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 DEFENDANTS WORLDWIDE FARMERS EXCHANGE AND ASHLEY MEDULAN'S PARTIAL MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

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Defendants Worldwide Farmers Exchange ("WFE") and Ashley Medulan ("Medulan") (collectively, "WFE Defendants") seek to dismiss four of Plaintiffs' causes of action in the First Amended Complaint ("FAC"). Three of these requests fail on the merits: (1) Plaintiffs state a claim under the knowingly-benefitted prong of 18 U.S.C. § 1595(a) of the Trafficking Victims Protection Reauthorization Act (TVPRA), 18 U.S.C. §§ 1589, *et seq.*, without relying on recently codified language about attempting or conspiring to benefit; (2) Plaintiffs plead a RICO enterprise and RICO standing, as described in Plaintiffs' Opposition to the Partial Motion to Dismiss filed by the LEI Defendants, ECF No. 46; and (3) under the "economic realities" test, Plaintiffs establish that both WFE and Medulan functioned as employers under the Fair Labor Standards Act (FLSA), and retaliated against Plaintiffs in violation of that law.

Plaintiffs do not oppose the WFE Defendants' final argument, that WFE and Medulan cannot be liable for violations of the Nebraska Wage Payment and Collection Act (NWPCA) because they are not employers under the Act. Plaintiffs agree with the WFE Defendants that they are not. To the extent the FAC suggested that Plaintiffs intended to include the WFE Defendants under this count, Plaintiffs clarify that their NWPCA claims are limited to the LEI Defendants, and, if necessary, offer to amend for clarity.

Plaintiffs address the WFE Defendants' remaining arguments in turn.

I. STATEMENT OF FACTS

Starting in at least 2020, Defendants Bruce Livingston, Livingston Enterprises Inc. (collectively, "LEI"), on the one hand, and WFE, Medulan, and Maria Los Angeles Cifuentes Moran, on the other, began working together to procure foreign students through the J-1 visa program to work at LEI. FAC ¶¶ 1, 40-53. Defendants knew that the J-1 visa program was supposed to be a training program and not a means to obtain cheap labor. *Id.* at ¶¶ 8, 63, 66, 69, 82, 99-104, 238. To circumvent this, Defendants conspired to recruit foreign students with false promises of an educational and cultural exchange, while intending to employ them as general laborers at LEI. *Id.* at ¶¶ 234-38. LEI paid WFE for each worker WFE successfully recruited, *id.* at ¶ 130, and WFE relayed the misrepresentations to potential candidates, organized necessary paperwork, and, with LEI, arranged for workers' travel and housing. *Id.* at ¶¶ 89-103, 130, 184-87.

To effect this scheme, Defendants made various false promises to Plaintiffs: they would be trained in LEI's business practices, earn at least $2,500 a month, be paid weekly, have weekends off to experience American culture, and have free or low-cost housing. *Id.* at ¶¶ 2, 93, 238, 251, 341. 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. 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 ¶¶ 94-97.

After collecting the fees, WFE had Plaintiffs sign a document purporting to be an agreement between WFE and Plaintiffs. *Id.* at ¶¶ 107-14. WFE instructed Plaintiffs not to read the document, and instead summarized it to them, omitting parts that conflicted with its earlier promises. *Id.* The night before Plaintiffs were to depart for Nebraska, WFE gave Plaintiffs yet another document— a "Living Expense Deduction Form" – that said LEI would withhold taxes and deduct housing and transportation costs from wages. *Id.* at ¶¶ 124-30. Plaintiffs protested the new terms, but WFE issued an ultimatum: sign 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 be paid monthly, not weekly, making it difficult to pay off the debt and interest they had accrued to enroll in the program. *Id.* at ¶ 145. They worked long days in dangerous conditions, often for seven to ten days straight. *Id.* at ¶¶ 160-82. There were no cultural or educational opportunities. *Id.* at ¶ 183.

