IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

MADELYN CAILAO; HARRY LINCUNA; and ALLAN GARCIA, on behalf of themselves and all others similarly situated, Plaintiffs, v. HOTELMACHER LLC dba HOLIDAY INN EXPRESS; STEAKMACHER, LLC dba MONTANA MIKE'S STEAKHOUSE; SCHUMACHER INVESTMENTS, LLC dba WATER ZOO; APEX USA, INC.; WALTER SCHUMACHER; and CAROLYN SCHUMACHER Defendants.	)	Case No. CIV-17-800-SLP

O R D E R

Before the Court are the Motions to Dismiss and/or Strike Plaintiffs' Class Action Complaint [Doc. Nos. 28-33] filed by each of the Defendants.[1] Plaintiffs have filed a collective Memorandum in Opposition [Doc. No. 40] and Defendants have filed a collective Reply [Doc. No. 43].[2] The matter is fully briefed and ready for decision. For

[1] Defendants' Motions are virtually identical. For ease of reference and unless otherwise indicated, when referring to Defendants' Motions, the Court cites the Motion to Dismiss of Defendant APEX USA, Inc. [Doc. No. 31] (APEX Mot.).

[2] The Court's citations to the filings in this matter reference the page number in the ECF header.

the reasons set forth below, Defendant APEX USA, Inc.'s Motion is granted in part and denied in part. The remaining Defendants' Motions are denied.[3]

I. INTRODUCTION

Plaintiffs and putative class members (collectively, Plaintiffs) are Filipino nationals who obtained H-2B visas to work for one or more of the Defendants in the State of Oklahoma. Defendants are individuals and entities engaged in the hospitality industry and own or operate businesses including a hotel, a restaurant and a water park in Clinton, Oklahoma. Plaintiffs allege, inter alia, that Defendants subjected them to forced labor during the course of their employment and failed to pay them the wages or provide the additional benefits as promised in their employment and other contracts. Plaintiffs bring three claims for relief: (1) violations of the Trafficking Victims Protection Act of 2000 (TVPA) as amended by the Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA); (2) breach of written employment contract under Oklahoma law; and (3) third-party beneficiary claim for breach of contract under Oklahoma law.

II. GOVERNING STANDARD

To survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a plaintiff must plead sufficient factual allegations "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim

[3] Defendants recently filed a Notice [Doc. No. 59] and Supplemental Notice [Doc. No. 60] stating that "Defendants have settled with the United States Department of Labor." *Id*. at 1. The United States Department of Labor is not a party to this action. Moreover, Defendants do not reference their pending Motions to Dismiss in the Notices or otherwise purport to explain the significance of the Notices on the claims in this action. The Court, therefore, has not considered the Notices in ruling on Defendants' Motions to Dismiss.

is facially plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

To evaluate the sufficiency of the allegations of the complaint under the "*Twombly/Iqbal* pleading standard" the court undertakes a "two-prong approach." *Alpenglow Botanicals, LLC v. United States*, 894 F.3d 1187, 1195 (10th Cir. 2018) (citation omitted). Under the first prong, the court determines which allegations are not entitled to the assumption of truth and includes "legal conclusions" and "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Id*. (citation omitted). The second prong requires the court to assume the truth of the well-pleaded factual allegations and determine whether they state a plausible claim for relief. *Id*. (citation omitted).

"Generally, the sufficiency of a complaint must rest on its contents alone." *Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010). Thus, "[w]hen a party presents matters outside of the pleadings for consideration . . . 'the court must either exclude the material or treat the motion as one for summary judgment.'" *Brokers' Choice of Am., Inc. v. NBC Universal, Inc*., 861 F.3d 1081, 1103 (10th Cir. 2017) (quoting *Alexander v. Oklahoma*, 382 F.3d 1206, 1214 (10th Cir. 2004)). Certain exceptions exist, and the court may consider: (1) documents attached to the complaint as exhibits; (2) documents referenced in the complaint that are central to the plaintiff's claims if the parties do not dispute the documents' authenticity; and (3) matters of which the court may take judicial notice. *Gee*, 627 F.3d at 1186.

III. FACTUAL ALLEGATIONS OF THE COMPLAINT[4]

During the period January 1, 2008 through December 31, 2014, Defendants applied with the United States Department of Labor (DOL) for temporary labor certifications to employ foreign workers as H-2B workers. Defendants engaged in recruitment efforts in the Philippines to hire Plaintiffs and others to work at one or more of the Defendant entities located in Clinton, Oklahoma – Hotelmacher LLC dba Holiday Inn Express; Steakmacher, LLC, dba Montana Mike's Steakhouse; and Schumacher Investments, LLC, dba Water Zoo. Defendants Walter Schumacher and Carolyn Schumacher, husband and wife, own and/or operate the Defendant entities. Defendant APEX USA, Inc. (APEX) is a not-for-corporation organized under the laws of Oklahoma and headquartered in Clinton, Oklahoma. APEX engaged in the business of recruiting and providing foreign students and workers to United States companies, including the Defendant entities.

On behalf of the Defendant entities, Defendant Walter Schumacher filed with the DOL temporary labor certification applications for the admission of H-2B workers and attested that the Defendant entities would abide by applicable regulatory requirements including those related to payment of wages and deductions from wages.

