No. 14-3691

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

THOMAS PEREZ, Secretary of Labor,
United States Department of Labor,

Appellee – Petitioner,

v.

EL PATO, INC., d/b/a EL MAGUEY MEXICAN RESTAURANT;
JYR'S EL MAGUEY CORPORATION, INC., d/b/a EL MAGUEY MEXICAN RESTAURANT; MANUEL JAIME, Deceased; JUSTO ADAN, Individually; and HUMBERTO JAIME, Individually,

Appellants – Respondents.

Appeal from the United States District Court for the Western District of Missouri
Honorable Dean Whipple, Judge, Case Nos. 03-cv-872, 05-cv-601, 07-cv-914

BRIEF FOR THE SECRETARY OF LABOR

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SUMMARY OF THE CASE AND STATEMENT REGARDING ORAL ARGUMENT

This appeal follows more than a decade of proceedings involving Respondents' (collectively "El Maguey") violations of the Fair Labor Standards Act of 1938, 29 U.S.C. 201, et seq. ("FLSA" or "Act"). The Secretary filed the present petition for contempt after an investigation revealed that El Maguey continued to implement a fixed pay system violating the FLSA's minimum wage and overtime requirements and failed to keep proper pay records, notwithstanding the district court's prior orders to comply with the Act and previous adjudications of contempt against some of the Respondents. Following a show cause hearing, the district court held each Respondent in contempt of one or more of its previous orders, and set forth requirements that El Maguey must follow to remedy past and prevent future violations of the FLSA.

During the hearing, the district court heard testimony from Wage and Hour Investigators and received into evidence written interview statements from El Maguey's managers, servers, and kitchen workers. On appeal, El Maguey does not challenge the admission of the managers' statements, but argues that the district court abused its discretion by admitting statements, and analyses based on those statements, from non-managerial employees. El Maguey also challenges the district court's adjudication of contempt against Respondent Humberto Jaime for his failure to comply with a 2003 order enjoining El Maguey's officers, agents,

servants, employees, and those persons in active concert or participation with them, who received actual notice of the judgment, from future violations of the FLSA.

Although the Secretary will gladly participate in oral argument to answer any questions the Court might have, he believes that oral argument is not warranted in this case because the issues are well settled and can be decided on the briefs.

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Honorable Dean Whipple, Judge, Case Nos. 03-cv-872, 05-cv-601, 07-cv-914

BRIEF FOR THE SECRETARY OF LABOR

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had jurisdiction over this case pursuant to section 17 of the FLSA, 29 U.S.C. 217; 28 U.S.C. 1331 (federal question); and 28 U.S.C. 1345 (suits commenced by an agency or officer of the United States). This court has jurisdiction to review the district court's Adjudication of Contempt and Findings of Fact and Conclusions of Law pursuant to 28 U.S.C. 1291 (final decisions of district courts).

Respondents-Appellants filed a timely Notice of Appeal from the district court's order on November 21, 2014. App. 367. On December 2, 2014, Respondents-Appellants amended the Notice of Appeal. App. 369.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion when it admitted under Federal Rule of Evidence 801(d)(2)(D) statements from current El Maguey employees about matters within the scope of their employment, including when they started and stopped work and their pay.

Federal Rule of Evidence 801(d)(2)(D)

DCS Sanitation Mgmt. v. Occupational Safety & Health Review Comm'n, 82 F.3d 812 (8th Cir. 1996).

Aliotta v. Nat'l R.R. Passenger Corp., 315 F.3d 756 (7th Cir. 2003).

2. Whether the district court abused its discretion when it admitted Wage and Hour analyses based on the non-hearsay statements.

Federal Rule of Evidence 801(d)(2)(D)

DCS Sanitation Mgmt. v. Occupational Safety & Health Review Comm'n, 82 F.3d 812 (8th Cir. 1996).

Aliotta v. Nat'l R.R. Passenger Corp., 315 F.3d 756 (7th Cir. 2003).

3. Whether, even if the statements were hearsay, admitting them did not substantially prejudice the contempt adjudication because the Secretary's other

evidence proved that El Maguey failed to comply with the district court's prior orders and because the monetary sanctions were appropriate.

United States v. Sanchez-Godinez, 444 F.3d 957 (8th Cir. 2006).

Chicago Truck Drivers v. Bhd. Labor Leasing, 207 F.3d 500 (8th Cir. 2000).

DiMauro v. United States, 706 F.2d 882 (8th Cir. 1983).

4. Whether the district court abused its discretion by holding Humberto Jaime in contempt given that the court did not clearly err in finding, based on all of the facts of the case, that Jaime had knowledge of and was responsible for complying with the court's 2003 Order enjoining violations of the FLSA.

Chicago Truck Drivers v. Bhd. Labor Leasing, 207 F.3d 500 (8th Cir. 2000).

Stewart v. United States, 236 F. 838 (8th Cir. 1916).

STATEMENT OF THE CASE

A. The District Court's Prior Orders Enjoining Respondents from Violating the FLSA

Respondent El Pato, Inc. d/b/a El Maguey Mexican Restaurant ("the Lee's Summit El Maguey") operates a restaurant in Lee's Summit, Missouri. A1-2.[1] Respondent JYR's El Maguey Corporation, Inc. d/b/a El Maguey Mexican Restaurant ("the Independence El Maguey") operates a restaurant in Independence

[1] The Secretary draws some of the facts set forth in this Statement from the district court's findings of fact, where those findings are unchallenged or where Respondent, despite objecting to the Secretary's evidence, does not challenge the district court's characterizations of that evidence.

Missouri. A2. Respondent Manuel Jaime, who passed away while this matter was pending, owned both restaurants. A2. Respondent Justo Adan is the manager for the Independence El Maguey. A2. Humberto Jaime is Manuel Jaime's brother and is involved in the operation of the Lee's Summit El Maguey. App. 614 (Tr. 237:10-11); App. 627; App. 631.

On September 26, 2003, the Secretary of Labor ("Secretary") brought an action to permanently enjoin the Lee's Summit and Independence El Maguey restaurants, Manuel Jaime, and their "officers, agents, servants, employees, and those persons in active concert or participation" with them, from violating the FLSA. App. 26-27, 30; A2. The Secretary alleged that Manuel Jaime and the El Maguey restaurants failed to pay employees minimum wages, failed to pay them overtime, and also violated the FLSA's recordkeeping provisions. App. 28 (minimum wage); App. 28-29 (overtime); App. 29 (recordkeeping).

District Court Judge Whipple entered a consent judgment against Manuel Jaime and the El Maguey restaurants on October 20, 2003. App. 40-45 (hereinafter "the 2003 Order"). The judgment ordered Manuel Jaime and the El Maguey restaurants to pay $78,701.90 plus interest in unpaid minimum wage and overtime compensation. App. 42. The judgment also permanently enjoined and restrained future violations of the FLSA's minimum wage, overtime, and recordkeeping provisions. App. 40-41; A2. The injunction required compliance

with the FLSA from Manuel Jaime, the El Maguey restaurants, and "their officers, agents, servants, employees, and those persons in active concert or participation with them" who received actual notice of the judgment. App. 40; A2.

On July 25, 2005, the Secretary petitioned the district court to hold Manuel Jaime and the Lee's Summit El Maguey in contempt for violating the terms of the 2003 Order. App. 46-51. The Secretary alleged that Manuel Jaime and the Lee's Summit El Maguey violated the 2003 Order by repeatedly failing to pay employees minimum wages and overtime, and failing to keep records required by the FLSA. App. 48-50.

On the same day, the Secretary filed a separate FLSA action against Manuel Jaime, the Lee's Summit El Maguey, and Humberto Jaime, whom the complaint described as the operations manager at the Lee's Summit El Maguey. App. 53, 54; A3. The complaint specifically referenced the contempt petition, and stated that the petition and FLSA action were based on the same investigation. App. 57. The district court subsequently consolidated the actions for settlement and other purposes. App. 6; A3.

Upon an agreement of the parties, on September 8, 2006, Judge Whipple entered an adjudication of contempt against the Lee's Summit El Maguey and Manuel Jaime for violating the 2003 Order. App. 85-89 (the "2006 Order"); A3. The 2006 Order decreed that the restaurant and Manuel Jaime must immediately

begin complying with all of the provisions of the FLSA, including the minimum wage, overtime, and recordkeeping requirements. A3; App. 86. It also ordered them to pay $71,187.43 plus interest in unpaid minimum wage and overtime compensation. App. 86. The 2006 Order, entered pursuant to the parties' agreement, also dismissed Humberto Jaime from the action. App. 85, 89. Finally, the 2006 Order decreed that the 2003 Order remained in effect. App. 88; A3.

