UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

GATE GUARD SERVICES, L.P. and BERT STEINDORF,	)	
Plaintiffs,	)	
v.	)	Civil Action File No. 6:10-cv-91
HILDA L. SOLIS, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,	)	JURY
Defendant.	)	

AMENDED COMPLAINT

COME NOW Plaintiffs, Gate Guard Services, L.P. ("GGS") and Bert Steindorf ("Mr. Steindorf")[1] (collectively, "Plaintiffs"), and file this Amended Complaint against Defendant Hilda L. Solis, Secretary of Labor, United States Department of Labor ("Defendant"), stating as follows:

INTRODUCTION

Plaintiffs bring this action against Defendant for entry of an Order providing that Plaintiffs are not subject to the Fair Labor Standards Act of 1938, 29 U.S.C. § 201, et seq. (the "FLSA") with regard to GGS's contractors. Alternatively, if the Court determines that Plaintiffs

[1] Mr. Steindorf joins this action following Defendant's filing of a lawsuit in the Corpus Christi Division of this district, styled *Hilda L. Solis v. Gate Guard Services, L.P. d/b/a Gate Guard Services, Bert Steindorf and Sidney L. Smith*, Case No. 2:11-cv-41 (the "Corpus Christi Action"). Defendant filed its lawsuit in Corpus Christi, which contains the same claims as in this action, almost three months after the instant action was filed, naming GGS, Mr. Steindorf and Sidney L. Smith as defendants. Upon information and belief, Mr. Smith and Mr. Steindorf were named as defendants in the Corpus Christi Action in an effort to avoid dismissal and/or transfer of the Corpus Christi Action pursuant to the "first-to-file" rule. Defendant's addition of Mr. Smith and Mr. Steindorf is insufficient to defeat dismissal or transfer. Moreover, Plaintiffs do not believe that either Mr. Steindorf or Mr. Smith are proper parties. However, for clarification purposes, Plaintiffs add Mr. Steindorf and seek the Court's determination on whether he is a proper party. Defendant's addition of Mr. Smith is frivolous as he is clearly an improper party in both actions because he is not an "employer" under the Fair Labor Standards Act, but merely a manager who does not make operational decisions or decisions affecting payment of wages.

are subject to the FLSA with regard to the contractors, Plaintiffs request that the Court enter an Order that, pursuant to 29 U.S.C. §§ 206, 207, and 211, and 29 C.F.R. §§ 785.16, 785.19, 785.22, and 785.23, Plaintiffs are in compliance with the minimum wage, overtime, and record-keeping requirements of the FLSA, and that the sleep time, meal time and "waiting to be engaged" exceptions apply to the contractors. Plaintiffs also seek an order declaring that Defendant has improperly calculated overtime allegedly owed to GGS's service technicians.

PARTIES, JURISDICTION AND VENUE

1.

GGS is a Texas limited partnership with its principal place of business at 4646 Corona Drive, #163, Corpus Christi, Texas 78411.

2.

Mr. Steindorf is the founder and sole limited partner of GGS.

3.

Defendant is the Secretary of Labor for the United States Department of Labor, the federal regulatory agency that enforces the provisions of the FLSA.

4.

This Court has jurisdiction over this action pursuant to the FLSA, the Federal Declaratory Judgment Act, 28 U.S.C. § 2201, the Administrative Procedures Act, 5 U.S.C. § 701 et seq., and 28 U.S.C. § 1331.

5.

This Court has jurisdiction over the parties and subject matter of this case as set forth herein.

6.

This Court is empowered to render a declaratory judgment in this case pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., and the Administrative Procedures Act, 5 U.S.C. § 701 et seq.

7.

Defendant has issued a decision with respect to Plaintiffs' compliance with the FLSA, which constitutes final agency action authorizing Plaintiffs to seek a declaratory judgment pursuant to the Administrative Procedures Act, 5 U.S.C. § 701 et seq.

8.

There is a dispute between the parties in this case with respect to Plaintiffs' compliance with the FLSA. This dispute is an actual case or controversy for the purposes of the Federal Declaratory Judgment Act, and this Court is thus empowered to render a declaratory judgment respecting the future rights of these parties pursuant to 28 U.S.C. § 2201 et seq.

9.

Venue lies in this Court pursuant to 28 U.S.C. § 1391.