[4] The Court views the factual allegations of the Complaint in the light most favorable to Plaintiffs as the non-moving parties. *Straub v. BNSF Ry. Co.*, 909 F.3d 1280, 1287 (10th Cir. 2018). The Court has not considered the exhibit (a letter) attached to Defendants' Motions. The exhibit does not fall within any of the exceptions which would permit the Court to consider its contents in the context of a Rule 12(b)(6) ruling. As Defendants acknowledge, the dismissal motion "is not a proper mechanism to resolve a factual dispute" and, therefore, the Court cannot consider the contents of the letter. *See* APEX Mot. at 9.

Additionally, Defendants were required to obtain exit approval for Plaintiffs from the Philippine Overseas Employment Administration (POEA), a Filipino governmental entity which regulates the recruitment of nationals from the Philippines to work abroad. Under the POEA's rules and regulations, the employer is responsible for the payment of the visa fee, airfare, POEA processing fee and the Philippine Overseas Workers Welfare Administration fee. Documentation regarding the terms of employment must also be submitted to the POEA and must be verified by the Philippine Overseas Labor Office (POLO) to ensure that the terms of employment comply with the minimum standards of the POEA and the government of the country of destination – here, the United States.

Defendants used non-party recruiters (the Recruiters) to engage in recruitment efforts in the Philippines. The Recruiters would supply information regarding terms of employment with one or more of the Defendant entities through an offer of employment letter (Offer Letter). The basic pay rates in the Offer Letter equaled or exceeded the wages Defendants included in their temporary labor certification applications.

In 2012 each of the Plaintiffs received an Offer Letter from the Recruiters. The Offer Letter set forth the amount of pay (i.e. an hourly wage rate) and promised that any processing and travel fees would be reimbursed upon their arrival in Oklahoma. The Recruiters also promised Plaintiff Casilao that her H-2B visa would be renewed so that she could continue to work for Defendants. And, the Recruiters additionally promised Plaintiffs Lincuna and Garcia that housing, food and transportation would be provided.

Throughout the recruitment process, the Recruiters demanded and collected various fees from Plaintiffs. Those fees included airfare and travel expenses, consular fees, U.S.

embassy interview fees, medical fees and fees payable to the Philippine government. The Recruiters also charged recruiter fees or inflated processing fees in excess of the costs of the services. To pay these fees, Plaintiffs used their savings, borrowed money (often at high interest rates), or mortgaged or sold property or land belonging to them or their families. Under the terms promised, Plaintiffs should have been able to pay the recruitment fees in a fraction of the time for which their H-2B visas were valid. But based on the actual terms of employment, it would take Plaintiffs several months to repay the recruitment costs.

When Plaintiffs arrived in the United States to begin working, they were directed to report to the APEX office for their work assignments. Plaintiffs were assigned different work than what was reflected in their visas and employment contracts. And, Plaintiffs were paid wages significantly less than what was promised and/or mandated by federal law. Also, Plaintiffs were not provided full-time work as promised. As a result, Plaintiffs were barely able to pay their living expenses in Oklahoma and not able to send money home to the Philippines to repay debts incurred to obtain their H-2B visas.

Defendants also refused to reimburse Plaintiffs for their travel expenses to the United States or for the amounts paid in recruitment expenses. And, Defendants did not provide Plaintiffs with free food and free lodging or a housing allowance. Instead, Defendants charged Plaintiffs approximately $100-$350 per month at a local motel – even if Plaintiffs shared a room with several others. Plaintiffs had to purchase their own food and did not have access to a kitchen to cook for themselves. These conditions were in direct contradiction to the promises that had been made to Plaintiffs. Defendants also did not provide transportation as had been represented. Moreover, Defendants refused to

extend Plaintiffs' work visas and Plaintiffs did not make sufficient money to cover the recruitment fees that had been paid. Additionally, Defendant refused to pay return travel expenses for Plaintiffs and Plaintiffs did not have sufficient funds to pay for their return travel.

During their employment, Defendant Schumacher subjected Plaintiffs to implied threats of harm. For example, Defendant Schumacher told Plaintiff Garcia that he carried a firearm in his car and when Plaintiff Garcia inquired about the promised air fare to and from the United States, Defendant Schumacher said he would only pay for return airfare if the employee were returning "in a box." Defendant Schumacher also made it known to Plaintiffs that he was a current and/or former police sheriff and had ties to law enforcement. He also used a police patrol car and talked to Plaintiffs from the patrol car. Additionally, Defendant Schumacher threatened at least one local employer and as a result, other employers refused to hire any workers in need of additional work. Under the totality of these circumstances, Plaintiffs felt compelled to continue working for Defendants.

IV. DISCUSSION PART ONE: SUFFICIENCY OF THE ALLEGATIONS OF THE COMPLAINT

A. First Claim for Relief: Violations of the TVPRA – Providing or Obtaining Forced Labor Under 18 U.S.C. § 1589(a)

"The TVPA establishes a civil cause of action for victims of prohibited trafficking activity." *See Menocal v. GEO Group, Inc.*, 882 F.3d 905, 916 (10th Cir. 2018); 18 U.S.C. § 1595(a). Plaintiffs bring claims pursuant to the TVPRA's forced labor provision, 28

U.S.C. § 1589(a).[5] A defendant is liable under 18 U.S.C. § 1589(a) if he or she "knowingly provides or obtains the labor or service of a person" through the following:

> (1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;
>
> (2) by means of serious harm or threats of serious harm to that person or another person;
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> (3) by means of the abuse or threatened abuse of law or legal process; or
>
> (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint.

