, 191 n.5 (W.D.N.Y. 2011)).

A less severe consequence would deny the farmworkers their contractual right to the $11.29 per hour minimum wage promised on the job order. See JX 1; JX 3; 20 C.F.R. §§ 655.120, 122(l), (p)(2). A less severe consequence, furthermore, would provide a decreased deterrent effect to future employers who may also attempt to alter the terms of the job order upon the workers' arrival. The violation consists of the deduction itself—not the purported reasonableness of the deduction—so Respondent's argument concerning the "reasonable" price of meals, see Respondent's Brief at 16–18; RX 5; RX 7; RX 8, is inapposite.

Respondent's argument that some of the workers approved of the meal plan, see Respondent's Brief at 9–12, is also unavailing; the operative job orders—the contracts between Respondent and its workers—allow for kitchen access only. See JX 1, JX 3. The governing regulations require the "job offer [to] specify all deductions not required by law which the employer will make from the worker's paycheck." 20 C.F.R. § 655.122(p), (g), (q). Respondent's unilateral substitution of the meal plan for the agreed upon kitchen access is in violation of the regulations, *per se*. Respondent's reliance on Global Horizon as negative authority is not compelling, because, contrary to Respondent's assertion, Hernandez acted as Respondent's agent. The practical effect of this agency relationship is that when the workers paid Hernandez for the meal plan, it was as if they paid Respondent. See Respondent's Brief at 11. In other words, "the integrity of the wage setting process" in fact, did not remain "perfect intact." Id. at 12. Respondent's additional argument that, unlike the employer in Global Horizons, Respondent did not profit from the meal plan is also unavailing. See id. at 13. Profit can take many forms. Although some profit was certainly quantifiable—like the profit Hernandez made for the beers and non-alcoholic beverages he sold, and the fact that Pinon, Hernandez's wife, received employment in Respondent's kitchen—some forms of profit are less quantifiable. For example, Hernandez's meal plan made unnecessary any costly expansion of Respondent's kitchen facilities, which Respondent would have had to undertake to fulfill the terms the job orders at JX 1 and JX 3. See Tr. at 175–76 (Hernandez testifying that the kitchen was not large enough "for everyone to cook"). To argue, therefore, as Respondent does, that it

did not profit from the meal plan because no ready financial gain is apparent is not persuasive. Respondent did in fact profit from the sale of meals, so back pay is required. See Admin. v. Global Horizons, 2010-TAE-00002, slip op. at 9 (ALJ Dec. 17, 2010); see also PROFIT, Black's Law Dictionary (11th ed. 2019) ("The excess of revenues over expenditures in a business transaction.")

Finally, Respondent's argument that the Administrator's back pay award "overstates any claimed 'harm'" misses the point. See Respondent's Brief at 16. When Respondent provided a meal plan to its workers, rather than kitchen access, Respondent changed a material term of the job order. This contractual agreement codified a working relationship, which involves one party traveling sometimes thousands of miles from home, often with limited language skills. See "Temporary Agricultural Employment of H-2A Aliens in the United States," 29 FED. REG. 6884, 6894 (Feb. 12, 2010) ("There is ample evidence that agricultural workers are a particularly vulnerable population.") A material change to the terms of that contract necessarily provides "harm" to both the workers' reliance on the H-2A program to ensure that their rights are protected, as well as the overall integrity of the program itself. To deter such harm from occurring in the future, the equities of the case require back pay at the meal plan's full amount.

The Administrator, therefore, reasonably imposed a $128,285 back pay requirement, see PX 2, for the meal plan violations outlined above. WHI Perez authored the back wage assessment in PX 2; he is highly qualified to do so and credibly testified to the methodology he used in arriving at the $128,285 back pay figure. See Tr. at 305–08, 439–61. Respondent improperly deducted meals concerning ninety-six of its H-2A workers and fifty-one of its domestic workers.[150] For each worker, PX 2 lists the week worked ("payroll week ending" date) and how much the worker paid for, *inter alia*, meals. The parties stipulated that Hernandez charged between $75 and $80 per week; the Administrator accounted for this variance in her calculations in PX 2. The Administrator also subtracted those workers that did not engage in the meal plan from the back wage calculation. The Administrator's calculations, as expressed in PX 2, are reasonable and support her requirement for Respondent to provide back pay in the amount of $128,285.

2. Although back pay is required, the Administrator did not reasonably calculate the back pay owed to Respondent's workers for non-alcoholic drinks purchased during the summer of 2015. Respondent is liable to pay $64,960 in back wages for the non-alcoholic drinks the farmworkers purchased.

Hernandez—Respondent's agent—sold workers non-alcoholic drinks throughout the day; either in the fields or at the company store. See ALJX 1 at ¶ 23; Tr. at 22–23, 24–27, 96–97, 189–90, 193–97, 266–67, 360, 502. The money paid for the non-alcoholic drinks was an

[150] WHI Perez reasonably testified that the H-2A regulations do not allow an employer to discriminate between the treatment of H-2A workers and domestic workers. This explains why the Administrator charged Respondent for any meal plan violations concerning both the domestic and H-2A workers Respondent employed during the summer of 2015. See 20 C.F.R. § 655.122(a) ("The employer's job offer must offer to U.S. workers no less than the same benefits, wages, and working conditions that the employer is offering, intends to offer, or will provide to H-2A workers.").

unlawful deduction, because it reduced the workers' pay below the required $11.29 per hour threshold. ALJX 1 at ¶ 16; 20 C.F.R. §§ 655.120, 122(l), (p)(2). Because the farmworkers' access to clean water was sporadic—and the farmworkers had no other access to drinks aside from Respondent—it is appropriate to calculate back wages for the various drinks Hernandez sold.

Contrary to Respondent's argument, see Respondent's Brief at 20, allowing Hernandez to profit from non-alcoholic drink sales, indeed, would affect Respondent's "bottom-line," since such profit is reasonably viewed as a fringe benefit for Hernandez's continued employment. In other words, Respondent may have had to pay more to Hernandez absent the profits accrued from the non-alcoholic drinks he sold, thereby affecting Respondent's "bottom-line."

