IN THE UNITED STATE DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

FREDY ALVARADO CONTRERAS, SERGIO ESCOBAR GONZALEZ, and DENNIS NAJERA BARILLAS,

Plaintiffs,

v.

BRUCE LIVINGSTON, an individual; LIVINGSTON ENTERPRISES INC., a Nebraska corporation; WORLDWIDE FARMERS EXCHANGE, a California nonprofit corporation; ASHLEY MEDULAN, an individual; MARIA LOS ANGELES CIFUENTES MORAN, an individual,

Defendants.

Case No. 4:24-cv-03155

PLAINTIFFS' BRIEF IN OPPOSITION TO LIVINGSTON DEFENDANTS' PARTIAL MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

PLAINTIFFS' BRIEF IN OPPOSITION TO LIVINGSTON DEFENDANTS' PARTIAL MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

This case stems from a scheme to exploit a cultural exchange internship visa program to obtain cheap manual labor in industrial pig barns. Plaintiffs, three Guatemalans who fell prey to the scheme, filed the present action, bringing fourteen claims. Relying primarily on outdated and out-of-circuit caselaw (and sometimes no caselaw at all), Defendants Bruce Livingston and Livingston Enterprises Inc. (collectively, "LEI") ask this Court to dismiss six of those claims for failure to state a claim. Each of these challenges fails.

First, LEI claims that Plaintiffs have failed to plead an "ascertainable structure" distinct from the alleged RICO predicate acts, dooming their RICO enterprise allegations. But the Supreme Court did away with the "ascertainable structure" requirement fifteen years ago in *Boyle v. United States*, 556 U.S. 938, 947 (2009); and Plaintiffs easily meet the *Boyle* standard.

LEI's argument that Plaintiffs lack RICO standing fares no better: unlike the one (non-binding) case LEI cites for its proposition, Plaintiffs have alleged direct causation between LEI's predicate acts and their financial injuries, thereby easily establishing standing. *Second*, LEI mischaracterizes Plaintiffs' Fair Labor Standards Act ("FLSA") claim as an impermissible extension of minimum wage law to "internships." Not so. Plaintiffs allege that LEI did *not* provide an "internship" as promised, but instead employed Plaintiffs as general laborers. Plaintiffs incurred preemployment expenses for the sole benefit of LEI. Those expenses brought Plaintiffs' first work week wages below minimum wage and therefore violate the FLSA minimum wage requirement. *See* 29 U.S.C. § 206. *Third*, LEI wrongly conflates Plaintiffs' discrimination claims and misunderstands the bases for each. Plaintiffs allege that LEI discriminated against them on the basis of their alienage, a well-established basis for discrimination under Section 1981. On the other hand, Plaintiffs' Title VII and Nebraska Fair Employment Practice Act ("NFEPA") discrimination claims are based on Plaintiffs' Guatemalan national origin. *Finally*, LEI's argument that Plaintiffs have failed to state a claim under the Nebraska Wage Payment and Collection Act ("NWPCA") ignores the clear language of the Act and Nebraska law.

Plaintiffs have met their burden to state claims. Therefore, LEI's motion to dismiss should be denied on all counts.

I. STATEMENT OF FACTS

For purposes of a motion to dismiss, the Court must "take the plaintiff[s'] factual allegations as true." *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009). Therefore, Plaintiffs will only briefly summarize the detailed factual allegations in their First

Amended Complaint ("FAC"), incorporated by reference, that are relevant to LEI's arguments. *See* Fed. R. Civ. P. 10(c).

Starting in at least 2020, LEI, on the one hand, and Defendants Worldwide Farmers Exchange, Ashley Medulan, and Maria Los Angeles Cifuentes Moran (together, "WFE"), on the other, began working together to procure foreign graduates and undergraduates through the J-1 visa program to work at LEI's swine facilities. FAC ¶¶ 1, 40-53, ECF No. 15. Defendants knew that the J-1 visa program was intended as a training program and not as a means of obtaining cheap labor. *Id.* at ¶¶ 8, 63, 66, 69, 82, 99-104, 238. To circumvent these restrictions, Defendants conspired to recruit foreign undergraduates with false promises of an educational and cultural exchange, while intending to employ them as general laborers. *Id.* at ¶¶ 234-38. The relationship between the Defendants was symbiotic: LEI paid WFE for each worker WFE successfully recruited, *id.* at ¶ 130, and WFE relayed the misrepresentations to potential candidates, organized the necessary paperwork, and, with LEI, arranged for the travel and housing of workers at LEI's facilities. *Id.* at ¶¶ 89-103, 184-87.

To effect this scheme, Defendants promised Plaintiffs that they would be enrolled in a one-year exchange program in which they would be trained in LEI's business practices, earn at least $2,500 a month—paid on a weekly basis—for around 45 hours of work a week, and have weekends off to experience American culture. *Id.* at ¶¶ 2, 185, 238. Housing would be provided for free or at nominal cost. *Id.* at ¶¶ 2, 93, 238, 251, 341. Defendants made no mention of deductions from Plaintiffs' pay for housing, travel or taxes at any time during recruitment. *Id.* Defendants knew that Guatemalan students would be good candidates for their scheme because, in LEI's words, Guatemalans did what they were told and were grateful for the money. *Id.* at ¶ 196. Defendants also knew that the immigration and travel-related costs would be a significant expenditure for the Guatemalan students, which meant the students would need to stay at LEI to recover the money they had borrowed and spent to participate in the program. *Id.* at ¶ 251.

Defendants memorialized their false promises of a phased internship with cultural and educational opportunities in a U.S. State Department form provided to Plaintiffs (the LEI Training Plan) in June 2022. *Id.* at ¶¶ 98-101. Under the J-1 visa regulations, all essential program information, including, among other things, "the terms and conditions of any employment activities (job duties, number of work hours, wages and compensation, and any typical deductions for housing and transportation)," must be disclosed "at the time of recruitment and before exchange visitors enter into agreements and/or pay non-refundable fees." *Id.* at ¶ 62 (citing 22 C.F.R. § 62.9(d)(3)). The LEI Training Plan listed a wage rate of $11.50 per hour but made no mention of deductions of any kind. *Id.* at ¶ 101, 365. Plaintiffs and Defendants signed the Plan, and Defendants agreed to abide by the J-1 visa regulations and the FLSA under penalty of perjury. *Id.* at ¶¶ 98, 102, 104. In reliance on the LEI Training Plan, Plaintiffs took out loans, sold personal items and went into debt to pay thousands of dollars to WFE in recruitment fees. *Id.* at ¶¶ 3, 94-97, 106-11. After collecting the recruitment fees, WFE provided Plaintiffs with a separate document purporting to be an agreement between WFE and the J-1 visa applicants. *Id.* at ¶¶ 112-14. WFE orally summarized the contents—telling Plaintiffs they did not have to read it—but omitted key portions of it, including mention of housing deductions. *Id.*

The night before Plaintiffs were to depart for Nebraska, and only after Plaintiffs had spent thousands of dollars in recruitment and travel fees, WFE presented Plaintiffs with yet another document—a "Living Expense Deduction Form" —indicating that LEI would deduct housing and transportation costs from Plaintiffs' wages and withhold taxes. *Id.* at ¶¶ 124-30. When Plaintiffs protested the new conditions, WFE issued an ultimatum: sign the document or forfeit their place in the program. *Id.* at ¶ 131. Having already invested thousands of dollars, Plaintiffs felt they had no choice but to sign. *Id.*

Once at LEI, Plaintiffs were told they would not be paid weekly, but monthly, an alteration that made it difficult for Plaintiffs to pay off debt and interest they had accrued to enroll in the program. *Id.* at ¶ 145. They were required to work long days in dangerous conditions, often for seven to ten days at a time. *Id.* at ¶¶ 160-82. There were no cultural activities or educational opportunities. *Id.* at ¶ 183. Plaintiffs also learned they were getting paid less per hour than Mexican and American workers doing the same work and that they were paying more for LEI-provided housing than the Mexican workers. *Id.* at ¶ 152, 352-53. When Plaintiffs complained about the work conditions and discrepancies with the LEI Training Plan, LEI supervisors told them to stop complaining and keep working, like "other Guatemalans." *Id.* at ¶¶ 196, 208.

