IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

R. ALEXANDER ACOSTA,[1] SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, Plaintiff, vs. PARAGON CONTRACTORS CORP., JAMES JESSOP, and BRIAN JESSOP, Defendants, and PAR 2 CONTRACTORS, LLC, Intervenor Defendant,	FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: CALCULATION OF BACK WAGES Case No. 2:06-cv-700-TC

In this child labor case, Plaintiff R. Alexander Acosta, in his official capacity as Secretary of Labor (the Department of Labor or DOL), asks the court to order Defendants Paragon Contractors Corporation and Brian Jessop (Defendants) to pay a substantial amount of back wages to children who worked without pay from 2008 to 2013 at a pecan farm in southern Utah in violation of the court's 2007 injunction and the child labor provisions of the Fair Labor Standards Act (FLSA).

At an evidentiary hearing, the Department of Labor presented testimony and

[1] Originally, Thomas E. Perez, who was the Secretary of Labor at the time this action was filed, was the named plaintiff. He has since been replaced by R. Alexander Acosta, the current Secretary of Labor.

documentation to support its calculation that Defendants owe $1,012,960.90 in back wages. After considering all of the evidence, the court finds that the DOL has met its burden.

PROCEDURAL BACKGROUND

In 2006, the DOL filed a complaint alleging that Defendants Paragon Contractors, James Jessop, and Brian Jessop had violated the child labor provisions of the FLSA. In November 2007, the court issued a Permanent Injunction ("Injunction") (ECF No. 26).

In September 2015, the DOL filed a motion for an Order to Show Cause in which it contended that Defendants Paragon Contractors and Brian Jessop had violated the Injunction "by employing minors to engage in work on their behalf in activities related to the harvesting of pecans" at the Southern Utah Pecan Ranch (the "Ranch" or "SUPR"). (Mot. for Order to Show Cause at 2, ECF No. 30.) In June 2016, after an evidentiary hearing, the court issued an order finding the Defendants in contempt for violating the Injunction. (See June 1, 2016 Findings of Fact and Conclusions of Law ("Contempt Order"), ECF No. 99.)

Following the Contempt Order, the court issued its December 2016 Order on Sanctions (Sanctions Order, ECF No. 109), which required Defendants to make an initial deposit of $200,000 into a fund created to compensate the children. Because the names and ages of the children who worked for Defendants were largely unknown (they were members of an elusive, closely-knit polygamous group in Hildale, Utah, and Colorado City, Arizona), the Sanctions Order set a one-year claims period during which the Department of Labor was to reach out to that community and encourage individuals who worked for Defendants to submit a claim for compensatory payments from the fund based on the number of hours worked. (Id. at 20–21.) The court ordered the Wage and Hour Division of the Department of Labor ("Wage Hour") to evaluate the claims and create a proposed schedule of payments to be made from the fund. (Id.

at 21.) The court also directed the Defendants to make additional payments to cover all court-approved claims exceeding $200,000. (Id.)

After the claims period was over, the DOL filed a Proposed Schedule of Payments (ECF No. 189) based on the claims filed. Because the claims were filed in different formats and varied in the level of detail the claimant provided, Kevin Hunt, the District Director of the Wage and Hour Division of the U.S. Department of Labor, created a formula to synthesize the information and prepared the proposed schedule of back-wage payments. Based on his initial analysis, the DOL determined that Defendants owed approximately $1.5 million in back wages. The Defendants filed their Objections to the Proposed Schedule of Payments (ECF No. 190).

The parties, following a meeting to discuss the proposed schedule of payments, entered into a series of limited stipulations. Based on those discussions[2] and stipulations (see Joint Status Report, ECF No. 205), as well as adjustments made after Defendants highlighted issues during the evidentiary hearing,[3] the DOL re-estimated the amount of back wages and now contends that the Defendants owe $1,012,960.90.

In November 2018, the court held an evidentiary hearing to evaluate the evidence and

[2] After Mr. Hunt completed this process and drafted the original proposed schedule of payments, the parties reached an agreement that allowed Defendants to conduct limited discovery on the reconstruction. (See July 10, 2018 Joint Status Report, ECF No. 205.) The DOL gave the Defendants copies of the claim forms and Mr. Hunt's spreadsheet and notes reflecting his processes. (Tr. of Nov. 5, 2018 Evid. Hr'g at 158:14-16, ECF No. 237.) The DOL also made Mr. Hunt available to answer any of Defendants' questions and confer about substantive issues. (Id. at 28:7-34:23; 99:5-8.) Defendants were invited to bring any clerical or mathematical errors to the DOL's attention and raise substantive issues regarding the back wage reconstruction. (Id. at 142:25-143:11.) Following this process, Mr. Hunt made significant changes to his back wage computations and corrected errors brought to his attention, which reduced the amount to $1,155,994.06. (Id. at 28:23-32:14; Pl.'s Amended Proposed Schedule of Payments, Ex. A to July 10, 2018 Joint Status Report, ECF No. 205-1.)

[3] Mr. Hunt made further reductions after the evidentiary hearing, which resulted in the current number of $1,012,960.90. (See Supplemental Decl. of Kevin Hunt, ECF No. 239.)

methods underlying Wage Hour's calculations. Now, based on the parties' briefs, testimony, and exhibits, the court enters the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

Documentation of Uncompensated Hours

The court has already found that Defendants "failed to maintain records of work performed on the [Southern Utah Pecan] Ranch, denied the Department access to the Ranch, refused to provide names of employees who worked at the Ranch, refused to respond to subpoenas, and made incredible denials of their involvement with the work at the Ranch." (Sanctions Order at 10.) Consequently, there are no precise records reflecting the specific number of uncompensated hours worked by children for Defendants in violation of the child labor provisions of the FLSA.