The Administrator attempted to reconstruct the amount of non-alcoholic drinks sold; Hernandez either destroyed or otherwise could not produce his records as to the workers' purchase of drinks in the summer of 2015. See Tr. at 209 (Hernandez's testimony), 361 (WHI Perez stating that Hernandez "did not have purchase receipts for drinks," even though he had such receipts for meals). In doing so, the Administrator reasonably followed the standard propounded in Anderson v. Mt. Clemens Pottery Co., where the Supreme Court determined that, in an action to recover unpaid wages under the FLSA, an employee is required to provide exact evidence of unpaid wages. 328 U.S. 680, 686–89 (1946); see Administrator v. Fernandez Farms, Inc., 2014-TAE-00008, slip op. at 35 (ALJ Aug. 25, 2016) (applying the Mt. Clemens standard within a TAE context)). Rather, where an employer fails to keep records documenting unpaid wages, the Supreme Court applies a burden-shifting standard, which first requires the employer to account for the charges. Id. at 687. If an employer does not provide accurate records, the burden shifts to the employee to provide "sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference." Id. At that point, the burden shifts back to the employer to rebut the scope and size of the alleged violations. Id. at 687–88.

The Mt. Clemens standard applies here, as the FLSA has similar records retention requirements as the H-2A program. Twenty C.F.R. § 655.122(j), titled "Earnings Records," requires employers under the Act "to keep accurate and adequate records with respect to the workers' earnings, including but not limited to . . . records showing . . . the rate of pay (both piece rate and hourly, if applicable); the workers' earnings per pay period . . . ." *Cf.* 29 U.S.C.A. § 211 (c); 29 C.F.R. Part 516 (providing similar requirements under the FLSA). From a prudential standpoint, application of the Mt. Clemens test is reasonable here because, in both the FLSA and H-2A contexts, "[e]mployees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy." 328 U.S. at 687. Accordingly, the Mt. Clemens burden-shifting construct applies to determine the amount of back pay owed to Respondent's workers for the sale of non-alcoholic drinks.

Here, the Administrator reviewed the entirety of the record and concluded that each of Respondent's workers purchased, on average, 4.42 drinks per day. The preponderant evidence of record, however, establishes that the workers purchased an average of only four, not 4.42, non-alcoholic drinks per day. It was reasonable, however, and likely in Employer's favor, to

assume that Respondent sold the drinks for an average of $1.25 per can.[151] The weekly cost to an average worker for drink purchases in the summer of 2015 was $35.00.[152] The Administrator considered 1,856 separate weeks[153] in finding the total amount of non-alcoholic drinks consumed in the summer of 2015. Thus, Respondent owes $64,960—not $71,790.08, as the Administrator recommended—in back pay for non-alcoholic drinks.[154]

3. The Administrator reasonably calculated the back pay owed to the farmworkers for beer purchased during the summer of 2015. Respondent, therefore, owes $8,972.61 in back pay for the profit Hernandez made on beer.

Similar to the non-alcoholic drinks issue, Hernandez did not keep accurate records as to the amount of beer sold to Respondent's workers. Therefore, the Mt. Clemens burden-shifting standard, again, applies. Appendix C to the Administrator's brief titled "Revised Back Wage Computations as to Illegal Beer Sales at a Profit." The Administrator revised her initial back pay assessment for the illicit beer purchases, see JX 10 (Order of Reference), after taking witness testimony at the hearing. Appendix C lists the worker's name, the number of weeks they were on Respondent's payroll during the summer of 2015, as well as the total profit Respondent obtained from selling the worker beer. For most workers (some did not imbibe), the Administrator utilized a profit per week of $4.87, based on its conclusion that the workers drank 3.75 beers per week and Hernandez made $1.30 profit per can. Because Hernandez unlawfully sold alcohol without a license, ALJX 1 at ¶ 26, the regulations do not permit him to make a profit off such sales. See 29 C.F.R. § 531.31. Therefore, the Administrator reasonably charged Respondent for Hernandez's profit. Respondent is unable to rebut the Administrator's calculations as unreasonable. As discussed, *supra*, the Administrator's estimates as to the number of beers consumed per week and Hernandez's profits were reasonable.

4. The Administrator reasonably assessed $198,450 in CMPs concerning Respondent's violations of 20 C.F.R. §§ 655.122(g), (p), and (q).

Although it was likely within the Administrator's reasonable discretion to assess separate CMPs for each violation of 20 C.F.R. §§ 655.122(g), (p), and (q), the Administrator decided to assess one $1,350 CMP for the entirety of the violations of § 655.122. The Administrator reasonably assessed the $1,350 CMP for each of the 147 effected workers, which amounts to a $198,450 CMP. District Director Rachor explained that the Administrator assessed the CMP in

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[151] Because the Mt. Clemens standard only requires estimates, it is irrelevant whether the Administrator calculated prices using numbers derived from Costco rather than Sam's Club, where Hernandez shopped. See Respondent's Brief at 22. Both are wholesale clubs and likely sell products at similar prices; precision is not required.

[152] Four drinks per day bought at $1.25 per drink over a weekly period of seven days.

[153] The total amount of non-alcoholic drinks the Administrator found was $71,790.08. That figure divided by the weekly amount it considered ($38.68) shows the total number of weeks (1,856 weeks) the Administrator considered. See PX 2.

[154] $35.00 per week multiplied by 1,856 separate weeks.

this way due to the seriousness of the violation and the "large amount of workers affected." (Tr. at 849.) The Administrator's assessment of a $1,350 CMP for each worker was reasonable, because she reviewed each of the mitigation criteria at 29 C.F.R. § 501.19(b). (Tr. at 849–54) The Administrator allowed a ten percent reduction in the CMP, due to the fact that Respondent had no prior history with the H-2A program. (Tr. at 852.) That assessment is accurate and reasonable. Because of the large amount of workers affected, the Administrator reasonably did not allow a reduction for the second mitigation factor. The Administrator rationally viewed the violation as serious, and so appropriately did not provide a reduction for the third factor. Concerning the fourth factor, whether Respondent made good faith efforts to comply, the Administrator reasonably did not make a reduction; even throughout the hearing, Russel Marino, Jr. continued to argue that Respondent complied with its requirement to provide the workers with kitchen access. See Tr. at 772. The Administrator did not allow for a reduction for factor five because Respondent never provided a good explanation for not abiding by the job order. That consideration was rational. Because Respondent did not commit to future compliance, the Administrator reasonably did not apply the sixth factor. Finally, the Administrator appropriately recognized the financial gain to Respondent from the meal plan and other items sold to the farmworkers and declined to apply the final mitigation factor. Because the Administrator rationally considered all of the § 501.19(b) mitigation factors, the $198,450 CMP for violations of 20 C.F.R. §§ 655.122(g), (p), and (q) is appropriate.