Throughout Plaintiffs' employment at LEI, WFE and LEI coordinated with each other to keep the scheme running smoothly. For instance, WFE and LEI communicated frequently about Plaintiffs' work and housing conditions, job performance, and complaints. *Id.* at ¶¶ 185-87, 204-05, 209, 228-33. When Plaintiff Dennis Najera Barillas abruptly left LEI, unable to endure the conditions, it was WFE who issued threats of deportation, loss of reputation and other "measures or penalties" to Plaintiffs. *Id.* at ¶ 200-01. Ultimately, LEI fired the remaining Plaintiffs with WFE's support, and WFE threatened to terminate their visas if they did not "accept the decision and return home promptly and peacefully." *Id.* at ¶¶ 224-33.

II. LEGAL STANDARD

"To survive a motion to dismiss [under Rule 12(b)(6),] a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Schriener* *v. Quicken Loans, Inc.*, 774 F.3d 442, 444 (8th Cir. 2014) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Iqbal*, 556 U.S. at 678, and the court "must take the plaintiff[s'] factual allegations as true." *Braden*, 588 F.3d at 594. Further, the complaint "should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible." *Id.*

Ultimately, to defeat a Rule 12(b)(6) motion to dismiss, "it is sufficient for a plaintiff to plead facts indirectly showing unlawful behavior, so long as the facts pled 'give the defendant fair notice of what the claim is and the grounds upon which it rests,' and 'allow [ ] the court to draw the reasonable inference' that the plaintiff is entitled to relief." *Id.* (citation omitted).

III. LEGAL ARGUMENT

A. PLAINTIFFS HAVE STATED A CLAIM UNDER RICO (COUNT II)

Plaintiffs allege LEI violated the RICO by associating with three enterprises to "participate, directly or indirectly, in the conduct of such enterprise[s'] affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c).[1] Plaintiffs also allege LEI conspired to violate the RICO. 18 U.S.C. § 1962(d). In seeking to dismiss Plaintiffs' RICO claims, LEI offers two arguments: (1) Plaintiffs have failed to plead an enterprise as an "ascertainable structure distinct from the alleged pattern of racketeering," Livingston Defs.' Br. Supp. Partial Mot. Dismiss 6 ("LEI Br."), ECF No. 39; and (2) Plaintiffs lack standing because they do not allege "proximate

[1] Plaintiffs allege the three enterprises in the alternative. *See Nebraska Sec. Bank v. Dain Bosworth, Inc.*, 838 F. Supp. 1362, 1368 (D. Neb. 1993) (considering each enterprise separately). Pleading alternative enterprises "does not undermine the plausibility of the pleadings." *Jackson v. Sedgwick Claims Mgmt. Servs., Inc.*, 699 F.3d 466, 480 (6th Cir. 2012), *vacated in unrelated part*, 731 F.3d 556 (6th Cir. 2013).

cause between their alleged injuries . . . and the alleged misrepresentation[]," *id.* at 8. Both arguments fail.

1. Plaintiffs adequately allege the existence of three association-in-fact enterprises.

LEI is wrong that Plaintiffs need to establish an "ascertainable structure" separate from the alleged predicate acts. The Supreme Court did away with the "ascertainable structure" requirement fifteen years ago in *Boyle v. United States*, 556 U.S. 938 (2009), in favor of a more relaxed standard requiring only that plaintiffs show "a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." 556 U.S. at 946-47. Plaintiffs have pleaded ample factual allegations to meet this standard. However, even if the pre-*Boyle* "ascertainable structure" requirement persists in the Eighth Circuit as LEI suggests, Plaintiffs meet this standard as well.

a. Under Boyle, Plaintiffs need not establish the enterprise as an "ascertainable structure."

A RICO enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). Though not explicit in the statute, courts have long recognized that a RICO enterprise is "an entity separate and apart from the pattern of activity in which it engages," *United States v. Turkette*, 452 U.S. 576, 583 (1981). Such a distinction is easy when the alleged enterprise is a legal entity; "[l]egal entities are garden-variety 'enterprises' which generally pose no problem of separateness from the predicate acts." *Bennett v. Berg*, 685 F.2d 1053, 1060 (8th Cir. 1982). But for several decades, courts were split on how to assess the separateness of an association-in-fact enterprise, where no legal structure was implicated. *See, e.g.*, *United States v. White*, No. 3:23-CR-00043-SHL-SBJ, 2024 WL 5054963, at *14 (S.D. Iowa Sept. 3, 2024) (describing circuit split over required elements to establish association-in-fact RICO enterprise). Some circuits held that RICO did not require any particular organizational structure, separate or otherwise. *See, e.g. Odom v. Microsoft Corp.*, 486 F.3d 541 (9th Cir. 2007). Others, including the Eighth, required RICO plaintiffs to establish an enterprise as an "ascertainable structure distinct from that inherent in a pattern of racketeering," *Handeen v. Lemaire*, 112 F.3d 1339, 1351 (8th Cir. 1997).

In 2009, the Supreme Court resolved this split, "reject[ing] th[e] formalistic syllogism" of an "ascertainable structure" requirement. *Kruse v. Repp*, 611 F. Supp. 3d 666, 704 n. 14 (S.D. Iowa 2020) (citing *Boyle*, 556 U.S. at 947). It adopted instead a more relaxed definition of a RICO enterprise. Under that definition, an enterprise has three "structural features: 'a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose.'" *Boyle*, 556 U.S. at 946; *see also White*, 2024 WL 5054963, at *14 ("*Boyle* effectively overruled . . . Eighth Circuit precedent as to the putative third element [requiring the proof of an "ascertainable structure"]. . . . There is simply no fair reading of *Boyle* that would make it necessary . . . to prove that the 'association had a structure distinct from that necessary to conduct the pattern of racketeering activity,' or words to similar effect."). In so holding, *Boyle* emphasized that RICO's "terms are to be 'liberally construed to effectuate its remedial purposes.'" 556 U.S. at 944 (citing § 904(a), 84 Stat. 947, note following 18 U.S.C. § 1961); *see also, e.g.*, *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 257 (1994) ("RICO broadly defines 'enterprise'"); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985) (same); *Russello v. United States*, 464 U.S. 16, 21 (1983).

The result of *Boyle* is that the "evidentiary bar of proving an association-in-fact [enterprise] is low." *Kruse*, 611 F. Supp. 3d at 703-04 (citations omitted). Post-*Boyle*, an association-in-fact enterprise is a "'broad' category with an 'expansive' reach, consisting of 'a group of persons associated together for a common purpose of engaging in a course of conduct,' and is 'proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit.'" *Kruse ex rel. Kruse v. Repp*, 543 F. Supp. 3d 654, 680 (S.D. Iowa 2021) (citing *Boyle*, 556 U.S. at 944-45). At its core, "an association-in-fact enterprise is simply a continuing unit that functions with a common purpose," *Boyle*, 556 U.S. at 948, that can be proved using the same evidence used to prove the pattern of racketeering activity, *id.* at 947 ("evidence used to prove the pattern of racketeering activity and the evidence establishing an enterprise 'may in particular cases coalesce.'").