In sanctioning Defendants for their contempt of the 2007 Injunction, the court determined that it "will not allow Defendants to benefit from their failure to keep, or produce, labor records for the Ranch." (Id. at 12.) The court acknowledged that the "lack of records may hinder the ability to discern the precise extent of uncompensated work" but determined that the solution was not to penalize the children in this case by denying them a recovery. (Sanctions Order at 13 (internal quotes omitted).) The court established the fund to allow "individuals to come forward with some evidence regarding whether they worked on the Ranch and for how long." (Id. at 13.)

Claims Process

The court charged Wage Hour with establishing a claims process and evaluating the claims to create a proposed schedule of payments. Wage Hour undertook a significant outreach effort to inform individuals with potential claims about the claims process and availability. (See Decl. of Kevin Hunt ¶ 4, ECF No. 189-1.) Wage Hour established a dedicated phone line with a

toll-free number to the Wage Hour Salt Lake City District Office for individuals to call in to obtain more information and to notify the Department of their involvement in the harvest. (Id.) Wage Hour posted flyers with information about the claims process and how to reach the Department at various schools, businesses, and post offices near and around the Hildale, Utah, area and on the Department's website. (Id.) Wage Hour also issued several press releases with links to the Department's website, the claim form, and the toll-free number to publicize its outreach efforts. (Id.) Finally, Wage Hour published a blog about the claims process on the Department's website and placed a Public Service Announcement on television and radio stations in Utah. (Id.)

Wage Hour designed a claim form that requests personal information such as name, address, date of birth, phone number, and email address. (See Claim Form, attached to Hunt Decl. ¶ 5 and pp. 5–6.) The claim form also has a series of questions pertaining to job duties, the years, months, weeks, days, and hours worked at SUPR, and any equipment used in performing specific job duties. (See id.) This information provided sufficient evidence to show the amount and extent of each individual's work at SUPR during the relevant time period. Each claimant was required to execute the claim form pursuant to 28 U.S.C. § 1746, and declare under penalty of perjury that the statements provided were true and correct to the best of their knowledge and belief. (Hunt Decl. ¶ 5; Claim Form.) The claim form was available electronically on the Department's website and in hard copy for anyone who could not access the website. (Hunt Decl. ¶ 5.)

Calculation of Back Wages

Kevin Hunt evaluated the 135 claims received during the one-year claims period. (Tr. of Nov. 5, 2018 Evid. Hr'g (Tr.) at 22:7-8, 23:3-6, ECF No. 237.) Of those, 104 claimants are

eligible for back wages in accordance with the court's Sanctions Order because their work at SUPR was oppressive child labor. (Id. at 28:12-30:1.)

Mr. Hunt reviewed the claim forms for accuracy to ensure they were consistent with evidence Wage Hour obtained during its investigation regarding the hours and days worked by individuals at the harvest. (See Hunt Decl. at ¶ 6; Tr. at 23:6-22.) He also called some claimants and emailed others, particularly those who worked in hazardous occupations. (Tr. at 39:6-8; 73:15-24; 137:17-138:2; 139:4-6.) Some of his attempts to communicate with claimants went unanswered. (Id. at 73:16-17.) He then summarized the information from the claim forms and added it to an Excel spreadsheet that allowed him to track the data received by the claimants while accounting for various factors that influenced the back wage reconstruction, including the applicable minimum wage rate over the six year claim period,[4] the claimants' dates of birth which determines when they can work and what type of work they can perform under the agricultural child labor regulations, and the specific hours, weeks and months worked at SUPR. (Id. at 22:11-17.)

The parties' subsequent efforts to meet and confer resulted in a number of stipulations applicable to the back wage reconstruction. The parties stipulated that anyone between the ages of three and fifteen years old at the time of their employment at SUPR and who engaged in oppressive child labor was eligible to submit a claim. (See Joint Status Report at ¶ 1, ECF No. 205.) The parties also agreed that the following categories apply for purposes of ascertaining

[4] For example, the federal minimum wage increased over a three-year period from $5.85 to $7.25 between 2007 and 2009, which overlaps with the six year claims period. When reconstructing back wages, Mr. Hunt factored in the applicable minimum wage rate depending on the year the work was performed. For simplicity, he used the applicable minimum wage rate at the beginning of any given year and applied it to work performed over the course of that entire year which worked in favor of the Defendants. (Tr. at 26:19-27:13.)

what hours are compensable (that is, hours worked by children whose employment constitutes oppressive child labor under the FLSA and implementing regulations):[5]

a. All hours worked by individuals who were under the age of twelve at the time of their employ at SUPR;

b. All hours worked by individuals who were twelve or thirteen years old at the time of their employ at SUPR, unless they were employed with written consent of his/her parent or person standing in the place of his/her parent, or if they worked on a farm where such parent or person was also employed, in which case, only hours worked during school hours[6] are compensable;

c. All hours worked during school hours by individuals who were fourteen or fifteen years old at the time of their employ at SUPR; and

d. All hours worked in hazardous occupations by anyone who was under the age of sixteen at the time of their employ at SUPR. [7]

(Id. ¶ 2 (citing 29 C.F.R. § 570.2(b) & 570.71).)