II. Respondent violated 20 C.F.R. § 655.122(i)(1) in discharging twenty-four total workers before they had worked for at least three-fourths of the workdays of the total period specified in the work contract. The Administrator properly found that $142,728.22 in total back wages are due and reasonably assessed $1,350 in CMPs.

The H-2A regulations require employers "to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total period . . . specified in the work contract." 20 C.F.R. § 655.122(i)(1). The Administrator assessed back wages and CMPs concerning Respondent's violation of the three-fourths requirement to three discrete groups of workers. The first set involves the nineteen workers that Respondent terminated after the May 2015 argument. See Administrator's Brief at 63–73. The second set concerns four workers—Luna Gonzales, Elizondo Soto, Raya Tapia, and Morales Acosta—whom Respondent laid off in August 2019. See Administrator's Brief at 63. The final set concerns a single worker, Islas Larraga, who last worked for Respondent on June 9, 2015. See Administrator's Brief at 73. Application of the governing law establishes that Respondent terminated or otherwise constructively discharged each of the twenty-four workers, and that the Administrator reasonably assessed back wages and CMPs for violation of the § 655.122(i) three-fourths requirement.

A. After the May 2015 argument, Respondent terminated nineteen workers without cause. Back pay is therefore due.

Upon arrival at the camp, Hernandez was openly hostile to the workers. Cheguez testified that Hernandez was a "bad" supervisor and threatened the workers with deportation if they did not work faster. (Tr. at 138–39.) Elizondo Soto's deposition testimony supports Cheguez's recollection. See PX 5 at 125. Additionally, the workers arrived at the camp and

encountered the working and housing conditions from which the current litigation arises. As discussed throughout this Decision and Order, those conditions were oftentimes in violation of the governing federal regulations, state law, or both. It was within this context that the nineteen workers engaged with Hernandez and Russel Marino, Jr., which lead to the May 2015 argument that ended in their termination. *Cf.* Tr. at 106–7 (Gustavo Perez stating that the argument represented the workers' attempt at fixing the foregoing problems with Respondent). During the conversation, Russel Marino, Jr. became upset and became verbally and, perhaps even, physically abusive. See Tr. at 107–08 (Gustavo Perez stating that Russel Marino, Jr. was very upset and cursed at the farmworkers, and feeling like he could not continue working), 147 (Cheguez remembering that Russel Marino, Jr. "scream[ed] and yell[ed] in an arrogant way"), 222 (Hernandez stating that Russel Marino, Jr. "was a little bit upset"); PX 9 at 232, 258 (Hugo Leonel Cinta Tegoma recalling during deposition that Russel Marino, Jr. tried to hit him). In his anger, Russel Marino, Jr. terminated the nineteen workers. See Tr. at 39–40, 65 (Maldonado stating that Russel Marino, Jr. had "practically fired us"), 80–83 (Maldonado recalling that Russel Marino, Jr. said that the workers "could leave" if they did not like the conditions and that Russel Marino, Jr. "practically fired [the farmworkers]" during the argument, and that he felt like he "needed to leave"; he left due to problems "with my boss"), 107–08, 125–29 (Gustavo Perez recalling that Russel Marino, Jr. was upset at the farmworkers and said "we weren't necessary" during the argument, that he did not have the opportunity to continue working for Respondent due to the conversation, and that Hernandez told him he "must leave"). Respondent argues that, given the status of the asparagus crop as ripe for harvesting, it makes no logical sense for Russel Marino, Jr. to fire the nineteen workers. See Respondent's Brief at 24–26.

However, the employee witnesses were consistent in describing the heated events at the meeting while Joseph Marino was unable to remember specifically what was said. During his deposition, Joseph Marino testified that he that he did not recall what was said at the argument; at the hearing, Joseph Marino said he recalled "part of what [Russel Marino, Jr.] said." (Tr. at 825–29.) Joseph Marino's testimony, compared to the employees, lacks credibility. The facts, as presented at the hearing, are that the employees arrived at the worksite to find a difficult supervisor in Hernandez, grueling work picking asparagus, and living conditions that were not as promised in their contract. They asked for a meeting to try to address the issues with management; this angered management, who felt pressure to get their crop harvested. Management made a decision, albeit a rash, and perhaps illogical, decision, to terminate this group of workers and then quickly replace the terminated workers. See JX 2, JX 6 (showing a number of H-2A workers hired at the end of May 2015). Considering the entirety of the evidence, Respondent terminated the nineteen workers that left in May 2015 before they worked the guaranteed three-fourths of the hours promised in their contracts, and is liable for any back pay due because of such termination.

1. Assuming, *arguendo*, Respondent did not terminate the workers in May 2015; it constructively discharged such workers. Back pay, therefore, is due.

To find constructive discharge, a plaintiff must "show working conditions so intolerable that a reasonable person would have felt compelled to resign." Pennsylvania State Police v. Suders, 542 U.S. 129, 147 (2004); WHD Bulletin No. 2012-1 (Feb. 28, 2012) ("If a worker

departs employment because working conditions have become so intolerable that a reasonable person in the worker's position would not stay, the worker's departure may constitute a constructive discharge and not abandonment"). The Administrative Review Board emphasizes that the analysis turns on the employee's "reasonable inferences" drawn from the statements and conduct of the employer. Jackson v. Protein Express, 95-STA-38 (Jan. 9, 1997). The Third Circuit[155] instructs finders of fact to review the following nonexclusive factors: "(1) a threat of discharge; (2) suggestions or encouragement of resignation; (3) a demotion or reduction of pay or benefits; (4) involuntary transfer to a less desirable position; (5) alteration of job responsibilities; (6) unsatisfactory job evaluations." Nuness v. Simon & Schuster, Inc., 325 F. Supp. 3d 535, 560 (D.N.J. 2018) (summarizing Clowes v. Allegheny Valley Hosp., 991 F.2d 1159, 1161 (3d Cir. 1993)); WHD Bulletin No. 2012-1 ("the terms and conditions of the worker's employment must have been effectively altered by the employer's conduct," and intolerable housing and working conditions can demonstrate a constructive discharge claim). In Clowes, the Third Circuit reversed a finding of constructive discharge, in part, when the plaintiff "was never threatened with discharge; nor did her employer ever urge or suggest that she resign or retire." 991 F.2d at 1161. The Wage and Hour Division advises that a worker who quits because the worker is "unhappy with the general nature of work assignments" is not constructively discharged.