The Eighth Circuit has incorporated *Boyle* into its RICO enterprise analysis. *See, e.g.*, *Nelson v. Nelson*, 833 F.3d 965, 968 (8th Cir. 2016) ("To count as a RICO enterprise, such an informal association must be 'a continuing unit that functions with a common purpose.'" (citing *Boyle*, 556 U.S. at 948)); *Crest Constr. II, Inc. v. Doe*, 660 F.3d 346, 354 (8th Cir. 2011) (citing *Boyle*, 556 U.S. at 946). While *Crest Construction II* maintained some pre-*Boyle* standards, including an assessment as to whether an enterprise would "still exist were the predicate acts removed from the equation," 660 F.3d at 355, under *Boyle*, this element is no longer required,[2] and indeed, other Eighth Circuit cases have omitted it. *See United States v. Green*, 104 F.4th 12, 14 (8th Cir. 2024) (an enterprise "'need not have a name' at all, much less a permanent one") (citing *Boyle*, 556 U.S. at 946, 948); *see also Nelson*, 833 F.3d at 968-69; *Kruse*, 611 F. Supp. 3d at 704, n. 14.

b. Plaintiffs succeed in establishing three association-in-fact enterprises under the Boyle standard.

---

[2] The Western District of Missouri's opinion initially granting the Defendants' motion to dismiss, *Crest Constr. II, Inc. v. On Time Auto*, No. 07-0728-CV-W-DGK, 2010 WL 3456690, at *3 (W.D. Mo. Aug. 27, 2010), *aff'd sub nom. Crest Constr. II, Inc. v. Doe*, 660 F.3d 346 (8th Cir. 2011), makes it abundantly clear the plaintiff's complaint was incomplete and poorly crafted. *Id.* The district court specifically took issue with the plaintiff's failure to plead a relationship between the enterprise participants. *Id.* Notably, however, the district court noted the defendants incorrectly applied a pre-*Boyle* standard by arguing that the RICO enterprise must have "an organizational pattern or system of authority *beyond what was necessary to* [*perpetrate*] *the predicate crimes.*" *Id.* Therefore, the district court found the plaintiff *had* sufficiently pleaded the enterprise purpose, which was synonymous with the alleged predicate acts. *Id.*

Plaintiffs' detailed allegations easily meet the purpose, relationship, and longevity elements of the *Boyle* standard. Plaintiffs allege three alternative association-in-fact enterprises: (1) all Defendants ("RICO Enterprise I"); (2) all Defendants and the U.S. Department of State ("RICO Enterprise II"); and (3) Defendants LEI and WFE ("RICO Enterprise III"). FAC ¶¶ 40-45.

Purpose: To meet this element, Plaintiffs must allege facts sufficient to establish that each enterprise constitutes a group of persons associated together for "a common purpose of engaging in a course of conduct." *Boyle*, 556 U.S. at 944-45. Enterprises may include legitimate and illegitimate goals. *Nat'l Org. for Women, Inc.*, 510 U.S. at 260; *see also Kruse ex rel. Kruse*, 543 F. Supp. 3d at 680 (no requirement that enterprise exists solely for "the common purpose of committing illegal predicate acts or pursuing a larger illicit scheme."). Plaintiffs meet this standard. Plaintiffs allege that members of Enterprises I and III share the "common purpose of recruiting foreign university undergraduates or graduates to work as laborers at the LEI Defendants' hog farms." FAC ¶ 49. The FAC provides ample detail evincing the Enterprise I and III members' goal of misusing the J-1 visa program to employ general laborers. *Id.* at ¶¶ 8, 63, 66, 69, 82, 99-104, 234-38.

Alternatively, Plaintiffs plead that Enterprise II is an association-in-fact enterprise with the "common purpose of recruiting, transporting, providing, processing, and obtaining foreign undergraduates or graduates to come to the U.S. on J-1 visas, including at LEI's operations." *Id.* at ¶ 50. To that end, the FAC details Defendants' repeated coordination with the State Department to achieve their goal of obtaining J-1 visa holders, based on information Defendants provided in the LEI Training Plan. *Id.* at ¶¶ 64-73, 98-104, 358. These allegations meet the basic purpose requirement.

Relationship: Plaintiffs likewise satisfy the second characteristic. The relationship element "does not require 'a hierarchical structure or chain of command; decisions may be made on an ad hoc basis and by any number of methods.'" *Hatfield v. Ornelas*, No. 5:22-CV-05110, 2022 WL 16838137, at *11 (W.D. Ark. Nov. 9, 2022) (citing *Boyle*, 556 U.S. at 948). Rather, "the group must function as a . . . unit." *Id.* Here, the FAC describes how the various members of RICO Enterprises I and III coordinated their activities through a legitimate and ongoing business relationship in which LEI paid WFE to recruit on its behalf, and the members worked together to complete necessary paperwork, arrange travel, and supervise and house Plaintiffs. FAC ¶¶ 89-103. The Enterprise I and III members maintained communications with each other about the J-1 visa program before, during and after Plaintiffs' tenure at LEI, including conversations about housing, wages, job performance, and LEI's ultimate termination of two of the Plaintiffs. *Id.* at ¶¶ 185-87, 204-05, 209, 228-33. This ongoing relationship served to further their common goal of recruiting foreign university undergraduates or graduates to work as laborers at LEI's hog facilities.

The FAC also details the relationship between Defendants and the U.S. State Department for Enterprise II: namely, Defendants' use of the State Department, through the filling out and filing of paperwork, to achieve the common goal of recruiting and obtaining foreign graduates and undergraduates through the J-1 visa program. *Id.* at ¶¶ 98-101. Through this legitimate relationship, Defendants worked with the U.S. State Department to ensure they could recruit and place foreign individuals at LEI's facilities using methods provided for by law.

Plaintiffs' allegations that "the parties had a working relationship with each other as well as distinct roles in the scheme," suffice to establish a RICO relationship. *Hatfield*, 2022 WL 16838137, at *11.

Longevity: Finally, the FAC alleges each Enterprise's longevity. Plaintiffs allege that the Defendants' relationship with each other and with the U.S. State Department existed from at least 2020, and continues to the present day, FAC ¶¶ 1, 40-53, long enough to "accomplish the enterprise's goals." *Hatfield,* 2022 WL 16838137, at *11. Indeed, the FAC alleges that the enterprises' goals *were* accomplished. Members of Enterprises I and III succeeded in using the J-1 visa program to recruit foreign individuals, like Plaintiffs, to work as general laborers at LEI. And members of Enterprise II succeeded, and continue to succeed, in obtaining J-1 visas. Plaintiffs allege that the members of the Enterprises continue to pursue their common purposes today. FAC ¶ 48. This is sufficient to establish longevity. *Hatfield*, 2022 WL 16838137, at *11; *Kruse*, 611 F. Supp. 3d at 702 (relationship starting from at least March 2015 through 2020 "more than enough time for those members to pursue the enterprise's alleged purpose").

In sum, Plaintiffs have adequately pleaded three association-in-fact enterprises and LEI's motion on this issue should be denied.

c. Plaintiffs succeed in establishing three association-in-fact enterprises as distinct from the alleged predicate acts.

Relying almost entirely on pre-*Boyle* case law, LEI urges this Court to require Plaintiffs to prove that the alleged enterprises have an "ascertainable structure distinct from the pattern of racketeering," LEI Br. 7, and to conclude that Plaintiffs have failed to do so. Even if this were still the standard, Plaintiffs' allegations easily satisfy it.

