UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JULIE A. SU, Acting Secretary of Labor, United States Department of Labor,[1]	)	
Plaintiff,	)	Case No. 1:21-cv-02160-SEB-TAB
v.	)	
TPS CAREGIVING, LLC d/b/a COMFORT KEEPERS HOME CARE a limited liability company; HEAL AT HOME, LLC, a limited liability company; and TIM PAUL, an individual,	)	
Defendants.	)	

ACTING SECRETARY OF LABOR'S
PETITION FOR ADJUDICATION OF CIVIL CONTEMPT

Plaintiff Julie A. Su, Acting Secretary of Labor, United States Department of Labor, respectfully petitions this Court to hold Defendants TPS Caregiving, LLC d/b/a Comfort Keepers Home Care ("Comfort Keepers"); Heal at Home, LLC ("Heal at Home"); and Tim Paul (collectively, "Defendants") in contempt for violating the terms of an Order and Judgment entered by this Court pursuant to Section 17 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 217 ("FLSA"). In support of this petition, Plaintiff states as follows:

[1] This action was commenced in the name of Martin J. Walsh, Secretary of the Department of Labor. Mr. Walsh is now the former Secretary of Labor and Julie A. Su is now the Acting Secretary. Therefore, Ms. Su is being automatically substituted for Mr. Walsh as the Plaintiff, pursuant to Fed. R. Civ.P. 25(d), and the caption of this action is amended accordingly.

1. Plaintiff Julie A. Su is the Acting Secretary of Labor, United States Department of Labor. As the Acting Secretary of Labor, Plaintiff is charged with enforcing the FLSA.

2. Defendant Comfort Keepers is and at all times since January 20, 2022, has been a home health care agency located at 1335 Sadler Circle, Indianapolis, Indiana 46239 providing home health services in the Indianapolis, Indiana metropolitan area.

3. Defendant Heal at Home is and at all times since January 20, 2022, has been a home health care agency located at 1335 Sadler Circle, Indianapolis, Indiana 46239 providing home health services in the Indianapolis, Indiana metropolitan area.

4. Defendant Paul is and at all times since January 20, 2022, has been the owner of Comfort Keepers and Heal at Home.

5. On August 2, 2021, Petitioner initiated this lawsuit against Defendants seeking recovery of unpaid overtime compensation, an equal amount in liquidated damages for amounts unlawfully withheld from employees, and an injunction permanently enjoining and restraining them from violating the overtime and recordkeeping provisions of the FLSA. (Doc. No. 1)

6. On December 1, 2021, the Parties entered into a consent judgment (Doc. No. 20), which the Court entered and deemed effective on January 20, 2022. (Doc. No. 24).

7. In the consent judgment, Defendants agreed to pay damages, in the form of back wages and liquidated damages, for FLSA violations from April 30, 2019 through April 11, 2020. (Doc. No. 20, p. 2, § II).

8. Of particular relevance to this Petition, the consent judgment ordered that Defendants were "permanently enjoined and restrained from violating the provisions of the Act." (Doc. No. 20, p. 1). Specifically, this Court enjoined Defendants from employing nonexempt employees for workweeks longer than 40 hours unless Defendants paid the overtime premium for hours over 40 in a workweek. (Doc. No. 20, p. 2, ¶(I)(A)).

9. Beginning on September 14, 2023, the United States Department of Labor, Wage and Hour Division ("WHD"), conducted an investigation of Defendants to determine their compliance with the FLSA. In relevant part, WHD determined from at least April 12, 2020 to the present, Defendants committed repeated and willful FLSA violations. ("Violation Period").

10. WHD's investigation of Defendants included examining time, payroll, and other employment and corporate records provided by Defendants covering about 700 employees from April 12, 2020 through approximately May 2023.

11. Through meetings with Paul and Defendants' counsel, Defendants have represented their pay practices have not changed since May 2023.

12. Specifically, WHD found that Defendants:

a. repeatedly and willfully manipulated employees' regular rates of pay during overtime weeks, effectively to pay employees at or near straight time for all hours worked; and

b. repeatedly and willfully violated the FLSA's recordkeeping provisions by failing to record the regular hourly rate for any workweek in which Defendants owed overtime due to impermissible payment practices, by failing to maintain accurate straight time earnings due to impermissible payment practices, and by failing to maintain accurate records of premium pay for overtime hours due to impermissible payment practices. *See* Declaration of Wage and Hour Investigator Meghann Kennedy ("Kennedy Decl."), attached hereto as Exhibit A.

