No. 18-16493

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

R. ALEXANDER ACOSTA, SECRETARY OF LABOR,
U.S. DEPARTMENT OF LABOR,
Plaintiff-Appellee,

v.

EMPLOYER SOLUTIONS STAFFING GROUP, LLC, et al.,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Arizona
No. CV-16-02916-PHX-ROS

SECRETARY OF LABOR'S ANSWERING BRIEF

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STATEMENT OF JURISDICTION

The district court had jurisdiction over this case pursuant to 29 U.S.C. 217 of the Fair Labor Standards Act ("FLSA" or "the Act"). The district court also had jurisdiction under 28 U.S.C. 1331 (federal question jurisdiction) and 28 U.S.C. 1345 (jurisdiction over suits commenced by an agency or officer of the United States).

This Court has jurisdiction pursuant to 28 U.S.C. 1291 (review of final decisions of district courts). On December 16, 2016, the district court entered an

order dismissing cross-claims brought by Defendants-Appellees Employer Solutions Staffing Group, LLC, Employer Solutions Staffing Group II, LLC, Employer Solutions Staffing Group III, LLC, and Employer Solutions Staffing Group IV, LLC (collectively "ESSG"). *See* ESSG's Excerpts of R., Vol. I ("ER") 216-22. On March 28, 2017, the district court denied ESSG's motion for reconsideration of the court's December 16, 2016 order and for leave to file a third-party-complaint. *Id*. 170-71. On June 27, 2018, the district court entered an order granting summary judgment to the Plaintiff-Appellee Secretary of Labor ("Secretary"). *Id*. 9-16. The court entered a final judgment against ESSG on July 10, 2018. *Id*. 4-6. ESSG timely filed a Notice of Appeal. *Id*. 1-3.

STATEMENT OF THE ISSUES

1. Whether the district court correctly concluded that ESSG willfully violated the FLSA's overtime requirements where ESSG knew its employees worked over 40 hours per workweek without receiving overtime pay and showed reckless disregard for whether its conduct was prohibited by the FLSA.

2. Whether the district court appropriately awarded liquidated damages where ESSG willfully violated the FLSA's overtime requirements and failed to demonstrate that it acted in good faith.

3. Whether the district court properly dismissed ESSG's cross-claims for contribution or indemnification and denied its motion for leave to bring a third-

party complaint because such claims are not authorized under the FLSA or federal common law.

STATEMENT OF THE CASE

A. Statement of Facts

1. The relevant facts are not in dispute. ESSG is a staffing company that recruits, places, and assigns employees to fulfill labor needs of other "host" employers. *See* ER 9-10, 32. It represents to its clients that it knows and complies with wage and hour laws. *Id*. 35. ESSG provides in-house training to its staff on the FLSA's requirements, including overtime. *Id*. 36.

2. As relevant here, ESSG entered into an outsource agreement with New Way Staffing, LLC, dba Sync Staffing, under which Sync Staffing recruited, placed, and assigned employees at TBG Logistics, LLC ("TBG"). *See* ER 10, 32. TBG, in turn, provided workers ("TBG employees") to unload grocery products from tractor trailers at an Albertson's warehouse. *Id*. ESSG processed payroll for the TBG employees and was responsible for ensuring that these employees were appropriately compensated for all hours worked. *Id*. 10, 32-33. In its agreement with Sync Staffing, ESSG represented that it would assist Sync Staffing in identifying employees according to "pay status" under the FLSA and any other rule or regulation, and assumed "such responsibilities as are required by applicable

federal, state, and local laws." *Id*. 35-36. ESSG concedes that it was an employer of the TBG employees under the FLSA. *Id*.

3. To initiate the payroll, TBG sent spreadsheets to Sync Staffing, identifying the TBG employees and their hours worked. *See* ER 10, 34. These spreadsheets included separate columns for regular hours and overtime hours, but TBG often included all hours worked under the regular hours column, including those over 40 hours per workweek. *Id*. Sync Staffing then forwarded these spreadsheets to an ESSG payroll administrator, Michaela Haluptzok ("Ms. Haluptzok"), for processing and the issuing of paychecks. *Id*.

4. Ms. Haluptzok's duties as an ESSG payroll administrator were to manage and prepare payroll for assigned client accounts, including TBG. *Id*. 38. After completing a brief training period, Ms. Haluptzok worked "independent[ly]" and was "expected to follow directions and training and seek clarification when needed." *Id*. 37-38.

5. Ms. Haluptzok received her first TBG payroll spreadsheet from Sync Staffing in November 2012. *See* ER 10, 56. That spreadsheet identified many employees who worked more than 40 hours per week but indicated that all the hours should be paid at the regular rate. *Id*. 10, 34. Upon receipt of this spreadsheet, Ms. Haluptzok prepared a preliminary draft payroll, segregating the hours so that employees would be paid 1.5 times their regular rate for all hours

worked over 40 hours per workweek. *Id*. Ms. Haluptzok sent this draft payroll to Sync Staffing for review. *Id*. Sync Staffing instructed Ms. Haluptzok to process the payroll exactly as indicated on TBG's spreadsheet, paying the lower, regular rate for all hours worked without overtime pay. *Id*. 10-11, 34. Sync Staffing did not provide details as to why it would be appropriate to process the payroll in this manner. *Id.* 11, 34, 56. Without conducting any inquiry, and with no "understanding of what type of work ESSG employees were . . . performing at TBG," Ms. Haluptzok processed the payroll in accordance with Sync Staffing's instructions and paid the TBG employees the regular rate for all hours worked. *Id*. 11, 56-57. To do so, Ms. Haluptzok dismissed error messages generated by ESSG's software warning that the TBG employees who worked more than 40 hours per week might not be receiving proper compensation. *Id*. 11, 38-39.[1]

6. Ms. Haluptzok processed TBG's payroll in this manner on behalf of ESSG for almost two years. *See* ER 11, 38-39. During this time, TBG's spreadsheets regularly reflected that the TBG employees worked over 40 hours per workweek. *Id*. Between August 30, 2013 and July 27, 2014, ESSG failed to pay its TBG employees overtime in 1,103 instances, averaging 22 violations per week.

[1] ESSG disputes whether Ms. Haluptzok had a conversation with ESSG's owner in which he explicitly approved the override, despite Ms. Haluptzok's deposition testimony that such a conversation took place. *See* Sec'y's Suppl. Excerpts of R. ("SER") 044; ER 85-87. Regardless, that conversation is immaterial to ESSG's liability for the reasons set forth herein.

Id. 11, 39. To process the payroll over that period of time in this manner, Ms. Haluptzok repeatedly dismissed error messages generated by ESSG's software warning of improper overtime pay. *Id*. The total amount of unpaid overtime for this time period was $78,518.28. *Id.*

B. Course of Proceedings and District Court's Decisions

1. On August 30, 2016, the Secretary filed a complaint against several corporate and individual defendants, including ESSG, alleging that these defendants repeatedly and willfully violated the FLSA's overtime and recordkeeping provisions in sections 7, 11, and 15 of the Act, 29 U.S.C. 207(a), 211(c), 215. *See* ER 183, 249, 277-91. The Secretary sought to recover unpaid overtime compensation owed to the defendants' present and former employees and an equal amount in liquidated damages. *Id*.; *see* 29 U.S.C. 216(c). The Secretary also sought to permanently enjoin the defendants from committing further violations of the FLSA. *Id*.; *see* 29 U.S.C. 217.

2. In its answer to the Secretary's complaint, ESSG brought cross-claims against its codefendants for indemnification or contribution under several legal theories. *See* ER 228-38, 264-76. The codefendants moved to dismiss these cross-claims under Federal Rule of Civil Procedure 12(b)(6). *Id*. 216-22. The district court granted the motions to dismiss on December 16, 2016, for lack of a viable legal claim. *Id*. The district court first noted that ESSG had conceded that its

claims for indemnification or contribution under the FLSA were not viable. *Id*. 218. The district court then concluded that federal common law does not authorize such claims, citing Supreme Court and Ninth Circuit precedent. *Id*. 218-19. Finally, the court concluded that ESSG's cross-claim against Sync Staffing for contractual indemnity was not enforceable because such a claim is either "against public policy or preempted by Federal law." *Id*. 221.

3. On February 24, 2017, ESSG moved for reconsideration of the district court's dismissal of its cross-claims, and for leave to file a third-party complaint against Albertsons Companies, LLC and Albertson's, LLC. *See* ER 213-15. The district court denied ESSG's motion on March 28, 2017, concluding that ESSG's arguments in favor of reconsideration were raised and considered by the court in issuing its prior order. *Id*. 170-71. The court further denied ESSG's requests (to the extent raised) for a Rule 54(b) judgment (multiple claims or parties) or certification for interlocutory appeal under 28 U.S.C. 1292(b). *Id*.

4. Between March and September 2017, the Secretary entered into consent judgments or stipulated to dismissals with all defendants but ESSG; thus, as of September 2017, ESSG remained the only defendant contesting liability under the FLSA. *See* ER 127-69.

