No. 20-16385

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES DEPARTMENT OF LABOR,
MARTIN J. WALSH, SECRETARY OF LABOR,

Plaintiff – Appellee,

v.

WELLFLEET COMMUNICATIONS,
ALLEN ROACH, LIGHTHOUSE COMMUNICATIONS, LLC,
NEW CHOICE COMMUNICATIONS, INC., and RYAN ROACH

Defendants – Appellants.

On Appeal from the United States District Court for the District
of Nevada (No. 2:16-cv-02353-GMN-GWF, Honorable Gloria M. Navarro)

SECRETARY OF LABOR'S ANSWERING BRIEF

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SECRETARY OF LABOR'S ANSWERING BRIEF

The Secretary of Labor ("Secretary") submits this brief in response to the brief of Defendants Wellfleet Communications ("Wellfleet"), Allen Roach, Lighthouse Communications, LLC ("Lighthouse"), New Choice Communications,

[1] Martin J. Walsh was sworn in as the Secretary of Labor on March 23, 2021 and has been substituted as the plaintiff-appellee pursuant to Federal Rule of Appellate Procedure 43(c)(2).

Inc. ("New Choice"), and Ryan Roach (collectively, "Defendants"). This Court should affirm the district court in all respects.

STATEMENT OF JURISDICTION

The Secretary sued Defendants in the U.S. District Court for the District of Nevada alleging violations of the Fair Labor Standards Act ("FLSA" or "Act") and seeking, among other remedies, back wages and liquidated damages on behalf of over 1,500 workers. The district court had jurisdiction pursuant to sections 16(c) and 17 of the FLSA, 29 U.S.C. 216(c) & 217, and 28 U.S.C. 1331 (federal question jurisdiction) and 1345 (jurisdiction over suits by the United States).

Except as noted, this Court has jurisdiction over Defendants' appeal pursuant to 28 U.S.C. 1291. The district court entered final judgment for the Secretary on May 20, 2020. 1-ER-0008-0009; 1-SER-019. On July 16, 2020, Defendants filed a notice of appeal, 10-ER-2607-2608, which was timely under Federal Rule of Appellate Procedure 4(a)(1)(B).

On August 12, 2020, Defendants filed a motion in the district court under Federal Rule of Civil Procedure 60(b) to set aside the judgment. 1-SER-002-018. On December 18, 2020, the court denied the motion. 1-ER-0002-0007. Defendants did not thereafter file a notice of appeal or amend their existing notice of appeal. As argued below, this Court does not have jurisdiction over any appeal of the denial of that motion.

STATEMENT OF THE ISSUES

1. Whether an Internal Revenue Code provision expressly limited to federal tax law carves out Defendants' workers from coverage as employees under the FLSA, and assuming that it does not as courts have ruled, whether the district court erred in ruling that the undisputed material facts show that the workers were Defendants' employees.

2. Whether the district court erred in concluding that Defendants' FLSA violations were willful where Defendants were aware of the Act's minimum wage requirements, consistently paid off complainants who asserted violations of similar state law requirements, took no steps to assure compliance with the Act's requirements, internally admitted that their pay practices were unlawful, and took steps to avoid compliance.

3. Whether Defendants can satisfy the FLSA's good faith defense to avoid or reduce liquidated damages considering that this Court recently held that a finding that violations were willful precludes the defense, and in any event, whether Defendants carried their burden of proving the defense.

4. Whether the district court erred in determining that the Secretary's back-wage calculations were supported by a just and reasonable inference that the workers typically worked 30-hour weeks and that Defendants did not negate the reasonableness of that inference, and whether the court abused its discretion in

denying Defendants' motions to strike a declaration regarding the back-wage calculations and for discovery sanctions.

5. Whether this Court has jurisdiction to hear an appeal of the district court's denial of Defendants' Rule 60(b) motion to set aside the judgment where Defendants did not file a notice of appeal or amend the existing notice of appeal after denial, and if this Court has jurisdiction, whether the district court erred in denying the motion.

STATUTORY ADDENDUM

Pertinent statutory provisions are contained in the Addendum.

STATEMENT OF THE CASE

1. Factual Background

a. The Working Relationship between Defendants and the Workers

Defendants operated a call center (telemarketing) business in Nevada. 1-ER-0020. Defendants contracted with telephone service providers (Defendants' clients), *see*, *e.g.*, 1-SER-121-138, and Defendants employed workers to make calls to sell their clients' long distance telephone services, 2-ER-0075. According to Allen Roach, there was not a "high bar" for hiring workers. 4-ER-0894. Defendants did not "check their education"; "if they could read a script and they sounded good," Defendants hired them. *Id.*

The workers made calls for Defendants in their call centers; they could not work from home. 2-SER-276-280, 300, 307-308, 421. Defendants' dialer system automatically dialed the "leads" (potential customers) for the workers to call, and if someone answered, the workers read from Defendants' script to try to make the sale. 2-SER-337-338. Defendants expected the workers to follow the script. 2-SER-284 (manager describing monitoring workers' sales calls "to make sure they were staying on script"), 341 (workers were not supposed to deviate from scripts). Workers were directed to be respectful and to "[a]lways" end calls by saying "Have a nice day"; workers were admonished that any misrepresentations on calls "will result in written warnings, fines and/or termination." 1-SER-232; *see also* 2-SER-324-325. When each call ended, the worker indicated the call disposition (sale, no sale, etc.) in a drop-down menu. 2-SER-335-338; 1-SER-225-226. Then, the system dialed the next lead, and the worker followed that process again. 2-SER-337-338.

Defendants provided training materials to the workers, and Defendants' managers trained the workers, including on using the dialer system. 2-SER-282-283, 336-339. The workers' equipment was provided by Defendants, including computer equipment and a headset. 2-SER-277-278, 308. The workers performed no duties for Defendants other than making calls to sell long distance services. 2-SER-338.

Defendants imposed numerous work rules on the workers. Defendants implemented a dress code (including no "do-rags," tank tops, and flip-flops); prohibited swearing; prohibited personal phone calls at the call centers; and warned that "negativity" on the sales floor was grounds for termination. 1-SER-237, 264-265; 2-SER-292-293, 311-314. Defendants' managers made the workers change clothes when they did not follow the dress code. 2-SER-313-315; 4-ER-0908.

Defendants imposed a strict schedule on the workers: daily shifts five days a week and potentially Saturdays, designated break and lunch times, and reduced pay when they were late. 1-SER-228; 2-SER-319-321, 331-333. Defendants dictated that the weekday shift begin at 7:30 a.m., end at 2:30 p.m., and consist of six hours on the phone, a 30-minute lunch break, and two 15-minute breaks, with the workers all taking breaks at the same time. 5-ER-1164 (schedule was six hours per day, 30 hours per week); 1-SER-228; 2-SER-283, 288-289, 296-297, 320-321, 331-333. The workers had to request approval to take days off and were required to call their managers if they were late or absent. 2-SER-294-295, 319-320, 322-323; 1-SER-237 ("Call the front desk and your manager if you are going to be late or absent. No Call/No Shows are NOT tolerated.").

Defendants paid the workers "solely for their sales" – "never for their time" and kept "no time records" for them. 2-ER-0075. Defendants determined the commission rates for the workers. 4-ER-0915; 2-SER-290-291, 309-310; 1-SER-

246. Defendants compensated the workers by paying them commissions on the sales that they made and attendance/contest bonuses (sometimes called "spiffs") for showing up for a shift and making at least one sale. 2-SER-327, 329-330, 334. Workers who made no sales during a week were paid zero dollars for the week. 2-SER-334. If a worker made a sale and was paid a commission but the sale was later rejected, Defendants would institute a "chargeback" and deduct the already-paid commission from any future commissions paid. 4-ER-0913-0917. Defendants did not pay bonuses/spiffs to workers who were more than 10 minutes late for their shifts. 2-SER-320-321, 329-330.

In addition, Defendants levied fines on workers for making personal phone calls, for example, and deducted those fines from any commissions due. 4-ER-0913; 2-SER-326; 1-SER-118-119 (showing six fines totaling $175 collected from three workers in two months), 230. For a fee of typically $25, Defendants advanced pay to workers (*i.e.*, loaned them money); Defendants deducted the loan amounts and the fees from any commissions due. 4-ER-0917-0919; 1-SER-118-120 (showing hundreds of dollars in loan fees in each of three months).

b. The Agreements that Defendants Required the Workers to Sign

Defendants required the workers to sign agreements stating that the workers were "independent contractors" and "direct sellers." *See*, *e.g.*, 1-SER-201-204, 219-221, 234-242. The agreements provided that the workers were not paid an

hourly wage rate and that commissions were the "sole and absolute compensation" paid to the workers. *See*, *e.g.*, 1-SER-203, 219, 236, 241. The agreements further provided that the workers expressly waived any rights to payment of a minimum wage under the FLSA or Nevada law. *See*, *e.g.*, 1-SER-203, 220, 236, 241.

The agreements also sought to mask the real nature of the working relationship by stating, contrary to the facts, that the workers: "exclusively" controlled the "conduct and control" of the work performed and the "manner and method of performance thereof"; possessed "freedom and discretion"; and used "special skill services and knowledge." *See*, *e.g.*, 1-SER-203, 219-220, 236, 241. Ryan Roach was aware that the workers were treated as independent contractors, but never researched whether that was correct or asked anyone for advice; he "just assumed that call centers were ran like that." 9-ER-2363-2364. Allen Roach did not consult with anyone about the FLSA's minimum wage requirements before having the workers sign the agreements. 4-ER-0892; 5-ER-0937 (acknowledging that he never looked to see what the FLSA was even though the Act was mentioned in the agreements). Allen Roach believed that Nevada state agencies were familiar with Defendants' operations and that, if the agencies changed their "guidelines," "they would come and see us and advise us of those changes." 4-ER-0899.

c. Defendants Kept Their Heads Low and Paid Off Complainants

Defendants Allen Roach and Ryan Roach, who are uncle and nephew, managed the call center business as a family-run business following the death of Ryan Roach's father. 1-SER-253-254; 5-ER-1104, 1115-1116. They operated the business through several corporate entities (Wellfleet, Lighthouse, and New Choice) and managed them as one business. 5-ER-1104, 1115-1116, 1124; 1-SER-254-255, 258.