On December 10, 2007, after investigating FLSA violations at a different El Maguey restaurant owned by Manuel Jaime, the Secretary filed a second petition for contempt adjudication against him. App. 90, 95-96. On the same day, the Secretary filed a complaint for FLSA violations against Justo Adan, who co-owned the restaurant with Manuel Jaime, for violations uncovered in this investigation. App. 115-16, 119; A3. Judge Whipple entered a consent injunction against Adan on August 22, 2008, ordering payment of $26,244.17 in unpaid minimum wages and overtime compensation. App. 137, 139; A4. The court also permanently enjoined and restrained Adan, and those persons in active concert or participation with him, from violating the minimum wage, overtime, and recordkeeping provisions of the FLSA. App. 137-39; A4.

The district court held Manuel Jaime in contempt for the second time on September 5, 2008. App. 141; A4. The court found that "rather than paying wages and overtime required by the FLSA" and the court's "prior orders," Manuel Jaime

"paid fixed salaries" and "no overtime." App. 147. Further, Manuel Jaime used "false payroll records," misstating the hours employees worked and their compensation, "to simulate compliance with the FLSA's requirement to pay overtime compensation." App. 147-48. Manuel Jaime "committed these violations after five investigations by Wage and Hour, and in spite of an injunction and a previous order of contempt." App. 149. The court ordered Manuel Jaime to pay $52,488.34 in restitution to former and current employees and the remaining balance still due from the 2006 Order, and imposed additional "stringent sanctions." App. 149-50.

B. The Secretary's 2011 Investigation into Respondents' FLSA Violations

In 2011, the Department of Labor again investigated the Lee's Summit and Independence El Maguey restaurants, Manuel Jaime, Humberto Jaime, and Justo Adan. A4-5. Wage and Hour Investigators reviewed payroll records and interviewed employees at each location. A5. Once again, the Department concluded that El Maguey failed to pay employees the minimum wages and overtime mandated by the FLSA and failed to keep proper records. A5-8.

1. Investigation of the Lee's Summit El Maguey

Wage and Hour Investigator Adam Huggins led the investigation at the Lee's Summit El Maguey. App. 410-11 (Tr. 34:17–35:21). On November 17, 2011, the day prior to the first compliance visit, Investigator Huggins conducted

surveillance at the restaurant. App. 413 (Tr. 37:3-5); App. 627 (noting date). He observed when the Lee's Summit El Maguey opened and closed, and the arrival and departure times of individuals who appeared to be employees. App. 413 (Tr. 37:7-12). He also entered the establishment to observe the number of employees working and to identify their positions. App. 413-14 (Tr. 37:23-38:3). The next day, November 18, 2011, Investigator Huggins entered the establishment, introduced himself to the employees and the manager, and began conducting interviews. App. 414 (Tr. 38:13-19); App. 627 (noting date). Investigator Huggins conducted a subsequent unannounced site visit three days later, on November 21, 2011. App. 423 (Tr. 47:6-8); App. 430 (Tr. 54:7-9); App. 631.

On both occasions, Investigator Huggins interviewed Ernesto "El Gato" Contreras Flores, the manager of the Lee's Summit El Maguey. App. 627-29; App. 630-31; App. 416-25 (Tr. 40:2-49:18). Manager Contreras Flores stated that he collected employees' time cards and sent their hours to the accountant, and the accountant sent him the employees' paychecks. App. 627. He also stated, however, that the Lee's Summit El Maguey had a "system of paying employees with fixed salaries," based on "weekly amounts." App. 630; see App. 418 (Tr. 42:18-23). The busboys earned $325 per week; the dishwashers earned $300 to $315 a week; the "second" and "third" cooks earned $480 and $400 a week, respectively; and the "first" cook earned $600 a week. App. 630. Manager

Contreras Flores explained that he paid the employees in cash for "the difference between what comes on the check and their promised salary." App. 630. The restaurant did not keep records of the cash payments to employees. App. 627.

Manager Contreras Flores explained that Humberto Jaime instructed him to pay the fixed salary rates. App. 418-19 (Tr. 42:18-43:5); App. 630-31; A10. Humberto Jaime was also the person who promoted Contreras Flores to the manager position. App. 627. Contreras Flores said that Humberto Jaime usually came by the restaurant three times a week, and called him frequently to ensure that "everything is alright." Id. Humberto Jaime asked Contreras Flores "lots of questions," including whether the restaurant needed more workers. Id.

During the site visits on November 18 and 21, Investigator Huggins also interviewed individuals employed by the Lee's Summit El Maguey as cooks, servers, dishwashers, and busboys and "chip runners." See generally App. 425-33; App. 437-50; App. 636; App. 638; App. 641; App. 647; App. 650; App. 653; App. 656-57.[2] Investigator Huggins conducted the interviews at the restaurant with

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[2] El Maguey objects to the admission of and testimony concerning "approximately twenty-three" employee statements taken by the Secretary's investigators. Appellants' Br. at 29. In accordance with Federal Rule of Appellate Procedure 28(e), the Secretary provides the following citations to the Appendix pages where the statements to which El Maguey appears to object were identified, offered, and received: App. 425, 428 (Elias Callejas-Antonio); App. 428-29, 460-61 (Felix Canales); App. 431, 433 (Jose Lorenzo Canales-Rodriguez); App. 433-34, 436-37 (Esteban Candia-Rodriguez); App. 437, 441 (Luis Perez Rea); App. 441, 444

employees who were working at the time.[3] App. 426 (Tr. 50:5-6, 14-16); App. 429 (Tr. 53:2-3, 17-19); App. 431 (Tr. 55:18-19), App. 432 (Tr. 56:2-3); App. 437 (Tr. 61:16-17), App. 437-38 (Tr. 61:25-62:2); App. 442 (Tr. 66:4-5, 13-15); App. 444 (Tr. 68:23-24), App. 445 (Tr. 69:7-9); App. 447 (Tr. 71:19-20), App. 448 (Tr. 72:5-7). A fellow Wage and Hour Investigator interviewed two additional employees at the restaurant during the November 18 site visit. App. 435 (Tr. 59:1-9); App. 644; App. 450-51 (Tr. 74:20-75:4); App. 660.

The employees answered questions about their work: how many days they worked, when they started and stopped work, when they took breaks, and their pay. App. 636; App. 638; App. 641; App. 644; App. 647; App. 650; App. 653; App. 656; App. 660. As the district court found, the employees stated in general that they worked six days a week, for approximately twelve to thirteen hours per day,

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(Manuel Lorenzo-Rodriguez); App. 444, 447(Jenaro Santos-Cruz); App. 447, 450 (Oscar Silvano-Marcial); App. 450, 452 (Angel Zaragoza-Perez); App. 452, 454-55 (Lorenzo Issac Alonzo Rodriguez); App. 391-92, 564 (Frederico Contralez); App. 492, 565-66 (Zenaido Diaz Martinez); App. 395, 566 (Gabriel Gonzalez Mendoza); App. 397, 567 (Gamiel Gonzalez Mendoza); App. 506, 508 (Cristina Guiterrez-Molina); App. 399, 569, 502, 570 (Elezar Arellano Martinez); App. 570-71, 504, 571-72 (Antonio Martinez Ortega); App. 572-75 (Bernadino Martinez Ortega); App. 400-401, 574-75 (Adelado/Delgado Ortega Ortega); App. 575-76 (Jose Luis Ortega).

[3] In January, Investigator Huggins interviewed a former Lee's Summit employee via telephone. <u>See</u> App. 663; App. 452 (Tr. 76:16-17).

with two to three hour breaks in the middle of the day.[4] A5; see App. 636; App. 641; App. 644; App. 653; App. 656.

Most of the employees stated that they received a fixed weekly or biweekly salary. A5; App. 636; App. 641; App. 644; App. 650; App. 653; App. 656.[5] As the district court found, employees explained that when they received a pay check for an amount different than this agreed upon salary, El Maguey paid the employee the difference in cash, or the employee cashed the check and returned the difference in cash to the manager. A6. "First Cook" Jose Lorenzo Canales Rodriguez, who was in charge of the kitchen, explained that he received a paycheck, but he did not "pay attention to all of that." App. 641. Instead, the restaurant paid him on a fixed weekly salary and, if his check came out short, paid him the difference in cash. Id. Another employee explained that if his check came out to more than the biweekly amount, he would give the difference back to the manager. App. 656; App. 449 (Tr. 73:13-16).

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[4] The statements reveal slight variations in the employees' schedules. For example, some employees stated that they worked five days a week, App. 638; App. 650; App. 653, or shorter days, App. 638; App. 660. One employee, Luis Perez Rea, appears to have worked part time. App. 647.

[5] Some of the servers indicated that their paychecks varied slightly. App. 638; App. 660.

