

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 18 May 2012**

CASE NO.: 2010-FLS-00008

*In the Matter of:*

HONG KONG ENTERTAINMENT (OVERSEAS)  
INVESTMENTS, LTD., d/b/a  
TINIAN DYNASTY HOTEL AND CASINO, and  
RAYMOND CHAN, an individual  
Respondents,

and

CASE NO.: 2011-FLS-00004

*In the Matter of:*

KWAN MAN, an individual.  
Respondent.

**- RECEIVED -  
U.S. DEPARTMENT OF LABOR**

**MAY 18 2012**

**OFFICE OF THE SOLICITOR  
SAN FRANCISCO**

**ORDER GRANTING IN PART PLAINTIFF'S MOTION FOR SUMMARY DECISION  
AND SETTING HEARING**

This case arises under the provisions of the Fair Labor Standards Act of 1938, as amended, ("FLSA"), 29 U.S.C. § 201, *et seq.*, for alleged violations of its overtime provisions by Respondents' business, Hong Kong Entertainment Investments, Ltd. ("HKE"), doing business as Tinian Dynasty Hotel and Casino, and individuals, Raymond Chan and Kwan Man. It was initiated with the Office of Administrative Law Judges ("OALJ") and referred to the OALJ for formal hearing on April 1, 2011. On February 1, 2012, Plaintiff filed a motion for summary decision asking that I affirm the decision to impose a civil money penalty ("CMP") of \$191,400.00 against Respondents.

For the reasons set forth below, Plaintiff's motion for summary decision is GRANTED in part and DENIED in part.

**PROCEDURAL BACKGROUND**

The Plaintiff, the Administrator of the Wage and Hour Division, United States Department of Labor (the "Administrator"), filed a complaint against the Respondents, Hong Kong Entertainment Investments, Ltd. etc., for civil money penalties for willful and repeat

violations of the provisions of the FLSA. Respondents timely filed an exception to the complaint and the matter was referred to the Office of Administrative Law Judges.

On August 31, 2007, the Plaintiff assessed civil money penalties against Respondents HKE and Raymond Chan for repeat and willful violations of the FLSA. The Plaintiff assessed civil money penalties against Respondent Kwan Man on February 4, 2011.

On January 26, 2010, the Plaintiff filed an Order of Reference with the OALJ initiating these proceedings against Respondents Raymond Chan and HKE. The Plaintiffs filed an Order of Reference against Respondent Kwan Man on March 22, 2011.

A hearing on the claims against only Respondents Raymond Chan and HKE, was originally scheduled for December 15, 2010, but I granted Plaintiff's unopposed motion to continue the hearing in this matter to March 30, 2011, or as soon as was practicable thereafter, as the parties required additional time to conduct discovery. The parties filed a stipulation to consolidate the civil money penalty claims against Respondents HKE and Raymond Chan and Respondent Kwan Man on April 15, 2011, which I granted on April 29, 2011. The hearing in the consolidated cases was subsequently re-scheduled for March 20, 2012, to March 22, 2012.

On February 1, 2012, the Plaintiff filed a motion for summary decision ("MSD") against the Respondents, and Respondents filed a motion for partial summary decision.<sup>1</sup> On February 6, 2012, I issued an order vacating the hearing and establishing a briefing schedule for responses to motions for summary decision and partial summary decision. The Respondents filed an opposition to Plaintiff's motion for summary decision and a cross motion for summary decision on certain issues on March 7, 2012. I granted Plaintiff's request for leave to file a reply memorandum on March 28, 2012, and received the Plaintiff's reply on April 9, 2012.

### ANALYSIS AND FINDINGS

The Plaintiff moves for summary judgment arguing that it has shown all facts necessary to impose CMPs on the Respondents. Plaintiff argues that, as a matter of law, the CMP of \$191,400.00 assessed against the Respondents was appropriate and should be affirmed.

#### Issues

The issues to decide in ruling on the Plaintiff's motion for summary decision include:

1. Did the Plaintiff establish all material facts without genuine dispute?
2. Is the Plaintiff entitled to judgment as a matter of law that:
  - a. The actions of Respondents are covered by the FLSA;
  - b. Respondents each individually qualify as an employer and are personally liable for violations;
  - c. The 2007 violations were both repeat and willful;
  - d. The CMP assessed by the Administrator was appropriate under the FLSA?

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<sup>1</sup> This order only addresses the Plaintiff's motion for summary decision. Respondents' motion for partial summary decision was denied in my order of April 3, 2012.

## Legal Standard for Summary Decision

Under OALJ regulations embodied in the Code of Federal Regulations and the Federal Rules of Civil Procedure, an administrative law judge (“ALJ”) may grant a motion for summary decision if the pleadings, affidavits, evidence obtained by discovery, or other evidence show that there is no genuine issue of material fact and that the moving party would win as a matter of law. 29 C.F.R. §§ 18.40-18.41; Fed. R. Civ. P. 56(c). The burden is on the moving party to present evidence that shows “an absence of evidence to support the non-moving party’s case.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the moving party presents such evidence, the non-moving party “may not rest upon mere allegations or denials of his pleading, but ... must set forth specific facts showing that there is a genuine issue for trial.” *Anderson v. Liberty Lobby, Inc.*, 447 U.S. 242, 249 (1986). Issues of statutory interpretation and questions of law are appropriate for disposition by the judge at the summary decision stage.

When considering a motion for summary decision, the judge does not assess credibility or weigh conflicting evidence, as all evidence must be viewed in the light most favorable to the non-moving party and all reasonable inferences made in the non-moving party’s favor. *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630-31 (9th Cir.1987). However, to prevent a summary decision, the non-moving party must have more than a mere “scintilla” of evidence supporting its position. *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 919 (9<sup>th</sup> Cir. 2001).

### I) Establishment of Material Facts

The Plaintiff has moved for summary decision here, and so must present evidence, which is not subject to genuine dispute, that establishes all material facts necessary for a judgment in Plaintiff’s favor under the FLSA. 29 C.F.R. §§ 18.40-18.41; Fed. R. Civ. P. 56(c).

#### *A) Issues of admissibility of evidence*

Before examining the factual evidence offered by the Plaintiff, I want to first dispose of a cluster of related objections to that evidence, filed by Respondents. The Respondents’ opposition to the MSD argues that the majority of the evidence submitted by the Plaintiffs is not admissible under the Federal Rules of Evidence (“FRE”) and cannot be considered. These arguments are all based on the incorrect assumption that the FRE governs evidence submitted to OALJ in an FLSA case. Rather, as the Plaintiff correctly points out, these proceedings are “not bound by the rules of evidence except those with respect to privileges.” 29 C.F.R. § 18.104(a). I can see no proper reason to exclude the highly relevant and reliable evidence presented by the Plaintiffs – in particular the depositions of the Respondents Mr. Kwan and Mr. Chan – but I will respond to each of these objections individually so there can be no confusion as to why they are groundless.

#### 1) Court reporter certification and 30-day review for Mr. Chan’s deposition

The Respondents first argue that the two parts of the deposition of Mr. Chan must be “stricken from the record,” because they lack a signed reporter’s certificate and because Respondents allege that they were deprived of a full 30 days to review the transcripts before they became evidence. (Respondents’ Opposition to MSD, pp. 19-21.)

Beyond the inapplicability of federal rules of evidence and the general audacity of asking a court to set aside highly probative evidence because purely typographical corrections had not yet been made, these arguments face the further challenge that these transcripts have since been certified by the court reporter. The signed certificates were submitted by the Plaintiff as Exhibits A and B to the declaration of Attorney Joseph Lake in support of Plaintiff's reply to the opposition to MSD.

In addition, even if the rules of evidence applied, this deposition contains only admissions of a party opponent, Mr. Chan, a named Respondent, which qualify for admission under 29 C.F.R. § 18.801(d)(2).

Lastly, while the Respondents attempt to place the blame for their belated receipt of these transcripts on the Plaintiff, evidence submitted by Respondents themselves shows that the sole reason there was a delay was Respondents' own decision not to pay for a copy of the deposition transcripts when the court reporter offered one on January 10, 2012. (Respondents' Exhibit ("RX") N, p. 138.) Whatever informal plan Counsel may have made for giving Respondents a free copy of these transcripts, the court reporter had a perfect right to seek payment for a copy of his work product. The Respondents cannot use their own refusal to pay the court reporter as justification for eliminating probative evidence unfavorable to them.

## 2) Identification and dual nature of deponent in Mr. Chan's deposition

The Respondents also argue that the deposition transcripts of Mr. Chan are inadmissible because he was deposed in both his personal capacity and as the representative of HKE under Rule 30(b)(6), but HKE was not identified as the deponent. (Respondents' Opposition to MSD, pp. 21-22.)

Again, the primary problem with this objection is that, under the applicable rules, an administrative law judge is free to consider any relevant evidence unless a rule of privilege applies. *See* 29 C.F.R. § 18.104(a). Mr. Chan's testimony, as an officer of HKE identified as the most knowledgeable person to consult about the corporation's actions in this case, is highly probative and was taken down by a court reporter in the presence of his attorney.<sup>2</sup> (*See* Plaintiff's Exhibit ("PX") 1, pp. 30, 32-33.) Therefore, I see no reason to ignore this evidence because of an inapplicable technicality.

If Respondents' Counsel objected to Mr. Chan's deposition being used to solicit both his personal knowledge and his knowledge as a 30(b)(6) representative, the time to make that objection was when Plaintiff's Counsel consulted Respondents' Counsel on this matter during the deposition when they had this exchange:

Mr. Lake: Now, Mr. Long, I think this might be an appropriate time for us to discuss the 30(b)(6) Deposition and whether [HKE] is prepared to have Mr. Chan represent the company for that as well.

Mr. Long: Yes.