To establish the existence of a distinct structure, pre-*Boyle* Eighth Circuit law required that "the common activities of the enterprise extend[ed] beyond the minimal association necessary to sustain the pattern of racketeering." *McDonough v. National Home Ins. Co.*, 108 F.3d 174, 177 (8th Cir. 1997) (citation omitted); *see also Handeen*, 112 F.3d at 1352 (court must determine "if the enterprise would still exist were the predicate acts removed from the equation."). Similarly, plaintiffs alleging a RICO enterprise had to show there existed an "on-going structure" and that "its members were not simply engaged in sporadic, ad hoc criminal activity." *Kragness*, 830 F.2d at 857.[3]

Plaintiffs meet this standard even under the pre-*Boyle* paradigm.[4] While the Defendants here used the enterprises to commit predicate acts, the structure of the enterprises would have existed even if the predicate acts were not committed. Stated differently, had the Defendants not used the enterprise to commit the predicate acts, but rather had lawfully brought Plaintiffs to the United States, where they freely participated in a legitimate internship to gain experience in animal science, the same enterprises would have existed. Indeed, the structure of the J-1 visa "trainee/intern" program requires the existence of these very associations. FAC ¶¶ 54-74 (explaining the program and the roles and obligations of the "sponsor" and the "host.").[5]

Further, as detailed above, Plaintiffs allege that the members of Enterprises I and III worked together more than sporadically. Rather, they associated for years to recruit foreign nationals to work in the U.S., a legitimate process that required filling out paperwork, interviewing potential candidates, arranging their travel, preparing and executing employment contracts and policies, and monitoring the J-1 visa holders' performance and housing. FAC ¶¶ 89-103, 184-87.

Similarly, there can be no doubt that Enterprise II would have existed "even if the predicate acts were ignored." *United States v. Dougherty*, No. 09-00143-04-CR-W-ODS, 2011 WL

---

[3] Again, as noted above, *Boyle* changed the analysis. After *Boyle*, a RICO enterprise no longer needed an ascertainable structure, or even a structure "distinct from that necessary to conduct the pattern of racketeering activity." *White*, 2024 WL 5054963, at *14.

[4] LEI omits any mention of the predicate acts alleged, which include: (1) forced labor in violation of 18 U.S.C. § 1589; (2) trafficking persons with respect to forced labor in violation of 18 U.S.C. § 1590; (3) mail fraud in violation of 18 U.S.C. §1341; (4) wire fraud in violation of 18 U.S.C. §1343; (5) fraud in foreign labor contracting in violation of 18 U.S.C. § 1351; and/or (6) visa fraud in violation of 18 U.S.C. § 1546. FAC at ¶¶ 58-61.

[5] It is axiomatic that a RICO enterprise need not have an existence entirely separate from the racketeering activity. Such a narrow view would eviscerate the purpose of the RICO to provide remedial devices for the prosecution of organized crime. *See Turkette*, 452 U.S. at 589.

13205771, at *2 (W.D. Mo. Jan. 21, 2011). "Compared to an instance where 'several individuals, independently and without coordination, engaged in a pattern of crimes listed as RICO predicates,'" the FAC includes sufficient facts that serve as proof of "both the existence of [the enterprises] and that [their] participants engaged in a pattern of racketeering activity while advancing a shared purpose." *Kruse*, 611 F. Supp. 3d 703 (citing *Boyle*, 556 U.S. at 947 n.4).

In its cursory attempt to argue the contrary, LEI relies almost exclusively on *Bucco v. Western Iowa Tech Community College*, 555 F. Supp. 3d 628 (N.D. Iowa 2021) (*Bucco I*), a Northern District of Iowa case that bears a superficial resemblance to this one insofar as it involves J-1 visa holders and RICO claims. *Bucco I* is easily distinguishable, as the plaintiffs there did not provide anything near the detailed allegations concerning the enterprise's ongoing relationships and common purpose that Plaintiffs do here.[6] Unlike *Bucco I*, and other cases cited by LEI, *see, e.g., Crest Constr. II,* 660 F.3d at 355 (*see also* n.2, *supra*), Plaintiffs' pleadings are far from conclusory. To the contrary, Plaintiffs' 384-paragraph complaint thoroughly catalogues the long-standing relationships between the Enterprise members, the members' distinct roles in the scheme, and the lawful activities they undertook, separate and apart from the predicate acts. *Bucco I*, 555 F. Supp. 3d at 646-47; *see also Kruse*, 611 F. Supp. 3d at 705.

LEI further appears to misunderstand the standard applied in *Bucco I*. The court in *Bucco I* held that the plaintiffs had failed to "allege any further facts regarding the nature of this business relationship outside of the facts pertaining to the alleged *unlawful conduct* related to the J-1 visa program." *Bucco I*, 555 F. Supp. 3d at 646 (emphasis added). LEI miscites this standard,

[6] Indeed, the *Bucco I* plaintiffs appeared to have bolstered their factual allegations significantly in their second amended complaint, including detailed evidence of collaboration and communications amongst the various defendants. *See Bucco v. W. Iowa Tech Cmty. Coll.*, No. C21-4001-LTS, 2022 WL 605801, at *1-*3 (N.D. Iowa Mar. 1, 2022) (*Bucco II*) Based on the allegations in the first amended complaint, the court in *Bucco I*, 555 F. Supp. 3d at 663 dismissed the RICO claims with prejudice. Therefore, the additional facts in the second amended complaint were not considered.

claiming that Plaintiffs here allege facts that "only relate to the nature of the business relationship between Defendants' conduct with respect to the J-1 visa program." LEI Br. 7. Contrary to LEI's assertion, that is precisely "enough to show an ascertainable structure existed outside the alleged pattern of racketeering." *Id.* Plaintiffs have established that a business relationship existed and would have existed between the members of the Enterprises apart from the predicate acts and that the Enterprise members worked as a unit to "oversee[] and coordinat[e] the commission of several different predicate offenses and other activities on an on-going basis." *Kragness*, 830 F.2d at 857. This is enough to satisfy the separate existence requirement. *Id.*

2. Plaintiffs Have RICO Standing.

LEI's proximate cause argument fares no better.

As a preliminary matter, Defendants focus exclusively on Plaintiffs' fraud-related predicate acts while ignoring the forced labor-related allegations. Because Defendants do not raise a causation argument arising out of Plaintiffs' forced labor-related RICO claims, Plaintiffs will assume causation in that context is undisputed.[7] For fraud-related RICO claims the Supreme Court has held that proximate cause is clear where the plaintiff is the "primary and intended victim[] of the scheme to defraud." *Bridge v. Phoenix Bond & Indemnity Co.*, 553 U.S. 639, 650 (2008); *see also Bieter Co. v. Blomquist*, 987 F.2d 1319, 1325 (8th Cir. 1993) (causation

[7] It also is plainly obvious. Courts routinely find plaintiffs have met causation requirements where workers recruited abroad bring RICO claims arising both out of forced labor and fraud for economic injuries similar to those Plaintiffs seek in this case. *See, e.g., Byron v. Avant Healthcare Pros.*, LLC, No. 6:23-CV-1645-JSS-LHP, 2024 WL 2304490, at *17 (M.D. Fla. Apr. 10, 2024), *report and recommendation adopted*, 2024 WL 3738488 (M.D. Fla. Aug. 9, 2024) ("unpaid wages, reduced and suppressed wages, payments of expenses related to coming to the United States…"); *Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674, 691 (S.D. Tex. 2009) (fees and a lower-than-promised wages). Further, the recruitment-related costs, wage differentials, and other economic losses Plaintiffs claim are well within the common scope of damages awarded in forced labor claims. *See, e.g., Francisco v. Susano*, 525 F. App'x 828, 835 (10th Cir. 2013) (unpaid wages); *Nunag-Tanedo v. E. Baton Rouge Par. Sch. Bd.*, 790 F. Supp. 2d 1134, 1141 (C.D. Cal. 2011) (recruitment fees).

determined by "directness of the relationship between the injury asserted and the injurious conduct alleged" (citation omitted)); *Hamm v. Rhone-Poulenc Rorer Pharm., Inc.*, 187 F.3d 941, 952 (8th Cir. 1999) ("The plaintiff must have been injured by conduct which constitutes racketeering activity, that is, RICO predicate acts, and not by other conduct of the defendant." (citation omitted)).