Throughout Plaintiffs' employment, WFE and LEI coordinated with each other to keep the scheme running smoothly. They communicated frequently about Plaintiffs' work and housing conditions, job performance, and complaints. *Id.* at ¶¶ 185-87, 204-05, 209, 228-33. WFE, through Medulan and Cifuentes, also communicated regularly with Plaintiffs about wages, working and housing conditions, and job performance, serving as a go-between for LEI when

Plaintiffs had complaints, or to explain LEI employment policies and determinations. *Id.* at ¶¶ 184-87; 228-33. When Plaintiff Najera Barillas left LEI, unable to endure the conditions, it was WFE who threatened Plaintiffs with deportation, loss of reputation, and other "measures or penalties." *Id.* at ¶¶ 200-01. Ultimately, with WFE's support, LEI fired the remaining Plaintiffs 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 v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009). 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.* at 595 (citation omitted).

III. LEGAL ARGUMENT

A. PLAINTIFFS HAVE STATED A CLAIM UNDER THE TVPRA (COUNT I)

The WFE Defendants ask this Court to dismiss Plaintiffs' TVPRA claim "to [the] extent that [Plaintiffs'] allegations fall under the language 'attempts or conspires to benefit'" in 18 U.S.C. § 1595(a). Br. Supp. Mot. Dismiss 6 ("WFE Br."), ECF No. 41. This argument fails for the simple reason that none of Plaintiffs' TVPRA allegations rely on the "attempts or conspires to benefit" clause.

The WFE Defendants' apparent confusion notwithstanding, there is nothing unclear about "which, if any, causes of action were brought on the basis that WFE and/or Medulan attempted or conspired to benefit from participation in a venture which they knew or should have known was engaged in an act in violation of the TVPRA." WFE Br. 5. The answer is none. The FAC is explicit that the WFE Defendants "*knowingly benefited* financially and/or . . . *received* something of value from participation in" such a venture, in violation of 18 U.S.C. § 1595(a). FAC ¶ 254 (emphasis added). Indeed, the FAC says nothing about the WFE Defendants attempting or conspiring to financially benefit because, again, Plaintiffs allege that the WFE Defendants *did* benefit. Paragraph 254 goes on to describe just how the WFE Defendants actually benefitted financially from Defendants' forced labor, trafficking in forced labor, attempted forced labor, and conspiracy to commit forced labor, including by (a) collecting recruitment fees from Plaintiffs, knowing they would be coerced into labor; (b) collecting monthly payments from the LEI Defendants for Plaintiffs and other J-1 visa trainees; and (c) engaging in a continued relationship with the LEI Defendants that would allow WFE to continue collecting recruitment fees and monthly payments from LEI. *Id.* (c), (d) and (e).

Perhaps the WFE Defendants are confused by Plaintiffs' reference to "attempted forced labor" and "conspiracy to commit forced labor" in Paragraph 254, insofar as the same words, attempt and conspire, are used. But Plaintiffs' references to "attempted forced labor" and "conspiracy to commit forced labor" arise from 18 U.S.C. § 1594, not § 1595. Under 18 U.S.C. § 1594, whoever attempts or conspires with another to violate, *inter alia*, sections 1589 (forced labor) or 1590 (trafficking) of the Act are punishable "in the same manner as a completed violation of such section." *Id.* (a) (attempt), (b) (conspire). Thus, Plaintiffs allege that all Defendants conspired to "violate 18 U.S.C. § 1589 in violation of 18 U.S.C. § 1594(b)," FAC ¶ 253, and that, in the alternative to the alleged violations of 18 U.S.C §§ 1589, 1590, and 1594(b), Defendants attempted to subject Plaintiffs to these violations. *Id.* ¶ 256 (omitting reference to § 1594(a)). Though both sections include the words attempt and conspire, they refer to two different acts: attempt and conspiracy to commit forced labor (§1594) versus attempt or conspiracy to financially benefit (§ 1595). Plaintiffs only allege the former.