FACTS

GGS's Business Operations

10.

GGS provides certain services to oil field operators. Specifically, GGS contracts with individuals and/or entities (the "contractors") to log vehicles that enter and depart an oil field during drilling and production operations.[2]

[2] A substantial number of the contractors (*e.g.*, at least 85 of the 140 located in South Texas) are located in counties in or around Victoria, Texas, including Dewitt, Lavaca, Goliad and Refugio counties.

11.

When a vehicle enters or departs the oil field, the contractor is responsible for recording the driver's name, company name, license tag number, date and time in a Traffic Log.

12.

The Traffic Log is used for the purpose of identifying persons present at the oil field in the event of an emergency. For example, if there is a safety emergency at the oil field, the site supervisor of an oil field operation will review the Traffic Log to determine whether all persons have been accounted for or if search and rescue teams should be engaged to locate missing individuals.

13.

The services provided by the contractors are limited to logging vehicles entering and departing an oil field operation. The contractors are not engaged to perform any other service for GGS.

14.

GGS enters into a written Independent Contractor Agreement with each contractor who is assigned to an oil field operation where drilling and production is taking place. Each contractor is paid between $100 and $175 per day.

15.

GGS provides the contractors with 1099 forms which record the income earned by the contractors.

16.

Upon information and belief, the contractors declare themselves to be independent contractors to the Internal Revenue Service, and also deduct expenses related to their work for GGS.

17.

Many of the contractors receive social security income.

18.

The contractors provide their own tools, equipment and supplies for the performance of their duties for GGS. Specifically, each contractor provides his or her own recreational vehicle or camper, which is parked at the entrance of the oil field operation during the duration of the assignment. The contractors reside and work from the recreational vehicle or camper which they provide.

19.

GGS provides only a generator and a septic tank for the contractors' use during an assignment.

20.

The contractors are permitted to hire and direct other individuals to log vehicles that enter and depart the oil field operation. Many contractors hire and direct other individuals to perform this work. Contractors may trade assignments with other contractors.

21.

GGS does not monitor or control the manner in which the contractors perform their work of logging in vehicles or any other task. In fact, the only contact a contractor has with GGS during the course of an assignment is when GGS personnel service the septic tank approximately

every week or every other week. GGS provides no instructions to the contractors regarding the manner in which their work is performed and does not provide any training to the contractors.

22.

The length of the relationship between the contractors and GGS varies depending upon the type of oil field operation being performed. Most contractors provide services for GGS for only a few months or part of a year. Thus, their work for GGS is on a temporary basis.

23.

The contractors perform services for GGS on a project-by-project basis, and are not guaranteed continued work beyond each project. The contractors are under no obligation to accept an assignment from GGS and are free to refuse an assignment.

24.

Many of the contractors provide services similar to those provided to GGS to other companies.

25.

For each vehicle that enters and departs an oil field operation, the contractor spends approximately two minutes recording the vehicle information into a Traffic Log. Once the vehicle is logged, the contractor returns to his or her personal pursuits.

26.

Depending on the activity at the oil field operation, sometimes no vehicles enter during a 24 hour period and the contractors perform no work at all. Most contractors do not work more than two to four hours per day logging vehicles.

27.

The contractors engage in personal activities when not logging in vehicles during their assignments. For example, contractors use the Internet, talk on the telephone, read, play board games or card games, entertain guests, watch television, complete household chores, and engage in other hobbies during the majority of the day when they are not logging vehicles.

28.

GGS does not place any restrictions on the contractors' personal or other activities.

29.

GGS requires that the contractors ensure that someone oversees the entrance to the oil field during the oil field operation in order to log vehicles entering or departing the oil field. Sometimes, oil field operations shut down during the evening.

30.

The contractors are able to sleep at least five to eight hours per 24-hour period. Many contractors sleep for longer periods of time during a 24-hour period.

31.

The contractors are able to eat meals during an assignment from GGS, and have at least three (3) periods of uninterrupted meal times, which last at least 30 minutes each or longer.

32.

As stated above, GGS's service technicians visit the contractors on assignment approximately every week or every other week to service the septic tanks and/or provide fuel to the contractors.

33.

The service technicians are paid as employees and receive W-2 forms from GGS which record their earnings.

The Defendant U.S. Department of Labor's Investigation

34.