Assuming it did not fire the workers outright, the preponderant evidence demonstrates that Respondent constructively discharged the nineteen workers who left in May 2015. The first Clowes factor is satisfied. Hernandez threatened the workers with discharge, and Russel Marino, Jr. likely fired the workers during the May 2019 argument. See *supra*. Therefore, unlike the plaintiff in Clowes, here Respondent actually threatened the workers with discharge, or the workers reasonably inferred such a threat, or both. 991 F.2d at 1161. Indeed, Respondent likely outright fired the nineteen farmworkers. The first Clowes factor weighs considerably toward a finding of a constructive discharge; the deplorable situation in which the workers found themselves upon arrival at Respondent's farm compounds the significance of this consideration.

Another Clowes factor fulfilled here is that Respondent's actions materially reduced the workers' benefits. Despite the assurances Respondent made on the job order—the employment agreement both sides agreed upon prior to the summer 2015 growing season—the workers arrived at Respondent's camp to learn not only that they did not have kitchen access, but also that Employer expected them to pay for a meal plan costing between seventy-five and eighty-dollars per week. This arrangement caused a quantifiable reduction in the benefits the workers reasonably relied upon when agreeing to travel to the United States to work in Respondent's fields.

[155] As this case arose in New Jersey, the undersigned will apply the law of the U.S. Court of Appeals for the Third Circuit. In a case arising within the State of California, an administrative law judge applied Ninth Circuit law. Without passing specific judgment on the ALJ's decision to do so, the Administrative Review Board affirmed in full the administrative law judge's Decision and Order. See Global Horizons, ARB Case No. 09-016, ALJ Case No. 2008-TAE-00003, 11 (Dec. 21, 2010); Delegation of Authority and Assignment of Responsibility to the Administrative Review Board, 77 FED. REG. 69378, 69378–80 (Nov. 16, 2012) (declining to provide any discussion as to which circuit law applies to the Administrative Review Board's review of an administrative law judge's decision and order in a TAE matter).

Finally, Hernandez changed the terms and conditions of the workers' responsibilities. Contrary to the job order, the workers regularly worked twelve-hour days in extreme weather conditions. The job order stated that they would work between five and seven hours per day (except one day per week), see JX 1 and JX 3; however, the workers testified to regularly working twelve-hour days. Although the job orders stated that workers "may be requested" to work additional hours, see id., the corroborative testimony of numerous workers establishes that Hernandez told the workers where, when, and how long to work and that he often directed them to work twelve hour days. This was a material change to the workers' responsibilities as listed on the job orders, and so the fifth Clowes factor applies.

Thus, the evidence of record establishes many of the Clowes factors, including threat of discharge, reduction of benefits, and alteration of job responsibilities. Although the other factors—suggestions or encouragement of resignation, involuntary transfer, and unsatisfactory job evaluations—are not satisfied, those factors do not necessary apply to the exigencies of the working situation at Respondent's farm. Weighing the Clowes factors in the totality, the Administrator has preponderantly established that Respondent constructively discharged nineteen farmworkers after the May 2015 argument.

Aside from the Clowes factors, the WHD Bulletin provides additional guidance that compels a finding that Respondent constructively discharged the workers who left in May 2015. See WHD Bulletin No. 2012-1 ("Constructive discharge may exist when a worker leaves the job because the housing conditions in which the worker is required to live are intolerable and violate applicable safety and health standards (*i.e.*, grossly inadequate heating during the winter, lack of running water, exposure of bare electrical wires)." As demonstrated, *infra*, Respondent is liable for numerous violations of the regulations concerning the proper housing and transportation of H-2A workers. The workers' housing conditions involved broken screens, which allowed in flies and other pests. The dormitory area also had litter strewn on the ground and trashcans without lids; the bathrooms lacked sufficient hot water. Respondent also provided unsafe transportation to its workers. When the workers initially arrived, the fields lacked bathrooms and access to water. All of these violations further demonstrate that Respondent committed a constructive discharge of the nineteen workers who left after the May 2015 argument.

The nineteen terminated or otherwise constructively discharged workers, therefore, did not abandon their positions. See 655.122(n) (providing that the three-fourths guarantee does not apply to workers who voluntarily abandon their jobs); WHD Bulletin No. 2012-1 (stating that a constructively discharged worker does not commit the act of abandonment). Although the WHD Bulletin states that constructive discharge does not apply to workers who are merely unhappy with their work assignment; that provision does not apply here. The facts establish that the workers engaged with Hernandez and Russel Marino, Jr., because the workers wanted to work but were unhappy with the working and living conditions. The workers' concerns were not subjective; they related to the actual living and working conditions they faced while working for Respondent. The fact that other workers stayed while the nineteen workers left, see Respondent's Brief at 27, does nothing to dispel the unacceptable—and at times unlawful—conditions to which Respondent subjected the farmworkers. Because Respondent terminated or otherwise constructively discharged the nineteen workers after the May 2015 argument, the Administrator has established a three-fourths violation concerning such workers.

2. Respondent violated the three-fourths guarantee concerning four of the forty-four workers it laid off in August 2015. Therefore, back pay is warranted.

Respondent laid off forty-four workers in August 2015 due to inclement weather and lack of work. Respondent did not meet the three-fourths guarantee for four such workers: Luna Gonzalez, Elizondo Soto, Raya Tapia, and Morales Acosta. See PX 1; Tr. at 702–04. At the hearing, Respondent withdrew RX 4, which—according to "Respondent's Exhibit List"—contained a "calculation of hours worked for [six] workers." See "Respondent's Exhibit List; see also Tr. at 702–04. Respondent's counsel stated "I was wrong" about the contents of RX 4, and agreed that the Administrator provided accurate calculations as to Respondent's three-fourths violations concerning Luna Gonzalez, Elizondo Soto, Raya Tapia, and Morales Acosta. (Tr. at 704.) In its brief, Respondent did not discuss or otherwise defend against the alleged three-fourths guarantee violation concerning these four workers. Accordingly, the undersigned finds that Respondent does not controvert the violation of the three-fourths guarantee concerning Luna Gonzalez, Elizondo Soto, Raya Tapia, and Morales Acosta. Review of the evidence of record further establishes that fact.