The WFE Defendants next argue that the "attempts or conspires to benefit" language cannot be applied retroactively. Because Plaintiffs do not rely on this language, no discussion of this argument is necessary. And because this is the only argument the WFE Defendants raise against Plaintiffs' TVPRA claim, and it is inapplicable, the WFE Defendants' motion as to this claim should be denied. *See Republican Party of Minn. v. Kelly*, 247 F.3d 854, 881 (8th Cir. 2001) ("[I]ssues not argued in an opening brief cannot be raised for the first time in a reply brief."), *rev'd on other grounds sub. nom. Republican Party of Minn. v. White*, 536 U.S. 765 (2002).

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

The WFE Defendants make the same RICO arguments as the LEI Defendants. To avoid repetition, Plaintiffs incorporate in full the arguments in their Opposition Brief to LEI's Motion to Dismiss, ECF No. 46.

C. PLAINTIFFS HAVE STATED A RETALIATION CLAIM UNDER THE FLSA (COUNT IV)

The WFE Defendants say they cannot be held liable under FLSA because they are not "employers" under the Act. WFE Br. 9-11. Their argument ignores both the "striking breadth" with which the FLSA defines the word "employer," *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992), and Plaintiffs' low burden at the motion-to-dismiss stage. The FLSA defines an employer as "includ[ing] any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). The definition is "expansive[]," *Nationwide Mut. Ins. Co.*, 503 at 326, because the statute is remedial in nature. *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999). And "assessing whether a person is an employer 'is a fact-based inquiry' not appropriate for resolution on a motion to dismiss." *Grove v. Meltech, Inc.*, No. 8:20CV193, 2021 WL 1516412, at *3 (D. Neb. Apr. 16, 2021) (quoting *Arnold v. DirecTV, Inc.*, No. 4:10CV00352, 2011 WL 839636, at *6 (E.D. Mo. Mar. 7, 2011) (noting "constraints of a Rule 12(b)(6) review" in context of FLSA "employer" determination)). At this stage of the litigation, Plaintiffs need only allege—not establish—that the WFE Defendants are "employers," but in any event, the FAC offers ample evidence that they are.

When determining whether an entity or individual is an employer, courts look to whether the alleged employer possessed the power to control the plaintiff-worker, taking into account the "economic reality" presented by the facts of each case. *Id.* at *2. Thus, courts within the Eighth Circuit consider whether the alleged employer: "(1) had hiring and firing power, (2) supervised and controlled the plaintiff's work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained the plaintiff's employment records." *Id.* (citing *Childress v. Ozark Delivery of Mo. L.L.C.*, 95 F. Supp. 3d 1130, 1139 (W.D. Mo. 2015)). But "[t]hese factors are not exhaustive and no one factor is dispositive." *Childress*, 95 F. Supp. 3d at 1139; *see Herman*, 172 F.3d at 139 ("[A]ny relevant evidence may be examined so as to avoid having the test confined to a narrow legalistic definition"). Indeed, "in certain circumstances, an entity can be a joint employer under the FLSA even when it does not hire and fire its joint employees, directly dictate their hours, or pay them." *Zheng v. Liberty Apparel Co. Inc.*, 355 F.3d 61, 70 (2d Cir. 2003) (citing *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947)). At the motion-to-dismiss stage, in particular, plaintiffs need not run through every factor simply to state a claim. *See McClean v. Health Sys., Inc.*, No. 11-03037-CV-S-DGK, 2011 WL 2650272, at *2 (W.D. Mo. July 6, 2011).

The exact contours of the economic-realities factors vary by court, but "the overarching concern" remains the same: "whether the alleged employer possessed direct or indirect power to control significant aspects of the plaintiff's employment." *Childress*, 95 F. Supp. 3d at 1139. The FAC makes clear that WFE had that power and was therefore an employer under the FLSA.

