

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

_____	)	
HECTOR LUNA,	)	
JULIAN GARCIA,	)	
FRANCISCO JAVIER LORENZO	)	
SANTOS G. MALDONADO,	)	
BARTOLO NUÑEZ,	)	
PATRICIA WOODARD,	)	
individually and on behalf of all others	)	
similarly situated,	)	
Plaintiffs,	)	Case No. 1:06-cv-02000-JEC
vs.	)	
	)	
DEL MONTE FRESH PRODUCE	)	
(SOUTHEAST), INC., and	)	
DEL MONTE FRESH PRODUCE N.A.,	)	
INC.	)	
Defendants.	)	
_____	)	

**PLAINTIFFS' MOTION TO VACATE ERRONEOUS JUDGMENT  
AND FOR CLARIFICATION AND CORRECTION OF RECORD**

Pursuant to Federal Rules of Civil Procedure 59(e) and 60(a), Plaintiffs move this Court to vacate an apparently erroneous judgment entered on March 19, 2008 (Rec. Doc. 232) and to seek clarification and correction with respect to this Court's Order filed March 19, 2008 (Rec. Doc. 231), as follows:

1. On March 19, 2008, this Court granted Plaintiffs' Motions for Summary Judgment against Defendant Del Monte Fresh Produce (Southeast), Inc.

(“DMSE”), holding that Defendant DMSE employed Plaintiffs within the meaning of the FLSA, AWP, and H-2A regulations. Rec. Doc. 231 (Order at 4-17).

2. In the same Order, the Court held that Defendant Del Monte Fresh Produce, N.A. (“DMNA”) did not so employ Plaintiffs and that DMNA should not be held liable for employment-based violations under the FLSA and AWP under an integrated enterprise or agency theory. Rec. Doc. 231 (Order at 21-27).
3. Neither the Court’s March 19 Order nor the parties’ underlying summary judgment motions addressed Plaintiffs’ claims against either Defendant pursuant to 29 U.S.C. § 1842, which prohibits the utilization of unlicensed farm labor contractors and for which employer status, an integrated enterprise, or agency relationships are not prerequisites to liability.
4. Due to the bifurcated discovery Order entered in this Court, the parties have not conducted discovery into the merits of the 29 U.S.C. § 1842 claim. See Rec. Doc. 66.
5. The Court’s March 19 Order further granted “Attorney Mary Bauer’s unopposed Motion to Withdraw” as counsel, citing to Record Document 229.

6. Record Document 229, although filed by Ms. Bauer, actually requests that Plaintiffs' counsel Arlen Benjamin-Gomez be withdrawn as counsel.
7. Plaintiffs have conferred with Defendants before filing this Motion and Defendants have indicated that they do not oppose Ms. Bauer's reinstatement as one of Plaintiffs' counsel.
8. Immediately subsequent to the Court's March 19 Order, the Clerk of Court issued a judgment stating, inter alia, that Plaintiffs were employees of DMSE for the purposes of the FLSA, AWPAs, and regulations governing the H-2A guestworker program.
9. The Clerk's March 19 judgment further indicated that the action was "dismissed," without specification of which claims had been dismissed. This action has subsequently been listed on CM/ECF as "terminated."

WHEREFORE, Plaintiffs respectfully request that this Court direct the Clerk to amend and correct the record as follows:

- a. Vacate the judgment entered by the Clerk of Court on March 19, 2008 (Rec. Doc. 232);
- b. Re-open this case and clarify on the record that this action is not in fact "terminated" because Plaintiffs' claims against Defendant DMSE still survive in their entirety and because

Plaintiffs' claim for violations of 29 U.S.C. § 1842 survives against Defendants DMNA and DMSE; and

- c. Reinstate attorney Mary Bauer as Plaintiffs' counsel.

For the Court's convenience, a proposed order is submitted with this Motion.