5. On November 15, 2017, the Secretary moved for summary judgment on the grounds that ESSG willfully violated the FLSA's overtime requirements and

that an award of liquidated damages was warranted. *See* SER 020-41. ESSG opposed summary judgment as to whether it willfully violated the FLSA, but did not oppose summary judgment as to liquidated damages. *Id*. 001-19. On June 27, 2018, the district court granted the Secretary's motion for summary judgment, concluding that ESSG willfully violated the FLSA's overtime requirements and thus applied the three-year statute of limitations permitted under the Portal-to-Portal Act, 29 U.S.C. 207, 255(a). *See* ER 9-16. Citing longstanding Supreme Court and Ninth Circuit precedent, the district court explained that an employer acts "willfully" under the FLSA if it "'knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute,'" and that an employer may act with reckless disregard if the employer was "'on notice of its FLSA requirements, yet took no affirmative action to assure compliance with them.'" *Id*. 11 (quoting *McLaughlin v. Richland Shoe Co*., 486 U.S. 128, 133 (1988), and *Flores v. City of San Gabriel*, 824 F.3d 890, 906 (9th Cir. 2016), respectively).

Pursuant to these authorities, the district court found that ESSG indisputably was aware of its obligations under the FLSA and was aware that its TBG employees worked more than 40 hours per workweek, and yet repeatedly paid those employees the regular rate for all hours worked. *See* ER 13. In doing so, ESSG repeatedly dismissed warnings that such pay violated the FLSA, without conducting any inquiry into whether the employees were entitled to overtime pay.

Id. The court concluded that, under these circumstances and pursuant to controlling precedent, "ESSG willfully violated the FLSA as a matter of law." *Id*.

The district court then addressed and rejected all of ESSG's various "unusual legal arguments" in opposition to the award of summary judgment. *See* ER 12. The court first addressed ESSG's argument that it could not have willfully violated the Act because it is a large company processing large numbers of payroll transactions and only violated the FLSA a "handful of times." *Id*. The district court noted that, to the extent ESSG was arguing that an audit would have been impractical because it would not have uncovered violations, such an argument fails because ESSG did, in fact, commit over 1,000 overtime violations during the period at issue in this case. *Id*. 13-14. Further, to the extent ESSG was arguing that a large company cannot be expected to pay every employee in the manner required by the FLSA, the court explained that the Act contains no exemption for large employers. *Id*. 14. The violations at issue here, the court noted, were not unwitting violations such as through a typographical error, but rather involved ESSG's repeated processing of payroll, which clearly reflected that employees worked more than 40 hours per workweek without receiving overtime pay, with no basis on which to believe that those employees were exempt from the FLSA's overtime requirements. *Id*.

The district court next addressed ESSG's arguments that it did not act willfully because no supervisor or manager was aware of the violations and, relatedly, that the actions of Ms. Haluptzok, a lower-level employee, cannot be imputed to the company. *See* ER 14. The court rejected these arguments, noting that the lack of relevant authority to support ESSG's position was "not surprising." *Id*. ESSG's theory, the court explained, would "create a very strange incentive for employers," under which they could insulate themselves from FLSA liability by simply delegating the responsibilities of FLSA compliance to lower-level employees and ensuring that no higher-ranking employee was ever involved in the payroll processing. *Id*. 14-15. Such a scheme, the court noted, is inconsistent with the FLSA. *Id*. Instead, "an employer that delegates FLSA compliance to a particular employee must be held responsible for that employee's actions." *Id*. 15 (citing *Chao v. Barbeque Ventures, LLC*, 547 F.3d 938, 943 (8th Cir. 2008)). The district court concluded that, despite Ms. Haluptzok's position as a lower-level employee, ESSG structured its business so that "she was the only individual who could possibly act on behalf of ESSG regarding overtime decisions," and under these circumstances her "knowledge and behavior" must be imputed to ESSG. ER 15. Finally, the district court rejected ESSG's "collective scienter doctrine" argument, a doctrine typically applied in securities fraud cases, which the court

construed to be "another way of asserting that [Ms.] Haluptzok's knowledge should not be imputed to ESSG." *Id*. 15-16.

Accordingly, the district court held that ESSG willfully violated the FLSA as a matter of law. *See* ER 15. The court then entered final judgment on July 10, 2018, ordering ESSG to pay $78,518.28 in back wages to its current and former TBG employees, and an equal amount in liquidated damages. *Id*. 5. The district court also enjoined ESSG from committing any further violations of the FLSA's overtime requirements. *Id*. 4-5.

SUMMARY OF ARGUMENT

1. The district court properly concluded that ESSG willfully violated the FLSA's overtime requirements as a matter of law because ESSG showed reckless disregard for whether its failure to pay overtime compensation to its TBG employees for known overtime hours worked violated the FLSA. As particularly relevant here, this Court has explained that "[a]n employer who knows of a risk that its conduct is contrary to law, yet disregards that risk, acts willfully The employer must take 'affirmative action to assure compliance[.]'" *Haro v. City of L.A.*, 745 F.3d 1249, 1258 (9th Cir. 2014) (quoting *Alvarez v. IBP, Inc.*, 339 F.3d 894, 909 (9th Cir. 2003) (brackets in original)).

Here, ESSG delegated to its agent, Ms. Haluptzok—a newly-hired and newly-trained employee—the entire responsibility to ensure that the TBG employees were paid in compliance with the FLSA, but conducted no oversight of her work. ESSG knew that the FLSA requires overtime pay for any hours worked over 40 hours per workweek. And ESSG, through its agent Ms. Haluptzok, knew that its TBG employees regularly worked overtime hours. Despite this knowledge, ESSG denied its TBG employees overtime pay. Not only did ESSG fail to take any affirmative steps to assure that its denial of overtime pay to the TBG employees complied with the FLSA, its agent repeatedly rejected warnings that such pay practices violated the FLSA, thereby acting with reckless disregard of the dictates of the Act.

The district court correctly concluded that, under these circumstances and pursuant to this Court's binding precedent, ESSG willfully violated the FLSA's overtime requirements as a matter of law. *See, e.g.*, *Flores*, 824 F.3d at 907 (an employer willfully violates the FSLA where it is "on notice of its FLSA requirements, yet [takes] no affirmative action to assure compliance with them") (internal quotation marks omitted). ESSG asks this Court to overturn its longstanding precedent and require some higher level of awareness of the violations to find that an employer willfully violated the Act. ESSG has not, however, petitioned for initial en banc review, thereby leaving this Court's

precedent intact. Regardless, under any conceivable reasonable measure for willful behavior, ESSG willfully violated the FLSA under the circumstances present here.

ESSG argues that it should not be liable for these FLSA overtime violations because Ms. Haluptzok was a lower-level employee. Specifically, ESSG argues that Ms. Haluptzok's actions cannot be imputed to the company because she is not a supervisor and, relatedly, that the FLSA requires that a certain level of management be aware of the violation before an employer may be held liable. The district court correctly rejected these arguments. It is well settled that an employer may not escape liability under the FLSA by delegating compliance to a subordinate. Moreover, the FLSA does not require that a particular level of management or higher-level employee be aware of the violations at issue to hold an employer liable. Where, as here, an employer structures its business so that employees must report their hours worked to a specific, non-managerial payroll administrator, the employer cannot then disclaim knowledge of the hours worked simply due to the payroll administrator's position within the company.

ESSG also argues that it should not be liable for the overtime violations at issue here because it is a large employer and it paid its other employees in compliance with the Act. The district court properly rejected this argument as well. The Act contains no exemption for large employers, and requires that

employers pay each and every employee the wages to which he or she is due. Here, ESSG failed to pay its TBG employees overtime pay for known overtime hours worked in 1,103 instances. It is irrelevant whether ESSG paid its other employees appropriately. In particular regard to whether it acted willfully, the question is whether ESSG acted with reckless disregard vis-à-vis the violations it committed; it does not somehow get credit by virtue of having followed the dictates of the FLSA, as of course it must, in other instances.

2. The district court properly awarded liquidated damages because it concluded that ESSG willfully violated the FLSA. As a threshold matter, ESSG did not oppose the award of liquidated damages in its opposition to the Secretary's motion for summary judgment, and accordingly has waived this issue for review. Should this Court nevertheless decide to reach the issue of liquidated damages, under its binding precedent, where a court concludes that an employer willfully violated the FLSA, liquidated damages are required as a matter of law because "a finding of good faith is plainly inconsistent with a finding of willfulness." *Chao v. A-One Med. Servs., Inc.,* 346 F.3d 908, 920 (9th Cir. 2003). Given the district court's conclusion here that ESSG willfully violated the FLSA's overtime requirements, the district court was not required to separately examine whether ESSG satisfied its heavy burden under the Act to warrant relief from liquidated damages.