Overtime Violations

13. Defendants' violations during the Violation Period have occurred in two circumstances: upon implementation of enterprise-wide reforms in conjunction with the consent judgment and when Medicare or Medicaid approved an employee's patient for additional coverage hours.

Consolidation of Hours Worked Enterprise-wide

14. Among other FLSA violations in 2019 and 2020 covered by the consent judgment (Doc. No. 20), Defendants failed to pay employees an overtime premium for hours worked in excess of 40 in a workweek by dividing employees' pay among multiple companies within the same enterprise.

15. Following the period covered by the consent judgment (Doc. No. 20), Defendants—along with several (new!) related companies—began combining all hours worked by employees across the entire enterprise.

16. As a result of combining employees' hours for hours worked enterprise-wide, more of Defendants' employees accrued significant overtime hours.

17. To counter the rising costs of overtime, Defendants began routinely lowering employees' regular rates of pay.

18. With certain statutory exclusions not relevant here, an employee's "regular rate" includes "all remuneration for employment paid to, or on behalf of, the employee…." 29 U.S.C. § 207(e). "Since the term regular rate is defined to include all remuneration for employment . . . the overtime provisions of the act cannot be avoided by setting an artificially low hourly rate upon which overtime pay is to be based and making up the additional compensation due to employees by other means." 29 C.F.R. § 778.500(a).

19. For example, an employee may have been working 36 hours at each of two Corporate Defendants, at a regular rate of $14 per hour. Because the employee's work did not exceed 40 hours in a workweek at a single company, Defendants calculated their pay without the overtime premium. In this example, Defendants would pay the employee for 72 hours work at the regular rate of $14 per hour or $1,008 per week.

20. Upon consolidation of the employee's hours enterprise-wide, they would be entitled to 40 hours at the regular rate of $14 per hour and 32 hours at the

overtime rate of $21 per hour, for a total of $1,232 per week. To keep their costs down, Defendants would then lower the employee's regular rate, for example, to $12 per hour. Defendants would then pay the employee 40 hours at the new regular rate of $12 per hour and 32 hours at the new overtime rate of $18 per hour, for a total of $1,056.

21. While this amount is more than the $1,008 Defendants illegally paid the employee previous to the rate adjustment, it still did not equal the $1,232 they were entitled to under the FLSA. Accordingly, this represents a manipulation of the employee's regular rate of pay for the purpose of avoiding paying the overtime premium.

Changes of Medicare- or Medicaid-Approved Hours

22. In the second circumstance—when Medicare or Medicaid initially approved a higher number of care hours for a given patient—Defendants often require the same assigned employee to work the additional care hours.

23. For example, if Medicare or Medicaid initially approved a patient for 48 care hours, Defendants paid the corresponding employee approximately $14 per hour as a regular rate of pay for the first 40 hours and at $21 per hour for the eight overtime hours, totaling $728 per week.

24. If Medicare or Medicaid increased the approved care hours to 72 per week, the employees were entitled to the same 40 hours at $14 per hour, and $21 per hour for the next 32 hours, a total of $1,232 per week. However, Defendants reduced the corresponding employee's regular rate to approximately $12.50 per

hour as a regular rate of pay for the first 40 hours and paid the employee for 32 hours at the new overtime rate of $18.75 per hour, for a total of $1,100 per week.

25. While $1,100 is more money than Defendants paid the employee previous to the rate adjustment, it was not the $1,232 per week they were entitled to under the FLSA. This represents a manipulation of the employee's regular rate of pay for the purpose of avoiding paying the overtime premium.

26. When Medicare- or Medicaid-approved hours significantly decreased, Defendants typically returned to paying employees their original regular rates of pay.

Pay Agreements

27. Both when consolidating the hours worked at different companies, and when adjusting for additional Medicare- or Medicaid-approved hours, Defendants have and have had employees purportedly agree to the revised regular rate using a "Pay Agreement." These Pay Agreements, sometimes sent via text message and sometimes handwritten on blank paper, often include examples of the revised pay structure demonstrating that the employee would make more money within each week. Conveniently, they do not include information on how much money the employee would have been entitled to under the FLSA should they work the increased hours under their original regular rate of pay.