With these agreements in place, Mr. Hunt analyzed the claim forms to determine the number of compensable hours worked by the claimants. Mr. Hunt used the information provided by each claimant regarding the number of hours worked at SUPR as a starting point and then eliminated all non-compensable hours based on the regulations and stipulations listed above. (See Tr. at 30:19-22 to 32:14.)

Defendants attempt to reduce the number of compensable hours by citing to exemptions in the child labor law. They either reply upon exemptions that are not applicable or they fail to provide evidence that such exemptions apply.

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[5] 29 C.F.R. §§ 570.2(b) & 570.71.

[6] The parties stipulated that the school hours for the school districts in which the minors were living at the time of the child labor violations in this case were 8:00 am to 2:30 pm five days per week excluding holiday schedules during which school was closed.

[7] Mr. Hunt used each claimant's exact date of birth to ensure they were not credited for any hours worked outside of school hours for fourteen and fifteen year olds (unless they were engaged in hazardous occupations), or any hours worked after they turned sixteen. (Tr. at 49:14-20; 50:2-51:24.)

Despite Defendants' objections, Mr. Hunt included all hours worked by those who were between the ages of three and fourteen at the time of their employment at SUPR, as that employment constitutes oppressive child labor. The Defendants contend that this is an incorrect calculation.

They point to the FLSA and implementing regulations which permit twelve and thirteen year olds to work outside of school hours with the written consent of their parents or persons standing in the place of their parents, or if they work on a farm where such parent or person is also employed. See 29 U.S.C. § 213(c)(1)(B); 29 C.F.R. § 570.2(b)(1). But there is no evidence to support a finding that twelve and thirteen year olds worked at SUPR with the written consent of their parents or persons standing in the place of their parents. (Tr. at 33:1-16.) There also is no evidence that the parents of these twelve and thirteen year olds were also employed at SUPR. (Id.)

Defendants are not allowed to simultaneously claim ignorance of the work performed at SUPR, as they did at the original contempt hearing, and then assert that the minors worked alongside their parents when doing so conveniently works to their advantage. Witnesses who testified at the original contempt hearing confirmed that the minors did not work alongside their parents. (See, e.g., Decl. of Alyssa Bistline ¶ 11, ECF No. 62; Decl. of Sheryl Barlow ¶ 12, ECF No. 72.) And Defendants' failure to keep, maintain or preserve records of employment of these children at SUPR, including records of written parental consent, or the names of employees to establish parental or other relationship, precludes Defendants from benefitting from the child labor agricultural exemptions for the twelve and thirteen year olds in this case.

Defendants also cite to the FLSA and implementing regulations, which permit children under the age of twelve to work outside of school hours with the consent of their parents. But

this rule only applies on small farms where all employees are exempt from minimum wage requirements because they use less than 500 "man-days" of agricultural labor[8] in each calendar quarter based on the previous calendar year. See 29 U.S.C. § 213(c)(1)(A); 29 C.F.R. § 570.2(b)(2). Here, all of the witnesses who testified at the original contempt proceeding, including Defendants' employee Dale Barlow, established that Defendants employed more than 500 man-days of agricultural labor in all of the years they operated the harvest at SUPR. (See Plaintiff's Proposed Findings of Fact and Conclusions of Law (submitted following the original contempt hearing) ¶¶ 19-20, 35, ECF No. 93 (containing specific citations to the record from various witnesses regarding the number of individuals employed by Defendants at SUPR between 2008 and 2013).)

In short, there is no evidence that the child labor exemptions found in Section 213(c)(1) of the Act apply to the facts in this case.

Mr. Hunt, following the stipulations, calculated the specific number of hours worked by each claimant. Those numbers were taken from the completed claim forms.[9] The claim form provided these instructions: "For each year, identify how many days, weeks, and/or months you worked at SUPR; and the average number of hours you worked each day" with a caveat directing the claimant to "use any category that allows you to accurately describe the period of time you worked at SUPR during each year; if you recall the specific dates you worked at SUPR, please include them." (Claim Form.) The one-year claims period was open between April 2017 and April 2018. Considering that the claimants were being asked during this window of time to

[8] A "man-day" is defined as "any day during which an employee performs any agricultural labor for not less than one hour." 29 U.S.C. § 203(u).

[9] The original claim forms are in Wage Hour's possession. A redacted set of claim forms has been filed under seal. (See ECF No. 240.) In addition, the Plaintiff provided a summary of each claim. See Pl.'s Evid. Hr'g Ex. B.

recall the number of hours they worked five to ten years ago (that is, the years between 2008 and 2013) when they were between the ages of three and fourteen, this approach was reasonable. Moreover, there is no reason to question the reliability of the information provided by the claimants.

Consistent with the instructions on the claim form, some claimants listed the specific number of hours, days, weeks and months they worked at SUPR each year. Others submitted some but not all categories of information (for example, some said they worked "all season" without specifying the number of days or weeks, and others gave a range such as "November to January" (see Tr. at 150:7, 152:7) without specifying the number of weeks or days) which was also consistent with the instructions on the claim form that asked them to "use any category that allows you to accurately describe the period of time you worked at SUPR during each year." (Claim Form.) All claimants, with the exception of five who submitted claims over the phone, signed a written declaration under penalty of perjury that the information provided was true and correct to the best of their knowledge and belief.[10] (Tr. at 125:1-4.)