18 U.S.C. § 1589(a).

The parties agree that the first category of conduct – force, threats of force, physical restraint or threats of physical restraint – is not at issue in this action. Thus, the Court's inquiry as to the sufficiency of Plaintiffs' allegations is focused on the second, third and fourth categories of conduct.

1. Serious Harm or Threats of Serious Harm / Scheme Pattern or Practice

The TVPRA defines "serious harm" to include "any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same

[5] Plaintiffs also allege violations of the additional provisions of the TVPRA including: violations of § 1590 (recruiting or trafficking individuals for the purpose of forced labor); violations of §§ 1589(b), 1593A and 1589(a) (knowingly benefitting from forced labor); and violations of § 1594 (conspiring to violate the TVPRA). Defendants' Motions, however, focus exclusively on the forced labor provision, 18 U.S.C. § 1589(a). Therefore, the Court's analysis is confined to that provision.

background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm." 18 U.S.C. § 1589(c)(2). The statute is "'intended to reach cases in which persons are held in a condition of servitude through nonviolent coercion.'" *Camayo v. John Peroulis & Sons Sheep, Inc.*, Nos. 10-cv-00772-MSK-MJW and 11-cv-01132-MSK-MJW, 2012 WL 4359086 at *4 n. 4 (D. Colo. Sept. 24, 2012) (unpublished op.) (quoting *Kiwanuka v. Bakilana*, 844 F. Supp.2d 107, 115 (D. D.C. 2012)). "The 'threat of financial harm constitutes serious harm within the meaning of the TVPA.'" *Paguirigan v. Prompt Nursing Emp't Agency LLC*, No. 17-cv-1302(NG)(JO), 2018 WL 4347799 at *8 (E.D. N.Y. Sept. 12, 2018) (unpublished op.) (internal quotation marks and citations omitted).

Here, the Complaint sufficiently alleges serious harm and a scheme, pattern or practice by setting forth facts to demonstrate Defendants engaged in fraudulent conduct that resulted in nonphysical and/or financial harm to Plaintiffs. In making this determination, the Court takes into account the particular vulnerabilities of the Plaintiffs and the circumstances surrounding their recruitment and employment by Defendants. *See, e.g., Ross v. Jenkins*, 325 F. Supp.3d 1141, 1164 (D. Kan. 2018) (When assessing whether harm is sufficiently 'serious' to satisfy the TVPRA, . . . the relevant inquiry is whether the defendant "intentionally cause[d] the oppressed person reasonably to believe, given her special vulnerabilities, that she ha[d] no alternative but to remain in involuntary service for a time." (citations and internal quotation marks omitted)).

Plaintiffs allege that they incurred substantial debts as a result of Defendants' recruitment and employment of them, that Defendants' paid them less than what was

promised, assigned them to jobs other than those promised and charged them for housing contrary to representations that housing would be provided at no charge. Plaintiffs also allege Defendants engaged in conduct that prevented them from obtaining other employment. As a result, Defendants could not repay the debts they owed or afford travel home and felt compelled to continue to work. These allegations suffice. *See, e.g., David v. Signal Intern, LLC*, 37 F. Supp.3d 822, 832 (E.D. La. 2014) ("Because Plaintiffs have alleged Burnett induced them into incurring substantial debts and Plaintiffs were compelled to continue working to repay those debts, Plaintiffs' complaints contain sufficient facts to state a claim under Section 1589(a)(2)."); *Nuñag-Tanedo v. E. Baton Rouge*, 790 F. Supp. 2d 1134, 1146 (C.D. Cal. 2011) (Fraudulent scheme to financially manipulate plaintiffs stated valid claim under TVPRA; plaintiffs, having incurred massive debts associated with recruitment and other fees, felt compelled to continue to work as such debt would be crushing to plaintiffs without access to the promised jobs in the United States).[6]

Because the Court finds sufficient allegations of financial harm and a scheme, pattern or practice to withstand dismissal, the Court need not separately address whether the allegations of the Complaint sufficiently allege nonphysical and/or psychological harm. However, the allegations that Defendant Schumacher carried a gun and made a statement that he would only pay for return travel if the employee were "in a box" appear to suffice

[6] Plaintiffs total out-of-pocket expenses to pay the fees associated with obtaining their H-2B visa and employment with Defendants typically totaled between approximately $2000-$3000 USD. Compl., ¶ 63. Plaintiffs allege this amount is significant in the Philippines "where the annual average income per family in 2012 was less than $6,000 USD." *Id*.

at the pleading stage where the Court must construe the allegations as true and draw all reasonable inferences in favor of Plaintiffs.

2. Abuse of Legal Process

The TVPRA defines "abuse or threatened abuse of law or legal process" as "the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure" on the victim to take, or refrain from taking, some action. 18 U.S.C. § 1589(c)(1); *See also Aguirre v. Best Care Agency, Inc.*, 961 F. Supp. 2d 427, 443 (E.D. N.Y. 2013) ("'Abuse of the law or legal process'" is the "use of threats of legal action, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed in order to coerce someone into working against that person's will." (citation omitted)). Defendants move for dismissal of any § 1589 claim premised on abuse of the law or legal process arguing that Plaintiffs have alleged only that Defendants failed to comply with certain immigration regulations in arranging for Plaintiffs to come to work for them. Defendants contend Plaintiffs conflate the concept of a "violation" of law with the concept of an "abuse of legal process." APEX Mot. at 25.