28. Some Pay Agreements explicitly tie the rate change to the number of working hours, for instance by having employees affirm, "I understand if I return to

a permanent schedule of no more than 40 hours per week, my pay rate will return to the rate I was offered at hire."

29. Many employees sign or otherwise "agree" to their Pay Agreements after the rate change went into effect, or without an effective date. While this delay is often only a was a matter of a few days, it sometimes spans months.

30. For some employees who have multiple changes in hours worked and regular rates of pay, Defendants have them sign new Pay Agreements each time, sometimes as often as once a month.

31. For other employees, Defendants fail to provide them with updated Pay Agreements for their additional rate changes.

32. Some employees have their regular rates adjusted only once. But for those employees, their rates have not been further adjusted only because their work hours have not changed again.

33. These rate reductions are not "bona fide" because employees' regular rates fluctuate based on their hours rather than being set by a new pay policy meant to be in place for a substantial period of time, and because employees sometimes do not consent to their rate changes.

Recordkeeping Violations

34. Defendants repeatedly violated Sections 11 and 15(a)(5) of the FLSA by failing to keep complete and accurate records. 29 U.S.C. §§ 211, 215(a)(5), 29 C.F.R. Part 516.

35. Defendants failed to maintain complete and accurate time and pay records under 29 C.F.R. § 516.2(a)(6)(i) by not recording the regular hourly rate for any workweek in which overtime was owed due to falsified payrolls.

36. Defendants failed to maintain complete and accurate time and pay records under 29 C.F.R. § 516.2(a)(8) by not maintaining accurate straight time earnings due to falsified payrolls.

37. Defendants failed to maintain complete and accurate time and pay records under 29 C.F.R. § 515.2(a)(9) by not maintaining accurate records of premium pay for overtime hours due to falsified payrolls.

Remedies Sought

38. Defendants' acts and omissions as set forth above constitute contempt of the Consent Judgment entered by this Court insofar as they violate the FLSA in contravention of the Court's permanent injunction. To date, Defendants have provided no evidence they ceased these violations or complied with the prior judgment of this Court.

39. As a result of these violations, Defendants owe back wages to certain present and former employees. However, Defendants' rate manipulation prevented WHD from being able to calculate back wages due to employees under the FLSA.

40. To uncover the extent of Defendants' violations, WHD will have to examine time and pay records for each pay period for each of the approximately 700 employees known through May 2023, plus those employed since then.

41. Calculating the damages from these voluminous records would present an extreme burden to WHD.

42. The contemptuous behavior of Defendants merits the equitable remedy of requiring them to pay for the analysis and calculation of back wages by a third-party auditor.

WHEREFORE, Plaintiff respectfully requests this Court:

1. Issue an Order to Show Cause requiring Defendants to appear before the Court to show cause why they should not be held in contempt for violating the Consent Judgment and why they should not be ordered to purge themselves of their contempt;

2. Upon service of the Order to Show Cause, and upon appearance of Defendants, find Defendants in violation of civil contempt of this Court and further order:

a. Defendants to pay for the calculation by a third-party auditor of back wages owed to their employees since April 12, 2020;

b. Defendants to pay all back wages found due to their employees since April 12, 2020;

c. Imposition of an appropriate daily fine until Defendants fully comply with this Court's Order dated January 20, 2022;

d. Defendants to demonstrate they are paying workers at a rate of 1.5 times the regular rate for all hours worked in excess of 40 in a workweek, as required by Section 7 of the FLSA;

e. Defendants to demonstrate they have a recordkeeping system in place that includes making, keeping, and preserving adequate and accurate employment, pay and time records that comply with Section 11 of the FLSA and 29 C.F.R. Part 516, including accurately and fully recording employees' hours worked, regular rate of pay, and overtime pay, for all workers;

f. Defendants to demonstrate they have ceased the practice of manipulating employees' regular pay rates to avoid paying overtime premiums;

g. Defendants to pay the Acting Secretary's attorneys' fees, an amount of money sufficient to compensate for her fees and expenses incurred thus far in bringing and prosecuting this contempt proceeding and motion; and

h. Any further relief the Court deems equitable and just.

Date: July 10, 2024

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Motion has been filed this 10th day of July, 2024 with the Court's CM/ECF system and that notice of this filing was sent to all Defendants by operation of the Court's electronic filing system.