Mr. Hunt compiled all of the data provided in the claim forms to determine the average number of days worked each week and the average number of weeks worked during a season at SUPR. (See Hunt Decl.; Spreadsheet summarizing data compiled by Mr. Hunt, attached as Ex. B to DOL's Proposed Schedule of Payments, ECF No. 189-2.) This analysis allowed him to establish a pattern of the hours worked at SUPR, based on a representative sample of employees. For instance, 83 of 104 claimants identified the number of weeks they worked each season. (Tr.

[10] Wage Hour permitted workers to submit claims over the phone or in writing to accommodate as many individuals as possible. Claim numbers 4, 19, 46, 88, and 97 were submitted by phone. The information provided by these claimants was inserted directly into Wage Hour's excel spreadsheet used to analyze the data and prepare the individualized back wage computations in Mr. Hunt's spreadsheet (Ex. B to Pl.'s Proposed Schedule of Payments, ECF No. 189-2). (Tr. at 125:1-18.)

at 37:7-20.) Of these, the majority stated that they worked two-and-a-half to more than three months during the harvest season each year. (Id. at 32:5-7.) From these numbers, Mr. Hunt arrived at a three-month average. Similarly, 57 of 104 claimants reported the number of days they worked in a week. Of these, the majority said that they worked six days per week at SUPR. (Id. at 42:23-24.) For purposes of reconstructing the hours worked to determine the amount of compensation owed, Mr. Hunt calculated on an individualized basis where specific information was given (that is, a certain number of days, weeks or months) and he used averages where necessary for individuals who stated that they had worked the entire harvest season but did not identify the exact number of days worked. (Id. at 34:24-35:1; 38:9-16; 46:5-47:8; 146:4-147:2.) This approach is consistent with Wage Hour's internal policies and guidance, and case law as set forth below, in back wage reconstruction cases. (Id. at 24:15-21; 25:4-17; 39:12-24; 145:4-23.)

At the evidentiary hearing, the Defendants' attempted, unconvincingly, to undermine Mr. Hunt's methodology. (See id. at 55:17–62:13.) Defendants argued that a weighted average, rather than the universal average applied by Mr. Hunt, is the appropriate methodology. (See id. at 55:17–62:13; Defs.' Evid. Hr'g Ex. 3.) But they simply offer an alternative methodology that was not presented through expert testimony and that was designed to water down the hours worked based on weighted averages against claimants who did not report specific numbers for all three categories (hours, days, and weeks). (Tr. at 62:15-21.) Mr. Hunt's approach was reasonably calculated to identify a pattern and practice of hours worked at SUPR based on information reported by the claimants. His methodology was reliable and consistent with the evidence in this case. (Id.)

Applying the methodology outlined above, Mr. Hunt calculated back wages for all eligible claimants based on the hours they worked at SUPR in oppressive child labor in violation

of the FLSA and implementing regulations. (Id. at 91:11-94:15.) At the hearing, Defendants raised for the first time some additional clerical errors not previously brought to Mr. Hunt's attention. Mr. Hunt corrected these errors as set forth in his declaration attached as Exhibit C to the DOL's proposed findings of fact and conclusions of law, which slightly reduced Defendants' back wage liability.[11]

Additional issues arose when the parties could not agree on whether to reduce the amount of hours for travel time and meal time. Concerning travel time, Mr. Hunt testified that he reconstructed hours based on the claim forms, which only asked claimants to identify the hours worked for Defendants at SUPR, not the time spent traveling to and from the Ranch. (Id. at 34:11-13.) Accordingly, Mr. Hunt did not compute back wages based on the time claimants spent traveling to and from SUPR, except in error for one claimant, which has since been corrected. (See Supplemental Decl. of Kevin Hunt, ECF No. 239, Ex. C to Pl.'s Proposed Findings of Fact and Conclusions of Law (ECF No. 231).) Other than that one instance, there is no evidence to support a reduction for travel time.[12]

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[11] Specifically, Mr. Hunt adjusted: (a) claim number 74 to give nine hours of credit for one holiday in 2012 instead of the seven hours of credit previously given (Tr. at 81:22-83:21), and he applied a four day average for work performed in 2013 instead of a five day average (Tr. at 86:19-88:19); (b) claim number 82 to account for the one hour travel time in each direction included in the claimant's journal entry by reducing the hours worked each from eleven to nine hours (Tr. at 120:1-121:19); and (c) claim number 95 to apply four and a half weeks instead of months (Tr. at 133:17-135:19). (See Supplemental Decl. of Kevin Hunt, Ex. C. to Pl.'s Proposed Findings of Fact & Conclusions of Law, ECF No. 239; Tr. at 156:23-157:12.)

[12] The claim form asked for the "typical work schedule and average number of hours worked each day." (Claim Form). It further asked claimants to "include the start and stop times." The start times vary among claimants between 7:00 a.m. to 11:00 a.m., and stop times vary between 3:00 p.m. to 11:00 p.m. (Id.) A few claimants, such as the one in claim number 71, indicated that they arrived at SUPR at 8:00 a.m. and left at 5:00 p.m., with a notation that reads "plus transport each way for 1 hour on top of work time." There is no reason to assume, as Defendants urge, that 104 claimants erroneously included travel time in response to this specific inquiry regarding hours actually worked.

The claim form did not ask people to account for meal times; rather, it only sought information regarding the number of hours worked at SUPR for Defendants. For this reason, and in light of evidence at the original contempt hearing that meal periods were either of short duration or skipped altogether, Mr. Hunt did not initially deduct time spent for meal periods that would otherwise not be compensable. (Tr. at 34:13-23.) But, to avoid further dispute on this issue, Mr. Hunt amended the computations to account for a daily one-hour non-compensable meal break over the entire claim period. (See Hunt Supplemental Decl. ¶ 4.) This change reduced Defendants' back wage liability by approximately $183,000. (Id.)