ESSG argues that this Court should overturn its longstanding precedent and instead examine separately whether ESSG acted in good faith and had objectively reasonable grounds for believing it acted in compliance with the FLSA. Such a departure from this Court's longstanding binding precedent, however, would require en banc review, for which ESSG has not petitioned. Additionally, overturning that precedent simply does not make sense. If one has acted willfully, it logically follows that one has not acted in good faith or in an objectively reasonable manner.

Regardless, the award of liquidated damages must be affirmed because ESSG has not met its heavy burden to demonstrate that it acted in good faith, i.e., that it had "an honest intention to ascertain and follow the dictates of the Act." *Flores*, 824 F.3d at 905 (internal quotation marks omitted). ESSG cannot show that it acted in good faith because it took no steps to assure compliance with the Act, despite its knowledge that its employees worked overtime hours without receiving overtime pay. Thus, the award of liquidated damages is required as matter of law.

3. The district court correctly dismissed ESSG's cross-claims for contribution or indemnification and denied ESSG leave to bring a third-party complaint because there is no right to contribution or indemnification under the FLSA or federal common law. Indeed, ESSG has already conceded that the FLSA

does not provide for contribution or indemnification, implicitly or otherwise, and thus has waived that particular question on appeal. Even if not waived, the FLSA does not provide an implicit right to contribution or indemnification because (1) the FLSA makes no provision for such claims, (2) employers are not members of the class for whose benefit the FLSA was enacted, (3) the FLSA has a comprehensive remedial scheme that obviates the need for additional, judicially-engrafted remedies, and (4) the legislative history is silent on the issue. ESSG's claims for indemnification or contribution also are not authorized under the federal common law because the ability of one wrongdoer to recover from another is an insufficient basis for a court to exercise its authority to formulate the common law and because the FLSA is a comprehensive legislative scheme that preempts ESSG's claims. Thus, the district court appropriately dismissed ESSG's cross-claims and denied ESSG leave to bring a third-party complaint.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT ESSG WILLFULLY VIOLATED THE FLSA'S OVERTIME REQUIREMENTS BECAUSE ESSG NECESSARILY KNEW ITS EMPLOYEES WORKED OVER 40 HOURS PER WORKWEEK WITHOUT RECEIVING OVERTIME PAY AND SHOWED RECKLESS DISREGARD FOR WHETHER ITS CONDUCT IN NOT PAYING OVERTIME COMPENSATION VIOLATED THE FLSA

A. Standard of Review

This Court reviews a district court's grant of summary judgment de novo, "applying the same standard of review as the district court under Federal Rule of Civil Procedure 56." *Flores*, 824 F.3d at 897. Under Rule 56, a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A district court's determination regarding willfulness under 29 U.S.C. 255 is a mixed question of law and fact. *See Flores*, 824 F.3d at 906. This Court reviews de novo the district court's application of the law to established facts. *Id*.

B. ESSG Violated the FLSA's Overtime Requirements When it Failed to Pay its Employees the Overtime Rate for Known Hours Worked over 40 in a Workweek.

The FLSA requires employers to pay their employees "one and one-half times the regular rate at which [the employees are] employed" for any hours worked over 40 in a workweek. 29 U.S.C. 207(a)(1). Any work that is

"suffered or permitted" to be performed is work time for which the employer must appropriately compensate the employee. 29 U.S.C. 203(g). This Court has explained that the words "suffer or permit" mean "with the knowledge of the employer." *Forrester v. Roth's I.G.A. Foodliner, Inc.*, 646 F.2d 413, 414 (9th Cir. 1981). Accordingly, an employer that knows or should have known that its employees are working overtime must comply with the Act's overtime requirements. *Id*.

1. The district court correctly concluded that ESSG indisputably violated the FLSA's overtime requirements because ESSG failed to pay its TBG employees the overtime rate for known hours worked over 40 in a workweek. *See* ER 9-16. Specifically, the following facts are not in dispute. TBG employees regularly worked well beyond 40 hours per workweek. *Id*. 10-11, 34-35. TBG sent spreadsheets to ESSG, through Sync Staffing, accurately reflecting all hours worked by the TBG employees, including those hours worked over 40 in a workweek. *Id*. Sync Staffing sent these spreadsheets to ESSG's payroll administrator, Ms. Haluptzok, the person at ESSG authorized to receive those spreadsheets and process TBG's payroll. *Id*. Ms. Haluptzok then used the spreadsheets to enter the hours into the ESSG payroll software, exactly as they appeared on the spreadsheets. *Id*. Ms. Haluptzok, on behalf of ESSG, then processed the TBG payroll to pay the TBG employees the regular rate for

all hours worked, including those over 40 per workweek. *Id*. 11, 38-39. ESSG thus knew, through its agent, that its employees worked over 40 hours per workweek without receiving overtime pay. Therefore, ESSG violated the FLSA's overtime requirements as a matter of law. These violations resulted in a total of $78,518.28 in unpaid overtime for the period of August 30, 2013 through July 27, 2014. *Id*.

2. ESSG argues on appeal, as it did below, that it cannot be liable for these FLSA violations because Ms. Haluptzok was a lower-level employee and, therefore, her knowledge and actions may not be imputed to the company. *See* Appellants' Opening Br. & Addendum ("Op. Br.") 13-22. As the district court correctly explained, however, ESSG is responsible for the actions of its agent, Ms. Haluptzok, regardless of her position or title. *See* ER 14-15. It is well settled that an employer may not simply delegate away to a subordinate its responsibility to comply with the Act. *See Barbeque Ventures, LLC*, 547 F.3d at 943 ("This court has rejected the proposition that delegating the payroll function to a subordinate satisfies the FLSA.") (citing *Goldberg v. Kickapoo Prairie Broad. Co.*, 288 F.2d 778, 781 (8th Cir. 1961)); *Reich v. Dep't of Conservation & Nat. Res.*, 28 F.3d 1076, 1083 (11th Cir. 1994) ("[A] n employer is not relieved of the duty to inquire into the conditions prevailing in his business 'because the extent of the business may preclude his personal

supervision, and compel reliance on subordinates.'") (quoting *Gulf King Shrimp Co. v. Wirtz*, 407 F.2d 508, 512 (5th Cir. 1969)); *Lenroot v. Interstate Bakeries Corp.*, 146 F.2d 325, 328 (8th Cir. 1945) ("[T]he mandate of the statute is directed to the employer and 'he may not escape it by delegating it to others.' . . . He does not rid himself of that duty because the extent of the business may preclude his personal supervision, and compel reliance on subordinates.") (quoting *People v. Sheffield Farms-Slawson-Decker Co.*, 225 N.Y. 25 (1918)). Indeed, "[c]orporations can speak and act only through their agents." *Goldberg*, 288 F.2d at 781. Consequently, the conduct or knowledge of the employer's agents is that of the employer under the FLSA. *Id*. ("[K]nowledge on the part of the local managers that . . . overtime was worked which was not paid for was knowledge of the corporate employers."). The title of the agent is irrelevant; rather, "[a]n agent is one who 'act[s] on the principal's behalf and subject to the principal's control.'" *United States v. Bonds*, 608 F.3d 495, 506 (9th Cir. 2010) (alteration in original) (quoting Restatement (Third) Agency § 1.01). Accordingly, ESSG is liable for the conduct of its agents acting within the scope of their authority, including a lower-level employee such as Ms. Haluptzok, regardless of their official title. *See Goldberg*, 288 F.2d at 781; Restatement (Third) Agency § 7.04 (principal bound by agent's conduct when acting within scope of actual authority).

3. Relatedly, ESSG argues that no manager or higher-level executive was aware of the overtime hours worked and, therefore, ESSG cannot be liable for these violations. *See* Op. Br. 13-15. However, under the circumstances here, it is irrelevant whether any ESSG manager or supervisor was aware that the TBG employees worked overtime hours without receiving overtime pay. ESSG delegated to Ms. Haluptzok the responsibility and authority to receive TBG's spreadsheets reflecting their hours worked, and to process the payroll based on those spreadsheets, including the ability to override error messages generated by the ESSG payroll software. ESSG chose to conduct no oversight of the TBG payroll, despite Ms. Haluptzok's short tenure. Accordingly, ESSG must "stand or fall" by Ms. Haluptzok's actions. *Lenroot*, 146 F.2d at 328. That Ms. Haluptzok could ask questions if she had them, but did not, is of no import (*see* Op. Br. 8, 25); it is ESSG's responsibility to comply with the Act and it may not escape that liability by simply delegating its responsibilities to a lower-level employee and then "turning its back on [the] situation." *Forrester*, 646 F.2d at 414.

