No. 16-5002

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

THOMAS E. PEREZ, Secretary of Labor, United States Department of Labor,
Plaintiff - Appellee,

v.

EL TEQUILA, LLC and CARLOS AGUIRRE, Individually,
Defendants - Appellants.

On Appeal from the United States District Court for the
Northern District of Oklahoma,
Honorable John E. Dowdell, Judge, Case No. 4:12-CV-588-JED-PJC

BRIEF FOR PLAINTIFF-APPELLEE THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ORAL ARGUMENT NOT REQUESTED

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STATEMENT OF RELATED APPEALS

There are no prior or related appeals.

GLOSSARY

"Appellants" or **"Defendants"** means Defendants-Appellants El Tequila, LLC and Carlos Aguirre.

"Appellee," "Plaintiff," or **"Secretary"** means Plaintiff-Appellee the Secretary of Labor.

"Department" means the United States Department of Labor.

"FLSA" means the Fair Labor Standards Act of 1938, as amended.

"TAC" means the Third Amended Complaint in this action.

"WHD" means the Department's Wage and Hour Division.

STATEMENT OF THE ISSUES

1. Whether the district court properly concluded at summary judgment that Defendants had put forth no evidence that they had paid their employees discretionary bonuses, preventing them from creating a disputed issue of fact as to Plaintiff's calculations of back wages under the Fair Labor Standards Act ("FLSA").

2. Whether the district court correctly granted summary judgment to Plaintiff on legal issues Defendant conceded, and appropriately deemed undenied factual allegations to be admitted.

3. Whether the district court acted within its discretion by finding that Defendants had not demonstrated excusable neglect in failing to timely answer Plaintiff's Third Amended Complaint, where Defendants admitted that they had failed to properly calendar the deadline, stated the incorrect deadline in their extension motion that was filed 25 days after the actual deadline, and engaged in a pattern of rules violations and delays.

4. Whether the district court appropriately granted Plaintiff's motion for judgment as a matter of law that Defendants' FLSA violations were willful, where Defendants admitted that they falsified records, lied to a federal investigator, and instructed their employees to lie.

STATEMENT OF THE CASE

I. STATUTORY FRAMEWORK

The Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 et seq. ("FLSA"), requires covered employers to pay non-exempt employees (1) at least the federal minimum wage, currently $7.25 per hour, and (2) overtime pay—at least one and one-half times the employee's regular hourly rate ("time-and-a-half")—for each hour worked over 40 in a workweek. See 29 U.S.C. 206(a)(1), 207(a)(1). To effectuate these protections, it requires covered employers to make, keep, and preserve records of employees' wages and hours worked. See 29 U.S.C. 211(c).

The Secretary of Labor ("Secretary") investigates and enforces FLSA violations administratively through the Department of Labor's ("Department") Wage and Hour Division ("WHD"), and may bring a civil action on behalf of underpaid employees. See 29 U.S.C. 204, 211(a), 216(c), 217. In FLSA litigation, while the plaintiff bears the overall burden of proof, "[i]f employers do not keep accurate records the employee's burden is extremely difficult" to meet. Donovan v. Simmons Petrol. Corp., 725 F.2d 83, 85 (10th Cir. 1983). Accordingly, where the employee

> prov[es] that he has "in fact performed work for which he was improperly compensated and . . . [produces] sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference[,]" . . . the burden shifts to the employer to

> produce evidence of the precise amount of work performed or to negate the reasonableness of the inference drawn from the employee's evidence. If the employer does not rebut the employee's evidence, then damages may be awarded even though the result is only approximate.

Id. at 85 (quoting Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946)). Thus, "failure to comply with [the FLSA's] obligation to keep records shifts to the employer the burden of specifically and expressly rebutting the reasonable inferences drawn from the employee's evidence as to the amount of time spent working." Bledsoe v. Wirtz, 384 F.2d 767, 771 (10th Cir. 1967) (citing Mt. Clemens, 328 U.S. at 680).

The FLSA presumptively provides for liquidated damages equal to employees' unpaid wages, but if the employer can prove "that the act or omission [that caused its violations] was in good faith and that [it] had reasonable grounds for believing that [its] act or omission was not a violation of the [FLSA]," a court may award a lesser amount of liquidated damages, or none at all. 29 U.S.C. 216(b), 260.

FLSA violations are typically subject to a two-year statute of limitations, which is extended to three years if the violations are willful. See 29 U.S.C. 255(a).

II. FACTS[1]

Defendant-Appellant El Tequila, LLC ("El Tequila") is a chain of Mexican-themed restaurants with four locations in the Tulsa, Oklahoma area. SA63-64 ¶ II.1, SA65 ¶ V.1, SA79 ¶¶ 1, 4.[2] Defendant-Appellant Carlos Aguirre ("Aguirre"), who manages and directs El Tequila's business affairs, and acts in El Tequila's interests in relation to its employees, has conceded that he is also considered the employees' employer under the FLSA. SA64 ¶ II.2, SA79 ¶ 2. During all relevant times, El Tequila has been an enterprise engaged in commerce for purposes of the FLSA. SA1225-26 (30(b)(6) Dep. 85:12-88:23).

A. The First Harvard Investigation

On December 21, 2010, WHD began investigating the El Tequila location on Harvard Avenue (the "First Harvard Investigation") as a result of an employee complaint. SA1814 (TR43:3-18). During that investigation, Defendants falsely told WHD Investigator Ybelka Saint-Hilaire that their workers were paid on an

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[1] Defendants' statement of facts, Appellants' Br. 3-5, fails to contain "appropriate references to the record." Fed. R. App. P. 28(a)(6). Under such circumstances, this Court may dismiss the appeal, and at minimum should resolve any factual uncertainties against Defendants. See MacArthur v. San Juan Cty., 495 F.3d 1157, 1161 (10th Cir. 2007); Rhoten v. Pase, 252 F. App'x 211, 214 (10th Cir. 2007) (unpublished) (citing Alberty-Velez v. Corporacion de P.R. Para La Difusion Publica, 361 F.3d 1, 4 n.1 (1st Cir. 2004)).

[2] Appellees' brief uses the following citation conventions: "A__" (Appellants' Appendix), "SA__" (Appellee's Supplemental Appendix), and "TR__" (trial transcript). Exhibits are described at the first citation to each exhibit and in the table of contents to the Supplemental Appendix.

hourly basis, earned the minimum wage, and worked little overtime. SA1815, 1823-24 (TR49:5-12, 66:24-67:12). They also provided her with time and payroll sheets that purported to show that employees worked approximately 40 hours per week and were paid minimum wage, plus overtime pay if required. See SA780-801 (sample time and payroll sheets, First Harvard Investigation), SA1817-18 (TR51:11-52:5). These sheets, it was later learned, were created by Defendants' accountant, Victor Kubli, based on information Defendants provided him. See SA1237-38 (30(b)(6) Dep. 223:21-227:21), SA1244-45 (Aguirre Dep. 79:14-83:9), SA1300-01 (Kubli Dep. 136:10-138:15), SA1876-77 (TR247:19-248:20). For all relevant times, Defendants would not send Kubli clock-in and clock-out times for each worker, but simply a document that purported to show the total daily and/or weekly hours for each worker (hereinafter "middle sheet"). See SA745-79 (examples of "middle sheets"), SA1229-30 (30(b)(6) Dep. 169:5-170:4), SA1296, 1298-99 (Kubli Dep. 91:20-92:5, 114:5-117:3), SA1931-34, 1937 (TR376:13-378:19, 382:4-20).[3]

Presuming that Defendants' representations regarding their employees'

[3] The record does not contain copies of "middle sheets" Defendants created before 2011. The exhibit at SA745-79 contains examples of "middle sheets" from 2011-2014, which, as Aguirre and Kubli testified, are similar in form, and contained the same information, as those that Defendants sent Kubli before the First Harvard Investigation. See SA1230 (30(b)(6) Dep. 170:5-170:9), SA1297 (Kubli Dep. 111:7-23).

hours and pay were truthful, Saint-Hilaire closed the First Harvard Investigation on March 23, 2011, finding only recordkeeping violations. SA1243 (Aguirre Dep. 66:13-21), SA1824-25 (TR67:13-68:10).

B. The Second Harvard Investigation

Three months later, Saint-Hilaire opened a second investigation of the Harvard location (the "Second Harvard Investigation") following complaints by employees that they were not, in fact, being paid as required, and that Aguirre had told employees to lie to Saint-Hilaire during the first investigation and had sent home employees who might disobey. SA1825-26 (TR68:11-69:9). Defendants provided Saint-Hilaire with handwritten timesheets—which they stated they began using in early 2011 after the First Harvard Investigation—purporting to show employees' shift times. See SA1781-1811 (handwritten timesheets, Harvard), SA1829-30 (TR72:20-73:20).

Like the payroll sheets, these timesheets showed that employees generally worked approximately 40 hours per week. SA1781-1811. However, employees told Saint-Hilaire that they worked considerably more hours, and did not receive overtime pay. See SA689-91 (Saint-Hilaire's narrative, Second Harvard Investigation), SA1831-32 (TR74:13-75:6). Additionally, Saint-Hilaire noticed that the timesheets had numerous entries that appeared to have been "whited out." SA1830-31 (TR73:21-74:4).

Aguirre finally admitted to Saint-Hilaire that Defendants' employees were not paid hourly, but received a fixed weekly salary, which comprised check payments that were recorded in the payroll sheets and cash payments that were not. SA1242 (Aguirre Dep. 61:16-22), SA1844, 1876 (TR98:18-24, 247:19-22). He further admitted that, contrary to Defendants' records, the employees worked significantly more than 40 hours per week. SA1231-32 (30(b)(6) Dep. 189:10-190:8), SA1246, 1249-50 (Aguirre Dep. 93:20-94:2, 118:21-122:16), SA1834-35, 1844, 1853, 1882-83 (TR77:17-78:24, 98:18-24, 118:8-21, 253:6-254:11). Nonetheless, before the investigations, Aguirre would tell his managers to write in the "middle sheets" that employees worked approximately 40 hours weekly, regardless of their actual hours worked. SA1248 (Aguirre Dep. 110:4-21), SA1875-76 (TR246:19-247:10). Finally, Aguirre admitted that he told employees to tell Saint-Hilaire during the first investigation that they were paid hourly and compensated according to law. SA1232 (30(b)(6) Dep. 190:12-191:2), SA1249 (Aguirre Dep. 117:1-118:19). Based on her interviews and analysis, Saint-Hilaire concluded that Defendants violated the FLSA by failing to pay minimum wage and overtime pay for all hours worked. See SA689-91, SA1831-33 (TR74:13-76:10).

As described infra § II.E, WHD calculated that Defendants owed $261,760.77 to 58 employees at the Harvard location from December 5, 2009 until

August 6, 2011. See SA687-91. Defendants signed a settlement agreement to pay these amounts. See SA694-97 (Signed Form WH-56), SA802-07 (Settlement Installment Agreement).