In response, Plaintiffs contend the following factual allegations of the Complaint support their claim of a § 1589 violation premised on abuse of legal process: (1) Defendants misused the legal process to recruit H-2B workers by, inter alia, refusing to pay them at the rates promised when securing the visas; (2) Defendants ensured that Plaintiffs could not work for other employers by informing them they could not work for others because it would be a violation of their visa and by confronting at least one local employer who had

hired "putative class members"; and (3) Defendant Walter Schumacher made it known to Plaintiffs that he was a current and/or former police sheriff, used a police car, made it known he carried a firearm in his car, and stated that he would only pay for return tickets to the Philippines if the employee were returning "in a box." *See* Pls.' Resp. at 22-23 (citing Compl., ¶¶ 86, 87-89, 91, 110).

As one court has observed, "the question of whether statements (and actions) by an employer must be viewed in light of all the surrounding circumstances, and thus, resolution of whether a certain statement amounts to an abuse of the legal process is one that is particularly difficult on the sparse record of a motion to dismiss." *Camayo*, 2012 WL 4359086 at *5 n.6. Construing Plaintiffs' allegations as true, and drawing all reasonable inferences in favor of Plaintiffs, the Court concludes the conduct alleged by Plaintiffs suffices. *See, e.g., id.*, 2012 WL 4359086 at *4 ("Several cases have found the 'abuse of the legal process' prong satisfied by conduct in which the employer threatens to involve law enforcement or immigration authorities in order to persuade the employee to remain faithful or continue working.").

In sum, Plaintiffs have alleged facts sufficient to state plausible claims for relief under the forced labor provisions of the TVPRA. Thus, Defendants' Motions for dismissal of Plaintiff's TVPRA claims are denied.

B. Second Claim for Relief: Breach of Written Employment Contract

Defendants next move to dismiss Plaintiffs' breach of written employment contract claim. *See* Compl., ¶¶ 117-125. Initially, Defendants contend that any breach of contract claim should be dismissed against Defendants Walter Schumacher, Carolyn Schumacher

and APEX because none of these Defendants entered into any contract with any Plaintiff. Defendants further contend Plaintiffs impermissibly base their contract claim on the H-2B regulatory documents submitted during the H-2B application process. Defendants argue these documents do not constitute an enforceable contract.

Both parties rely on Oklahoma law as governing any breach of contract claim. Under Oklahoma law, to support a claim for breach of contract a plaintiff must show: (1) the formation of a contract; (2) breach of the contract; and (3) damages as a result of that breach. *Cates v. Integris Health, Inc.*, 412 P.3d 98, 103 (Okla. 2018).

The Complaint includes the following allegations concerning formation of the alleged employment contracts:

- "In emails, contracts and other documents and communications, the Recruiters promised putative class members full-time jobs with hourly pay rates higher than the U.S. minimum wage; free housing (or housing allowance), food and transportation; reimbursed travel and recruitment expenses; and renewals of the H-2B visas once they arrived, resulting in long-term work and income potential in Oklahoma."

- Defendants submitted documents to the POEA and POLO to formalize "the verbal promises made to Plaintiffs and putative class members by the Recruiters. These forms were signed by Defendants W. Schumacher and/or C. Schumacher and included an employment contract signed by Defendants W. Schumacher and/or C. Schumacher and the putative class members."

Compl., ¶¶ 56-57.

The Complaint alleges that the Plaintiffs' terms of employment included, among other things:

- The job title, job location and basic rate of pay included in the Offer Letter;

- Guaranteed wages no lower than the United States minimum wage or the minimum wage of the Philippines, whichever was the highest;
- Travel to Clinton and return travel to the Philippines upon contract completion at the employer's expense; and
- Free food and lodging or a housing allowance.

Compl., ¶ 57 (a)-(d).

1. The Complaint Alleges Sufficient Facts to Demonstrate the Formation of a Contract

The Complaint alleges that the applications for temporary employment certification, entitled ETA Form 9142(b), were signed by Defendant Walter Schumacher for the Defendant entities as the employers. Compl., ¶¶ 40-49. The Complaint further alleges that Defendant Walter Schumacher directed recruitment efforts including communications by mail, fax, email and telephone and that Defendant Walter Schumacher periodically traveled to the Philippines in relation to the recruitment efforts. Compl., ¶ 51. The Complaint also alleges that Defendants Walter Schumacher and Carol Schumacher signed employment contracts. Compl., ¶ 57. As to Defendant APEX, the Complaint alleges that it made the work assignments once Plaintiffs arrived in Oklahoma and informed Plaintiffs "that they would be working for certain Defendants regardless of whether that Defendant was the party named in the . . . contracts and/or government-certified H-2B visa applications." Compl., ¶ 71.

The Court finds Plaintiffs' have stated sufficient factual allegations to survive dismissal of their breach of contract claim. Defendants argue that "H-2B regulatory requirements do not, as a matter of law, form binding employment contracts between H-

2B workers and their employers." APEX Mot. at 12. Defendants contend that any contract arising from the H-2B regulations is unenforceable for lack of consideration because Defendants were legally obligated to comply with the regulations. *Id*. at 13. ("[A] party may not rely on promises made to do something or refrain from doing something that the promising party is already legally obligated to do or refrain from doing.").