Mr. Lake: Is that something that the company will stipulate to?

Mr. Long: Yes.

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<sup>2</sup> Respondents' Counsel, Mr. Long, participated by telephone in the depositions of Mr. Chan and Mr. Kwan.

... [Notice of Deposition of Respondent HKE introduced] ...

Mr. Lake to Mr. Chan: [HKE] has designated you as the Rule 30(b)(6) Deponent.  
[translation clarification]

Mr. Chan: Yes.

Mr. Lake: Do you understand what that means?

Mr. Chan: The response for the company.

...

Mr. Lake: So, when you're answering questions today, you're answering both on your own behalf and on behalf of [HKE].

Mr. Chan: Yes.

(PX 1, pp. 30, 32-33.) Respondents' Counsel, Mr. Long, did not object to this arrangement at that time. Instead, he allowed the deposition to proceed with Plaintiff's Counsel relying on the approval Respondents' Counsel had apparently given. To object now and force the Plaintiff to either go without the highly probative evidence Mr. Chan provided or to potentially retake this already logistically complicated and expensive deposition, is contrary to the interests of justice.

Finally, Respondents contend that a witness' deposition as an individual and as a representative for a corporation under 30(b)(6) are "substantially different," yet I see no evidence that that is a difficulty in this case. (Respondents' Opposition to MSD, p. 22.) While a 30(b)(6) deposition is not limited to the witness's personal knowledge – as a deposition in individual capacity is – but extends to information the corporation has reasonable access to, for a high-level executive there can be a great deal of overlap between those two categories. Fed. R. Civ. P. 30(b)(6). This certainly appeared to be the case for Mr. Chan, and when necessary, the capacity he was answering in was clarified. (*See, e.g.*, PX 1, pp. 74-75 (Plaintiff's Counsel checked whether answers were in Mr. Chan's individual capacity or as 30(b)(6) representative and Mr. Chan identified another officer as informed about that aspect of the corporation).) Even the case Respondents cite for the proposition that personal and representative depositions are "separate and distinct," actually acknowledges that testimony can also overlap, suggesting that sometimes a witness can just adopt their testimony from the personal deposition for the purposes of the 30(b)(6) to avoid unnecessary duplication. *See Sabre v. First Dominion*, 2001 WL 1590544 at \*2 (S.D.N.Y. 2001). I find that is essentially what the Respondents agreed to do here, so the deposition of Mr. Chan serving a dual purpose is not a reason to find it inadmissible.

### 3) Objections made during the depositions of Mr. Kwan and Mr. Chan

The Respondents further assert that the burden is on the Plaintiff to demonstrate that deposition testimony is admissible over any objections made by Respondents. (Respondents' Opposition to MSD, pp. 18, 23.) The only particular objection Respondents point out is that made to questions about events after the 2007 Investigation. (*Id.* at 23.) Even then, Respondents allow that the evidence can be used once the court resolves the objections. (*Id.* at 18.)

Again, I am free to admit probative evidence, constrained only by the rules of privilege. *See* 29 C.F.R. § 18.104(a). Moreover, as the Plaintiff points out, I have already denied Respondents' requests to limit the questions asked at these depositions twice, first in my order issued November 2, 2011, where I denied the Respondents' motion for a protective order and

again in my November 10, 2011, order, which summarized a conference call where I specifically ruled that the Plaintiff could ask about Respondents' compliance with the FLSA after 2007. The Respondents made no motion under 29 C.F.R. § 18.22(e), or otherwise, to convince me to change my ruling on these matters.

Therefore, I will consider the entirety of the depositions of Mr. Kwan and Mr. Chan as evidence that may be used in arguing the Plaintiff's MSD. While ultimately I find the violations after 2007, unhelpful to the Plaintiff's case, that is a question of law and will be addressed at that stage of this decision.

Likewise, I will not strike from the record the parts of the declaration of Terence Trotter that refer to events in 2011. (Respondents' Opposition to MSD, p. 24.) Since I am the decision-maker here, regardless of whether the evidence remains in the record or not, I have already been "inflamed" to the degree such evidence was capable, which I assure the parties, is to no degree at all. (*See id.*) As I have already stated, for reasons of law I find that the Plaintiff's case does not rely on or require evidence of events after 2007, but I will not prematurely limit the facts presented.

#### 4) Authentication of Plaintiff's Exhibit 11

Lastly, Respondents claim that the letter that District Director John Glyder sent to Ronald Chan in 2005 has not been properly authenticated and is inadmissible. (Respondents' Opposition to MSD, pp. 24-25.) Respondents also assert that the letter is excludable as hearsay.<sup>3</sup> (*Id.*)

Once more, under the rules of this proceeding, I am not bound by rules of evidence and even under 29 C.F.R. § 18.901(a), authentication can be satisfied by "evidence sufficient to support a finding that the matter in question is what its proponent claims it to be." *See* 29 C.F.R. § 18.104(a). Given the dearth of plausible suggestions for what this letter could be *other* than what the Plaintiff says it is, I think that the declaration of Plaintiff's Counsel is sufficient to justify the letter's consideration as evidence. (*See* Plaintiff's Reply to Opposition to MSD, p. 8.)

Likewise, even if the rules of evidence applied, the letter would not be hearsay as, as the Plaintiff points out, the letter was not offered to prove the truth of the statements it contained, but to show that the Respondents had notice of the FLSA's requirements before the 2007 Investigation. (Plaintiff's Reply to Opposition to MSD, p. 9; 29 C.F.R. § 18.801(c).)

Thus, I do not find that any of the Respondents' many objections to the admissibility of the Plaintiff's evidence have merit. Accordingly, I will consider the record in full, without exclusions.

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<sup>3</sup> I would point out that, if I assumed that the Respondents' Counsel meant what he actually wrote, he immediately undercut this accusation of hearsay by stating that the letter "can be shown to come within the business record exception." (Respondents' Opposition to MSD, p. 24.)

*B) Respondents engaged in interstate commerce and generated revenue of more than \$500,000.00 during all relevant periods*

The Plaintiff has submitted undisputed evidence that at all relevant times, HKE's employees utilized goods and materials produced in interstate commerce. It is similarly clear that HKE during these same periods generated an annual gross volume of business greater than \$500,000.00.

For example, Wage and Hour Investigator Donna Hart testified by declaration that during the First Investigation,<sup>4</sup> HKE employees worked with "parts and engineering supplies from Hong Kong," and that in 1999, HKE did over \$30 million in business. (Hart Declaration, ¶¶ 7-8.) Similarly, the Wage and Hour Investigator during the Second Investigation, Richard Hamilton, declared that in 2007, HKE employees worked with soy sauce and cooking oil imported from China and that HKE did over \$29 million in business in 2005, and over \$31 million in business in 2006. (Hamilton Declaration, ¶¶ 7-8.)

Far from disputing these facts, Respondent Mr. Chan, during his deposition testimony on November 8, 2011, affirmed that HKE brought in goods from outside of the Commonwealth of the Northern Mariana Islands ("CNMI"), including playing cards and "Chinese-style foods." (PX 8, pp. 9-10.) Respondents' answer to Plaintiff's admissions request acknowledged that HKE did more than \$500,000.00 worth of business from 1999-2001, and in 2007. (PX 10, ¶ A.)

*C) Respondents' exercise of control over HKE's employment relationships*

The Plaintiff has submitted undisputed evidence that Respondents HKE and Mr. Kwan both exercised a great deal of control over the nature and structure of the employment relationships HKE had with the workers affected by the alleged FLSA violations. There are, however, genuine disputes about the degree of control over workers' employment that was vested in Respondent Mr. Chan.

1) HKE's control over employment

It is indisputably established that HKE, as a company, employed workers and exerted great control over the structure of those employment relationships. (*See, e.g.*, PX 1 (HKE employs hundreds of workers that it hires, fires, and pays).) HKE was the workers' employer in every sense of the word.

2) Mr. Kwan's control over employment

The Plaintiff has also presented convincing evidence that Mr. Kwan had the final say about almost every feature of the employment relationship HKE had with its workers, evidence which Respondents do not dispute.

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<sup>4</sup> Throughout this decision I will refer to the Wage and Hour Division's investigation of HKE's payroll practices for the period from February 6, 1999, to February 9, 2001, as the "First Investigation." This is to distinguish it from the Wage and Hour Division's investigation that looked at HKE's payroll practices from March 16, 2007, to May 26, 2007, which I will call the "Second Investigation."

Mr. Kwan's responses to Plaintiff's request for admissions freely state that Mr. Kwan "either approved or made all major management decisions," and approved "all hiring decisions," "the terms of employment for non-foreign contract workers," and "all decisions of the company to terminate an employee." (PX 4, pp. 2-4.) Mr. Kwan further admitted that his approval was required to pay any of HKE's bills or payroll to HKE's employees and that he had the authority to direct the work of HKE employees. (*Id.* at 4-5.) In his deposition, Mr. Kwan said that he was the President and Chairman of HKE and gave final approval to many of the key employment decisions at HKE. (PX 3, pp. 14, 18-20.) Despite lower-level managers approving many of these decisions as a preliminary to submission to Mr. Kwan, these decisions are ineffective until Mr. Kwan signs on. (*Id.*)

### 3) Mr. Chan's control over employment

The facts about Mr. Chan's degree of control over HKE's employment decisions are much less clear. While Mr. Chan signed off on many of HKE's decisions, at least some evidence indicates that this was a very weak control, as no action took place without at least one level of higher approval. (*See* PX 3, pp. 18-20.) Too, there is conflicting evidence about whether Mr. Chan set the pay scale for employees. (*Compare* RX M, pp. 131-32 (Mr. Chan set the rate of pay); *with* PX 1, pp. 45, 59 (Mr. Chan only checks that the pay rate listed is consistent with the company pay scale, which he had no role in designing).)