/s/ Adam Lubow
Adam Lubow
Trial Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

JULIE A. SU, Acting Secretary of Labor, United States Department of Labor,	)	
Plaintiff,	)	Case No. 1:21-cv-02160-SEB-TAB
v.	)	
TPS CAREGIVING, LLC d/b/a COMFORT KEEPERS HOME CARE *et al.*,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF ACTING SECRETARY OF LABOR'S PETITION FOR ADJUDICATION OF CIVIL CONTEMPT

Plaintiff Julie A. Su, Acting Secretary of Labor, United States Department of Labor ("Acting Secretary" or "Department") submits this Memorandum in Support of her Petition for Adjudication of Civil Contempt against Defendants and Defendants TPS Caregiving, LLC d/b/a Comfort Keepers Home Care ("Comfort Keepers"); Heal at Home, LLC ("Heal at Home"); and Tim Paul (collectively, "Defendants"). Despite previously agreeing to comply with the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201, et seq. ("FLSA"), Defendants manipulated the regular rate of their employees to avoid their obligation to pay them an overtime premium. As will be established below, Defendants' repeated and willful actions violate a Judgment of this Court. Defendants must be held accountable for their contemptuous behavior.

I. Relevant Background

Comfort Keepers and Heal at Home are home health care agencies located at 1335 Sadler Circle East Drive, Indianapolis, Indiana 46239, owned and operated by Paul. Following an investigation by the U.S. Department of Labor Wage and Hour Division ("WHD") for Defendants' compliance with the FLSA on August 2, 2021, the Acting Secretary filed this suit against Defendants seeking, among other things, to permanently enjoin and restrain them from violating the FLSA's overtime and recordkeeping provisions. On December 1, 2021, the Parties entered into a Consent Judgment (Doc. No. 20), entered by the Court and deemed effective on January 20, 2022, acknowledging the requirements of the FLSA and agreeing to comply with the Act. (Doc. No. 24). Under the terms of the Consent Judgment, this Court "hereby permanently enjoined and restrained [Defendants] from violating the provisions of the Act." (Doc No. 20, p. 1). Specifically, the Consent Judgment prohibits Defendants from employing any employees for more than 40 hours per week unless Defendants pay the employees the overtime premium. (Doc. No. 20, p. 2, ¶(I)(A)).).

WHD initiated another investigation into Defendants' wage and hour practices in November 2022. (Exhibit A, Decl. of Meghann Kennedy ("Kennedy Decl.") ¶ 16). During the investigation, WHD found evidence of Defendants' continued violations of Sections 7 and 11 of the FLSA. (*Id.* ¶ 20). Specifically, WHD found Defendants (a) repeatedly and willfully manipulated employees' regular rates of pay during overtime weeks, effectively to pay employees at or near straight time for all hours worked; and (b) repeatedly and willfully violated the FLSA's recordkeeping provisions by not recording the regular hourly rate for any workweek

in which Defendants owed overtime due to falsified payrolls, by not maintaining accurate earnings due to falsified payrolls, and by not maintaining accurate records of premium pay for overtime hours due to falsified payrolls. (*Id.* ¶¶ 21-36). Accordingly, Defendants are liable for wages owed to these employees, plus an equal amount in liquidated damages.

Despite agreeing to comply with the FLSA—and being ordered to do so by this Court—Defendants engaged in a rate manipulation scheme to avoid paying employees the overtime premium for hours worked over 40 in a workweek. (Kennedy Decl. ¶¶ 21-29). When employees worked significantly more than 40 hours in a workweek, Defendants routinely lowered these employees' regular pay rates. Defendants appear to have implemented this scheme in two situations. First, following entry of the 2022 Consent Judgment, Defendants began combining all hours worked by employees across the entire enterprise, resulting in more employees working significant overtime hours. (*Id.*). Second, when Medicare or Medicaid approved a higher number of care hours, Defendants often had the same assigned employee work the additional care hours, resulting in higher overtime expenses. (*Id.* ¶¶ 30-36).

Further, WHD found Defendants violated the FLSA's recordkeeping provisions. 29 C.F.R. § 516.2(a)(6)(i) requires employers to record employees' regular hourly rate for any workweek in which overtime was owed. Defendants falsified their payrolls by manipulating employees' regular rates of pay. 29 C.F.R. § 516.2(a)(6)(i). Defendants failed to maintain complete and accurate pay records

required by 29 C.F.R. § 516.2(a)(8) because they have not maintained accurate straight time earnings. Finally, Defendants violated 29 C.F.R. § 515.2(a)(9) by not maintaining accurate records of premium pay for overtime hours. (Kennedy Decl. ¶¶ 45-48).