Defendants too narrowly construe the terms of the employment contracts when they argue that Plaintiffs' contract-based claim is based on allegations that the H-2B regulations embodied written agreements. *See, e.g.*, APEX Mot. at 13 ("The Complaint essentially alleges a violation of H-2B regulations and/or the documentation submitted as part of the H-2B process and then attempts to disguise that claim as a contract-based claim by alleging that those regulations embodies written agreements."). As set forth above, the allegations regarding contract formation are more broad and incorporate other documentation and communications independent of the H-2B regulations. *See, e.g., Bourke v. W. Bus. Prods, Inc*., 120 P.3d 876, 887 (Okla. Civ. App. 2005) (addressing formation of employment contract under Oklahoma law which encompasses "all provisions – discernable from the circumstances under which the agreement was reached – which are indispensable to effectuate the parties' intent") (citing *Dixon v. Bhuiyan*, 10 P.3d 888, 891 (Okla. 2000)); *see also Sexton v. Kipp Reach Academy Charter School, Inc*., 260 P.3d 435, 437 (Okla. Civ. App. 2011) (reversing district court's dismissal of breach of employment contract claim and finding plaintiff alleged the elements of an implied contract based on verbal offer, acceptance of that offer and subsequent conduct of the parties).

Additionally, Plaintiffs allege the legal obligations attendant to their H-2B applications (both through the regulations and certification applications) are incorporated into their contracts of employment. Although Defendants contend any contract based on such legal obligations would lack sufficient consideration, numerous courts have allowed H-2B workers to advance a breach of contract claim based on the same contractual theory as that advanced by Plaintiffs. *See, e.g., Cuellar–Aguilar v. Deggeller Attractions, Inc.*, 812 F.3d 614, 620 (8th Cir. 2015) ("Like a minimum-wage law, the Department of Labor regulations imposed upon [defendant] a legal obligation to pay its H–2B employees no less than the prevailing wage. In light of this legal duty, we hold that the terms of the labor certification applications, including the agreement to pay the prevailing wage . . . form a part of the workers' contracts."); *Aviles-Cervantes v. Outside Unlimited, Inc*., 276 F. Supp. 3d 480, 494-495 (D. Md. 2017) (denying defendants' motion to dismiss breach of contract claim on grounds of lack of consideration as to their obligations to comply with H-2B regulations and terms of H-2B certifications); *Moodie v. Kiawah Island Inn Co., LLC*, 124 F.Supp.3d 711, 725–28 (D. S.C. 2015) (finding law and regulations applicable to the H-2B program were part of employment contract and denying motion to dismiss similar state law breach of contract claims by H–2B workers); *Zamalloa v. Thompson Landscape Servs., Inc*., No. 4:17-CV-00519-ALM-KPJ, 2018 WL 3032677 at *5 (E.D. Tex. May 3, 2018) (unpublished op.) (denying motion to dismiss state law breach of contract claim and finding contracts with plaintiffs under the H-2B visa program "explicitly and/or by operation of law included the terms and conditions set forth in the certification application, including Defendants' promise to pay Plaintiffs no less than the prevailing wages for all hours of

work").[7] Therefore, the Court finds Plaintiffs have alleged sufficient facts to state a plausible claim for breach of employment contract.

2. Dismissal of the Breach of Contract Claim Against Defendants' Walter Schumacher, Carol Schumacher and /or APEX

Defendants further move for dismissal of the breach of contract claims against Defendants Walter Schumacher, Carolyn Schumacher and/or APEX. Defendants contend that "Plaintiffs cannot assert contract claims against individuals or entities with whom they had no contract." APEX Mot. at 11 (citations omitted); *see also* Def. Walter Schumacher's Mot. [Doc. No. 32] at 11-12 and Def. Carolyn Schumacher's Mot. [Doc. No. 33] at 10-11.

"Privity of contract is an essential element of a cause of action on contract, or an action based on a contractual theory. As a general rule only the parties and privies to a contract may enforce it." *Wells Fargo Bank, N.A. v. Heath*, 280 P.3d 328, 334 (Okla. 2012).

The Court finds dismissal of Plaintiffs' breach of contract claim is proper as to Defendant APEX. The Complaint alleges the following with respect to Defendant APEX:

- Defendant APEX "engaged in the business of recruiting and providing foreign students and workers to . . . Defendants Hotelmacher LLC,

[7] Defendants rely on the absence of any federal regulation requiring a separate written contract as grounds for dismissal of Plaintiffs' breach of contract claims and point to the related H-2A program that expressly imposes such a requirement. Defendants cite two cases in support of this argument, *Bojorquez–Moreno v. Shores & Ruark Seafood Co., Inc.*, 92 F.Supp.3d 459 (E.D.Va. 2015) and *Garcia v. Frog Island Seafood, Inc.*, 644 F.Supp.2d 696 (E.D. N.C. 2009). *See* APEX Mot. at 12-13. But as subsequent courts have found, Plaintiffs' breach of contract claim is based on state law, not federal law and "[n]either the defendants nor the two cases on which they rely ,[*Bojorquez–Moreno* and *Garcia*] explain how a federal agency's thoughts on whether a contract exists does or could preclude the existence of a contract under state law." *Cordova v. R & A Oysters, Inc.*, 101 F.Supp.3d 1192, 1198–99 (S.D. Ala. 2015) (denying motion to dismiss state law breach of employment claims brought by H-2B workers).

> Steakmacher LLC, Schumacher Investments, LLC, W. Schumacher and C. Schumacher."
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> • "APEX employees informed Plaintiffs and putative class members that they would be working for certain Defendants, regardless of whether that Defendant was the party named in the putative class members' contracts and/or government certified H-2B visa applications."