Moreover, it is important to take into account ESSG's primary role in processing the TBG payroll in compliance with the FLSA when analyzing Ms. Haluptzok's position and authority to bind the company. As the payroll administrator for the TBG account, Ms. Haluptzok was solely responsible for

reviewing the hours worked and issuing the paychecks. *See* ER 35-36. She was, in effect, the individual to whom hours must be reported in order for the workers to receive appropriate compensation. Thus, regardless of her title or position within ESSG's hierarchy, her role with respect to the TBG employees is analogous to that of a supervisor or manager in a company's payroll department in other employment contexts, in that she was responsible for reviewing hours and timesheets to ensure that employees are correctly compensated. ESSG, which is a staffing agency that has acknowledged both its familiarity and compliance with wage and hour laws, structured its operations such that Ms. Haluptzok, an admittedly inexperienced and newly hired worker, was "the only individual who could possibly act on behalf of ESSG regarding overtime decisions." *Id*. 15. ESSG thus delegated to Ms. Haluptzok the responsibility and authority to process the payroll for the TBG employees, and make decisions regarding overtime pay. Acting within the scope of this authority, Ms. Haluptzok processed the TBG payroll without overtime pay, despite her knowledge that the TBG employees worked over 40 hours per workweek.

4. ESSG argues that *Forrester* and other cases examining whether an employer "suffered or permitted" overtime work require that a manager or higher-level executive be aware of the overtime hours worked to hold an

employer liable under the FLSA. *See* Op. Br. 13-15. ESSG misconstrues these cases, as none require that a particular level of management be aware of the hours worked before an employer may be held liable under the FLSA. Rather, these cases simply reflect the fundamental principle that, to be liable under the FLSA, the employer must have suffered or permitted the work, i.e., the employer must know or have reason to know that the work was performed. *See, e.g.*, *Forrester*, 646 F.2d at 414 ("[A]n employer who knows or should have known that an employee is or was working overtime must comply with the provisions of [the FLSA]."). Further, they all involved circumstances under which employees were required to report overtime hours worked to a manager or supervisor, unlike the circumstances here.

For example, in *Forrester*, this Court concluded that an employer did not "suffer or permit" the overtime hours worked where the employee who worked those hours did not report the hours at all and actively prevented his employer from learning of them. 646 F.2d at 414-15. The employee was required to report his overtime hours on his timesheet, but deliberately did not do so and acknowledged that he would have been paid overtime for those hours worked if reported. *Id*. This Court explained that in such instances, "where the acts of an employee prevent an employer from acquiring knowledge . . . of alleged uncompensated overtime hours, the employer cannot be said to have suffered or

permitted the employee to work in violation of [29 U.S.C.] 207(a)." *Id*. at 414-15.[2] Similarly, in *Maciel v. City of Los Angeles*, 569 F. Supp. 2d 1038 (C.D. Cal. May 29, 2008), the district court concluded that the employee there had failed to demonstrate that he had ever reported the hours worked to anyone, noting in dicta that the only supervisor who allegedly knew of the hours worked was not credible and was not a "manager" because the Los Angeles Police Department did not define him as such.

Here, however, it is undisputed that the TBG employees accurately and appropriately reported their hours worked, including overtime, to ESSG's designated recipient of such information. *See* ER 10-11. Ms. Haluptzok was responsible for receiving TBG's spreadsheet reporting the hours worked by the TBG employees, and then processing the TBG payroll and issuing paychecks based on this information. *Id.* 14-15. As the district court explained, "she was the only individual who could possibly act on behalf of ESSG regarding overtime decisions." *Id*. Thus, unlike *Forrester* or *Maciel*, ESSG (through its agent Ms. Haluptzok) knew that its employees worked overtime hours.

[2] This Court, however, explained that "[t]his is not to say that an employer may escape responsibility by negligently maintaining records required by the FLSA, *or by deliberately turning its back on a situation*." *Forrester*, 646 F.2d at 414 (emphasis added).

Similarly, ESSG mistakenly relies on two district court decisions to argue that *only* the knowledge of a certain level of management may be imputed to a company under the FLSA. *See* Op. Br. 16-17 (citing *Garcia v. Sar Food of Ohio, Inc*., No. 1:14–CV–01514, 2015 WL 4080060 (N.D. Ohio. July 6, 2015), and *Ellerd v. Cty. of L.A.*, No. CV 08–4289, 2012 WL 893608 (C.D. Cal. Mar. 14, 2012)). These cases do not, as ESSG asserts, require that a person acting on behalf of the employer hold a particular position to find an employer liable under the FLSA. Rather, in *Ellerd*, the district court *rejected* the employer's argument that a front line supervisor's actual knowledge of the overtime hours worked could not be imputed to the employer as a matter of law simply because of her relatively low position within the company. *See* 2012 WL 893608, at *2. Instead, the court concluded, whether the supervisor's knowledge could be imputed to the company required consideration of the circumstances surrounding her responsibilities. *Id.* In *Garcia*, the district court concluded that the front line supervisors' knowledge of overtime hours worked could in fact be imputed to the employer, despite their relatively low position within the company, because the front line supervisors allegedly prevented the employees from accurately reporting their hours and encouraged the employees to under-report hours. *Garcia*, 2015 WL 4080060, at *6. Moreover, the court did not

hold or even suggest that these were the *only* circumstances under which a lower-level employee's knowledge may be imputed to the company. *Id.*[3]

5. ESSG also turns to English common law and maritime law to argue that only managers or supervisors can act on behalf of an employer. *See* Op. Br. 15. Notwithstanding the irrelevance of these authorities in the context of the FLSA, none support ESSG's argument. None of these cases hold, or even suggest, that an employer is not liable for the actions of its employees that are delegated authority to act for the company, as Ms. Haluptzok was here. Rather, these authorities reflect the longstanding common law principle of agency that when an agent acts on behalf of the company, that agent's conduct binds the company. *See, e.g., Protectus Alpha Navigation Co. v. N. Pac. Grain Growers, Inc.* 767 F.2d 1379, 1386 (9th Cir. 1985) ("We agree that a corporation can act only through its agents and employees."). Under these decisions, ESSG is indisputably liable for Ms. Haluptzok's actions.

[3] ESSG also points to an Office of Personnel Management ("OPM") regulation at 5 C.F.R. 551.104 (defining "[s]uffered or permitted work" in relation to an "employee's supervisor") to support its argument that a supervisor must know of the hours worked to hold an employer liable under the FLSA. *See* Op. Br. 15. This regulation, however, was not issued by the Department of Labor and governs pay administration for civil service employees, and thus is not relevant here. *See Am. Fed. of Gov't Emps. v. OPM*, 821 F.2d 761, 770 (D.C. Cir. 1987) (examining legislative history, which shows that OPM is responsible for administering the FLSA in regard to the federal work force).

6. ESSG also urges this Court to apply *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), and this Court's related decisions under Title VII to impute Ms. Haluptzok's actions to ESSG only if this Court concludes that ESSG acted negligently. *See* Op. Br. 19-22. ESSG offers no compelling argument as to why this Court should apply Title VII case law to this matter. Regardless, *Ellerth* and this Court's related decisions are of no assistance to ESSG. These cases address whether an employee's tortious conduct that is committed *outside the scope of employment* nonetheless may be attributed to the employer due to the employer's own negligence. *See Ellerth*, 524 U.S. at 758. These decisions otherwise reflect that employers are *strictly liable* for the misconduct of their employees committed *within* the scope of employment. *Id.*

Here, it is undisputed that Ms. Haluptzok acted within the scope of her employment and on behalf of ESSG when she processed the TBG payroll and failed to pay the TBG employees overtime pay, ignoring warnings that such pay practices violated the FLSA. *See* ER 38. Indeed, as ESSG explains, "process[ing] her assigned payrolls" (including the TBG payroll) was Ms. Haluptzok's only role. *See* Op. Br. 23. Accordingly, *Ellerth* does not support ESSG's position, but rather further demonstrates that Ms. Haluptzok's actions committed within the scope of her employment must be imputed to ESSG.

7. Finally, ESSG relies on its own payroll records audit, conducted after the Secretary initiated an investigation, to argue that the violations at issue here represent only a small percentage of its overall payroll transactions and thus it had no reason to know of or suspect violations. *See* Op. Br. 2, 22-25. This argument ignores that Ms. Haluptzok's knowledge of the overtime hours worked must be imputed to ESSG. In any event, ESSG's reliance on this audit defies logic; ESSG conducted the audit *after* the violations at issue. Thus, the audit does nothing to show what basis anyone at ESSG had at the time of the violations to believe that ESSG's failure to pay the TBG employees overtime pay complied with the Act. If anything, the audit demonstrates that ESSG management would have uncovered the 1,103 overtime violations by simply conducting a records audit, or for that matter any review of Ms. Haluptzok's work, during the relevant time period.

ESSG also posits that the FLSA does not require "clairvoyan[ce]" or "perfection" and, therefore, it should be excused from these 1,103 violations because it paid its other employees appropriately and to assure full compliance would be "extremely impractical." Op. Br. 1, 24. Even assuming ESSG's self-audit accurately reflects that its other employees were paid appropriately during the relevant time period, this argument has no basis in the law. The FLSA requires that an employer appropriately pay *every employee* the

overtime to which he or she is due when the employer knows or should have known of the hours worked. *See* 29 U.S.C. 207(a)(1) ("[N]o employer shall employ *any* of his employees . . . for a workweek longer than forty hours unless *such employee* receives [overtime pay].") (emphases added). As detailed above, ESSG failed to pay its TBG employees the overtime rate for known hours worked over 40 per workweek in over 1,000 instances, and conducted no inquiry into whether such pay practice was appropriate. Whether ESSG paid its *other* employees in compliance with the Act does not alter these facts. *Cf. Flores*, 824 F.3d at 906 ("Evidence that the City complied with its other obligations under the Act . . . [does] not demonstrate what the City has done to ascertain whether its classification of the payments at issue here complied with the FLSA.").

