No. 13-1685

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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

Plaintiff-Appellee

v.

LORRAINE ENTERPRISES, INC., d/b/a Piccolo E. Posto;

LORRAINE LAGO;

PEDRO GONZALEZ,

Defendants-Appellants

On Appeal from the United States District Court
for the District of Puerto Rico

BRIEF FOR THE SECRETARY OF LABOR

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REASONS WHY ORAL ARGUMENT NEED NOT BE HEARD

The Secretary of Labor, Plaintiff-Appellee, believes that oral argument is not warranted in this case because the issues are well settled and can be decided on the briefs. *See Fed. R. App. P.* 34(a)(2)(C).

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court had jurisdiction over this case pursuant to section 17 of the Fair Labor Standards Act ("FLSA" or "Act"), 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 July 13, 2012 Opinion and Order granting summary judgment to the Secretary, and its March 28, 2013 Opinion and

Order denying Defendants-Appellants' Motion for Reconsideration of Judgment, pursuant to 28 U.S.C. 1291 (final decisions of district courts). Defendants filed a timely notice of appeal on May 24, 2013. *See* Fed. R. App. P. 4(a)(1)(B)(ii) (sixty days to file notice of appeal when United States agency is a party).

STATEMENT OF THE ISSUES

1. Whether the district court correctly ruled that Lorraine Lago and Pedro Gonzalez were individually liable for FLSA violations where the Defendants did not contest this issue until after the district court granted summary judgment for the Secretary of Labor ("Secretary"), and the Defendants admitted sufficient facts in their Answer to the Secretary's Complaint to establish that Lago and Gonzalez were employers under the FLSA.

2. Section 3(m) of the FLSA requires an employer to provide notice to employees before taking a tip credit toward its minimum wage obligations. The employer carries the burden of showing that it provided proper notice. The issue here is whether the district court correctly ruled that the Defendants failed to raise a triable issue of fact as to notice, given restaurant general manger Pedro Gonzalez' testimony that workers did not receive notice.

3. Whether the district court correctly ruled that the Secretary did not violate Defendants' due process rights where the Defendants did not raise this issue until after the district

court entered its judgment, and they received notice of the tip credit allegation by virtue of the Secretary pleading violations of the FLSA's minimum wage provision.

STATEMENT OF THE CASE

A. Statement of Facts and Course of Proceedings

Defendant Lorraine Enterprises, Inc. owns and operates the Piccolo e Posto restaurant in Guaynabo, Puerto Rico. App. 72, 418.[1] In February 2008, the Department of Labor's Wage and Hour Division initiated an investigation to determine whether practices at Piccolo e Posto complied with the FLSA. App. 45. At that time, Lorraine Lago and her husband Joe Rao each owned 50% of Lorraine Enterprises. App. 330. Rao passed away in December 2008. App. 76, 420.

On July 6, 2009, the Secretary filed a Complaint against Lorraine Enterprises, Inc. d/b/a Piccolo e Posto, Lorraine Lago, and Pedro Gonzalez (collectively, "Lorraine"), alleging violations of the FLSA's minimum wage, overtime compensation, and recordkeeping requirements, seeking back wages and liquidated damages (or in the alternative, prejudgment interest), and requesting permanent injunctive relief. App. 13-18. The Secretary alleged that Lorraine had committed these

[1] References to Defendants-Appellants' Appendix are cited as "App. (appendix page number(s))." References to the Addendum located at the end of Appellants' opening brief are cited as "Add. (addendum page number(s))."

violations since at least March 2006. App. 16. Gonzalez, who initially worked as a waiter at Piccolo e Posto, served as general manager beginning in 2006. App. 76, 420.

On March 7, 2011, the Secretary moved for summary judgment on the minimum wage claim. App. 69-84, 266-85. Lorraine subsequently moved for summary judgment on the Secretary's overtime and recordkeeping claims. App. 286-302; Add. 25. Both motions were opposed. App. 401-17, 426-41. The district court referred both motions to Magistrate Judge Camille L. Velez-Rive who issued two Reports and Recommendations, addressing each motion separately. Add. 1-23, 24-31.

The first Report and Recommendation recommended granting in part and denying in part the Secretary's Motion for Summary Judgment. Add. 22. The Magistrate Judge found no genuine issue of material fact as to the Secretary's minimum wage claim, which alleged that Lorraine (1) did not inform its tipped employees of the FLSA's tip credit provision; (2) had instituted an invalid tip pool; and (3) made impermissible "spillage fee" deductions from tipped employees' wages (including tips). Add. 4-15. The Report recommended denying the Secretary's request for liquidated damages and injunctive relief (but granting prejudgment interest), reasoning that the additional monetary award would impose a heavy burden on the restaurant's practices, and because the Secretary acknowledged that Lorraine no longer

engaged in the violative practices. Add. 16-22. The second Report and Recommendation denied summary judgment for Lorraine and granted it for the Secretary on the overtime compensation claim. Add. 30. Lorraine only filed objections to the first Report. App. 640-64.

On July 13, 2012, U.S. District Court Judge Jay A. Garcia-Gregory adopted the Magistrate Judge's Reports in an Opinion and Order granting the Secretary's Motion for Partial Summary Judgment and denying Lorraine's Motion. *Solis v. Lorraine Enters.*, 907 F. Supp. 2d 186 (D.P.R. 2012). Lorraine filed a Motion for Reconsideration pursuant to Federal Rule of Civil Procedure 59(e), which the district court denied. Add. 48-56, 692-736. Lorraine timely appealed both decisions. App. 749-50.