The Plaintiff's evidence asserts that, as HKE's financial controller, Mr. Chan was responsible for managing all of HKE's accounts, including payroll. (PX 1, p. 13.) In HKE's accounting department, Mr. Chan was the primary supervisor of around 30 employees and he sits on HKE's executive committee. (*Id.* at 14, 54.) According to Investigator Hamilton, Mr. Chan was "involved in the daily operations of the business," and had "hired and fired employees," and otherwise directed employee work. (RX H, p. 61.) Mr. Chan was also the primary representative of HKE working with the Wage and Hour Division on the company's alleged FLSA violations. (Hart Declaration, ¶¶ 5, 11; Hamilton Declaration, ¶¶ 11-12.)

However, Respondents have presented evidence minimizing the degree of control Mr. Chan had at HKE. In a declaration filed by Mr. Chan, he testified that, "[n]o payroll or any other payment or disbursement by accounting can be paid without the express authorization of Chairman Kwan," nor could any employee be hired or fired without Mr. Kwan's approval. (Chan Declaration Opposing MSD, ¶¶ 22-23.) In his deposition, Mr. Chan claimed that he had no role in hiring or firing or setting employee pay scales, and could not make withdrawals from HKE's corporate accounts. (PX 1, pp. 15, 26, 45, 62.) He also described HKE's executive committee as only meeting once or twice in eleven years. (*Id.* at 54.) From the Respondents' evidence, it appears that Mr. Chan's role in the operation of HKE was much more circumscribed than the Plaintiff suggests.

I find that there is some evidence that Mr. Chan exerted control over employees of HKE, at least in the accounting department, and some evidence that Mr. Chan could not make decisions affecting employment at HKE without the approval of higher management. Thus, I find that the facts available at this juncture are genuinely open to dispute.

*D) Respondents knew the FLSA's overtime requirements before 2007*

The Plaintiff submitted testimony from the Respondents' depositions that establishes that both Mr. Kwan and Mr. Chan knew HKE's overtime payment obligations under the FLSA long before the Second Investigation. Respondents have made no objections to the substance of this evidence.

For example, during his deposition, Mr. Chan said that he learned about the FLSA when he started his job at HKE and knew that it required timely payment of overtime even before the First Investigation. (PX 1, pp. 80, 95-96 (Mr. Chan admitted he was aware of the FLSA before 2001, could list the basic requirements, and added that "my other understanding is when we need to – when we should pay the employees, we need to pay. This is what I understand about FLSA.")) Mr. Chan also testified that he had explained what the FLSA required to Mr. Kwan after the First Investigation, and explicitly remembered telling Mr. Kwan that wages had to be paid by the end of the next pay period. (*See id.* at 103; PX 8, p. 13.)

For his part, Mr. Kwan stated that he had known the basic principles of the FLSA since 1998, including that workers have to be paid on time, which at HKE meant within two weeks after payday. (PX 3, pp. 33-35, 37 ("In fact, this is only matter of common sense, because everybody in the world knows you have to pay somebody if they have worked for you.")) He was certain that after the First Investigation, someone had explained to him that HKE had to pay within two weeks, no matter what, and that "I'm sure [Wage and Hour] have told us to pay on time," though whether HKE complied with that rule was "another matter." (*Id.* at 40-41.)

I believe, therefore, that it is uncontested that Mr. Chan and Mr. Kwan were both fully aware of HKE's obligation under the FLSA to pay employees their overtime wages on time and had gained that knowledge by the close of the First Investigation, at the latest.

*E) Before 2007, Respondents paid employees overtime wages late<sup>5</sup>*

The Plaintiff has supplied plenty of evidence that during the period of the First Investigation, from 1999-2001, HKE did not pay some employees their overtime wages before the end of the next pay period,<sup>6</sup> i.e. that overtime wages were paid "late." While Respondents denied this, they failed to present any specific facts that would contradict the Plaintiff's evidence and, thus, did not raise a "genuine dispute" about these facts.

The Plaintiff submitted the declaration of Investigator Hart, who testified that she discovered that between February 6, 1999, and February 9, 2001, HKE employees "worked overtime without being compensated for their work on the scheduled payday." (Hart Declaration, ¶ 9.) Transcripts from the depositions of Mr. Chan and Mr. Kwan show that the Respondents

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<sup>5</sup> For the purposes of discussing facts, I define the word "late" as Counsel agreed to use the term during the deposition of Mr. Chan, namely that wages were "late" if they were not paid to employees before the end of the next pay period. (PX 8, pp. 11-12.) The legal implications of the fact of paying late, under this definition, are reserved for the next section of this decision.

<sup>6</sup> The Plaintiff's evidence also proves that HKE's employees' regular pay period was every two weeks. (*See* PX 1, pp. 37, 110; PX 3, pp. 26, 37; Chan Declaration Opposing MSD, ¶ 13.)

also admitted that late payments of overtime occurred during these years.<sup>7</sup> Further, the 2002 Consent Judgment states that Respondents would not “continue to withhold the payment” of \$591,535.02 in “unpaid overtime pay hereby found to be due under the FLSA to 436 [HKE] employees for the period from February 6, 1999, to February 9, 2001.” (PX 7, ¶ 3.)

While Respondents have raised many legal arguments about the implications of the way they paid employees in 1999-2001 which I will address in the next section, the only possible denial of the Plaintiff’s facts I found was in Respondents’ first amended response to Plaintiff’s admissions request. There, HKE and Mr. Chan merely said that they “deny” request number 19, which asked Respondents to admit that HKE “did not pay their employees on time for at least one pay period from February 6, 1999, to February 10, 2001.” (PX 10, ¶ B; *see* PX 9, Request for Admission No. 19.) Respondents provided no explanation for why they denied this, nor did they present any specific facts to show that wages were paid on time during those years. (*See* PX 10, ¶ B.) Based on the bare denial provided, it is even possible that Respondents were not denying any of the facts in request for admission No. 19, but merely disputing the definition of “on time,” or making another legal objection.

The law is clear that “mere allegations or denials,” unsupported by “specific facts showing that there is a genuine issue [of fact] for trial,” are not enough to defeat summary decision. *Liberty Lobby*, 447 U.S. at 249. Thus, I find that the Plaintiff has supplied evidence that in 1999-2001, at least some of HKE’s employees were not paid the overtime wages they were owed within two weeks of their regular payday, and Respondents have not genuinely disputed this.

*F) Respondents paid employees overtime wages late<sup>8</sup> in 2007*

Respondents themselves plainly admit that they paid HKE employees overtime wages late in 2007. (*See* Respondents’ Opposition to MSD, p. 1 (“Respondents do not dispute that the delayed or late wage payments subject to the FLSA during the period March 16, 2007, to May 26, 2007, constitute unpaid wages.”), 31 (admitting that the FLSA’s overtime requirements apply to HKE and that during the Second Investigation, at least \$87,486.56 in unpaid overtime wages accrued).) The Plaintiff has bolstered this admission with additional evidence that Respondents paid wages late in 2007.

For instance, there is the testimony of Investigator Hamilton that his 2007 investigation found that HKE “failed to pay 348 employees \$309,816.21 in regular and overtime pay due under the FLSA.” (Hamilton Declaration, ¶ 10.) Mr. Chan and Mr. Kwan also unequivocally

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<sup>7</sup> (PX 1, pp. 90 (Mr. Chan agreed that Investigator Hart found HKE late in paying wages and that HKE actually was late in paying at that time), 91 (Mr. Chan agreed that HKE paid wages due under the FLSA late), 97 (Mr. Chan confirmed that HKE did not deny that it owed employees the unpaid wages listed in the 2002 Consent Judgment), 106-07 (Mr. Chan agreed that in 2001, 149 HKE employees’ rights under the FLSA were violated in ways other than misclassification, namely late payment of wages); PX 8, pp. 12 (Mr. Chan admitted that HKE paid wages late in 1999-2001), 99 (Mr. Chan agreed HKE was late paying wages in 2001, including overtime wages); PX 3, p. 45 (Mr. Kwan agreed that HKE owed its employees the money listed in the 2002 Consent Judgment: “Yes, I agree. Otherwise I wouldn’t have signed it.”))

<sup>8</sup> Again, “late” is defined as not paid to employees before the end of the next pay period. (*See* PX 8, pp. 11-12.)

admitted that HKE had not paid its employees on time in 2007, owing its employees a large sum in unpaid wages.<sup>9</sup>

While Respondents have asserted that the 2007 Compliance Agreement cannot “be construed as HKE admitting to a certain amount of unpaid FLSA wages,” to the degree that this is a factual rather than legal argument, it is not material. (See Respondents’ Opposition to MSD, p. 31.) This is because even if that one document did not contain facts supporting the Plaintiff’s argument, Plaintiff has other sources of evidence, as already discussed, and the Compliance Agreement definitely is not evidence that contradicts the Plaintiff’s evidence or shows the Respondents paid all wages on time in 2007. (See RX A, pp. 5-6.)

Therefore, I can find no evidence that contradicts the facts put forward by the Plaintiff, facts which show that Respondents paid overtime wages late in 2007.

*G) In 2007, Respondents paid employees late because HKE was short on funds*

The final set of facts that the Plaintiffs have submitted undisputed evidence about deals with the reason Respondents paid HKE’s employees their overtime wages late. From the evidence before me, it seems plain that Respondents did not pay on time because they believed HKE did not have cash on hand sufficient to pay the wages when due.