Likewise, the Act contains no exemption for large employers who may find it impractical to assure FLSA compliance. *See, e.g.*, *Lenroot*, 146 F.2d at 328 (it is the employer's duty to comply with the Act and "[h]e does not rid himself of that duty because the extent of the business may preclude his personal supervision"). As the district court noted, while some large employers may unknowingly violate the Act due to a typographical or clerical error, those facts are not present here. *See* ER 15. Instead, ESSG repeatedly ignored warnings that its failure to pay its TBG employees overtime pay for overtime

work violated the FLSA. Further, ESSG delegated its responsibilities under the FLSA with respect to its TBG employees to Ms. Haluptzok, a new and inexperienced employee, and yet conducted no oversight of the TBG payroll until investigated by the Department of Labor. Holding ESSG responsible for such conduct is a far cry from requiring "clairvoyance."

8. In sum, under the circumstances of this case, Ms. Haluptzok's knowledge and actions must be imputed to ESSG. To permit otherwise, as ESSG requests here, would "nullify the statute." *Barbeque Ventures, LLC*, 547 F.3d at 943. As the district court aptly explained, under ESSG's argument, an employer could insulate itself from liability by simply delegating the payroll function to a lower-level employee and never reviewing their work. *See* ER 14-15. "The FLSA was not meant to incentivize employers in this manner." *Id*. (citing *Parth v. Pomona Valley Hosp. Med. Ctr.*, 630 F.3d 794, 799 (9th Cir. 2010) ("Congress's purpose in enacting the FLSA was to protect all covered workers from substandard wages and oppressive working hours.") (internal quotation marks omitted); *see Gulf King Shrimp Co.*, 407 F.2d at 512 ("[I]f an employer has been discreetly aloof from those who have served his interest, he may under this argument disown knowledge of them and escape the Act. We cannot accept such a proposition.").

Accordingly, the undisputed facts demonstrate that ESSG knew that its TBG employees worked over 40 hours per workweek. "[A]rmed with this knowledge," ESSG may not "stand idly by" but must appropriately compensate its employees. *Forrester*, 646 F.2d at 414. As the relevant regulation states, "it is the duty of the management to exercise its control and see that the work is not performed if it does not want it to be performed. It cannot sit back and accept the benefits without compensating for them." 29 C.F.R. 785.13 (duty of management).

C. ESSG's Overtime Violations Were Willful Because ESSG Showed Reckless Disregard for Whether its Conduct Was Prohibited by the FLSA.

Where an employer willfully violates the FLSA's overtime requirements, a three-year statute of limitations applies instead of a two-year limitations period. *See* 29 U.S.C. 255. A violation is willful if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *Richland Shoe*, 486 U.S. at 133. As this Court has explained, "[a]n employer need not violate the statute knowingly for its violation to be considered 'willful' under [the Act] although 'merely negligent' conduct will not suffice." *Flores*, 824 F.3d at 906 (quoting *Richland Shoe*, 486 U.S. at 133, and *Alvarez*, 339 F.3d at 908). Accordingly, "[a]n employer's violation of the FLSA is willful when it is on notice of its FLSA requirements,

yet [takes] no affirmative action to assure compliance with them." *Flores*, 824 F.3d at 906 (alteration in original) (internal quotation marks omitted). As particularly relevant here, this Court has explained that "[a]n employer who knows of a risk that its conduct is contrary to law, yet disregards that risk, acts willfully." *Haro*, 745 F.3d at 1258 (citing *Alvarez*, 339 F.3d at 908–09).

1. The district court properly concluded that ESSG willfully violated the FLSA as a matter of law. *See* ER 13. ESSG indisputably knew that the FLSA requires that ESSG's employees be paid the overtime rate for all hours worked over 40 hours per workweek. *Id*. 10, 32-36. Indeed, ESSG promoted its expertise of the Act to its clients, and expressly referenced the FLSA and assumed responsibility for compliance with the Act in its agreement with Sync Staffing. *Id*. ESSG also provided in-house training to its staff, including Ms. Haluptzok, on the FLSA's overtime requirements, and built automatic warnings into its payroll system to warn users of FLSA overtime violations. *Id*. Despite ESSG's awareness of the Act's overtime requirements, and (as detailed above) its awareness that its TBG employees worked over 40 hours per workweek without overtime pay, ESSG ignored warnings that its pay practices violated the Act and took no affirmative steps to assure that its failure to pay the TBG employees overtime pay complied with the FLSA.

Specifically, after a short training period, ESSG delegated the responsibility for processing TBG's payroll to Ms. Haluptzok, a "new and relatively inexperienced employee (only three months on the job)." Op. Br. 9; *see* ER 10, 15, 35-36. Acting on behalf of ESSG, Ms. Haluptzok processed TBG's payroll and was responsible for ensuring that the TBG employees were paid in compliance with the FLSA. *See* ER 10, 15, 35-36. Beginning in November 2012, Ms. Haluptzok received TBG's spreadsheets reflecting accurate hours worked, including hours worked over 40 in a workweek. *See* ER 10, 56. Upon first receiving the spreadsheets, Ms. Haluptzok entered the hours into the ESSG payroll system so that the TBG employees would receive overtime pay for hours worked over 40 in a workweek. *Id*. 10, 34. However, upon an unexplained instruction from Sync Staffing, Ms. Haluptzok revised the payroll so that the TBG employees would receive the lower, regular rate for all hours worked. *Id*. 10-11, 34, 56-57. The ESSG payroll software generated automatic warnings that the TBG employees were not paid appropriately for all hours worked, but Ms. Haluptzok dismissed these warnings and paid the TBG employees without overtime pay. *Id*. 11, 38-39. Ms. Haluptzok had no understanding of the type of work performed by the TBG employees and conducted no inquiry into whether it was appropriate to deny them overtime pay (e.g., based on an exemption from the overtime requirements). *Id*. 11, 56-

57. She processed the TBG employees' payroll in this manner for almost two years. *Id*. 11, 38-39.

To be clear, it was ESSG's duty as the employer to comply with the FLSA and ensure that the TBG employees were appropriately paid for overtime work. *See* 29 U.S.C. 203(d), 207(a)(1); 29 C.F.R. 785.13. ESSG, however, delegated this responsibility to Ms. Haluptzok and, accordingly, is responsible for her actions. *See, e.g., Barbeque Ventures, LLC*, 547 F.3d at 943; *Gulf King Shrimp Co.*, 407 F.2d at 512.[4] ESSG management did not review the TBG payroll, despite the fact that Ms. Haluptzok was a relatively new and "inexperienced employee." Op. Br. 8-9. While ESSG disputes whether Ms. Haluptzok was subject to appropriate oversight, *see* Op. Br. 1-2, there is no dispute that Ms. Haluptzok worked independently and overrode the error messages for the entire relevant time period. *See* ER 10-11, 38-39. By its own admission, no safeguard was in place, system generated or otherwise, to ensure that anyone besides Ms. Haluptzok saw these error messages, which, after being dismissed, were no longer in the payroll software system. *See* Op. Br. 10. Indeed, ESSG adamantly denies that any supervisor or manager ever reviewed

[4] All of the arguments advanced by the Secretary *supra* as to why ESSG is liable for the overtime violations committed are equally applicable as to why ESSG is liable for the willful violations, as Ms. Haluptzok's actions are necessarily imputed to the company.

the TBG payroll. *See, e.g.*, Op. Br. 17 ("[T]here is no evidence in the record that any owner, director, manager or supervisor of ESSG knew about Haluptzok's failure to pay overtime to the temporary employees."); *Id*. 22 ("The entire faulty payroll for the 44 employees in question in this case was processed by a single low-level ESSG employee, Michaela Haluptzok.").

It is of no consequence that Ms. Haluptzok did not receive any calls or emails from any TBG employees about their paychecks (*see* Op. Br. 33); Ms. Haluptzok received warnings from ESSG's own payroll software notifying her of the problem. Nor is it redeeming that Ms. Haluptzok first processed the TBG payroll appropriately, but then paid the workers straight time for all hours worked upon the unexplained direction of Sync Staffing. *Id*. 25. ESSG argues that this fact demonstrates that Ms. Haluptzok's training on overtime "obviously worked." *Id*. Obviously it did not, given the 1,103 overtime violations at issue here. If anything, Ms. Haluptzok's initial proper processing of the payroll demonstrates that she was clearly aware of the FLSA's overtime requirements.