C. The Investigation of Defendants' Other Three Restaurants

On September 29, 2011, Saint-Hilaire opened investigations for El Tequila's other three locations—Broken Arrow, Owasso, and Memorial—covering August 8, 2009 through August 6, 2011. SA1844-45 (TR98:6-99:4), SA1366 (Saint-Hilaire Dep. 71:23-72:9). At all four restaurants, the employees performed the same types of work and worked the same hours, and Defendants paid employees the same way and maintained their records in the same manner. SA1236 (30(b)(6) Dep. 215:22-216:11), SA1251-52 (Aguirre Dep. 139:15-143:7). Thus, WHD concluded that Defendants had violated the FLSA's recordkeeping, minimum wage, and overtime provisions at the other three locations, for the same reasons as at Harvard. SA1851 (TR111:3-9). After unsuccessful settlement attempts, the Secretary ("Plaintiff") initiated this litigation on October 22, 2012, seeking back wages from October 22, 2009 forward. SA43-52.

D. Continuing Violations Uncovered During Litigation

Through discovery, Plaintiff determined that Defendants continued violating the FLSA until at least June 30, 2014. A163 ¶ 4. While Defendants' violations continued, their methods evolved. In approximately August 2011, Defendants

began paying their employees only by check and on an hourly basis. SA1223, 1228, 1233, 1234 (30(b)(6) Dep. 54:4-6, 121:1-13, 199:2-10, 205:10-12). And beginning in approximately January 2012, Defendants had their employees clock in and out using Casio QT 6600 register machines ("Casio registers"). SA1224, 1235 (30(b)(6) Dep. 66:15-69:1, 208:7-21), SA1247-48, 1257 (Aguirre Dep. 108:22-109:3, 202:16-203:2).

Using the Casio registers, Defendants' managers generated weekly reports that included employee names, clock-in and clock-out times, and hours worked. SA1258-59 (Aguirre Dep. 232:2-233:3), SA1355 (Hight Dep. 27:7-28:5); SA698-744 (samples of Casio time reports). However, Plaintiff found thousands of reports where asterisks appeared under a particular heading ("Job#"), and in many of those records, time entries had been replaced with zeroes. See, e.g., SA698-744, SA1901-02, (TR325:24-326:21).[4] As Bill Hight, who services Defendants' Casio registers and trained Defendants on the registers, testified, asterisks under the "Job#" heading mean that an entry was altered, and zeroes mean that Defendants had manually "zeroed out" entire shifts recorded by the machines. See SA1354, 1355, 1356, 1357-58 (Hight Dep. 10:21-12:5, 28:8-25, 30:4-6, 70:5-20, 72:22-73:1), SA1257 (Aguirre Dep. 203:24-204:19). Only Defendants' managers can

[4] The cited pages at SA698-744, excerpts of two exhibits totaling over 1,200 pages, are provided for illustrative purposes. Plaintiff can provide the full exhibits upon request.

alter the Casio records. See SA1357 (Hight Dep. 70:21-24), SA1260 (Aguirre Dep. 239:8-14). Thus, Defendants' managers edited these records so they listed fewer hours worked.

Defendants further reduced employees' wages in a second step. When Aguirre submitted employees' hours to Kubli for payroll processing, he provided Kubli the "middle sheets," see supra at 5, SA745-79, not the falsified Casio records themselves. See SA1261 (Aguirre Dep. 258:3-11), SA1298-99 (Kubli Dep. 114:5-117:3), SA1902-04 (TR326:13-328:8); 1931-32 (TR376:13-377:25). In a sample of 11 employees, Plaintiff found 50 instances where the hours on the "middle sheet" were lower than those in the Casio records, including some where shifts from the Casio records do not appear on the "middle sheet" at all. See A167-68 ¶ 18, SA1398, 1484, 1548, 1570, 1624, 1667, 1683, 1708, 1718, 1742, 1771 (50 samples of pay discrepancies).[5] Thus, in purporting to transfer information from the already-deficient Casio records to the "middle sheet," Defendants reduced employees' recorded hours again. On February 5, 2015, Plaintiff filed a Third Amended Complaint, adding allegations concerning these issues. See A31-33 ¶¶ V.2, V.3, VI.2, IX.1.

[5] The cited pages, summaries created by the Department, were admitted at trial under Federal Rule of Evidence 1006. SA1905-09 (TR329:19-333:4). For each employee, the underlying documents from Defendants' records appear after the summary sheet. Identical records were submitted at summary judgment. SA304-686.

E. Calculation of Back Wages Owed

Plaintiff seeks affirmance of the district court's $2,137,627.44 amended judgment. A352. As explained below, this amount comprises wages from three categories. In each category, Plaintiff used the most conservative calculations available to determine hours worked and the corresponding amounts owed.

1. Second Harvard Investigation, December 5, 2009 to August 6, 2011

For the Second Harvard Investigation, because Defendants' time records were fabricated, Saint-Hilaire determined employees' hours worked based on employee interviews. See SA689-90. She determined that each week, on average, "back-of-the-house" employees—cooks and dishwashers—worked 72 hours and were paid $450, while "front-of-the-house" employees—servers, bussers, and hosts—worked 62 hours and were paid $550. Id.[6] Thus, back-of-the-house employees earned $6.25 per hour, $1.00 less than the minimum wage, and did not receive overtime pay, while front-of-the-house employees earned $8.87 per hour, above the minimum wage, but did not receive overtime pay. See id. Multiplying these amounts by the weeks Defendants' employees worked, and comparing the totals to what they should have earned had they received minimum wage and overtime pay, Saint-Hilaire calculated that Defendants owed a total of

[6] Averages may be used to calculate back wages when employers' records are inadequate. See Bledsoe, 384 F.2d at 771.

$261,760.77, $49,392.00 for minimum wage violations and $212,368.77 for overtime violations. Id.

Although Defendants agreed to pay this amount to settle the Second Harvard Investigation, Aguirre admitted that eight employees who received wages under the settlement returned the money to Defendants, violating the FLSA. SA1252-55 (Aguirre Dep. 143:11-155:25), A208 ¶ 9; see Marshall v. Quik-Trip Corp., 672 F.2d 801, 807 (10th Cir. 1982) ("[T]he employer's obligation . . . to pay back wages [is not] . . . extinguished where the employee voluntarily repays part or all of the sum to the employer."). Defendants admitted that they accepted returned wages totaling $45,442.62, comprising minimum wage and overtime pay, and the district court granted Plaintiff summary judgment as to this amount. A181, A195, A208 ¶ 9, A234.

2. Broken Arrow, Memorial, and Owasso Locations, October 22, 2009 to August 6, 2011

Based on Saint-Hilaire's calculations of hours worked and weekly wages described above, WHD initially determined that $267,107.94 was owed for the Memorial location, $258,000.19 for Owasso, and $248,108.46 for Broken Arrow for the period of Saint-Hilaire's investigation. SA285 (Defendants' expert report). During the litigation, Defendants retained an expert witness, William Cutler, Jr., to analyze Plaintiff's investigation. SA281. Cutler concluded that each week, on average, back-of-the-house employees worked 61.4 hours, and earned $557.36,

and front-of-the-house employees worked 57.2 hours, and earned $563.91. See SA293-94. Thus, Cutler concluded that Defendants' employees worked less, and earned more, than under WHD's calculations. He also opined that WHD should have excluded workweeks to account for vacation and sick days and eliminated workweeks before October 22, 2009 due to the statute of limitations. Id.

Cutler agreed, however, that Defendants committed overtime violations from August 8, 2009 through August 6, 2011. SA1336, 1338, 1339-40 (Cutler Dep. 75:6-12, 188:9-21, 256:18-257:10). While he did not calculate the wages owed, he testified that this amount could be calculated by using his report. SA1336-37 (Cutler Dep. 75:6-78:21).

For the purpose of this litigation, Plaintiff adopted Cutler's calculations of hours worked and pay rates for the Broken Arrow, Memorial, and Owasso restaurants from October 22, 2009 to August 6, 2011. See A163-64 ¶¶ 6-9, A112-13. Applying them to the weeks the employees worked, and subtracting certain workweeks as per Cutler's recommendations, for this period, Plaintiff calculated that Defendants owe $138,013.90 for Broken Arrow, $126,404.12 for Memorial, and $122,469.80 for Owasso, totaling $386,887.82, all of which comprises overtime pay. See A163-65 ¶¶ 6-10, SA808-09, 866-67, 922-23 (Back Wages for Broken Arrow, Memorial, and Owasso (Oct. 2009-Aug. 2011) using Cutler's

numbers); see generally SA808-967.[7]

3. All Four Locations, August 7, 2011 to June 30, 2014

Cutler did not fully analyze the period from August 6, 2011 to June 30, 2014. A201 ¶ 4. Accordingly, because Defendants' records of hours worked remained inadequate, to determine employees' hours for this period, Plaintiff relied on testimony by Aguirre and Defendants' managers, who testified that back-of-the-house and front-of-the-house employees worked approximately 60 and 45 hours a week, respectively. See A165 ¶ 11.b, SA1360-61 (Javier Aguirre Dep. 19:14-21:4), SA1363-64 (Flores-Mendez Dep. 44:17-46:24); see generally SA1222, 1227, 1230, 1232, 1233, 1239, 1240 (30(b)(6) Dep. 53:6-14, 100:9-101:8, 170:12-19, 193:7-19, 198:1-6, 237:14-16, 238:15-20), SA1368 (Rodriguez Dep. 34:10-36:4), SA1370-72 (Perez Dep. 44:9-50:19), SA1251-52 (Aguirre Dep. 139:15-143:7). Based on these estimates, and using Defendants' records to determine employees' hourly pay rates,[8] Plaintiff determined that for this period, Defendants

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[7] The Supplemental Appendix does not include all of the documents on which WHD District Director Michael Speer relied for his calculations. These documents total approximately 2,000 additional pages and are unnecessary to resolve the issues on appeal since Defendants, except for their discretionary bonus argument, see Argument § I, have not challenged Plaintiff's back-wage calculations on appeal. Plaintiff can provide these documents upon request.

[8] Because at this point Defendants were paying employees hourly and by check only, their payroll records were used to determine employees' hourly rates, although they did not accurately reflect employees' hours worked. See supra at 8-10.

owed $120,437.93 for Broken Arrow, $162,407.62 for Harvard, $176,485.46 for Memorial, and $177,152.27 for Owasso, totaling $636,483.28, all of which comprised overtime pay. A166-67 ¶¶ 11-16, SA968-69, 1020-21, 1083-84, 1140-42 (Back Wages for Broken Arrow, Harvard, Memorial, and Owasso (Aug. 2011-June 2014) using managers' numbers), see generally SA968-1215.

4. Total Back Wages Due

A summary of the wages the district court found due is below:

Category	Amount	Basis for Amount
Harvard, December 5, 2009-August 6, 2011	$45,442.62 (minimum wage and overtime)	Conceded by Defendants
Other 3 Restaurants, October 22, 2009-August 6, 2011	$386,887.82 (overtime only)	Hours worked and pay rates based on Cutler's calculations
All 4 Restaurants, August 7, 2011-June 30, 2014	$636,483.28 (overtime only)	Hours worked based on Defendants' and their managers' testimony; pay rates based on Defendants' records
Total:	$1,068,813.72	

Because the court awarded an equal amount in liquidated damages, see 29 U.S.C. 216(b), the $1,068,813.72 total is doubled to yield $2,137,627.44, the amount of the final judgment. A352.