B. District Court Opinion and Order

The district court first addressed the Secretary's Motion for Partial Summary Judgment, which alleged that there were no genuine issues of material fact as to whether Lorraine (1) failed to inform its employees of its intention to take a tip credit against its minimum wage obligations prior to taking the credit; (2) instituted an invalid tip pool that included employees who did not customarily and regularly receive tips within the meaning of the FLSA; and (3) made improper "spillage fee" deductions. *Lorraine Enters.*, 907 F. Supp. 2d at 190. Concluding that there was no genuine issue of material fact on

the notice violation, the district court adopted the Magistrate Judge's findings, granted the Secretary's Motion, and found the "Defendants liable for the full amount of minimum wages owed, calculated to be $129,057.22." *Id.* at 190-93.[2]

The FLSA requires employers to "inform" its tipped employees of the provisions of the tip credit section of the Act, 29 U.S.C. 203(m), before taking the tip credit. If the employer fails to give proper notice, it is liable for the full minimum wage. *See Martin v. Tango's Rest., Inc.*, 969 F.2d 1319, 1323 (1st Cir. 1992). The district court adopted the Magistrate Judge's finding that Lorraine failed to raise a triable issue of fact on the notice issue, reasoning that "[t]he only concrete evidence" of notice "is the testimony of the restaurant's general manager, Pedro Gonzalez, who flatly stated that the waiters were never told or otherwise informed that their tips

[2] The court did not address the tip pool and spillage fee issues in detail because the notice violation established Lorraine's liability for the full minimum wage for all hours its tipped employees worked. *Lorraine Enters.*, 907 F. Supp. 2d at 190 ("Since the Court adopts the Magistrate Judge's Report and Recommendation on the issue of notice violations, a [section] 203 violation has been established. As a consequence, it is unnecessary to consider in depth the Secretary's additional arguments relating [to] the spillage fee and improper pooling of tips."). The district court noted in a footnote, however, that it found Lorraine's objections to the Magistrate Judge's Report on these other issues "unpersuasive" and "after *de novo* review" adopted the Judge's "findings on these issues as well." *Id.* at 190 n.2. Lorraine does not appear to be contesting the tip pool or spillage fee determinations on appeal; the argument section of its opening brief only discusses the tip credit notice issue.

would be considered as part of their wages." *Lorraine Enters.*, 907 F. Supp. 2d at 191. It further explained that Lorraine had the "ultimate burden of proof" of showing that it was entitled to the tip credit and "cannot merely rely on the absence of competent evidence, but must affirmatively point to specific facts that demonstrate the existence of an authentic dispute." *Id.* The court concluded that Lorraine had not produced any such "definite, competent" evidence. *Id.*

The district court also dismissed Lorraine's argument that the Department's Wage and Hour investigator did not discuss the tip credit notice issue in her investigation report. *Id.* at 192; *see* App. 330-37. The court explained that "nothing precludes the Secretary from incorporating claims for violations of the FLSA that result from additional investigation," and that the "Defendants are charged with a [section] 203(m) violation on the basis of [Gonzalez'] testimony, and not on the original investigation conducted by the case agent." *Lorraine Enters.*, 907 F. Supp. 2d at 192.[3]

Following the district court's decision, Lorraine filed a Motion for Reconsideration pursuant to Federal Rule of Civil

[3] The district court adopted the Magistrate Judge's recommendations to deny liquidated damages and injunctive relief, and grant prejudgment interest. *Lorraine Enters.* 907 F. Supp. 2d. at 192. It also adopted the Judge's recommendation to grant summary judgment to the Secretary on the overtime claim. *Id.* at 192-93. These rulings are not at issue on appeal.

Procedure 59(e). App. 692-736. In that motion, Lorraine argued for the first time that (1) the Secretary had not offered any evidence establishing Lorraine Lago's and Pedro Gonzalez' individual liability; (2) Lago's deposition testimony established that Rao gave proper tip credit notice to employees he hired; and (3) the Secretary violated Lorraine's due process rights by first raising the tip credit notice issue in his summary judgment motion. App. 694-704, 710-30. The district court denied Lorraine's Rule 59(e) motion. Add. 48-56.

SUMMARY OF ARGUMENT

Lorraine argues that the district court erred in holding Lorraine Lago and Pedro Gonzalez individually liable for the FLSA violations because the Secretary failed to produce evidence that they were employers under section 3(d) of the FLSA, 29 U.S.C. 203(d). Because Lorraine first contested individual employer liability in its Rule 59(e) motion, this argument is waived. Even if this issue is not waived, Lorraine's factual admissions concerning individual employer status in its Answer to the Secretary's Complaint were sufficient to justify the district court's individual employer liability finding.

Lorraine's second argument, that the district court erred in granting summary judgment for the Secretary on the tip credit notice issue, is similarly without merit. Section 3(m) of the FLSA requires an employer to inform its employees of certain tip

credit information before it can use the credit toward its minimum wage obligations. *See* 29 U.S.C. 203(m); *Tango's*, 969 F.2d at 1322-23. The employer carries the burden of showing that it provided notice and was entitled to the credit. *See, e.g., Barcellona v. Tiffany English Pub., Inc.*, 597 F.2d 464, 467-68 (5th Cir. 1979). The district court correctly granted summary judgment on the basis that the only "definite, competent" evidence regarding notice was the testimony from general manager Gonzalez that employees (including him) did not receive notice. *Lorraine Enters.*, 907 F.2d at 191. Lorraine's attempts to limit the scope of Gonzalez' testimony do not sufficiently speak to the notice issue, and its reliance on unsubstantiated testimony from Lago, which concerns the actions of someone else and is not accompanied by any corroborating evidence, is insufficient to create a genuine issue of material fact as to whether employees received notice.

Finally, the district court correctly rejected Lorraine's due process argument, which was raised for the first time in its Rule 59(e) motion. Even if Lorraine did not waive its argument that it was unaware that the Secretary's Complaint included a claim that Lorraine had not notified its employees of the tip credit pursuant to section 3(m) of the FLSA, that argument is without merit. The Secretary was not required to separately plead a violation of section 3(m), and provided adequate notice

of the tip credit claim by alleging in his Complaint that Lorraine violated the FLSA's minimum wage provision, which necessarily encompasses section 3(m)'s allowance for an employer to take a tip credit against its minimum wage obligations under the FLSA.