In or around September 2010, Defendant's Wage and Hour investigator, David Rapstine, initiated an investigation regarding the independent contractor classification of GGS's contractors and payments to the service technicians.

35.

On or about October 4, 2010, Rapstine issued an oral opinion to GGS that Defendant considered GGS to be in violation of the FLSA. Specifically, Rapstine found that GGS must classify its contractors as employees rather than independent contractors. Rapstine further determined that the contractors must be compensated at the federal minimum wage for 24 hours for each day they are assigned to an oil field operation, with no deductions for sleep time, meal time, or the time the contractors spend engaged in personal activities. Rapstine also determined that the service technicians were not properly paid for overtime. Rapstine calculated back wages and overtime owed by GGS to be $6,192,752 since July 2008.

36.

On November 10, 2010, Defendant's District Director in McAllen, Texas, Eden Ramirez, represented to GGS's Counsel, Annette A. Idalski, that Defendant determined that GGS is in violation of the FLSA on the grounds that GGS allegedly misclassified the contractors as independent contractors rather than employees and allegedly failed to pay overtime to its service technicians. (See Amended Declaration of Annette A. Idalski ¶ 3, attached hereto as Exhibit A.)

37.

On November 10, 2010, Ramirez stated that litigation by the DOL was imminent because GGS refused to come into compliance with the FLSA by compensating its contractors for two years of back pay, classifying the contractors as nonexempt employees on a go forward basis, and compensating its service technicians for overtime allegedly owed. (See Amended Declaration of Annette A. Idalski ¶ 4, attached hereto as Exhibit A.)

38.

On November 19, 2010, Ramirez, Michael Speer, Targeted Enforcement Coordinator and an attorney from Defendant's Office of the Solicitor, conducted a "final conference" with GGS representatives. During the conference, Ramirez and Speer stated that Defendant had finished its investigation and had determined that GGS is in violation of the FLSA due to its alleged misclassification of the contractors as independent contractors rather than employees and its alleged failure to pay overtime to the service technicians. Ramirez and Speer further represented that Defendant is requiring GGS to classify its contractors as employees and to compensate the contractors as employees going forward in order to come into compliance with the FLSA. Ramirez and Speer also stated that GGS must compensate its contractors at the federal minimum hourly wage for each 24-hour period in which the contractors are assigned to an oil field operation because Defendant determined that the contractors are engaged to wait. Defendant also found that GGS must pay the service technicians for alleged unpaid overtime. Defendant also found that GGS has violated the record-keeping requirements of the FLSA with respect to the contractors and the service technicians. Finally, Ramirez and Speer stated that Defendant would seek to recover liquidated damages from GGS. (See Amended Declaration of Annette A. Idalski ¶¶ 6-7, attached hereto as Exhibit A.)

39.

At the November 19, 2010 final conference between GGS and Defendant, Ramirez and Speer stated that Defendant had "finished" its decision-making process and that an enforcement action against GGS by Defendant was imminent. Ramirez and Speer further represented that GGS must immediately comply with Defendant's final decision and, in the presence of Defendant's attorney, stated that the file was being referred to the Office of the Solicitor and that the filing of a lawsuit against GGS was imminent. (See Amended Declaration of Annette A. Idalski ¶ 8, attached hereto as Exhibit A.)

Defendant's Second-Filed Lawsuit Against Plaintiffs

40.

Consistent with its decision that GGS is in violation of the FLSA, on February 16, 2011, almost three months after the instant lawsuit was filed, Defendant filed the Corpus Christi Action against Plaintiffs and Sidney L. Smith.

41.

The Corpus Christi Action is identical with respect to the claims alleged in the instant lawsuit. Defendant alleges that Plaintiffs owe back wages which includes unpaid minimum wages to the contractors and unpaid overtime to the contractors and the service technicians, and that Plaintiffs have violated the record-keeping requirements of the FLSA with respect to its contractors and service technicians. Defendant also seeks liquidated damages, injunctive relief and costs against Plaintiffs.

42.

Even though the issues raised in this action and the Corpus Christi Action are the same and substantially overlap, Defendant filed the Corpus Christi Action and did not apprise the Court in that action of this pending related litigation.

43.

Defendant's determination that Plaintiffs are in violation of the FLSA affects the rights and obligations of Plaintiffs under the FLSA.

44.