III. PROCEDURAL HISTORY

Plaintiff filed a Complaint on October 22, 2012. See SA43-52. Plaintiff

filed a First Amended Complaint shortly thereafter to correct a clerical error, SA53-62, and a Second Amended Complaint on December 31, 2012. SA63-74. After Defendants' motion to dismiss was denied, SA75-78, the case proceeded to discovery. On February 5, 2015, Plaintiff filed a Third Amended Complaint. SA83-109, SA136-38, A29-49.

On March 19, 2015, Plaintiff moved for summary judgment. A77-79, SA184-222. On July 10, 2015, the district court granted Plaintiff's motion in part. A214-41. The court concluded that both Defendants were "employers" under the FLSA and had violated the FLSA's minimum wage, overtime, and recordkeeping provisions. A217-20. The court further concluded that injunctive relief was warranted, A238-40, and that Defendants were liable for liquidated damages equal to the wages due because they had failed to establish a defense of good faith and reasonable grounds, A234-38.

On the calculation of back wages, the court granted summary judgment to Plaintiff in all respects but one. A230-34. The only sum on which the court partially denied summary judgment was the amount still due from the Harvard settlement due to Defendants' acceptance of returned back wages. A233-34. Plaintiff had argued that 15 employees were owed a total of $89,325.21. SA215-16, A163 ¶ 5. Defendants, however, asserted that seven of those employees did not return their payments, and that Defendants only owed the remaining eight

employees $45,442.62. A181, 195; A208 ¶ 9, SA275-76 (Speer Decl., Jan. 5, 2016) ¶ 5. The court granted summary judgment only as to the $45,442.62 Defendants conceded. A233-34. After summary judgment, Plaintiff chose not to pursue the $43,882.59 difference. SA242-43 (Speer Decl., July 14, 2015) ¶¶ 5-7, SA275-76 ¶¶ 4-5.

The court denied summary judgment on the willfulness of Defendants' violations, and that issue alone remained for trial. A220-30. At the trial's conclusion, the jury found that the violations were not willful. A306. Having moved twice previously for judgment as a matter of law under Federal Rule of Civil Procedure 50(a), Plaintiff renewed that motion under Rule 50(b). A307-31, 510-14 (TR734:10-738:6), 517-18 (TR741:14-742:7). The court granted the motion, concluding that no reasonable jury could have found that Defendants' violations were not willful, and entered an amended judgment of $2,137,627,44. A332-49, A352. This appeal followed.

SUMMARY OF THE ARGUMENT

This Court should affirm the judgment of the district court.

First, Defendants' argument regarding discretionary bonuses is meritless. It was Defendants' burden at summary judgment to present evidence that they paid their employees discretionary bonuses and that Plaintiff failed to take those bonuses into account when calculating employees' wage rates. Because

Defendants failed to do so, the district court correctly concluded that they failed to create a dispute of fact as to Plaintiff's back wage calculations.

Second, the district court properly granted summary judgment to Plaintiff on conceded legal issues and appropriately deemed undenied factual allegations to be admitted. Plaintiff expressly moved for summary judgment on Defendants' liability for minimum wage and overtime violations. Because Defendants failed to contest such liability in their opposition brief, they conceded it and cannot raise it on appeal. Additionally, because Defendants failed to answer Plaintiff's Third Amended Complaint, the district court correctly deemed Defendants to have admitted allegations that they manually altered the Casio records to reduce employees' recorded hours worked. Furthermore, any error in these "deemed admissions" would have been harmless because the admitted allegations did not substantially influence the outcome below.

Third, the district court did not abuse its discretion by denying Defendants' motion to answer the Third Amended Complaint out of time. This Court has held that the failure to apply a straightforward rule is not excusable neglect, and that is what occurred here, where Defendants admitted that they failed to properly calendar the Answer's deadline, filed their motion nearly a month after the deadline, and also listed the incorrect deadline in their motion. The court's decision was further supported by Defendants' pattern of disregard for rules and

orders throughout the litigation.

Finally, the court properly granted Plaintiff's Rule 50(b) motion because the evidence at trial, which indisputably showed that Defendants falsified records of hours worked, lied to a federal investigator, and instructed their employees to lie, pointed only toward the conclusion that Defendants' violations were willful. Defendants are wrong to suggest that Plaintiff's 50(b) motion advanced different grounds than his earlier 50(a) motions, and are likewise wrong to challenge the amount of the court's amended judgment, which was compelled by the court's prior rulings.

ARGUMENT

I. THE DISTRICT COURT APPROPRIATELY REJECTED DEFENDANTS' ARGUMENT ON DISCRETIONARY BONUSES AT SUMMARY JUDGMENT

A. Standard of Review[9]

This Court reviews a grant of summary judgment de novo, applying the same standard as the district court. See Mumby v. Pure Energy Servs. (USA), Inc., 636 F.3d 1266, 1269 (10th Cir. 2011). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). While

[9] Defendants erroneously argue that the standard of review for summary judgment applies to all of the issues on appeal. Appellants' Br. 15-18.

the evidence must be viewed in the light most favorable to the nonmoving party, "[w]hen the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 587 (1986) (citations omitted). Additionally, "failure to rebut the arguments raised by [a movant] in [its] motion for summary judgment is fatal to [a non-movant's] attempt to raise and rebut such arguments on . . . appeal." Coffey v. Healthtrust, Inc., 955 F.2d 1388, 1393 (10th Cir. 1992).

B. Defendants' Argument on Discretionary Bonuses Lacked Any Evidentiary Support.

Under the FLSA, an employee's "regular rate," for purposes of determining overtime pay, includes "all remuneration for employment paid to, or on behalf of the employee," with certain specific exceptions. 29 U.S.C. 207(e). Discretionary bonuses—bonuses unrelated to productivity— are one such exception. See 29 U.S.C. 207(e)(3)(a); 29 C.F.R. 778.211; Chavez v. City of Albuquerque, No. CIV-02-562, 2007 WL 8043104, at *17 (D.N.M. Aug. 10, 2007). For example, if an employee's regular rate is $20 per hour but she receives a discretionary bonus of $500, her overtime rate is $30 and does not incorporate the bonus.[10]

[10] Defendants' brief quotes extensively from Herman v. Fabri-Centers of America, Inc., 308 F.3d 580 (6th Cir. 2002). Fabri-Centers concerns 29 U.S.C. 207(h)(2),

Defendants appear to argue that Plaintiff improperly included discretionary bonuses in employees' regular rates, resulting in excessive overtime wages due. Relatedly, Defendants argue that the court ruled on this issue sua sponte, preventing them from raising this issue below. Both arguments are meritless.

1. It Was Defendants' Burden to Prove That They Paid Discretionary Bonuses and that Plaintiff Failed to Take Them Into Account.

As they did below, Defendants ignore that discretionary bonuses are an affirmative defense, not an element of Plaintiff's claim. This Court and other circuits have held that an employer bears the burden of proof to establish the applicability of exceptions to the "regular rate" under 29 U.S.C. 207(e), such as discretionary bonuses under section 207(e)(3)(a). See Baker v. Barnard Constr. Co., 146 F.3d 1214, 1216 n.1, 1217 (10th Cir. 1998); see also Acton v. City of Columbia, Mo., 436 F.3d 969, 976 (8th Cir. 2006); O'Brien v. Town of Agawam, 350 F.3d 279, 294 (1st Cir. 2003); Madison v. Res. for Human Dev., Inc., 233 F.3d 175, 187 (3d Cir. 2000); Local 246 Util. Workers Union v. S. Cal. Edison Co., 83 F.3d 292, 296 (9th Cir. 1996). This is because "the application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof." Corning Glass Works v. Brennan, 417 U.S.

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which pertains not to discretionary bonuses, but to contractual premium payments under 29 U.S.C. 207(e)(5), (6), and (7).

188, 196-97 (1974); see Baker, 146 F.3d at 1216 n.1. Thus, at summary judgment, once Plaintiff presented evidence of Defendants' employees' regular rates and the resulting back-wage calculations, see supra at 11-15, it was Defendants' burden to present evidence that those rates and calculations were too high because they included discretionary bonuses.[11]

2. Defendants Failed to Meet their Evidentiary Burden.

Defendants failed to present any evidence that they had paid their employees discretionary bonuses. In their opposition to summary judgment, they cited three pieces of evidence that they asserted support their argument, A195-96, none of which actually does.

First, Defendants quoted testimony by WHD District Director Michael Speer. See A195-96. The cited testimony, however, simply explains what discretionary bonuses are and that they are not included in the regular rate. Id.

Second, Defendants cited Speer's declaration explaining WHD's calculations, see A196, 163-68, apparently because it does not mention

[11] To the extent that some courts have held that a plaintiff moving for summary judgment must show the absence of issues of fact regarding affirmative defenses "specifically reserved by the non-moving party," Conoco Inc. v. J.M. Huber Corp., 148 F. Supp. 2d 1157, 1165 (D. Kan. 2001), Plaintiff was not required to do so here regarding discretionary bonuses, as Defendants failed to state this affirmative defense in their Answer or in any proposed amended Answers, despite stating every affirmative defense listed in Federal Rule of Civil Procedure 8(c)(1). See SA80-81, 228, 234.

discretionary bonuses. This is unsurprising, since Speer saw no convincing evidence that Defendants paid them. See SA1217-20. Indeed, Defendants' own expert report did not discount employees' rates for supposed discretionary bonuses. See SA290-94. In fact, the sole reference to discretionary bonuses in Cutler's report incorrectly states that "Plaintiff has interjected an issue involving the payment of bonuses to nonexempt personnel," and that "Defendant has stated that these bonuses are discretionary." SA300. Defendants, not Plaintiff, "interjected" this issue, yet failed to provide evidence that they paid discretionary bonuses.

Finally, Defendants cited an affidavit by Aguirre, which contains the statement, "I declare that in the matter the Department of Labor is imposing overtime charges on discretionary bonuses paid by El Tequila." A174 ¶ 27. As the district court concluded, this "utterly conclusory" statement cannot defeat summary judgment. A263; see Valley Forge Ins. Co. v. Health Care Mgmt. Partners, Ltd., 616 F.3d 1086, 1095 n.2 (10th Cir. 2010) ("[A] 'conclusory and self-serving' affidavit is insufficient to create a factual dispute."). Moreover, as the court concluded, to the extent Aguirre was offering his opinion, his statement was inadmissible because it states a legal conclusion and is based on technical knowledge of the FLSA. A263 (citing Fed. R. Evid. 701).