When Allen Roach took over the business in 2009, there were 14 Nevada wage complaints pending totaling about $11,000 to $12,000. 5-ER-0934. Because of these complaints, Allen Roach met with an official from the Nevada Office of the Labor Commissioner ("NOLC") to resolve them by paying the amounts due. *Id*. As recounted by Allen Roach, the NOLC official knew the Roach family, and "[o]ur agreement that day with the State consisted of pay[ing] the hourly [wage] when the employee contest[ed] the wages and keep your head low. Don't raise any flags and you guys should be fine. (He was retiring that year and the comments were all verbal. I knew it would not last forever.)" 1-SER-148. Allen Roach added: "[w]hen I started I always knew the day would come when the State would come knocking at our door," and "I always felt that later down the road that this would be the jurisdiction that would be knocking our door." *Id*. He assumed that

Nevada authorities – not the Department of Labor's Wage and Hour Division ("WHD") – would come after Defendants. *Id*.

Defendants "often" received complaints after 2009 for violations of Nevada's wage-and-hour law. 4-ER-0931; 5-ER-0934, 0953 (acknowledging, on average, 10 to 12 complaints per year). Many of the complaints involved the failure to give the workers their final pay – itself a minimum wage violation. Defendants continued to settle the complaints by paying the workers the amounts due for the hours worked. 5-ER-0946-0948 ("[L]et's pay them for that, just to settle it out. Let's be done with it, because that's what I was told to do."). After Defendants paid the worker, Defendants sent the NOLC a copy of the check to the worker and a print-out from the dialer system (the "Noble Dialer") purporting to show the worker's "log-in" and "log-out" times as evidence of the worker's hours worked. 5-ER-0944-0950; 1-SER-091-096, 197, 206, 210. Allen Roach did not think that the Noble Dialer print-outs were accurate, but they allowed him to resolve the NOLC complaints. 5-ER-0950 ("I did provide it with the understanding that it probably wasn't accurate time, but it allowed me to settle the dispute that I had, and I was … fine with that."). The NOLC did not actually investigate these complaints and closed them out once Defendants paid the worker. 1-SER-109, 199. Despite these complaints, Defendants continued to require the

workers to sign agreements expressly waiving their minimum wage rights. 2-ER-0075.

In response to an NOLC complaint in 2010 by a worker who had been terminated, Allen Roach personally researched "the litmus test of an independent contractor" and sent a letter to the NOLC arguing that the worker was an independent contractor, not an employee. 4-ER-0930-0931; 5-ER-0934, 0939-0940; 1-SER-216. In the letter, he made numerous misstatements about the working relationship in an attempt to fit the work into an independent contractor relationship. 1-SER-216. For example, he claimed that the workers paid for their work space,[2] the workers supplied their own work supplies,[3] the business took all risks of chargebacks,[4] the workers called on "random customers,"[5] the work day

[2] Allen Roach later admitted that the workers did not pay for their work space. 4-ER-0921.

[3] Defendants provided the workers with equipment necessary to perform the work. 2-SER-277-278, 308.

[4] Allen Roach admitted that chargebacks were deducted from the workers' earnings, meaning that Defendants faced little risk of actually paying the workers for sales that were later canceled. 4-ER-0913-0917.

[5] The workers called customers designated by Defendants' dialer system. 2-SER-337-338.

was set by the worker,[6] and the workers had the right to control or direct the result of their work.[7] *Id.*

d. The Nevada Unemployment Compensation Audit

In 2010, the Nevada Department of Employment, Training and Rehabilitation ("DETR") initiated an audit of Defendants pursuant to Nevada's Unemployment Compensation Law. 9-ER-2399 (citing Nev. Rev. Stat. 612.260). Defendants provided certain documents to DETR and met with DETR once, and according to Allen Roach, DETR told them that their agreements were in compliance although DETR recommended a couple of modifications to the agreements (which Defendants did not make) and never provided Defendants with a closing letter. 4-ER-0923-0929. DETR did not speak with any of the workers and reviewed mostly financial documents as opposed to documents characterizing the actual working relationship. 4-ER-0929; 9-ER-2399.

e. The Department of Labor's Investigation and Lawsuit and Defendants' Efforts to Obstruct

WHD began its investigation of Wellfleet's call center business in October 2015, and according to Allen Roach, Wellfleet began to treat the workers as

[6] Defendants required a strict work schedule, including the daily shifts, start and stop times, and designated break and lunch times. 5-ER-1164; 1-SER-228; 2-SER-283, 288-289, 296-297, 319-321, 331-333.

[7] The workers lacked the control or the ability to direct the result of their work. *See supra* pgs. 5-7.

employees beginning in February 2016 as a result. 2-ER-0075. WHD's investigation initially focused on Wellfleet and Allen Roach, and the Secretary's Complaint (filed in October 2016) named them as the defendants. 2-SER-409-417. During WHD's investigation and discovery once the Complaint was filed, Allen Roach sought to conceal Ryan Roach's involvement in the business and the existence of related corporate entities (Lighthouse and New Choice). 2-SER-348-349. Regarding Ryan Roach, for example, Allen Roach told WHD that he (Allen) was the 100% owner of Wellfleet, 1-SER-060; however, Ryan Roach (aka "Ryan Lore") was Wellfleet's majority owner according to its operating agreement, 1-SER-178-179. In addition, Allen Roach produced records to WHD from which Ryan Roach's name had been deceptively redacted. 1-SER-074-075. As a result of this concealment, the Secretary did not uncover Ryan Roach's role in the business until months after filing the complaint. 2-SER-348.

Ryan Roach knew about WHD's investigation soon after WHD's first visit to the business, 1-SER-247-248, and he learned about the Secretary's lawsuit from Defendants' then-attorneys within a week of its filing, 1-SER-113. Four months after the Secretary filed suit, Allen Roach emailed Ryan Roach saying that he expected Ryan Roach to "take care" of the lawsuit against Wellfleet and him: "The federal case is yours technically and I was an acting GM. I have the original agreements[.] I expect you to take care of it to the fullest extent." 1-SER-140.

Allen Roach added that he was "taking this hit to save" Ryan Roach: "I would hope that no matter what happens with the [D]OL that you will take care of the attorney fees and any fines as I'm taking this hit to save you … face on having your name[] in the Boston Globe." 1-SER-142.

Regarding Lighthouse and New Choice, Allen Roach did not disclose their existence to WHD during the investigation. 5-ER-0966-0967. Soon after WHD notified Allen Roach of the potential back-wage liability that he and Wellfleet faced, he and Ryan Roach arranged the transfer of Wellfleet's assets and the call center's operations to New Choice in April 2016 – after which Wellfleet was no longer in business. 5-ER-1124-1128; 2-SER-361-364 (describing meeting during which WHD conveyed then-current back-wage calculations); 1-SER-149, 152-165. Allen Roach and Wellfleet did not disclose this transfer of assets and operations to WHD during the investigation or before the lawsuit was filed, 2-SER-348-349, and their then-attorney misrepresented Wellfleet's continued existence and operation of the business, 2-SER-407-408 (stating in September 2016 that Wellfleet is the workers' employer and paying them). Allen Roach disclosed the existence of New Choice in February 2017. 2-SER-348-349. The district court later granted the

Secretary leave to file an amended complaint adding Ryan Roach, New Choice, and Lighthouse. 2-SER-384-397.[8]

During WHD's investigation and around when Wellfleet's assets and operations were transferred to New Choice, Allen Roach "purged" Wellfleet's documents, including pay sheets containing hours worked; he felt that Defendants had already provided WHD everything that it needed. 5-ER-1089-1091. Around that time, Defendants stopped using the Noble Dialer because they switched to a different system, Allen Roach put the Noble Dialer in storage at his house, and he never tested it thereafter to see if it functioned. 5-ER-0955-0959. As explained below, Defendants did not offer it as a means of establishing the workers' hours worked or otherwise suggest that they intended to use it in this litigation. Later during discovery, however, the Secretary requested the Noble Dialer to search for information regarding the workers' hours worked because Defendants stated that they kept no time records, and Defendants produced it. 2-SER-375. WHD could not retrieve any information from it and shipped it to Deloitte, WHD's forensic consultant. *Id.* Deloitte imaged the Noble Dialer's servers and shipped it back to WHD, and it was damaged en route back to WHD in September 2017. *Id.*; 2-SER-369-370. The Secretary immediately informed Defendants, 2-SER-269-370, who

[8] Lighthouse was a corporate entity that operated part of the call center business through about October 2015. 2-SER-387-388.

filed motions for discovery sanctions and attorney's fees, 10-ER-2626 (ECF 82 & 83). The Magistrate denied the motions including Defendants' request for an adverse inference because there was no evidence that the Noble Dialer's damage was intentional, Defendants had disclaimed the relevance of any information on the Noble Dialer and did not intend to introduce it as evidence, and the information on it may have been preserved in the imaged drives. 10-ER-2628-2629 (ECF 105 & 110); 4-ER-0680-0686, 0689-0692, 0695-0696 ("[Defendants made an assertion after the fact that [the Noble Dialer] contained relevant evidence, which is 180 degrees from what [they] claimed before [they] produced it."). Defendants objected to the Magistrate's decision, and the district court overruled the objection. 1-SER-041-045. Ultimately, neither the Secretary nor Defendants tried to access information from the Noble Dialer's imaged servers because of the time and expense involved.

2. Procedural History

a. Summary Judgment Except on Amount of Back Wages

On September 29, 2018, the district court largely granted the Secretary's summary judgment motion, and denied Defendants' dispositive motions. 1-ER-0019-0047. The court rejected Defendants' argument that an Internal Revenue Code ("IRC") provision, 26 U.S.C. 3508, stating that qualifying "direct sellers" are not employees for IRC purposes, means that such workers are independent

contractors under the FLSA. 1-ER-0031-0033. Relying on the breadth of the FLSA's definitions and other courts' rejection of the same argument, the court determined that the IRC provision "does not provide an exception to the FLSA's definition of 'employee.'" 1-ER-0033.