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment de novo. *Hines v. State Room, Inc.*, 665 F.3d 235, 241 (1st Cir. 2011). This Court's review of the disposition of Lorraine's Rule 59(e) motion is plenary, and the legal issues raised therein are reviewed de novo. *See Rio Mar Assocs., LP, SE v. UHS of P.R., Inc.*, 522 F.3d 159, 163 (1st Cir. 2008).

ARGUMENT

I. BECAUSE LORRAINE DID NOT RAISE THE ISSUE OF INDIVIDUAL EMPLOYER LIABILITY UNTIL ITS RULE 59 MOTION, IT IS WAIVED; EVEN IF IT IS NOT WAIVED, ADMISSIONS IN LORRAINE'S ANSWER TO THE SECRETARY'S COMPLAINT WERE SUFFICIENT TO CONCLUDE THAT LAGO AND GONZALEZ WERE FLSA EMPLOYERS

Lorraine argues that the district court erred in finding Lago and Gonzalez individually liable for FLSA violations because the Secretary failed to establish that they were "employer[s]" under section 3(d) of the FLSA, 29 U.S.C. 203(d). *See* Defendants-Appellants' Brief on Appeal ("Lorraine's Br.") 25.

1. The Secretary alleged in his Motion for Summary Judgment

that "Defendants owe $129,057.22" in unpaid minimum wage obligations. App. 278; *see* Add. 21. Those "Defendants" included Lago and Gonzalez. The Magistrate Judge agreed, and recommended granting the Secretary's motion with respect to owed backwages. Add. 21-22. Although Lorraine had the opportunity to contest individual employer liability in its Memorandum in Opposition to the Secretary's Motion for Summary Judgment or in its Objections to the Magistrate Judge's Report and Recommendation, it did not do so. *See* App. 401-17, 640-64. This failure alone was sufficient to waive this argument on appeal because "'only those issues fairly raised by the objections to the magistrate's report are subject to review in the district court and those not preserved by such objection are precluded on appeal.'" *Sch. Union No. 37 v. United Nat'l Ins. Co.,* 617 F.3d 554, 564 (1st Cir. 2010)(quoting *Keating v. Sec'y of Health & Human Servs.,* 848 F.2d 271, 275 (1st Cir. 1988)); s*ee, e.g., Curet-Velázquez v. ACEMLA de P.R., Inc.*, 656 F.3d 47, 53-54 (1st Cir. 2011).

Lorraine instead first raised its individual employer liability defense in its Rule 59(e) Motion for Reconsideration. App. 694-704; *see* Add. 52. The district court rightly concluded that Loraine could not raise this argument for the first time after the entry of judgment. Add. 52 (citing *Venegas-Hernandez v. Sonolux Records*, 370 F.3d 183, 189-90 (1st Cir. 2004)). It

is well settled that a party cannot make new arguments in a Rule 59(e) motion if such arguments "could, and should, have been raised before the court's pulling of its judgment trigger." *Markel Am. Ins. Co. v. Diaz-Santiago*, 674 F.3d 21, 32 (1st Cir. 2012); *see DiMarco-Zappa v. Cabanillas*, 238 F.3d 25, 34 (1st Cir. 2001) ("Rule 59(e) . . . does not provide a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to . . . advance arguments that could and should have been presented to the district court prior to judgment."). By not timely contesting individual employer liability before the district court, Lorraine failed to preserve this issue for appeal. *See, e.g.*, *In re Redondo Constr. Corp.*, 678 F.3d 115, 122 (1st Cir. 2012) (stating that issue of prejudgment interest was "exception to [the] general rule" that "arguments presented for the first time in a Rule 59(e) motion ordinarily are deemed forfeited" and thus not preserved for appeal) (citation omitted)*; Weihaupt v. Am. Med. Ass'n*, 874 F.2d 419, 425 (7th Cir. 1989) (refusing to consider argument first raised in Rule 59(e) motion). Accordingly, this Court should not consider Lorraine's individual employer liability arguments.

2. Even if Lorraine did not waive its right to contest individual employer liability, it admitted to facts set forth in the Secretary's Complaint sufficient to establish that Lago and Gonzalez were FLSA employers (and therefore individually

liable). Under the "economic reality" test for determining whether an individual qualifies as an employer under the FLSA, this Court examines an individual's role in causing the FLSA violation, looking to factors such as the individual's ownership interest and operational control over significant aspects of the business. *See Manning v. Bos. Med. Ctr. Corp.*, 725 F.3d 34, 47 (1st Cir. 2013) (citing *Baystate Alt. Staffing, Inc. v. Herman*, 163 F.3d 668, 678 (1st Cir. 1998)).

The Secretary's Complaint included factual allegations that, if true, justified the conclusion that the Defendants were employers under the FLSA. Specifically, the Secretary alleged that Lago and Gonzalez each had "active control and management of defendant corporation, regulated the employment of persons employed by defendant corporation, acted directly and indirectly in the interest of defendant corporation in relation to the employees, and is thus an employer of the employees within the meaning of section 3(d) of the Act." App. 14. Lorraine "admitted" these allegations in their entirety in its Answer to the Secretary's Complaint. App. 23.