Defendants further argue that they were unfairly surprised by the district court's ruling. See Appellants' Br. 22-24. In this regard, Defendants state that

they "[did] not respond" on the discretionary bonus issue at summary judgment, because they had "no notice or knowledge that they should respond to such an argument." Id. at 22-23. As noted above, however—and as Defendants admit just a few sentences later, see id. at 23-24—Defendants did argue this issue in their summary judgment response, albeit inadequately. But more importantly, as explained above, it was not Plaintiff's burden to move for summary judgment regarding discretionary bonuses; it was incumbent upon Defendants to adequately raise this issue and support it with evidence. See Benavidez v. Gunnell, 722 F.2d 615, 617 (10th Cir. 1983) (summary judgment non-movant cannot rest on asserted affirmative defenses, but must "set forth specific facts showing that there is a genuine issue for trial"). As the court explained in denying Defendants' motion for reconsideration:

> The defendants misunderstand what issue of fact they failed to create. . . . [T]he Court found that the defendants had failed to create a triable issue of fact not as to whether the defendants paid their employees discretionary bonuses but instead as to whether the Secretary's calculation of damages was correct. . . . The issue of discretionary bonuses arose only because the defendants raised it to resist what the Secretary's motion did seek, namely summary judgment as to the Secretary's damages calculation. The definition of discretionary bonuses . . . is relevant to the calculation of damages only if the defendants actually paid discretionary bonuses. In their Opposition to the summary judgment motion, the defendants did not offer evidence that they did. Thus, they did not offer any evidence that would call into question the Secretary's calculation of damages, and failed to create a triable issue of fact as to that issue.

A261-62 (emphasis in original).

3. The Evidence Defendants Offer on Appeal Is Similarly Insufficient.

Having failed to meet their burden at summary judgment, Defendants cite additional evidence. Because Defendants failed to present this evidence at summary judgment, they cannot do so now. See Coffey, 955 F.2d at 1393. But even reviewed on its merits, this evidence is inadequate.

Defendants cite testimony by their accountant, Kubli, who asserted that "if you included discretionary bonus in the calculation of what is the regular rate, then that would result in them overstating the amount of overtime that would be due[.]" Appellants' Br. 25. But this testimony does not show that Defendants actually paid their employees discretionary bonuses, or if they did, how much, to whom, and when. Id. at 24-26.[12]

Defendants also quote testimony from Speer stating that he did not consider the application of discretionary bonuses to this case. Appellants' Br. 26-27. But as Speer testified, he never considered their application because he had no convincing evidence that Defendants paid them. SA1217-20 (Speer Dep. 133:7-136:3). Absent such evidence, Speer was under no more of an obligation to "consider" discretionary bonuses than he was to "consider" numerous other exemptions to the

[12] Additionally, as the district court concluded, Kubli was not qualified to offer an expert opinion on this subject, given that his alleged expertise was based on reading a single pamphlet published by the Department. A262, SA258-60, SA1295 (Kubli Dep. 82:18-83:10).

regular rate, such as stock options, Christmas gifts, or contributions to a retirement or health insurance plan. See 29 U.S.C. 207(e)(1), (4), (8).

Defendants appear to believe that merely invoking the term "discretionary bonuses" is sufficient. Yet Defendants, who bear the burden of proof on this issue, have failed to present any evidence that such bonuses were paid, and if so, how they would affect the back-wage calculations. The district court thus appropriately rejected Defendants' argument on discretionary bonuses and granted Plaintiff summary judgment on the back-wage calculations.

II. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT ON ISSUES THAT DEFENDANTS FAILED TO CONTEST AND APPROPRIATELY DEEMED UNDENIED FACTUAL ALLEGATIONS TO BE ADMITTED

In arguing that "the trial court erred in granting summary judgment based on Defendants' failure to file responsive pleadings," Defendants rely on cases that are not on point. To the extent that the court's grant of partial summary judgment relied, in part, on matters that were conceded or admitted, such reliance was consistent with well-established law.

A. Standard of Review

The applicable standard of review is explained above in section I.A.

B. The District Court Did Not Enter Judgment As a Sanction For Defendants' Failure to Respond.

As a threshold matter, the reversals of district court decisions that Defendants cite in support of their argument are cases in which—unlike here—

district courts dismissed cases in their entirety based on the failure of plaintiffs—most of whom were pro se or incarcerated—to file pleadings or appear at hearings. See Davis v. Miller, 571 F.3d 1058, 1060 (10th Cir. 2009) (district court sua sponte dismissed prisoner's habeas petition for failure to meet deadlines); Farrell v. Keys, 13 F. App'x 838, 840 (10th Cir. 2001) (unpublished) (district court granted summary judgment against pro se prisoner who failed to respond to summary judgment motion); Miller v. Dep't of Treasury, 934 F.2d 1161, 1161-62 (10th Cir. 1991) (same); Hancock v. City of Oklahoma City, 857 F.2d 1394, 1395 (10th Cir. 1988) (district court granted summary judgment when plaintiff's counsel did not notice that defendant had moved for summary judgment and failed to respond); Meade v. Grubbs, 841 F.2d 1512, 1518 (10th Cir. 1988) (district court dismissed claim of pro se plaintiff who failed to respond to motion to dismiss); Meeker v. Rizley, 324 F.2d 269, 270 (10th Cir. 1963) (district court entered default judgment against pro se plaintiff for failure to appear at pretrial conference).

The district court did not enter final judgment against Defendants for their failure to respond. Rather, in its 28-page opinion, it drew two discrete conclusions to which Defendants object, see Appellants' Br. 29: (1) that because Defendants did not contest their liability for minimum wage or overtime violations in their opposition brief, Plaintiff was entitled to summary judgment on those issues, A218-20; and (2) that Defendants admitted that they manipulated the Casio records

because they failed to answer the Third Amended Complaint, A226-27.

Indeed, one of the cases Defendants cite, Luginbyhl v. Corr. Corp. of Am, 216 F. App'x 721 (10th Cir. 2007) (unpublished), emphasizes the distinction between the entry of judgment as a sanction and the application of rules under which a party waives arguments or admits factual allegations by failing to respond to them. See id. at 723 (noting that while "a party's failure to respond to a motion for summary judgment, in and of itself, is not a legally sufficient basis on which to grant the motion and enter judgment against that party . . . pursuant to local rules, a party may, by failing to offer a timely response, waive the right to respond or to controvert the facts asserted in a motion for summary judgment") (citing Reed v. Bennett, 312 F.3d 1190, 1195 (10th Cir. 2002)). Here, the district court did not enter judgment as a sanction, but resolved Plaintiff's summary judgment motion on the merits, while appropriately treating limited issues and facts as conceded or admitted.

C. The District Court Correctly Concluded that Defendants Failed to Contest Liability at Summary Judgment.

This Court has upheld local rules requiring parties to expressly controvert statements of material fact when opposing summary judgment, see Jones v. Eaton Corp., 42 F. App'x 201, 206 (10th Cir. 2002) (unpublished), including the rules of the Northern District of Oklahoma at issue here, see Taylor v. Pepsi-Cola Co., 196

F.3d 1106, 1108 n. 1 (10th Cir. 1999).[13] Similarly, a district court may grant summary judgment on legal issues raised by a movant that the nonmovant fails to address in an opposition brief, and failure to address such issues at summary judgment precludes contesting them on appeal. See Hinsdale v. City of Liberal, Kan., 19 F. App'x 749, 768-69 (10th Cir. 2001) (unpublished) (affirming summary judgment on claim that nonmovant abandoned by failing to address it in his opposition brief); Coffey, 955 F.2d at 1393.

Here, Plaintiff moved for summary judgment on ten grounds, SA185, including that "Defendants Violated the FLSA's Overtime Provisions," SA208-12, and that "Defendants Violated the FLSA's Minimum Wage Provisions," SA212-13. In their opposition brief, Defendants presented four arguments in response: (1) questions of fact existed regarding willfulness, (2) Plaintiff's damages claims were incorrect, (3) liquidated damages should not be awarded, and (4) injunctive relief should not be awarded. See A177, 187-94, 194-96, 196-98, 198-99. Nowhere did Defendants argue that they did not violate the FLSA's minimum wage or overtime provisions or set forth any disputes of material fact regarding such liability. Therefore, they cannot do so on appeal. See Coffey, 955 F.2d at 1393.

On appeal, Defendants provide only two specific citations to their summary

[13] Notably, Defendants' counsel also represented the plaintiff in Taylor who was deemed to have admitted material facts he failed to controvert. See Taylor, 196 F.3d at 1107.

judgment opposition brief in which they claim to have contested liability. Appellants' Br. 36 (citing, without describing, "Disputed Facts No. 3 and No. 9"). But neither of these "disputed facts" actually did so.

"Disputed Fact[] No. 3" states:

> Carlos Aguirre denies that when he told employees nearly four years ago that they were paid by the hour that he believed at that time that it was a lie. At that time, Carlos Aguirre believed that employees were being paid according to the job he or she had and the amount of time he or she worked. (Refuting No. 17 of Plaintiffs Statement.) (See Affidavit, Carlos Aguirre, Exhibit 9.)

A184. These sentences, which describe Aguirre's state of mind, are irrelevant to whether he actually paid his employees minimum wage or overtime.

"Disputed Fact[] No. 9" states:

> Defendants dispute the analysis by Director Speer. The assertion by Mr. Speer in ¶ 18 of his declaration does not identify the 11 employees, does not specify the alleged inconsistencies, and does not explain the amounts of money allegedly withheld from employees. However, assuming the identi[t]y of the 11 employees based on the deposition, questions, further analysis reveals that valid explanations exist for the alleged discrepancies in the Casio records. (Refuting No. 44, Plaintiffs Statement); (Affidavit, Carlos Aguirre, Exhibit 9); (Affidavit Javier Aguirre, Exhibit 11); (Affidavit, Francisco Rodriguez, Exhibit 16); and (Affidavit, Refugio Flores-Mendez, Exhibit 13).