3. Respondent violated the three-fourths guarantee concerning Jose Islas Larraga, and he deserves back pay.

According to the information Respondent provided to the Administrator, Islas Larraga last worked for Respondent on June 9, 2015. See PX 1. The regulations only absolve an employer from liability for a worker's three-fourths guarantee when the worker abandons the job or is otherwise terminated for cause. 20 C.F.R. § 655.122(n). The record contains no evidence to establish that Islas Larraga abandoned his job. Assuming, *arguendo*, he did abandon his job, the regulations would only relieve Respondent of three-fourths guarantee liability if it provided timely notice to the Department. See id. (referring to the DOL Notification Process at 76 FED. REG. 21,041). Respondent provided no notice to the Department concerning the end of Islas Larraga's employment. Therefore, Respondent violated the three-fourths guarantee concerning Islas Larraga, as well.

4. The Administrator reasonably computed back wages for the twenty-four workers discussed in this section.

WHI Perez has worked as an investigator for U.S. Department of Labor, the Wage and Hour Division for six years. (Tr. at 305–06.) Of the 200 cases he has helped investigate during his tenure with the Department, WHI Perez has worked on between five and ten cases concerning violations of the H-2A regulations. (Tr. at 306.) WHI Perez created the table at PX 1, which calculated the three-fourths guarantee for the twenty-four workers for whom Respondent is required to remit back pay. The undersigned admitted PX 1 as a summary of voluminous records under 29 C.F.R. § 18.1006. The voluminous records that PX 1 summarizes are Respondent's weekly payroll records, which are contained in the record at PX 23. See Tr. at 420–21. Charlene Rachor is the "District Director of the Southern New Jersey District Office for the Wage and Hour Division." (Tr. at 845.) In that capacity, District Director Rachor oversees

investigations, supervises investigators, and issues letters regarding findings of investigations including H-2A determination letters. (Id.) Although District Director Rachor was not WHI Perez's supervisor, she supported the quality of WHI Perez's work product and stated that "he would do the back wages as accurately as possible." (Tr. at 897–98.) District Director Rachor said that WHI Perez's supervisor would have reviewed his back wages calculations. (Tr. at 898.) WHI Perez described the methodology he employed to determine back wages due, (Tr. at 420–30); his testimony was reasonable based on the evidence of record. Aside from arguing that voluntary abandonment voids the three-fourth guarantee, Respondent did not criticize WHI Perez's calculations or the methodology he applied in PX 1 concerning either the nineteen workers terminated in May 2015 or Islas Larraga. See Respondent's Brief at 23–28. Review of PX 1 shows that WHI Perez reasonably determined not only that a three-fourths violation occurred, but also the back wages Respondent owes, because of such underpayment.

Respondent, however, alleged that WHI Perez failed to account for the hours Respondent offered to the four workers whom it laid off in August 2015, and for whom the Administrator asserted violations of the three-fourths guarantee. See Respondent's Brief at 28–30. Respondent noted that its tracking system was incapable of capturing any time, for example, where Respondent offered hours to a worker, but the worker was sick or otherwise unable to take the hours. Id. Respondent's argument is unpersuasive, as the governing regulations require it to "keep accurate and adequate records with respect to the workers earnings, including but not limited to . . . records showing . . . the number of hours of work **offered** each day . . . ." 20 C.F.R. § 655.122(j)(1) (emphasis added); see § 655.122(j)(3). Although Respondent took ample testimony about the immoderate costs and general capabilities concerning its record keeping system, see Tr. at 682–86, 706, 798, Respondent is unable to argue persuasively that the Administrator's calculations are unreasonable when Respondent's tracking system does not comport with the regulatory requirements. The Administrator, therefore, reasonably calculated the back wages owed to the four workers laid off in August 2015.

In sum, the Administrator reasonably assessed a combined $142,728.22 in back wages for Respondent's three-fourths guarantee violations concerning the nineteen farmworkers terminated in May 2015, the four farmworkers laid off in August 2015, and Islas Larraga.

5. The Administrator reasonably assessed a single $1,350 CMP for the violations discussed in this section.

Additionally, the Administrator assessed a reasonable CMP of $1,350,[156] total, for Respondent's various three-fourths guarantee violations. The Administrator reasonably considered all of the mitigation factors. See Tr. at 856–58, 935–37. District Director Rachor explained the importance of the three-fourths guarantee:

> Well, as I said, we have a situation where, you know, workers are -- H-2A allows an employer to bring over farmer workers, non-immigrant workers by laying out

[156] At the time of the assessment, the governing regulations allowed the Administrator to assess $1,500 in civil money penalties for "[e]ach failure to pay an individual worker properly or to honor the terms or conditions of a worker's employment." 29 C.F.R. § 501.19(a), (c) (2016).

> terms and conditions of employment basically in the form of a contract. The workers are provided a copy of that so they can see, okay, this is the money I'm going to earn. If they come here and they are terminated, forced to resign, and they don't receive that three-[fourths] guarantee, now that's wages that they've lost and perhaps they wouldn't have come.

(Tr. at 858.) The undersigned finds compelling District Director Rachor's explanation of the rationale behind the Administrator's decision to apply CMPs for the three-fourths guarantee violations. District Director Rachor also rationally explained the Administrator's decision to apply only the mitigation factor concerning Respondent's lack of a history of violations. See Tr. at 856–57. The undersigned agrees with the Administrator's decision not to apply the remaining mitigation factors. The Administrator, therefore, reasonably assessed one $1,350 CMP for Respondent's twenty-four three-fourths guarantee violations.

III. The Administrator reasonably decided to assess a $1,350 CMP for Respondent's attempt to cause its workers to waive the three-fourths guarantee.