Defendant's determination that the contractors must be classified as employees, rather than independent contractors, and be compensated at the minimum hourly rate for 24-hour periods, is a final order from which legal consequences will flow against Plaintiffs unless challenged.

45.

Defendant's determination that the service technicians are owed for unpaid overtime is a final order from which legal consequences will flow against Plaintiffs unless challenged.

46.

Defendant's determination that Plaintiffs must compensate the contractors and service technicians for back pay since July 2008, calculated at $6,192,752, is a final order from which legal consequences will flow against Plaintiffs unless challenged.

47.

Defendant's determination that Plaintiffs have violated the record-keeping requirements of Section 11(c) of the FLSA, 29 U.S.C. § 211(c), is a final order from which legal consequences will flow against Plaintiffs unless challenged.

48.

Defendant's determination that Plaintiffs owe liquidated damages, that Plaintiffs should be subject to an injunction, and that Plaintiffs should pay costs, is a final order from which legal consequences will flow against Plaintiffs unless challenged.

COUNT I
DECLARATORY JUDGMENT THAT GGS'S CONTRACTORS ARE PROPERLY CLASSIFIED AS INDEPENDENT CONTRACTORS AND ARE NOT SUBJECT TO THE FLSA

49.

Plaintiffs incorporate by reference all allegations contained in Paragraphs 1 through 48 and re-allege the same as if specifically pled herein.

50.

Pursuant to 29 U.S.C. § 206(a), only "employers" are required to pay "employees" the federal minimum wage. Accordingly, independent contractors fall outside the scope of the FLSA and are not required to be compensated at the federal minimum wage.

51.

As set forth in Paragraphs 14 through 24 above, the contractors are not employees but instead are independent contractors of GGS pursuant to the "economic realities" test. Plaintiffs exert no control over the performance of the contractors' duties. The relationship between Plaintiffs and the contractors is not permanent. The contractors supply their own tools, equipment and supplies for the performance of their duties. The contractors may hire other individuals to log vehicles, thus allowing contractors the opportunity for profit and loss.

52.

Defendant has issued its final decision constituting final agency action that Plaintiffs are in violation of the FLSA and that Plaintiffs must classify the contractors as employees rather than independent contractors.

53.

Defendant also has found that Plaintiffs must compensate the contractors as employees and that they must pay back pay, calculated since July 2008, in the amount of $6,192,752.

54.

Defendant's decision is final and is ripe for adjudication by this Court. There exists an actual case or controversy between Plaintiffs and Defendant as to Plaintiffs' rights and obligations under the FLSA.

55.

Accordingly, Plaintiffs request that this Court enter an Order declaring that the contractors are properly classified as independent contractors and are not employees under the FLSA.

COUNT II
DECLARATORY JUDGMENT THAT PLAINTIFFS HAVE COMPLIED WITH THE MINIMUM WAGE PROVISIONS OF THE FLSA

56.

Plaintiffs incorporate by reference all allegations contained in Paragraphs 1 through 55 and re-allege the same as if specifically pled herein.

57.

As set forth in Paragraph 14 above, the contractors are paid between $100 and $175 per day.

58.

As set forth in Paragraphs 25 through 27 above, the contractors spend approximately two minutes recording vehicle information into a Traffic Log for each vehicle that enters and departs an oil field operation. Depending on the activity at the oil field operation, sometimes no vehicles enter during a 24-hour period and the contractors perform no work at all. Most contractors do not work more than two to four hours per day logging vehicles. The contractors engage in personal pursuits during the majority of the day when they are not logging vehicles.

59.

Pursuant to Section 6 of the FLSA, 29 U.S.C. § 206, employees must be paid not less than the federal minimum wage for each hour worked, which currently is $7.25 per hour.

60.

The contractors are paid at or above the federal minimum hourly wage for each hour worked.

61.

Defendant has issued its final decision constituting final agency action that Plaintiffs are in violation of the FLSA and must compensate the contractors at the federal minimum hourly wage for 24 hours per day for each day they are engaged to log vehicles that enter and depart an oil field operation, regardless of the number of hours actually worked by the contractors during each 24-hour period.

62.

Defendant also has found that Plaintiffs must compensate the contractors for back pay in the amount of $6,192,752, calculated from July 2008, which includes payment for many hours over and above those actually worked by the contractors. Furthermore, Defendant calculated the

back pay allegedly owed by Plaintiffs in violation of the two year statute of limitations under the FLSA.