This "disputed fact," which pertains to Defendants' alteration of the Casio records and reduction of hours in the "middle sheets," also fails to dispute liability. Even assuming—contrary to Defendants' admission, see infra § D—that Defendants edited the Casio records for "valid" reasons, the undisputed evidence cited in

Plaintiff's Fact 44 demonstrates that Defendants' records were still inaccurate, because not only were the Casio records altered (for whatever reason), but Defendants further reduced the hours when transferring them to the "middle sheets." A195-96 (Plaintiffs' Fact No. 44), A167-68 ¶ 18. These undisputed inaccuracies entitled Plaintiff to establish employees' hours worked during that period as a matter of just and reasonable inference. See Mt. Clemens, 328 U.S. at 687-88. Using the uncontroverted testimony of Aguirre and Defendants' managers to establish those hours, Plaintiff showed that Defendants had failed to pay overtime as required, confirming Defendants' liability. See A166-67 ¶¶ 11-16.[14]

Defendants also argue that "a close review of the affidavit" by their expert, Cutler, reveals that Cutler concluded that Defendants did not commit minimum wage violations. Appellants' Br. 35. What Defendants fail to cite—because they cannot—is any reference to this conclusion in their memorandum in opposition to

[14] Defendants' "dispute" also fails for other reasons. First, Defendants' contention that the Casio records were edited for "valid" reasons was precluded by their admission that they "manually altered the [Casio records] in order to reduce the actual hours shown worked by employees" when they failed to respond to the Third Amended Complaint. See infra § II.D, A226-27. Second, contrary to Defendants' assertions, the records to which Speer referred in his declaration display the names of the 11 employees and include summary spreadsheets detailing the inconsistencies between the Casio records and the "middle sheets" and payroll documents, as well as the underlying records themselves. See A167-68 ¶ 18, SA304, 390, 454, 476, 530, 573, 589, 614, 624, 648, 677; see generally SA304-686. Finally, even if this "dispute" were somehow relevant to Defendants' liability, it pertains only to 2012 forward, when Defendants used the Casio registers.

summary judgment. See A176-200.[15] Because they failed to present this evidence to the district court in their opposition brief, Defendants are precluded from presenting it now. See Coffey, 955 F.2d at 1393; Adler v. Wal-Mart Stores, Inc., 144 F.3d 664, 672 (10th Cir. 1998) ("[W]here the burden to present . . . specific facts by reference to exhibits and the existing record was not adequately met below [at summary judgment], [this Court] will not reverse a district court for failing to uncover them itself.").[16]

Even if this court were to consider Defendants' untimely citation to Cutler's affidavit, it would at most only create a question of fact as to Defendants' minimum wage liability. As Defendants have acknowledged, the only minimum wage violations at issue are a "small portion" of the $45,442.62 that Defendants owe under the Harvard settlement—an amount Defendants admitted they

[15] While Defendants cited Cutler's report in their opposition brief, they never cited his conclusion on minimum wage liability; rather, they cited an excerpt in which he characterized Plaintiff's back-wage calculations as excessive. A194. As the district court concluded, however, Cutler had analyzed Plaintiff's preliminary calculations, and Plaintiff subsequently incorporated Cutler's critiques into the calculations for which Plaintiff sought summary judgment. A232, A163-64 ¶¶ 6-9.

[16] Although Defendants belatedly cited Cutler's conclusion on minimum wage liability in a motion for reconsideration, see A252, this is insufficient to preserve the issue. Reconsideration is not permitted based on evidence that was "known and available during the summary judgment proceedings." Jones v. Castellucci, 618 F. App'x 374, 378 (10th Cir. 2015) (unpublished) (citing Monge v. RG Petro-Mach. (Grp.) Co., 701 F.3d 598, 611 (10th Cir. 2012). Because the relevant portion of Cutler's affidavit was attached to, but not cited in, Defendants' summary judgment opposition, it was certainly "known and available" at that time.

improperly accepted from their employees. A195. The remainder of the wages due reflects overtime violations only—violations Cutler agreed occurred. See A165 ¶ 10, A167 ¶ 16, SA272, SA1336 (Cutler Dep. 75:6-12). Thus, even if this Court were to consider Defendants' belated reliance on Cutler's affidavit—which it should not—it would not affect the vast majority of the wages due.[17]

D. The District Court Properly Deemed Allegations Regarding the Casio Records Admitted When Defendants Failed To Respond to the Third Amended Complaint, and the Admissions Were Harmless In Any Event.

Under the Federal Rules of Civil Procedure, "[a]n allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied." Fed. R. Civ. P. 8(b)(6); see Burlington N. R.R. Co. v. Huddleston, 94 F.3d 1413, 1415 (10th Cir. 1996) (citing prior Rule 8(d)). Thus, because, as explained below, see infra § III, Defendants failed to answer Plaintiff's Third Amended Complaint, the district court appropriately ruled that they admitted Plaintiff's new allegations in the Third Amended Complaint regarding their alteration of the Casio records. See A227.

Moreover, even assuming arguendo that the court erred by not allowing Defendants to file an Answer out of time, any such error was harmless because the

[17] Defendants also argue that they contended below that Plaintiff improperly included discretionary bonuses when calculating overtime due. Appellants' Br. 36. Defendants raised this argument only to dispute the amount of wages due, not liability, see A194-96, and it is meritless, see supra § I.B.

deemed admissions did not substantially influence the outcome below, or create grave doubt as to whether they had such an effect. See Mehojah v. Drummond, 56 F.3d 1213, 1215-16 (10th Cir. 1995); 28 U.S.C. 2111. Contrary to Defendants' contention, Plaintiff's summary judgment motion, SA184-222, was not "based primarily" on the deemed admissions, Appellants' Br. 3, 4, nor were the district court's rulings.

Plaintiff cited these admissions at summary judgment as evidence of three points: (1) that Defendants' records from approximately January 2012 forward were inaccurate, thus entitling Plaintiff to establish employees' hours worked as a matter of just and reasonable inference under Mt. Clemens, SA204-08, (2) that Defendants' violations were willful, SA214, and (3) that Defendants failed to show good faith and reasonable grounds for their violations and were therefore liable for liquidated damages, SA219.

On the first point, as discussed above, while Defendants contended that the Casio records were altered for "valid" reasons, they did not dispute—nor did Kubli or Cutler—that Defendants' records for this period were inaccurate due to both the altered Casio records and Defendants' reduction of hours in the "middle sheets," rendering the Mt. Clemens standard applicable even without the deemed admissions. See A191 ("Unquestionably, there were a lot of edits [to the Casio records.]"); see also, e.g., SA1293 (Aguirre Dep. 399:8-400:2), SA1352 (Cutler

Dep. 334:6-336:1), SA1317, 1332-33, 1333, 1334 (Kubli Dep. 243:7-23, 303:10-305:11, 307:11-308:14, 310:6-311:10); see generally SA1262-93 (Aguirre Dep. 276-400), SA1302-34 (Kubli Dep. 184-311), SA1341-52 (Cutler Dep. 291-336). On the second point, the court denied Plaintiff's summary judgment motion as to willfulness, ruling that the Casio records were manipulated outside of the relevant time frame, A227, 230, and its later order granting Plaintiff's Rule 50(b) motion explicitly did not rely on the manipulation of the Casio records, A344. On the final point, while the court noted in a footnote that the Casio admissions would negate any claim of good faith from 2012 forward, such a conclusion did not affect the outcome because, as the court also noted, Defendants had failed to present any evidence of reasonable grounds for believing they were in compliance, and both good faith and reasonable grounds are necessary to avoid liquidated damages. A237-38 & n.9. In sum, the Casio admissions were tangential to the case and did not substantially influence the outcome.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN CONCLUDING THAT DEFENDANTS' FAILURE TO MEET NUMEROUS DEADLINES DID NOT CONSTITUTE EXCUSABLE NEGLECT

Defendants challenge the district court's denials of untimely motions for extensions of time covering five separate filings, arguing that the court should have permitted the filings out of time due to "excusable neglect." Appellants' Br. 37-44. As explained below, the court did not abuse its discretion in denying

Defendants' motions.

A. Standard of Review.

The district court's rulings on this issue are reviewed for abuse of discretion. See Quigley v. Rosenthal, 427 F.3d 1232, 1237 (10th Cir. 2005). This is because "[i]n supervising the court, a judge is constantly making case-management oriented decisions which are, of necessity, discretionary[,]" and thus has "a superior position within which to make these decisions." Hanson v. City of Oklahoma City, 37 F.3d 1509 (Table), 1994 WL 551336, at *2 (10th Cir. 1994).

B. The District Court Did Not Abuse its Discretion in Denying Defendants' Motions.

The only filing for which they were denied an extension that Defendants identify was their response to the Third Amended Complaint ("TAC"). Appellants' Br. 37-38.[18] The TAC, which was filed on February 5, 2015, added

[18] The other four filings for which the Court denied Defendants' untimely extension motions were opposition briefs to four motions in limine. A158-60, SA156-83. Defendants do not argue, nor can they, that the denials of these extensions substantially influenced the proceedings below. One such motion in limine, which sought to preclude Defendants from making claims of malicious prosecution, was denied as overbroad. SA246-47. Plainly, Defendants cannot show that they were prejudiced by being denied leave to file an opposition to a motion that was denied. While the other three motions, which sought to exclude evidence regarding Defendants' employees' immigration status, to exclude evidence regarding the parties' press releases, and to preclude Defendants from introducing any time records they had not produced in discovery, were granted, SA236-37, 246-48, at no point have Defendants argued that they were prejudiced by the granting of these ancillary motions.

allegations regarding Defendants' manipulation of the Casio registers. A31-33. Defendants failed to file an Answer by their February 23, 2015 deadline, see Fed. R. Civ. P. 5(b)(2)(E), 6(d), 15(a)(3), and did not move to file it out of time until March 20, 2015, a day after Plaintiff moved for summary judgment. A119-20.[19] Defendants' motion stated—incorrectly—that the Answer was due on February 26, and further stated that it was not timely filed "because the Answer date was not properly docketed." A119 ¶¶ 2-3. The court denied Defendants' motion, concluding that Defendants had failed to demonstrate "excusable neglect" to justify an out-of-time extension. A149-57.

The district court's ruling followed directly from this Court's precedent. A motion to extend time after the time has expired may be granted only "if the party failed to act because of excusable neglect." Fed. R. Civ. P. 6(b)(1)(B). Circumstances relevant to "excusable neglect" include "'[1] the danger of prejudice to the [nonmoving party], [2] the length of the delay and its potential

[19] While the district court characterized the Answer deadline as February 19, 2015, A147 n.1, 14 days after the TAC was filed, see Fed. R. Civ. P. 15(a)(3), the actual deadline appears to have been February 23, 2015, due to the "three-day rule" for electronic service, see Fed. R. Civ. P. 6(d), 5(b)(2)(E), and an intervening weekend. This distinction is immaterial, as Defendants still substantially missed their deadline and stated the incorrect deadline in their extension motion. The "three-day rule" did not affect the deadlines for Defendants' four responses to motions, see supra n.18, which ran from the date of filing, not service. See N.D. Okla. Loc. Civ. R. 7.2(e); Pavone v. Miss. Riverboat Amusement Corp., 52 F.3d 560, 566 (5th Cir. 1995).

impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the movant, and [4] whether the movant acted in good faith.'" United States v. Torres, 372 F.3d 1159, 1162 (10th Cir. 2004) (quoting Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380, 395 (1993)). However, the third factor, "'fault in the delay[,] remains a very important factor—perhaps the most important single factor—in determining whether neglect is excusable.'" Id. at 1163 (quoting City of Chanute v. Williams Nat. Gas Co., 31 F.3d 1041, 1046 (10th Cir. 1994)). Accordingly, "inadvertence, ignorance of the rules, and mistakes construing the rules do not constitute excusable neglect for purposes of Rule 6(b)." Quigley, 427 F.3d at 1238; see Torres, 372 F.3d at 1163-64 ("[C]ounsel's misinterpretation of a readily accessible, unambiguous rule cannot be grounds for relief unless the word 'excusable' is to be read out of the rule.") (citing cases).

Thus, when counsel misses a deadline because he failed to comprehend or apply a straightforward rule—such as Rule 15(a)(3), which requires a response to an amended pleading within 14 days—a finding of excusable neglect is an abuse of discretion, even if (as the district court found here) the other three factors weigh in the movant's favor. A153-57; see Biodiversity Conservation All. v. Bureau of Land Mgmt., 438 F. App'x 669, 673 (10th Cir. 2011) (unpublished) ("[C]ounsel's miscalculation of the deadline or a failure to read the rule . . . cannot constitute

excusable neglect[.]"); Torres, 372 F.3d at 1163-64 (reversing excusable neglect finding where counsel confused deadlines for filing civil and criminal appeals).