This is precisely what Plaintiffs here allege. Plaintiffs allege three fraud-based RICO predicate acts: (1) mail and wire fraud in violation of 18 U.S.C. §§ 1341, 1343, FAC ¶¶ 270-73, 279-88); (2) fraud in foreign labor contracting in violation of 18 U.S.C. § 1351, FAC ¶¶ 274-75, 279-88; and (3) visa fraud in violation of 18 U.S.C. § 1546, FAC ¶¶ 276-78, 279-88. In each instance, Plaintiffs allege that they were the intended targets of LEI's fraud, and that these predicate acts directly caused them to spend thousands of dollars in recruitment and travel fees, take on debt, and accrue interest when they were unable to pay off loans due to LEI's underpayment. *Id.* Thus, Plaintiffs' allegations evince a "direct relation between the injury asserted" in the form of recruitment and travel fees, debt, interest, and underpayment, "and the injurious conduct alleged," *i.e.*, mail and wire fraud, fraud in foreign labor contracting, and visa fraud designed to lure Plaintiffs to work as general laborers at LEI's swine facilities. *Anza v. Ideal Steel Supply Corp*, 547 U.S. 451, 457 (2006).

In support of its argument to the contrary, LEI cites a single Fifth Circuit case, *Molina-Aranda v. Black Magic Enterprises, L.L.C.*, 983 F.3d 779, 785 (5th Cir. 2020). *Molina-Aranda* has never been adopted or even cited by the Eighth Circuit, and has been interpreted by district courts in the Eighth Circuit and elsewhere as having adopted "too narrow a reading of RICO's flexible causation standard." *Hanekom v. Kuchenbecker Excavating, Inc.*, No. C23-3046-LTS-KEM, 2024 WL 2963792, at *5 (N.D. Iowa June 12, 2024) (citing *Carmen v. Health Carousel,* *LLC*, No. 1:20-CV-313, 2023 WL 5104066 at *13 (S.D. Ohio Aug. 9, 2023)). In any case, *Molina-Aranda* is distinguishable. The plaintiffs there alleged they were recruited to work as construction workers under the H-2B visa program and promised a wage of $13.72 an hour. 983 F. 3d at 783-84. Instead, they were made to work as truck drivers, a category of H-2B worker that would have garnered a higher wage rate had it been accurately conveyed to and approved by the Department of Labor in the employer's application for H-2B workers. *Id.* The plaintiffs alleged they were not only paid less than the H-2B rate for truck drivers, but also paid less than the rate promised in their employment contracts, and sometimes not paid at all. *Id.* The plaintiffs brought RICO claims alleging that the employer had defrauded the U.S. Department of Labor by filing false H-2B applications, resulting in Plaintiffs' underpayment. The court disagreed, finding the chain of causation too attenuated between the filing of fraudulent visa applications and the alleged injury. *Id.* at 785 ("[C]ritically, Plaintiffs' reduced wages were several steps in the causal chain away from the transmission of fraudulent forms; nothing about the forms required underpayment.").

Molina-Aranda is wholly inapposite. Plaintiffs' injuries here were not the result of a "series of attenuated decisions *after* the visa application process," *Hanekom,* 2024 WL 2963792, at *6 (emphasis added), but the intended effect of a scheme in which Defendants knowingly recruited Plaintiffs with false promises relating to the amount of pay, deductions, and the nature and conditions of work and housing. Moreover, the RICO violations alleged in *Molina-Aranda* "concerned fraudulent statements made *to immigration officials*"; that has "little bearing" here, when Plaintiffs allege they were the target of the fraudulent representations. *Carmen*, 2023 WL 5104066, at *13.

Two recent district court cases, one in this Circuit, illustrate the distinction: *Hanekom*, 2024 WL 2963792, at *6, and *Carmen*, 2023 WL 5104066, at *13. Like here, both cases concerned RICO claims by foreign workers that the defendant employers had lured them to the U.S. with false promises regarding the nature of the work, wages and housing. *Hanekom*, 2024 WL 2963792, at *6; *Carmen*, 2023 WL 5104066, at *13. In upholding the plaintiffs' RICO claims at the pleading stage, both courts rejected the *Molina-Aranda* holding as non-binding and "too narrow," given RICO's "flexible causation standard." *Hanekom*, 2024 WL 2963792, at *5 (quoting *Carmen*, 2023 WL 5104066, at *13) ("After all, RICO penalizes illicit *schemes*, furthered through predicate acts. And as the Supreme Court clarified in *Bridges*, the RICO plaintiff need not be the target of the predicate act to recover."). Adhering instead to the Supreme Court standard set forth in *Bridge*, both district courts reasoned that "visa fraud on immigration officials, committed as part of a scheme to import and underpay immigrant laborers, strikes the Court as causally linked with the injury those laborers suffer when they immigrate and are underpaid." *Carmen*, 2023 WL 5104066, at *13; *Hanekom*, 2024 WL 2963792, at *5; *see also Aquino v. Mobis Alabama, LLC*, 739 F.Supp.3d 1152, 1221 (N.D. Ga. 2024) (in foreign worker RICO fraud case, plaintiffs sufficiently pleaded causation with respect to travel costs, visa fees, housing-related costs, and lower-than-promised wages).

The same result should obtain here. Because Plaintiffs have sufficiently pleaded both RICO enterprises and RICO standing, LEI's motion to dismiss this claim should be denied.

B. PLAINTIFFS HAVE STATED A CLAIM UNDER THE FLSA (COUNT III)

LEI next seeks to dismiss Plaintiffs' FLSA minimum wage claim, referring to it as a "novel theory which has never been recognized under the FLSA for reimbursement of pre-internship fees." LEI Br. 2. Here again, LEI misreads both Plaintiffs' FAC and the law.

Plaintiffs' FLSA minimum wage claim is based on the well-established principle that the FLSA requires minimum wages to be paid "free and clear" of job-related expenses. 29 C.F.R. § 531.35. The wage requirements of the Act are not met where an employee "'kicks-back' directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee." *Martinez-Bautista v. D & S Produce*, 447 F. Supp. 2d 954, 963 (E.D. Ark. 2006) (citing 29 C.F.R. § 531.35). If an expense is determined to be primarily for the benefit of the employer, the employer must reimburse the employee during the workweek in which the expense arose. *Arriaga v. Fla. Pac. Farms, L.L.C.*, 305 F.3d 1228, 1237 (11th Cir. 2002) (citing 29 C.F.R. § 531.35).

When evaluating whether a cost is "primarily for the benefit of the employer," courts consider whether such costs "would have arisen in the ordinary course of life," or "from the employment itself." *Arriaga,* 305 F.3d at 1242; *Perez-Benites v. Candy Brand, LLC*, No. 1:07-CV-1048, 2011 WL 1978414, at *14 (W.D. Ark. May 20, 2011). This is a fact-specific question. *Arriaga,* 305 F.3d at 1243. If such costs are determined to have arisen from the employment itself, they must be reimbursed to the extent that they bring a worker's wages below minimum wage. *See id.* at 1235-36. Courts have long held that the minimum wage requirement is not met if the employee incurs pre-employment expenses, primarily for the benefit of the employer, which reduce the wages for the first workweek below the minimum wage rate. *Martinez-Bautista*, 447 F. Supp. 2d at 963; *Arriaga*, 305 F.3d at 1237 ("There is simply no legal difference between an employer requiring a worker to have the tools before the first day of work, requiring the tools to be purchased during the first workweek, or deducting the cost of the tools from the first week's wages."); *see also Marshall v. Root's Rest., Inc.*, 667 F.2d 559, 560 (6th Cir. 1982).