63.

Defendant's decision is final and ripe for adjudication by this Court. There exists an actual case or controversy between Plaintiffs and Defendant as to Plaintiffs' rights and obligations under the FLSA.

64.

Accordingly, in the event the Court finds that the contractors are not independent contractors and are employees under the FLSA, Plaintiffs request that this Court enter an Order declaring that Plaintiffs have complied with the minimum wage provisions of Section 6 of the FLSA, 29 U.S.C. § 206, because the wages paid to the contractors are in excess of the federal minimum wage for each hour worked by the contractors.

COUNT III
DECLARATORY JUDGMENT THAT PLAINTIFFS HAVE COMPLIED WITH THE OVERTIME PROVISIONS OF THE FLSA AS TO THE CONTRACTORS

65.

Plaintiffs incorporate by reference all allegations contained in Paragraphs 1 through 64 and re-allege the same as if specifically pled herein.

66.

As set forth in Paragraph 14 above, the contractors are paid between $100 and $175 per day.

67.

As set forth in Paragraphs 25 through 27 above, the contractors spend approximately two minutes recording vehicle information into a Traffic Log for each vehicle that enters and departs

an oil field operation. Depending on the activity at the oil field operation, sometimes no vehicles enter during a 24 hour period and the contractors perform no work at all. Most contractors do not work more than two to four hours per day logging vehicles. Therefore, the contractors do not work more than forty hours per workweek.

68.

Pursuant to Section 7 of the FLSA, 29 U.S.C. § 207, employees must be paid at a rate of not less than one and one-half times their regular rate for all hours worked in excess of forty hours per workweek.

69.

Defendant has issued its final decision constituting final agency action that Plaintiffs are in violation of the FLSA and must compensate the contractors at the federal minimum hourly wage for 24 hours per day for each day they are engaged to log vehicles that enter and depart an oil field operation, and that Plaintiffs must compensate the contractors at the rate of not less than one and one-half times the minimum wage for all hours worked in excess of forty hours per workweek (*i.e.*, 16 hours of overtime pay per day).

70.

Defendant also has found that Plaintiffs must compensate the contractors for back pay from July 2008, in the amount of $6,192,752, which includes payment for overtime pay. Furthermore, Defendant calculated the back pay allegedly owed by Plaintiffs in violation of the two year statute of limitations under the FLSA.

71.

Defendant's decision is final and ripe for adjudication by this Court. There exists an actual case or controversy between Plaintiffs and Defendant as to Plaintiffs' rights and obligations under the FLSA.

72.

Accordingly, in the event the Court finds that the contractors are not independent contractors and are employees under the FLSA, Plaintiffs request that this Court enter an Order declaring that Plaintiffs have complied with the overtime provisions of Section 7 of the FLSA, 29 U.S.C. § 207, because the contractors have not and do not work hours in excess of forty per workweek.

COUNT IV
DECLARATORY JUDGMENT THAT CONTRACTORS ARE "WAITING TO BE ENGAGED"

73.

Plaintiffs incorporate by reference all allegations contained in Paragraphs 1 through 72 and re-allege the same as if specifically pled herein.

74.

As set forth in Paragraphs 10 through 13 above, the contractors and Plaintiffs have agreed that the contractors are engaged only for the purpose of logging vehicles that enter and depart an oil field operation.

75.

Furthermore, as set forth in Paragraphs 27 and 28 above, the contractors are free to engage, and do engage, in personal activities when they are not logging vehicles that enter and depart an oil field operation.

76.

Pursuant to 29 C.F.R. § 785.16, the contractors are not working while engaged in their personal pursuits and their time spent engaged in personal pursuits is not compensable under the FLSA.

77.

Defendant has issued its final decision constituting final agency action that Plaintiffs must compensate the contractors at the minimum hourly wage for 24 hours per day for each day they are engaged to log vehicles that enter and depart an oil field operation, regardless of the amount of time contractors engage in personal pursuits during each 24-hour period, and that the contractors are "engaged to wait".

78.

Defendant also has found that Plaintiffs must compensate the contractors for back pay in the amount of $6,192,752, which includes time spent by contractors engaged in personal pursuits. Furthermore, Defendant calculated the back pay allegedly owed by Plaintiffs in violation of the two year statute of limitations under the FLSA.