A $1,350 CMP for Employer's attempt to cause its workers to waive the three-fourths guarantee is reasonable. Twenty-nine C.F.R. § 501.5 mandates, "[a] person may not seek to have an H-2A worker . . . or a U.S. worker . . . waive any rights conferred under 8 U.S.C. 1188, 20 C.F.R. part 655, subpart B." Under 20 C.F.R. § 655.122(i), employers are required "to offer the worker employment for a total number of work hours equal to at least three-fourths of the workdays of the total period . . . ." Here, Employer provided worker departure forms to the nineteen farmworkers that left in May 2015. The worker departure forms stated that the farmworkers voluntarily left their jobs due to personal issues.[157] The regulations consider such an act "abandonment," the practical effect of which is to forego a farmworker's three-fourths guarantee." See § 655.122(n). The worker departure forms Respondent provided did not allow the farmworkers to state the true reasons they left. Respondent affirmatively provided the worker departure forms to the Department and other government agencies. This was a misrepresentation, as Respondent terminated or otherwise constructively discharged the workers. Further, Respondent admitted in its brief that the workers had no sick or deceased family members. See Respondent's Brief at 31; PX 15 at 475 (Russel Marino, Jr. stating that the purpose of the worker departure forms was to "protect against . . . this lawsuit"). That a third party may have advised the workers to sign the form as written does not absolve Respondent's liability from first, affirmatively providing forms with false information to the workers and second providing such documents to the Department.

Although the worker departure forms do not specifically state that the workers would give up their three-fourths guarantee, a proximate result of the misrepresentation is that the workers would forfeit their right to the three-fourths guarantee. The forms averred that

[157] See Tr. at 37 (Maldonado's testimony), 108–110, 149–50 (Cheguez's testimony), 225 (Hernandez's testimony), 272–74 (Almanza testifying that Hernandez gave the workers a form "and asked us to sign the paper because 'there was no other choice'" and "we couldn't do anything about it"), 409–10 (WHI Perez's testimony), 732–34 (Russel Marino, Jr. saying that he gave the worker "the option to check off the box that said they were returning home because of personal reasons"), 769 (Russel Marino, Jr. recalling that he brought forms for the workers to sign stating that they were "resigning").

Respondent offered the worker additional work sufficient to complete the three-fourths guarantee; however, Respondent never made such a representation to the workers. Russel Marino, Jr. said that he did not want to have the workers sign a form saying that they were terminated, so he "gave them the option" to say that they quit for personal reasons. (Tr. at 733.) The fact that Respondent did not allow the workers to attest to the exact reason they left Respondent's employ renders moot Respondent's argument that it did not seek to have the employees waive any right. See Respondent's Brief at 31. Here, the worker departure forms effectively waived the farmworkers' right to the three-fourths guarantee; Respondent coerced the farmworkers into doing so.

To arrive at the $1,350 CMP, the Administrator decided against instituting the penalty per violation; rather the Administrator applied one $1,500 CMP, which included a $150 deduction because Respondent had no prior violations. See Tr. at 856–58. The Administrator made the $150 deduction after reviewing all mitigation factors. (Id.) Based on review of the record and the findings of fact made herein—including Respondent's limited experience with the H-2A program—the Administrator's decision to impose a $1,350 CMP for Respondent's violation of 29 C.F.R. 501.5 is reasonable.

IV. Respondent violated 20 C.F.R. § 655.122(d)(1) by providing inadequate housing, but the Administrator did not impose a reasonable $3,600 CMP. Rather, a $3,150 CMP is reasonable to assess.

As discussed below, the Administrator has successfully established violations for the bathroom windows with missing or broken screens, dormitory windows with missing or broken screens, uncovered garbage cans, and a shortage of hot water. However, the Administrator is unable to demonstrate that Employer committed a violation due to the provision of any unclean mattresses. A separate CMP for any mattress violation, therefore, is not warranted.

A. The Administrator assessed a reasonable $3,150 CMP resulting from Respondent's housing violations concerning missing or broken screens, uncovered garbage cans, and a shortage of hot water

The Administrator assessed $3,150 in CMPs for four violations of 20 C.F.R. § 655.122(d)(1), as follows: $900 for the unscreened bathroom windows; $900 for the faulty dormitory screen windows and doors; $900 for the uncovered garbage cans; and $450 for the hot water shortage. See Administrator's Brief at 84 (citing JX 10 at 160; Tr. 861–65, 938–39). Because Respondent's dormitories were built prior to 1980, the applicable regulations are the Employment and Training Administration Housing Standards codified at 20 C.F.R. §§ 654.404 through 654.417. The Administrator assessed reasonable CMPs because of Respondent's four discrete violations of § 655.122(d)(1). First, the record clearly shows unscreened bathroom windows. See Tr. at 331; PX 28, pages 1046–47. Section 654.408(a) mandates that "all outside opening . . . be protected with screening of not less than [sixteen] mesh." The Administrator, therefore, has successfully established a violation of § 655.122(d)(1). Second, the record shows obviously broken screens on the windows and doors of the dormitory in violation of § 654.408(a). See Tr. at 201–03 (Hernandez's testimony); PX 28, pages 1049–55. WHI Perez recalled the presence of flies in the dormitory. (Tr. at 323–28.) Third, the grounds surrounding

Respondent's dormitory also contained uncovered trash cans. Section 654.414 requires employers to provide "fly tight, clean containers . . . adjacent to each housing unit for the storage of garbage or other refuse." Here, some of the garbage cans surrounding the dormitory did not have lids and WHI Perez noted the presence of flies around such lidless garbage cans. See Tr. at 324, 332. PX 33, page 1094, is a photograph of an open pile of discarded cans of soda and beer. See Tr. at 374–75, 603–04. The pile of discarded cans is located "directly across from the dormitory housing." (Tr. at 375.) PX 33, pages 1095 through 1102, are more photographs of the discarded cans. (Id.) The Administrator, therefore, has established a violation of § 654.414. Fourth, the Administrator reasonably assessed $450 in CMPs for the shortage of hot water. According to § 654.412, "[b]athing and hand washing facilities, supplied with hot and cold water under pressure, must be provided for the use of all occupants." Here, the bathrooms at Respondent's dormitory lacked sufficient hot water. See Tr. at 30, 59–60 (Maldonado's testimony), 103–04 (Gustavo Perez's testimony), 330 (WHI Perez's testimony that he had to wait two to three minutes "to determine that there was no hot water present"); PX 7 at 189 (Silva Lopez recalling that, at times, he took cold showers); PX 11 at 288 (Hector Mishel Garcia Dominguez stating in his deposition that there was only enough hot water for ten people to shower before it ran out). *Cf.* 203, 215 (Hernandez's testimony that workers had to "wait a little bit" for hot water). Respondent, therefore, violated the hot water requirement at § 654.412. The Administrator reviewed and applied the various mitigation factors at 29 C.F.R. § 501.19(b) to the facts surrounding the violation and reasonably reduced the CMPs to $3,150.[158] See Tr. at 862–66.