The evidence for this comes from the statements of Mr. Chan and Mr. Kwan, including those made to Investigator Hamilton during the Second Investigation and during their depositions. Investigator Hamilton’s report included a note that “Mr. Chan said that business was slow and this had created a cash flow problem for the firm,” that led to payments to workers being delayed. (RX H, p. 63.) During his deposition on November 7, 2011, Mr. Chan agreed that HKE had not paid employees on time during the First Investigation because the casino did not have enough cash on hand to do so. (PX 1, p. 94.) Mr. Chan said that the nature of the casino business made revenue hard to predict, that “[w]e don’t know when we will have no money. It’s very hard to tell. We can have no money today, but tomorrow we will have the money,” because if “we don’t win today, maybe we can win tomorrow.” (*Id.* at 93-94.) Relying on this same belief, Mr. Kwan claimed that when HKE had the money, it certainly paid employees on time, but that there was “nothing we could do,” when they were low on funds. (PX 3, p. 41.) Asked why HKE did not pay its employees on time in 2007, Mr. Kwan was firm that the reason was, “[b]ecause we really have no money.” (*Id.* at 56.)

The Plaintiff pressed Respondents on these facts, establishing that though Respondents believed they could not afford to pay the entire payroll owed each payday, the structuring of repayment under the 2007 Compliance Agreement was compatible with the casino’s uncertain income. (PX 1, p. 99.) I have no evidence before me that the Respondents had a different reason for not paying their employees on time.

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<sup>9</sup> See PX 8, pp. 19 (Mr. Chan agreed HKE was late on payroll in 2007), 22-23 (Mr. Chan said that he signed the 2007 Compliance Agreement because HKE owed its employees their salaries), 26 (Mr. Chan confirmed that all of the payrolls between March 16 and May 26, 2007, were paid late), 91 (Mr. Chan agreed that the amount listed in the 2007 Compliance Agreement was “the amount that we pay the employees late”); PX 3, p. 48 (Mr. Kwan agreed that HKE was not paying its employees on time in 2007).

## II) Judgments as a Matter of Law

Under the second requirement for summary decision, the burden is on the Plaintiff to show that the undisputed facts established above, support judgment in the Plaintiff's favor as a matter of law. 29 C.F.R. §§ 18.40-18.41; Fed. R. Civ. P. 56(c).

### *A) Respondents' are covered by the FLSA*

For an entity to be subject to the FLSA's overtime provisions, its employees must be "engaged in commerce or in the production of goods for commerce, or employed in an enterprise engaged in commerce." 29 U.S.C. § 207(a)(1). An "enterprise" under the FLSA, is, "related activities performed (either through unified operation or common control) by any person or persons for a common business purpose." 29 U.S.C. § 203(r). The "commerce" the FLSA regulates is interstate commerce, where goods move across state boundaries, such as the one between CNMI and countries outside of the United States. *See* 29 U.S.C. § 203(b); *Donovan v. Scoles*, 652 F.2d 16 (9<sup>th</sup> Cir. 1981). Lastly, an "enterprise engaged in commerce," must have "employees engaged in commerce or in production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person," and the enterprise also needs to have a gross annual volume of sales of \$500,000.00 or more. 29 U.S.C. § 203(s)(1)(A).

Based on the undisputed facts here, under Section 203, HKE is an enterprise engaged in commerce. 29 U.S.C. § 203(s)(1)(A). HKE is a company that runs a casino and hotel, under the management of Mr. Kwan, for business purposes. (*See* PX 4, pp. 2-5; PX 3, pp. 14, 18-20.) HKE, at all times relevant to this case, had many employees working with goods produced outside of CNMI, i.e. that had moved in interstate commerce, and generated sales of more than \$500,000.00. (*See* Hart Declaration, ¶¶ 7-8; Hamilton Declaration, ¶¶ 7-8; PX 8, pp. 9-10; PX 10, ¶ A.) Thus, as a matter of law under 29 U.S.C. §§ 203(r)-(s)(1)(A), HKE is covered by the FLSA's overtime requirements.

### *B) Respondents' qualification as employers under the FLSA*

To be personally liable for civil money penalties, each Respondent must qualify as an "employer" under the FLSA, which is defined very broadly as "any person acting directly or indirectly in the interests of an employer in relation to an employee." 29 C.F.R. § 578.3; 29 U.S.C. § 203(d). This definition is given an "expansive interpretation in order to effectuate the FLSA's broad remedial purposes." *Lambert v. Ackerley*, 180 F.3d 997, 1011-12 (9<sup>th</sup> Cir. 1999).

In particular, when analyzing whether a respondent qualifies as an employer, the law looks at whether an individual exercises "control over the nature and structure of the employment relationship" or "economic control" over the employee. *Lambert*, 180 F.3d at 1012. This includes consideration of whether the individual: 1) could hire and fire employees; 2) supervised and controlled employees and their conditions of employment; 3) determined the rate and method of payment; and 4) maintained employment records; among other markers of economic control. *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465, 1470 (9<sup>th</sup> Cir. 1983).

1) HKE is an employer under the FLSA

Under every possible definition, HKE is an employer under the FLSA. The evidence is undisputed that HKE employed hundreds of workers which it hires, pays, and fires. (*See, e.g.*, PX 1.) There is no dispute that HKE is an employer here, rather the question is if particular executives of the company also qualify as employers who could be held individually liable.

2) Mr. Kwan is an employer under the FLSA

It is not controversial that I find that Mr. Kwan is an employer who is personally liable under the FLSA. The Respondents make it clear on the first page of their response to MSD that they do not dispute Mr. Kwan's personal liability as an employer.

The undisputed facts put forward earlier make this legal conclusion plain. Mr. Kwan is vested with the final say in the hiring, firing, and payment of every employee of HKE. (PX 4, pp. 2-5; PX 3, pp. 14, 18-20.) It is only with his approval that HKE can perform most major employment actions. (*Id.*) As a matter of law, Mr. Kwan exercises economic control over HKE's employees and qualifies as an employer under the FLSA. *See* 29 U.S.C. § 203(d); *Lambert*, 180 F.3d at 1011-12; *Bonnette*, 704 F.2d at 1470.

3) Mr. Chan has not been shown, as a matter of law, to be an employer under the FLSA

Mr. Chan is a manager at HKE who has a substantial role in running the business. But because Mr. Chan's degree of control over HKE's employees is disputed, and there is evidence pointing in both directions, I find that I cannot decide his status as an employer under the FLSA, as a matter of law, at this time.

For instance, despite Investigator Hamilton reporting that Mr. Chan "hired and fired employees," Respondents assert that, while Mr. Chan was one of many lower level manager to sign off on these decisions, no one could enter or leave HKE's employment without the approval of Mr. Kwan. (*Compare* RX H, p. 61; *with* Chan Declaration Opposing MSD, ¶ 23.) Likewise, though the Plaintiff claimed Mr. Chan set payroll for new employees, Mr. Chan himself described his involvement as merely checking the wage against the company's defined standards, a routine task requiring little or no discretion, rather than the exercise of executive power. (*See* PX 1, p. 59.) At least two elements out of four listed for consideration in *Bonnette*, therefore, are unsettled. 704 F.2d at 1470.

Further, unlike in other cases, I have no real evidence about any possible ownership stake Mr. Chan may have in HKE.<sup>10</sup> *See Donovan v. Agnew*, 712 F.2d 1509 (1<sup>st</sup> Cir. 1983). While the Plaintiff is correct that the term "employer" should be interpreted very broadly to effectuate the FLSA's remedial purpose, on the other hand, care should be taken not to sanction managers who did not cause and had no real power to prevent the violations that form the basis for the penalty.

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<sup>10</sup> Respondents say that as a foreign contract worker it would be illegal for Mr. Chan to have an ownership interest in HKE itself, but refused to answer questions about the ownership of Tinian Dynasty Holding Company Ltd., the opaque entity which totally owns HKE. (*See* PX 1, pp.64-72; PX 3, p. 6.) If Mr. Chan were to have a significant ownership stake in the company that controls HKE, that could arguably be grounds for finding he had an increased degree of "economic control" over HKE's decisions about when to pay employees. *See Agnew*, 712 F.2d 1509.

See *Lambert*, 180 F.3d at 1011-12; cf. *Agnew*, 712 F.2d 1509; *Baystate Alt Staffing v. Herman*, 163F.3d 668 (1<sup>st</sup> Cir. 1988) (not every manager is open to personal liability, degree of control over violations matters).

For these reasons then, I find that, at this time, no summary decision can be reached about Mr. Chan's personal liability as an "employer" under the FLSA.

C) *Respondents violated the FLSA by paying overtime wages late*

Though the FLSA does not explicitly include a time when wages, including overtime, must be paid to employees, both binding legal precedent and published agency opinion prove that timely payment is inherently part of the FLSA's structure.