79.

Defendant's decision is final and ripe for adjudication by this Court. There exists an actual case or controversy between Plaintiffs and Defendant as to Plaintiffs' rights and obligations under the FLSA.

80.

Accordingly, in the event the Court finds that the contractors are not independent contractors and are employees under the FLSA, Plaintiffs request that this Court enter an Order declaring that the contractors are waiting to be engaged and that Plaintiffs must compensate the

contractors at the federal minimum hourly wage only for the time the contractors actually spend logging vehicles that enter and depart an oil field operation.

COUNT V
DECLARATORY JUDGMENT THAT THE CONTRACTORS' SLEEP TIME AND MEAL PERIODS ARE NOT COMPENSABLE TIME WORKED

81.

Plaintiffs incorporate by reference all allegations contained in Paragraphs 1 through 80 and re-allege the same as if specifically pled herein.

82.

As set forth in Paragraph 30 above, the contractors sleep at least five to eight hours per 24-hour period, and often sleep for longer periods of time.

83.

As set forth in Paragraph 31 above, the contractors are able to eat meals during an assignment, and have at least three (3) periods of uninterrupted meal times, which last at least 30 minutes or longer.

84.

Pursuant to 29 C.F.R. §§ 785.19, 785.22, and 785.23, the contractors' sleep and meal periods are not compensable under the FLSA.

85.

Defendant has issued its final decision constituting final agency action that Plaintiffs must compensate the contractors at the minimum hourly wage for 24 hours per day for each day they are engaged to log vehicles that enter and depart an oil field operation, regardless of the amount of time the contractors spend sleeping and eating during each 24-hour period.

86.

Defendant also has ordered Plaintiffs to compensate the contractors for back pay in the amount of $6,192,752, which includes sleeping and eating time. Furthermore, Defendant calculated the back pay allegedly owed by Plaintiffs in violation of the two year statute of limitations under the FLSA.

87.

Defendant's decision is final and ripe for adjudication by this Court. There exists an actual case or controversy between Plaintiffs and Defendant as to Plaintiffs' rights and obligations under the FLSA.

88.

Accordingly, in the event the Court finds that the contractors are not independent contractors and are employees under the FLSA, Plaintiffs request that this Court enter an Order declaring that Plaintiffs are not required to compensate the contractors for bona fide sleep periods of up to 8 hours and the contractors' bona fide meal periods in a 24 hour period.

COUNT VI
DECLARATORY JUDGMENT THAT DEFENDANT HAS IMPROPERLY CLASSIFIED AND CALCULATED ALLEGED OVERTIME OWED TO THE SERVICE TECHNICIANS

89.

Plaintiffs incorporate by reference all allegations contained in Paragraphs 1 through 88 and re-allege the same as if specifically pled herein.

90.

Defendant has improperly classified and calculated unpaid overtime allegedly owed by Plaintiffs to the service technicians.

91.

Defendant has issued its final decision constituting final agency action that Plaintiffs are in violation of the FLSA and must compensate the service technicians for alleged unpaid overtime. Furthermore, Defendant calculated the back pay allegedly owed by Plaintiffs in violation of the two year statute of limitations under the FLSA and based upon incorrect hours worked.

92.

Defendant's decision is final and ripe for adjudication by this Court. There exists an actual case or controversy between Plaintiffs and Defendant as to Plaintiffs' rights and obligations under the FLSA.

COUNT VII
DECLARATORY JUDGMENT THAT PLAINTIFFS HAVE COMPLIED WITH THE RECORD-KEEPING REQUIREMENTS OF THE FLSA

93.

Plaintiffs incorporate by reference all allegations contained in Paragraphs 1 through 92 and re-allege the same as if specifically pled herein.

94.

As set forth above in Paragraph 11, when a vehicle enters or departs the oil field, the contractor is responsible for recording the driver's name, company name, license tag number, date and time in a Traffic Log. Thus, the Traffic Logs record the time actually worked by the contractors.

95.

Furthermore, the time worked by the service technicians is properly recorded.

96.

Pursuant to Section 11(c) of the FLSA, 29 U.S.C. § 211(c), employers are required to maintain certain records regarding an employee's wages, hours and other conditions and practices of employment. Plaintiffs have complied with all provisions of the FLSA record-keeping requirements pursuant to Section 11(c) of the FLSA, 29 U.S.C. § 211(c).