The district court then applied this Court's multifactor analysis for determining whether a worker is an FLSA employee or an independent contractor. 1-ER-0033-0034. The court ruled that, "[i]n this case, there is no dispute of material fact that Defendants' call center workers are 'employees' under the FLSA" and were "entitled to the FLSA's protections." *Id*. The court relied on, among other undisputed facts: the "strict schedule and work content assigned to each call center worker—attributing little discretion to the worker, if at all, on how to complete their tasks"; Defendants' sole control of "a worker's ability to earn a commission, the scope of a worker's interaction with a client, and how much an employee earned with each sale"; "each call worker operated solely off Defendants' equipment and in Defendants' office space"; the workers "did not need to possess any specialized skills"; and the workers were "an integral part of Defendants' call center businesses." *Id*.

Regarding liability, the district court noted Defendants' admission that they did not pay the workers minimum wage or keep records regarding their hours worked prior to treating them as employees beginning in 2016, and concluded that

"there is no dispute of material fact that Defendants violated the FLSA." 1-ER-0038-0039.

The district court further found that the Secretary had "established that there is no genuine dispute of material fact that Defendants 'willfully' violated the FLSA," extending the statute of limitations from two years to three years. 1-ER-0035-0036. Citing the well-settled knowledge or reckless disregard standard, the court relied on the facts that Defendants: received numerous notices of violations each year from the NOLC for failure to pay the minimum wage; did not take affirmative steps to determine compliance with the FLSA; and continued to require the workers to sign agreements expressly waiving their FLSA minimum wage rights and classifying them as independent contractors. *Id*. The court concluded that "Defendants failed to inquire into FLSA compliance as [they] should have" and thus acted with reckless disregard to whether their conduct was prohibited by the FLSA. 1-ER-0036.

The district court rejected the Secretary's argument that equitable tolling should extend the limitations period beyond three years. 1-ER-0036-0038. The Secretary had argued that equitable tolling applied because Defendants' requirement that the workers sign agreements waiving their FLSA minimum wage rights and Defendants' misrepresentations of the workers' working relationship concealed the violations and prevented the workers from bringing claims earlier.

Id. The court ruled that the Secretary did not carry his burden of showing that the rare and exceptional circumstances for equitable tolling to apply were present here. 1-ER-0038.

Turning to back wages, the district court explained that employees can recover unpaid wages by showing that the employer's records are inadequate and the employees performed uncompensated work, and in such circumstances, the employees need not prove the precise amount of uncompensated work and can instead establish the amount as a matter of a just and reasonable inference. 1-ER-0039. Applying that standard, the court concluded that the Secretary showed as a matter of reasonable inference that each worker worked at least 30 hours per week and "evidence by Defendants show[ed] that this is a valid inference." *Id.* The court observed that Defendants did "not dispute this calculation in their Responses." *Id.* Because the Secretary's back-wage calculations went beyond three years on the grounds that equitable tolling was appropriate and because the court rejected that argument, however, the court directed the Secretary to recalculate the back-wage amount under the three-year limitations period and file a supplemental brief with the recalculated amount. 1-ER-0039, 0046.

The district court rejected Defendants' argument that they acted in good faith and awarded liquidated damages under the FLSA in an amount equal to the back wages due. 1-ER-0040. The court found that there was no dispute of

material fact on this issue "because Defendants failed to take any action to determine their FLSA compliance in the face of repeated notices of potential violations of employment regulations." *Id*. The court found the DETR audit unavailing because "that audit related only to Nevada's employment laws" and did not "provide reason for Defendants to believe that they complied with the FLSA." *Id*.[9]

b. Finalizing Amount of Back Wages and Entering Judgment

As directed, the Secretary submitted a supplemental brief recalculating the back wages using a three-year limitations period. 1-SER-038-040. Using the same methodology from the initial calculation but removing all workweeks prior to the limitations period, the Secretary calculated that the back wages due totaled $728,994.77. 1-SER-039. As with the summary judgment motion, the Secretary attached to his supplemental brief a declaration from Michael Eastwood ("Eastwood"), WHD's Director of Enforcement for the Western Region, providing summary testimony of WHD's back-wage recalculation, which multiplied the estimated 30 hours worked per week for each worker (for the time period directed by the district court) by the FLSA's $7.25 minimum wage and subtracted the

[9] The district court granted summary judgment on several additional issues not on appeal, including that Allen Roach and Ryan Roach were individually liable under the FLSA, New Choice was liable as a successor-in-interest, and the Secretary was entitled to prospective injunctive relief. 1-ER-0041-0045.

amounts that Defendants had previously paid each worker (*i.e.*, commissions and bonuses/spiffs). 1-SER-036-037; 9-ER-2368-2378. Defendants had previously moved to strike Eastwood's declaration (when it was filed with the Secretary's summary judgment motion) on the grounds that he was an undeclared expert. 9-ER-2402-2406; 10-ER-2409-2415. After the Secretary submitted a revised Eastwood declaration with his supplemental brief, the court denied the motion to strike on March 19, 2019 because "[a] witness does not need to be declared as an expert to apply basic arithmetic to voluminous records or comment on fundamental document review of which he or she has personal knowledge." 1-SER-031 (footnote 1).

As the only outstanding issue at that point was the amount of back wages, the Secretary filed a motion pursuant to Federal Rule of Civil Procedure 58 asking the district court to enter judgment. 1-SER-024-029. On December 12, 2019, the district court denied the Secretary's motion. 1-ER-0010-0018. Although the court had already "determined the method … to calculate back wages," it had not yet determined "the total amount of back wages to award" and thus there was no "final judgment on the merits of [the Secretary's] FLSA claims for damages" to enter. 1-ER-0013. The district court chastised Defendants for "attempt[ing] to relitigate how the Court should calculate the employees' lost wages," saying that it had "already held that [the Secretary's] calculation, based upon the assumption that

each employee worked an average of thirty hours per week, is reasonable" and that the holding "is the law of the case." 1-ER-0011. The court ordered the parties to file a proposed joint pretrial order within 30 days, 1-ER-0014, and set a settlement conference with the Magistrate, 10-ER-2637 (ECF 187).

On December 26, 2019, Defendants' remaining attorneys (one law firm had already withdrawn) moved to withdraw, which the district court granted on January 15, 2020. 10-ER-2637-2638 (ECF 188 & 191). In its order granting the motion, the court directed the withdrawing attorneys to notify Defendants, vacated the settlement conference, and directed Defendants to retain new counsel if possible. 1-SER-022-023. Three months later, because Defendants had not responded, the court issued an order directing Defendants to inform it within ten days whether they intended to retain new attorneys or proceed *pro se*. 1-SER-020-021.

Defendants again did not respond, and because Defendants "stopped complying with the Court's directives altogether," the district court issued an order directing them to show cause why it should not enter final judgment for the Secretary. 10-ER-2603-2606. Citing its authority under Federal Rule of Civil Procedure 56(f)(3) to grant summary judgment on its own and noting that the amount of damages was "the only remaining issue to be decided," the court credited the Secretary's evidence that the workers' damages totaled $1,457,989.54

($728,994.77 in back wages and $728,994.77 in liquidated damages) and found that the amount of damages was "not reasonably in dispute." 10-ER-2605. Defendants did not respond to the show-cause order, and on May 20, 2020, the court granted summary judgment to the Secretary on the amount of damages due, awarded $1,457,989.54 in damages, and entered final judgment. 1-ER-0008-0009; 1-SER-019.

Defendants' attorneys reappeared, and on July 16, 2020, Defendants filed a notice of appeal. 10-ER-2607-08. On August 12, 2020, notwithstanding the pending appeal, Defendants filed with the district court a Federal Rule of Civil Procedure 60(b) motion to set aside the judgment, arguing that they had not been given notice of the district court's orders and that their failure to respond was excusable. 1-SER-002-018. The district court ruled that it had no jurisdiction over the Rule 60(b) motion because Defendants had already appealed the judgment. 1-ER-0005-0006. It further ruled pursuant to Federal Rule of Civil Procedure 62.1 that it was not inclined to grant the motion because "Defendants' alleged failure to receive notice is the product of their own misfeasance" – namely their failure once they "ceased paying their counsel" to provide their contact information to the district court as required by the local rules. 1-ER-0006-0007.

SUMMARY OF ARGUMENT

In their opening brief, Defendants repeat many arguments that the district court rejected and lob many accusations at the Secretary; none of them negate the accuracy of the district court's rulings on appeal.

The Workers Were Defendants' Employees under the FLSA. Defendants' argument that the workers were not employees under the FLSA because of an IRC provision designating a qualifying "direct seller" as a statutory non-employee for IRC purposes is unavailing. The IRC provision, by its terms, plainly limits its applicability to federal tax law. The FLSA has no such provision and contains its own definitions delineating who is an employee under the Act. To determine whether workers are FLSA employees or independent contractors, this Court applies a well-settled analysis focusing on the economic realities of the working relationship and whether the workers were economically dependent on the employer or in business for themselves. Applying that analysis, Defendants' workers were employees under the FLSA because it is undisputed that, from Defendants' call centers, with no skill required, and using equipment, training, and scripts provided by Defendants, they sold the services of Defendants' clients to customers identified by Defendants for commission payments set by Defendants. In short, the workers were Defendants' telemarketing business.

Defendants' Violations Were Willful. FLSA violations are willful, thus extending the limitations period from two years to three years, where the employer was on notice of its obligations under the Act but took no affirmative acts to assure compliance with them. Here, Defendants were on notice of the FLSA's minimum wage obligations because they required the workers to sign agreements expressly waiving any right to a minimum wage under the FLSA, and because they received and settled numerous complaints that they failed to pay wages due under Nevada's wage-and-hour law. Indeed, Defendants admitted internally that their pay practices were unlawful. And Defendants took no action to assure compliance. Instead, they took steps to avoid compliance by continuing to settle the complaints, trying to avoid detection and keeping their heads low, and continuing to require the workers to sign agreements that waived their rights and mischaracterized the nature of the work.

Liquidated Damages. Because Defendants' violations were willful, they are foreclosed by this Court's precedent from showing that they acted in good faith to avoid liquidated damages. In any event, Defendants did not meet their burden of proving the good faith defense for many of the same reasons that their violations were willful. Their reliance on the DETR audit is misplaced because the workers' status as non-employees under Nevada's Unemployment Compensation Law was

based on a particular exception in that law for certain telemarketers that had no bearing on the FLSA.