Only a few years after the passage of the FLSA, the question of time for payment was raised and found an implicit part of the Act by the Supreme Court. *Brooklyn Savings v. O'Neil*, 324 U.S. 697 (1945); see *Calderon v. Witvoet*, 999 F.2d 1101, 1108 (7<sup>th</sup> Cir. 1993) (the FLSA requires the employer to pay on time); *United States v. Klinghoffer Bros. Realty Corp.*, 285 F.2d 487 (2<sup>nd</sup> Cir. 1961) ("[w]hile the FLSA does not expressly set forth a requirement of prompt payment, such a requirement is clearly established by the authorities"); *U.S. Department of Labor v. Micro-Chart, Inc.*, ARB Case No. 98-080, 1998-FLS-12 (ARB, Nov. 4, 1998) (FLSA "requires payment on the employees' regular payday as established by agreement or past practice of the parties"). The reasoning behind this was fleshed out by the Ninth Circuit case, *Biggs v. Wilson*, which held that, "under the FLSA wages are 'unpaid' unless they are paid on the employees' regular payday." 1 F.3d 1537 (9<sup>th</sup> Cir. 1993). Because the FLSA allowed workers to sue for unpaid overtime and had a statute of limitations for pursuing claims, the Ninth Circuit found that "necessarily assume[s] that wages are due at some point, and therefore become unpaid." *Id.* "The only logical point that wages become 'unpaid' is when they are not paid at the time the work has been done ... and wages are ordinarily paid – on payday," or the statute of limitations would become a moving target. *Id.*

This reading of the FLSA was also codified by the Department of Labor as 29 C.F.R. § 778.106, which stated that while the act did not require payment of overtime weekly, as a general rule overtime must be paid on the regular payday for that pay period. See also Wage and Hour Administrative Opinion (Jan. 27, 1969). The Department of Labor issued an interpretive bulletin stating that under some circumstances an employer is unable to calculate how much overtime was worked by the regular payday, but that "in no event may payment be delayed beyond the next payday after such computation can be made." 29 C.F.R. § 778.106. Though interpretative bulletins such as this, "are not issued as regulations under statutory authority, they do carry persuasiveness as an expression of the view of those experienced in the administration of the Act and acting with the advice of a staff specializing in its interpretation and application." *Overnight Motor Co. v. Missel*, 316 U.S. 572, 580-81 n.17 (1941); 29 C.F.R. § 778.1; see also *Chevron v. NRDC*, 467 U.S. 837, 842-44 (1984) (deference owed to agency opinions on questions not directly addressed by Congress).

Even with the favorable inference that HKE was unable to calculate overtime wages by the regular payday, delay in payment beyond the two-week pay period that followed<sup>11</sup> violated Section 7 of the FLSA, 29 C.F.R. § 778.106. As discussed in the fact section, in both 1999-2001, and 2007, Respondents paid some employees their overtime wages far more than two weeks after their regular payday. (See Respondents' Opposition to MSD, pp. 1, 31; PX 8, pp. 12, 99.) From the undisputed evidence then, the Plaintiff has proved that the Respondents violated Section 7 during both the First and Second Investigations.

*D) The Respondents' overtime violations in 2007 were repeat and willful*

The next set of issues to consider is whether the Plaintiff has proved that, as a matter of law, the Respondents' violations of Section 7 in 2007 were both repeat and willful.

1) The Respondents' overtime violations in 2007 were repeat violations

Under 29 C.F.R. § 578.3(b)(1), a violation of Section 7 is a "repeat violation" when the employer previously violated Section 7 of the FLSA and "received notice, through a responsible official of the Wage and Hour Division or otherwise authoritatively, that the employer allegedly was in violation of the provisions of the Act." Here, there is no question that from 1999-2001, the Respondents violated Section 7 and were informed of that violation by Wage and Hour officials, including Investigator Hart.<sup>12</sup> Therefore, I find that the Respondents' 2007 violations of Section 7 were "repeat" violations as a matter of law. 29 C.F.R. § 578.3(b)(1).

The Respondents raised four primary legal arguments challenging the results and resolution of First Investigation, one of which I have already discussed and dismissed in my order denying Respondents' motion for partial summary decision on April 16, 2012.<sup>13</sup> The remaining three are 1) that using the 1999-2001 violations as the predicate for "repeat," would violate the 2002 Consent Judgment in that case; 2) that the 2002 Consent Judgment only covered violations of Section 15 of the FLSA, not Section 7, so there was no previous Section 7 violation; and 3) that the Plaintiff made some sort of binding "judicial admission" that the 1999-2001 violations could not be proved.<sup>14</sup> (Respondents' Opposition to MSD, pp. 15-18; PX 5, p. 13.) Each of these arguments is without merit and I will dispose of each in turn.

First, use of the violations discovered in the First Investigation to show that the 2007 violations were "repeat," is not in any way "contrary to" the 2002 Consent Judgment. (See

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<sup>11</sup> Again, the Plaintiff's evidence establishes that HKE's employees' regular pay period was every two weeks. (See PX 1, pp. 37, 110; PX 3, pp. 26, 37; Chan Declaration Opposing MSD, ¶ 13.)

<sup>12</sup> (Hart Declaration, ¶ 9; PX 1, pp. 90 (Mr. Chan agreed that Ms. Hart found HKE late in paying wages and that HKE actually was late in paying at that time), 91 (Mr. Chan agreed that HKE paid wages due under the FLSA late); PX 8, pp. 12 (Mr. Chan admitted that HKE paid wages late between 1999 and 2001), 99 (Mr. Chan agreed HKE was late paying wages in 2001, including overtime wages); PX 3, p. 45 (Mr. Kwan agreed that HKE owed its employees the money listed in the 2001 Consent Judgment: "Yes, I agree. Otherwise I wouldn't have signed it."))

<sup>13</sup> As I explained in my previous order, Respondents' argument that the statute of limitations precludes use of the 1999-2001 violations to show that Respondents' 2007 violations were "repeat," is without merit and appears to be based on a critical misunderstanding of the purpose of statutes of limitation. See Order Denying Respondents' Motion for Partial Summary Decision (April 16, 2012). I will pass on to the Respondents' other objections.

<sup>14</sup> Respondents' arguments in Section II(B) of their opposition to MSD were very difficult to understand. This is a restatement of what I interpret to be their arguments.

Respondents' Opposition to MSD, pp. 17-18.) No one has claimed – nor reasonably could claim – that the 2002 Consent Judgment holds that the Respondent *did not* violate Section 7 of the FLSA. The Consent Judgment just arguably did not include an explicit admission that the Respondent *did* violate Section 7.<sup>15</sup> Proving that the Respondents violated overtime laws from 1999-2001, then does not contradict the Consent Judgment. At most, it establishes something the Consent Judgment did not address and which is entirely consistent with what the Consent Judgment did say. The Respondents' argument that there is a conflict is based on highly flawed logic and unworthy of further consideration.

In a second argument, HKE and Mr. Chan said that “[t]he 2002 consent judgment did not concern and was not based on violations of Sections 6 or 7 of the [FLSA],” and so there was no previous violation of Section 7 that would make the 2007 violations “repeat.” (PX 5, p. 13 (response to Plaintiff’s interrogatories).) Instead, Respondents insisted that the 2002 Consent Judgment only dealt with a violation of Section 15 of the FLSA. (*Id.*) Looking at the language of the Consent Judgment, however, this is clearly untrue, as in paragraph 1 the parties agree that HKE would not violate the overtime payment requirements of Section 7. (PX 7, p. 2.) Moreover, the relevant parts of Section 15 make it illegal to violate Section 7, meaning that when the Consent Judgment enjoined Respondents from violating Section 15(a)(2), overtime violations of Section 7 were necessarily the issue at stake. (*Id.*) Again, Respondents’ argument is meritless.

The third argument the Respondents make is the truly mystifying one for me. (*See* Respondents’ Opposition to MSD, pp. 7, 15.) The idea seems to be that because the Plaintiff sought to compel certain discovery about the First Investigation and petitioned me for reconsideration when I did not grant that motion, the Plaintiff’s arguments for seeking that evidence constitute a “judicial admission” that the Plaintiff “cannot prove a repeat violation.”<sup>16</sup> (*Id.* at 15.) Further, Respondents posit that this admission is so conclusive that it “cannot be overcome at the summary judgment stage by contradictory affidavit testimony or other evidence in the summary judgment record.” (*Id.* at 7.)

I find that proposition abhorrent to the interests of justice in this case. I originally denied the Plaintiff’s request for discovery of payroll records and other evidence from the First Investigation because I thought it unfair to give the Plaintiff “two bites at the apple,” particularly when doing so would put a considerable burden on the Respondents to gather old records. The Plaintiff’s statement that it did not have evidence to prove the 1999-2001 violations was perhaps true at the time the additional discovery was sought, but it was never intended to mean – nor would any reasonable person ever understand it to mean – that the Plaintiff could *never* prove the 1999-2001 violations. Once the Respondents testified at their depositions that they violated the FLSA from 1999-2001, any idea that the Plaintiff would even have difficulty proving the earlier violations went out the window: proof was in the Plaintiff’s hands despite my denial of the

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<sup>15</sup> Arguably though, through the language in paragraph 3, the Respondents did admit violating the FLSA’s overtime provisions. (*See* PX 7, ¶ 3 (Respondents would not “continue to withhold the payment” of \$591,535.02 in “unpaid overtime pay hereby found to be due under the FLSA to 436 [HKE] employees for the period from February 6, 1999 to February 9, 2001.”))

<sup>16</sup> At least, I assume that is what the Respondents were arguing, as the alternative interpretation is that “the Plaintiff needs evidence to prove the violations during the First Investigation,” which is so obvious as to be unnecessary to state, let alone compose a page of very involved argument about, including numerous citations to the evidence and to unreported cases.

requested discovery. I can see no legal basis for preventing the Plaintiff from using that evidence just because at some previous point the Plaintiff did not know that evidence would come into its possession.

Therefore, based on the factually undisputed evidence submitted by the Plaintiff that shows the Respondents violated FLSA Section 7 from 1999-2001, I find that the Respondents' violations of Section 7 in 2007, were "repeat" violations as a matter of law. 29 C.F.R. § 578.3(b)(1).

2) The Respondents' overtime violations in 2007, were willful violations

Under 29 C.F.R. § 578.3(c)(1), a violation of Section 7 is a "willful violation" when the employer "knew that its conduct was prohibited by the Act or showed reckless disregard for the requirements of the act." In addition, "an employer's conduct shall be deemed knowing ... if the employer received advice from a responsible official of the Wage and Hour Division to the effect that the conduct in question is not lawful." 29 C.F.R. § 578.3(c)(2).