From the outset, WFE controlled the hiring and recruiting of foreign undergraduates and graduates, like Plaintiffs, to the J-1 visa program for positions at LEI. Indeed, as an official State Department sponsor, WFE had the sole responsibility of identifying candidates, recruiting them, vetting them, and informing them of the program terms and conditions. FAC ¶¶ 60-67 (citing 22 C.F.R. § 62), 90-93. WFE, through Defendant Cifuentes, also helped fill out and filed the immigration paperwork necessary for Plaintiffs to receive their visas, arranged Plaintiffs' consular interviews, provided Plaintiffs with the LEI Training Plan for review and signing, and collected fees from Plaintiffs. FAC ¶¶ 89-131. In sum, WFE acted as the gatekeeper of the J-1 visa holders' employment at LEI; without WFE, Plaintiffs would not have been hired. *See, e.g.*, *Ruiz v. Fernandez*, 949 F. Supp. 2d 1055, 1067 (E.D. Wash. 2013), *order clarified*, No. CV-11-3088-RMP, 2013 WL 12167930 (E.D. Wash. June 24, 2013) (finding that agent's gatekeeper role with regards to hiring "weighs heavily in support of finding that [agent] [was] a joint employer under the FLSA").

The FAC also alleges that WFE had a hand in supervising and controlling Plaintiffs' conditions of employment. Such supervision was required by the J-1 visa regulations: the regulations mandate, and WFE agreed, that sponsors ensure that hosts, like LEI, provide J-1 trainees with the professional training and cultural opportunities they were promised. FAC ¶¶ 60-61, 65-67; FAC Ex. A (LEI Training Plan) at 3, ECF No. 15-1 (WFE, through Medulan, agreeing to ensure that trainees will not displace regular laborers, trainees will receive on-site supervision and mentoring, and trainees will obtain skills through "structured and guided activities," like on-the-job training). To this end, WFE frequently communicated with LEI and with Plaintiffs about Plaintiffs' housing and working conditions, and Plaintiffs' concerns about how they were being treated. *See* FAC ¶¶ 184-87 (Defendant Medulan explaining wage rates, acknowledging that Plaintiffs' living conditions were subpar, and sharing that she asked LEI to address the housing issues), ¶ 209 (Medulan speaking with LEI about Plaintiff Alvarado Contreras's job performance after Plaintiffs expressed concerns that they were being retaliated against), ¶¶ 229-30 (Medulan speaking with LEI about Plaintiffs' termination).

As a sponsor, WFE also exercised control over whether Plaintiffs could or should be fired or transferred to a new employer. Thus, when two of the Plaintiffs appealed to Medulan saying they had been wrongly terminated, Medulan responded that she had spoken to LEI and "determined that Plaintiffs have violated LEI policy and would be terminated from the program immediately." FAC ¶ 230. Medulan rejected Plaintiffs' requests to be transferred, instead telling them she would terminate Plaintiffs' visas unless they could "accept the decision and return home promptly and peacefully." *Id.* at ¶ 232. WFE further exerted its control by threatening the possibility of deportation if Plaintiffs tried to leave LEI early. FAC ¶¶ 200-01. After Defendant Najera Barillas abruptly left LEI, unable to endure the conditions, Defendant Cifuentes warned the remaining Plaintiffs not to leave LEI early lest they become "fugitives" or earn a lifetime ban from returning to the U.S. FAC ¶ 200.

Together, these allegations make clear that WFE possessed the power to control significant aspects of Plaintiffs' employment. *See, e.g.*, *Ruiz*, 949 F. Supp. 2d at 1067 (day-to-day supervision unnecessary to establish joint employment, where agent had power to hire, transfer, or terminate workers). Plaintiffs have therefore sufficiently alleged that WFE was an employer under the FLSA.

The same is true of Defendant Medulan. "Where an individual exercises control over the nature and structure of the employment relationship or economic control over the relationship, that individual is an employer within the meaning of the [FLSA], and is subject to liability." *Lambert v. Ackerley*, 180 F.3d 997, 1012 (9th Cir. 1999) (cleaned up). The FAC states that Medulan was the President and Program Director of WFE, FAC ¶ 32, and that she was the WFE employee in charge of ensuring that Plaintiffs' training program was running as it was supposed to, FAC ¶¶ 112(a), 204-05. Medulan signed agreements, like the LEI Training Plan, binding WFE to its terms. *See* FAC Ex. A. It was Medulan who consistently communicated with LEI regarding Plaintiffs' employment issues and conditions, and who actively took part in two of the Plaintiffs' ultimate firing. FAC ¶¶ 230-31.