Plaintiffs allege that the recruitment and travel costs they incurred were primarily for the benefit of LEI and that the costs brought Plaintiffs' first work week wages below minimum wage. FAC ¶¶ 292-93. Plaintiffs are therefore entitled to reimbursement. Contrary to LEI's assertions, there is nothing "novel" about Plaintiffs' theory. Federal courts, including in this Circuit, have long acknowledged that foreign "employees' travel and visa costs [are] not expenses they would have incurred normally in the course of life, but rather, like a work uniform or tools, [are] costs necessitated by the job itself." *Perez-Benites*, 2011 WL 1978414, at *14 (citing *Arriaga*, 305 F.3d 1228 at 1243-44); *see also West v. Butikofer*, No. 19-CV-1039-CJW-KEM, 2020 WL 5245226, at *5 (N.D. Iowa Aug. 18, 2020) (H-2A workers); *Martinez–Bautista*, 447 F.Supp.2d at 963–64 (H-2A workers); *Jatupornchaisri v. Wyndham Vacation Ownership, Inc.*, No. 6:12-CV-59-ORL-31GJK, 2012 WL 1600435, at *2 (M.D. Fla. May 7, 2012) (J-1 visa holders).

Here, Plaintiffs allege that Defendants lured them to enroll in the J-1 visa program with false promises of a cultural exchange program, causing them to expend thousands of dollars in recruitment and travel related fees, only to be employed as full-time general laborers at LEI's facilities. FAC ¶¶ 1-3; 89-133. LEI offered no cultural or educational opportunities, no training by professionals, and no supervision or assessment. *Id.* at ¶¶ 4-8, 134-233. The promised educational experience for which Plaintiffs paid—and from which they may have benefitted—was non-existent. Instead, Plaintiffs' recruitment fees and travel to Nebraska benefited only Defendants, who were able to fill LEI's labor needs with cheaper labor and profit off Plaintiffs' enrollment. Because Plaintiffs were employed as employees, their pre-employment expenses were primarily for the benefit of LEI, and those expenses reduced Plaintiffs' first workweek's pay below the minimum wage of $7.25 an hour, each Plaintiff must be reimbursed. *Martinez-Bautista*, 447 F. Supp. at 964.

LEI seeks to avoid this outcome by casting it as too broad and at fundamental odds with the J-1 program itself. LEI Br. 10-11. They argue that Plaintiffs cannot possibly be right, because "then reimbursement would be required for all J-1 programs even if there were no employment activity or a minor one employment activities [sic]." *Id.* This is illogical, and not Plaintiffs' argument. First, the FLSA only applies where there is an employer-employee relationship, so would have no relevance where "there were no employment activity." Second, it is *Defendants'* conduct—not Plaintiffs' claims—which resulted in a perversion of the J-1 program. Where a J-1 host does, in fact, provide its J-1 visa holders with a bona fide training and cultural exchange experience, as required under the regulations, then whether the visitors' travel and recruitment expenses could be categorized as "primarily for the benefit" of the employer may well be a closer call. But that is not the case here, where Plaintiffs allege they were tricked into expending thousands of dollars to work as general laborers against their will.

For similar reasons, LEI cannot rely on the J-1 visa regulations' reference to certain "non-refundable fees," to argue that "pre-internship fees" like "visa fees, airfare cost, and program or recruitment fees," are never reimbursable. LEI Br. 9-11 (citing 22 C.F.R. § 62.9(d)(3)). LEI cites no authority for its assertion that the phrase "non-refundable fees" refers to pre-employment fees, and the regulations do not define it. But even if it encompasses fees like those Plaintiffs incurred, that would not obviate LEI's obligations under the FLSA. As detailed in the FAC, Defendants agreed, under penalty of perjury, to abide by the FLSA when employing J-1 visa holders, FAC ¶ 104, and further averred that the intern would "not displace full-or part-time, seasonal or permanent American workers, or serve to fill a labor need." *Id.* at ¶¶ 66, 69. When LEI chose to employ Plaintiffs as full-time employees instead of trainees, contrary to the J-1 regulations, against Plaintiffs' will, and for its own benefit, LEI's obligations under the FLSA kicked in. *See, e.g.*, *Jatupornchaisri*, 2012 WL 1600435, at *2 (allowing J-1 visa plaintiffs to bring FLSA claims against J-1 employer, including claims that employer violated the FLSA by failing to reimburse Plaintiffs for the expenses incurred in obtaining their visas and for travel).

LEI's motion as to this claim should be denied.

C. PLAINTIFFS STATE CLAIMS OF DISCRIMINATION (COUNTS VII, VIII, X)

LEI next urges this Court to dismiss Plaintiffs' claims of discrimination under Title VII, Section 1981 and the NFEPA, asserting that Plaintiffs fail to adequately plead discrimination based on national origin. In so arguing, LEI mischaracterizes Plaintiffs' allegations and ignores basic principles of discrimination law.

As an initial matter, LEI treats Plaintiffs' discrimination claims as interchangeable, but the basis for Plaintiffs' Title VII and NFEPA claims differs from that underlying their Section 1981 claim. Plaintiffs' discrimination claims under Section 1981 are based on alienage discrimination, FAC ¶ 325, while Plaintiffs' Title VII and NFEPA claims are based on national origin ("Guatemalan origin") discrimination, *id.* at ¶¶ 330, 345. Courts routinely recognize such "bundled" theories of discrimination, in which allegations of discrimination may be based on multiple protected characteristics and arise under different statutes. *Walton v. Medtronic USA, Inc.*, No. 22-CV-50 (PJS/JFD), 2023 WL 3144320, at *4, *7 (D. Minn. Apr. 28, 2023) (permitting plaintiff to amend complaint to allege race discrimination under Section 1981 in addition to age and sex discrimination under Title VII); *Newman v. Amazon.com, Inc.*, No. 21-CV-531 (DLF), 2022 WL 971297, at *7 (D.D.C. Mar. 31, 2022) ("it is not disqualifying—or even uncommon—for plaintiffs to allege, based on the same adverse employment action, that they were discriminated against based both on their sex and their race" (citations omitted)). Plaintiffs address the sufficiency of each claim in turn.

1. Plaintiffs Sufficiently Plead Alienage Discrimination Claim under Section 1981.

The FAC alleges that LEI subjected Plaintiffs to disparate treatment based on their J-1 visa status in violation of Section 1981. FAC at ¶¶ 325-27. Contrary to LEI's assertion, this is not "fatal" to Plaintiffs' Section 1981 claim.

It is well-settled that Section 1981 applies as much to alienage discrimination as it does to race. *See Graham v. Richardson*, 403 U.S. 365, 377 (1971) (Congress intended for § 1981 to apply to all persons within the jurisdiction of the United States); *Gen. Bldg. Contractors Ass'n., Inc. v. Pennsylvania*, 458 U.S. 375, 386-87 (1982); *see also Sagana v. Tenorio*, 384 F.3d 731, 738 (9th Cir. 2004), as amended (Oct. 18, 2004) ("Just as the word 'white' indicates that §1981 bars discrimination on the basis of race, the word 'citizen' attests that a person cannot face disadvantage in the activities protected by § 1981 solely because of his or her alien status.").

Myriad cases, including in this Circuit, confirm that discrimination against an employment-authorized foreign citizen based on visa status constitutes alienage discrimination under Section 1981. *See, e.g.*, *Rios-Gutierrez v. Briggs Traditional Turf Farm, Inc.*, No. 21-0374-CV-W-FJG, 2024 WL 4033067, at *19 (W.D. Mo. Sept. 3, 2024) (defendants' admission that they did not pay overtime to plaintiffs based on plaintiffs' "H-2A status" constituted direct evidence of a Section 1981 violation); *Ruiz v. Zoom Video Commc'ns Inc.*, No. C21-1379-RSM-SKV, 2022 WL 770293, at *4 (W.D. Wash. Feb. 1, 2022), *report and recommendation adopted*, 2022 WL 766994 (W.D. Wash. Mar. 14, 2022) (DACA recipient); *Chacko v. Texas A&M Univ.*, 960 F. Supp. 1180, 1191 (S.D. Tex. 1997), *aff'd*, 149 F.3d 1175 (5th Cir. 1998) (Canadian H-1B visa holder); *cf. Hernandez v. Siri & Son Farms, Inc.*, No. 6:20-CV-00669-MK, 2021 WL 4999022, at *7 (D. Or. Sept. 30, 2021), *report and recommendation adopted*, 2021 WL 4993475 (D. Or. Oct.