Under these circumstances and this Court's precedent, ESSG at the very least showed a reckless regard for whether its failure to pay its TBG employees overtime pay was prohibited by the Act. This Court has held that an employer acts willfully where, as here, it "knows of a risk that its conduct is contrary to

law, yet disregards that risk." *Haro*, 745 F.3d at 1258 (citing *Alvarez* 339 F.3d at 908–09). In *Haro*, this Court concluded that an employer acted willfully where it had been previously sued and lost on its determination that a group of workers were exempt from the Act. *Id.* at 1258-59. The employer then failed to examine whether a different group of workers were appropriately classified as exempt as well (which they were not). *Id.* This Court explained that "[i]gnoring these red flags and failing to make an effort to examine the positions at issue" showed willfulness. *Id*. at 1258. Similarly, in *Flores*, this Court concluded that an employer acted willfully when it was aware that it must properly determine the "regular rate" for calculating overtime pay, but took no affirmative steps to ensure that its exclusion of certain benefit pay from the regular rate was in compliance with the Act. *See* 824 F.3d at 906-07; *see also Alvarez*, 339 F.3d at 909 (finding willfulness where employer "'could easily have inquired into' [its FLSA obligations] and the type of steps necessary to comply therewith" but did not, noting that such conduct "may more properly be characterized as attempts to evade compliance, or to minimize the actions necessary to achieve compliance") (quoting *Herman v. RSR Sec. Servs., Ltd.*, 172 F.3d 132, 142 (2d Cir. 1999).

Here, like the employers in *Haro* and *Flores*, ESSG was aware of the FLSA's overtime requirements, but did nothing to assure that its pay practices

(denying overtime pay to the TBG employees) complied with those requirements. As detailed above, ESSG was indisputably aware that the FLSA requires that employees be paid the overtime rate for hours worked over 40 in a workweek. ESSG delegated the task of processing the TBG payroll to a newly-hired and newly-trained employee, and left her to her own devices for almost two years, conducting no oversight of the TBG payroll whatsoever. During this entire period of time, on behalf of ESSG, Ms. Haluptzok received accurate spreadsheets from the TBG employees, regularly reflecting that these employees worked over 40 hours per workweek, but did not pay these employees the overtime rate. ESSG's own software system generated alerts warning Ms. Haluptzok, and thus ESSG, that the workers were not receiving overtime compensation to which they were due. Despite these warnings—quite literally, "ignoring these red flags"—Ms. Haluptzok denied the TBG employees overtime pay without conducting any inquiry into whether it was appropriate to do so. Such conduct is willful as a matter of law. *See Haro*, 745 F.3d at 1258.

2. ESSG argues that this Court's test for willfulness needs "recalibrating." Op. Br. 34. Relying on the Third Circuit's decision in *Souryavong v. Lackawanna County*, 872 F.3d 122 (3d Cir. 2017), ESSG argues that willfulness should require "awareness or assumed awareness of specific violations of the FLSA." *Op. Br.* 30. As a threshold matter, ESSG fails to

acknowledge that this Court is bound by its prior rulings and any such "recalibrating" requires en banc review. *See United States v. Easterday*, 564 F.3d 1004, 1010 (9th Cir. 2009) ("[A] panel opinion is binding on subsequent panels unless and until overruled by an en banc decision of this circuit."); Fed. R. App. P. 35 (en banc determination). ESSG has not petitioned for en banc review of the district court's decision. *See* Fed. R. App. P. 35(c) ("A petition that an appeal be heard initially en banc must be filed by the date when the appellee's brief is due.").

Even if this Court were to consider "recalibrating" its test of willfulness to require some higher level of specific awareness (short of a knowing violation), ESSG willfully violated the FLSA by recklessly disregarding its obligations under the Act in accordance with any reasonable measure.[5] In *Lackawanna County*, the case upon which ESSG mainly relies, the Third Circuit distinguished the facts of that case from those in *Flores* to conclude that Lackawanna County did not willfully violate the FLSA. *See* 872 F.3d at 126-

[5] In *Richland Shoe*, 486 U.S. 128, the Supreme Court unequivocally held that willfulness includes *either* where the employer knew *or* showed reckless disregard for whether its conduct violated the FLSA. *Id*. at 133. There are thus two levels of misconduct that will satisfy *Richland Shoe's* test for willfulness. Applying *Richland Shoe*, this Court appropriately recognizes that, while a violation need not be knowing to be willful, "'merely negligent' conduct will not suffice." *Flores*, 824 F.3d at 906 (quoting *Richland Shoe*, 486 U.S. at 133). Conduct falling in between these two outer limits, showing a reckless disregard for compliance, is willful.

27. Specifically, the Third Circuit concluded that the County's overtime violations were not willful where, unlike in *Flores*, there was no evidence that the County was aware of the specific overtime problem at issue (aggregation of hours across different jobs for purposes of overtime) and the case lacked a certain "degree of egregiousness" found in *Flores* and other cases. *Id*. Thus, to the extent that *Lackawanna County* can be read to require some specific level of awareness of an FLSA violation, the facts of *Flores* provide a useful benchmark for comparison.

Here, unlike the employer in *Lackawanna County* but like the employer in *Flores*, ESSG *was* aware of the specific type of FLSA overtime problem at issue—overtime hours worked by the TBG employees without overtime pay. Further, ESSG not only was aware of the specific type of problem, it was aware (through its agent Ms. Haluptzok) of the potential violation and did nothing to assure compliance until the Department of Labor initiated an investigation. Thus, under any measure, ESSG showed at minimum a reckless disregard for whether its failure to pay overtime complied with the FLSA. Accordingly, this Court must affirm the district court's conclusion that ESSG willfully violated the FLSA's overtime requirements as a matter of law.

II. THE DISTRICT COURT APPROPRIATELY AWARDED LIQUIDATED DAMAGES BECAUSE ESSG WILLFULLY VIOLATED THE FLSA AND ESSG FAILED TO SHOW THAT IT ACTED IN GOOD FAITH

A. Standard of Review

A district court's award of liquidated damages under 29 U.S.C. 260 is a mixed question of law and fact. *See Flores*, 824 F.3d at 905 (addressing the standard for determining whether an employer acted in good faith and had objectively reasonable grounds for its behavior). This Court reviews de novo the district court's application of the law to established facts. *Id*.

B. Liquidated Damages Are Mandatory because ESSG Willfully Violated the FLSA's Overtime Requirements.

An employer who violates the FLSA's minimum wage or overtime protections is liable to its employees not only for back wages but also for "an additional equal amount" as liquidated damages. 29 U.S.C. 216(b). If an employer demonstrates, to the satisfaction of the court, both that the violation was committed "in good faith" and that the employer "had reasonable grounds for believing" that its actions did not violate the FLSA, "the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in [29 U.S.C.] 216." 29 U.S.C. 260. However, "[i]f an employer fails to satisfy its burden under [29 U.S.C.] 260, an award of liquidated damages is mandatory." *Flores*, 824 F.3d at 905.

1. On appeal, ESSG attempts to challenge the district court's award of liquidated damages, Op. Br. 34-42, but ESSG has waived this matter for review. Despite its assertion to the contrary, *id*. 6, ESSG did have an opportunity to be heard on the question of liquidated damages, but did not take it. The Secretary unequivocally moved for summary judgment on ESSG's willful violations and on liquidated damages. *See* SER 020-41. ESSG opposed summary judgment with respect to the willful violations, but did not oppose summary judgment with respect to liquidated damages. *Id*. 001-19.[6] Accordingly, ESSG may not now dispute the award of liquidated damages on appeal. *See Zerby v. City of Long Beach*, 637 F. App'x 1008, 1011 (9th Cir. 2016) (issue waived on appeal where not disputed below); *Novato Fire Prot. Dist. v. United States*, 181 F.3d 1135, 1142 n.6 (9th Cir. 1999) (failure to raise issue in summary judgment motions constitutes waiver on appeal).

2. If this Court determines that the issue is not waived, it should conclude that the district court appropriately awarded liquidated damages because, as

[6] Instead, after the district granted summary judgment to the Secretary, ESSG sent an extra-record email to the district court, opposing the inclusion of liquidated damages in the Secretary's proposed judgment. The district court appropriately ignored this email and it is not part of the record on appeal (despite ESSG's inclusion of this email in its Excerpts of Record). *See* Fed. R. Civ. P. 7(b)(1) ("A request for a court order must be made by motion."); Fed. R. App. P. 10 (Composition of the Record on Appeal); Cir. R. 10-2 (Contents of the Record on Appeal).

detailed above, the district court correctly concluded that ESSG willfully violated the FLSA's overtime requirements. Under this Court's controlling precedent, consistent with a majority of circuit courts to have considered the question, an award of liquidated damages is mandatory where the court has concluded that the employer acted willfully in violating the FLSA. *See A-One Med. Servs., Inc*., 346 F.3d at 920. As this Court has explained, "a finding of good faith is plainly inconsistent with a finding of willfulness." *Id*.; *see, e.g.*, *Elwell v. Univ. Hosps. Home Care Servs.*, 276 F.3d 832, 841 n.5 (6th Cir. 2002) (a finding of willfulness forecloses a finding of good faith). Accordingly, given the district court's determination that ESSG willfully violated the FLSA's overtime requirements, the district court correctly awarded liquidated damages as a matter of law.