97.

Defendant has issued its final decision constituting final agency action that Plaintiffs have violated the record-keeping requirements of Section 11(c) of the FLSA, 29 U.S.C. § 211(c).

98.

Defendant's decision is final and ripe for adjudication by this Court. There exists an actual case or controversy between Plaintiffs and Defendant as to Plaintiffs' rights and obligations under the FLSA.

99.

Accordingly, in the event the Court finds that the contractors are not independent contractors and are employees under the FLSA, Plaintiffs request that this Court enter an Order declaring that Plaintiffs are in compliance with the record-keeping requirements of Section 11(c) of the FLSA, 29 U.S.C. § 211(c).

100.

Furthermore, Plaintiffs request that this Court enter an Order declaring that Plaintiffs have complied with the record-keeping requirements of Section 11(c) of the FLSA, 29 U.S.C. § 211(c) with respect to the service technicians.

COUNT VIII
DECLARATORY JUDGMENT THAT PLAINTIFFS HAVE ACTED IN GOOD FAITH AND HAVE NOT WILLFULLY VIOLATED THE FLSA

101.

Plaintiffs incorporate by reference all allegations contained in Paragraphs 1 through 100 and re-allege the same as if specifically pled herein.

102.

At all relevant times, Plaintiffs have relied upon federal statutes, federal regulations and opinions, and their own investigations, in determining that they are in compliance with the FLSA. Thus, pursuant to 29 U.S.C. § 260, Plaintiffs have acted in good faith and have reasonable grounds for believing that their practices do not violate the FLSA. Plaintiffs have not willfully violated the FLSA, thus, the statute of limitations for commencing an action under the FLSA against Plaintiffs is two years after the cause of action accrued.

103.

Defendant has issued its final decision constituting final agency action that Plaintiffs owe liquidated damages.

104.

Defendant's decision is final and ripe for adjudication by this Court. There exists an actual case or controversy between Plaintiffs and Defendant as to Plaintiffs' rights and obligations under the FLSA.

105.

Accordingly, in the event the Court finds that the contractors are not independent contractors and are employees under the FLSA and/or finds that the service technicians are owed unpaid overtime, Plaintiffs request that this Court enter an Order declaring that Plaintiffs are not required to pay liquidated damages under the FLSA and have not willfully violated the FLSA.

COUNT IX
PRELIMINARY AND PERMANENT INJUNCTION

106.

Plaintiffs incorporate by reference all allegations contained in Paragraphs 1 through 105 and re-allege the same as if specifically pled herein.

107.

Defendant's final determination that Plaintiffs have misclassified the contractors as independent contractors, that Plaintiffs are liable for back pay totaling $6,192,752 for alleged unpaid wages, including overtime payments, to the contractors and service technicians, that Plaintiffs must immediately classify the contractors as employees and compensate them at the federal minimum wage for 24 hours per day, that Plaintiffs have violated the record-keeping provisions of the FLSA, that Plaintiffs owe liquidated damages, that Plaintiffs should be enjoined, and that Plaintiffs are liable for costs, as set forth in Paragraphs 34 through 48 above, has immediate adverse legal consequences for Plaintiffs.

108.

Plaintiffs do not have an adequate remedy at law to protect their legal rights under the FLSA, making an injunction proper against Defendant. Plaintiffs will suffer irreparable harm if Defendant is not prevented from attempting to enforce its final determination that Plaintiffs have violated the FLSA.

109.

Defendant should be enjoined from attempting to enforce its final determination against Plaintiffs.

COUNT X
ATTORNEYS' FEES AND COSTS

110.

Plaintiffs incorporate by reference all allegations contained in Paragraphs 1 through 109 and re-allege the same as if specifically pled herein.

111.

Defendant's final determination that Plaintiffs have misclassified the contractors as independent contractors, that Plaintiffs are liable for back pay totaling $6,192,752 for alleged unpaid wages, including overtime payments, to the contractors and service technicians, that Plaintiffs must immediately classify the contractors as employees and compensate them at the federal minimum wage for 24 hours per day, that Plaintiffs have violated the record-keeping provisions of the FLSA, that Plaintiffs owe liquidated damages, that Plaintiffs should be enjoined, and that Plaintiffs owe costs, as set forth in Paragraphs 34 through 48 above, is not substantially justified and is contrary to the law and facts of this case.