These violations prove Defendants' blatant disregard for the FLSA's requirements and this Court's orders. The Court should hold Defendants in civil contempt and order them to pay a daily fine until they come into compliance with the FLSA.

II. Legal Standard

To establish civil contempt, the movant must provide a decree from the court that sets forth with specific detail an unequivocal command and show by clear and convincing evidence that the responding party violated that order. *Bailey v. Roob*, 567 F.3d 930, 934 (7th Cir. 2009). The violation must have been "significant, meaning the alleged contemnor did not substantially comply with the order," and the responding party must have "failed to make a reasonable and diligent effort to comply." *S.E.C. v. Hyatt*, 621 F.3d 687, 692 (7th Cir. 2010). A Respondent bears the burden of proof if it claims it is presently unable to comply with the order. *United States v. Rylander*, 460 U.S. 752, 757 (1983).

The Court "may impose sanctions for civil contempt in order to coerce compliance or to compensate the complainant for losses sustained as a result of the contumacious conduct." *South Suburban Housing Ctr. v. Berry*, 186 F.3d 851, 854 (7th Cir. 1999). District courts are also authorized by statute "to punish by fine or

imprisonment, or both, at its discretion, such contempt of its authority, and none other, as . . . [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command." 18 U.S.C. § 401(3). Ultimately, district courts have broad discretion to fashion an appropriate remedy in a civil contempt action. *Taylor v. Washington*, Case No. 4:21-cv-00127-TWP-KMB, 2024 WL 1756180, at *9 (S.D. Ind. Apr. 23, 2024).

III. Argument

A. Defendants Should Be Held in Contempt.

This Court should hold Defendants in contempt because they violated the terms of the Consent Judgment. A consent judgment is "a court order that embodies the terms agreed upon by the parties as a compromise to litigation." *United States v. Alshabkhoun*, 277 F.3d 930, 934 (7th Cir. 2002). The Supreme Court has long held a consent judgment is a judicial act enforceable by the Court through its contempt powers. *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932); *see also Rolex Watch U.S.A., Inc. v. Crowley*, 74 F.3d 716 (6th Cir. 1996).

The Consent Judgment Defendants signed was definite and specific. As discussed above, the Consent Judgment enumerates the specific FLSA provisions Defendants were prohibited from violating and the ways Defendants must comply with the Act. (Doc. No. 20, pp. 1-2). Defendants also had knowledge of the Consent Judgment; they agreed to its terms to settle the Department's claims against them at that time. Finally, Defendants clearly violated the Consent Judgment when they effectively paid employees at their regular rates for all time worked. In an even

more egregious violation of the Consent Judgment, Defendants manipulated employees' regular rates of pay in order to obscure their FLSA violations. (Kennedy Decl. ¶¶ 21-36). By manipulating the employees' regular rates of pay, Defendants also violated the FLSA recordkeeping provisions. The Acting Secretary has met her burden to show contempt is appropriate by clear and convincing evidence.

B. Judicial Sanctions Are Appropriate.

Civil contempt proceedings may be either remedial or coercive. *See United States v. Dowell*, 257 F.3d 694, 699 (7th Cir. 2001). They are "designed either to compel the contemnor into compliance with an existing court order or to compensate the complainant for losses sustained as a result of the contumacy." *Id*. In this case, the Acting Secretary respectfully requests the Court impose both remedial and coercive sanctions. First, the Court should order Defendants to pay all back wages owed as a result of their FLSA violations from April 12, 2020, to the present. Second, the Court should order Defendants to pay for a third-party auditor to calculate the amount of back wages due to affected employees. Third, the Acting Secretary seeks the imposition of a coercive daily fine should the Defendants fail to comply with the FLSA within five calendar days of the Court's Order. Finally, the Court should order Defendants to pay the Acting Secretary's attorneys' fees incurred to bring this petition.