27, 2021) (U.S. citizen vis a vis H-2A worker); *Jimenez v. Servicios Agricolas Mex, Inc.*, 742 F. Supp. 2d 1078, 1085-87 (D. Ariz. 2010) (same).

Rios-Gutierrez, 2024 WL 4033067 at *18-19, is instructive. There, a class of Mexican H-2A workers alleged that defendants paid the H-2A workers differently than U.S. citizens "despite performing the exact same work (for which the U.S. citizens were paid overtime)." The Western District of Missouri found that the defendants' admission that it paid the two groups differently based on the plaintiffs' H-2A status was "direct evidence" of a Section 1981 violation, rejecting defendants' argument that discrimination based on visa status was not actionable under Section 1981. *Id.*, at *18 ("Courts have long found that section 1981 applies to alienage discrimination." (citing cases)). The same rationale applies here: Plaintiffs allege that LEI intentionally paid its J-1 visa employees less than its non-J-1 visa employees (who were Mexican and American) for performing the same work. ECF No. 15 at ¶¶ 8, 326 352, 353. These allegations, like those in *Rios-Gutierrez*, establish direct evidence of alienage discrimination under Section 1981. 2024 WL 4033067 at *18-19.

LEI's admission that it treated its Mexican TN-visa holders more favorably based on their distinct visa status hurts, rather than helps, its argument. LEI Br. 13. Plaintiffs allege that the Mexican TN-visa holders were in fact employed to do the same work as Plaintiffs, separate visas notwithstanding, but paid more, making them the correct comparator group. FAC ¶ 326. And LEI makes no mention of the other non-J-1 visa holders, the American employees, whom Plaintiffs claim were also paid more for the same work. *Id.*; *see* LEI Br. 11-13.[8] To the extent LEI intends

[8] Plaintiffs note that, although their Section 1981 claim does not include the term "American," its reference to "non-J-1 visa holders" should be read to include Americans, as discussed elsewhere in the FAC. *See* FAC at ¶¶ 8, 326, 352, 353; *see also Braden*, 588 F.3d at 594 ("[T]he complaint should be read as a whole, not parsed piece by piece to determine whether each allegation, in isolation, is plausible."). Plaintiffs offer to amend if further clarity is needed at this stage.

to imply that its more favorable treatment of some visa holders (TN) insulates it from liability for discrimination against holders of a separate visa (J-1), courts have consistently found the opposite. *Juarez v. Nw. Mut. Life Ins. Co.,* 69 F. Supp. 3d 364, 370 (S.D.N.Y. 2014), *amended*, No. 14-CV-5107 (KBF), 2014 WL 12772237 (S.D.N.Y. Dec. 30, 2014) ("[a] defendant is not insulated from § 1981 liability for intentional discrimination against some members of a protected class merely because not *every* member of the class becomes a victim of the discrimination."); *Juarez v. Soc. Fin., Inc.,* No. 20-CV-03386-HSG, 2021 WL 1375868, at *6 (N.D. Cal. Apr. 12, 2021) (rejecting loan refinancer's argument that it did not discriminate against DACA holders because other non-citizens were still eligible for credit); *Rodriguez v. Procter & Gamble Co.*, 465 F. Supp. 3d 1301, 1321-23 (S.D. Fla. 2020) (discussing cases upholding allegations of Section 1981 discrimination where defendant "subject[ed] only certain subclasses of immigrants to adverse treatment").[9]

Plaintiffs' allegations that LEI purposefully and intentionally discriminated against them based on their J-1 visa status are sufficient to state a claim for alienage discrimination at this stage. *See, e.g.*, *Kitchen v. Developmental Servs. of Neb.*, *Inc.,* No. 8:20CV08, 2020 WL 13004836, at *4 (D. Neb. Oct. 2, 2020).

2. Plaintiffs Sufficiently Plead National Origin Discrimination under Title VII and NFEPA.

Plaintiffs also separately allege that LEI subjected them to disparate treatment based on their "Guatemalan origin," in violation of Title VII and NFEPA. FAC ¶¶ 330, 345. Both statutes explicitly prohibit discrimination based on national origin. *See* 42 U.S.C. § 2000e-2(a) and Neb.

[9] That LEI hired its Mexican workers under a visa only available to skilled professionals but then employed them to perform the same general labor as its J-1 visa holders is further evidence that LEI was not paying the workers differently based on skill level, as LEI implies, but rather that it was misusing two different visa types in order to pay its J-1 visa holders less.

Rev. Stat. ¶ 48-1104(1). The FAC alleges that LEI intentionally targeted Guatemalan workers, knowing they would be compelled to work for low pay, FAC ¶¶ 8, 251; that they intentionally paid Guatemalans and other non-Mexican, non-American employees less than they paid Mexican and American employees for the same work, *id.* at ¶¶ 8, 331, 352-53, 374; that LEI supervisors made comments to Plaintiffs about their Guatemalan national origin in a derogatory way, *id.* at ¶¶ 196-97; and that LEI charged Guatemalans and other non-Mexican workers more for employer-provided housing than Mexican workers, *id.* at ¶¶ 152, 299, 326, 331, 346, 352.

LEI attempts to circumvent these allegations by recasting them as "visa title" claims, asserting that "Plaintiffs base their discrimination claims by comparing J-1 Visa Holders and non J-1 visa holders [sic]." LEI Br. 12-13. This is incorrect. Plaintiffs reference the J-1 visa in their national origin claims only because LEI used the J-1 visa as a proxy for national origin insofar as no Mexican or American (the two comparator groups) held a J-1 visa. In other words, LEI's discrimination against its non-Mexican, non-American J-1 visa employees, including Guatemalans, had the "purpose or effect of discriminating on the basis of national origin." *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 92 (1973) ("Certainly Tit[le] VII prohibits discrimination on the basis of citizenship whenever it has the purpose or effect of discriminating on the basis of national origin."); *see also Segabandi v. Pinnacle Tech. Res., Inc.*, No. 4:14CV1082 HEA, 2015 WL 851346, at *2 (E.D. Mo. Feb. 26, 2015) (dismissal "would be premature" where plaintiff's complaint "can be liberally construed as alleging that the alleged pay difference for citizens versus non-citizens was a pretext for discrimination based on national origin."); *Ibarra v. City of Willmar*, No. CIV. 12-3027 JRT/FLN, 2014 WL 3396048, at *11 (D. Minn. July 11, 2014) (plaintiff adequately alleged that employer used citizenship status as a proxy for national origin).

Also, as indicated above, the FAC details a broader set of national origin discrimination claims than those alleged in Plaintiffs' Section 1981 claim, including that LEI singled out Guatemalans like Plaintiffs for recruitment, and then applied stereotypical standards to dismiss their complaints about the work and wages. FAC ¶¶ 8, 251; ¶¶ 196-97. *See Johnson v. Sch. Dist. of Philadelphia*, No. CV 23-3430, 2024 WL 1773358, at *5 (E.D. Pa. Apr. 24, 2024) (references to comparators and allegations that plaintiff was "subjected to comments employing racial stereotypes" were sufficient to defeat motion to dismiss Title VII claims).

Plaintiffs' allegations of national origin discrimination under Title VII and NFEPA more than suffice to give LEI "fair notice of what [Plaintiffs'] claim is and the grounds upon which it rests." *Cook v. George's, Inc.*, 952 F.3d 935, 938-39 (8th Cir. 2020) (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (there is no "rigid pleading standard for discrimination cases."); *See Williams v. Dakota Cnty. Bd. of Comm'rs.*, No. 8:09CV201, 2010 WL 964699, at *4 (D. Neb. Mar. 10, 2010) (complaint stated a plausible claim for discrimination under Title VII where plaintiff alleged disparate pay by reason of race and gender). LEI's motion to dismiss these claims should be denied.