Back-Wage Calculations. Defendants admittedly did not keep time records of the workers' hours worked, and the Secretary's back-wage calculations based on a 30-hour workweek, as summarized in Eastwood's declaration, was a just and reasonable inference supported by the evidence. The district court did not abuse its discretion in denying Defendants' motion to strike Eastwood's declaration because, contrary to their claim, he did not provide expert testimony. And the district court did not abuse its discretion in denying Defendants' motion for discovery sanctions resulting from the damages to the Noble Dialer because the damage was unintentional, Defendants' repeatedly disclaimed the relevance of any evidence on the Dialer, and they were not prejudiced.

Denial of Motion to Set Aside the Judgment. Finally, this Court lacks jurisdiction over any appeal of the district court's denial of Defendants' Rule 60(b) motion to set aside the judgment. Defendants filed the motion after filing their notice of appeal, and once the district court denied the motion, they did not file a second notice of appeal or amend their existing notice of appeal. Even if this Court has jurisdiction, it should affirm the denial because the district court was correct in holding that it lacked jurisdiction over the motion and in indicating

pursuant to Rule 62.1 that it was inclined to deny the motion (and such inclinations are not appealable).

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo, "applying the same standard of review as the district court under [Rule 56]." *Flores v. City of San Gabriel*, 824 F.3d 890, 897 (9th Cir. 2016). "A district court's interpretation of federal law, such as the FLSA, is also reviewed de novo." *Tijerino v. Stetson Desert Project, LLC*, 934 F.3d 968, 971 (9th Cir. 2019). A district court's determination regarding willfulness and good faith under the FLSA is a mixed question of fact and law, and this Court reviews mixed questions *de novo* and the factual findings underpinning the determination for clear error. *Flores*, 824 F.3d at 905; *Alvarez v. IBP, Inc.*, 339 F.3d 894, 908 (9th Cir. 2003), *aff'd*, 546 U.S. 21 (2005). The Court reviews a district court's denials of motions to strike a declaration and for discovery sanctions for abuse of discretion. *Algaier v. Bank of Am., N.A.*, 691 F. App'x 497, 498 (9th Cir. 2017) (motion to strike); *Finato v. Fink*, 803 F. App'x 84, 87 (9th Cir. 2020) (motion for discovery sanctions). And if this Court has jurisdiction to hear an appeal of the district court's denial of the Rule 60(b) motion, it reviews such denials for abuse of discretion. *Sch. Dist. No. 1J, Multnomah Cty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT DEFENDANTS' WORKERS WERE EMPLOYEES UNDER THE FLSA.

The district court correctly granted summary judgment to the Secretary regarding the FLSA employment status of Defendants' workers. 1-ER-0031-0034. Applying well-settled law to the undisputed material facts, the workers were employees under the FLSA and entitled to the Act's protections.

A. Defendants' Argument that Their Workers Were Not Employees under the FLSA Because of an Internal Revenue Code Provision Is Meritless.

Defendants argue that their workers were not employees under the FLSA because of an IRC provision, 26 U.S.C. 3508, that designates a qualifying "direct seller" as a statutory non-employee for purposes of the IRC. Defendants' Brief, 35-40. Assuming that their workers qualify as "direct sellers" under the IRC, the argument that they were independent contractors under the FLSA as a result has no textual basis in the IRC provision, is refuted by the FLSA's text and purpose, and has been summarily rejected by courts.

The IRC provision states that, "[f]or purposes of this title," a "direct seller" (as the provision defines that term) "shall not be treated as an employee." 26 U.S.C. 3508(a). By its plain terms, this provision is limited to "this title" – *i.e.*, Title 26 of the U.S. Code, *i.e.*, the IRC. The FLSA is in Title 29 of the U.S. Code.

29 U.S.C. 201, *et seq*. Accordingly, this IRC provision does not apply to the FLSA or any other statute outside of Title 26. In addition to the district court here, 1-ER-0031-0033, other courts have reached this conclusion. *Esquivel v. Hillcoat Properties, Inc.*, 484 F. Supp.2d 582, 584 (W.D. Tex. 2007) (explaining that 26 U.S.C. 3508 "[b]y its terms … applies only to Title 26, the Internal Revenue Code" and that there was "no authority whatsoever for the proposition that a classification for income tax purposes has any application to the determination of employee status under the FLSA"); *Heidingsfelder v. Burk Brokerage, LLC*, No. 09-3920, 2010 WL 4364599, at *4-5 (E.D. La. Oct. 25, 2010) (citing *Esquivel* to reject argument that workers are independent contractors as opposed to employees under the FLSA because of 26 U.S.C. 3508). And this Court has explained that, as a general matter, "the Internal Revenue Code, the Code of Federal Regulations, and court opinions interpreting these provisions … do not bear on the definition of 'employer' under either the FLSA or California law." *Serino v. Payday Cal., Inc.*, No. 08-56940, 2010 WL 1678302, at *1 n.2 (9th Cir. Apr. 27, 2010) (unpublished).[10]

[10] The *Smoky Mountain Secrets, Inc. v. United States* decision cited by Defendants (Defendants' Brief, 39) found that the workers in that case were "direct sellers" for federal tax purposes – not for the purposes of any other laws. 910 F. Supp. 1316, 1321-23 (E.D. Tenn. 1995).

Defendants' argument is also refuted by the FLSA. The FLSA defines "employer" to include "any person acting directly or indirectly in the interest of any employer in relation to an employee," 29 U.S.C. 203(d), "employee" to mean generally "any individual employed by an employer," 29 U.S.C. 203(e)(1), and "employ" to "include[] to suffer or permit to work," 29 U.S.C. 203(g).[11] The Supreme Court has stated that "[a] broader or more comprehensive coverage of employees within the stated categories would be difficult to frame," and that "the term 'employee' had been given 'the broadest definition that has ever been included in any one act.'" *United States v. Rosenwasser*, 323 U.S. 360, 362, 363 n.3 (1945) (quoting 81 Cong. Rec. 7657 (statement of Senator Black)). The Supreme Court has noted that, "in determining who are 'employees' under the Act, common law employee categories or employer-employee classifications under other statutes are not of controlling significance. Th[e] Act contains its own definitions, comprehensive enough to require its application to many persons and working relationships, which prior to this Act, were not deemed to fall within an employer-employee category." *Walling v. Portland Terminal Co.*, 330 U.S. 148, 150-51 (1947) (internal citation omitted). The Supreme Court has further noted the "striking breadth" of the FLSA's definition of "employ." *Nationwide Mut. Ins. v.*

[11] The FLSA's definition of "employee" contains exceptions, 29 U.S.C. 203(e)(2)(C), (3), (4), and (5), which do not apply here; there is no exception for "direct sellers" or anything close.

Darden, 503 U.S. 318, 326 (1992). As the Supreme Court explained, the FLSA's "suffer or permit" definition of "employ" originally came from state laws regulating child labor, which laws used such definitions of "employ" to expand their coverage more broadly than employers who controlled the means and manner of performance. *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 728 & n.7 (1947). The FLSA thus defines employment by its own terms; the IRC has no bearing.

As these cases illustrate, the FLSA's breadth of coverage comes from the Act's definitions themselves and what they meant when enacted – not from any principle of statutory construction based on the Act's remedial purpose. Thus, Defendants' discussion (Defendants' Brief, 38-39) of *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018), is misplaced. In *Encino*, the Supreme Court explained that the Act's exemptions from its minimum wage and overtime pay requirements for certain employees should be given "a fair reading" rather than "construed narrowly." *Id.* at 1142. The Supreme Court stated that the "narrow-construction principle relies on the flawed premise that the FLSA pursues its remedial purpose at all costs" and noted that the exemptions are part of the Act too and give no textual indication that they should be construed narrowly. *Id.* (internal quotation marks omitted). Significantly, *Encino* addressed exemptions from some of the Act's requirements that apply to certain employees – not who is an

employee under the Act in the first place. Indeed, a worker must be an employee to satisfy these exemptions and remains an employee under the Act even if an exemption applies. *See generally* 29 U.S.C. 213. On the other hand, the breadth of who is an employee under the FLSA comes from the Act's definitions themselves and not any "narrow-construction" principle and was not changed by *Encino*'s ruling on the Act's exemptions.[12] In sum, there is no basis in the FLSA for the argument that "direct sellers" under the IRC cannot be employees under the FLSA.

Finally, Defendants' bare assertion (Defendants' Brief, 37-38) that it is impossible to simultaneously comply with the IRC provision and the FLSA is untenable. If the workers here were direct sellers under the IRC, then there were certain federal tax consequences for them. 26 U.S.C. 3508. Nothing about those tax consequences prevented Defendants from recording their hours worked and paying them at least the minimum wage as required by the FLSA.[13] Although the workers would have a different employment status under the IRC than the FLSA if 26 U.S.C. 3508 were to apply, there is nothing about the respective obligations under the IRC and the FLSA that would actually conflict, and Defendants have

[12] Defendants' assertion (Defendants' Brief, 38) that the district court relied on the narrow-construction principle in rejecting their argument has no basis in the district court's decision, 1-ER-0031-0033.

[13] Commission payments are entirely compatible with the FLSA. *See*, *e.g.*, 29 U.S.C. 207(i); 29 CFR 778.117-.122.

identified none. For all of these reasons, this Court should reject Defendants' argument that the IRC's "direct seller" provision makes the workers here independent contractors under the FLSA.

B. Applying the Economic Realities Analysis, the Workers Were Economically Dependent on Defendants and Therefore Were Their Employees under the FLSA.

This Court applies a well-settled FLSA economic dependence analysis when determining whether workers are FLSA employees or independent contractors. Consistent with the FLSA's broad definitions, this Court analyzes whether the workers are economically dependent on the employer (and are thus employees) or are in business for themselves (and are thus independent contractors). *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1370-71 (9th Cir. 1981); *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 754 (9th Cir. 1979). To guide the analysis, this Court focuses on six factors that examine the economic realities of the working relationship: (1) the degree of the employer's right to control the manner in which the work is performed; (2) the worker's opportunity for profit or loss depending upon managerial skill; (3) the worker's investment in equipment or materials required for the work, or the worker's employment of helpers; (4) whether the work requires a special skill; (5) the degree of permanence of the working relationship; and (6) whether the work is an integral part of the employer's business. *Sureway Cleaners*, 656 F.2d at 1370; *Real*, 603 F.2d at 754. These

factors are not exhaustive, no single factor is determinative, and the analysis considers the circumstances of the whole activity. *Sureway Cleaners*, 656 F.2d at 1370; *Real*, 603 F.2d at 754-55.