As part of the investigation, Investigator Huggins also reviewed payroll records and time cards provided by the restaurant. App. 461 (Tr. 85:10-18). Investigator Huggins determined that these records were inaccurate. A7-8; App. 461-62 (Tr. 85:19-86:10). First, the records did not include all of the employees working at the Lee's Summit El Maguey. During one site visit, Investigator Huggins witnessed an employee working who was not on the restaurant's payroll, and Manager Contreras Flores confirmed that this employee did not receive a paycheck or punch a time card. App. 423 (Tr. 47:6-11; Tr. 47:18-20); App. 631. Huggins learned of another employee not listed on the payroll records as well; Manager Contreras Flores confirmed that this employee did not receive a paycheck. App. 424 (Tr. 48:9-13); App. 631. Investigator Huggins also discovered that "there were numerous weeks or pay periods that were missing time cards." App. 461-62 (Tr. 85:23-86:4). And he discovered discrepancies between the payrolls and time cards provided by the restaurant. See e.g., App. 466 (Tr. 90:17- 91:1) (describing, by way of example, how El Maguey's payroll records indicated that an employee worked fifty-two hours in a week, while the time cards showed that he worked a little over sixty-five hours). Because the payrolls and time records were inaccurate, Investigator Huggins reconstructed employees' hours and pay using the employee statements, which he cross-referenced with Manager Contreras Flores' statements. App. 455 (Tr. 79:3-21).

Based on the manager interviews, the employee interviews, and the payroll records, Investigator Huggins determined that the Lee's Summit El Maguey violated the minimum wage, overtime, and recordkeeping provisions of the FLSA. App. 469-70 (Tr. 93:18-94:7). Some of the employees DOL interviewed were entitled to back wages, App. 670-73, while some, such as Mr. Canales Rodriguez, were not. App. 433 (Tr. 57:9-17) (Canales Rodriguez); App. 430-31 (Tr. 54:20-55:9) (testifying that Mr. Felix Canales was not entitled to back wages); App. 451-52 (Tr. 75:22-76:2) (testifying that Mr. Zaragoza-Perez was not entitled to back wages).

2. Investigation of the Independence El Maguey

Wage and Hour Investigator Michele Bird investigated the Independence El Maguey in November 2011. App. 560 (Tr. 183:6-16); App. 561 (Tr. 184:3-4). Prior to the first site visit, Investigator Bird conducted surveillance, observing when employees arrived at and left the establishment, and how many were working inside the restaurant. App. 561-62 (Tr. 184:11-185:3). The purpose of the surveillance was to confirm that the people the Department saw enter the establishment "were, in fact, working at the establishment." App. 562 (Tr. 185:4-7).

The Department also interviewed and took statements from Justo Adan, the manager, along with individuals working for the Independence El Maguey as

cooks, servers, dishwashers, and busboys and "chip runners." See generally, App. 562 (Tr. 185:17-20); App. 391-401; App. 492-95; App. 502-509; see also App. 676; App. 491 (Tr. 115:3-16) (Adan). Because Investigator Bird does not speak Spanish, Investigator Huggins and another Spanish-speaking investigator conducted the interviews. App. 562 (Tr. 185:17-25); App. 491 (Tr.115:3-9); App. 390 (Tr. 14:8-17). These interviews took place at the restaurant, on November 18 and 22, and during another unannounced site visit on December 15. App. 392-93 (Tr. 16:9-17:1); App. 395-96 (Tr. 19:24 -20:3); App. 397 (Tr. 21:14-18); App. 399 (Tr. 23:10-13); App. 401 (Tr. 25:4-7); App. 491 (Tr. 115:12-20); App. 493 (Tr. 117:7-10); App. 502-503 (Tr. 125:20-25); App. 504 (Tr. 127:8-11); App. 690; App. 697; App. 679; App. 683; App. 686; App. 689; App. 695; App. 696; App. 702; App. 706; App 676 (December 15 visit was unannounced). Investigator Huggins testified that the non-managerial employees he interviewed were working at the time.[6] App. 493 (Tr. 117:9-22); App. 502-503 (Tr. 125:22-126:11); App. 504 (Tr. 127:10-21).

As with the Lee's Summit interviews, the non-managerial employees at the Independence El Maguey generally provided information about their work,

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[6] The Department conducted one of the interviews months after the initial site visit. See App. 709 (Jose Luis Ortega). The record also contains an undated interview from Bernardino Martinez Ortega. App. 703. It is unclear from the record on appeal when and where Wage and Hour conducted this interview.

including how many days they worked, when they started and stopped work, when they took breaks, and their pay. App. 679; App. 683; App. 686; App. 689; App. 692; App. 695; App. 696; App. 699; App. 702; App. 706. As the district court found, the employee interviews generally revealed that "the employees were paid a fixed salary and if their pay exceeded their fixed salary, employees returned the money to Justo Adan." A6; see App. 679; App. 683; App. 686; App. 695; App. 696; App. 699; App. 702; App. 703 (employees' statements indicating that they received a fixed salary).[7] For example, Antonio Martinez Ortega, the "Third Cook," explained that he earned a fixed biweekly salary of $750. App. 702; App. 505 (Tr. 128:20-22). As a result, although his biweekly paycheck indicated an hourly rate, Mr. Martinez Ortega "never paid attention to the rate." App. 702. When his check was more than the agreed upon salary, he returned the extra amount to Manager Adan. Id.; App. 506 (Tr. 129:1-5). When it was less, Mr. Adan paid him the difference in cash. App. 702; App. 506 (Tr. 129:1-5). Likewise, Zenaido Diaz Martinez, a dishwasher, explained that the restaurant paid him $600 every two weeks. App. 683. When his biweekly check came "out to more" than the agreed upon rate, Mr. Diaz Martinez gave the extra money to

[7] Two employees indicated that El Maguey paid them at an hourly rate. App. 689; App. 692. Jose Luis Ortega, whom Wage and Hour interviewed several months after the first site visit, also indicated that El Maguey paid him based on hours worked. App. 709. The statement of another employee is ambiguous on this point. App. 706.

Manager Adan in cash. App. 683. When his check came "out to less," Manager Adan gave him cash to make up the difference. App. 683. Mr. Diaz Martinez stated that he followed these procedures on Manager Adan's orders. See App. 683 ("I do it because I do not want to lose my job.").

Investigator Bird also reviewed payroll records provided by the restaurant. App. 577 (Tr. 200:3-17). From the payroll records alone, Investigator Bird determined that El Maguey paid its servers at an incorrect wage and failed to pay them overtime, and that it failed to pay overtime for the back-of-the-house employees—the chip runners, dishwashers, and the cooks. App. 577-78 (Tr. 200:22–201:4). Investigator Bird testified that she was able to compute back wages for the servers on payroll based solely on El Maguey's payroll records. App. 568 (Tr. 191:5-17). For other workers, Investigator Bird relied on employee interviews as well as payroll records. See e.g., App. 569 (Tr. 192:12-16); 588 (Tr. 211:9-21).

As with the Lee's Summit El Maguey, the Department discovered employees working at the Independence El Maguey who were not listed on the payroll. App. 563 (Tr. 186:1-10); A8. Manager Adan confirmed this observation. See App. 676 (statement of Manager Justo Adan that two employees were not on the restaurant's payroll at the time of DOL's previous site visit; however, he had since added them to the payroll); App. 492 (Tr. 116:4-9).

Based on the investigation, Investigator Bird concluded that the Independence El Maguey violated the minimum wage, overtime, and recordkeeping provisions of the FLSA. App. 578 (Tr. 201:19-24).

C. Show Cause Hearing Before District Court Judge Whipple

The Secretary filed a petition seeking contempt adjudications against the Lee's Summit El Maguey, the Independence El Maguey, Manuel Jaime, Justo Adan, and Humberto Jaime on March 20, 2013. App. 165-78. On July 31, 2014, Judge Whipple presided over a show cause hearing on the petition. A1.

Respondents included on their witness list several of the non-managerial employees who gave statements during the site visit. See App. 295-96 (listing potential witnesses, including: Gabriel Gonzalez Mendoza; Gamaliel Gonzalez Mendoza; Cristina Gutierrez Molina; Antonio Martinez Ortega; Adelaido [sic] Ortega); see also App. 686 (Gabriel Gonzalez Mendoza statement); App. 689 (Gamaliel Gonzalez Mendoza statement); App. 692 (Cristina Gutierrez Molina statement); App. 699, App. 702 (Antonio Martinez Ortega statements); App. 706 (Delgado Ortega Ortega statement). Ultimately, Respondents declined to call these witnesses, and presented testimony only from Humberto Jaime. App. 499.