Here, the Plaintiffs have submitted conclusive and, so far undisputed, evidence that the Respondents learned, before 2007, that not paying overtime by the end of the next pay period violated the FLSA.<sup>17</sup> In fact, both Mr. Chan and Mr. Kwan testified that they knew about the FLSA's requirements before even the First Investigation. (*See, e.g.*, PX 1, p. 80; PX 3, pp. 33-35.) Investigator Hamilton's notes also support this finding, as he recorded that "Mr. Chan ... stated that whenever [a worker] really needed money for something such as a bill etc. that the firm would give them the money, however, he knew this was still in compliance [sic]." (RX H, p. 63.) I find that all of this evidence establishes that the Respondents' 2007 violations were "willful" as a matter of law. 29 C.F.R. § 578.3(c)(1).

Respondents protest that, "[a] willfulness determination requires an assessment of a party's state of mind, which is a factual issue not readily susceptible to summary judgment." (Respondents' Opposition to MSD, p. 39.) While possibly true generally, when there is actual testimony from the Respondents admitting their knowing, and willful, state of mind, that factual issue is determined pretty easily. *See* 29 C.F.R. § 578.3(c)(1). Respondents' arguments ignore the deposition evidence. (*See* Respondents' Opposition to MSD, p. 40.)

I find the Respondents' argument that the 2005 letter from the Wage and Hour Division did not reach either of the named Respondents and so is not evidence of their willfulness under 29 C.F.R. § 578.3(c)(2), does have some merit, particularly since, for summary decision, all inferences are made in the non-moving party's favor. (*See* Respondents' Opposition to MSD, pp. 40-41.) That letter was sent to Ronald Chan, who is not a party in this case, and there is undisputed testimony that neither of the individual Respondents had knowledge of that particular letter. (PX 1, p. 109 (Mr. Raymond Chan was unaware of the letter's existence until his deposition); PX 3, p. 59 (Mr. Kwan did not remember anyone at HKE getting such a letter in 2005).) Thus, in finding that the Respondents' violations were "willful," I have not considered the additional evidence of the 2005 letter from the Wage and Hour Division. Even without it, however, there is plainly more than enough evidence to prove that in 2007, the Respondents

<sup>17</sup> *See, e.g.*, PX 1, pp. 80, 95-96, 103; PX 8, p. 13; PX 3, pp. 33-35, 37, 40-41 (all discussed above in the facts section).

acted with full knowledge that their actions violated the FLSA's overtime provisions. (*See, e.g.*, PX 1, pp. 80, 95-96, 103; PX 8, p. 13; PX 3, pp. 33-35, 37, 40-41.)

For all of the reasons above, I find that the Respondents' FLSA overtime violations in 2007, were both repeat and willful under 29 C.F.R. § 578.3.

*E) The civil money penalty assessed by the Administrator was appropriate*

The Plaintiff must show that the civil money penalty assessed against the Respondents was appropriate and complied with 29 C.F.R. §§ 578.3-578.4. To win a summary decision on this point, the Plaintiff must show "an absence of evidence to support" the Respondents' contention that the CMP amount was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706; *Celotex*, 477 U.S. at 325.

1) Mandatory considerations under 29 C.F.R. § 578.4(a)

To determine the amount of the civil money penalty for willful or repeat violations of Section 7 of the FLSA, the Administrator is required to consider: 1) the seriousness of the violations; and 2) the size of the employer's business. 29 C.F.R. § 578.4(a).

Here, the Administrator did just that. As laid out in the Plaintiff's response to the Respondents' interrogatories, the Administrator examined the facts and concluded, as I have, that the 2007 overtime violations were both "repeat" and "willful." (RX L, p. 102.) This meant that the Respondents had "committed the most serious type of FLSA violation in 2007 – repeat *and* willful." (Trotter Declaration, ¶ 8 (emphasis in original).) Turning to the second consideration, the size of the Respondents' business, the Administrator found that HKE was "the largest private employer on the island of Tinian, and one of the larger employers in the Commonwealth of the Northern Mariana Islands," which also weighed in favor of CMPs. (*Id.* at ¶ 7; RX L, p. 103; *see also* PX 1, pp. 14-15 (HKE had around 500 employees and had previously had more than 700).)

I have already discussed all evidence and arguments about the seriousness of the Respondents' violations and have found them "repeat" and "willful." I can find no assertion of facts or any legal argument disputing the Administrator's assessment of the size of HKE's business. Therefore, I find the Administrator's consideration of the mandatory factors under 29 C.F.R. § 578.4(a) was correct.

2) Discretionary considerations under 29 C.F.R. § 578.4(b)

Next, under 29 C.F.R. § 578.4(b), "[w]here appropriate, the Administrator may also consider other relevant factors in assessing the penalty, including but not limited to;" 1) good faith efforts to comply, 2) the employer's explanation for the violations, 3) previous history of violations, 4) the employer's commitment to future compliance, 5) the interval between violations, 6) the number of employees affected, and 7) whether there is any pattern to the violations. 29 C.F.R. § 578.4(b)(1)-(7). I will consider the Administrator's weighing of the listed considerations first, before looking at if any other factors were "relevant" to the CMP decision.

Again, in the Plaintiff's response to Respondents' interrogatories, the Administrator's assessment of these discretionary factors is explained. (RX L, pp. 103-04.) In the Administrator's

opinion, it was “not apparent” that HKE made good faith efforts to comply with the FLSA’s overtime provisions, since HKE’s responsibilities were spelled out for them during the First Investigation, in the 2002 Consent Judgment, but were not carried out. (*Id.* at 103; 29 C.F.R. § 578.4(b)(1).) Likewise, the Respondents’ explanation that they had paid workers late because business was slow, weighed in favor of CMPs, as it did not indicate any confusion about the law: the violations were not “an honest mistake,” but rather a conscious decision to let employees work when Respondents knew there was a substantial chance the workers could not be paid in compliance with the law. (RX L, p. 103; 29 C.F.R. § 578.4(b)(2).) The third factor looks at previous violations, “including whether the employer is subject to injunction against violations of the Act,” which the Respondents here were by virtue of the 2002 Consent Judgment. (PX 7, p. 2; 29 C.F.R. § 578.4(b)(3).) Next, the Administrator gave the Respondents credit for their “commitment to future compliance,” because they signed the 2007 Compliance Agreement, though this was discounted some since Respondents had broken the commitments they made in the 2002 Consent Judgment. (RX L, p. 103; 29 C.F.R. § 578.4(b)(4).) The Administrator did find that the six year interval between the Respondents’ violations was “sizeable,” mitigating the CMP assessment. (RX L, pp. 103-04; Trotter Declaration, ¶ 13; 29 C.F.R. § 578.4(b)(5).) However, a large number of employees – 348 – were affected by the violations. (RX L, p. 104; 29 C.F.R. § 578.4(b)(6).) Lastly, the Administrator felt that the similarity between the violations from 1999-2001, and in 2007, created a “pattern of failing to pay wages when they were due.” (RX L, p. 104; 29 C.F.R. § 578.4(b)(7).)

Based on these findings, District Director Terence Trotter determined that only half of the possible \$1,100.00 civil money penalty per violation should be assessed against the Respondents. (Trotter Declaration, ¶ 16; 29 C.F.R. § 578.3(a).) This determination granted the Respondents considerable mitigation of the penalty because of the six years that had passed between violations and because the Respondents had signed the 2007 Compliance Agreement. (*See* RX L, pp. 103-04.) By multiplying the \$550.00 CMP by the 348 violations, the Administrator assessed a total CMP of \$191,400.00 against the Respondents. (Trotter Declaration, ¶ 16.)

While Respondents allege that the discretionary factors under 29 C.F.R. § 578.4(b) were considered “for the purposes of escalating the CMP assessment,” I find that is an unreasonable inference. (Respondents’ Opposition to MSD, p. 28.) Looking at the Administrator’s explanation, the mandatory factors in this case supported an assessment of the maximum \$1,100.00 per violation CMP. (*See* RX L, p. 103 (most serious type of violation and relatively large employer).) But, as discussed, it looks like the reasonably long interval between violations and the Respondents’ signing of the 2007 Compliance Agreement were used to reduce the CMP, making consideration of discretionary factors a benefit to the Respondents rather than a penalty. (*See id.*)

Respondents had many objections to the CMP assessment, however. Looking at the listed discretionary factors in 29 C.F.R. § 578.4(b), Respondents believed that their inability to pay on time should have mitigated the CMP, alleging that the Administrator evaluated Respondents’ reason for nonpayment under the wrong legal standard: “a bona fide dispute of doubtful legal certainty.” (Respondents’ Opposition to MSD, pp. 36-38.) The Respondents claim that is the standard for liability under the Act, but not for assessing mitigation of CMP. (*Id.*) Instead, Respondents assert that “inability to pay a CMP is recognized as a mitigating factor” and “must be considered by the trier of fact to determine if that warrants a reduction in the CMP.” (*Id.*)

I will give Respondents' Counsel a sizeable benefit of the doubt and will assume that this argument was made based on deeply flawed legal research rather than a deliberate attempt to mislead the court.<sup>18</sup> This argument was based on only three unreported cases, all of which dealt with regulations other than Section 7 of the FLSA, a fact which Respondents either failed to notice or neglected to mention. See *Secretary of Labor v. Parris*, ARB Case No. 96-154 1997, WL 144082 (DOL Adm.Rev.Bd) (child labor case, evaluated under 29 C.F.R. § 579.5, not 29 C.F.R. § 578.4); *U.S. Department of Labor v. K & P Janitorial*, BSCA No. SCA-1258 (L.B.S.C.A.), 1988 WL 524408 (case under the Service Contract Act, not the FLSA); *In the Matter of Summit Investigative Service*, 1996 WL 678770 (DOL Adm.Rev.Bd 1996) (again, not even an FLSA case). It is possible that Respondents' argument has some merit under these other laws, but Respondents have provided no legal argument – nor can I imagine one – that would make the provisions of these unrelated regulations outweigh the express language of the regulation at issue, which says that in looking at the employer's explanation for the violation, the Administrator should consider “whether the violations were the result of a bona fide dispute of doubtful legal certainty.” 29 C.F.R. § 578.4(b)(2).