3. ESSG requests this Court to abandon its precedent and separately examine whether it acted in good faith and with reasonable grounds to believe it acted in compliance with the FLSA. *See* Op. Br. 38. As with willfulness, such a departure from this Court's prior rulings requires en banc review, for which ESSG has not petitioned. *See Easterday*, 564 F.3d at 1010; Fed. R. App. P. 35. In any event, this Court's existing precedent is entirely correct, because "a finding of good faith is plainly inconsistent with a finding of willfulness." *A-One Med. Servs.*, 346 F.3d at 920 (citing *Bothell v. Phase Metrics, Inc*., 299 F.3d 1120, 1130 (9th Cir. 2002)). As the Eleventh Circuit has explained, in making a determination

of willfulness under the FLSA for statute of limitations purposes, the factfinder "has already factored the possibility of good faith into its examination." *Alvarez Perez v. Sanford-Orlando Kennel Club*, 515 F.3d 1150, 1166 (11th Cir. 2008) (internal quotation marks omitted); *see Doyle v. United States*, 931 F.2d 1546, 1549 (Fed. Cir. 1991) ("[A] trial court must grant the victims of a willful violation liquidated damages."). In other words, while a defendant could arguably meet its burden to demonstrate that it acted in good faith in the *absence* of a finding of willfulness, a grant of summary judgment on willfulness necessarily does not allow for any argument that the defendant acted in good faith. ESSG has neither explained nor cited any authority demonstrating how a court could possibly find that an employer acted in good faith where that employer has willfully violated the statute.

Thus, where an employer has willfully violated the FLSA, it necessarily follows that the employer cannot have acted in good faith. And absent a finding of good faith, the award of liquidated damages is mandatory. *See Flores*, 824 F.3d at 905. Accordingly, under this Court's sound legal precedent, the district court appropriately awarded liquidated damages because it concluded that ESSG willfully violated the FLSA's overtime requirements.

C. Liquidated Damages Are Mandatory Because ESSG Failed to Meet its Heavy Burden under 29 U.S.C. 260.

Even if this Court were not to credit the district court's determination of willfulness as dispositive, the district court's award of liquidated damages must be affirmed because ESSG has failed to meet its significant burden under 29 U.S.C. 260. To avoid liquidated damages, an employer found to have violated the FLSA must establish that it had both (1) an "honest intention to ascertain and follow the dictates of the Act" and (2) "reasonable grounds for believing that [its] conduct complie[d] with the Act." *Flores*, 824 F.3d at 905 (alterations in original) (internal quotation marks omitted). As this Court has explained, "[a]n employer who failed to take the steps necessary to ensure its practices complied with the FLSA and who offers no evidence to show that is *actively endeavored* to ensure such compliance has not satisfied [29 U.S.C.] 260's heavy burden" and accordingly must pay liquidated damages. *Id*.

1. ESSG first argues that it acted in good faith because it generally otherwise complies with the FLSA, notwithstanding the 1,103 violations at issue here. *See* Op. Br. 40-41. This Court has squarely rejected such arguments, holding that paying *other* employees in compliance with the Act is insufficient to satisfy 29 U.S.C. 260. *See Flores*, 824 F.3d at 906 ("Evidence that the City complied with its other obligations under the Act or that it agreed to pay overtime more generously

than required by law do not demonstrate what the City has done to ascertain whether its classification of the payments at issue here complied with the FLSA.").

Moreover, as discussed above, ESSG is only certain of its compliance with respect to its other employees due to a post-investigation audit of its records. Such after-the-fact efforts are irrelevant to whether an employer acted in good faith or with reasonable grounds to believe it acted in compliance with the FLSA. *See Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 910 (3d Cir. 1991) (29 U.S.C. 260 requires "retrospective analysis of an employer's conduct with respect to violations of the FLSA, not appraisal of an employer's post-violation conduct"). ESSG does not contend that it conducted an audit prior to or during the violations at issue here, or took any affirmative steps to assure that denying its TBG employees overtime pay complied with the FLSA. The absence of any such affirmative efforts precludes a finding of good faith. *See Flores*, 824 F.3d at 905.

2. ESSG also argues that it acted in good faith because it had no knowledge or reason to know that the TBG employees worked overtime without pay. *See* Op. Br. 40-43. However, this argument again ignores that Ms. Haluptzok's knowledge must be imputed to ESSG, for the reasons detailed above. Ms. Haluptzok indisputably knew that the TBG employees worked over 40 hours per workweek without overtime pay, repeatedly ignored explicit warnings that such pay practice violated the FLSA, and conducted no inquiry or took any affirmative steps to

ensure that it was appropriate to deny the TBG employees overtime pay. Moreover, ESSG conducted no oversight of Ms. Haluptzok's processing of the TBG payroll for the entire relevant time period. Such reckless disregard for compliance with the Act cannot satisfy ESSG's burden to show good faith under 29 U.S.C. 260. *See A-One Med. Servs.*, 346 F.3d at 920 (reckless belief in compliance insufficient to establish good faith).

In sum, ESSG has failed to point to any probative evidence that it acted in good faith, and thus has failed to meet its heavy burden to satisfy the requirements of 29 U.S.C. 260. Accordingly, the district court's award of liquidated damages must be affirmed.

III. THE DISTRICT COURT CORRECTLY DISMISSED ESSG'S CROSS-CLAIMS AND DENIED ESSG LEAVE TO FILE A THIRD- PARTY COMPLAINT BECAUSE SUCH CLAIMS ARE NOT AUTHORIZED UNDER THE FLSA OR FEDERAL COMMON LAW

A. Standard of Review

This Court reviews de novo the district court's dismissal of claims under Federal Rule of Civil Procedure 12(b)(6) for lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).[7]

[7] The Secretary did not take a position before the district court on ESSG's cross-claims or third-party complaint. *See* SER 045-47. However, the Secretary has a substantial interest in the proper judicial interpretation of the FLSA because he has

B. ESSG Has Waived its Argument that the FLSA Implicitly Provides a Right to Contribution or Indemnification and, in any event, No Such Right Exists.

As this Court has explained, "[a] defendant held liable under a federal statute has a right to contribution or indemnification from another who has also violated the statute only if such right arises (1) through the affirmative creation of a right of action by Congress, either expressly or implicitly, or (2) via the power of the courts to formulate federal common law." *Mortgs., Inc. v. U.S. Dist. Court for Dist. of Nev. (Las Vegas),* 934 F.2d 209, 212 (9th Cir. 1991) (citing *Texas Indus., Inc. v. Radcliff Materials*, 451 U.S. 630, 638 (1981)).

1. ESSG argues on appeal that the FLSA implicitly provides for a right to contribution or indemnification. *See* Op. Br. 44-51. However, ESSG has already acknowledged that the FLSA neither explicitly nor implicitly provides for contribution or indemnification. *See* SER 054, ER 218 n.1 ("[T]he FLSA does not speak directly or indirectly to the particular question of remedies between or among codefendants..... As a result, the ESSG Defendants assert the creation of a right to indemnity or contribution falls within the power of the federal courts."). In light of this concession, the district court appropriately did not address this specific question and ESSG has waived this issue on appeal. *See Zerby*, 637 F. App'x at 1011 (issue waived where not disputed below); *United States v. Bentson*,

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a statutory mandate to administer and enforce the Act. *See* 29 U.S.C. 204, 211(a), 216(c), 217.

947 F.2d 1353, 1356 (9th Cir. 1991) ("As a general rule, where a party has conceded an issue below, that party may not raise the issue on appeal.").

2. Even if not waived, there is no implicit right to contribution or indemnification under the FLSA. While this Court has not considered this precise question, the Second Circuit directly addressed the issue in *RSR Security Services, Ltd.*, 172 F.3d at 143-44, and held that the FLSA does not provide for contribution or indemnification. Relying on the Supreme Court's decision in *Northwest Airlines, Inc. v. Transport Workers Union of America, AFL-CIO*, 451 U.S. 77 (1981), the Second Circuit correctly explained that such claims are prohibited because (1) the FLSA makes no provision for such claims, (2) employers are not members of the class for whose benefit the FLSA was enacted, (3) the FLSA has a comprehensive remedial scheme that obviates the need for additional, judicially-engrafted remedies, and (4) the legislative history is silent on the issue. *See RSR*, 172 F.3d at 143-44 (also citing *Lyle v. Food Lion*, 954 F.2d 984, 987 (4th Cir. 1992) (affirming dismissal of employer's counterclaim and third-party complaint for indemnity against plaintiff-supervisor for plaintiffs' FLSA claims); *Martin v. Gingerbread House, Inc.*, 977 F.2d 1405, 1408 (10th Cir. 1992) (employer's third-party complaint seeking indemnity from employee for alleged FLSA violations was preempted by FLSA); and *LeCompte v. Chrysler Credit Corp.*, 780 F.2d 1260,

1264 (5th Cir. 1986) (disallowing employer's claim for contribution or indemnification under FLSA against employees)).