Humberto Jaime testified that he did not own the Lee's Summit El Maguey, but that he would help his brother, Manuel Jaime, at the restaurant when asked. App. 619-20 (Tr. 242:19-243:1). He averred, however, that he did not go to the

restaurant "very often." App. 620 (Tr. 243:2-3). Respondents did not present any evidence to show that they complied with the district court's prior orders or the FLSA.

The Secretary presented testimony from Investigators Huggins and Bird, and a third Wage and Hour Investigator, who assisted with interviews at the Independence El Maguey. App. 378; App. 499; App. 389-90 (Tr. 13:22–14:17). The investigators testified about their investigation methods and what the Secretary learned from managers Contreras-Flores and Adan, and from the non-managerial employees. See generally, App. 389-410 (Alvarado); App. 410-559 (Huggins); App. 560-610 (Bird). The Secretary also offered the managerial and non-managerial employees' written statements into evidence. App. 379; App. 500. Finally, the Secretary offered into evidence salary and hours analyses for the Lee's Summit El Maguey (Exhibits 13 & 14) and back wage computations and summaries of wages owed at both locations (Exhibits 15, 16, 31, & 32). App. 379; App. 500; App. 455 (Tr. 79:6-7); App. 461 (Tr. 85:23-24); App. 664-73; App. 711-53).

Counsel for El Maguey objected that the investigators' testimony, the written statements, and computation documents contained hearsay from non-testifying employees. The district court, however, overruled El Maguey's continuing hearsay objection and admitted the Secretary's evidence. See, e.g.,

App. 393-94 (Tr. 17:22-18:8) (initial objection to testimony); App. 436-37 (Tr. 60:4-61:5) (further objection to written statements); App. 458 (Tr. 82:14-24) (objection to Exhibit 13); App. 468-69 (Tr. 92:20-93:13) (objection to Exhibit 14).[8]

D. The District Court's Decision Adjudicating Respondents in Contempt

On September 23, 2014, the district court issued Findings of Fact and Conclusions of Law and an Adjudication holding each of the Respondents in contempt of one or more of its prior orders. A1-20. Crediting the testimony of Investigators Huggins and Bird, A8, the court concluded that Respondents violated the FLSA, and the court's prior orders, by failing to pay their employees the applicable minimum wage, failing to pay their employees overtime pay, and failing to maintain and preserve employment records as required by law. A11.

The court further concluded that Humberto Jaime had notice of and responsibility to comply with the 2003 Order enjoining future violations of the FLSA. A9-11. Humberto Jaime, the district court found, was an agent, servant, employee, and/or in active concert or participation with the Lee's Summit El Maguey and Manuel Jaime. A10. In particular, the court noted Manager Contreras Flores' statement that Humberto Jaime "promoted him to manager," and "would stop by the restaurant approximately three times a week to make sure

[8] Exhibits 13 and 14, the admissibility of which El Maguey challenges on appeal, were identified at App. 455 and App. 461-62, respectively.

everything was in order." Id. Humberto Jaime himself testified, moreover, that he helped at the restaurant. Id. In addition, the court noted Manager Contreras Flores' statement that Humberto Jaime told Contreras Flores to "continue paying employees the already established salary rates." Id. The district court found that Humberto Jaime "aided and abetted the named parties" in committing violations of the court's prior orders. A11. The district court further found that, under the facts of the case, Humberto Jaime had "knowledge and notice of the Court's prior injunctions and judgments." A10.

Accordingly, the district court found each of the Respondents in civil contempt. A11. To purge themselves of the contempt, the district court ordered the Respondents, including Manuel Jaime's estate, to pay $198,945.57 in unpaid minimum wages and overtime compensation and an equal amount as delayed payment, to immediately begin complying with all provisions of the FLSA, and to adhere to a compliance plan submitted by the Secretary. A12, A16.

SUMMARY OF THE ARGUMENT

1. The district court was well within its discretion when, in adjudicating contempt, it admitted statements taken from El Maguey's current employees by Wage and Hour investigators during compliance visits to the restaurants. This Court has previously affirmed that current employee statements taken during a Department of Labor investigation are admissible as non-hearsay statements

against an employer under Federal Rule of Evidence 801(d)(2)(D) (statement of an opposing party). See DCS Sanitation Mgmt. v. Occupational Safety & Health Review Comm'n, 82 F.3d 812, 815 (8th Cir. 1996). Nothing compels a different result below.

El Maguey wrongly insists that the district court abused its discretion because the employees were not involved in the decisionmaking process of setting the schedules and wages about which they spoke. But Rule 801(d)(2)(D) does not contain a generalized "decisionmaker" requirement. Instead, the Rule requires only that the subject matter of the out-of-court statement be within the scope of the speaker's employment. Although courts have looked to decisionmaking authority in discrimination cases where the admission goes to the improper motive behind an otherwise lawful employment decision, El Maguey's motives are not at issue in this case. Regardless of why El Maguey failed to pay employees minimum wages and overtime and failed to keep proper records, doing so violated the FLSA and the district court's prior orders. There is no question, moreover, that El Maguey's employees spoke on matters related to their duties when they provided the Department with information about when they started their shifts, when they ended them, when they took breaks, and their pay.

Nor is there any question that employees made the statements during the existence of their employment relationship. El Maguey acknowledges this, but

nonetheless urges reversal based on the decisions of two district courts to exclude statements made in markedly different circumstances. While the speakers in those cases had effectively ended their employment relationships in order to avoid criminal liability, there was absolutely no evidence below that El Maguey's current employees were willing to risk their jobs by pitting themselves against El Maguey. In fact, El Maguey listed several of the employees who gave statements as defense witnesses at trial, though it ultimately declined to call them to testify. Although there was a possibility that an employee who spoke to the Department might later receive back wages, the district court did not abuse its discretion in admitting the employees' statements under these circumstances. The potential to receive back wages does not, in and of itself, place the interests of the employees in opposition to those of El Maguey. There was no guarantee that back wages would be forthcoming. Indeed, as it turned out, some employees who gave statements were not entitled to restitution. And the employees did not take any proactive steps to put themselves in an adversarial relationship with their employer.

2. For the same reasons, the district court did not abuse its discretion when it admitted the Secretary's Exhibits 13 and 14, which are salary and hour analyses for the Lee's Summit El Maguey prepared by the Department's investigators. The court, pursuant to Rule 801(d)(2)(D), properly admitted these analyses which are

based in part on non-hearsay statements from El Maguey's non-managerial employees.

3. Even if the non-managerial employees' statements were hearsay, any error in admitting them was harmless and is not reversible. The Wage and Hour Investigators' testimony about their own observations and the statements given by El Maguey's managers clearly and convincingly demonstrate that El Maguey violated the court's prior orders. As a result, the court could have held them in contempt based on this evidence alone. The court's assessment of monetary sanctions was also appropriate, regardless of whether the non-managerial employees' statements are admissible for the truth of the matter asserted. Given that El Maguey failed to keep accurate pay records, the court could rely on the Department's reasonable estimates of wages due, and the employee statements were, at a minimum, admissible for the limited purpose of determining whether the Secretary's reconstruction of wages and hours rested on a reasonable basis.

4. Finally, the district court did not abuse its discretion when it adjudicated Humberto Jaime in contempt. Given Manager Contreras Flores' statement about Jaime's oversight of the Lee's Summit El Maguey (the admissibility of which El Maguey does not challenge on appeal), and Humberto Jaime's own testimony about helping his brother, Manuel Jaime, the district court could only conclude that Humberto Jaime was an agent of, or at least in active concert with, Manuel Jaime

and the restaurant. In addition, Humberto Jaime was a party to the FLSA case consolidated with the second contempt proceeding against Manuel Jaime and the Lee's Summit El Maguey. Through his participation in that action, Humberto Jaime had knowledge of the 2003 Order. District Court Judge Whipple did not clearly err, therefore, when he found—based on all of the facts of a case before him for more than a decade—that Humberto Jaime had notice of the court's previous order enjoining him from violating the FLSA and was responsible for complying with it.

STANDARD OF REVIEW

This court reviews the "district court's imposition of a civil contempt order and assessment of monetary sanctions for abuse of discretion." FTC v. Neiswonger, 580 F.3d 769, 773-74 (8th Cir. 2009). The Secretary "bears the burden of proving facts warranting a civil contempt order by clear and convincing evidence." Indep. Fed'n of Flight Attendants v. Cooper, 134 F.3d 917, 920 (8th Cir. 1998). The district court's factual findings underlying the decision must be upheld unless they are clearly erroneous. Warnock v. Archer, 443 F.3d 954, 955 (8th Cir. 2006). "Under clear error review," this court may not reverse unless it has "a definite and firm conviction" that the district court "was mistaken." United States v. Black Bear, 542 F.3d 249, 252 (8th Cir. 2008) (internal quotation marks and citation omitted).