Because the applicable analysis focuses on the economic realities of the working relationship, an agreement characterizing the relationship as an independent contractor relationship or a label given to the relationship by the parties is not determinative. *Real*, 603 F.2d at 755 ("Economic realities, not contractual labels, determine employment status [under] the FLSA. Similarly, the subjective intent of the parties to a labor contract cannot override the economic realities reflected in the factors described above.") (internal citations omitted); *Rutherford Food*, 331 U.S. at 729 ("[P]utting on an 'independent contractor' label does not take the worker from the protection of the Act."). Accordingly and contrary to Defendants' arguments (Defendants' Brief, 41), the independent contractor designations in the agreements that Defendants required the workers to sign and how the workers identified themselves on their resumes are not material to the analysis.

Applying the economic realities factors to the undisputed material facts here, the workers were Defendants' employees under the FLSA:

Control. Defendants controlled what the workers sold, how they sold, how much they earned from their sales, to whom they sold, from where they sold, and

when they sold. Even if the scripts and the rules regarding what they were supposed to say and not say on the calls came from Defendants' clients as Defendants argue, Defendants imposed those scripts and rules on the workers, trained the workers on them, expected and monitored compliance, and placed additional work rules on the workers – leaving little, if any, room for the workers to control how they performed the work. Defendants also determined how much the workers earned when they made a sale and imposed deductions from their earnings in the form of fines, loan fees, and chargebacks. Defendants controlled whom the workers called because Defendants' dialer system determined which phone numbers to call and automatically dialed them. Defendants required that the work be performed at their call center during shifts that they set and that the workers arrive on time to be eligible for certain bonuses. Defendants' primary argument is that the workers could choose whether and how long to work. Defendants' Brief, 40-41. Even if the workers could make such "choices" within the confines of Defendants' requirements, those "choices" did not undercut Defendants' control over the work. As discussed above, when the workers worked, Defendants controlled their pay rates, how they performed the work, and the meaningful terms and conditions of the work. *See Acosta v. Off Duty Police Servs., Inc.*, 915 F.3d 1050, 1060 (6th Cir. 2019) ("When workers did accept assignments, [the employer] set the rate at which the workers were paid. [The

employer] would tell the workers where to go for the job, when to arrive, and whom they should contact when they got there."). There is no evidence that the workers' choices regarding whether and for how long to work indicated that they were in business for themselves; when they worked, Defendants' control over how they performed the work was paramount.

Opportunity for Profit or Loss. Like the workers in *Sureway Cleaners*, the workers here "make no capital investment and therefore bear no risk of a significant loss." 656 F.2d at 1371. Defendants determined the workers' opportunity to earn money by providing the services to sell, the potential customers, and the space and equipment to try to make the sales. And most significantly, Defendants determined the terms and amounts of the commissions and bonuses and deducted chargebacks, fines, and loan fees from those earnings. *See Scantland v. Jeffry Knight, Inc.*, 721 F.3d 1308, 1317 (11th Cir. 2013) (opportunity for profit or loss factor indicated employee status where workers could not affect "the rates they were paid" and "were also subjected to uncontestable chargebacks"). There were simply no managerial skills that Defendants' workers could exercise to affect their earnings. Of course, the workers earned more if they sold more, but such fluctuations in earnings are typical of employees, particularly salespersons, who earn more if they perform better, and are not the types of profits and losses that independent businesspersons

experience based on their managerial decisions. *See Hopkins v. Cornerstone Am.*, 545 F.3d 338, 344 (5th Cir. 2008) (opportunity for profit or loss factor indicated that sales leaders were employees where employer controlled the major determinants of earnings, including what and to whom they sold); *Brock v. Mr. W Fireworks, Inc.*, 814 F.2d 1042, 1051 (5th Cir. 1987) (workers who sold fireworks at prices determined by employer and made little investment were "far more closely akin to wage earners toiling for a living, than to independent entrepreneurs seeking a return on their risky capital investments"); *see also Scantland,* 721 F.3d at 1317 ("An individual's ability to earn more by being more technically proficient is unrelated to an individual's ability to earn or lose profit via his managerial skill, and it does not indicate that he operates his own business."). And Defendants' argument (Defendants' Brief, 40) that the workers may have earned less if they worked less misunderstands the type of opportunity for profit or loss that indicates independent contractor status. *See Off Duty Police*, 915 F.3d at 1059 ("Decreased pay from working fewer hours does not qualify as a loss."); *Dole v. Snell*, 875 F.2d 802, 810 (10th Cir. 1989) ("[T]here was no way that the decorators could experience a business loss. A reduction in money earned by the decorators is not a 'loss' sufficient to satisfy the criteria for independent contractor status.").

Investment. Defendants maintained the call centers and provided the workers with the equipment necessary for the work, including computer equipment

and headsets. The workers made no capital or meaningful investment to perform the work, and they did not hire helpers. In sum, Defendants – not the workers – supplied "the necessary risk capital" consistent with operating an independent business. *Sureway Cleaners*, 656 F.2d at 1372; *see also Sec'y of Labor, U.S. Dep't of Labor v. Lauritzen*, 835 F.2d 1529, 1537 (7th Cir. 1987) (workers' minimal investment "is an indication that their work is not independent of the [employers]").

Special Skill. Allen Roach explained that there was no special skill required for the work; instead, Defendants hired anyone who sounded good reading the script. In addition to providing the scripts and potential customers, Defendants provided the workers with training. Defendants determined to whom the workers sold, what they sold, and what they said when trying to sell. Contrary to Defendants' argument (Defendants' Brief, 41), even if a worker was talented at sales, the worker did not use sales talent in an independent manner, and sales talent is not skill or initiative indicative of an independent contractor. *See Mr. W Fireworks*, 814 F.2d at 1053 (sales experience and developing and maintaining rapport with customers were not "sufficient independent skill or initiative to indicate that [workers] were independent contractors"); *Usery v. Pilgrim Equip. Co.*, 527 F.2d 1308, 1314 (5th Cir. 1976) (developing "[c]ustomer rapport" does not indicate initiative, especially when the worker is paid on a commission basis;

instead, developing customer rapport is encouraged by the financial incentives of the employer's commission system). In sum, the work required no special skill indicative of workers in business for themselves.

Integral. Defendants were in the business of selling long distance telephone services through telemarketing, and the workers made calls from Defendants' call centers to sell those services on Defendants' behalf. The workers' work was not only an integral part of Defendants' business; their work was Defendants' business. *See, e.g.*, *Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298, 309 (4th Cir. 2006) (security guards were integral to company's business where company "was formed specifically for the purpose of supplying" private security). The workers were not in businesses for themselves and did not operate independently; instead, they were part of Defendants' business and dependent on it for work.[14]

[14] The district court made no findings regarding the permanence factor. Even if there was evidence that the workers' working relationships with Defendants were not exclusive and generally short in duration, such evidence more likely demonstrates that the workers were unskilled laborers who moved from one high-turnover service job to another rather than that they exercised business initiative indicative of independent businesspersons. In any event, that factor – like any other single factor – is not determinative. *Sureway Cleaners*, 656 F.2d at 1370; *Real*, 603 F.2d at 754-55. Considering the totality of the circumstances, the overwhelming degree to which the other five factors demonstrate that the workers were economically dependent on Defendants for work warranted summary judgment for the Secretary. *See Off Duty Police*, 915 F.3d at 1062 (concluding that workers were FLSA employees although one factor may have suggested otherwise because the analysis "must account for the full range of factors relevant to a worker's employment status").

In sum, there is no dispute that the workers were commission-based workers who, from Defendants' call centers and with no skill required, used equipment, training, and scripts provided to them by Defendants to sell the services of Defendants' clients to customers identified by Defendants for commission payments set by Defendants (and they performed the very telemarketing work that Defendants were in business to provide). Accordingly, this Court should affirm summary judgment on the workers' status as employees under the FLSA.

II. THE DISTRICT COURT CORRECTLY RULED THAT DEFENDANTS' FLSA VIOLATIONS WERE WILLFUL.

Where an employer willfully violates the FLSA, a three-year statute of limitations applies instead of a two-year period. 29 U.S.C. 255(a). A violation is willful if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the [FLSA]," though mere negligence will not suffice. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988). As this Court has explained, an employer need not knowingly violate the FLSA for its violation to be willful; its violation is willful where it disregarded the very possibility that it was violating the Act. *Flores*, 824 F.3d at 906; *Alvarez*, 339 F.3d at 908-09. In other words, "[a]n employer who knows of a risk that its conduct is contrary to law, yet disregards that risk, acts willfully." *Haro v. City of Los Angeles*, 745 F.3d 1249, 1258 (9th Cir. 2014). Accordingly, an employer's violation is willful when it is on notice of its obligations under the Act but took no

affirmative acts to assure compliance with them. *Flores*, 824 F.3d at 906; *Alvarez*, 339 F.3d at 909.

Here, it is undisputed that Defendants were on notice of their obligation to pay their workers a minimum wage under the FLSA and took no affirmative acts to assure compliance with that obligation. Defendants instead ignored the obligation and took steps to avoid compliance.

First, Defendants required their workers to sign agreements expressly waiving any rights to payment of a "minimum wage" under the "Fair Labor Standards Act." *See*, *e.g.*, 1-SER-203, 220, 236, 241. The agreements not only show Defendants' knowledge of the FLSA's minimum wage obligations, but they also represent a calculated and systematic effort to deter their workers from enforcing their FLSA rights.

Second, Defendants were on notice that they were not paying their workers the required minimum wage. When Allen Roach took over the business, there were 14 Nevada state wage complaints pending against the business. 5-ER-0934. Thereafter, Defendants "often" received complaints for violations of Nevada minimum wage laws – 10 to 12 such complaints per year. 4-ER-0931; 5-ER-0934, 0953. These complaints, which Defendants did not contest and instead settled, put them on notice. *See Haro*, 745 F.3d at 1258 ("Prior FLSA violations, even if they were different in kind from the instant one and not found to be willful, put the

employer on notice of other potential FLSA requirements.") (internal quotation marks omitted); *Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 919 (9th Cir. 2003) (finding "probative [the employer's] former FLSA violations, even if they were different in kind from the instant one and not found to be willful" in affirming summary judgment for the Secretary that the instant violation was willful). Based on this evidence, Defendants were indisputably on notice of their obligation to pay their workers a minimum wage under the FLSA.