Further, I agree with the Plaintiff that not having enough money on hand to pay employees<sup>19</sup> does not excuse violating the law. (Plaintiff's Reply to Opposition to MSD, p 22; see also *Donovan v. Kasycki*, 599 F. Supp. 860, 870 (S.D.N.Y. 1984) (“Defendants have cited no authority, and the Court has found none, that says an employer is relieved of the mandates of the FLSA simply because that employer has insufficient funds to meet those requirements.”)) While Respondents said that not having enough cash meant that there was “nothing they could do,” this is patently untrue, as they chose to violate Section 7 of the FLSA rather than, for instance, decrease the workforce to a size HKE could afford. (PX 3, p. 41.) If a venture is not profitable within the bounds of the law, that is a reason to either change or close the business, not to ignore statutory responsibilities and expect the government to let those violations slide. Therefore, I can see no flaw in how the Administrator weighed the listed discretionary considerations in reaching the CMP amount here.

The Respondents go on to argue that the Administrator should have considered additional factors in determining the CMP, claiming that HKE's location and the dollar amount of unpaid overtime should have provided mitigation. (Respondents' Opposition to MSD, pp. 28-34, 36-38.)

I will dispose of the “location as mitigation” argument first, a quick task, as almost no argument was actually made. Respondents flatly asserted that the company's “location should substantiate mitigating the CMP” and that its location, combined with inability to pay, “justify mitigating the CMP levy in this case.” (Respondents' Opposition to MSD, p. 38.) No legal citation is given to support this idea, nor is any logical reason laid out for how the collection of geographic factoids provided about CNMI,<sup>20</sup> create an argument that the Respondents' violations deserve less punishment. (*Id.*) In fact, the only relevant conclusion I can draw from HKE's remote location is that it makes Respondents' violations all the more serious, as it appears that

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<sup>18</sup> I would ask Counsel to consider seriously the potential repercussions that could ensue were he to make such disingenuous arguments before a court with the ability to impose sanctions.

<sup>19</sup> Which for the purposes of summary decision, I assume the Respondents were truly unable to do, though I might point out that when caught, the Respondents were able to obtain more funds from their investors to cover these expenses. (See RX H, p. 63.)

<sup>20</sup> Which oddly enough are all cited to legal cases rather than to say, an accepted authority on geography.

when employees were not paid, they could not easily leave the island or seek employment elsewhere.<sup>21</sup> That would decidedly not weigh in favor of mitigation of the CMP.

The Respondents' argument that the amount of unpaid overtime should mitigate the CMP has two parts: 1) that the Administrator should have considered that factor at all and 2) that the amount owed was much smaller than the \$309,816.21 listed in the 2007 Compliance Agreement. (Respondents' Opposition to MSD, pp. 28-34.)

The overarching problem with all of the Respondents' "additional factor" arguments is that while the Administrator "may consider other relevant factors," "[w]here appropriate," the statute does not require doing so. 29 C.F.R. § 578.4(b). Rather, that decision is left to the Administrator's discretion. *See id.* Consideration of the listed discretionary factors does not force the Administrator to "open the door" to any and every unlisted additional consideration the Respondents might want weighed.<sup>22</sup> The statute does not empower the Respondents to assess their own CMP, nor am I empowered to make my own determination about the appropriate amount. Rather, as the trier of fact, my place is to evaluate only whether the Plaintiff has shown that there is "an absence of evidence" that the Administrator's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706; *Celotex*, 477 U.S. at 325; *Baystate*, 163 F.3d at 680 ("Where the APA obtains, as here, a court may set aside an administrative action only if that action is arbitrary, capricious, or otherwise contrary to law."). Respondents have the burden, therefore, not of convincing me that I should consider these additional facts, but that the Administrator not doing so violated either the statute or the APA's standard of review for administrative decisions. *See id.* Based on the law and facts before me, I see no such evidence, so I find that the Administrator's assessment was a valid exercise of his discretion under the statute.

Not only is there no support for a general proposition that the Administrator must consider additional factors suggested by Respondents, Respondents also have no authority that says that the amount of unpaid overtime was appropriate to consider. (*See* Respondents' Opposition to MSD, pp. 28-34, 36-38.) While the Court in *Reich v. Baystate*, did mention that the violations there "caused underpayment of wages almost equal to the proposed penalty," in context it appears that this was merely another way of saying that these ongoing violations affected a large number of workers, an invocation of listed factors to consider under 29 C.F.R. § 578.4, not the addition of a new factor. *See* 1996 WL 737281 at \*6 (DOL Adm.Rev.Bd). Additionally, the purpose of the CMP is to penalize the employer, above and beyond paying the workers the amounts they are owed. *See* 29 C.F.R. § 578. Thus, it is not obvious to me that the amount of the penalty should be linked to the amount owed, as the intent of the penalty is to discourage any violation of Section 2 of the FLSA, not just violations involving large sums. *See*

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<sup>21</sup> I resist actually considering this possibility, as I am only evaluating the Administrator's determination, not making my own. I point this out only as an illustration of how unhelpful this argument is to the Respondents' case.

<sup>22</sup> Respondents made no citation to any case that would require this and logically, doing so would create wildly inconsistent CMP assessments, which would be contrary to the purpose of the statute and to the character of administrative determinations under the APA.

*id.*<sup>23</sup> After all, delay in payment of even a couple of hundred dollars may leave a worker unable to pay their rent or to afford groceries.

Even if the Administrator had considered the amount of unpaid overtime in assessing CMP, \$309,816.21 is not an amount that encourages leniency and the Respondents' legal arguments that they owed less than that under Section 7 fail.

The Respondents make a lengthy argument that the actual amount of overtime HKE owed workers was only \$87,486.56, because the rest of the \$309,816.21 was delayed regular wages, no FLSA minimum wage applies in CNMI, and so 29 C.F.R. § 778.315 cannot require payment of regular wages in order to comply with overtime. (Respondents' Opposition to MSD, pp. 28-34, 36-38.) It is of course not disputed that Section 6's minimum FLSA wage did not apply to workers in the CNMI at the time of these violations. (*See* RX H, p. 62; Plaintiff's Reply to Opposition to MSD, pp. 18-19; RX L, p. 115.). However, 29 C.F.R. § 778.315 makes no reference to and does not rely on minimum wage requirements in any way. Rather, it establishes that overtime payments are not considered "paid," unless the amount owed to the employee in "straight time compensation" for the regular, non-overtime hours worked, has been paid according to the worker's contract.<sup>24</sup> 29 C.F.R. § 778.315. Thus, the Respondents could not have avoided the violations in 2007, by paying the workers just the \$87,486.56 owed in overtime, as 29 C.F.R. § 778.315 means that overtime requirements can only be satisfied once regular wage obligations are met.<sup>25</sup> Because of Section 778.315, compliance with the FLSA's overtime provisions required payment of the full \$309,816.21, even though that majority of that amount was not originally overtime wages.

The Respondents further attempt to decrease the amount owed by arguing that some of the wages listed in the 2007 Compliance Agreement had already been paid by the time that agreement was signed. (Respondents' Opposition to MSD, pp. 33-34; Chan Declaration Opposing MSD, ¶ 34.) However, the "lateness" of overtime wages is not defined by whether they are paid before the Wage and Hour Division investigates, but by whether they were paid by two weeks after the regular payday. 29 C.F.R. § 778.106; *Micro-Chart*, ARB Case No. 98-080, 1998-FLS-12 ("Nothing in either the statutory provision or the regulations indicates that a CMP may not be assessed where an employer has paid the back wages after a Wage and Hour investigation has begun."). Belated payment of the wages owed does not erase the fact that they were still paid late and that late payment violates the statute. *Id.* at 4 ("an employer may be able to minimize, but cannot erase, a minimum wage or overtime CMP by belatedly paying the wages due," as that would make enforcement toothless). Even Respondent Mr. Chan admitted that \$309,816.21 was the amount that was paid late here. (PX 8, p. 91.) Respondents cannot reduce the dollar amount of violations by showing that some wages were paid less late than others.

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<sup>23</sup> An intent demonstrated, for instance, by the CMP being multiplied by the number of violations, rather than linked to the value of the violations. 29 C.F.R. § 578.

<sup>24</sup> Plaintiff's reply to opposition to MSD, page 19, lays out a helpful illustration of how 29 C.F.R. § 778.315 works in a jurisdiction where there is no FLSA minimum wage.

<sup>25</sup> On the other hand, this also means that if an employee worked no overtime, the FLSA provides no relief for regular wages that were not paid on time. This is why in 2007, only employees who were owed overtime wages were counted as FLSA violations and employees who were owed regular wages only were not.

In fact, the only valid argument the Respondents made about what the Administrator should have considered in setting the CMP was that Respondents' actions after the Second Investigation were irrelevant. (Respondents' Opposition to MSD, p. 24.) The Plaintiff argued that Respondents' actions post-2007 are relevant to how the Administrator should have weighed the Respondents' commitment to compliance, among other factors. (Plaintiff's Reply to Opposition to MSP, pp. 7-8.) But I find that in justifying the penalty, the agency can only rely on the information it had at the time that penalty was decided. See *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156 (1962). Doing so does not hinder the Plaintiff in this case, as these more recent alleged violations were not considered in the original determination and I have found that there was already sufficient basis for the CMP the Administrator assessed.<sup>26</sup> (RX L, p. 111 (Plaintiff admitted the civil penalty was not based on events after the 2007 agreement).) While the Respondents' more recent actions may be valuable evidence for the next investigation of HKE, I find that they have no bearing on the investigation at issue here.