Likewise, the district court had "wide discretion" in ruling on the admissibility of El Maguey's employees' statements. U.S. Salt v. Broken Arrow, 563 F.3d 687, 689-90 (8th Cir. 2009) (internal quotation marks and citation omitted). This court may not reverse the district court's evidentiary rulings unless there was a "clear and prejudicial abuse of discretion." Id. at 690 (internal quotation marks and citation omitted).

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING AT THE CONTEMPT HEARING NON-HEARSAY STATEMENTS FROM EL MAGUEY'S EMPLOYEES ABOUT THEIR HOURS AND PAY

A. Federal Rule of Evidence 801(d)(2)(D)

The district court did not abuse its discretion when it admitted statements taken by Department of Labor Investigators from El Maguey's non-managerial employees about when they started and stopped work, and their pay. El Maguey avers that these statements were inadmissible hearsay.[9] This is incorrect. The

[9] On appeal, El Maguey does not argue that the district court abused its discretion by admitting statements from Justo Adan, the manager of the Independence El Maguey, or Ernesto "El Gato" Contreras Flores, the manager of the Lee's Summit El Maguey. Appellants' Br. at 33 (arguing as to "hourly employees' statements"); id. at 34 (same); id. at 30 (defining "'hourly' employees" as those who "either worked in the kitchen as cooks, dishwashers or in the dining area of the two restaurants); id. at 32 (arguing as to the "23 employees who gave statements in this case"); id. at 29 (contrasting the twenty-three employees' statements with statements taken from Managers Adan and Contreras Flores).

statements are not hearsay under Federal Rule of Evidence 801(d)(2)(D) because they were (1) made by El Maguey's employees, (2) "concerning a matter within the scope of [their] . . . employment," (3) during the existence of the employment relationship. Kaiser Aluminum & Chem. Corp. v. Ill. Cent. Gulf R.R., 615 F.2d 470, 476 (8th Cir. 1980); Fed. R. Evid. 801(d)(2)(D) (providing that an out-of-court statement "is not hearsay," if "offered against an opposing party," and "made by the party's agent or employee on a matter within the scope of that relationship and while it existed").

Rule 801(d)(2)(D) provides for the "liberal" admission of such evidence on the premise that "while still employed an employee is unlikely to make damaging statements about his employer, unless those statements are true." Pappas v. Middle Earth Condo. Ass'n, 963 F.2d 534, 537 (2d Cir. 1992); see Nekolny v. Painter, 653 F.2d 1164, 1172 (7th Cir. 1981) ("Rule 801(d)(2)(D) takes the broader view that an agent or servant who speaks on any matter within the scope of his agency or employment during the existence of that relationship, is unlikely to make statements damaging to his principal or employer unless those statements are true."); 4 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 8:53, at 433 (3d ed. 2007) ("Christopher B. Mueller & Laird C. Kirkpatrick") (explaining that a current employee "is likely to speak carefully and not loosely, since what he says may put future employment at risk"). Rule 801(d)(2)(D) may

provide the only means to get at crucial information, moreover, because as time passes an employee is "likely to feel pressure (real or imagined)" from his employer to avoid making a statement that might be "useful to the other side." Id. at 432.

Accordingly, this court has not hesitated to affirm that current employee statements taken during a Department of Labor investigation are admissible as non-hearsay statements against an employer. See DCS Sanitation Mgmt. v. Occupational Safety & Health Review Commission, 82 F.3d 812, 815 (8th Cir. 1996) (holding that the district court did not abuse its discretion in admitting employee interviews with a Department of Labor Occupational Health and Safety Administration compliance officer). DCS Sanitation Management involved out-of-court statements from meat-packing workers indicating that their employer had not trained them in safety procedures prior to an accident. Id. at 814, 816-17. Just as these employees' statements were admissible under Federal Rule of Evidence 801(d)(2)(D), the El Maguey employees' statements are also admissible. The district court did not abuse its discretion by receiving this evidence.

B. El Maguey's Employees' Statements about When They Worked and Their Pay Concerned Matters within the Scope of Their Employment.

El Maguey concedes that "all the statements" taken by the Department's investigators "were from employees and made during the existence of the employment relationship." Appellants' Br. at 31. It nevertheless insists that the

district court erred in admitting the statements because the employees were not involved in the decisionmaking process of setting their schedules and wages, and therefore when they worked and their pay were not "matter[s] within the scope" of their employment. Id. at 29, 31, 33. This is not, however, the test under Rule 801(d)(2)(D), but "a mistaken reading of the case law." Aliotta v. Nat'l R.R. Passenger Corp., 315 F.3d 756, 762 (7th Cir. 2003).

1. As an initial matter, for a statement to be made on a matter within the scope of employment, "an employee need only be performing the duties of his employment when he comes in contact with the particular facts at issue." Aliotta, 315 F.3d at 762; 4 Christopher Mueller & Laird Kirkpatrick§ 8:55, at 445 ("There is no doubt that [Federal Rule of Evidence 801(d)(2)(D)] . . . reaches a statement that describes the declarant's own behavior in performing her duties."); cf. Doe v. B.P.S. Guard Servs., Inc., 945 F.2d 1422, 1425 (8th Cir. 1991) (explaining that, as a matter of evidentiary inference, the scope of one's employment includes "act[s] directed," or of the kind which the employee is "authorized to perform" within "working hours and at an authorized place").

Nothing in Rule 801(d)(2)(D) "prevents the out-of-court statements of low-level employees from coming into evidence as non-hearsay admissions of a party-opponent in appropriate factual scenarios." Wilkinson v. Carnival Cruise Lines, Inc., 920 F.2d 1560, 1565 (11th Cir. 1991); see Wright v. Farmers Co-op, 681 F.2d

549, 552-53 (8th Cir. 1982) (holding that a service station worker's statement about filling a propane tank "concerned a matter within the scope of his employment," under Fed. R. Evid. 801(d)(2)(D)).

Nor must, as El Maguey suggests, an employee be "authorized by their employer to make" the "statement on its behalf." Appellants' Br. at 35; see Fed. R. Evid. 801, Advisory Comm. Notes on 1972 Proposed Rules, subdiv. (d)(2)(D) (explaining that the rule eschews the "usual test of agency," and does not require that an admission be "made by the agent acting in the scope of his employment."); 5 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 801.33[2][c], at 801-92 (2d ed. 2014) ("The statement itself is not required to be within the scope of the declarant's agency.") (emphasis added) (internal quotation marks and citation omitted). The statement merely must concern some "matter within the scope" of employee's employment. See Fed. R. Evid. 801(d)(2)(D); Advisory Comm. Notes on 1972 Proposed Rules, subdiv. (d)(2)(D); Kaiser Aluminum, 615 F.2d at 476.

El Maguey's employees' statements undoubtedly satisfy this test. Whether a worker's job is to cook food, serve it, bus tables, or wash dishes, he is responsible for showing up for work on time and working his shift. Moreover, the evidence before the district court showed that El Maguey directed its employees to take specific actions to implement its pay system, by returning in cash any portion of

their paycheck that exceeded an agreed on hourly rate. See, e.g., App. 683; App. 656; App. 702. Accordingly, El Maguey's employees provided information about their basic duties when they answered questions about how many days they worked, when they started and stopped work, when they took breaks, and their pay. The district court correctly determined, therefore, that the employees' statements satisfied Rule 801(d)(2)(D). See Solis v. China Star, Inc., No. 08-1005-KMH, 2012 WL 1059876, at *2 (D. Kan. Mar. 28, 2012) (holding that there was "no question" that written statements by employees concerning their hours worked and rates of pay "address matters within the scope of that relationship").[10]

2. El Maguey's argument to the contrary incorrectly reads a generalized "decisionmaking" requirement into Rule 801(d)(2)(D). See Appellants' Br. at 31-34. Under El Maguey's view, for example, when an employee starts and stops work are not matters within the scope of his employment, unless the employee

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[10] El Maguey's citation to McAdams v. United States, see Appellants' Br. at 33, does not suggest otherwise. 297 F. App'x 183 (3d Cir. 2008) (unpubl'd). In McAdams, the plaintiff slipped and fell in a hospital lobby, and later, the technician performing her x-ray stated that the floor was "like a skating rink." Id. at 185. Nothing about the floor was related to the x-ray technician's duties, and "there was no way of knowing when the last time the x-ray technician had walked across the hospital lobby." Id. at 186. In any event, McAdams, as an unpublished decision, has no precedential value in the Third Circuit, much less in this circuit. See Third Circuit LAR, App. I, IOP 5.7 (such "opinions are not regarded as precedents that bind the court because they do not circulate to the full court before filing").