Respectfully Submitted,<sup>1</sup>

/s/ Kristi Graunke

Kristi L. Graunke

Georgia Bar Number 305653

Arlen Benjamin-Gomez

Member of the Bar of New York State

*Pro Hac Vice*

Andrew H. Turner

Virginia Bar Number 48853

*Pro Hac Vice*

Mary C. Bauer

Georgia Bar Number 142213

Immigrant Justice Project

Southern Poverty Law Center

400 Washington Avenue

Montgomery, Alabama 36104

Telephone: (334) 956-8200

Facsimile: (334) 956-8481

Email: [kgraunke@splcenter.org](mailto:kgraunke@splcenter.org)

[aturner@splcenter.org](mailto:aturner@splcenter.org)

[mbauer@splcenter.org](mailto:mbauer@splcenter.org)

Elizabeth J. Appley

Georgia Bar No. 020987

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<sup>1</sup> Pursuant to L.R. 7.1D, the undersigned certifies that this pleading complies with the font and point selections permitted by L.R. 5.1B. This Motion was prepared using the Times New Roman 14 point typeface.

235 Peachtree St. N.E.  
2212 North Tower  
Atlanta, GA 30303  
Telephone: (404) 523-3800  
Facsimile: (404) 523-0426  
Email: [eja@applelaw.com](mailto:eja@applelaw.com)

Attorneys for Plaintiffs

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on **March 26, 2008**, I electronically filed the foregoing with the Clerk of Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Jacqueline E. Kalk, Esq.  
Latesa K. Bailey, Esq.  
Bradley E. Strawn, Esq.  
LITTLER MENDELSON, P.C.  
3348 Peachtree Road N.E., Suite 1100  
Atlanta, GA 30326-1008

/s/ Kristi L. Graunke

Kristi L. Graunke

Georgia Bar Number 305653

Andrew H. Turner

Virginia Bar Number 48853

*Pro Hac Vice*

Mary C. Bauer

Georgia Bar Number 142213

Immigrant Justice Project

Southern Poverty Law Center

400 Washington Avenue

Montgomery, Alabama 36104

Telephone: (334) 956-8200

Facsimile: (334) 956-8481

Email: [mbauer@splcenter.org](mailto:mbauer@splcenter.org)

[kgraunke@splcenter.org](mailto:kgraunke@splcenter.org)

[aturner@splcenter.org](mailto:aturner@splcenter.org)

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**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF  
MOTION TO VACATE ERRONEOUS JUDGMENT AND FOR  
CLARIFICATION AND CORRECTION OF THE RECORD**

Pursuant to Federal Rules of Civil Procedure 59(e) and 60(a), Plaintiffs move this Court to vacate the judgment entered by the Clerk in this action on March 19, 2008, and to clarify and correct the record in this case in several respects. Specifically, Plaintiffs respectfully request that this Court direct the Clerk

of Court to correct and amend the record in this case as follows: (1) vacate the March 19 judgment entered by the Clerk which appears to erroneously dismiss all of Plaintiffs' claims; (2) clarify on the record that Defendant Del Monte Fresh Produce (Southeast), Inc. (DMSE) remains a defendant in this case as to all claims and that Defendant Del Monte Fresh Produce N.A. (DMNA) remains a defendant in this case with respect to a single claim under 29 U.S.C. § 1842; and (3) reinstate Mary Bauer as counsel.

### FACTS

On August 14, 2007, Defendants DMNA and DMSE filed several Motions for Summary Judgment seeking determination that they did not "employ" Plaintiffs within the meaning the term as defined by the FLSA and AWPAs and could not be held liable for FLSA or AWPAs violations under an agency or integrated enterprise theory. See Rec. Doc. 197, 198, 200, and 201. Defendants' Motions for Summary Judgment did not, however, seek judgment on a separate and legally distinct issue: whether, for the purposes of 29 U.S.C. § 1842, Defendants could be deemed to have "utilized" unlicensed farm labor contractors. See generally Rec. Doc. 197, 197, 198, 200, and 201; see also Rec. Doc. 106 (2d Am. Cmplt ¶ 100); Charles v. Burton, 169 F.3d 1322, 1334 (11<sup>th</sup> Cir. 1999) ("Even though [two Defendants] did not 'employ' appellants [under the AWPAs], they can be liable under section 1842



because it speaks only of a person who utilizes the services of an FLC, not an ‘employer.’”)