Compl., ¶¶ 19, 71.

The Complaint is void of any allegations that APEX was a party to any contract, signed any contract, or directed communications concerning the offers of employment. Although APEX may have acted in some agency capacity on behalf of Defendants when it made the Plaintiffs' post-contract work assignments, that conduct alone is insufficient to establish privity of contract. The Court finds, therefore, that Plaintiffs' breach of contract claim against Defendant APEX should be dismissed.

But the Court finds the breach of contract allegations are sufficient to withstand dismissal of the claims against Defendants Walter Schumacher and Carolyn Schumacher. The Complaint specifically alleges that these individual Defendants signed employment contracts with Plaintiffs. Compl., ¶ 57. Further factual development may ultimately disclose that these individual Defendants have no contractual relationship with Plaintiffs (or are shielded from liability by virtue of the Defendant entities' status as LLCs). But without the specific documentation at issue, at the pleading stage, dismissal of the individual Defendants is premature.[8]

[8] Defendants make certain assumptions about the terms of the contracts and the parties thereto. For example, Defendants argue that neither Defendant Walter Schumacher nor Defendant Carolyn Schumacher was an alleged party to any contract in his or her "individual capacity." *See* Defs.' Mots. [Doc. Nos. 32 and 33] at pp. 10-11 and 11-12, respectively. Defendants further argue "the

C. Third Claim for Relief: Third-Party Beneficiary Claim for Breach of Contract

Plaintiffs' Third Claim for Relief alleges a claim for breach of contract under a third-party beneficiary theory. Plaintiffs base this claim on documents Defendants submitted to and accepted by the POEA (the POEA Contract) which Plaintiffs allege were entered into for the benefit of Plaintiffs. *See generally*, Okla. Stat. tit. 15, § 29 (A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."). Plaintiffs' allege the terms of the POEA Contract included: (1) a guarantee that Plaintiffs would not be paid less than the federal minimum wage or the amounts Defendants represented they would pay Plaintiffs; and (2) a representation that Plaintiffs would be entitled to free lodging, food and transportation. Compl., ¶¶ 128-130.

Courts have refused to allow a third-party beneficiary breach of contract claim to proceed based on H-2B visa applications where the alleged breach is between a defendant and the DOL on grounds that "the third-party beneficiary claim is essentially a private right to enforce a regulatory scheme" and, therefore, not cognizable. *See, e.g., Moodie*, 124 F. Supp.3d at 728. Here, however, the contract at issue is not between Defendants and the DOL but between Defendants and government entities in the Philippines. Defendants cite no law that precludes a private right of action to enforce the terms of these agreements.

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documents that Plaintiffs allege formed the contracts at issue are only between two parties – the worker and their respective employer." Reply at 6. Defendants argue the only "employers" are the Defendant entities as opposed to the individual Defendants. For purposes of a motion to dismiss, however, the Court must construe the allegations of the Complaint as true and draw all reasonable inferences in favor of Plaintiffs. As set forth, as alleged in the Complaint, the parties' contract is not limited to the H-2B visa documentation. And, the Complaint alleges the individual Defendants signed employment contracts. Therefore, it is plausible that more than one Defendant may have acted as Plaintiffs' employer.

Defendants otherwise raise substantially the same argument as advanced in support of dismissal of the breach of contract claim.[9] The Court has found those arguments insufficient to warrant dismissal and, therefore, similarly finds dismissal of the third-party beneficiary breach of contract claim is not warranted.

D. Dismissal of Fair Labor Standards Act (FLSA) Claims

Defendants further argue that Plaintiffs' claims brought pursuant to the FLSA, 29 U.S.C. § 216(b), are untimely and that the FLSA provides the exclusive remedy for any claim for underpaid wages. In response, Plaintiffs state they do not purport to bring any claim under the FLSA. Plaintiffs further argue that their state law claims for breach of contract – including underpayment of wages – is not preempted by the FLSA.

Because Plaintiffs Complaint does not include a claim for relief under the FLSA, the Court need not address the arguments raised by Defendant in relation thereto. And the Court rejects Defendants' argument that the FLSA precludes Plaintiffs' state law breach of contract claims for unpaid wages. *See Hammond v. Lowe's Home Ctrs., Inc.*, 316 F. Supp.2d 975, 979 (D. Kan. 2004) ("[T]he FLSA does not create the exclusive remedy for unpaid wages, nor does the FLSA preempt a state law claim compensable pursuant to a

[9] Defendants further cite *Rao v. Covansys Corp.*, No. 06 C 5451, 2007 WL 3232492 (N.D. Ill. Nov. 1, 2007) (unpublished op.). But for the reasons set forth in the Court's analysis of Plaintiffs' breach of contract claim, the Court declines to follow the court's holding in *Rao*, which was based on a determination that no consideration supported the contract at issue.

breach of contract claim but not the FLSA.").[10] Defendants' Motions, therefore, are denied as to the FLSA-related arguments.

V. DISCUSSION PART TWO: SUFFICIENCY OF CLASS ALLEGATIONS

Defendants alternatively move to strike Plaintiffs' class allegations pursuant to Fed. R. Civ. P. 23(d)(1)(D). Defendants contend Plaintiffs have failed to adequately plead numerosity or demonstrate issues common to the class predominate.