"participated in creating the work schedules." Id. at 34. This view is "mistaken." Aliotta, 315 F.3d at 762.

In support of its position, El Maguey relies on language from employment discrimination decisions in this, the Fifth, and the Seventh Circuits. See Appellants' Br. at 32-33 (citing Ramirez v. Gonzales, 225 F. App'x 203, 210 (5th Cir. 2007); Yates v. Rexton, 267 F.3d 793, 802 (8th Cir. 2001); Williams v. Pharmacia, 137 F.3d 944, 950 (7th Cir. 1998)). It is true that in employment discrimination cases—where an admission is offered to show that a discriminatory purpose motivated an otherwise lawful employment decision—courts have looked to whether the speaker's duties include some involvement with the decisionmaking process. See, e.g., Ramirez, 225 F. App'x at 210 (in a case under Title VII of the Civil Rights Act ("Title VII"), an employee's out-of-court statement was not admissible to show that plaintiff's termination was linked to protected activity, because the employee who made the statement was not involved in the decision to terminate the plaintiff); Yates, 267 F.3d at 801-802 (in an Age Discrimination in Employment Act case, statements from individuals involved in shaping the workforce were admissible to show that "age was a determinative factor" in a termination decision); Williams, 137 F.3d at 950-51 (in a Title VII case, employees' statements were not admissible to show a pattern or practice of discriminatory decisionmaking because the speakers did not have responsibility for

the decisionmaking process itself); see also Jaramillo v. Colo. Judicial Dep't, 427 F.3d 1303, 1314 (10th Cir. 2005), as modified on denial of reh'g and reh'g en banc (Dec. 20, 2005) (in a Title VII case, statements made by an employee "not involved" in the decisionmaking "process" were not admissible to show that sex-based discrimination motivated the decision); Carter v. Univ. of Toledo, 349 F.3d 269, 273, 276 (6th Cir. 2003) (in a Title VII race discrimination case, comments about racism were nonhearsay admissible to prove discriminatory motive where the speaker was involved in the hiring process).

But as the Seventh Circuit clarified in a case subsequent to Williams, "no similar requirement exists in other contexts." Aliotta, 315 F.3d at 761-62 (explaining that the law is "muddled" because "the great bulk of cases interpreting what is within an employee's 'scope of employment' deals with employment discrimination"). A speaker's "decisionmaking authority" may be "critical" when the subject matter of an admission "deals with hiring/firing/promoting/demoting-type decisions," but is beside the point when the admission is not about discriminatory decisionmaking. Id. at 762 (emphasis added). The only generalized requirement is that "the subject matter of the admission match the subject matter of the employee's job description." Id.

In this case, it does not matter why El Maguey decided to underpay its employees. An employer violates the FLSA if it fails to pay its employees

minimum wages for hours worked or employs them for a workweek longer than forty hours without paying overtime—regardless of the employer's motivation to do so. See 29 U.S.C. 206-207. Nor did the district court's adjudication of contempt against the Respondents require any findings as to their intent. See NLRB v. Ralph Printing & Lithographing Co., 433 F.2d 1058, 1062 (8th Cir. 1970) ("[C]ivil contempt . . . is not dependent on the state of mind of the respondent."). The district court, accordingly, did not admit statements by El Maguey employees for the purpose of imputing a bad motive to El Maguey. It properly admitted the statements to show when employees arrived at work, when they left, when they took breaks, and their pay. These matters clearly corresponded to the scope of their employment at El Maguey, and thus the statements were admissible under Federal Rule of Evidence 801(d)(2)(D).

C. There Is No Evidence that Any of El Maguey's Current[11] Employees Effectively Ended their Employment Relationship by Acting as El Maguey's Adversary.

Finally, El Maguey maintains that its employees' interests were "adverse" to its own, given the possibility that they could receive back pay if the Secretary

[11] The district court did admit one statement from a former El Maguey employee taken by Investigator Huggins via telephone several months after the site visits. See App. 663 (Lorenzo Isaac Alonzo Rodriguez). This evidence was cumulative, however, given that the Secretary introduced more than twenty similar statements from current employees. Thus, any error in admitting it is not reversible. See United States v. Sanchez-Godinez, 444 F.3d 957, 960 (8th Cir. 2006).

found FLSA violations. Citing to two decisions from district courts outside of the Eighth Circuit, El Maguey contends that its employees' statements are not admissible under Rule 801(d)(2)(D) based on the employees' purportedly divergent interests. See Appellants' Br. at 34 (citing United States v. Petraia Mar. Ltd., 489 F. Supp. 2d 90, 96 (D. Me. 2007); United States v. West, No. 08CR669, 2010 WL 2698300 (N.D. Ill. July 6, 2010)). Again, El Maguey misunderstands Rule 801(d)(2)(D)'s requirements.

A statement admissible under the Rule must be made during the existence of an employment relationship. See Fed. R. Evid. 801(d)(2)(D). Accordingly, the Rule does not apply to statements made by a former employee or those "made in the context of terminating [the] employment." Young v. James Green Mgmt., Inc., 327 F.3d 616, 622-23 (7th Cir. 2003) (employee's out-of-court statement "made in the context of terminating his employment" and acting "in a very overt manner" as the adversary of his employer was not admissible against the employer). The district courts in Petraia and West applied this principle in narrow factual circumstances markedly different from the case at bar: where the speakers may have remained "technically still . . . employed," but had "effectively ended" their agency relationship by pitting themselves against their employer to avoid criminal liability. See Petraia, 489 F. Supp. 2d at 98; West, 2010 WL 2698300, at * 3. Even if the district courts in those cases properly exercised their discretion by

excluding statements in these circumstances, moreover, it does not follow that the court below abused its discretion when it admitted statements made in an entirely different factual scenario.

To be sure, the events in Petraia began similarly to those in this case; the government inspected a workplace (a ship), and interviewed employees about their duties and responsibilities on board. See 489 F. Supp. 2d at 92, 94. And in fact, the district court concluded that these statements—made by the employees during the initial on-site inspection—fell within "the purview of Rule 801(d)(2)(D) admissions." Id. at 95 n.4.

But the statements the court excluded on hearsay grounds occurred in the days following the on-site inspection. See Petraia, 489 F. Supp. 2d at 94, 99. At this point, the individual crewmembers had engaged their own legal representation, separate from the employer's. Id. at 92-93. The government arranged interviews through the individuals' own attorneys and the individuals made the additional statements under offers of immunity, and in some instances pursuant to formal cooperation agreements with the government. Id. at 92-94, 96-99. There was no evidence as to whether the speakers' employment continued during this time. Id. at 97. Two of the speakers were so "uncomfortable" after the off-site interviews, moreover, that they refused to return to their employer's ship. Id. Under such circumstances, the district court declined to receive the interviews as admissions of

the employer because the statements could "no longer be found to be made within the course" of the employment relationship. Id.; see id. at 98.

Likewise, in West, the employee made the statements at issue after he was arrested and told that he and his employer were subjects of a criminal investigation, at which point the employee's "general strategy" was to avoid responsibility by pinning the blame on the company's president. West, 2010 WL 2698300, at * 3; see SEC v. Geon Indus., Inc., 531 F.2d 39, 43 n.3 (2d Cir. 1976) (holding that the district court did not abuse its discretion by excluding testimony when the employer had already suspended the employee, and it was clear that the employee and employer were potential co-defendants who might have conflicting litigating positions).[12] In this scenario, the statements could not be admitted under Rule 801(d)(2)(D) because the employee was "no longer restrained by the inhibitions that normally prevent an employee from making harmful statements against his employer." West, 2010 WL 2698300, at *3-4. Not so here.

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[12] The districts court in Petraia and West also cited to the Fifth Circuit's decision in United States v. Summers, 598 F.2d 450 (5th Cir. 1979). The out-of-court speaker at issue in Summers, however, was not an employee of the city councilmember against whom the government offered his statement, but a superintendent of the water and sewer board who acted as a go-between in the councilmember's extortion of a city contractor. Id. at 452-53. The purpose of the agency relationship was to further the extortion. Id. at 458. Once the superintendent began working for the FBI to build a case against the city council member, therefore, the agency relationship had ceased. Id. at 458-59.