This Court has stated that "[o]rdinarily, a pleading admitting a fact alleged in an antecedent pleading is treated as a binding judicial admission, removing the fact from contention for the duration of the litigation." *Harrington v. City of Nashua*, 610 F.3d 24, 31 (1st Cir. 2010); *see Schott Motorcycle*

Supply, Inc. v. Am. Honda Motor Co., Inc., 976 F.2d 58, 61 (1st Cir. 1992). While parties may not similarly bind courts on questions of law, *see Harrington*, 610 F.3d at 31, a court can decide legal issues using facts admitted in pleadings. *See Schott*, 976 F.2d at 61 (citing with approval *Mo. Housing Dev. Comm'n v. Brice*, 919 F.2d 1306, 1315 (8th Cir. 1990), for proposition that "admissions in the pleadings are binding on the parties and may support summary judgment against the party making such admissions"); *cf. Ferguson v. Neighborhood Hous. Servs. Of Cleveland, Inc.*, 780 F.2d 549, 550-51 (6th Cir. 1986) (ruling that defendant's admission in its answer that it was an FLSA employer was a binding admission establishing subject matter jurisdiction).

The district court properly relied on the factual admissions in Lorraine's Answer to render its legal conclusion that Lago and Gonzalez were FLSA employers. Add. 51-52. Specifically, the court stated in its Opinion and Order Denying Lorraine's Motion to Alter Judgment that "those statements [in the Secretary's Complaint] were admitted as fact, giving the Court sufficient factual basis to find the individual defendants liable under the FLSA." Add. 52.

3. Lorraine has not provided sufficient justification for disturbing the district court's ruling concerning individual employer liability. Lorraine encourages this Court to examine

Lago's and Gonzalez' individual employer liability in the context of its Opposing Statement of Uncontested Material Facts, where it contends it qualified its earlier admission that the Defendants were FLSA employers. Lorraine's Br. 28; *see* App. 418-19. But this qualification was not sufficient to contest individual employer liability before either the magistrate judge or the district court. In *Napier v. Town of Windham*, this Court explained that it was "reluctant to forgive the omission of an argument from an opposition brief merely because the argument was made in an accompanying statement of facts[,]" and only considered an argument on appeal because it was "expressly outlined" in the plaintiff's statement of material facts and raised in his objections to the magistrate judge's decision. 187 F.3d 177, 186-87 (1st Cir. 1999). By contrast here, Lorraine did not contest individual employer liability in its Objections to the Magistrate's Report and Recommendation, and conceded the individual liability issue in its Answer.

Lorraine also tries to circumvent the admissions in its Answer by arguing that deposition testimony supports that Lago and Gonzalez were not FLSA employers. Lorraine's Br. 30-33. This argument is unavailing because it is undisputed that Lorraine never withdrew or amended its Answer. *See, e.g.*, *Mo. Housing Dev. Comm'n*, 919 F.2d at 1314 ("Admissions in the pleadings . . . are in the nature of judicial admissions binding

upon the parties, unless withdrawn or amended.")(internal quotation marks omitted); *Am. Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988)("Factual assertions in pleadings . . . unless amended, are considered judicial admissions conclusively bindings on the party who made them.").

At a more practical level, to not find Lorraine's Answer dispositive (i.e., to not hold it accountable for that Answer) would undermine the discovery process. After Lorraine filed its Answer on September 8, 2009, the Secretary had no reason to (and did not) expend resources during discovery gathering evidence concerning individual employer liability. *See Fontes v. Porter*, 156 F.2d 956, 957 (9th Cir. 1946)("Neither proof nor finding is requisite in respect of uncontested issues."); *cf. Meyer v. Berkshire Life Ins. Co,* 372 F.3d 261, 264-65 (4th Cir. 2004)("Judicial admissions . . . include intentional and unambiguous waivers that release the opposing party from its burden to prove the facts necessary to establish the waived conclusion of law."). Permitting Lorraine to now contest this issue would frustrate judicial efficiency by in effect requiring the Secretary to pursue discovery on conceded issues in order to avoid prejudice in cases where a party decided to mount a belated challenge. *See, e.g., Nat'l Sur. Corp. v. Ranger Ins. Co.*, 260 F.3d 881, 886 (8th Cir. 2001) (binding defendant to statement made in pleadings that had the effect of "lulling

[plaintiff] into not pursuing discovery[,]" and noting that "judicial efficiency demands that a party not be allowed to controvert what it has already unequivocally told a court by the most formal and considered means possible") (internal quotation marks and citation omitted). If the Court does not decide this issue on waiver grounds, these considerations further support affirming the district court's conclusion that Lorraine's Answer establishes Lago's and Gonzalez' individual liability as employers under the FLSA.

II. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT ON THE NOTICE ISSUE WHERE LORRAINE DID NOT PRODUCE "DEFINITE, COMPETENT" EVIDENCE THAT IT INFORMED ITS EMPLOYEES ABOUT THE TIP CREDIT

Summary judgment is appropriate if "there is no genuine issue of material fact and the undisputed facts show that the moving party is entitled to judgment as a matter of law." *Kuperman v. Wrenn*, 645 F.3d 69, 73 (1st Cir. 2011). As the moving party, the Secretary "had the initial burden of informing the judge of the basis for [his] motion and identifying portions of the record that demonstrate the absence of any genuine issue of material fact." *Id.* at 73-74. Then, on issues for which Lorraine "would bear the burden of proof at trial, [it] had to introduce definite, competent evidence to survive summary judgment." *Id.* (citing *Mesnick v. Gen. Elec. Co.*, 950 F.2d 816, 822 (1st Cir. 1991)).