Finally, Respondent argued that the Administrator did not attempt to determine whether Respondent addressed the housing violations WHI Perez observed. See Respondent's Brief at 31–33. This argument is unavailing, because the record does not establish that Respondent ever contacted the Administrator to inform her that it made such repairs. Therefore, the Administrator reasonably reviewed the mitigating factors at 29 C.F.R. §501.19(b), and rationally assessed CMPs for the foregoing housing violations.

B. The CMP assessed for the unclean mattress violation is unreasonable.

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[158] Concerning the bathroom screens, screen doors, and garbage cans, the Administrator applied the same mitigation factors and for the same reasons. The Administrator allowed a ten percent reduction because Respondent lacked a history of violations. However, the Administrator did not allow a reduction due to the number of workers affected, because of the gravity of the violation, because Respondent did not correct the violations immediately, and because Respondent provided no good explanation for the violations. See Tr. at 863–64. The Administrator applied the various mitigation factors at 29 C.F.R. § 501.19(b) to the facts surrounding the violation and reasonably reduced the CMP from a base penalty of $1,500 to $450. See Tr. at 865–66. The Administrator applied a ten percent deduction due to Respondent's commitment to future compliance and another ten percent deduction because the profit and loss component did not apply. Id.

Concerning the hot water violation, the Administrator did not apply mitigation factor number two, because the lack of hot water affected a large number of workers. The Administrator applied the mitigation factors for the gravity of the violation, because nobody was injured; she applied mitigation factor number five because Respondent provided a good explanation in that it did not know of the violation. The Administrator also applied mitigation factor six for a commitment to future compliance and another ten percent reduction because the Respondent did not stand to make any financial gain. Tr. at 865–66; see also Tr. at 937 (stating that the Administrator applied the same mitigation factors for the hot water and purported mattress violations, except the Administrator did not apply mitigation factor two). All of the Administrator's decision are reasonable based on the factual record.

The Administrator assessed a $450 CMP for unclean mattresses, which WHI Perez observed and photographed. See Administrator's Brief at 84 (citing JX 10 at 160; Tr. 862–66, 938–39). The CMP is unreasonable. The Administrator assessed the CMP due to a purported violation of 20 C.F.R. § 654.416, which requires an employer to "provide[]" H-2A workers with facilities consisting of, *inter alia*, "bunks, provided with clean mattresses." Here, WHI Perez assessed the violation, even though he "assumed" each worker had a mattress, and he could not recall if he observed any bunkbeds that were missing mattresses. See Tr. at 599; see also Tr. at 493. WHI Perez observed and photographed mattresses on the floor. See Tr. at 329; PX 28 at 1056. However, the photograph and WHI Perez's testimony does not preponderantly establish that Employer was in violation of § 654.416. The mattresses in the photograph are covered in bedsheets and other belongings, and so do not reasonably show the cleanliness of the employer-provided mattress. Although it is possible that the floor is unclean, thereby making the mattress unclean, neither the photographic nor the testimonial evidence proves this point. The Administrator did not successfully establish that Respondent did not "provide[]" its workers with "clean mattresses." § 654.416. Accordingly, the $450 CMP for unclean mattresses is not a reasonable penalty.

V. Respondent violated 20 C.F.R. § 655.122(h)(4) through its use of substandard transportation and use of unlicensed drivers. The Administrator imposed a reasonable $7,500 in CMPs.

Twenty C.F.R. § 655.122(h)(4) requires "[a]ll employer-provided transportation" to "comply with all applicable Federal, State or local laws and regulations." The Administrator reasonably assessed CMPs against Respondent because it used drivers without proper licenses, and because it transported its farmworkers using buses that fell below state and federal safety standards.

A. The $7,500 total CMP the Administrator imposed for transportation violations (20 C.F.R. § 655.122(h)(4)) was reasonable considering Respondent's violation for using unlicensed bus drivers.

The laws of the State of New Jersey prohibit driving on "public highways" without a driver's license. See N.J. Stat. Ann. § 39:3-10). New Jersey also prohibits the transportation of migrant farmworkers by drivers who are not licensed in the United States or Canada. See Administrator's Brief at 86–87 (citing N.J. Admin. Code § 13:21-13.2). Additionally, the H-2A regulations require drivers to possess a "valid permit qualifying the driver to operate the type of vehicle driven by him in the jurisdiction by which the permit is issued." 29 C.F.R. § 500.105(b)(1)(iii) (incorporated by reference in 20 C.F.R. § 655.122(h)(4)).

Here, in response to WHI Perez's request, none of the five workers WHI Perez observed driving the buses provided him with acceptable driver's licenses. See Tr. at 393, 399–400. Hernandez only provided driver's licenses to WHI Perez for three of the five drivers WHI Perez observed. (Tr. at 400.) Two had Mexican driver's licenses and one had an expired Mexican driver's license; the other two drivers had no licenses. See 390–401; PX 30 at 1064–72. The Administrator, therefore, has reasonably proven a violation of § 655.122(h)(4). The

Administrator reviewed the mitigation factors at 29 C.F.R. § 501.19(b), and reasonably assessed reductions of the CMPs. See Tr. at 868–70.[159]

B. The $7,500 total CMP the Administrator imposed for transportation violations (20 C.F.R. § 655.122(h)(4)) was also reasonable considering Respondent's violation for using unsafe vehicles.

The Administrator reasonably found two violations concerning the vehicles Respondent used to transport its farmworkers. One of the buses Respondent used to transport its farmworkers had a broken rear tail light. See Tr. at 405; PX 29 at 1057 (showing that bus number 205 has a broken right rear turn signal). The obviously broken tail light put Respondent in violation of federal and state motor vehicle laws. See, *e.g.*, 29 C.F.R. § 500.105(b)(3)(ii) (incorporating the lighting devices required under 49 U.S.C. 3102(c)); 49 C.F.R. § 393.11 (titled "Parts and Accessories Necessary For Safe Operation," specifically concerning commercial vehicles); N.J. Stat. Ann. § 39:3-61(a) (titled "Lamps and Reflectors Required on Particular Vehicles."). The CMP was reasonable, as it took into account the violation and the Administrator's review of the mitigation factors at 29 C.F.R. § 501.19(b).