There is no indication that El Maguey's employees did not feel restrained by a desire to maintain their employment. Wage and Hour Investigators arrived at the employees' place of work, following a period of surveillance to determine who was an employee. App. 413-14 (Tr. 37:7-38:19) (Lee's Summit surveillance); App. 561-62 (Tr. 184:11-185:7) (Independence surveillance). The Wage and Hour Investigators conducted the interviews with the employees at the El Maguey establishments, and Investigator Huggins testified that the employees he interviewed were on duty at the time. See supra pp. 9-10, 14.[13]

There was absolutely no evidence that El Maguey or the employees had taken steps to end the employment relationships. There was no evidence that any employee took an overt action to pit himself against El Maguey. Nor was there any evidence whatsoever from which the district court could have concluded that the employees were willing to risk their jobs by making harmful, untruthful statements about their employer. In fact, some employees who gave statements were not entitled to back wages. App. 433 (Tr. 57:9-17); App. 430-31 (Tr. 54:20-55:9); App. 451-52 (Tr. 75:22-76:2). Even if other employees theoretically stood to receive back wage payments—and before the district court there was no evidence that the employees were aware of such a possibility—the court did not

[13] It is unclear from the record on appeal when and where Wage and Hour interviewed Bernardino Martinez Ortega. App. 703.

abuse its discretion in concluding that the employees' relationship with El Maguey was intact when the Department interviewed them.

Indeed, El Maguey listed several of the employees who gave statements to the Secretary as trial witnesses, although it ultimately declined to call them to testify. See App. 295-96 (listing potential witnesses, including: Gabriel Gonzalez Mendoza; Gamaliel Gonzalez Mendoza; Cristina Gutierrez Molina; Antonio Martinez Ortega; Adelaido [sic] Ortega). All of these individuals stood to receive back wage payments if the Secretary prevailed. See App. 750-51 (showing unpaid wages for Gabriel Gonzalez Mendosa, Gamaliel Gonzalez Mendosa, Christina Guiterrez-Molina, Antonio Martinez Ortega, and Adelaido [sic] Ortega). Thus, far from an abuse of discretion, the district court's proper application of Rule 801(d)(2)(D) in these circumstances illustrates the importance of the Rule. See 4 Christopher B. Mueller & Laird C. Kirkpatrick § 8:53, at 432 ("Statements covered by Fed. R. Evid. 801(d)(2)(D) are necessary because . . . they may provide the only means to get the actual knowledge of the declarant: With the passage of time, . . . [h]e is likely to feel pressure (real or imagined) from his . . . employer to avoid making evidence useful to the other side.").

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING ANALYSES PREPARED BY WAGE AND HOUR INVESTIGATORS BASED IN PART ON EMPLOYEE STATEMENTS

El Maguey also argues that the district court erred in admitting the Secretary's Exhibits 13 and 14. Appellants' Br. at 37-38. [14] These exhibits are pay and hours analyses prepared by Investigator Huggins, and include information from the Lee's Summit El Maguey's payroll records and time cards, as well as from employee and manager interviews. App. 664; App. 665-69; App. 455 (Tr.79:16-21); App. 468 (Tr. 92:2-6). Exhibit 14 compares the hours reported in the payroll records to the hours reported on the time cards and the hours reported by employees. App. 665-69. Exhibit 13 calculates average pay and hours by job classification. App. 664. El Maguey contends, wrongly, that the district court should have excluded these exhibits because Investigator Huggins prepared them

[14] Notably, El Maguey does not argue that the district court erred in admitting the Secretary's Exhibits 15, 16, 31 or 32. See Appellants' Br. at 36-38. These exhibits contained Investigator Huggins' and Bird's back wage computations and summaries of unpaid wages. App. 670-71 (Exhibit 15); App. 672-73 (Exhibit 16); App. 711-48 (Exhibit 31); App. 749-53 (Exhibit 32). El Maguey describes Exhibits 15 and 16 in its recitation of facts, see Appellants' Br. at 11, 19, 21; however, having failed to offer any argument as to these documents, it has waived its right to do so. See Chay-Velasquez v. Ashcroft, 367 F.3d 751, 756 (8th Cir. 2004). In any event, to the extent Exhibits 15, 16, 31, and 32 were based on employee statements, these statements were not hearsay under Federal Rule of Evidence 801(d)(2)(D), and the district court did not err in admitting the exhibits.

based in part on employee statements which El Maguey maintains are "inadmissible hearsay." Appellants' Br. at 38.[15]

As discussed above, however, the statements are not hearsay, but admissible statements made by current El Maguey employees concerning a matter within the scope of their employment. See Fed. R. Evid. 801(d)(2)(D). In addition, the Secretary offered Exhibit 14 not only for the truth of the matter asserted, but also to show that Investigator Huggins "was not able to utilize" El Maguey's time sheets and payroll records "for what they purported to show," because "there were inconsistencies among" the time sheets, payroll records, and interviews. App. 469 (Tr. 93:6-11). The district court did not abuse its discretion, therefore, when it admitted Exhibits 13 and 14.

[15] El Maguey suggests in passing that the analyses of its payroll records and time cards did not satisfy Federal Rule of Evidence 1006's requirement that a summary be used to prove the content of voluminous writings that cannot be conveniently examined in court. Appellants' Br. at 37. El Maguey did not raise this objection below. See App. 458 (Tr. 82:14-24) (objection to Exhibit 13); App. 468-69 (Tr. 92:20-93:13) (objection to Exhibit 14). And on appeal, El Maguey has failed to support this suggestion with any meaningful argument to which the Secretary can respond. Any argument about the voluminous writing requirement is therefore waived. See Chay-Velasquez, 367 F.3d at 756.

III. EVEN IF THE STATEMENTS WERE HEARSAY, ANY ERROR WAS HARMLESS BECAUSE OTHER EVIDENCE PROVED THAT EL MAGUEY WAS IN CONTEMPT AND BECAUSE THE MONETARY SANCTIONS WERE APPROPRIATE

Even if the non-managerial employees statements were hearsay, the district court's decision to admit them did not "substantially prejudice the outcome" of the contempt proceeding, and is not grounds for reversal. United States v. Sanchez-Godinez, 444 F.3d 957, 960 (8th Cir. 2006) ("We will reverse only if an error substantially prejudiced the outcome.") (internal quotation marks and citation omitted). The district court could have adjudicated contempt based on other clear and convincing evidence that El Maguey violated the court's prior orders. And even if the employee statements were inadmissible to prove the truth they contained, the district court could properly rely on them for the limited purpose of evaluating the reasonableness of the Secretary's back wage computations. As a result, any error was harmless.

1. To hold El Maguey in contempt, the district court needed only to conclude that each Respondent violated the court's prior orders by failing to comply with the minimum wage, overtime, or recordkeeping requirements of the FLSA. See Chicago Truck Drivers v. Bhd. Labor Leasing, 207 F.3d 500, 505 (8th Cir. 2000) ("A party seeking civil contempt bears the initial burden of proving, by clear and convincing evidence, that the alleged contemnors violated a court order,"

at which point the burden shifts to the alleged contemnors to "show an inability to comply"). The Secretary proved El Maguey's failure to follow the court's prior orders by clear and convincing evidence, even excluding statements from El Maguey's non-managerial employees. El Maguey, moreover, presented no evidence that it was somehow unable to comply.

Along with the employee statements at issue in this appeal, the Secretary's evidence included Investigators Huggins' and Bird's testimony about their own observations and statements from Mr. Adan and Mr. Contreras Flores, El Maguey's managerial employees. As noted above, El Maguey does not argue (nor could it) that the district court somehow erred in receiving statements from Mr. Adan or Mr. Contreras Flores as vicarious admissions. See supra note 9. [16] The evidence from these witnesses and declarants demonstrated that El Maguey violated the court's prior orders on multiple counts.

Investigator Bird testified that from El Maguey's payroll records alone she determined that the Independence El Maguey paid its servers at an incorrect wage

[16] El Maguey does not dispute that Mr. Adan and Mr. Contreras Flores were managers, Appellants' Br. at 29, and even under El Maguey's misinterpretation of Federal Rule of Evidence 801(d)(2)(D) there is no question that they were significantly involved in the process of setting employees' schedules and paying them. See, e.g., App. 627, 630-31; Appellants' Br. at 30 (noting non-managerial employees' statements that Mr. Adan decided their hours and rate of pay and paid them). Mr. Adan, moreover, is a party in this matter.

and failed to pay them overtime, and that it failed to pay overtime for the back-of-the-house employees. App. 577-78 (Tr. 200:22–201:4). Indeed, Investigator Bird testified that even without interviews from servers, she would have been able to compute back wages for them based solely on El Maguey's payroll records. App. 568 (Tr. 191:5-17). Manager Adan admitted, moreover, that the Independence El Maguey failed to maintain payroll records for some of the workers. See App. 676; App. 492 (Tr. 116:4-9).

