IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BLANCA VALENZUELA, *et al.*,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 3:06-CV-2322-N
	§	
SWIFT BEEF COMPANY, INC., e*t al.*,	§	
	§	
Defendants.	§	

ORDER

This Order addresses Plaintiffs' motion for class certification [83]. The very issue giving rise to Plaintiffs' claims – it is relatively easy for an illegal worker to pass as a legal worker – prevents the Court from readily ascertaining who is and is not a proper class member. Because identification of the members of the proposed class would require tens of thousands of unwieldy individualized inquiries, the Court denies the motion for certification.

I. FACTUAL BACKGROUND

The eighteen named Plaintiffs were employed by Swift Beef Company at its processing facility in Cactus, Texas. Swift Beef Company, Inc. and Swift & Company (collectively "Swift") own and manage processing facilities in Cactus, Texas; Greeley, Colorado; Hyrum, Utah; Grand Island, Nebraska; Marshalltown, Iowa; and Worthington, Minnesota. The Plaintiffs allege that they were harmed by Swift's conspiracy to depress the wages paid to its employees by knowingly hiring a workforce substantially composed of illegal aliens. The Plaintiffs allege that Swift entered into agreements with middlemen in

order to help them obtain false documentation for individuals who Swift knew were unauthorized to work in this country. Such a hiring practice is illegal under the Immigration Reform and Control Act, and is actionable under the Racketeer Influenced and Corrupt Organizations Act (RICO). While this Court earlier dismissed Plaintiffs' RICO claim based on an alleged illegal immigrant *hiring* scheme, it allowed Plaintiffs to predicate a RICO claim on the allegation that Swift *harbored* illegal aliens. To win on the harboring claim, Plaintiffs must prove that Swift employed illegal aliens whom it helped to acquire false documentation and also that Swift's employment of those particular aliens depressed the Plaintiffs' wages. The Plaintiffs now move for the Court to certify them as representatives of the class of all workers employed from December 15, 2002 to the present as hourly wage earners at one of Swift's seven processing plants who had the legal right to work in the United States at the time of their employment. Plaintiffs estimate the class to include 45,000 to 55,000 workers.

II. CERTIFICATION IS IMPROPER BECAUSE THE PROPOSED CLASS IS NOT CLEARLY ASCERTAINABLE

Regardless whether the proposed class would have met the other requirements of Rule 23, the Court finds that the class in this case is not clearly ascertainable. In order to maintain a class action, the class must be adequately defined and clearly ascertainable. *John v. Nat. Sec. Fire & Cas. Co.*, 501 F.3d 443, 445 (5th Cir. 2007); *Ladd v. Dairyland County Mut. Ins. Co. of Texas*, 96 F.R.D. 335, 338 (N.D. Tex. 1982). While it is not necessary that the members of the class be so clearly identified that any member can be presently ascertained at the certification stage, *Ladd*, 96 F.R.D. at 336 (citing *Carpenter v. Davis*, 424

F.2d 257, 260 (5th Cir.1970)), the description of the class must be sufficiently definite so that it is administratively feasible for the Court to determine whether a particular individual is a member. *Id.* at 338 (citing *De Bremaecker v. Short*, 433 F.2d 733 (5th Cir.1970)).

The Plaintiffs state that the class can be identified by "subtracting from Swift's overall workforce the illegal immigrants contained therein, something that can be, and has been, done using easily available documents." Swift has provided the name of every worker employed at the facilities from 2002 to 2006, and Plaintiffs propose to identify the illegal workers by four methods: (a) using Swift's records of notifications from third parties that particular workers are using someone else's social security number ("the tips log"); (b) using records of workers investigated for suspected identity fraud ("the lists"); (c) examining the I-9 forms of every employee, with the presumption that a worker with a facially improper I-9 form is illegally employed; (d) submitting the names and social security numbers (SSNs) of all of Swift's hourly paid workers during the class period to the Social Security Administrations' Employer Verification System for matching, and excluding from the class those who have mismatches.

The Court is not convinced that the Plaintiffs' proposed methodology for separating legal from illegal workers can be implemented, or, more importantly, that it can conclusively determine which workers were illegally employed within the class period. According to Swift, the I-9 forms on which the Plaintiffs seek to rely are not available for the entire class period (or even the greater part of that period) for former employees at various Swift

facilities. Swift further states that the lists and the tips logs of workers suspected of identity fraud are not available before 2003.