However, for all of the many reasons above, I find that the Plaintiff has shown that the civil money penalty assessed against the Respondents was appropriate and complied with 29 C.F.R. §§ 578.3-578.4.

### 3) Further arguments about CMP assessment

Lastly, for the sake of thoroughness, I will address a handful of additional arguments the Respondents made contesting the CMP assessed against them.

Respondents Mr. Chan and HKE filed a response to Plaintiff's interrogatories that asserted that the "maximum civil penalty is \$1,100.00 for each violation and not for each employee who was the subject of such violation." (PX 5, p. 14, ¶ 11.) This unsupported statement implies that the total CMP assessed should have been \$1,100.00, or \$1,100.00 per pay period perhaps, rather than the \$191,400.00 that was reached by multiplying the penalty amount by the number of employees whose rights were violated. (*Id.*; Trotter Declaration, ¶ 16.)

The Respondents' contention is incorrect, however, based on the case law, on the intent of the statute, and on common sense. For instance, *Micro-Chart* demonstrates that the CMP amount is "multiplied by number of employees" affected. ARB Case No. 98-080, 1998-FLS-12 at \*2. Likewise, the clear intent of 29 C.F.R. §§ 578.3-578.4 is to motivate compliance with the FLSA's overtime requirements. If the penalty was the same regardless of whether it was one employee who was short-changed or one hundred employees, employers would be less likely to be discouraged from noncompliance. The plain language of 29 C.F.R. § 578.3 invalidates Respondents' interpretation.

The Respondents also devote many pages to arguing that the 2007 Compliance Agreement precludes the imposition of CMP for the violations in 2007. (Respondents' Opposition to MSD, pp. 8-14.) In Respondents' view, the Plaintiff made binding judicial admissions that the 2007 Agreement "spoke for itself," was "unambiguous," and must be interpreted without any evidence outside of the four corners of the agreement. (*Id.* at 8-11.) They argue that the language of the 2007 Agreement does not impose a CMP nor does it expressly

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<sup>26</sup> Note that I did not consider the post-2007 violations in my discussion above of the appropriateness of the CMP.

reserve the Administrator's right to assess a CMP for those violations, and, thus, the Administrator can impose a CMP on Respondents only during future investigations. (*Id.* at 12.)

Again, the Respondents have put forth an argument that requires ignoring basic legal principles, this time about the interpretation of contracts. The Plaintiff's reply to this argument does a nice job of breaking down the flaws in Respondents' contentions. (*See* Plaintiff's Reply to Opposition to MSD, pp. 9-16.) I will briefly restate the relevant points here.

First, the parole evidence rule the Respondents rely on to exclude the letter from Investigator Hamilton, only applies to totally integrated contracts, and extrinsic evidence can be considered to determine whether a contract is integrated in the first place. Second Restatement of Contracts ("S.R.C.") §§ 209 (whether an agreement is integrated must be decided before the parole evidence rule is applied), 213 (parole evidence rule), 214 (extrinsic evidence is admissible to establish whether a writing is an integrated agreement); *Sherman v. Mutual Benefit*, 633 F.2d 782, 784 (9<sup>th</sup> Cir. 1980) ("whether or not a written agreement is 'integrated,' ... depends on the parties' intent, which must be resolved by consideration of relevant extrinsic evidence that explains but does not flatly contradict the writing"). Here, the letter from Investigator Hamilton arrived with the 2007 Compliance Agreement and "all writings that are part of the same transaction are interpreted together," which indicates that in deciding whether the Compliance Agreement waives CMPs, the text of the Hamilton Letter should be considered. S.R.C. § 202(2). Finally, while the Compliance Agreement does not expressly reserve the right to impose CMPs, it does not expressly give up that right either: the issue was just not addressed. (*See* RX A, pp. 5-6; *Cleary v. News Corp.*, 30 F.3d 1255, 1263 (9<sup>th</sup> Cir. 1994) (introduce extrinsic evidence if a contract is silent on a material term).) There is no merger clause in the Compliance Agreement, and there is evidence that it was not fully integrated. (*See* RX A, pp. 4-6.) In addition, whether CMPs would be imposed is a term it would be natural to leave out of the Compliance Agreement, since Mr. Hamilton did not control that part of the investigation. (*See id.*)

Therefore, I find that the Compliance Agreement was not totally integrated. The Hamilton Letter is admissible to supply the consistent additional understanding that a CMP might still be assessed, as it does not contradict any term of the Compliance Agreement. S.R.C. §§ 216, 215, 210; *Cleary*, 30 F.3d at 1263. Thus, I hold that the 2007 Compliance Agreement does not preclude the imposition of CMPs on the Respondents for the 2007 violations.

Finally, the Respondents claim in their response to interrogatories that the CMP was "contrary to the spirit and perceived intent conveyed by Investigator Richard Hamilton which led to the decision to enter the 2007 agreement as opposed to litigating the matter." (PX 5, p. 14, ¶ 12.) Respondents allege that Mr. Hamilton did "not state the assessment of civil penalties [would] be trigger [sic] by the compliance agreement. Instead he implie[d] that civil penalties may be sought and that he could help insure that the agency would not seek to impose a harsh or unreasonable penalty," and that "by signing the agreement a 'high' penalty would not be assessed." (PX 5, p. 16, ¶¶ B, D.) This argument is compatible with Mr. Chan's testimony that he decided to sign the 2007 Compliance Agreement, "because I don't want the company to have any penalty." (PX 8, p. 43.)

However, even if Investigator Hamilton had made an explicit verbal promise that signing the Compliance Agreement meant no penalties,<sup>27</sup> the Respondents could no longer reasonably rely on that supposed promise once they received the letter that was attached to the Compliance Agreement. (See RX A, p. 4; Chan Declaration Opposing MSD, ¶ 27 (letter and agreement arrived together); S.R.C. § 202(2) (“all writings that are part of the same transaction are interpreted together”).) That letter explained that Investigator Hamilton had no control over the CMP assessment, that another office would decide whether to assess penalties, and that he could only make a recommendation based on whether Respondents agreed to comply with the law in the future. (RX A, p. 4.) Once the agreement package arrived with the Hamilton Letter, it became unreasonable for the Respondent to place reliance on any possible earlier oral assurance that the letter clearly contradicted. See S.R.C. §§ 202(2), 215.

Based on my findings above, I find that the Plaintiffs have shown “an absence of evidence to support” any of the Respondents’ contentions that the CMP amount was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706; *Celotex*, 477 U.S. at 325; *Baystate*, 163 F.3d at 680.

*F) Dismissing a final objection to summary decision*

The final argument advanced by Respondents was that under 29 C.F.R. § 18.40(d), if the moving party denies discovery to the non-moving party, the ALJ should deny summary decision. (Respondents’ Opposition to MSD, pp. 36, 45.) Here, the Respondents assert that the Plaintiff’s objections to some of Respondents’ interrogatories and requests to admit constitute sufficient reason to deny summary decision. (*Id.*) Specifically, the objections were to interrogatories which dealt with the Wage and Hour Division’s internal procedures for assessing the CMP and to requests for admission about Mr. Chan’s power to hire, fire, and otherwise control the employment and payroll of HKE employees. (*Id.*)

Though the administrative law judge “may” deny a motion for summary decision “whenever the moving party denies access to information by means of discovery to a party opposing the motion,” 29 C.F.R. § 18.40(d), she is not required to do so.<sup>28</sup> I can easily imagine instances where it would be in the interests of justice to exercise my authority under Section 18.40(d) so that the non-moving party could get the information necessary to defend its claims. However, I am not inclined to exercise it when the Respondents’ need for this discovery was so slight that they made no attempt to compel the responses before the current motion was filed. This is particularly true with regard to the requests for admission where Respondents asked the Plaintiff about facts that only the Respondents themselves possessed and, thus, have not been denied access to.

Like so many of the Respondents’ objections, I find this one was also frivolous and does not prevent me from entering a partial summary decision in the Plaintiff’s favor.

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<sup>27</sup> It seems more likely that Mr. Hamilton said “less penalty,” but the Respondents remember that as “no penalty” due to wishful thinking. For the purposes of summary decision I am making all reasonable inferences in the Respondents’ favor though.

<sup>28</sup> Respondents failed to direct me to any authority that denial of summary decision is required, as the single case they cited to (Respondents’ Opposition to MSD, p. 36), only addressed a very tangential point. See *NEC Corp. v. U.S. Dept. of Commerce*, 958 F. Supp. 624, 631-33 (Fed. Cl. 1997).

CONCLUSION

For the reasons provided above, the Plaintiff's Motion for Summary Decision is GRANTED, except with regard to Respondent Mr. Chan's personal liability as an "employer" under the FLSA, which I DENY, based on the currently disputed facts about his degree of economic control over the terms of employment at HKE.

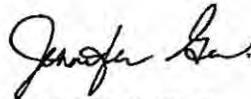
Because the civil money penalties were assessed against HKE, Mr. Kwan, and Mr. Chan jointly, and Mr. Chan's status cannot be resolved through summary decision, I cannot order payment of the civil money penalties until his status is determined.

ORDER

Accordingly, it is hereby ORDERED that this matter shall be set for hearing on September 6, 2012, beginning at 9:00 a.m. in the Department of Labor Courtroom, 90 Seventh Street, Suite 4-815, San Francisco, California, on the issue of whether Mr. Chan is an employer under the FLSA and also liable for the civil money penalties.

The parties are ORDERED to file their pre-hearing statements so that they are received by August 20, 2012. The parties are ORDERED to make themselves available for a telephonic pre-hearing conference on August 29, 2012, at 9:00 a.m. (PDT).

SO ORDERED.



JENNIFER GEE  
Administrative Law Judge