At the Lee's Summit El Maguey, Manager Contreras Flores' statements about the pay system were sufficient to show that the restaurant paid workers a fixed salary regardless of the hours he reported to El Maguey's accountant. See App. 630; App. 627. Furthermore, there was ample evidence that the restaurant ignored the court's orders to adhere to the recordkeeping requirements of the FLSA: Investigator Huggins observed that the Lee's Summit El Maguey did not report all of its workers on its payroll records, see App. 423 (Tr. 47:6-11; Tr. 47:18-20); App. 424 (Tr. 48:11-13) and Manager Contreras Flores' confirmed that he paid these employees in cash. App. 631. Investigator Huggins also discovered that "there were numerous weeks or pay periods that were missing time cards." App. 461-62 (Tr. 85:23-86:4). Finally, Investigator Huggins testified to discrepancies between the payrolls and time cards provided by the restaurant. See, e.g., App. 466 (Tr. 90:17-91:1).

This evidence clearly and convincingly demonstrates that both El Maguey locations and the individual Respondents were in violation of Judge Whipple's repeated orders to comply with the FLSA.[17] Accordingly, even if the non-managerial employee statements were inadmissible, the district court did not err in adjudicating El Maguey in contempt.

2. The district court also entered appropriate monetary sanctions against El Maguey, regardless of whether the employee interview statements were hearsay. The Secretary acknowledges that Wage and Hour investigators used the statements to compute the amounts the restaurants failed to pay for many of the employees, and the district court's monetary sanctions reflect these calculations. See A12; A8; see, e.g., App. 455 (Tr. 79:3-21); App. 569 (Tr. 192:12-16); 588 (Tr. 211:9-21). Given that El Maguey "failed to keep proper records" under the FLSA, the district court was empowered to determine back wage amounts based on a "just and reasonable inference" from the Secretary's evidence. See Reich v. Stewart, 121 F.3d 400, 406 (8th Cir. 1997) (citing Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946)). Moreover, the district court was allowed to consider the employee interview statements "for the limited purpose" of determining whether

[17] The Secretary's Exhibits 15, 16, 31, 32, the admission of which El Maguey has not challenged on appeal, also show that El Maguey violated the FLSA's minimum wage and overtime requirements. App. 670-71 (Exhibit 15); App. 672-73 (Exhibit 16); App. 711-48 (Exhibit 31); App. 749-53 (Exhibit 32).

the Secretary's reconstruction of wages and hours "rested on a reasonable basis," even if the statements themselves were "inadmissible to prove the assertions contained therein." DiMauro v. United States, 706 F.2d 882, 885 (8th Cir. 1983) (holding that the district court did not err in admitting an out-of-court statement on which the IRS Commissioner relied to calculate tax liability); see Brock v. Seto, 790 F.2d 1446, 1449 (9th Cir. 1986) (holding that the district court erred by excluding a Wage and Hour compliance officer's testimony about back wage computations based in part on employees' statements, "where it was limited to showing the methodology of the computations and not the veracity of the employees' statements"). Accordingly, the district court did not abuse its discretion in assessing monetary sanctions, even if it should have excluded the employee statements for the purpose of proving the truth of what they contained.

IV. THE DISTRICT COURT DID NOT CLEARLY ERR WHEN IT FOUND THAT HUMBERTO JAIME HAD KNOWLEDGE OF AND WAS RESPONSIBLE FOR COMPLYING WITH THE COURT'S 2003 INJUNCTION, AND THUS, DID NOT ABUSE ITS DISCRETION WHEN IT HELD HIM IN CONTEMPT

The district court was clearly within its discretion when it held Humberto Jaime in contempt of the court's 2003 Order. "It is well-settled that a court's contempt power extends to non-parties who have notice of the court's order and the responsibility to comply with it." Chicago Truck Drivers, 207 F.3d at 507. Under Federal Rule of Civil Procedure 65(d), an injunction binds parties' officers,

agents, servants, and employees, and those who are in active concert or participation with them, who have actual notice of the order. Based on all of the facts of the case, Judge Whipple found that Humberto Jaime had knowledge of the court's 2003 Order and a responsibility to comply with it. A10-11. These findings are not clearly erroneous and, accordingly, must be upheld. See Warnock v. Archer, 443 F.3d 954, 955 (8th Cir. 2006).

1. The district court's 2003 Order permanently enjoined and restrained Manuel Jaime, El Maguey restaurants, and "their officers, agents, servants, employees, and those persons in active concert or participation with them," who received actual notice of the judgment, from committing future violations of the FLSA's minimum wage, overtime, and recordkeeping provisions. App. 40-42; A2. Given the evidence before it, the district court correctly concluded that Humberto Jaime was an agent, or at least in active concert with his brother and the Lee's Summit El Maguey, and therefore subject to this directive. Manager Contreras Flores' statement revealed that Humberto Jaime was present at the Lee's Summit El Maguey approximately three times a week, and called the restaurant frequently "to make sure everything was in order." A10; App. 627. Indeed, Humberto Jaime admitted that he "would help" at the restaurant. App. 619-20 (Tr. 242:16-243:1). The Lee's Summit El Maguey manager further stated that Humberto Jaime made at least one promotion decision at the restaurant (Contreras Flores' own) and made

inquiries about the restaurant's hiring needs. App. 627. Moreover, the district court found, based on Manager Contreras Flores' statement, that Humberto Jaime instructed Manager Contreras Flores to "pay[] employees the already established salary rates." A10; see App. 418-19 (Tr. 42:18-43:5); App. 630-31. Accordingly, the district court did not clearly err when it found that "Humberto Jaime was an agent, servant, employee, and/or in active concert or participation" with the Lee's Summit El Maguey and Manuel Jaime. A10.

2. Nor did Judge Whipple clearly err in finding that Humberto Jaime "had knowledge and notice of the Court's prior injunctions and judgments." A10. Judge Whipple based this finding on all of the facts of a case he had presided over for more than a decade. Id.; App. 1, 4. As the Eighth Circuit has long recognized, a court may determine that a non-party had actual knowledge of its prior order based on circumstantial evidence showing the party's relationship to the underlying controversy. See Stewart v. United States, 236 F. 838, 844-45 (8th Cir. 1916). In Stewart, this court concluded that non-party union members had actual knowledge of an injunction against the union, where the injunction had been posted, the individuals "all lived in the community in which the original controversy" and the events following it "were staged," and they did not claim ignorance of the order when they testified. Id. at 845; see Sequoia Dist. Council of Carpenters, AFL-CIO v. NLRB, 568 F.2d 628, 634 (9th Cir. 1977) (holding that

non-party union officials had actual knowledge of the terms of an injunction against the union "by virtue of their long-standing relation to the underlying controversy").

The "entire history" of the proceeding before Judge Whipple "provides considerable circumstantial evidence" that Humberto Jaime had knowledge of Judge Whipple's 2003 Order. Sequoia, 568 F.2d at 634 n.11. As Judge Whipple was well aware, the Secretary brought its 2005 FLSA action against Humberto Jaime on the same day that he petitioned the district court to hold Humberto Jaime's brother, Manuel Jaime, and the Lee's Summit El Maguey in contempt for violating the 2003 Order. App. 46; App. 53, 54; A3. The complaint against Humberto Jaime specifically referenced the contempt petition, and Judge Whipple subsequently consolidated these actions. App. 57; App. 6; A3

Upon the parties' agreement, Judge Whipple dismissed Humberto Jaime from the consolidated actions in the same order (the 2006 Order) that adjudged the Lee's Summit El Maguey and Manuel Jaime in contempt of the 2003 Order. App. 85, 88. The 2006 Order, which was captioned to include Humberto Jaime along with the contemnors, described the 2003 Order as enjoining violations of "the minimum wage, overtime and record keeping provisions of the Fair Labor Standards Act." App. 85. As the district court explicitly noted in its conclusions

of law, the 2006 Order decreed that the 2003 Order "remains in effect." A10; App. 88.

Furthermore, although Humberto Jaime took the stand on his own behalf, not once did he plead "ignorance or want of notice of the injunction." Stewart, 236 F. at 845 (internal quotations marks and citation omitted); see App. 614-20. Given all of the facts before him over the course of years of proceedings, therefore, Judge Whipple did not clearly err when he found that Humberto Jaime had knowledge of, and responsibility to comply with, his 2003 Order but nevertheless persisted in minimum wage, overtime, and recordkeeping violations.

CONCLUSION

For the foregoing reasons, this court should uphold the district court's Adjudication of Contempt.

Dated April 6, 2015

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a) AND EIGHTH CIRCUIT RULE 28A(h)

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

1. The brief contains 11,656 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief was prepared using Microsoft Word 2010 with 14-point Times New Roman font in text and footnotes and converted to Portable Document Format.

3. I certify that this brief complies with Eighth Cir. R. 28A(h) because the brief has been scanned for viruses and is virus-free.

Dated: April 6, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2014, I electronically filed the foregoing Brief for the Secretary of Labor with the Clerk of the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. I certify that service will be accomplished by the appellate CM/ECF on the following registered CM/ECF user:

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