As this Court has observed, section 3(m) of the FLSA, 29 U.S.C. 203(m), permits an employer to credit a portion of its employees' tips against its minimum wage obligations, but only if the employer "informs" its employees of certain tip credit information before taking the credit. *See Tango's*, 969 F.2d at 1322; *see also Reich v. Chez Robert, Inc.,* 28 F.3d 401, 403 (3d Cir. 1994). The employer bears the burden of showing that it has met the FLSA's "notice" requirement, and that it is therefore entitled to take the tip credit. *See Barcellona*, 597 F.2d at 467; *Pedigo v. Austin Rumba, Inc.*, 722 F. Supp. 2d 714, 724 (W.D. Tex. 2010); *but see Fast v. Applebee's Int'l, Inc.*, 638 F.3d 872, 881-82 (8th Cir. 2011)(recognizing that "employer bears the burden of proof to establish that an [FLSA] exemption applies," but holding that tip credit is not an exemption in case applying burden-shifting framework under *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680 (1946)). Placing this burden on the employer is consistent with legislative intent, as expressed in the Senate Report to the 1974 amendments to the FLSA. *See* S. Rep. No. 93-690, at 43 (1974) (stating that amendments to section 3(m) were made in part "to make clear the original intent of Congress to place on the employer the burden of proving the amount of tips received by tipped employees and the amount of tip credit, if any, which such employer is entitled to claim as to tipped employees"). If the employer

cannot establish that it provided the requisite notice required by section 3(m), it cannot take a tip credit and is liable for the full minimum wage. *See Tango's*, 969 F.2d at 1323; *Chez Robert,* 28 F.3d at 403.

In 2011, the Department promulgated a tip credit regulation addressing the level of notice required by the statutory directive to "inform[]" tipped employees "of the provisions of this subsection." 29 U.S.C. 203(m).[4] Prior to this rulemaking, a few courts had addressed whether notice given in a particular case met the requirements of section 3(m). In *Tango's*, for example, this Court interpreted section 3(m) to require, "at the very least notice to employees of the employer's intention to treat tips as satisfying part of the employer's minimum wage

[4] The Secretary filed his Complaint against Lorraine on July 6, 2009. App. 13. The Department's tip credit regulation, 29 C.F.R. 531.59, became effective May 5, 2011, and is therefore not applicable in this case. *See* 76 Fed. Reg. 18,832-01, 18,832 (Apr. 5, 2011). The tip credit regulation provides that before taking the tip credit an employer must inform its tipped employees of the five requirements set forth in section 3(m) of the Act: (1) the amount of cash wage that will be paid to the tipped employee; (2) the additional amount by which the wages of the tipped employee are increased on account of the tip credit claimed by the employer; (3) that the amount claimed by the employer as the tip credit cannot exceed the value of tips actually received; (4) that all tips received by the tipped employee must be retained by the employee except for tips distributed through a valid tip pool; and (5) that the tip credit will not apply to any employee who has not been informed of these requirements. 29 C.F.R. 531.59(b); *see Nat'l Rest. Ass'n v. Solis*, 870 F. Supp. 2d 42 (D.D.C. 2012) (upholding regulation).

obligations[,]" and stated that the provision "could easily be read to require more[.]" 969 F.2d at 1322. In *Kilgore v. Outback Steakhouse of Florida, Inc.*, 160 F.3d 294, 298 (6th Cir. 1998), the court held that an employer was not required to "explain" the tip credit, but must still "inform its employees of its intent to take a tip credit toward the employer's minimum wage obligation." And in *Reich v. Chez Robert, Inc.*, the court held that an employer does not meet its obligation to "inform" under section 3(m) when it tells its tipped employees that they will be paid a specific wage but does not explain that the wage is below the minimum wage and that that is permitted by law based on the employees' tips. 821 F. Supp. 967, 977 (D. N.J. 1993), *rev'd on other grounds*, 28 F.3d 401 (3d Cir. 1994)).

A. Testimony from General Manager Gonzalez Satisfied the Secretary's Summary Judgment Burden.

The Secretary relied on Gonzalez' deposition testimony to satisfy his initial burden (as the party seeking summary judgment) of showing that there was no genuine issue of material fact as to whether Lorraine informed its tipped employees of the requirements of section 3(m) of the FLSA before taking a tip credit against its minimum wage obligations. It is undisputed that Gonzalez was hired as a waiter at Piccolo e Posto, and after six months was promoted to general manager. App. 76, 420. As general manager, he hired, fired, trained, supervised,

and determined the pay of restaurant waiters. App. 76, 420. These two positions afforded Gonzalez personal knowledge of restaurant notice practices from both the perspective of a waiter hired during Rao's tenure,[5] and as a general manager empowered to provide tip credit notice.

Gonzalez squarely addressed the notice issue in the following deposition exchange:

> [Attorney]: When you started working as a waiter at Piccolo e Posto, did anyone tell you that tips would be considered part of your wages?
> [Gonzalez]: No
> ***
> [Attorney]: In 2006--And just to clarify, were you the restaurant manager in 2006?
> [Gonzalez]: Yes
> ***
> [Attorney]: [W]hen a waiter started working at Piccolo e Posto, were they notified that their tips would count as part of their wages?
> [Gonzalez]: No.

App. 179 (p. 32, lines 17-20 & p. 33, lines 6-9, 16-19). The district court recognized this testimony's probative value, stating that the "only concrete evidence" concerning the notice requirement "is the testimony of the restaurant's general manager, Pedro Gonzalez, who flatly stated that the waiters were never told or otherwise informed that their tips would be

[5] Although Gonzalez' exact date of hire is unclear, it is undisputed that Gonzalez was promoted to general manager in 2006 after working as a waiter for six months. App. 76, 420.

considered as part of their wages." *Lorraine Enters.,* 907 F. Supp. 2d at 191. Gonzalez' testimony was sufficient to satisfy the Secretary's summary judgment burden.

B. Lorraine Failed to Supply "Definite, Competent" Evidence to Withstand Summary Judgment.

Lorraine argued before the district court that Gonzalez' deposition testimony did not establish that Lorraine failed to provide tip credit notice to all of its employees. *See Lorraine Enters.,* 907 F. Supp. 2d at 191. The district court rejected this argument, reasoning that "[i]n order to raise a triable issue of fact" at the summary judgment stage, "Defendants cannot merely rely on the absence of competent evidence, but must affirmatively point to specific facts that demonstrate the existence of an authentic dispute." *Id.* at 191 (citing, *e.g.*, *Suarez v. Pueblo Int'l, Inc.*, 229 F.3d 49 (1st Cir. 2000)).