Third, it is undisputed that Defendants took no affirmative acts to assure compliance. Ryan Roach never researched whether they were correct to treat the workers as independent contractors or asked anyone for advice; instead, he "just assumed that call centers were ran like that." 9-ER-2363-2364. Allen Roach did not consult with anyone about the FLSA's minimum wage requirements before having the workers waive them. 4-ER-0892. He never even inquired into the FLSA even though he required the workers to waive their rights under the Act. 5-ER-0937. His philosophy, with respect to the NOLC for example, was that the agency would "come and see" them if they were supposed to treat the workers as employees and pay them the minimum wage. 4-ER-0899.[15]

[15] Although Allen Roach involved an accountant in the DETR audit because it "was a financial situation where they're asking for financial documents," he did not involve the accountant when it was an "employee-employer issue." 4-ER-0931.

Indeed, the actions that Defendants did take were to avoid compliance. As Allen Roach admitted, they paid "the hourly [wage] when the employee contest[ed] the wage" and all along tried to "keep [their] head[s] low." 1-SER-148. Instead of evaluating their pay practices and seeking to address or fix the causes of the continuous stream of wage complaints, Defendants treated wage violations as a cost of doing business and settled with workers who complained. 5-ER-0946-0948 ("Yeah, let's pay them for that, just to settle it out."). Defendants knew that they were violating the law and would be caught, though they assumed it would be by a Nevada agency, not WHD. 1-SER-148 ("When I started I always knew the day would come when the State would come knocking at our door," and "I always felt that later down the road that this would be the jurisdiction that would be knocking our door.").

Moreover, language that Defendants included in the agreements that they required the workers to sign was a further effort to avoid compliance. Defendants included numerous misstatements regarding the working relationship in an attempt to bolster the unsupportable independent contractor classification. For example, the agreements stated that the workers "exclusively" controlled the work performed and the "manner and method of performance thereof," possessed "freedom and discretion," and used "special skill services and knowledge." *See*, *e.g.*, 1-SER-203, 219-220, 236, 241. As explained above, the workers exercised

little meaningful control or discretion when calling leads whom Defendants' automatic dialer chose and reading the scripts to sell telephone services for Defendants, and Allen Roach admitted that the work did not require any special skills or knowledge, 4-ER-0894. Similarly, when arguing to the NOLC that their workers were independent contractors, Defendants made numerous misstatements about the work in an attempt to recast them as legitimate independent contractors. *See* footnotes 2-7 *supra* and accompanying text. Allen Roach, after researching the independent contractor standard and gaining knowledge of it, essentially had to misrepresent the facts of the workers' work when arguing that the workers met the standard. *Id.*; 4-ER-0930-0931; 5-ER-0934, 0939-0940.

This record establishes a willful violation as a matter of law. *See Alvarez*, 339 F.3d at 909 (The employer "was on notice of its FLSA requirements, yet took no affirmative action to assure compliance with them. To the contrary, [the employer's] actions may more properly be characterized as attempts to evade compliance, or to minimize the actions necessary to achieve compliance."). Like the employer in *Alvarez*, not only were Defendants on notice of the FLSA's minimum wage requirements, and not only did they fail to take affirmative steps to assure compliance with those requirements, but they also took steps to evade compliance. Defendants have identified no clear error, and the district court was correct to grant summary judgment to the Secretary on willfulness.

Defendants' arguments to the contrary are unavailing. As an initial matter, Defendants complain that, in their view, the Secretary's pursuit of willfulness was "vindictive and intended to kill the Company." Defendants' Brief, 42-43. The Secretary brought this suit on behalf of workers whom Defendants paid less than the FLSA's $7.25 minimum wage, and any additional monies recovered from Defendants' violations being willful go straight to the workers who were deprived their wages. In any event, as set forth herein and as the district court found, the Secretary's assertion of willfulness is well-grounded in the facts and this Court's precedent.

Defendants' main argument is that the 2010 DETR audit of their unemployment compensation practices was sufficient to defeat summary judgment on willfulness. Defendants' Brief, 43-46. As the facts indicate, however, the DETR audit was of Defendants' unemployment compensation practices that reviewed certain financial records and did not involve interviewing the workers, evaluating their actual working relationships with Defendants, or reviewing Defendants' pay practices. 4-ER-0923-0929; 9-ER-2399. And most importantly, DETR's statement that Defendants' agreements with the workers were in compliance was plainly based on a particular provision in the Nevada unemployment compensation statute that exempts from employee coverage under that statute certain commission-based telemarketers. *See* Nev. Rev. Stat. 612.144

(excluding "[s]ervices performed by person selling or soliciting the sale of products in certain circumstances" from "employment" under Nevada's Unemployment Compensation Law). There is no such exception in the FLSA (or Nevada's wage-and-hour law), and there is no evidence that Defendants even took any affirmative step to determine whether there was such an FLSA exception. Indeed, Allen Roach did not talk to DETR about the FLSA's (or Nevada's) minimum wage requirements. 4-ER-0892. And in response to the repeated complaints from their workers that they were violating Nevada's wage laws, Defendants did not assert that the workers were independent contractors because of the DETR audit; instead, they paid hourly wages to settle the complaints (as described above).[16] As Allen Roach told Ryan Roach, Defendants knew that they were violating the law and that a government authority "would come knocking at our door." 1-SER-148.

Finally, Defendants argue that misclassifying employees and asking the workers to sign the agreements are not sufficient to demonstrate willfulness. Defendants' Brief, 45-46.[17] They also assert that the Secretary, to overcome the

[16] Defendants also did not assert that the workers were independent contractors because of the DETR audit for purposes of workers compensation coverage. 1-SER-050-051.

[17] The cases cited by Defendants do not involve employee misclassification or otherwise support their argument. Defendants' citation to *Richland Shoe*, 486 U.S. at 133-34, for the proposition that "mere negligence" does not demonstrate

agreements' invocation of the IRC "direct seller" provision and the alleged lack of other evidence, "carpet bombed the district court with cherry picked out of context facts." *Id*. Defendants gloss over the significance of the agreements' requirement that the workers expressly waive their FLSA minimum wage rights.[18] Regardless, as explained above, there is significantly more evidence here that is directly relevant to the willfulness issue under this Court's precedent, including: Defendants were subject to repeated complaints that they failed to pay their workers the wages due them; Defendants chose to pay the workers who filed complaints and otherwise tried to keep their heads low; Defendants took no steps to assure or even investigate compliance with the FLSA's minimum wage

willfulness is inconsequential given that the evidence here goes well beyond negligence. In *Hantz v. Prospect Mortgage, LLC*, 11 F. Supp.3d 612, 617-18 (E.D. Va. 2014), the employer was not on notice that its classification of its employees as exempt from the FLSA's overtime pay requirement was unlawful, and the employer relied on a WHD interpretation that the employees were exempt. And in *SEIU, Local 102 v. County of San Diego*, 60 F.3d 1346, 1355-56 (9th Cir. 1995), this Court was "unable to identify *any* knowing or reckless conduct" by the employer, which had "relied on substantial legal authority when it decided not to compensate for standing time as well as consulting experts and the DOL in an attempt to comply with the law" (emphasis in original).

[18] *See Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 740 (1981) ("FLSA rights cannot be abridged by contract or otherwise waived, because this would nullify the purposes of the statute and thwart the legislative policies it was designed to effectuate.") (internal quotation marks omitted).

obligations; and they have admitted as much. In sum, there is no dispute, because of the DETR audit or otherwise, that Defendants' violations were willful.[19]

III. THE DISTRICT COURT CORRECTLY AWARD LIQUIDATED DAMAGES.

When an employer violates the FLSA, liquidated damages in an additional amount equal to the back wages must be awarded unless the employer demonstrates that it acted in good faith and had reasonable grounds to believe that it was not violating the FLSA. 29 U.S.C. 216(b) ("An employer who violates the [FLSA] shall be liable for … the payment of wages lost and an additional equal amount as liquidated damages."); 29 U.S.C. 260 ("[I]f the employer shows … that the act or omission [underlying the violation] was in good faith and that [it] had reasonable grounds for believing that [its] act or omission was not a violation of the [FLSA], the court may, in its sound discretion, award no liquidated damages or award [a reduced amount]."); *see also Flores*, 824 F.3d at 905 ("If an employer fails to satisfy its burden under [section] 260, an award of liquidated damages is

[19] At the end of their willfulness argument, Defendants seem to make a one-sentence claim that, not only did Allen Roach, Ryan Roach, and New Choice not willfully violate the FLSA, but also "there was no basis" for the district court's individual liability and successor liability determinations. Defendants' Brief, 46. However, because Defendants did "not specifically and distinctly argue the issue in [their] opening brief," they waived any arguments relating to individual liability and successor liability. *United States v. Kama*, 394 F.3d 1236, 1238 (9th Cir. 2005); *see also Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief.").

mandatory."); *Haro*, 745 F.3d at 1259 ("Double damages are the norm; single damages are the exception."). Liquidated damages are not penalties payable to WHD; instead, they are additional compensation to employees for the delay in receiving their wages due under the Act. *Alvarez*, 339 F.3d at 909 (citing *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583-84 (1942)).

A. Because Defendants' FLSA Violations Were Willful, They Could Not Have Acted with the Good Faith Necessary to Avoid Liquidated Damages.

Under this Court's precedent, because Defendants' FLSA violations were willful, they cannot demonstrate that they acted in good faith pursuant to section 260. *Scalia v. Emp. Sols. Staffing Grp., LLC*, 951 F.3d 1097, 1102-03 (9th Cir. 2020) (rejecting argument that an employer can act in good faith while willfully violating the FLSA), *cert. denied*, 2021 WL 666405 (Feb. 22, 2021); *see also A-One Med. Servs.*, 346 F.3d at 920 ("Of course, a finding of good faith is plainly inconsistent with a finding of willfulness."). Where an employer has willfully violated the FLSA, it necessarily follows that the employer cannot have acted in good faith. Thus, a grant of summary judgment on willfulness necessarily forecloses any argument that the employer acted in good faith.[20] And absent a

[20] As noted in *Employer Solutions Staffing*, this Court's precedent on this issue "aligns with precedent in most other circuits." 951 F.3d at 1103 (citing *Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1166 (11th Cir. 2008)); *see also Singer v. City of Waco, Tex.*, 324 F.3d 813, 823 (5th Cir. 2003); *Elwell v. Univ. Hosps. Home Care Servs.*, 276 F.3d 832, 841 n.5 (6th Cir. 2002).

finding of good faith, awarding liquidated damages is mandatory. *Flores*, 824 F.3d at 905. Accordingly, applying this Court's precedent, the district court correctly awarded liquidated damages because it concluded (correctly) that Defendants willfully violated the FLSA.