1. Defendants must pay the back wages owed to affected employees.

"[T]he measure of the Court's power in civil contempt proceedings brought by the DOL is determined by the 'requirements of full remedial relief.'" *Walsh v. All*

Temporaries Midwest, Inc., Case No. 17-cv-3330 (JNE/TNL), 2021 WL 4813031, at *9 (D. Minn. July 30, 2021) (citing *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 193 (1949)). "[T]here can be no doubt that a District Court has the power, upon finding an employer to be in civil contempt, to order reimbursement of unpaid wages to his employees." *Mitchell v. All-States Business Prod. Corp.*, 232 F. Supp. 624, 626 (E.D.N.Y. 1964).

Defendants' rate manipulation scheme violates the FLSA and, therefore, the Consent Judgment. Thus, full remedial relief is appropriate here. This Court has the power to order Defendants pay affected employees all back wages owed and should do so.

2. *The Court should order Defendants to pay for a third-party auditor to calculate back wages.*

In contempt actions, "[a] court has broad discretion to fashion a remedy based on the nature of the harm and the probable effect of alternative sanctions." *Connolly v. J.T. Ventures*, 851 F.2d 930, 933 (7th Cir. 1988) (citing *U.S. v. United Mine Workers of America*, 330 U.S. 258, 303-04 (1947)). When imposing a monetary penalty, "[t]he district court must explain how it arrived at the specific amount of the sanction imposed." *F.T.C. v. Trudeau*, 579 F.3d 754, 770 (7th Cir. 2009) (citing *Mid-Am Waste Sys., Inc. v. City of Gary, Ind.*, 49 F.3d 286, 293 (7th Cir. 1995)). In other words, the Court must explain where the numbers came from and the methodology used to get there. *Id.*

The WHD regulates and investigates violations of federal minimum wage, child labor, overtime, and related labor laws. Thus, when WHD is required to

reinvestigate truculent employers who repeatedly violate the FLSA and court-ordered injunctions, it saps resources from its overall mission of protecting the American workforce. Accordingly, the Acting Secretary seeks an equitable remedy for Defendants' contemptuous behavior: for Defendants to pay for a third-party auditor to calculate the back wages owed to affected employees from April 12, 2020, until they stop violating the FLSA.

Based on WHD's investigation, there are about 700 affected workers from April 12, 2020 to May 2023. (Kennedy Decl. ¶¶ 18-19, 49-50). Because Defendants' overtime violations are ongoing, there likely are significantly more affected workers employed since those dates. Given the nature of Defendants' rate manipulation scheme, WHD would have to review weekly payroll records from April 12, 2020 to the present – over 215 weeks – for each of the over 700 employees to calculate back wages due. (*Id.* ¶ 50). This is an extensive burden on WHD, which already expended 305 hours of resources in investigating and prosecuting Defendants for the original FLSA violations and has already expended at least 94 hours of resources in investigating and establishing this contempt. (*Id.* ¶¶ 14, 94). The calculation of four years of back wages for 700 workers would take WHD at least approximately 1,120 additional hours, all for an employer who has already promised to comply with the law. (*Id.* ¶ 50).

The Court needs an accurate accounting of the back wages Defendants owe in order to make affected employees whole. Ordering Defendants to pay for a third-party auditor to comply with the back wages would provide the Court with the

amounts and methodologies necessary to determine that amount while encouraging Defendants and similarly situated businesses to comply with the law to avoid such expense in the future. This remedy would relieve WHD of the burden of examining voluminous records – a burden that would not exist but for Defendants' refusal to comply with this Court's Consent Judgment. Accordingly, the Court should order Defendants to hire, at their expense, a third-party auditor to calculate the back wages owed to its employees.

3. *A coercive daily fine is appropriate.*

Given Defendants' refusal to comply with the Court's Consent Judgment, a daily fine for their continued failure to comply is appropriate. Defendants' violations are ongoing to this day, even after WHD conducted another full investigation and advised them of their ongoing violations. (Kennedy Decl. ¶¶ 16-19). A daily fine is necessary to coerce Defendants to come into compliance with the FLSA. The Acting Secretary requests the Court order Defendants to come into compliance with the FLSA within five calendar days and subject Defendants to a coercive fine of $500 per day for each day thereafter until they comply. *See e.g.*, *Sec'y of Labor v. La Bomba Food Restaurant, Inc.*, Case No. 1:20-cv-02678 (Doc. No. 23) (N.D. Ill. May 20, 2021) (Pacold, J.) (imposing $250 daily fine for failure to comply with order enforcing subpoena duces tecum); *Sec'y of Labor v. River Ranch Bar & Grille, LLC*, 2018 WL 2074161, at *3 (M.D. Fla. Apr. 13, 2018), report and recommendation adopted, 2018 WL 2011372 (M.D. Fla. Apr. 30, 2018) (imposing $500 daily fine for

failure to comply with default judgment obtained by the Secretary in an FLSA case). A daily fine of $500 is necessary and appropriate here.