Work performed at SUPR in 2013 is another issue the parties were unable to resolve. The Sanctions Order expressly permits individuals who worked for Defendants at SUPR between 2008 and 2013 to submit a claim.

Defendants point to a subcontract agreement between Paragon and SUPR to justify its position that the contract for work ended no later than January 31, 2013. But this position ignores evidence that Defendants worked through the 2012-2013 harvest for Defendants at SUPR. (See Bistline Decl. ¶¶ 7-8 (describing the post-harvest work to be done); Sheryl Barlow Decl. ¶ 10 (testifying that her children were not paid for their work in 2013); Decl. of Thomas Barlow ¶ 11, ECF No. 73 (testifying that he trimmed trees at SUPR during February and March 2013).)[13] It is unlikely, and the evidence does not support a finding, that Defendants immediately halted their work at SUPR when they first learned of the DOL's investigation. Defendants' position

[13] Moreover, Defendants argue—without any evidentiary support—that no work was undertaken in January 2013 due to the Department's pending investigation. Not only is this contrary to evidence, but the timeline does not make sense. The DOL's investigation began with an investigation of SUPR in December 2012. The nature and extent of Paragon's and Brian Jessop's involvement at SUPR was largely unknown to the Department until approximately September 2015 when the DOL filed the original show cause motion, after years of subpoena enforcement litigation. (See Pl.'s Proposed Findings of Fact and Conclusions of Law at 12 n.13, ECF No. 231.)

regarding work performed at SUPR in 2013 is speculative and there is insufficient evidence to disregard the forty-nine claims from individuals who declared under penalty of perjury that they worked at SUPR in 2013. (Tr. at 33:21-23.)

The last issue in dispute between the parties is whether Defendants are able to use the proceeds from the 2012 harvest held in the DOL lockbox based on a settlement agreement between the DOL and SUPR to offset its back wage liability. (See Pl.'s Response to Defs.' Mot. Reconsideration of Sanctions Order, ECF No. 115-1.) The court previously resolved this issue when it denied Defendants' motion to reconsider its order denying the same request. (Order Denying Mot. Stay and Mot. Reconsider, ECF No. 119.) In the motion to reconsider, Defendants moved the court to reconsider the Sanctions Order to "revise downward the amount that it ordered to be paid into the DOL's fund to take into account the fact that the Department of Labor has seized a large sum of money that can be used for compensation." (Id. at 3 (quoting Defs.' Mot. Reconsider).) Defendants claimed that the proceeds from the DOL's seizure of the sale of nuts harvested in 2012 should offset the amount they were required to pay in sanctions. The court found that "the proceeds of the sale of these nuts, according to a settlement agreement between Southern Utah Pecan Ranch and the Government, are not available at this time. Because Defendants fail to establish any right to the use of these proceeds, Defendants fail to establish that the court should reconsider its order." (Id.) The proceeds of the sale of the nuts remain unavailable at this time, and Defendants still have not established any right to the use of these proceeds.[14]

[14] The proceeds from the 2012 harvest were seized from SUPR (not Defendants) by the Department of Labor under the "hot goods" provision of the FLSA. Under the settlement agreement between the DOL and SUPR, the Department must hold on to these funds "until the conclusion of the Wage Hour investigation into Paragon Contractors and/or other parties and until any related litigation involving Paragon Contractors and/or other parties is complete." (Pl.'s Response to Mot.

CONCLUSIONS OF LAW

Though this is a contempt case, a finding of contempt has already been made (and upheld by the Tenth Circuit) by clear and convincing evidence. See Acosta v. Paragon Contractors Corp., 884 F.3d 1225, 1229–30 (10th Cir. 2018). This proceeding is related only to the civil contempt remedy, which the court determined is compensation to the minors who worked for Defendants in violation of the 2007 Injunction and the child labor provisions of the FLSA. The court required Defendants to pay into an interest-bearing account on which children could make claims as a "workable solution [that] allows individuals to come forward with some evidence regarding whether they worked on the Ranch and for how long." (Sanctions Order at 13.)

In the Sanctions Order, this court relied on the seminal FLSA back wage reconstruction case of Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946).[15] The court acknowledged that the "lack of records may hinder the [DOL's] ability to discern 'the precise extent of uncompensated work,'" but determined that "the solution 'is not to penalize the

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Reconsideration of Sanctions Order, ECF No. 115-1.) SUPR agreed that "if any civil money penalties, back wages, and/or liquidated damages are assessed against Paragon Contractors and/or other parties by the Department of Labor related to work performed at [SUPR], SUPR will pay to the Department of Labor the amount assessed, up to, and not to exceed, the amount held in the lockbox." (Id.) The DOL cannot release these funds until related litigation involving Paragon Contractors and others is complete. For instance, the DOL filed a parallel action related to work performed at SUPR against the FLDS Church and Lyle Jeffs in this district. See Perez v. Jeffs, Case No. 2:15-cv-643-JNP. In that case, Judge Jill Parrish entered partial default judgment (ECF No. 31 in 2:15-cv-643)), but ordered that a determination of back wages in that case be held in abeyance until the completion of this case. In addition, the DOL filed an administrative action against Defendants for civil money penalties related to child labor violations at SUPR. The DOL also assessed civil money penalties against the FLDS Church and Lyle Jeffs. Because they did not contest the assessment, the administrative determination became a final order under 29 C.F.R. Pt. 580.5. To date, the civil money penalties have not been paid. Under the DOL's settlement agreement with SUPR, the amounts held in the lockbox could be used to satisfy the civil money penalties against these Defendants as well. Accordingly, litigation is not complete and these funds are not available to Defendants to satisfy their obligations in this case.