B. In Addition, the District Court Correctly Found that There Was No Dispute of Material Fact that Defendants Did Not Act in Good Faith.

To demonstrate good faith, Defendants have a "heavy burden" and must establish that they had an honest intention to ascertain and follow the dictates of the Act and had reasonable grounds for believing that their conduct complied with the Act. *Flores*, 824 F.3d at 905; *see also Alvarez*, 339 F.3d at 910 (the employer bears the difficult burden of proving both subjective good faith and objective reasonableness).

The district court correctly determined that Defendants did not meet their burden.[21] Defendants knew that their pay practices were unlawful; Allen Roach acknowledged that to Ryan Roach. 1-SER-146-149. As discussed above, Defendants received numerous complaints from their workers, and in response, they settled the complaints, kept their heads low, did not inquire into the legality of their pay practices, and continued to require their workers to expressly waive their

[21] Although the district court appeared to entertain the possibility that Defendants could show good faith even though their FLSA violations were willful, it did note that "a lack of good faith is correlated to the … finding of willfulness." 1-ER-0040.

FLSA minimum wage rights. *See* pgs. 41-44, *supra*. Ryan Roach never researched whether they were correct to treat the workers as independent contractors or asked anyone for advice. 9-ER-2363-2364. And Allen Roach did not consult with anyone about the FLSA's minimum wage requirements or inquire into the Act before having the workers waive the requirements. 4-ER-0892; 5-ER-0937. Accordingly, the district court correctly found that, "because Defendants failed to take any action to determine their FLSA compliance in face of repeated notices of potential violations of employment regulations," there is "no dispute of material fact that Defendants did not act in good faith to conform with the FLSA." 1-ER-0040.

In response, Defendants assert (Defendants' Brief, 47) that Allen Roach believed that the agreements signed by the workers were "vetted by legal counsel" and that treating the workers as independent contractors was commonplace in the industry (citing "[w]ord of mouth" and "gossip," 4-ER-0877). However, assumptions and gossip fall well short of this Court's standard, especially when neither Allen Roach nor Ryan Roach took any steps to seek advice regarding the FLSA. 4-ER-0892; 5-ER-0937; 9-ER-2363-2364. Defendants also assert that Allen Roach discussed "the issue" with an accountant. Defendants' Brief, 47. Although Allen Roach involved the accountant in the DETR audit of Defendants' unemployment compensation practices, he stated that he did not: involve the

accountant when it was an "employee-employer issue" because "I receive the[m] often," 4-ER-0931; talk to the accountant regarding the workers' classification as direct sellers, 5-ER-1159; rely on the accountant's advice for the workers' status as independent contractors because that model "was already in place," 4-ER-0877; or consult with anyone about the FLSA's minimum wage requirements before having the workers waive them, 4-ER-0892.

Defendants also raise the DETR audit (Defendants' Brief, 47-48). As explained above, however, the DETR audit was limited to Defendants' unemployment compensation practices and reviewed certain financial records as opposed to their pay practices. *See* pgs. 45-46, *supra*. The workers' status as non-employees concerned only Nevada's unemployment compensation statute, which exempts from employee coverage certain telemarketers. *See* Nev. Rev. Stat. 612.144. There is no such exception in the FLSA, and there is no evidence that Defendants took any step to determine whether there was. Defendants assert repeatedly that WHD did not meaningfully investigate the merits of the DETR audit. *See*, *e.g.*, Defendants' Brief, 47-48. However, the salient points of the audit are undisputed, and the workers' satisfaction of a statutory exception peculiar to Nevada's unemployment compensation statute without any effort by Defendants to determine compliance with the FLSA's requirements (but efforts to force the workers to waive those requirements) are not the honest intentions and reasonable

grounds necessary to carry their burden of demonstrating good faith. *See Flores*, 824 F.3d at 905.[22]

The cases cited by Defendants provide no support. In *Bratt v. Cty. of Los Angeles*, 912 F.2d 1066, 1072-73 (9th Cir. 1990), the employer assigned a qualified individual to survey job responsibilities and determine workers' FLSA exemption status, and this Court held that the employer's contemporaneous interpretation of the FLSA and supporting regulations was reasonable, even if incorrect. Here, Defendants made no effort to determine FLSA compliance and thus laid no groundwork for any reasonable interpretation of the FLSA. And in *SEIU, Local 102*, 60 F.3d at 1355-56, this Court was unable to identify any "knowing or reckless conduct" by the employer, which had "relied on substantial legal authority" and had "consult[ed] experts and the DOL in an attempt to comply with the law." Here, Defendants made no such efforts. For all of these reasons, the district court correctly rejected Defendants' good faith defense.

[22] Defendants assert that they used the DETR audit as a defense to "subsequent wage/hour and unemployment claims." Defendants' Brief, 47. Although this assertion is supported as to unemployment claims, Defendants' record citations (5-ER-0935-0938, 0945) do not support this assertion as to wage-and-hour claims. Indeed, as explained above, in response to their workers' repeated complaints that they were violating wage-and-hour laws, Defendants did not assert the DETR audit as a defense; instead, they paid the workers hourly wages to settle the complaints. *See* pg. 46, *supra*.

IV. THE DISTRICT COURT CORRECTLY ADOPTED WHD'S METHODOLOGY AND CALCULATION OF THE BACK WAGES DUE.

A. The District Court Correctly Calculated Back Wages.

Because Defendants did not keep time records of the workers' hours worked, the district court correctly determined that the Secretary's back-wage calculations, as summarized in Eastwood's declaration, were based on a just and reasonable inference that the workers typically worked 30-hour weeks and that Defendants did not negate the reasonableness of that inference. When an employer fails to keep accurate records, as Defendants failed here, the plaintiff need only produce "'sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference'" to establish the amount of back wages owed. *Brock v. Seto*, 790 F.2d 1446, 1448 (9th Cir. 1986) (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946)).

Defendants challenge the reasonableness of the back-wage calculations but do not substantiate their argument. Defendants' Brief, 53-54. Eastwood's back-wage calculations were based on Defendants' own evidence that the workers worked at least 30 hours per week, reduced for the first and last weeks of employment. 9-ER-2373-74. Allen Roach testified that the workers worked 30 hours per week, 6 hours per day. 5-ER-1163-1164. Other evidence, including testimony from Defendants' managers, corroborated his testimony. 1-SER-228

(Monday through Friday schedule was 7:30 am to 2:30 pm with one hour of breaks); 2-SER-288-289, 320-321 (regular weekday shift was from 7:30 am to 2:30 pm; "a lot" of workers worked past 2:30), 331-333. Given Defendants' failure to keep time records, the Secretary met his burden of showing the amount of work performed by a just and reasonable inference, shifting the burden to Defendants to show the precise number of hours worked or negate the reasonableness of the inference.

Defendants did not contest the 30-hours-per-week evidence at summary judgment as the district court noted, 1-ER-0039, and their belated arguments now fail to negate its reasonableness. Their attempt to rely now on information from the Noble Dialer is too convenient considering their prior insistence that its information did not count as time sheets and was not accurate. *See* pgs. 15-16, *supra*. Defendants reference to a "six year back wage calculation" (Defendants' Brief, 53) is beside the point considering that the calculation was consistent with the Secretary's position that equitable tolling applied and was revised by the Secretary as directed by the district court. 1-SER-036-037. And Defendants do not contest the reasonableness of the damages calculations that the district court actually approved. Defendants' argument that Eastwood used a "higher" number of hours worked than the WHD investigator (Defendants' Brief, 53) ignores the fact that the investigator offered to calculate the back wages at 25-hours-per-week

in an effort to resolve the matter prior to litigation, *see* 2-SER-356-358, 360 (testimony from WHD investigator explaining that she calculated back wages at 25.5 hours per week as a "negotiated" or "agreed-upon" amount with Allen Roach), and that evidence subsequently adduced during litigation demonstrates the reasonableness of using 30-hours-per-week as the baseline to calculate back wages. On this record, the district court correctly approved the Secretary's back-wage calculation.

B. The District Court Did Not Abuse Its Discretion in Denying Defendants' Motion to Strike Eastwood's Declaration.

Defendants argue that the district court erred by not striking Eastwood's declaration providing summary testimony regarding WHD's back-wage methodology and calculation because he was an undeclared expert witness. Defendants' Brief, 49-50. Defendants do not actually support their claim that Eastwood was an expert witness and seem more focused on the length of time that it took for the district court to deny the motion and the perceived lack of explanation for the denial. *Id*.

In any event, in denying the motion, the district court determined that Eastwood's testimony applied "basic arithmetic to voluminous records" and commented "on fundamental document review of which he [had] personal knowledge" and thus was not expert testimony. 1-SER-031 (footnote 1). The district court cited Federal Rules of Evidence 602 (personal knowledge required),

701 (non-experts may provide certain opinion testimony), and 1006 (summary testimony allowed), reinforcing its determination that Eastwood provided summary testimony as a non-expert regarding a matter about which he had personal knowledge. *Id*.

Eastwood's declaration confirms that he provided no expert testimony. 9-ER-2368-2378. He described the documents that WHD reviewed, the relevant time periods, the methodology that WHD used to determine hours worked, and the simple calculations that WHD made to determine back wages due. 9-ER-2369-2377. His personal involvement and thus his personal knowledge are evident from his testimony. *Id*. By contrast, expert testimony is based on the witness' "scientific, technical, or other specialized knowledge." Fed. R. Evid. 702(a). And although this case involves voluminous records and many workers, Eastwood simply testified as to how WHD determined the amount of back wages due – evidence that WHD provides in every case in which it finds FLSA violations. *See Seto*, 790 F.2d at 1448 (holding that district court erred in excluding testimony of WHD compliance officer on methodology of back-wage computations); *Perez v. Oak Grove Cinemas, Inc.*, 68 F. Supp.3d 1234, 1251-54 (D. Or. 2014) (relying on testimony of the Secretary's paralegal to explain review of records and back-wage calculations); *Chao v. Self Pride, Inc.*, No. Civ. RDB 03-3409, 2006 WL 469954, at *3-4 (D. Md. Jan. 17, 2006) (finding credible the testimony of WHD Assistant

District Director regarding back-wage calculations performed by WHD staff, including their review of over 3,500 timesheets); *see also Goldberg v. United States*, 789 F.2d 1341, 1343 (9th Cir. 1986) (holding that compiler of "voluminous tax records" properly testified as non-expert because "no expert opinions or conclusions were offered"). For all of these reasons, Defendants have not shown that the district court abused its discretion.