The WFE Defendants rely on *Wirtz v. Pure Ice Co.,* 322 F.2d 259 (8th Cir. 1963) to argue that an individual must have some operational control of the employer-business to qualify as an employer under the FLSA—"status as an owner or high-level executive is not enough." WFE Br. at 10. But *Wirtz* was not decided at the motion to dismiss stage. *Id.* at 260-63. Moreover, unlike the CEO-defendant in *Wirtz*, whom the Court found was not an employer, the FAC alleges that Medulan did maintain operational control over WFE and over Plaintiffs' employment. *Wirtz* involved a CEO who was so uninvolved in the day-to-day operations of his company that for between six weeks and two months, he did not know that the manager of his ice plants had disappeared, and that the manager's wife had taken over her husband's duties. *Id.* at 260-61. That is hardly the situation here. As described above, as the President and representative of WFE, Medulan was intimately involved in Plaintiffs' employment at LEI. She communicated frequently with Plaintiffs and LEI about Plaintiffs' wages, deductions, housing conditions, allegations of discrimination and retaliation, and their job performance. FAC ¶¶ 185-87, 204-05, 209, 217. Medulan spoke multiple times with LEI about Plaintiffs' complaints and LEI's employment decisions, including Plaintiffs' frequent transfers and their issues with supervisors. FAC ¶¶ 187, 209. Plaintiffs also allege that Medulan played a direct role in their ultimate firing from LEI. FAC ¶¶ 230-31. These allegations are more than enough at this early stage, when Plaintiffs have not yet had the benefit of discovery. *Grove*, 2021 WL 1516412, at *3; *Arnold*, 2011 WL 839636, at *6; *Holland v. Bordelon*, No. 4:20-cv-00344-KGB, 2021 WL 966422, at *7 (E.D. Ark. Mar. 15, 2021) ("[The employer inquiry] is a fact-based inquiry, not appropriate for resolution at this stage of the litigation on the record before the Court.").

The WFE Defendants also appear to argue that Plaintiffs have not adequately alleged that they were involved in any retaliation. *See* WFE Br. at 10. To the contrary, the FAC states that WFE, via Defendant Cifuentes, threatened to cancel Plaintiffs' visas and have them deported if they left the program—despite having the ability, as the sponsor, to either place Plaintiffs in a different program or, if Plaintiffs did leave, hold off on immediately terminating their visas. FAC ¶¶ 200-01. The FAC also establishes that WFE, through Defendant Medulan, retaliatorily threatened to terminate Plaintiffs Escobar Gonzalez and Alvarado Contreras from the program. FAC ¶¶ 228-30. When Plaintiffs pleaded with Medulan to call them so they could discuss their termination from LEI, Medulan declined to speak with them. FAC ¶¶ 229-30. Instead, she spoke only with LEI, supported LEI's decision, and took the extra step of threatening to terminate Plaintiffs from the J-1 visa program if they did not depart "promptly and peacefully." FAC ¶ 230-32. When Plaintiffs noted that LEI had repeatedly violated the J-1 visa program requirements, and informed Medulan that they would seek legal counsel about their complaints against LEI, Medulan threatened to send their personal data to the Department of Homeland Security. FAC ¶ 233, 302. These detailed allegations state a retaliation claim against the WFE Defendants. *Braden*, 588 F.3d at 594 ("[T]he complaint should be read as a whole[.]").

Because the FAC adequately pleads that both WFE and Medulan were Plaintiffs' employers, and that they retaliated against Plaintiffs, the WFE Defendants' motion to dismiss this count should be denied.

IV. CONCLUSION

For the reasons above, this Court should deny Defendants WFE and Ashley Medulan's Motion to Dismiss as to Plaintiffs' TVPRA, RICO, and FLSA claims.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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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.

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