[15] Mt. Clemens was superseded by statute on other grounds as stated in Carter v. Panama Canal Co., 463 F.2d 1289, 1293 (D.C. Cir. 1972).

employee by denying him any recovery . . . . Such a result would place a premium on an employer's failure to keep records in conformity with [the law].'" (Sanctions Order at 13 (quoting Mt. Clemens Pottery Co., 328 U.S. at 687). The court determined that

> the law favors a system in which individuals may make claims on the Fund, carrying their burden of production by establishing that they worked at the Ranch in violation of the Injunction. They may do so by producing sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference.

(Id. at 13 (internal quotations omitted; emphasis added).) Despite the Defendants' assertion otherwise, the "just and reasonable inference" is the appropriate burden of proof for the Plaintiff for purposes of this proceeding. Of course, where the court imposes a fine upon the contemnor for compensatory purposes, the amount must be based upon the actual losses sustained as a result of the contempt, and cannot be speculative or arbitrary. See O'Connor v. Midwest Pipe Fabrications, Inc., 972 F.2d 1204, 1211 (10th Cir. 1992).

The court finds that the Plaintiff has met his burden to establish losses sustained by the minors as a result of Defendants' contumacy by just and reasonable inference with evidence that is neither speculative nor arbitrary. The DOL's back wage computation in the amount of $1,012,960.90 is based on concrete information provided by 104 claimants under penalty of perjury, from which the DOL established a pattern of Defendants' violation of the Injunction that resulted in uncompensated hours worked by minors in oppressive child labor between 2008 and 2013.

Under the FLSA, employers are required to "make, keep, and preserve" records of their employees including "wages, hours, and other conditions and practices of employment." 29 U.S.C. § 211(c). An employer's compliance with section 211(c) "determines the burden of proof

faced by a plaintiff in establishing the [] hours worked." McGrath v. Central Masonry Corp., No. 06-cv-00224, 2009 WL 3158131, at *6 (D. Colo. Sept. 29, 2009) (unpublished).

> [W]here the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes[,] a more difficult problem arises.... In such a situation ... an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.

Mt. Clemens Pottery Co., 328 U.S. at 687–88. When an employer does not comply with section 211(c), a plaintiff need only meet the "just and reasonable inference" burden of proof to establish the hours worked. Baker v. Barnard Constr. Co., Inc., 146 F.3d 1214, 1220 (10th Cir. 1998); Donovan v. Simmons Petroleum Corp., 725 F.2d 83, 85–86 (10th Cir. 1983).

While this case is unique in many ways, the need to reconstruct hours worked to compute back wages owed to employees due to an employer's failure to make, keep and maintain records is not unusual in cases involving violations of the FLSA. See Mt. Clemens Pottery Co., 328 U.S. at 687–88 (approving the use of employee estimates of uncompensated time where the employer failed to maintain accurate records); Baker v. Barnard Constr. Co., 146 F.3d 1214, 1220 (10th Cir. 1998) (recognizing that an employer's failure to keep accurate records makes the employees' burden extremely difficult and upholding an award for uncompensated travel time despite plaintiff's failure to connect their travel time to any specific job site or specific work day); Metzler v. IBP, Inc., 127 F.3d 959, 965-66 (10th Cir. 1997) ("When the employer has failed to record compensable time and the employees have proved that they actually performed the work in question, the plaintiffs need only produce evidence sufficient to support a reasonable inference of the amount and extent of that work."); American Waste Removal Co. v. Donovan,

748 F.2d 1406, 1409 (10th Cir. 1984) ("We have consistently upheld back wage awards based on reasonable approximations made in the absence of employer records."); Hodgson v. Humphries, 454 F.2d 1279, 1283 (10th Cir. 1972) (affirming the investigator's use of employees' estimations of the amount of hours they generally worked); Donovan v. Williams Oil Co., 717 F.2d 503, 505–06 (10th Cir. 1983) (awarding back pay to 34 employees based on a representative sample from 19 employee interviews and reiterating that the employer was in a poor position to claim that the Secretary failed to prove the amount of the back-pay award with absolute certainty); McGrath, 2009 WL 3158131, at *7 (concluding that the plaintiff's estimation of the number of overtime hours he worked on a weekly basis satisfied the deferential standard in Mt. Clemens Pottery Co.); Solis v. Melt Brands Stores, LLC, Case No. 11-cv-292-CMA-BNB, 2012 WL 364685 (D. Colo. Feb. 2, 2012) (awarding back wages based on the Secretary's estimates of the hours worked and wages earned from limited records and employee interviews); Chao v. First Nat'l Lending Corp., 516 F. Supp. 2d 895, 902 (N.D. Ohio Mar. 31, 2006) (finding that when the defendants did not provide records to calculate back wages, comparing the information gained from interviews of employees provided sufficient evidence).