Defendants' arguments on appeal rely on a false premise. Defendants assert that the district court failed to take account of Defendants' counsel's "diminished productivity" as a result of a recently-diagnosed medical condition, lumbar spinal stenosis. Appellants' Br. 40. But by their own admission, Defendants' failure to timely answer the TAC was not due to this medical condition, but "because the Answer date was not properly docketed." A119. Moreover, Defendants' extension motion stated that the deadline they had missed was later than it actually fell; thus, even had they "properly docketed" what they believed was the Answer date, Defendants would have missed the deadline anyway. See A119 ¶¶ 2-3.

In fact, Defendants cited the medical condition to the district court to justify not their failure to answer the TAC, but to justify untimely motions for extensions for seven other filings. See A137-40. Having expressly represented that they failed to timely answer the TAC due to a docketing error—and having demonstrated that their Answer would have been late even without that error—Defendants cannot claim that the reason was a medical condition.

Tellingly, Defendants do not explain how counsel's condition could have caused him to fail to notice the missed deadline until the Answer was nearly a month overdue. While counsel cites his status as a solo practitioner, this also does

not warrant a finding of excusable neglect. See McLaughlin v. City of LaGrange, 662 F.2d 1385, 1387 (11th Cir. 1981) (per curiam) (cited with approval in Hamilton v. Water Whole Int'l Corp., 302 F. App'x 789, 800 (10th Cir. 2008) (unpublished)). The district court's ruling was compelled by Torres, and was not an abuse of discretion.

Jennings v. Rivers, 394 F.3d 850 (10th Cir. 2005), on which Defendants rely, is easily distinguishable. In Jennings, this Court, questioning whether the entry of final judgment was appropriate for an "isolated incident of tardiness," reversed a district court for awarding a plaintiff zero damages when her attorney arrived at a hearing 20 minutes late. Id. at 852-53, 856-57. But as the district court noted, the contrasts between this case and Jennings are stark. Defendants missed the relevant deadline not by 20 minutes, but by 25 days, and their behavior was not isolated but typical:

> [D]efense counsel's error is far from an isolated incident, and indeed forms part of a pattern of neglect, repeated delays, meritless filings, and an inability to comply with the case's schedule and pace that both has preceded and followed the motion before the Court. . . . [D]efense counsel's motion suggests his misreading of a readily accessible and unambiguous rule would have caused him to file his Answer out of time, even in the absence of his docketing error, and thus run afoul of Torres. . . . In light of these facts and the exacting standard outlined in Torres, the Court cannot find that defense counsel's neglect in this instance was excusable.

A156-57.[20]

Finally, Defendants incorrectly state that the district court did not explain why it granted three of Defendants' extension requests, but denied others. Appellants' Br. 41. In fact, the court noted that Defendants' motions for the

[20] This "pattern" began in filings predating the excusable neglect ruling and continued long afterwards. See, e.g., SA110-12 & n.1 (noting that Defendants' counsel allowed misrepresentations to the court to stand uncorrected for six weeks, and admonishing counsel for raising new arguments in reply briefs); SA121, 131 n.9 (noting that Defendants falsely contended that Plaintiff had not submitted an affidavit to support a privilege claim, and that Defendants asserted irrelevant affirmative defenses); SA134-35, 139 (rejecting Defendants' objections to discovery rulings as "entirely meritless" and "utterly without merit"); SA145, 152 (noting that Defendants "assert[ed] their claims in conclusory fashion, tracking the language of the rule almost without argument," and "once again mischaracterize[d] the authority on which they rel[ied]"); A146 (noting that Defendants requested extensions of time at least 10 times); SA238 (characterizing Defendants' pretrial disclosures as "obviously and unacceptably insufficient"); SA251-52 (striking Defendants' affirmative defenses, which simply "[c]op[ied] and past[ed] all the defenses enumerated in [Fed. R. Civ. P. 8(c)]"), SA253-55 (noting that Defendants' proposed pretrial order purported to reserve for trial issues foreclosed by court's prior rulings); SA260-61 n.3 (stating that "the Court has reason to doubt that the defendants' disregard for its orders results from misunderstanding rather than obstinacy and guile," and threatening sanctions); A21 at ECF 283 (stating that Defendants "consistently refused to agree to a reasonable proposed pretrial order, to conform their proposed witness and exhibit lists to this Court's orders, and otherwise to participate in good faith in the drafting of the proposed pretrial order"); A346-47 n.4 (noting that Defendants' designation of "cumulative and clearly irrelevant" exhibits totaling 16,000 pages "seemed intended only to mire the Secretary in paper and obscure the defendants' trial strategy"), A346 n.1 (noting that Defendants' counsel "sought to sabotage the Court's order [for an interpreter for Aguirre's testimony] by independently contacting the court interpreter and misinforming him that his services would not be needed"), A346 n.3 (noting that despite the court's ruling excluding evidence at trial on the amount of wages due, Defendants submitted proposed jury instructions highlighting those amounts).

granted extensions were filed only one day after the deadlines, and that Plaintiff, with whom Defendants conferred prior to the deadlines, did not oppose these extensions. A157-58. In contrast, Defendants did not seek an extension for their Answer and four other filings until they were 25, 28, 27, 18, and 16 days overdue, respectively, having substantially miscalculated or disregarded their due dates. A152, 159-60. As the court explained, this failure to apply an unambiguous rule meant that even assuming that the other Torres factors weighed in Defendants' favor, Defendants could not demonstrate excusable neglect. A154-57, 159-60.

IV. THE DISTRICT COURT PROPERLY CONCLUDED THAT DEFENDANTS' VIOLATIONS WERE WILLFUL AS A MATTER OF LAW

A. Standard of Review

This Court reviews a ruling on a Rule 50(b) motion for judgment as a matter of law de novo, applying the same standard as the district court. United States ex rel. MMS Constr. & Paving, L.L.C. v. W. Sur. Co., 754 F.3d 1194, 1199 (10th Cir. 2014). A Rule 50(b) judgment is required "if the evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion." Id. (internal quotation marks and citation omitted). Thus, a Rule 50(b) judgment must be entered if no reasonable jury could arrive at a contrary verdict.

Zisumbo v. Ogden Reg'l Med. Ctr., 801 F.3d 1185, 1198 (10th Cir. 2015).[21]

B. No Reasonable Jury Could Conclude that Defendants' Violations Were Not Willful.

A willful violation is one in which "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [FLSA]." McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133-34 (1988). Defendants' admissions at trial demonstrated that throughout the October 22, 2009-October 21, 2010 period that the district court deemed relevant (the "relevant time period"), Defendants knew that their actions violated the FLSA, or at minimum, acted in reckless disregard of it.[22] No reasonable jury could have

[21] Defendants argue that a 50(b) motion must be granted only if "no reasonable juror could find in the non-moving party's favor." Appellants' Br. 48-49. This Court has used both the "no reasonable jury" and "no reasonable juror" standards. See Zisumbo, 801 F.3d at 1198; F.D.I.C. v. UMIC, Inc., 136 F.3d 1375, 1382 (10th Cir. 1998). Because jury verdicts must be unanimous, these standards appear to be interchangeable.

[22] In its summary judgment order, the district court ruled sua sponte that to extend the statute of limitations to three years, Plaintiff needed to prove specifically that Defendants' conduct during the third year preceding the Complaint—October 22, 2009 through October 21, 2010— was willful. A227. While Plaintiff is aware of one other district court that concluded similarly, see Solis v. La Familia Corp., No. 10-cv-2400, 2013 WL 589613, at *7 (D. Kan. Feb. 14, 2013), courts generally do not examine whether the events supporting a willfulness determination occurred during the third year preceding the complaint. See, e.g. Mumby, 636 F.3d at 1272 (finding willfulness based on discussion between defendant and its attorney, without noting when it occurred relative to filing of complaint). Moreover, courts have found violations willful based on conduct that occurred later than the third year preceding the complaint. See Bull v. United States, 68 Fed. Cl. 212, 274

concluded otherwise.

(2005), aff'd, 479 F.3d 1365, 1379 (Fed. Cir. 2007) (finding willfulness based in part on internal audit in same year complaint was filed).

Because Plaintiff did not contest the district court's ruling on this point, Plaintiff restricts its discussion above to the "relevant time period." However, this Court need not adopt the district court's conclusion on the scope of the "relevant time period" in order to affirm its judgment. Because Defendants' violations during the third year preceding the Complaint were willful, it is unnecessary for this Court to hold that only such violations may extend the statute of limitations.

However, if this Court concludes that a reasonable jury could conclude that the violations during the "relevant time period" were not willful, in light of the above case law, this Court should affirm the judgment below based on what the district court called the "unquestionable willfulness of [Defendants'] FLSA violations after October 21, 2010." A333 (emphasis in original); United States v. Sandoval, 29 F.3d 537, 542 n.6 (10th Cir. 1994) (appellate court may affirm for reasons other than those relied on by district court). Evidence of such willfulness included Defendants' actions related to violations both before and after October 21, 2010, see SA1816-17, 1846 (TR50:3-51:7, 100:5-20) (FLSA posters at Defendants' restaurants, demonstrating knowledge of requirements), SA1823-24 (TR66:24-67:12) (Aguirre lied to Saint-Hilaire about employees' hours worked), SA1827-29 (TR70:24-72:6) (signs with work rules listing improper pay deductions were hidden during First Harvard Investigation), SA1835, 1847, 1850, 1852-53 (TR78:2-24, 106:8-20, 109:4-25, 117:23-118:21) (Aguirre admitted to falsifying timesheets, including after First Harvard Investigation), SA1854-56 (TR137:12-139:15) (Aguirre continued to lie to Saint-Hilaire until final conference of Second Harvard Investigation), as well as their actions related to violations after October 21, 2010 only, see SA1830-31, 1847-49 (TR73:21-74:4, 106:4-108:23) (timesheets appeared to have been whited-out), SA1836-43 (TR79:6-86:11) (Saint-Hilaire provided Aguirre with fact sheets after Second Harvard Investigation and instructed him on FLSA compliance), SA1891-96 (TR265:13-270:18) (Defendants violated settlement agreement by accepting returned wages), SA1857-73, 1959 (TR184:9-200:24, 688:11-19) (Defendants altered Casio records to reduce employees' recorded hours worked), SA1899-1924, 1925-26, 1936-40 (TR323:24-348:12, 352:18-353:19, 381:1-385:7) (Defendants reduced hours when transferring them from Casio records to "middle sheets").