The Administrator also rationally proved that the Respondent committed a violation by operating three buses with worn tires. Regardless of the instrument by which the investigator measured the tread on the tires, it is plainly evident that the Respondent operated buses with bald, unsafe tires. See Tr. at 402–06, 607–08; PX 29, pages 1058–63 (showing three tires that are clearly unsafe for road use due to the condition of the tire as worn, cracked, or both). Respondent did so in violation of federal and state laws. See 29 C.F.R. § 500.105(b)(3)(v); N.J. Admin. Code § 13:21-13.11(b) (prohibiting motor vehicles from transferring migrant workers with "tires which have been worn so smooth as to expose the tire fabric or which shall have any other defect likely to cause failure of the tire."). Respondent's actions also put lives at risk. The Administrator reviewed the mitigation factors at 29 C.F.R. § 501.19(b) and reasonably assessed a CMP of $750 per vehicle. See Tr. at 870–71. The gravity of the violation—involving a threat to the health and safety of Respondent's workers—is such that the Administrator's decision to apply any of the mitigation factors whatsoever represents a lenient decision. See Tr. at 868–74.

VI. Conclusion

This Decision modifies, in part, the Administrator's findings. Nevertheless, the preponderant evidence of record establishes that Respondent must remit $344,945.80[160] in back

[159] The Administrator reasonably allowed a ten percent reduction due to Respondent's lack of history with the H-2A program; her decisions to allow additional ten percent reductions due to the number of workers involved, and Respondent's commitment to future compliance, financial gain to the Respondent, and the catch all factor were also correct based on the record. (Tr. at 868–69.) The Administrator reasonably explained why it did not provide reductions for the gravity of the violation—unlicensed drivers are a safety hazard—as well as Respondent's efforts to comply in good faith and its explanation for the violation. (Id.) Respondent's practice of using unlicensed drivers demonstrates its general disregard for the safety and wellbeing of not only the guest farmworkers in its employ, but also for other motorists.

[160] $128,285 in back wages for meals; $64,960 in back wages for non-alcoholic drinks; $8,972.61 for beer; $142,728.22 for the various three-fourths guarantee violations.

wages and $211,800[161] in civil money penalties. The undersigned found the Administrator's assessments to be reasonable and accurate, except for the back wages owed for non-alcoholic drinks, and the CMP assessed for the non-existent mattress violation.

In its brief, Respondent noted that the penalties "dwarf those"[162] assessed in the Global Horizons cases, 2005-TAE-0001 and 2010-TAE-0002, which involved "rampant wage theft" and employers being paid kickbacks from the workers. Respondent's Brief at 4. There, the Administrator sought $350,000 in civil money penalties. Here, the Administrator has established $212,250.00 in CMPs. The scale of the CMPs is due to no reason aside from the sheer numbers of farmworkers affected by Respondent's violations. Additionally, the Administrator utilized conservative estimates to calculate the required back pay. The Administrator showed further restraint when deciding to apply one CMP for all of the violations of §§ 655.122(g), (p), and (q); she was well within her rights to have required Respondent to pay for each violation separately. Moreover, the governing regulations allow the Administrator to debar the Respondent from further certification, among other penalties. The Administrator showed further restraint in her decision not to apply those remedies, as well.

The Administrator's findings, modified in part herein, illustrate the truism that serious violations call for serious penalties. Respondent engaged in serious violations of the Act, and committed such violations against 147 farmworkers who in good faith engaged with the H-2A program.

THEREFORE, the undersigned finds:

1. Respondent violated 20 C.F.R. § 655.122(g), (p), and (q) by making false promises about kitchen access and failing to disclose meal charges. As a result, it owes $128,285 in back wages, and $198,450 in CMPs.
2. Respondent violated 20 C.F.R. § 655.122(p) through the sale of drinks and other items at a profit or in violation of state law. As a result, it owes $64,960 in back wages for non-alcoholic drinks sold and $8,972.61 for the profit it made from the beer it sold.
3. Respondent violated 20 C.F.R. § 655.122(i) in discharging certain workers prior to such workers meeting the three-fourths guarantee. As a result, it owes $142,728.22 in back wages, and $1,350 in CMPs.

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[161] $198,450 for violations of 20 C.F.R. §§ 655.122(g), (p), (q); $1,350 for the three-fourths guarantee violations; $1,350 for coercing the waiver of the three-fourths guarantee; $3,150 for the various housing violations; and $7,500 for violations concerning the use of unsafe vehicles.

[162] Respondent's laches and estoppel arguments, see Respondent's Brief at 18–19, are also denied as there is no indication that the Administrator engaged in a prolonged delay in enforcement. WHI Perez arrived at Respondent's dormitory in July 2015 in an investigatory capacity, only. ALJX 1 ¶ 36. The Administrator did not make a formal conclusion as to whether Respondent committed any violations until the June 22, 2016 determination letter. See ALJX 1 at ¶ 38. Because any delay was not unreasonable, the undersigned denies Respondent's estoppel and laches arguments.

4. Respondent violated 29 C.F.R. § 501.5 by attempting to cause workers to waive the three-fourths guarantee at 20 C.F.R. § 655.122(i). As a result, it owes $1,350 in CMPs
5. Respondent violated 20 C.F.R. § 655.122(d) through the provision of inadequate housing. As a result, it owes $3,150 in CMPs.
6. Respondent violated 20 C.F.R. § 655.122(h)(4) through substandard transportation and unlicensed drivers. As a result, it owes $7,500 in CMPs.

SO ORDERED.

THERESA C. TIMLIN
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: Any party seeking review of this decision, including judicial review, shall file a Petition for Review (§Petition§) with the Administrative Review Board (§ARB§) within 30 days of the date of this decision. 29 C.F.R. § 501.42. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed. An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents. Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov
If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. If you e-File your petition, only one copy need be uploaded. Copies of the Petition should be served on all parties and on the undersigned Administrative Law Judge. If the ARB does not receive the Petition within 30 days of the date of this decision, or if the ARB does not issue a notice accepting a timely filed Petition within 30 days of its receipt of the Petition, this decision shall be deemed the final agency action. 29 C.F.R. §501.42(a).