C. The District Court Did Not Abuse its Discretion in Rejecting Defendants' Claim for an Adverse Inference.

Defendants argue that the district court "was required to draw an adverse inference from the DOL's destruction of the Noble Dialer," Defendants' Brief, 51-53, but provide no basis for this supposed requirement or explanation of why the district court abused its discretion in concluding otherwise. Indeed, Defendants repeatedly insisted that there were "no time records" for the workers, 2-ER-0075, and Allen Roach disclaimed the accuracy of any information about hours worked gleaned from the Dialer, 5-ER-0946 ("I would never consider the[m] time sheets."), 0950; *see also* 2-SER-403 ("Nothing at [Wellfleet] functioned as a time clock for the Direct Sellers because [Wellfleet] did not keep time for them."). As the litigation progressed, the Noble Dialer was sitting in storage at Allen Roach's house until the Secretary requested it, 5-ER-0958, and there was no indication up to that point that Defendants intended to use any information from the Dialer affirmatively or to rebut the Secretary's evidence (which did not include

information from the Dialer). And the Noble Dialer was damaged during shipment. 2-SER-375. Defendants latched on to the supposed relevance of the Dialer to their case only after it was damaged.

On this record, Defendants cannot show that the information was relevant, that the "destruction" was intentional, or that they were prejudiced. *See Med. Lab. Mgmt. Consultants v. Am. Broad. Cos.*, 306 F.3d 806, 824-25 (9th Cir. 2002) (affirming denial of adverse inference in part because there was no bad faith or intentional conduct and the other party failed to pursue the lost evidence). The cases cited by Defendants do not support their argument. In *Yeti By Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1105-07 (9th Cir. 2001), this Court affirmed the exclusion of an expert witness' testimony because the party "failed to provide his expert report for two and a half years." And in *Akiona v. United States*, 938 F.2d 158, 161 (9th Cir. 1991), this Court actually reversed the district court's decision shifting the burden of proof to the government as a sanction for destroying records.[23] In sum, Defendants tried "to hit a home run and get something out of [the Noble Dialer damage] that might serve [their] benefit" as the Magistrate stated, 4-ER-0697, but the umpire made the correct call.

[23] Defendants complain that the district court granted summary judgment before resolving their request for discovery sanctions. Defendant's Brief, 53. However, the Magistrate rejected the request (ECF 110) and the district court overruled Defendants' objections (ECF 169) before resolving the summary judgment motions (ECF 170). 10-ER-2629, 2636.

V. THIS COURT DOES NOT HAVE JURISDICTION OVER ANY APPEAL OF THE DISTRICT COURT'S DENIAL OF DEFENDANTS' MOTION TO SET ASIDE THE JUDGMENT, AND THE DISTRICT COURT CORRECTLY DENIED THE MOTION IN ANY EVENT.

This Court does not have jurisdiction to consider Defendants' underdeveloped contention (Defendants' Brief, 54) that the district court erred in denying their Rule 60(b) motion to set aside the judgment because Defendants never appealed that denial. They filed their notice of appeal on July 16, 2020 and then filed their motion to set aside on August 12, 2020. 10-ER-2607-2608. After the district court denied the motion on December 18, 2020, 1-ER-0002-0007, Defendants did not file a notice of appeal or amend their existing notice of appeal.

A notice of appeal must be filed "after entry of the judgment or order appealed from." Fed. R. App. Proc. 4(a)(1). "If there has been no timely notice of appeal from an order, a circuit court of appeal has no jurisdiction to review that order." *Cruz v. Int'l Collection Corp.*, 673 F.3d 991, 1001 (9th Cir. 2012) (citing *Browder v. Dep't of Corrs. of Ill.*, 434 U.S. 257, 265 (1978)). A notice of appeal "'invokes our jurisdiction and establishes the issues to be addressed. A timely notice of appeal from the judgment or order complained of is mandatory and jurisdictional.'" *Id.* (quoting *Whitaker v. Garcetti*, 486 F.3d 572, 585 (9th Cir. 2007)). In *Whitaker*, this Court ruled that it did not have jurisdiction to hear an appeal of an order denying a post-judgment motion because the appellants "neither

amended their prior notice of appeal nor filed a new notice." 486 F.3d at 585;[24] *see also Cruz*, 673 F.3d at 1001-02 (this Court lacked jurisdiction to hear an appeal of post-judgment orders because the amended notice of appeal was filed late). As in *Whitaker*, this Court lacks jurisdiction to hear any appeal of the order denying the Rule 60(b) motion because Defendants never filed a notice of appeal or amended notice of appeal after the order was entered.

Even if this Court has jurisdiction, the district court did not. Once Defendants filed the notice of appeal, the district court no longer had jurisdiction to consider the Rule 60(b) motion filed thereafter. *See Davis v. Yageo Corp.*, 481 F.3d 661, 685-86 (9th Cir. 2007) (citing *Gould v. Mut. Life Ins. Co. of N.Y.*, 790 F.2d 769, 772 (9th Cir. 1986)). The district court correctly ruled that it lacked jurisdiction over the Rule 60(b) motion. 1-ER-0005-0006. Defendants do not contest the district court's jurisdictional ruling (Defendants' Brief, 54) and accordingly have waived any argument to the contrary. *See Kama*, 394 F.3d at 1238; *Greenwood*, 28 F.3d at 977. Defendants briefly restate (Defendants' Brief, 54) the arguments that the district court rejected in making its indicative ruling pursuant to Rule 62.1. However, "[a]n indicative ruling under [Rule 62.1] is a

[24] Although *Whitaker*'s section 1983 ruling is no longer good law, *A.E. ex rel. Hernandez v. County of Tulare*, 666 F.3d 631, 636-38 (9th Cir. 2012), its ruling that it lacked jurisdiction to hear an appeal of the denial of the post-judgment motion was unaffected.

procedural ruling, not an appealable 'final determination on the merits.'" *Doucette v. U.S. Dep't of the Interior*, Nos. 19-35743 & 20-35269, --- F. App'x ---, 2021 WL 915378, at *2 (9th Cir. Mar. 10, 2021) (quoting *Martinez v. Ryan*, 926 F.3d 1215, 1229 (9th Cir. 2019)). In any event, the district court did not abuse its discretion in finding that the basis for Defendants' motion was "the product of their own misfeasance" given their failure once they "ceased paying their counsel" to provide their contact information to the district court as required by the local rules. 1-ER-0006-0007.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that this Court affirm the district court's decisions in their entirety.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that the foregoing Secretary of Labor's Answering Brief:

(1) complies with Federal Rule of Appellate Procedure 32(a)(6) because it was prepared in a proportionally spaced typeface (14-point Times New Roman font); and

(2) complies with Circuit Rule 32-1(a) because it contains 13,989 words excluding those parts of a brief listed in Federal Rule of Appellate Procedure 32(f).

/s/ Dean A. Romhilt
DEAN A. ROMHILT

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Secretary of Labor's Answering Brief was served this 12th day of May, 2021, via this Court's ECF system on the following:

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ADDENDUM

Fair Labor Standards Act, 29 U.S.C. 203 (Definitions)

As used in this chapter—

* * *

(d) "Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer) or anyone acting in the capacity of officer or agent of such labor organization.

(e)(1) Except as provided in paragraphs (2), (3), and (4), the term "employee" means any individual employed by an employer.
(2) In the case of an individual employed by a public agency, such term means--

* * *

(3) For purposes of subsection (u), such term does not include any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer's immediate family.
(4)(A) The term "employee" does not include any individual who volunteers to perform services for a public agency which is a State, a political subdivision of a State, or an interstate governmental agency, if--

* * *

(5) The term "employee" does not include individuals who volunteer their services solely for humanitarian purposes to private non-profit food banks and who receive from the food banks groceries.

* * *

(g) "Employ" includes to suffer or permit to work.

* * *

Fair Labor Standards Act, 29 U.S.C. 255 (Statute of Limitations)

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act--

(a) if the cause of action accrues on or after May 14, 1947--may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;

* * *

Fair Labor Standards Act, 29 U.S.C. 260 (Liquidated Damages)

In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

Internal Revenue Code, 26 U.S.C. 3508
(Treatment of Real Estate Agents and Direct Sellers)

(a) General rule.--For purposes of this title, in the case of services performed as a qualified real estate agent or as a direct seller--
(1) the individual performing such services shall not be treated as an employee, and
(2) the person for whom such services are performed shall not be treated as an employer.

(b) Definitions.--For purposes of this section--

* * *

(2) Direct seller.--The term "direct seller" means any person if--
(A) such person--
(i) is engaged in the trade or business of selling (or soliciting the sale of) consumer products to any buyer on a buy-sell basis, a deposit-commission basis, or any similar basis which the Secretary prescribes by regulations, for resale (by the buyer or any other person) in the home or otherwise than in a permanent retail establishment,
(ii) is engaged in the trade or business of selling (or soliciting the sale of) consumer products in the home or otherwise than in a permanent retail establishment, or
(iii) is engaged in the trade or business of the delivering or distribution of newspapers or shopping news (including any services directly related to such trade or business),
(B) substantially all the remuneration (whether or not paid in cash) for the performance of the services described in subparagraph (A) is directly related to sales or other output (including the performance of services) rather than to the number of hours worked, and
(C) the services performed by the person are performed pursuant to a written contract between such person and the person for whom the services are performed and such contract provides that the person will not be treated as an employee with respect to such services for Federal tax purposes.
(3) Coordination with retirement plans for self-employed.--This section shall not apply for purposes of subtitle A to the extent that the individual is treated as an employee under section 401(c)(1) (relating to self-employed individuals).