Rule 23(d)(1)(D) provides that in conducting an action asserted under Rule 23, the court may "require that the pleadings be amended to eliminate allegations about representation of absent persons and that the action proceed accordingly." Fed. R. Civ. P. 23(d)(1)(D). Federal district courts have relied on Rule 23(d)(1)(D) "to strike class allegations at the pleading stage where it is clear from the pleadings that the requirements for class certification under Rule 23 cannot be satisfied." *In re Syngenta AG MIR 162 Corn Litig.*, No. 14-md-2591-JWL, 2016 WL 1391045 at *2 (D. Kan. April 7, 2016) (unpublished op.); *see also Dollison v. Am. Nat'l Ins. Co.*, No. 13-CV-100-CVE, 2013 WL

[10] The Court recognizes that "state law claims that merely seek to enforce the defined remedies of the FLSA are preempted." *Hammond*, 316 F. Supp.2d at 979 (citing *Conner v. Schnuck Markets, Inc.*, 121 F.3d 1390, 1399 (10th Cir. 1997)); *see also Mickle v. Wellman Prods., Inc.*, No. 08-CV-0297-CVE-PJC, 2008 WL 3925266 at *3 (N.D. Okla. Aug. 20, 2008) (unpublished op.) ("If a plaintiff's common law claims are merely duplicative of the remedies provided by the FLSA, the common law remedies are preempted. However, the FLSA does not preempt state law remedies that are more generous than those provided by the FLSA." (citation omitted)). The allegations of Plaintiffs' Complaint demonstrate that Plaintiffs seek remedies beyond those provided by the FLSA through their breach of contract claim. As recognized by the court in *Hammond*, here, Plaintiffs, inter alia, seek unpaid wages in excess of the two and three year FLSA limitation periods contained in 29 U.S.C. § 255(a)" and "[i]n this situation, [P]laintiffs' claims under the express contract would supplement rather than abridge their rights under the FLSA." *Id.* at 979. The scope of remedies available to Plaintiffs is not a matter before the Court on the pending dismissal motions.

1944891 at *9 (N.D. Okla. May 9, 2013) (unpublished op.) ("A court may strike class allegations under [Rule 23(d)] where a complaint fails to plead the minimum facts necessary to establish the existence of a class satisfying Rule 23's mandate.") (citation omitted). "[E]arly resolution of class certification issues or other issues regarding the viability of claims that may be decided on the pleadings serves the interests of efficiency by avoiding the continued litigation of claims that ultimately cannot survive." *In re Syngenta*, 2016 WL 1391045 at *2.

Rule 23(d)(1)(D) imposes a "high standard" and a motion to strike class allegations is a "drastic remedy." *Tullie v. Quick Cash, Inc.*, No. 14-cv-0491 SMV/SCY, 2014 WL 12782961 at *2 (D. N.M. Dec. 2, 2014) (unpublished op.) (citations omitted). Thus, "courts in this circuit and elsewhere have . . . viewed motions to strike or dismiss class allegations at the pleading stage with particular disfavor" as they "seek to preemptively terminate the class aspects solely on the basis of what is alleged in the complaint, and before the plaintiff has had any meaningful chance to conduct discovery." *Hockenbury v. Hanover Ins. Co.*, No. CIV-15-1003-D, 2016 WL 552967 at *3 (W.D. Okla. Feb. 10, 2016) (unpublished op.) (citing cases); *cf. Wilson v. Landers McLarty Olathe KS, LLC*, No. 18-2051-JAR-GEB, 2018 WL 5617832, at *7 (D. Kan. Oct. 29, 2018) (unpublished op.) (finding "the better course is to allow discovery to proceed on class certification and consider these issues in the context of a motion to certify the class" rather than dismiss at the pleading stage being "mindful of the [court's' obligation to conduct a 'rigorous analysis' into whether the prerequisites of Rule 23 are met"); *Wornicki v. Brokerpriceopinion.com, Inc.*, No. 13-cv-03258-PAB-KMT, 2015 WL 1403814 at *4 (D.

Colo. March 23, 2015) (unpublished op.) (recognizing that courts within district "have held motions to strike class allegations to a high standard of proof").

To certify the class, Plaintiffs must show the purported class meets the four threshold requirements of Rule 23(a) – numerosity, commonality, typicality and adequacy of representation. *See* Fed. R. Civ. P. 23; *Shook v. El Paso Cnty.*, 386 F.3d 963, 968 (10th Cir. 2004). If these threshold requirements are satisfied, the court must "then examine whether the action falls within one of three categories of suits set forth in Rule 23(b)." *Shook*, 386 F.3d at 971.

Defendants move to strike class allegations on grounds Plaintiffs fail to plead sufficient facts to establish Rule 23(a)'s numerosity requirement. Defendants further challenge Plaintiffs' class allegations as insufficiently demonstrating satisfaction of the predominance requirement of Rule 23(b)(3).

A. Numerosity

Rule 23(a) requires that the class be so numerous that joinder of all members individually is "impracticable." Fed. R. Civ. P. 23(a)(1). No specific numerical threshold is required. Rather, each case must be examined independently. *General Tel. Co. v. E.E.O.C.*, 446 U.S. 318, 330 (1980); *see also Colorado Cross Disability Coal. v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1215 (10th Cir. 2014) ("Plaintiff's must offer some evidence of established, ascertainable numbers constituting the class, but there is no set formula to determine if the class is so numerous that it should be so certified." (internal quotations marks and citation omitted)). Due to the "fact-specific" nature of the inquiry,

district courts are granted "wide latitude" in making the numerosity determination. *Trevizo v. Adams*, 455 F.3d 1155, 1162 (10th Cir. 2006).