3. ESSG has offered no compelling reason why this Court should not adopt the well-reasoned and sound decision of the Second Circuit. Instead, ESSG argues that the FLSA codified the common law right of assumpsit, and therefore must also provide for the distinct common law claims for contribution and indemnification. *See* Op. Br. 44-51. In support of this argument, ESSG cites to various court decisions describing FLSA wage claims as *analogous* to common law claims for assumpsit. *See* Op. Br. 44-51. Even if these authorities could somehow be interpreted to establish that the FLSA "codified" the common law right of assumpsit, it is unclear how these authorities demonstrate that the FLSA provides for the distinct right to contribution or indemnification. ESSG simply argues that there is "no reason" to conclude otherwise. *See* Op. Br. 49. However, as set forth in *RSR*, there are several compelling reasons to do so.

ESSG also relies on the Supreme Court's decision in *Musick, Peeler & Garrett v. Employers Ins. of Wausau*, 508 U.S. 286 (1993). *See* Op. Br. 44-51. However, *Musick* is of no assistance to ESSG; instead, it demonstrates that this Court should prohibit ESSG's claims. In *Musick*, the Supreme Court held that federal courts have authority to imply a right to contribution under a 10b–5 securities fraud action because the 10b–5 cause of action was not created by

Congress, but rather was implied by the judiciary. *See* 508 U.S. at 298. The Court, however, explicitly distinguished the permissibility of implied rights to contribution or indemnification under *implied* causes of actions from such implied rights under *statutory* causes of action. *Id*. at 290-91. The Supreme Court explained that the *Northwest* or *Texas Industries* frameworks (relied on by this Court and the Second Circuit in *Mortgages* and *RSR*, respectively) are more appropriate to determine whether implied rights to contribution or indemnification exist under a statutory cause of action. *See Musick,* 508 U.S. at 290-91 ("The federal interests in both *Texas Industries* and *Northwest Airlines* were defined by statutory provisions that were express in creating the substantive damages liability for which contribution was sought . . . [b]ut these inquiries are not helpful in the present context."). Here, the underlying cause of action is unquestionably statutory, brought by the Secretary under the FLSA. Thus, under *Musick*, the Second Circuit appropriately applied the *Northwest* framework to conclude that the FLSA does not provide an implied right to contribution or indemnification.

C. The District Court Properly Declined to Formulate a Claim to Indemnification or Contribution under the Federal Common Law.

As noted above, a defendant found liable under a federal statute may have a right to indemnification or contribution even in the absence of an express or implied statutory right "via the power of the courts to formulate federal common law." *Mortgs., Inc.*, 934 F.2d at 212 (citing *Texas Indus.*, 451 U.S. at 638-39).

This power includes those "few instances" where "a federal rule of decision is necessary to protect uniquely federal interests." *Id*. (internal quotation marks omitted). "The right of recovery from another wrongdoer, however, does not implicate any such interests." *Mortgs., Inc.*, 934 F.2d at 213 (citing *Texas Indus.*, 451 U.S. at 642). Courts may also formulate federal common law "when a statute contains sweeping language and its legislative history indicates Congress's expectation that the courts will 'give shape to the statute's broad mandate by drawing on common-law tradition.'" *Mortgs., Inc.*, 934 F.2d at 213 (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978)). Courts should not, however, formulate common law where "Congress has enacted a comprehensive legislative scheme, including integrated procedures for enforcement." *Mortgs., Inc.*, 934 F.2d at 213 (citing *Northwest*, 451 U.S. at 97).

a. Relying on *Mortgages, Inc.* and *Texas Industries*, the district court correctly held that a right to contribution or indemnification for FLSA liability is not authorized under the federal common law. *See* ER 219. As set forth above, there is no right to contribution or indemnification under the FLSA, implicitly or explicitly. Thus, if any such right exists, it must be under the court's power to formulate federal common law and, therefore, must be necessary to protect uniquely federal interests. *See Texas Indus.*, 451 U.S. at 638-39; *Mortgs., Inc.*, 934 F.2d at

212. This Court has clearly held that “the right of recovery from another

wrongdoer" does not implicate such interests. *Mortgs., Inc.*, 934 F.2d at 213. ESSG's desire to recover from its prior codefendants, therefore, is an insufficient basis for this Court to formulate a claim under the common law.

In addition, ESSG's claims for contribution or indemnification are not authorized under the common law because the FLSA is a "comprehensive legislative scheme" that includes "integrated procedures for enforcement." *Mortgs., Inc.*, F.2d at 213; *cf. United States v. Darby*, 312 U.S. 100, 109 (1941) (the FLSA is a "comprehensive legislative scheme"); *RSR*, 172 F.3d at 144 ("[T]he FLSA's remedial scheme is sufficiently comprehensive as to preempt state law in this respect."). Accordingly, courts should not formulate common law claims for contribution or indemnification in light of this comprehensive scheme. *See Mortgs., Inc.*, F.2d at 213; *cf. Oneida Cty. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 237 (1985) (federal statute did not preempt common law where the federal statute did not "[speak] directly to the question" of remedies).

Indeed, permitting ESSG to bring a claim for indemnification or contribution in this case would be especially troubling in that it would encroach upon and interfere with the Secretary's exclusive authority to bring an action under 29 U.S.C. 217. The Secretary asserted claims under 29 U.S.C. 217 against ESSG and against its prior codefendants from whom ESSG seeks indemnification or contribution. *See* ER 183, 249, 277-91. With the district court's approval, the

Secretary resolved his claims against these codefendants. *Id*. 127-69. ESSG may not "arrogate to itself power delegated by Congress solely to the Secretary" to revive an FLSA action as to those defendants, or to bring such a suit against additional parties. *See Brennan v. Emerald Renovators, Inc.*, 410 F. Supp. 1057, 1062 (S.D.N.Y. 1975) ("[A] [29 U.S.C. 217] action ousts jurisdiction from all persons other than the Secretary, and defendant cannot, by means of a third-party action, arrogate to itself power delegated by Congress solely to the Secretary.").

b. ESSG argues that this Court's decision in *Williamson v. General Dynamics Corp.*, 208 F.3d 1144 (9th Cir. 2000), reflects a determination by this Court that the FLSA is *not* a comprehensive, preemptive statute and thus ESSG's claims should be permitted under the federal common law. *See* Op. Br. 54. *Williamson*, however, supports the opposite conclusion. In *Williamson*, this Court examined whether the FLSA's anti-retaliation provision preempted an employee's common law claim for career fraud against an employer. *See* 208 F.3d at 1151. First addressing "field preemption," this Court considered whether Congress intended to preempt the "entire field" by providing for *exclusive* remedies. *Id*. Relying on the FLSA's "savings clause," 29 U.S.C. 218(a), this Court concluded that the FLSA provided for *comprehensive*, but not exclusive, remedies. *Id.* This Court went on to

consider whether the employee's fraud claims were barred under

"conflict preemption," concluding that such claims were "not contrary to the purpose of the FLSA" which is intended to protected employees. *Id.*

Here, however, ESSG's claim *is* contrary the FLSA's central purpose to protect employees and is thus preempted. *See Williamson*, 208 F.3d at 1154 ("[T]he Supreme Court and the Ninth Circuit have consistently found that the central purpose of the FLSA is to enact minimum wage and maximum hour provisions designed to protect employees."). As the district court correctly explained, albeit in the context of contractual indemnification, cross-claims for contribution or indemnification are preempted by the FLSA because they conflict with and frustrate this central purpose. *See* ER 221-22. By lessening an employer's potential liability, such claims would weaken an employer's incentive to comply, thus harming the employees that the Act is intended to protect. *Id.* Thus, even if this Court were to conclude that the FLSA is not a comprehensive legislative scheme that speaks directly to the question of remedies, ESSG's claims for indemnification or contribution are still preempted because they conflict with the FLSA's central purpose. *See Williamson*, 208 F.3d at 1154-55 (determining whether common law claim for fraud is preempted by the FLSA includes analysis of "conflict preemption," i.e., whether the common law claim conflicts with or

frustrates the purpose of the federal statute).[8] Accordingly, the district court appropriately concluded that ESSG's claims for indemnification or contribution are not authorized under the federal common law.

[8] The district court also dismissed ESSG's cross-claim for contractual indemnification against Sync Staffing. *See* ER 220-21. ESSG did not appeal or even reference the district court's dismissal of this claim in its opening brief. Accordingly, ESSG has waived review of the district court's dismissal of ESSG's claim for contractual indemnification. *See* Fed. R. App. P. 28(a) (Appellant's brief); *Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 738 (9th Cir. 1986) ("The Court of Appeals will not ordinarily consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief.") (citing *Int'l Union of Bricklayers & Allied Craftsmen Local No. 20 v. Martin Jaska, Inc.*, 752 F.2d 1401, 1404 (9th Cir.1985)).

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decisions.

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, there are no known related cases pending in this Court.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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