D. PLAINTIFFS HAVE STATED A CLAIM UNDER THE NWPCA (COUNT IX)

LEI's final two arguments seeking to dismiss Plaintiffs' claims arising under the NWPCA ignore the plain language of the NWPCA as well as Plaintiffs' detailed allegations.

With regards to LEI's first argument, that LEI was under no obligation to alert Plaintiffs to a change in the pay schedule, LEI does not dispute that the NWPCA requires an employer to "pay . . . wages due its employees on regular days . . . agreed upon by the employer and employee," or that thirty-days written notice is required before regular paydays may be altered. LEI Br. 14 (citing Neb. Rev. Stat. § 48-1230(1)). Instead, LEI posits that no notice was required because there was no alteration to the regular payday: Upon arrival at LEI, Plaintiffs were told they would be paid on a monthly basis and accordingly were never paid on a weekly basis. *Id.* This argument ignores the plain language of the NWPCA and adds an unnecessary precondition. Nothing in the NWPCA requires that an employee already have been paid to trigger the thirty-day notice requirement. Rather, the NWPCA specifies that the "regular days" on which wages are due be "agreed upon by the employer and employee," Neb. Rev. Stat. § 48-1230(1), as was the case here. LEI, through its agent, WFE, agreed to pay Plaintiffs weekly. FAC ¶ 339. This is sufficient to state a claim that thirty-days written notice of the change was required. *See Walkinshaw v. Saint Elizabeth Reg'l Med. Ctr.*, 428 F. Supp. 3d 171, 183 (D. Neb. 2019) (denying motion to dismiss where "parties' employment relationship shows that there was at least some agreement with regard to terms, conditions, and rate of payment.").

LEI's final argument, that Plaintiffs authorized the housing and transportation deductions from their wages, is equally unavailing. Plaintiffs allege that their signatures on the form authorizing deductions were obtained without Plaintiffs' "prior meaningful consent," FAC ¶¶ 341-42. Under Nebraska law, agreements obtained "by means of pressure brought to bear" are voidable as a product of duress. *Gilkerson v. Neb. Colocation Ctrs., LLC*, 859 F.3d 1115, 1118 (8th Cir. 2017). This principle is especially relevant in circumstances where a "stronger party exploits the other's vulnerability in a manner that passes the bounds of economic self-interest." *City of Scottsbluff v. Waste Connections of Neb., Inc.*, 282 Neb. 848, 867, 809 N.W.2d 725 (2011).

In the FAC, Plaintiffs allege that: (1) Defendants were required to disclose all terms and conditions of any employment activities, including "any typical deductions for housing and transportation" at the time of recruitment and before exchange visitors enter into any agreements or pay fees, FAC ¶ 62 (citing 22 CFR § 62.9(d)(3)); (2) the LEI Training Plan, which served as the employment contract, failed to disclose any deductions for housing and transportation, *see id.* at ¶¶ 101-02; (3) after signing the LEI Training Plan, Plaintiffs paid thousands of dollars in recruitment and travel fees in reliance on the Plan's terms, *id.* at ¶¶ 107-11, 117, 123-24; (4) after that, WFE gave Plaintiffs a document, advised them not to read it, and summarized it, omitting mention of housing deductions, *id.* at ¶¶ 112-13; and (5) LEI, through its agents, WFE, provided Plaintiffs with a document notifying them of housing and transportation deductions the day before they were scheduled to fly to Nebraska and told them that if they did not sign it, they would not be able to go to LEI, *id.* at ¶¶ 126-31, 342.

Plaintiffs' allegations are enough to state a claim that the deductions were unauthorized under the NWCPA by virtue of duress. *See, e.g. McCubbin v. Buss*, 180 Neb. 624, 144 N.W.2d 175 (1966) (duress found when employer threatened to terminate plaintiff's employment if plaintiff did not agree to altered terms of contract); *see also Lincoln Ben. Life Co. v. Edwards*, 45 F. Supp. 2d 722, 750 (D. Neb. 1999), *aff'd*, 243 F.3d 457 (8th Cir. 2001) ("Duress may be found if, for example, an employer who has the right to terminate the employment at will threatens to fire an employee as a means of obtaining some unrelated advantage . . . ." (citing E. Allan Farnsworth, *Farnsworth on Contracts* § 4.17, at 484 (2d ed. 1998))).

LEI's attempt to graft meaningful consent onto Plaintiffs' allegations by omitting key parts of the FAC is as transparent as it is futile. LEI references paragraph 113 of the FAC as evidence that "Plaintiffs allege that they agreed to tax deductions and housing costs on July 19, 2022" LEI Br. 14 (citing FAC ¶ 113). But Paragraph 113 is explicit that, after telling Plaintiffs not to read the document, WFE "did *not* mention that the document also stated that $345 in taxes would be deducted from the trainees' pay every month" or that the document "referred to a separate document supposedly pertaining to housing costs. [WFE] did *not* provide Plaintiffs with any separate document." FAC ¶¶ 112-14 (emphasis added). No reading of Paragraph 113 could result in the conclusion that Plaintiffs "allege that they agreed" to deductions, as the paragraph clearly states WFE omitted any mention of them. LEI Br. 14. LEI's tongue-in-cheek remark that "[i]t is not a violation for the agreement to be made the day before Plaintiffs arrive in the United States," *id.* at 14-15, is both incorrect and inchoate. Incorrect because, in fact, the J-1 visa program required LEI to inform Plaintiffs of deductions "at the time of recruitment and before exchange visitors enter into agreements . . . or pay . . . fees," FAC ¶ 62 (citing 22 CFR § 62.9(d)(3)). Inchoate because it excises Plaintiffs' detailed allegations that their signatures were obtained through coercion. *Id.* at ¶ 131.

LEI's motion to dismiss Plaintiffs' NWPCA claims should be denied.

IV. CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that the Court deny LEI's Motion to Dismiss.

Respectfully submitted,

s/ Melia Amal Bouhabib
Melia Amal Bouhabib
TN Bar No. 035588
Kelsey R. Eberly (PHV)
VT. Bar No. 6126
Hannah R. Schwarz (PHV)
IL Bar No. 6339642
FarmSTAND
712 H Street NE Suite 2534
Washington, DC 20002
202-630-3095
Fax: 1-978-845-2282
Email: amal@farmstand.org
Email: kelsey@farmstand.org
Email: hannah@farmstand.org

Adolfo Daniel Reynaga
Bar Number: 26380
Legal Aid of Nebraska
1423 First Avenue
Scottsbluff, Nebraska 69363
308-632-4734
Fax: 308-632-3844
Email: dreynaga@legalaidofnebraska.org

Ivy Marie Lutz
Bar Number: 27890
Legal Aid of Nebraska
947 O St. #301
Lincoln, Nebraska 68508
402-435-2161
Email: ilutz@legalaidofnebraska.org

Daniel Werner
GA Bar No. 422070
RADFORD SCOTT, LLP
125 Clairemont Avenue
Suite 380
Decatur, GA 30030
678-271-0304
Fax: 678-271-0314
Email: dwerner@radfordscott.com

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with NECivR 7.1(d) and that the word count function was applied to include all text, including the caption, headings, footnotes, and quotations. This document was prepared using Microsoft Word and contains 9,878 words.

I hereby certify that this brief complies with NECivR 7.1(d) and that no generative artificial intelligence program was used in drafting the document, or that to the extent such a program was used, a human signatory of the document verified the accuracy of all generated text, including all citations and legal authority.

s/Melia Amal Bouhabib
Melia Amal Bouhabib