1. Defendants Admitted That They Falsified Records, Lied to a Federal Investigator, and Told Their Employees to Lie.

Case law conclusively establishes that when an employer intentionally falsified its records or attempted to conceal its violations by lying or directing its employees to lie, this warrants a conclusion that the violations were willful. See, e.g., Yu Y. Ho v. Sim Enters, Inc., No. 11-CIV-2855-PKC, 2014 WL 1998237, at *13 (S.D.N.Y. May 14, 2014) (finding willfulness where employer instructed employees to enter inaccurate hours); Solis v. SCA Rest. Corp., 938 F. Supp. 2d 380, 393 (E.D.N.Y. 2013) (finding willfulness where defendant created false records and lied and instructed his employees to lie to a Department investigator regarding their pay and work hours); Solis v. Best Miracle Corp., 709 F. Supp. 2d 843, 858-59 (C.D. Cal. 2010) (finding willfulness where Defendants "engaged in a deliberate campaign to falsify records"), aff'd, 464 F. App'x 649 (9th Cir. 2011) (unpublished); cf. Janik Paving & Constr., Inc. v. Brock, 828 F.2d 84, 88, 94 (2d Cir. 1987) (affirming willfulness where defendants "falsified their certified payrolls" and "manipulated overtime pay rates by reducing overtime hours by one-third" in attempt to hide violations of the overtime requirements of the Contract Work Hours and Safety Standards Act); see also cases cited in A321-25, 343. This Court concluded similarly, albeit under a broader willfulness standard. See Donovan v. Pointon, 717 F.2d 1320, 1323 (10th Cir. 1983) (finding willfulness

under predecessor to Richland Shoe standard where employer "kept his business records as to indicate that he was paying overtime in accordance with the [FLSA], when, in fact, he was not").

The evidence at trial supported no reasonable inference other than that during the "relevant time period," Defendants falsified records to make it appear as if they were complying with the FLSA, thereby demonstrating their knowledge or, at minimum, reckless disregard of the FLSA's requirements. Aguirre admitted that before the First Harvard Investigation in December 2010, he had his managers create records stating that Defendants' employees worked approximately 40 hours each week, even though they worked considerably more. See SA1875-76, 1881, 1883, 1886 (TR246:19-247:10, 252:4-25; 254:2-11; 257:9-20). And although Defendants paid their employees a straight salary, Aguirre provided these false records to his accountant, Kubli, who generated payroll sheets that made it appear as if employees were paid hourly, worked approximately 40 hours each week, and received precisely the statutory minimum wage and overtime pay rates—rates that Aguirre directed him to enter into the payroll sheets. SA1875-76, 1877-86, 1930, 1931-32, 1935 (TR246:19-247:10, 248:1-257:5; 374:2-19, 376:13-377:25, 380:12-22). Samples of these payroll sheets for periods during, and immediately following, the "relevant time period" were admitted into evidence. See SA1376-97 (sample time and payroll sheets, First Harvard Investigation), SA1384-87, 1392-94

(sample payroll sheets from "relevant time period"), SA1818-19 (TR52:18-53:5), Aguirre received, and was aware of, these payroll sheets, and knew that they falsely indicated that employees were paid the minimum wage for all their hours worked, and time-and-a-half for any hours above 40 in a workweek. SA1878-79, 1885-86 (TR249:3-250:16, 256:15-257:5). In short, Defendants created and kept records that made it appear—falsely—that they were complying with the FLSA.

When Saint-Hilaire began her investigation in December 2010, Defendants further demonstrated that they knew that their actions during the preceding year—the "relevant time period"—violated the FLSA. Specifically, Aguirre admitted that until the final conference of the Second Harvard Investigation, he lied to Saint-Hilaire, telling her that his employees were paid hourly, and that he told his employees to lie to her as well. SA1887-89 (TR258:16-260:1). He also provided Saint-Hilaire with the falsified records, withholding the ones that showed that employees were actually paid a straight salary. SA1817-18, 1822, 1835-36, 1875-76, 1889-90 (TR51:11-52:17, 65:9-19, 78:7-79:5, 246:19-247:10, 260:8-261:16). These actions demonstrate conclusively that Defendants knew of their FLSA obligations but disobeyed them anyway. As the court concluded, "[i]t is difficult to imagine a clearer case of willfulness." A334.[23]

[23] Defendants incorrectly suggest they should prevail if a reasonable jury could find that any one of nine potentially willful acts listed in the court's summary

2. The Alternative Inferences For Which Defendants Argue Are Impermissible or Unreasonable.

Defendants offer several inferences they assert a reasonable jury could have drawn in their favor. All of these inferences, however, are impermissible or unreasonable. Cf. Carney v. City & Cty. of Denver, 534 F.3d 1269, 1276 (10th Cir. 2008) (standard for judgment as a matter of law "does not require [a court] to make unreasonable inferences in favor of the non-moving party") (internal quotation marks omitted).

i. The Jury Could Not Have Permissibly Concluded That No Violations Occurred During 2009-2010.

Defendants first argue that the jury could have found that no violations whatsoever (regardless of whether they were willful) occurred from October 22, 2009 to October 21, 2010. Appellants' Br. 50-52. Such a finding was impermissible. The court determined at summary judgment that Defendants violated the FLSA from October 22, 2009 through June 30, 2014, and instructed the jury as such. SA1958 (TR685:9-17). The jury's sole question was whether the violations during the "relevant time period" were willful. Id.

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judgment opinion was not, in fact, willful. Appellants' Br. 49. As the court stated, Plaintiff was not required to prove that all nine acts supported willfulness. SA254, SA1374, 1375 (pretrial conference transcript excerpts).

ii. Evidence of Willfulness From 2012 Forward Did Not Permit the Jury To Ignore Such Evidence From 2009-2010.

Relatedly, Defendants argue that the extensive testimony on Defendants' manipulation of the Casio records, which began in approximately 2012, may have led the jury to believe that no violations—or perhaps no willful violations—occurred from October 22, 2009 to October 21, 2010. Appellants' Br. 50-52.[24] Again, the jury could not have found that no violations occurred since the violations were established at summary judgment. Moreover, to the extent that this testimony confused the jury, leading it to ignore the undisputed evidence that Defendants falsified records during 2009-2010, lied to Saint-Hilaire, and instructed their employees to lie, such confusion would be grounds for granting a 50(b) motion as well. See Michelman v. Clark-Schwebel Fiber Glass Corp., 534 F.2d 1036, 1042 (2d Cir. 1976) ("The jury's role as the finder of fact does not entitle it to return a verdict based only on confusion, speculation or prejudice; its verdict must be reasonably based on evidence presented at trial."); Colonial Lincoln-Mercury, Inc. v. Musgrave, 749 F.2d 1092, 1098 & n.3 (4th Cir. 1984) (affirming judgment n.o.v. where district court opined that the jury may have been "confused by the evidence").

[24] Plaintiff presented this evidence not "to vilify Mr. Aguirre," Appellants' Br. 50, but because the court ruled that such evidence could support an inference of willfulness during the "relevant time period." A344.

No matter how much evidence was presented about willful violations from 2012 onward, the jury was not permitted to disregard the undisputed relevant evidence from the 2009-2010 period the jury was specifically instructed to evaluate. If it did so due to confusion—as the district court surmised it may have, see A344 (opining that the evidence regarding the Casio registers was "superfluous and no more than confusing" and created "a false sense of its centrality")—such error was appropriately addressed in the 50(b) ruling.

iii. Defendants Could Not Have Reasonably Relied on Kubli.

Defendants also argue that a reasonable jury could have found that Kubli, Defendants' accountant, was the party truly at fault, and that his failure to apprise them of their violations could lead a reasonable jury to infer that Defendants' violations were not willful. Appellants' Br. 52-57. As the district court concluded, such an inference would be manifestly unreasonable. See A349 n.12 (describing this argument as "fanciful" and "risible").

As the court noted, Aguirre admitted that he sent Kubli fabricated records of hours worked, preventing Kubli from knowing that the payroll sheets he generated did not reflect employees' actual hours. SA1875-86, 1890, 1931-34, 1937 (TR246:19-257:5, 261:10-18, 376:13-379:25, 382:15-24). Accordingly, Defendants' assertion that "the jury could have found that any payroll errors were the responsibility of CPA Kubli and not the Defendants" is not only legally

incorrect—since Defendants, not Kubli, are responsible for paying their employees in compliance with the FLSA—but factually unsupportable. Defendants cannot admit that they kept Kubli in the dark, yet argue that they relied on him to pay their employees properly. Cf. Mumby, 636 F.3d at 1270 (to assert good-faith reliance on counsel, a party must disclose all relevant facts to counsel).

The basis for Defendants' argument appears to be Aguirre's speculative assertion, wholly unsupported by evidence, that Kubli must have realized Defendants were paying employees in cash as well as by check. Appellants' Br. 55. But as Defendants note only a page later, the use of cash and check payments does not itself violate the FLSA. Id. at 56. More importantly, Defendants' violations for this period stemmed from their failure to adequately pay their workers for the numerous hours they did not report to Kubli. As the court noted, there was simply no evidence that Kubli knew that Defendants' employees were working these additional hours. SA1948 (TR416:13-15).[25]

But even if a jury could reasonably conclude that Kubli knew, or should

[25] While Defendants also cite Kubli's "experience," as noted earlier, Kubli is not an FLSA expert. SA258-60, SA1946-48 (TR414:16-416:16). Kubli is an accountant who processed Defendants' payroll, which Aguirre set. SA1877, 1927-30 (TR248:1-10, 371:18-374:23). The testimony Defendants cite indicates that Aguirre would "sometimes" ask Kubli about "accounting and CPA things," not FLSA compliance. A457. And Kubli denied, in uncontroverted testimony, that Aguirre came to him for FLSA compliance advice or relied on him for FLSA matters. SA1941-45 (TR391:8-395:18).

have known, that something was amiss, this does not vitiate Defendants' willfulness. Defendants, not Kubli, are legally responsible for complying with the FLSA. Defendants, not Kubli, falsified records. Defendants, not Kubli, lied to Saint-Hilaire. Defendants, not Kubli, instructed their employees to lie. These undisputed facts demonstrate that Defendants' violations were willful, whether or not their accountant should have known better.

iv. A Single Calculation Error in Plaintiff's Spreadsheets Was Irrelevant to Willfulness.

Defendants also argue that a jury could have inferred that the violations were not willful because Plaintiff's counsel admitted to a calculation error in a spreadsheet that overstated the amount of time for which a single employee was not paid in a single pay period in 2013. See Appellants' Br. 57-58. Again, the inference Defendants suggest is unreasonable.

The calculation error was in one of 50 instances where Plaintiff found that 11 sample employees were underpaid relative to their hours recorded by the Casio registers. SA1398, 1484, 1548, 1570, 1624, 1667, 1683, 1708, 1718, 1742, 1771, SA1904-05, 1937-40 (TR328:14-329:18, 382:25-385:7). The error concerned hours worked in 2013. SA1484 (TR529:13-533:13). Even accounting for the error, the employee in question was underpaid. SA1954-55 (TR532:14-533:13).