1. Lorraine's "Qualified Admissions" Do Not Support that Employees Received Tip Credit Notice.

Lorraine argues that three "qualified admissions" in its Opposing Statement of Additional Uncontested Material Facts (accompanying its opposition brief to the Secretary's Motion for Summary Judgment) "established the existence of a dispute" sufficient to withstand summary judgment on the notice issue. Lorraine's Br. 36-38. These allegations at most raise immaterial questions about the scope of Gonzalez' job as general

manager, and do not undermine his testimony that employees did not receive tip credit notice.

1a. In his Uncontested Facts in Support of the Plaintiff's Motion for Partial Summary Judgment ("Statement of Uncontested Facts"), the Secretary alleged that "Pedro Gonzalez has run the day-to-day operations of Piccolo e Posto as General Manager since 2006." App. 76 (fact 24). Lorraine accepted this fact with the qualification that Gonzalez did not have "human resources or payroll duties" as general manager. Lorraine's Br. 36. Relying on this qualification (and Gonzalez' testimony that he did not review payroll summaries), Lorraine asserts that Gonzalez "did not specifically review if [employee] salary or pay rate was correct." *Id*. This allegation is inapposite. Lorraine did not explain (let alone provide evidence supporting) how the scope of Gonzalez' payroll duties created a triable issue of fact on the distinct notice issue. Whether Gonzalez reviewed employee payroll summaries has no bearing on whether employees were informed about the restaurant's intention to utilize the tip credit.

1b. The Secretary also stated in his Statement of Uncontested Facts that "[w]aiters were not notified by Defendant Gonzalez that tips would count as part of their wages when hired to work at Piccolo e Posto." App. 76 (fact 27). Lorraine asserts that it accepted this fact with the qualification that

Gonzalez' testimony that employees did not receive proper notice "refers specifically to the employees hired by him." Lorraine's Br. 37. In support, Lorraine cites nearly 200 pages of the appendix, including numerous extraneous documents (such as restaurant payroll summaries and the Secretary's Complaint). *Id.* (citing App. 72-256, Exhibit 4, p. 179 (p. 33, lines 16-19)). The cited portion of Gonzalez' deposition (reproduced at App. 179) states:

> [Attorney]: [W]hen a waiter started working at Piccolo e Posto, were they notified that their tips would count as part of their wages?
> [Gonzalez]: No.

This exchange, on its face, provides no basis for concluding that Gonzalez' testimony only encompassed employees he hired. To the contrary, Gonzalez had knowledge of the restaurant's notice practices before he became general manager, testifying that he did not receive tip credit notice when he started working as a waiter. *Supra* p. 21. Lorraine's "unsupported speculation" about the scope of Gonzalez' testimony cannot defeat the Secretary's Motion for Summary Judgment. *See Dow v. United Bhd. of Carpenters and Joiners of Am.*, 1 F.3d 56, 58 (1st Cir. 1993).

1c. Finally, Lorraine argues that the Secretary's allegation in his Statement of Uncontested Facts that Gonzalez "hires, fires, trains, supervises and determines the pay of

waiters" was "qualified inasmuch as it generalizes the statement as to all of the restaurant's employees." Lorraine's Br. 36. More specifically, Lorraine alleges that Gonzalez only possessed these duties while he was general manager, and that Rao ran day-to-day restaurant operations in 2006. *Id.* 36-37. Lorraine also asserts that the Secretary "did not offer any evidence to demonstrate that Mr. Gonzalez was present during the hiring and/or training of any and all of the employees whom are allegedly owed wages." *Id.* 35.

As the district court stressed in rejecting this argument, the "Defendants bear the ultimate burden of proof to be entitled to claim [a] tip credit," and must "affirmatively point to specific facts that demonstrate the existence of an authentic dispute." 907 F. Supp. at 191 (citing, *e.g.*, *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)). This required Lorraine to produce "definite, competent" evidence that it notified its employees that it was availing itself of the tip credit. *Id.; see Pedigo*, 722 F. Supp. 2d at 725-26 (granting summary judgment on tip credit notice issue where employer failed to provide evidence that nineteen of twenty-three employees received notice). Lorraine's allegations about the distribution of duties between Rao and Gonzalez, and about when Gonzalez assumed

managerial functions, do not speak to the notice issue, and are therefore insufficient to withstand summary judgment.[6]

Lorraine never challenged Gonzalez' testimony insofar as it established that he did not provide notice to workers he hired. The Secretary's Statement of Uncontested Facts stated that "[w]aiters were not notified by Defendant Gonzalez that tips would count as part of their wages when hired to work at Piccolo e Posto." App. 76 (fact 27). As noted *supra*, Lorraine accepted this fact with a single qualification: "it generalizes the statement as to all of the restaurant's employees. Mr. Gonzalez statement refers specifically to the employees hired by him." App. 421 (fact 14). Lorraine maintains the same tack on appeal, alleging that some waiters were hired before Gonzalez became general manager in 2006, but not challenging that Gonzalez failed to provide notice to the workers he hired. *See* Lorraine's Br. 41 ("District Court should have concluded that those employees that were hired by Mr. Rao were in fact duly notified of the tip credit provisions."). Significantly,

[6] As to the allocation of managerial duties, Lorraine asserted that "Gonzalez's deposition testimony was to the effect that in the year 2006, it was Mr. Joe Rao who ran the day to day operations of the restaurant." Lorraine's Br. at 36-37. However, Gonzalez testified that he and Rao ran day-to-day operations in 2006; for example, in 2006 Gonzalez and Rao signed employee paychecks for seven and five months, respectively. App. 173 (p. 11, lines 18-20), 179 (p. 34, lines 20-23).