112.

Plaintiffs request that the Court award to Plaintiffs their reasonable attorneys' fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

WHEREFORE, Plaintiffs respectfully request the following relief:

a. That this Court enter an Order declaring that the contractors are properly classified as independent contractors and are not employees under the FLSA;

b. That, if the Court enters an Order finding that the contractors are not independent contractors and are employees under the FLSA, that this

Court enter an Order declaring that Plaintiffs have complied with the minimum wage provisions of Section 6 of the FLSA, 29 U.S.C. § 206.

c. That, if the Court enters an Order finding that the contractors are not independent contractors and are employees under the FLSA, that this Court enter an Order declaring that Plaintiffs have complied with the overtime provisions of Section 7 of the FLSA, 29 U.S.C. § 207.

d. That, if the Court enters an Order finding that the contractors are not independent contractors and are employees under the FLSA, that this Court enter an Order declaring that the contractors are "waiting to be engaged" and that Plaintiffs must compensate the contractors at the federal minimum hourly wage only for the time the contractors actually spend logging vehicles that enter and depart an oil field operation;

e. That, if the Court enters an Order finding that the contractors are not independent contractors and are employees under the FLSA, that this Court enter an Order declaring that Plaintiffs are not required to compensate the contractors for bona fide sleep periods of up to 8 hours and bona fide meal periods during an assignment;

f. That the Court enter an Order finding that Defendant has improperly classified and calculated overtime allegedly owed to the service technicians;

g. That, if the Court enters an Order finding that the contractors are not independent contractors and are employees under the FLSA, that this Court enter an Order declaring that Plaintiffs have complied with the

record-keeping provisions of Section 11(c) of the FLSA, 29 U.S.C. § 211(c);

h. That the Court enter an Order finding that Plaintiffs have complied with the record-keeping provisions of Section 11(c) of the FLSA, 29 U.S.C. § 211(c) with respect to the service technicians;

i. That, if the Court enters an Order finding that the contractors are not independent contractors and are employees under the FLSA, that this Court enter an Order declaring that Plaintiffs have acted in good faith pursuant to 29 U.S.C. § 260, that they are not required to pay liquidated damages, and that they have not acted willfully in violation of the FLSA;

j. That the Court enter an Order finding that Plaintiffs are not required to pay liquidated damages, and that they have not acted willfully in violation of the FLSA, with respect to the service technicians;

k. That the Court enter an Order preliminarily and permanently enjoining Defendant from attempting to enforce its final determination that Plaintiffs have misclassified the contractors as independent contractors, that Plaintiffs are liable for back pay totaling $6,192,752 for alleged unpaid wages, including overtime payments, to the contractors and service technicians, that Plaintiffs must immediately classify the contractors as employees and compensate them at the federal minimum wage for 24 hours per day, that Plaintiffs have violated the record-keeping provisions of the FLSA, that Plaintiffs owe liquidated damages, that Plaintiffs should be enjoined, and that Plaintiffs owe costs.

l. That this Court award to Plaintiffs their reasonable attorneys' fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, because Defendant's final determination that Plaintiffs have misclassified the contractors as independent contractors, that Plaintiffs are liable for two years of back pay totaling $6,192,752 for alleged unpaid wages, including overtime payments, to the contractors and service technicians, that Plaintiffs must immediately classify the contractors as employees and compensate them at the federal minimum wage for 24 hours per day, that Plaintiffs have violated the record-keeping provisions of the FLSA, that Plaintiffs owe liquidated damages, that Plaintiffs should be enjoined, and that Plaintiffs owe costs, is not substantially justified under the law;

m. That this Court award such other and further relief as it deems just and proper; and

n. A trial by jury.

This 11th day of March, 2011.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

GATE GUARD SERVICES, L.P. and BERT STEINDORF,	)	
Plaintiffs,	)	
v.	)	Civil Action File No. 6:10-cv-91
HILDA L. SOLIS, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,	)	JURY
Defendant.	)	

CERTIFICATE OF SERVICE

This is to certify that on this date I have electronically filed the foregoing AMENDED COMPLAINT with the Clerk of Court via the CM/ECF system and have served a copy of the same via United States mail to:

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This 11th day of March, 2011.

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