4. *The Acting Secretary is Entitled to Attorneys' Fees Related to this Petition.*

The Acting Secretary is entitled to the reasonable attorney's fees expended because of Defendants' contumacious conduct. *See, e.g., La Bomba Food Restaurant, Inc.*, Case No. 1:20-cv-02678 (Doc. No. 23) (ordering defendants to pay Secretary of Labor's reasonable attorneys' fees at market rate). In this case, the Acting Secretary requests the Court require Defendants to pay the reasonable attorney's fees incurred by the undersigned in drafting the petition for contempt and its supporting documents.

The Acting Secretary is entitled to attorney's fees based on the prevailing rate in the relevant community. *See, e.g., Blum v. Stenson*, 465 U.S. 886, 895 (1984). "The trial court's initial point of departure, when calculating a 'reasonable' attorney fee, should be the determination of the fee applicant's 'lodestar,' which is the proven number of hours reasonably expended on the case by an attorney, multiplied by his court-ascertained reasonable hourly rate." *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983).

Here, the undersigned attorneys have a combined 23 years of experience as practicing attorneys. (*See* Exhibit B, Decl. of Haley R. Jenkins ("Jenkins Decl.") ¶ 2; Exhibit C, Decl. of Adam Lubow ("Lubow Decl.") ¶ 1). A recent FLSA case in this District approved hourly rates of $550 an hour for senior attorneys $550 an hour and $450 and $300 an hour for associates. *Walters v. Pro. Lab. Grp., LLC*, Case No. 1:21-cv-

02831-JRS-MJD, 2023 WL 7411394, at *1 (S.D. Ind. Nov. 9, 2023). A reasonable rate for an attorneys with Ms. Jenkins' seven years of experience is at least $350 per hour. (Jenkins Decl. ¶ 5). Ms. Jenkins spent 63.5 hours preparing this petition and its corresponding materials. (Jenkins Decl. ¶ 6). A reasonable rate for an attorney with Mr. Lubow's Mr. Lubow's 16 years of experience is at least $450 per hour. Mr. Lubow spent 60.5 hours preparing this motion and its corresponding materials. (Lubow Decl. ¶ 5 Therefore, the Court should order Defendants to pay the Acting Secretary's attorneys' fees of $49,450.

IV. Conclusion

Defendants' pay scheme repeatedly and willfully violated the FLSA and a Consent Judgment of this Court. Their contemptuous rate manipulation requires this Court's intervention. For the reasons set forth above, the Acting Secretary respectfully requests the Court:

1. Issue an Order to Show Cause requiring Defendants to appear before the Court to show cause why they should not be held in contempt for violating the Consent Judgment and why they should not be ordered to purge themselves of their contempt;

2. Upon service of the Order to Show Cause, and upon appearance of Defendants, find Defendants in violation of civil contempt of this Court and further:

   a. Ordering Defendants to pay all back wages found due to their employees since April 12, 2020;

   b. Ordering Defendants to pay for the calculation by a third-party auditor of back wages owed to their employees since April 12, 2020;

c. Imposing an appropriate daily fine until Defendants fully comply with this Court's Order dated January 20, 2022;

d. Requiring Defendants to demonstrate they are paying workers at a rate of 1.5 times the regular rate for all hours worked in excess of 40 in a workweek, as required by Section 207 of the FLSA;

e. Requiring Defendants to demonstrate they have a recordkeeping system in place that includes making, keeping, and preserving adequate and accurate employment, pay and time records that comply with Section 211 of the Act and 29 C.F.R. Part 516, including accurately and fully recording employees' hours worked, regular rate of pay, and overtime pay, for all workers;

f. Requiring Defendants to demonstrate they have ceased the practice of manipulating employees' regular rates of pay to avoid paying overtime premiums;

g. Ordering Defendants to pay the Petitioner's attorneys' fees, an amount of money sufficient to compensate for her fees and expenses incurred thus far in bringing and prosecuting this contempt proceeding; and

h. Ordering any further relief the Court deems equitable and just.

Date: July 10, 2024

Respectfully Submitted,

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