Even if these documents were available for the entire class period, however, identifying the illegal workers would require further, individualized inquiry in most instances. The tips logs and internal investigation lists could be used to eliminate the workers that Swift itself fired for presenting fraudulent documentation. However, even if these two methods eliminate about 400 workers, *see* Plaintiffs' App. 137, that still leaves the vast majority of the investigation to be carried out through I-9 and Social Security matching, using the employee information Swift would provide. First, the Employer Verification System (E-Verify) with which the Plaintiffs propose to find SSN mismatches may not be used, under the terms of the program itself, for non-wage reporting purposes such as identifying class members in this lawsuit. E-Verify Memorandum of Understanding, Art. II (C)(8) (2007), http://www.uscis.gov/files/nativedocuments/MOU.pdf.; *see also* SSNVS Handbook (2008), http://www.ssa.gov/employer/ssnvs_handbk.htm (under heading "Proper Use of SSNVS"). Second, a match may indicate identity theft rather than a legal worker, *see* Divine Decl. 9 (Swift App. 127), or workers who have subsequently gained authorization to work, but were illegal at the time of hiring. *Id.* at 8. Third, not all people with mismatches fall outside the class. The Social Security Administration itself states that a mismatch can happen for a variety of reasons unrelated to authorization to work, *see* Overview of Social Security Employer No-Match Letters Process, http://www.ssa.gov/legislation/nomatch2.htm (last visited Jan. 13, 2009), and emphasizes that a mere mismatch cannot be the basis for

adverse employer action. *See* SSNVS Handbook, *supra*. Proper identification of class members through SSN matching, even if it could be done, would therefore require some kind of individualized follow-up.

Determining class membership by examining I-9 forms is subject to similar limitations. Even if it were true, as the Plaintiffs state, that improper completion of the I-9 forms creates the presumption that the employer knows the employee is unauthorized, this does not help the Plaintiffs in their identification of who was in fact authorized to work for purposes of class membership. In many instances of the identity fraud that Plaintiffs are alleging as a basis for their claims, the I-9 forms could be proper on their face as a result of consistent but falsified documents. Aside from the possibility that a worker's failure properly to fill out an I-9 form is due to error rather than a lack of authorization, the examination of I-9 forms will fail to catch many of the actually unauthorized workers.

In short the Court finds: (1) much of the written records that Plaintiffs propose the Court use to determine whether workers are legal does not exist for most of the class; (2) SSN matching is not available; (3) SSN matching and review of I-9s are both over and under-inclusive tests of whether a worker is legal, and therefore insufficiently reliable to be a basis for class membership; and (4) it is impractical for the Court to conduct 45,000 to 55,000 individualized investigations to determine whether each person was working legally in order to ascertain members of the class.

The Plaintiffs point to a similar case about illegal hiring and wage depression in which a court allowed class certification to proceed over the defendant's objection that trying to

determine a worker's authorization by checking his I-9 form or his social security card was inconclusive. *Mendoza v. Zirkle Fruit Co.*, 222 F.R.D. 439, 442 (E.D. Wash. 2004). The *Mendoza* plaintiffs countered that the defendant's objection belied its own practice, because it routinely terminated employees whose documentation did not match. *Id.* The *Mendoza* court did not elaborate on why it allowed certification to proceed over the objection, stating merely, "A class of authorized workers clearly exists. Determining the identity of its members and providing them with adequate notice will not be easy. However, the plaintiffs have provided an adequate plan for accomplishing these tasks." *Id.* It is unclear whether the *Mendoza* court agreed with the plaintiffs that their document matching proposal was a sufficient way to exclude potential class members. Regardless, even if this Court were to agree with the *Mendoza* court that document matching alone could correctly exclude some employees from the proposed class, that does nothing to address the over-inclusiveness problem, i.e., all the possible instances in which there is no mismatch because an unauthorized worker is using documents that are consistent but fraudulent.

Ultimately, there is no way around a series of individual inquiries into approximately 50,000 workers' employment authorizations. In this case, determining whether a given employee is a member of the proposed class therefore raises a host of individualized issues which preclude class certification. *See Owner Operator Ind. Drivers Ass'n., Inc. v. FFE Transp. Servs., Inc.*, 245 F.R.D. 253, 255 (N.D. Tex. 2007).

III. CONCLUSION

Because it is not possible to determine class membership without an extensive factual inquiry into thousands of employees' work authorization, the Court finds that the class is not clearly ascertainable. Accordingly, the Court denies certification.

Signed January 13, 2009.

David C. Godbey
United States District Judge