The Complaint alleges that "the Class is believed to include 50 to upwards of 100 individuals." Compl. ¶ 95. The Complaint further alleges that Defendants applied for temporary labor certifications for approximately 108 workers from January 1, 2008 through December 31, 2014, the "Relevant Time Period." Compl., ¶ 41.

It is not clear from these allegations that Plaintiffs could not satisfy the numerosity requirement for class certification. *Cf. Bennett v. Sprint Nextel Corp*., 298 F.R.D. 498, 504-05 (D. Kan. 2014) ("[A] good faith estimate of at least 50 members is a sufficient size to maintain a class action."); *Ditty v. Check Rite, Ltd*., 182 F.R.D. 639, 641 (D. Utah 1998) (It is not "necessary that the plaintiffs identify the exact number of class members involved; courts have often used common sense assumptions to support a finding of numerosity."). Thus, the Court finds striking the class allegations on this ground is not warranted.

B. Predominance

Defendants particularly focus on Rule 23(b)(3)'s predominance requirement in moving to strike Plaintiffs' class allegations. Defendants argue that Plaintiffs' "class allegations sound essentially in TVPRA violations and breach of contract" and that "[e]ach potential class member's claims will turn on highly individualized inquires" to include: (1) the terms of each class member's employment; (2) whether the terms of that employment were violated; (3) the "specific conditions", "i.e., the nature of any threats" to which each employee was exposed; (4) the particular vulnerabilities of each class member; and (5) the amount of each class member's damages. APEX Mot. at 30-31.

The Tenth Circuit recently addressed the predominance requirement where class allegations of violations of § 1589(a) of the TVPRA were at issue. *See Menocal*, 882 F.3d at 914-15. The court explained:

> The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation. It is not necessary that all of the elements of the claim entail questions of fact and law that are common to the class, nor that the answers to those common questions be dispositive. Put differently, the predominance prong asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues.

Id. (internal quotation marks and citations omitted). Thus, in conducting the predominance inquiry, the court must "*characterize* the issues in the case as common or not, and then *weigh* which issues will predominate." *Id*. at 915 (internal quotation marks and citation omitted).

As alleged in the Complaint, the terms of the employment contracts are largely based upon standardized documents and, therefore, individualized factual questions about the terms of those contracts are not likely. Similarly, the Complaints' allegations allow a reasonable inference that the contracts were breached in substantially the same manner.

The crux of Defendants' predominance argument is premised in the causation element of Plaintiffs' TVPRA claim. To establish a violation of the TVPRA's forced labor provision, Plaintiffs "must prove that an unlawful means of coercion caused them to render labor." *Id*. at 918. Plaintiffs may prove this "causation element" of their TVPRA claim through "common circumstantial evidence." *Id*. at 918-19. As discussed in the context of the Court's ruling on the sufficiency of the allegations of the Complaint under Rule 12(b)(6), Plaintiffs have alleged facts demonstrating Defendants engaged in a scheme to

cause them financial harm. To the extent Plaintiffs' TVPRA claim, therefore is based on "allegations of a single, common scheme", Plaintiffs' may be able to establish causation in this manner. *Id*. at 919 ("[A] court may . . . allow a class to rely on circumstantial evidence that the class shares to establish causation on a class-wide basis" and "the TVPA class members share the relevant evidence in common because their claims are based on allegations of a single common scheme."); *see also Paguirigan*, 2018 WL 4347799 at *8 (rejecting challenge to class certification on grounds that whether a particular plaintiff suffered harm sufficiently serious to compel continued labor or services would require an individualized consideration – "[t]he question is not whether each individual felt compelled to continue her employment as a result of defendant's conduct, but whether a reasonable person of the same background and of the same circumstances would find that conduct a threat of serious harm").

Defendants' damages argument is also insufficient grounds upon which to strike the class allegations. The fact that damages may have to be ascertained on an individual basis is not, standing alone, sufficient to defeat class certification. *Id*. at 922 ("The presence of individualized damage issues does not defeat the predominance of questions common to the TVPA class.").

The Court emphasizes that no ruling is made at this time as to whether Plaintiffs can meet the requirements of Rule 23. The Court holds only that *at the pleading stage*, it is premature to strike the class allegations. The "high burden" attendant to this "drastic remedy" has not been satisfied. And, the Court deems the better course is to allow discovery prior to reaching the merits of the class certification issue.

VI. CONCLUSION

IT IS THEREFORE ORDERED that Defendant APEX USA Inc.'s Motion to Dismiss and/or Strike Plaintiffs' Class Action Complaint [Doc. No. 31] is GRANTED in part and DENIED in part. As more fully set forth above, Plaintiffs' breach of contract claim against Defendant APEX USA Inc. is dismissed without prejudice. All other claims survive dismissal under Fed. R. Civ. P. 12(b)(6). Additionally, no class allegations are stricken pursuant to Fed. R. Civ. P. 23(d). The remaining Defendants' Motions to Dismiss and/or Strike Class Action Complaint [Doc. Nos. 28-30 and 32-33] are DENIED.

IT IS SO ORDERED this 5th day of February, 2019.

SCOTT L. PALK
UNITED STATES DISTRICT JUDGE