On March 19, 2008, this Court filed an Order deciding various motions filed by the parties, in which it granted Plaintiffs’ Motion for Summary Judgment as the employer status of Defendant DMSE and granted Defendant DMNA’s Motion for Summary Judgment on the employer status, integrated enterprise, and agency theories of liability. See Rec. Doc. 231 (Order at 2-27). Subsequently, the Clerk of Court entered judgment in favor of Plaintiffs as to the employer status of Defendant DMSE, but also appeared to erroneously dismiss the case in its entirety. Rec. Doc. 232. That same day, this action appeared as “terminated” on pacer.

The Court’s March 19 order also granted as unopposed “Attorney Mary Bauer’s unopposed Motion to Withdraw,” citing Record Document 229. Record Document 229 is in fact styled as a Motion to Withdraw Arlen Benjamin-Gomez as counsel, and was filed by Plaintiffs’ counsel Mary Bauer on Ms. Benjamin-Gomez’s behalf. See Rec. Doc. 229.

## ARGUMENT

I. **This Action Is Not Properly Terminated Because All Claims Against DMSE Survive and One AWPAs Claim Against DMNA Is Unaffected by the Court's Decision**

In its March 19 Order, this Court held that Defendant DMSE “employed” Plaintiffs within the meaning of the AWPAs, FLSA, and H-2A regulations, but that Defendant DMNA did not do so. Rec. Doc. 231 (Order at 2-26). The Court further held that Defendant DMNA did not function in an integrated enterprise or agency relationship with Defendant-Employer DMSE. Rec. Doc. 231 (Order at 26-27).

Neither parties’ cross-motions for summary nor the Court’s Order on the parties’ motions addressed, however, an AWPAs claim asserted by Plaintiffs which does not rely on employer status: Defendants’ utilization of unlicensed farm labor contractors in violation of 29 U.S.C. § 1842.

Section 1842 of the AWPAs provides in relevant part

No person shall utilize the services of any farm labor contractor to supply any migrant or seasonal agricultural worker unless the person first takes reasonable steps to determine that the farm labor contractor possesses a certificate of registration which is valid and which authorizes the activity for which the contractor is utilized.

As the Eleventh Circuit has made clear, violation of this section of the AWPAs involves a distinct legal inquiry and does not require a finding of employer status.

See Charles, 169 F.3d at 1334 (holding that two defendants who were not

employers under the AWPAs or FLSA could still be held liable for violations of AWPAs section 1842).

Due to the bifurcated discovery order entered into this case, the parties have not had an opportunity to conduct merits discovery on Plaintiffs' claims based on 29 U.S.C. § 1842. See Rec. Doc. 66 (bifurcated discovery order providing that the first stage of discovery would focus on employer status issues). Accordingly, neither Plaintiffs nor Defendants moved for summary judgment on this distinct legal issue, and the Court's March 19 Order does not dispose of this claim against either Defendant. See Rec. Doc. 231; see also Imaging Bus. Machs., LLC v. BancTec, Inc., 459 F.3d 1186, 1191 (11th Cir. 2006) (a court may not *sua sponte* grant summary judgment on an issue without providing the parties with advance notice and an opportunity to present evidence and arguments).

The Clerk erroneously dismissed and terminated this case on March 19, 2008, apparently doing so with respect to both Defendants. See Rec. Doc. 232. Plaintiffs therefore respectfully request that this Court clarify that DMSE remains a defendant in this case as to all claims and that DMNA remains a defendant in this case as to the single claim asserted against it pursuant to 29 U.S.C. § 1842.

II. **Attorney Mary Bauer Does Not Seek to Be Removed as Plaintiffs' Counsel**

Plaintiffs also move to have attorney Mary Bauer reinstated as Plaintiffs' attorney. As set forth in Plaintiffs' Motion for Withdrawal of Counsel (Rec. Doc. 229), Plaintiffs moved to withdraw Arlen Benjamin-Gomez as counsel after she left the employ of the Southern Poverty Law Center.<sup>1</sup> Although Ms. Benjamin-Gomez is identified as the subject of the Motion for Withdrawal of Counsel, the Motion was apparently docketed inaccurately as a Motion by Mary Bauer to withdraw as counsel. Ms. Bauer remains in the employ of the Southern Poverty Law Center and intends to remain as counsel on the case. Plaintiffs therefore respectfully request that Ms. Bauer be reinstated as Plaintiffs' counsel. See Rec. Doc. 229. Plaintiffs have conferred with Defendants prior to filing this Motion, and Defendants have indicated that they do not oppose the reinstatement of Mary Bauer as counsel in this matter.