Gonzalez – who was hired as a waiter during Rao's tenure as manager – unambiguously testified that he never received notice.

2. Lago's Testimony Is Insufficient to Withstand Summary Judgment.

After the district court granted summary judgment for the Secretary, Lorraine raised a new argument based on Lago's deposition testimony. When asked if waiters were notified "that their tips were going to be applied as part of their wages for minimum wages purposes[,]" Lago testified that "[w]hile Joe [Rao] was the one hiring, yes, he did[,]" and she also stated that waiters received notice "[b]efore they accepted the job offer." App. 114 (p. 55, lines 22-25 & p. 56, lines 1-3). Based on this testimony, Lorraine alleges on appeal that "while Mr. Joe Rao was hiring, he notified the waiters that their tips were going to be applied as part of their wages for minimum wage purposes" and therefore "the restaurant did comply with notice requirements at the very least during the period and with those waiters which Mr. Rao hired." Lorraine's Br. 39-40.

Even if this argument is properly before the Court,[7] Lago's unsubstantiated assertion that her husband provided notice to

[7] Since Lorraine waited until its Rule 59(e) motion to argue that Lago's testimony supported finding that employees received tip credit notice, this argument is waived. *See, e.g., Santiago v. Canon U.S.A., Inc.*, 138 F.3d 1, 4 (1st Cir. 1998) ("The district court is under no obligation to discover or articulate new legal theories for a party challenging a report and recommendation issued by a magistrate judge"; and "a Rule 59(e)

all employees he hired is insufficient to raise a triable issue of fact sufficient to withstand summary judgment. As the party with the burden of proof at trial, Lorraine "may not defeat a motion for summary judgment by relying upon evidence that is merely colorable or not significantly probative[,]" but instead must present "definite, competent evidence." *Fajardo Shopping Ctr., S.E. v. Sun Alliance Ins. Co. of P.R., Inc.*, 167 F.3d 1, 7 (1st Cir. 1999)(internal quotation marks omitted); *see Hochen v. Bobst Grp., Inc.*, 290 F.3d 446, 453 (1st Cir. 2002) (non-moving party must offer more than a "mere scintilla" of evidence to survive summary judgment).

Lago provided no testimony or documentary evidence to substantiate her claim, which relies on the behavior of somebody else. For example, she did not explain how she acquired this knowledge, and Lorraine did not present anyone to corroborate her testimony. The only waiter who was deposed (former waiter Pedro Gonzalez) testified that waiters (including him) did not receive notice. App. 179 (p. 33, lines 16-19). Lago testified that workers initially received tip credit notice in writing

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motion . . . may not be used to argue a new legal theory") (internal quotation marks and citations omitted); *accord* cases cited *supra* pp. 11-12.

(which is not required under the FLSA), but produced no records substantiating this claim. App. 114 (p. 56).[8]

Although the district court did not specifically address Lago's testimony (which Lorraine raised only after the court granted the Secretary's Motion for Summary Judgment) it is well settled that a party cannot defeat summary judgment by relying "upon conclusory allegations, improbable inferences, and unsupported speculation." *Byrd v. Ronayne*, 61 F.3d 1026, 1030 (1st Cir. 1995) (citation omitted). Because Lago's unsubstantiated testimony is the only proffered evidence supporting Lorraine's contention that Rao provided tip credit notice to the employees he hired, Lorraine has failed to raise a triable issue of fact sufficient to withstand summary judgment.

III. LORRAINE'S DUE PROCESS CLAIM IS UNTIMELY AND NOT SUPPORTED BY THE RECORD

Lorraine lastly argues that the Secretary violated its due process rights by not specifically pleading the tip credit

[8] Lorraine also argues that its employees received notice of the tip credit provisions of the Act through their paystubs. Although the employee paystubs are not in the record, Lorraine points to Lago's statement in her deposition that tips were reported on the employees' paystubs. *See* Lorraine's Br. 40 ("[W]eekly paystubs . . . clearly notified and explained the restaurant's payroll practices."). Even if the paystubs did include a reference to tips, courts have recognized in analogous situations that this does not satisfy the notice required by section 3(m). *See, e.g.*, *Pedigo*, 722 F. Supp. 2d at 724 (holding that a job application indicating that tipped employees would receive $2.13 an hour was insufficient to inform tipped employees of the requirements of section 3(m) of the FLSA).

notice claim in his Complaint. Once again, because Lorraine raised this argument for the first time in its Rule 59(e) Motion for Reconsideration, App. 713-35, it is waived. *See, e.g.*, *F.D.I.C. v. World Univ. Inc.*, 978 F.2d 10, 16 (1st Cir. 1992) ("Motions under Rule 59(e) . . . may not be used to argue a new legal theory.") (citation omitted); *Trust Co. Bank v. U.S. Gypsum Co.*, 950 F.2d 1144, 1152, n. 16 (5th Cir. 1992) (ruling that equal protection claim raised for first time in Rule 59(e) motion waived on appeal); *accord* cases cited *supra* pp. 11-12.[9]

Even if Lorraine's due process claim is not waived, it is without merit. Lorraine asserts as part of this argument that it did not receive notice of the Secretary's tip credit notice claim under Federal Rule of Civil Procedure 8(a)(2) because the Secretary did not specifically plead it in his Complaint. *See* Lorraine's Br. 47-50. In other words, despite the fact that the Secretary's Complaint alleged that Lorraine violated section 6 (minimum wage) of the FLSA, App. 15, Lorraine argues that it could only have been put on notice that the Secretary was

[9] Lorraine did argue in its Opposition to the Secretary's Motion for Summary Judgment that the narrative report filed in this case by the Department's Wage and Hour Investigator following her investigation did not "inform of a notice failure regarding the use of [the tip credit]." App. 405. Lorraine never alleged, however, that this implicated its right to due process. It is indisputable that Lorraine's due process arguments grounded in the Secretary's pleadings were not raised until its Rule 59(e) motion.

pursuing a tip credit notice claim if the Complaint specifically alleged a violation of section 3(m) of the FLSA.