In Donovan v. Simmons Petroleum Corporation, the Tenth Circuit upheld an award of back pay for uncompensated time based on the reconstruction of the hours worked. 725 F.2d 83, 85–86 (10th Cir. 1983). The damages were established through testimony from a representative sample of employees and some documentary evidence that established a pattern of violations. Id. The Tenth Circuit held:

> Not all injured employees need testify in order to establish a prima facie case as a matter of "just and reasonable inference." The plaintiff's evidence was sufficient to establish a pattern of violations, thereby causing the burden to shift to the Employer. The Employer did not produce evidence to rebut the inference. Thus, the court was justified in formulating a reasonable approximation of damages. The court evaluated and reworked the compliance officer's formulae in light of the

> evidence. Unable to rebut the plaintiff's evidence, the Employer is not in a position to complain that the award is imprecise.

Id. (internal citations omitted).

Here, Plaintiff collected declarations from 104 claimants regarding the number of days, weeks, months, and specific hours they worked for Defendants at SUPR between 2008 and 2013. The claimants prepared and submitted the declarations under penalty of perjury that the information they provided was true and correct to the best of their knowledge and belief going back five to ten years when they were between the ages of three and fifteen years old. The claim form directed claimants to "use any category [i.e. days, weeks, months, etc.] that allows you to accurately describe the period of time you worked at SUPR during each year" which is exactly the information the claimants provided. There is no reason to believe that the information provided by the claimants under these circumstances is unreliable and there is no basis to find that it is speculative or arbitrary. Rather, the information obtained from the claim process established a pattern of violation, from which the just and reasonable inference arose. See id. at 86 n.5.

Wage Hour's methodology to compute back wages on an individualized basis where specific information was provided, and to utilize averages where necessary based on a pattern of violations, was reasonable. For each claimant, Mr. Hunt carefully accounted for various factors that influenced the back wage reconstruction such as the applicable minimum wage rate over the six-year period, each claimants' date of birth which determines when they can work and what type of work they can perform under the agricultural child labor regulations, holidays and school hours (based on the parties' stipulation), and so forth. The court agrees with Mr. Hunt's position regarding travel time (there is no reason to assume that the claimants erroneously included travel time as hours worked) and the court finds Mr. Hunt's concession to apply a one-hour non-

compensable meal period for each shift during the claims period acceptable. Overall, the court finds that Mr. Hunt's computations of the compensation owed to the minors as a result of Defendants' contumacy is consistent with Wage Hour's internal policies and guidance and controlling case law in these types of cases.

"The duty to keep records rests solely with the employer and failure to comply with this obligation to keep records shifts to the employer the burden of specifically and expressly rebutting the reasonable inferences drawn from the employee's evidence as to the amount of time spent working." Bledsoe v. Wirtz, 384 F.2d 767, 771 (10th Cir. 1967); see also Solis v. Supporting Hands, LLC, Case No. CIV 11-0406 JB/KBM, 2013 WL 1897822 (D.N.M., Apr. 20, 2013) (finding that where an employer violates its § 211(c) record-keeping duties, it cannot meet its burden to rebut the Wage and Hour Division's reasonable estimates of back pay owed to the employees). Defendants have not specifically and expressly rebutted the reasonable inferences drawn from the evidence obtained from the 104 claimants.[16] Defendants largely rely on two of the 104 claimants who submitted journal entries with their claim forms to undermine the information given by the other 102 individuals.[17] Defendants' improperly rely on these outliers

[16] While Defendants attempted to rebut the inference with testimony from two women who claim they worked at SUPR during the relevant claim period, their testimony was not credible. Up until the evidentiary hearing concerning the back wage contempt remedy, Defendants claimed ignorance about the harvest at SUPR - including refusing to provide names of employees who worked at the Ranch - and they "made incredible denials of their involvement with the work at the Ranch." (Sanctions Order at ¶ 10.) Even if the court credited the women's testimony, it would have no bearing on the outcome of this decision. Their testimony failed to cast doubt on the reasonableness of the inferences drawn from the information obtained from the 104 claimants.

[17] Defendants also assert for the first time that all of the minors between the ages of three and fourteen are entitled to the child labor exemption found in 29 U.S.C. § 213(c)(1)(A) and (B) for hours worked outside of school hours because they worked with the implied consent of their parents. But this is not what the law requires. In addition to the requirement that minors under the age of fourteen can only be employed with written parental consent that does not exist here, Defendants' argument ignores the fact that Defendants employed more than 500 man-days of agricultural labor between 2008 and 2013 which also disqualifies them for the exemption for

and a handful of others in an attempt to create uncertainty and speculation regarding individual nuances of the claimants while ignoring the Defendants' clear pattern of oppressive child labor at SUPR in violation of the Injunction. These efforts, and Defendants' general dissatisfaction with Plaintiff's method of reconstruction, fall short of Defendants' burden to specifically and expressly rebut the inferences to be drawn from the evidence obtained through the claims process.[18] When the employer fails to produce sufficient rebuttal evidence, the court may award damages to the employees, even though the result may be only approximate. See Mt. Clemens Pottery Co., 328 U.S. at 687-88. "The employer [who fails to keep adequate records] cannot complaint that the damages lack the precision that would have been possible if the employer had kept the records required by law." Simmons Petroleum, 725 F.2d at 85–86.[19]

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children under the age of twelve. Finally, Defendants position contradicts the stipulation they agreed to specifically acknowledging that all hours worked by individuals under the age of twelve are compensable. (See July 10, 2018 Joint Status Report ¶¶ A.2.a., A.2.b, ECF No. 205.)

