

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

NORTH CAROLINA GROWERS')
ASSOCIATION, INC., *et al.*)
)
Plaintiffs,)
)
v.)
)
HILDA L. SOLIS, *et al.*,)
)
Defendants.)
_____)

Case No. 09 CV 411

AFFIDAVIT OF CHRIS MACIBORSKI

The affiant, having been duly sworn, affirms and states as follows:

1. My name is Chris Maciborski. I am owner of Dutchman Tree Farms, a Christmas tree farm outside Manton, Michigan (approximately two hours north of Grand Rapids). I have personal knowledge of the facts stated herein.

2. Our agricultural work force consists of approximately 50 percent domestic and 50 percent H-2A workers. Our first "wave" of workers starts in April of each year, and they are responsible for spring planting of tree seedlings and summer pruning of more mature trees, and then they stay on for the harvest season, which begins in the fall. This first wave stays with us until early December. We bring in a second wave of workers for harvest season in September, and they also stay until early December. We apply for the second wave of H-2A workers in July.

3. I conduct my business planning for the coming season during January and February. At that time, I review the previous year's performance and determine where I can reduce excess costs. To the extent that I can control it (as opposed to the customer), I also

determine what we will charge for our trees in the coming year. However, I have very little flexibility in pricing Christmas trees – we are in a “buyer’s market” now.

4. In 2008, the Adverse Effect Wage Rate (“AEWR”) for my area was \$10.01 per hour. Under the Chao Final Rule, the applicable mandatory wage for H-2A workers went down to \$7.74 per hour. Although I could have paid the \$7.74-per-hour rate, I made the decision to leave my workers at the \$10.01 per hour rate for 2009, but I was planning to let the Chao Final Rule give me the flexibility to leave wages relatively “flat” for a few years. Under the Solis Final rule, my AEWR will go up to \$10.63 per hour, which is substantially more than even the “increased” wage I have been voluntarily paying my first wave of workers, who came in under the Chao Final Rule. I will probably have to stop using H-2A workers in 2010 unless the Solis Final Rule is enjoined.

5. As I understand the Solis Final Rule, the wage structure under the Chao Final Rule will apply to H-2A workers whose applications were filed before June 29, 2009. This means that my first wave of H-2A workers will be paid a lower hourly rate than my second wave, which will have to be paid the \$10.63 per hour rate. Because my first and second waves of workers overlap, they will be aware of this disparity, and it is going to cause strife and division among my the members of my workforce. However, I cannot afford to pay the first wave the Solis AEWR this year because I had not and could not have anticipated it before I had already made commitments for the 2009 season.

5. As a Christmas tree farmer, I am very aware of the issue related to whether Christmas tree farming is “forestry” or “agriculture.” Overtime during the Christmas tree harvest season has been a substantial, and nearly prohibitive, expense for us. However, we cannot avoid

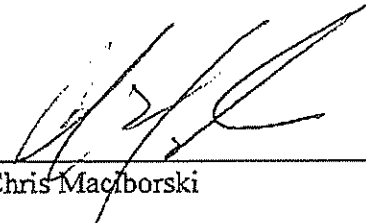
overtime work during this period. After the Chao Final Rule was issued in December 2008, we were advised by the Michigan Farm Bureau that we no longer had to pay overtime to our workers. This, in part, allowed me to offer the 2008 AEWB to my workers in 2009 despite the substantially lower mandatory minimum under the Chao Final Rule.

6. Now the Solis Final Rule takes the position that Christmas tree farming is “forestry” rather than “agriculture,” which means that we must pay overtime to our workers. The Solis designation of Christmas tree farming is irrational and arbitrary, for the reasons stated in Pam Helmsing’s affidavit. We have been advised that we must pay overtime for all hours worked in excess of 40 per week beginning June 29, 2009. This will impose substantial costs on our operation that we did not plan for, and assuming the Solis Final Rule is invalidated by the courts, we will not be able to get back that money from either the workers or from the federal government. It also causes confusion because the Solis Final Rule does not seem to be effective at all for workers whose applications were filed before June 29, 2009. So, although I know we have to pay overtime to our second wave workers, I am not sure whether we have to pay it to our first wave workers.

7. Because our H-2A workers come directly to us from Mexico, we are also responsible for reimbursing their transportation and travel-related expenses in accordance with the law. Our workers’ transportation and travel-related expenses amount to approximately \$500 per H-2A worker. Under the Solis Final Rule, we will be required to reimburse these expenses during in the first workweek’s wages to the extent that they bring the worker’s adjusted hourly wage below the applicable minimum. This unfortunately provides an incentive for H-2A workers to get into the country legally, accept their reimbursements, and then leave the farm in search of more lucrative jobs.

8. I strongly prefer the Chao Final Rule and would like to see it stay in effect. It much better reflects the realities of Christmas tree farming. But even so, if Secretary Solis had wanted to change the rules, it seems to me that she should have made them effective as of the beginning of the 2010 season so that we would not have so much mid-season disruption and confusion.

This the 8 day of June, 2009.



Chris Macborski

State of Michigan }
County of Missaukee } ss.

SWORN TO AND SUBSCRIBED BY ME
This the 8th day of June, 2009

Theresa M. Ladd
Notary Public Theresa M. Ladd
My Commission Expires: 10/18/2013
Wexford County, Michigan
Acting in Missaukee County, Michigan