Other courts have already recognized, however, that a party is not required to separately plead a violation of section 3(m). *See Whitehead v. Hidden Tavern, Inc.*, 765 F. Supp. 2d 878, 881 (W.D. Tex. 2011) ("a plaintiff need only plead a violation of the minimum wage provisions, and the burden to prove the requirements of the tip credit exception were met lies with the defendant")(citing, *e.g.*, *Pedigo*, 722 F. Supp. 2d at 723-24)). As the district court explained in *Pedigo*, section 16(b) of the FLSA, 29 U.S.C. 216(b), creates a private cause of action for violations of sections 6, 7 (overtime), and 11 (recordkeeping), but the FLSA does not create a separate cause of action for section 3(m) violations. *See* 722 F. Supp. 2d at 722. Since section 3(m) is in effect an exception from an employer's minimum wage obligations, a section 3(m) violation is permissibly pled as a section 6 minimum wage violation. *Id.* at 724. The same rationale applies to suits brought by the Secretary pursuant to 29 U.S.C. 216(c). Therefore, there was no prejudice to Lorraine by virtue of the Secretary not specifically listing the notice violation in his Complaint. *See Guan Ming Lin v. Benihana Nat. Corp.*, 275 F.R.D. 165, 171 (S.D.N.Y. 2011) ("Because the gravamen of a tip credit violation is that the employees' wage fell below the statutory minimum as

a result of the employer's unlawful taking of the tip credit, the [complaint alleging minimum wage violations under the FLSA and New York state law] was sufficient to put the defendants on notice of the plaintiffs' tip credit claims."). As a defense to the allegation that it failed to pay the minimum wage, it was incumbent on Lorraine to prove that it properly availed itself of the section 3(m) tip credit if it believed that its use of the tip credit did not result in any minimum wage violation.

Moreover, there is no question that Lorraine knew that the Secretary was investigating the compensation of its tipped employees. The Secretary's investigation began in 2008. As discussed *supra*, an employer is not entitled to take the tip credit unless it has informed its tipped employees about that credit pursuant to section 3(m) of the FLSA, and the employer bears the burden of showing that it has met this requirement. Therefore, once Lorraine knew that the Secretary was investigating the compensation of its tipped employees, it was incumbent upon Lorraine to demonstrate that it had met this requirement in order to show that it was entitled to compensate its tipped employees using that credit.[10]

[10] For this reason, Lorraine's argument that the notice issue was not raised by the Department's Wage and Hour Investigator in her narrative report is immaterial. Moreover, Lorraine has not presented any authority challenging the district court's ruling that the Secretary may base his complaint on information

Lorraine further asserts that the Secretary's tip credit notice claim is mostly time-barred under the Portal-to-Portal Act, 29 U.S.C. 255(a), which establishes a two year statute of limitations for non-willful FLSA violations. *See* Lorraine's Br. 54. Lorraine alleges that "the notice violation claim was presented on March 7, 2011" and therefore the Secretary can only collect backwages beginning March 7, 2009. Lorraine's Br. 53.[11] Because, however, the Secretary properly pleaded the tip credit notice violation, Lorraine received notice of this claim when the Secretary filed his Complaint on July 6, 2009. Accordingly, if the Court affirms the district court's ruling that Lorraine failed to inform its employees that it intended to take a tip credit against its minimum wage obligations, the Secretary could ordinarily recover backwages beginning July 6, 2007. *See Herman v. Hector I. Nieves Transport, Inc.*, 91 F. Supp. 2d 435, 445 (D.P.R. 2000) ("under 29 U.S.C. § 255(a), the statute of limitations bars wage claims occurring more than two years prior to the date the complaint is filed"). Here, the parties entered

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discovered after the initial investigation. *Lorraine Enters.*, 907 F. Supp. 2d at 191-92.

[11] To support the March 7, 2011 date Lorraine cites "Appx. 50-52[,]" Lorraine's Br. 53, which corresponds to two documents related to the Secretary's motion to amend Exhibit A to his Complaint (to add employees allegedly owed backwages). Because both documents were filed on December 1, 2010, the Secretary assumes that Lorraine intended to cite to the Secretary's Motion for Summary Judgment, which was filed on March 7, 2011. App. 69.

into an agreement tolling the statute of limitations for "the time period beginning on March 6, 2006 until and including March 2, 2008." App. 203-04. Accordingly, the Secretary can recover backwages beginning March 6, 2006.

CONCLUSION

Lorraine's individual employer liability and due process arguments are not properly before this Court because each was first raised in Lorraine's Rule 59(e) Motion for Reconsideration of Judgment. Even if the Court rules that these arguments were not waived, both fail. Lorraine's admissions in its Answer to the Secretary's Complaint establish Lago's and Gonzalez' individual employer liability, and Lorraine's right to due process was preserved by virtue of the Secretary pleading violations of the FLSA's minimum wage provision in his Complaint. With respect to the Secretary's claim that Lorraine failed to notify its employees that it intended to take a tip credit, Lorraine failed to put forth sufficient evidence to create a triable issue of fact given Gonzalez' direct testimony that workers did not receive notice.

Accordingly, this Court should affirm the district court's Opinion and Order granting summary judgment for the Secretary.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure Rule 32(a)(7)(C)(i), I certify the following with respect to the foregoing brief of the Secretary of Labor:

1. This brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because this brief contains 7,820 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. 32(a)(5)(B) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface of 10.5 characters per inch, in Courier New 12-point type style. The brief was prepared using Microsoft Office Word 2010.

January 13, 2014
DATE

s/ Steven W. Gardiner
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CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2014, I served the foregoing Brief for the Secretary of Labor via CM/ECF to:

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I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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