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<sup>1</sup> Plaintiffs have learned from the Clerk's office that the erroneous withdrawal of Mary Bauer occurred when Ms. Bauer attempted to file a Motion to Withdraw on behalf of Ms. Benjamin-Gomez, who has left the employ of Plaintiffs' counsel's firm. Plaintiffs apologize for any error which apparently led to the inadvertent removal of Ms. Bauer.

## CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court grant their Motion to Vacate Erroneous Judgment and for Clarification and Correction of the Record by directing the Clerk to: (1) re-open this action; (2) vacate the dismissal and judgment issued on March 19, 2008 to the extent this judgment appears to dismiss Plaintiffs' 29 U.S.C. § 1842 claims against Defendant DMNA and/or any claims asserted by Plaintiffs against DMSE in this action; (3) clarify that all of Plaintiffs' claims asserted against Defendant DMSE in this action and Plaintiffs' claims asserted under 29 U.S.C. § 1842 against Defendant DMNA are not dismissed and may proceed to future merits discovery and adjudication; and (4) reinstate Mary Bauer as one of Plaintiffs' counsel.

Respectfully Submitted,<sup>2</sup>

/s/ Kristi Graunke

Kristi L. Graunke

Georgia Bar Number 305653

Arlen Benjamin-Gomez

Member of the Bar of New York State

*Pro Hac Vice*

Andrew H. Turner

Virginia Bar Number 48853

*Pro Hac Vice*

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<sup>2</sup> Pursuant to L.R. 7.1D, the undersigned certifies that this pleading complies with the font and point selections permitted by L.R. 5.1B. This Motion was prepared using the Times New Roman 14 point typeface.

Mary C. Bauer  
Georgia Bar Number 142213  
Immigrant Justice Project  
Southern Poverty Law Center  
400 Washington Avenue  
Montgomery, Alabama 36104  
Telephone: (334) 956-8200  
Facsimile: (334) 956-8481  
Email: [kgraunke@splcenter.org](mailto:kgraunke@splcenter.org)  
[aturner@splcenter.org](mailto:aturner@splcenter.org)  
[mbauer@splcenter.org](mailto:mbauer@splcenter.org)

Elizabeth J. Appley  
Georgia Bar No. 020987  
235 Peachtree St. N.E.  
2212 North Tower  
Atlanta, GA 30303  
Telephone: (404) 523-3800  
Facsimile: (404) 523-0426  
Email: [eja@appleylaw.com](mailto:eja@appleylaw.com)

Attorneys for Plaintiffs

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**PROPOSED ORDER**

Having reviewed Plaintiffs' Motion to Vacate Erroneous Judgment and for Clarification and Correction of the Record and related submissions, the Court GRANTS Plaintiffs' Motion and orders as follows:

1. The Clerk of Court is directed to vacate the Judgment entered on March 19, 2008 (Rec. Doc. 232) and re-open this action;

2. Plaintiffs' claims against Defendant Del Monte Fresh Produce (Southeast), Inc. survive in their entirety and the parties shall be allowed to proceed with merits discovery and adjudication as to these claims, subject to supervision and scheduling by this Court;
3. Plaintiffs' claims against Del Monte Fresh Produce, N.A., Inc. asserted pursuant to 29 U.S.C. § 1842 survive as un-adjudicated by this Court's March 19, 2008 Order (Rec. Doc. 231) and the parties shall be allowed to proceed with merits discovery and adjudication as to this claim, subject to supervision and scheduling by this Court; and
4. Plaintiffs' counsel Mary C. Bauer is hereby reinstated as one of Plaintiffs' counsel.

SO ORDERED.

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Julie E. Carnes, United States District Judge

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Date