[18] This includes the just and reasonable inferences made with respect to work performed at SUPR in 2013. Defendants' position that the minors did not work for Defendants at SUPR in 2013 is speculative (i.e. they imply that the claimants must have worked for someone other than Defendants) which is insufficient to disregard the forty-nine claims from individuals for work they performed for Defendants at SUPR in 2013.

[19] It is also important to remember that while Defendants attempt to minimize their liability they are already benefiting from the fact that there are likely many potential children who harvested pecans during the relevant claim period – for Defendants' gain – who did not file claims for back wages. Credible witnesses who testified at the contempt proceeding consistently said that the number of workers numbered in the hundreds or thousands and that the majority were under the age of fourteen. (See Decl. of Winnie Barlow ¶ 16 ("During the 2012 harvest, I remember there being at least 400 to up to 1,000 people working while we collected the ground nuts. A lot of them were 14 years old and younger."), ECF No. 74; Martha Barlow Decl. ¶ 8 ("I would estimate up to 2,500 people working on the busiest days. I would guess a little less than half were nine and young."); Bistline Decl. ¶ 12 ("The people performing the work ranged in age from four through adult. The majority – probably around 70% – were children between the ages of eight and 14."); Decl. of Thomas Barlow ¶ 9 ("I remember most days there were up to 500 people working on the ground harvest. I would say about half were kids."), ECF No. 73.)

Defendants also unpersuasively challenge Mr. Hunt's failure to conduct follow-up interviews with the claimants. First, as noted above, Mr. Hunt did contact claimants alleging hazardous work to obtain clarification. And some of his attempts to call or email claimants went unanswered. (Tr. at 73:15-17.)

In addition, Defendants' criticism is based on an unrealistic assumption that the claimants were readily available for interviews. Mr. Hunt's ability to interview employees to gather specific information from a representative sample of employees was significantly hindered.

In this case, the children were part of the elusive, tight-knit, and very controlled FLDS polygamist enclave closely linked to Paragon.[20] During the contempt proceedings, the DOL presented evidence of Defendants' active attempts to hide wrongdoing and keep witnesses away from DOL investigators. After the DOL began its investigation, "[i]t quickly became clear that Defendants were putting up roadblocks and witnesses were withholding critical information from Wage Hour regarding the child labor activities at SUPR. Wage Hour spent the next two and a half years litigating subpoena enforcement actions in the District of Utah…." (DOL's Mar. 21, 2016 Proposed FOF & COL (submitted during contempt proceedings) ¶ 7.) At contempt hearings, the witnesses who did appear for the Defendants were recalcitrant and lacked credibility. Mr. Jessop was evasive at best and the court found that he was not credible (as had other courts in previous proceedings). (See Sanctions Order at 10 (finding that Defendants "failed to maintain records of work performed on the Ranch, denied the Department access to the

[20] For instance, at the relevant times, Defendant Brian Jessop, Paragon's President, had high standing within the FLDS Church and held important roles, including a member of security for high-ranking church officials. (See Bistline Decl. ¶ 25.) He was present at FLDS church meetings when the pecan harvest was discussed. (Id. ¶ 26.) And his children worked at SUPR. (Id. ¶ 30.)

Ranch, refused to provide names of employees who worked at the Ranch, refused to respond to subpoenas, and made incredible denials of their involvement with the work at the Ranch.").

There is also evidence that the children were told to avoid detection and deny involvement with SUPR. (See, e.g., Bistline Decl. ¶ 31 ("Also when I worked for Paragon in 2009, I was instructed by Brian Jessop and my step-father, James Jessop, that if anyone ever asked me if Paragon is associated with the nut harvest to say no and pretend I didn't know anything."); Decl. of Martha Barlow ¶¶ 13–14 ("[Security] would tell workers to run if they saw people taking pictures" and that "when CNN showed up at the ranch, … a security guy came across the field and yelled at everyone to run."), ECF No. 68.)

With no conventional way to approach the employees, the DOL fashioned a broad campaign to reach potential claimants. Its reliance on the written claims and its method for reconstructing back wages is legitimate, particularly given the employer's repeated resistance to the DOL's collection of information. The court concludes that the DOL has established a pattern of violations and has satisfied its burden to calculate the uncompensated hours worked by the claimants in violation of the Injunction as a matter of just and reasonable inference.

As a final matter, the court rejects the Defendants' repeated claim of entitlement to the proceeds from the 2012 harvest held in the DOL lockbox pursuant to a settlement agreement between the DOL and SUPR to offset its back wage liability. As the court previously determined, the proceeds from the sale of these nuts are not available at this time and Defendants have not established any right to the use of these proceeds.

ORDER

Based on the foregoing, the court orders the Defendants to replenish the Fund in the amount of $812,960.90, less any interest that has accrued on the interest-bearing account, within

30 days of the date of this Order to compensate the minors who worked for Defendants at SUPR in violation of the Injunction. Once the funds are received, the DOL shall distribute the amounts owed to each claimant as set forth in the final proposed schedule of payments attached to Mr. Hunt's declaration dated January 24, 2019. Any sums which cannot be distributed to the claimants, or to their personal representatives, because of the inability of the DOL to locate the proper persons or because of any person's refusal to accept payment, shall be deposited by the DOL in a special deposit account to be paid to the rightful employee. If such sums are not claimed by the claimant (or a personal representative of the claimant) within three years, the DOL shall deposit them into the United States Treasury as miscellaneous receipts.

SO ORDERED this 2nd day of July, 2019.

BY THE COURT:

Tena Campbell

TENA CAMPBELL
U.S. District Court Judge