Plaintiff's concession of one error out of 50 examples does not reasonably call into question the remainder of Plaintiff's case. First, Plaintiff put into

evidence all 50 examples of the discrepancies between the Casio records and the "middle sheets" and payroll sheets—discrepancies that Kubli confirmed, and Aguirre confirmed at least in part. See SA1908 (TR332:9-11), SA1910-18 (TR334:3-342:7), SA1919-24 (TR343:22-348:12), SA1925-26 (TR352:18-353:19), SA1936-40 (TR381:11-385:7); see generally SA1398-1780. And the court instructed the jury, consistent with Defendants' admission, that "defendants . . . manually altered the electric time record weekly reports with the effect of reducing the actual hours shown as worked by employees." SA1959 (TR688:15-18).

Moreover, even if a jury could have reasonably inferred that Plaintiff's calculations contained inaccuracies, such an inference would have been irrelevant. An inaccuracy in a spreadsheet Plaintiff created regarding hours worked in 2013 does not support a reasonable inference that Defendants did not act willfully from 2009 to 2010 when they paid their employees a salary, falsified records that made it appear otherwise, and then lied about it to Saint-Hilaire and instructed their employees to do the same.

v. A Jury Could Not Have Reasonably Inferred that Defendants' Violations Were Merely Negligent.

Finally, Defendants argue that a reasonable jury could have credited Aguirre's testimony that he "didn't know how to do it the right way" and found that Defendants' violations were merely negligent. Appellants' Br. 52, 58-59.

This inference would have been unreasonable as well.

The evidence simply did not support a reasonable inference that Aguirre was merely negligent. When Saint-Hilaire inspected the Harvard location in December 2010, just after the "relevant time period," the restaurant prominently displayed a poster showing the FLSA's requirements, demonstrating that Aguirre was not ignorant of them. SA1815-17 (TR49:15-51:7), A349 n.10. Further, Defendants' own payroll sheets for the "relevant time period" (and immediately thereafter) made it appear as if their employees earned precisely the statutory minimum wage, usually worked no more than 40 hours a week, and were paid time-and-a-half if they did. SA1376-78, 1380-82, 1384-94. This evidence further demonstrated that Aguirre knew what the law required. If Aguirre either believed that paying his employees a straight salary was permissible or was unaware of the FLSA's requirements, there was no reason for him to have created and kept records stating that his employees were paid hourly and received minimum wage and overtime pay. Even viewed in the light most favorable to Defendants, this evidence compels the conclusion that Defendants knew their actions violated the FLSA.

Furthermore, even if, notwithstanding the above, a jury were to credit Aguirre's testimony that he simply paid employees the way he was paid when he first worked in restaurants, A422-23 (TR257:18-258:4), Aguirre's complete failure to inquire about the legality of his practices constituted reckless disregard,

rendering Defendants' violations willful. Reckless disregard includes "action entailing an unjustifiably high risk of harm that is either known or so obvious that it should be known." Mumby, 636 F.3d at 1270 (internal quotation marks and citation omitted); see Herman v. RSR Sec. Servs. Ltd., 172 F.3d 132, 142 (2d Cir. 1999) (finding willfulness where employer "could easily have inquired into" relevant compliance issues); 29 C.F.R. 578.3(c)(3). Aguirre worked in the restaurant industry most of his life, owned four El Tequila locations, and had over a decade of experience as a restauranteur. SA1874 (TR234:2-23). Under these circumstances, his failure to inquire into whether paying waiters, cooks, and others without any regard for their hours worked was impermissible constituted, at minimum, reckless disregard. See Breen v. Concrete by Wagner, Inc., No. 98-C-3611, 1999 WL 1016267, at *13 (N.D. Ill. Nov. 4, 1999) (Defendant that was "engaged in business as a concrete company, hiring concrete laborers . . . should have investigated the basic content and requirements of the FLSA[,]" and failure to do so was reckless disregard).

C. Plaintiff's Rule 50(b) Motion Did Not Advance Different Grounds Than Its Rule 50(a) Motion.

Defendants' suggestion that Plaintiff's Rule 50(b) renewed motion for judgment as a matter of law advanced different grounds than Plaintiff's Rule 50(a) motion for judgment as a matter of law, Appellants' Br. 45-48, is plainly wrong. Plaintiff moved under Rule 50(a) twice during the trial. See A470-73, 480-86

(TR420:3-423:16, 437:18-443:17), A495-507, 508-09 (TR661:8-673:13, 679:7-680:9). As the transcripts make clear, these motions advanced the same grounds as Plaintiff's 50(b) motion did.

Plaintiff's 50(b) motion, A307-31, argued that Defendants knew they were violating the law because they falsified records, A321-23, withheld the accurate records from Saint-Hilaire, A323-24, lied to Saint-Hilaire, and told his employees to lie, A324-25. Plaintiff also argued that Defendants demonstrated reckless disregard by failing to take any actions whatsoever to determine whether they were in compliance, A325-29.

All of these issues were raised during Plaintiff's earlier 50(a) motions, in which Plaintiff argued that Defendants acted with knowledge of their violations because they falsified records, A471-73 (TR421:3-423:1), A481-82 (TR438:12-439:3), A483-85 (TR440:22-442:4), A497-99 (TR663:19-666:1), A501-02 (TR667:24-668:20), A503-06 (TR669:25-672:19), A508 (TR679:13-19), withheld the correct ones, A504 (TR670:9-25), lied to Saint-Hilaire, A471 (TR421:4-6), A500 (TR666:2-12), and told employees to lie, A470-71 (TR420:24-421:6), A486 (TR443:11-15), A498-99 (TR664:25-665:15), A505-06 (TR671:24-672:6). Plaintiff's reckless disregard argument was briefer, but still sufficient, arguing that Defendants acted in reckless disregard of their obligations by withholding records and failing to seek training or to inquire regarding whether their practices complied

with the FLSA. See A504 (TR670:16-25), A509 (TR680:3-7).[26]

Defendants appear to believe that 50(b) and 50(a) motions must be identical virtually word-for-word, or must cite the exact same facts. See Appellants' Br. 47.[27] To the contrary, this Court has held that "[b]ecause the requirement of Rule 50 that a directed verdict motion must precede a motion for judgment n.o.v. is harsh in any circumstance, a directed verdict motion should not be reviewed narrowly but rather in light of the purpose of the rules to secure a just, speedy, and inexpensive determination of a case[,]" and therefore, "in satisfying the requirements of Rule 50, technical precision is unnecessary." Anderson v. United Tel. Co. of Kansas, 933 F.2d 1500, 1503 (10th Cir. 1991) (internal quotation

[26] Regardless, the court concluded that Defendants acted with knowledge of their requirements, rendering Plaintiff's reckless disregard arguments unnecessary. A333, 342, 349 n.10.

[27] Defendants also misleadingly include in their appendix an exhibit, A523-24, listing facts allegedly referenced in Plaintiff's 50(b) motion but not in the 50(a) motion. This exhibit is not part of the district court record and therefore should not be considered. Moreover, Plaintiff's 50(a) motions actually referenced many of the facts listed in Defendants' exhibit, including Aguirre's business experience, A482 (TR439:12-13), his knowledge of the FLSA's requirements, A470, 473, 486, 498-99 (TR420:10-23, 423:1, 443:11-17, 664:3-665:8), posters with work rules stating that employees would have money deducted from their paychecks for infractions, A482 (TR439:4), Defendants' failure to make sufficient inquiries regarding compliance, A504 (TR670:16-25), their violation of the Harvard settlement, A482, 500 (TR439:9-10, 666:13-20), and Defendants' admitted manipulation of the Casio records and "middle sheets," A472, 484-85, 503-04, 506 (TR422:12-25, 441:17-442:4, 669:22-670:15, 672:10-21). In any event, as explained here, this Court does not require an exacting level of specificity in a 50(a) motion.

marks, brackets, and citations omitted).[28] Here, Plaintiff's 50(a) motions raised not only the legal standard, but the very facts on which the Court relied in granting Plaintiff's 50(b) motion. To conclude otherwise would require a level of precision in an oral 50(a) motion that, as this Court has recognized, is unnecessary to effectuate the purposes of Rule 50. See Anderson, 933 F.2d at 1504.

D. Defendants' Challenges to the Amended Judgment are Meritless.

Finally, Defendants argue that that the district court exceeded its authority by entering an amended judgment for $2,137,627.44 because the jury did not rule on the amount of wages due. But because the court had previously awarded Plaintiff summary judgment on the back-wage calculations and liquidated damages, the amended judgment was a ministerial act that required no new conclusions of fact or law.

At summary judgment, Plaintiff moved for judgment that Defendants were liable for $2,225,392.62. A78, SA215-18. Specifically, Plaintiff sought wages totaling $1,112,696.31, plus an equal amount in liquidated damages, for a total of $2,225,392.62. A78, SA218.

In its summary judgment order, although the court did not enter a monetary judgment because the amount due would depend on whether Defendants'

[28] "Directed verdict motion" and "motion for judgment n.o.v." are the former terms for Rule 50(a) and 50(b) motions, respectively. See Weese v. Schukman, 98 F.3d 542, 547 (10th Cir.1996).

violations were willful, it expressly granted summary judgment to Plaintiff on the calculation of back wages, with one exception: the returned wages from the Harvard settlement that Defendants improperly accepted. See A230-34, 240. Instead of the $89,325.21 Plaintiff sought for the Harvard settlement, the court awarded $45,442.62. See A234; supra at 16-17. This reflects a difference of $43,882.59, a difference Plaintiff subsequently conceded. See supra at 16-17. Subtracting $43,882.59 from the amount of wages sought at summary judgment—$1,112,696.31—yields $1,068,813.72. Doubling this amount for liquidated damages, which the court, at summary judgment, concluded were justified, see A234-38, yields $2,137,627.44, the precise amount in the amended judgment.

Thus, contrary to Defendants' contention, the amended judgment was not based on new information. Although the court, after granting Plaintiff's 50(b) motion, requested that Plaintiff submit "updated WH-55 and WH-56 Forms covering the period of October 22, 2010 through August 6, 2011," A351, Plaintiff explained in a detailed response that no additional submissions were necessary because Plaintiff provided the necessary records at summary judgment. See SA267-77, 267 n.1. Defendants' argument that they had no opportunity to challenge the back-wage calculations is therefore meritless. Defendants had that opportunity at summary judgment.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the district court.

Dated: June 9, 2016

Respectfully submitted,

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Pursuant to Federal Rule of Appellate Procedure 32(a), the undersigned certifies that this brief complies with the applicable type-volume limitation, typeface requirements, and type-style requirements.

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Dated: June 9, 2016

s/ Jesse Z. Grauman
JESSE Z. GRAUMAN

ANTI-VIRUS CERTIFICATION FORM

I hereby certify that a virus check, using McAfee VirusScan Enterprise and AntiSpyware Enterprise 8.8, was performed on the PDF version of this brief and no viruses were found.

Dated: June 9, 2016

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify as follows:

1) All required privacy redactions have been made per 10th Cir. R. 25.5, and

2) The seven hard copies being submitted to the Court are exact copies of the version submitted electronically via the Court's CM/ECF system.

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CERTIFICATE OF SERVICE

I hereby certify that on June 9, 2016, a true and correct copy of the foregoing brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system, which will send notification of such filing to:

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