No. 15-35322

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

THOMAS E. PEREZ, SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Plaintiff-Appellee

v.

ZHAO "JENNY" ZENG HONG, an individual,
Defendant-Appellant

On Appeal from the United States District Court
for the Western District of Washington, USDC No. 2:13-cv-00877-RSL

SECRETARY OF LABOR'S RESPONSE BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

The Secretary of Labor does not believe that oral argument is necessary because the facts and legal arguments related to whether the jury instructions were proper where Defendants did not object to the instructions or the special verdict form, and whether the district court properly awarded liquidated damages, may be resolved on the basis of the briefs filed with this Court. If this Court determines that oral argument is necessary, the argument on this brief should be heard at the same time as *Perez v. Huang "Jackie" Jie*, No. 15-35323, because the facts underlying the cases are related and the briefs raise substantially the same legal issues.

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STATEMENT OF JURISDICTION

The district court had jurisdiction over the subject matter of this case pursuant to section 17 of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 217, and 28 U.S.C. 1331 (federal question jurisdiction) and 1345 (suits commenced by an agency of officer of the United States). On March 24, 2015, district court Judge Robert S. Lasnik entered a judgment following a jury trial in this case. Def's ER at 4 (Mar. 24, 2015 Judgment).[1] Zhao "Jenny" Zeng Hong ("Zhao") filed a timely notice of appeal in this Court on April 23, 2015. This Court has jurisdiction over an appeal from the district court's judgment under 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the jury was properly instructed to determine Zhao's employer status where Defendants did not object to the jury instructions or the special verdict form, the instructions did not contain a plain error, and in any event, the evidence supported the jury's findings that Zhao was an employer of all of the Restaurant and Spa employees.

2. Whether the jury was properly instructed to determine whether Defendants' violations were willful with respect to all employees where Defendants did not object to the jury instructions or the special verdict form, the instructions did not contain a plain error, and in any event, the evidence supported

[1] Appellant Zen "Jenny" Hong Zhao's Excerpts of Record are referenced as Def's ER at __.

the jury's findings that Defendants' violations were willful with respect to all employees.

3. Whether the jury instruction regarding the meaning of "in any other manner discriminate" under section 15(a)(3) of the FLSA was proper where Defendants did not object to the jury instruction, adverse action is broadly construed, and the evidence showed that the employees had an objectively reasonable belief that refusing to lie about the work they performed when ordered to do so by their employer would result in retaliation.

4. Whether the district court properly exercised its discretion to award liquidated damages where Defendants actively sought to avoid detection of their violations.

STATUTORY ADDENDUM

All pertinent statutes and rules are contained in Addendum A.

STATEMENT OF THE CASE

A. Course of Proceedings

Beginning in February 2012, the Department of Labor ("DOL") conducted an investigation of Pacific Coast Foods, Inc. d/b/a J & J Mongolian Grill (the "Restaurant"), and J & J Comfort Zone, Inc., d/b/a Spa Therapy (the "Spa"), including employer and employee interviews, review of records provided by the employer, and observation of the worksite. Trial Transcript ("Tr.") 76:16–21;

116:4–12, Mar. 2–5, 2015 (consecutively paginated) (DOL ER at 150).[2] On September 11, 2013, the Secretary of Labor ("Secretary") filed an amended complaint against Defendants Zhao, Huang "Jackie" Jie ("Huang"), the Restaurant, and the Spa under sections 16(c) and 17 of the Fair Labor Standards Act ("FLSA"). Def's ER at 69 (Second Am. Compl.); *see* 29 U.S.C. 216(c), 217.

Based on the findings of the investigation, the complaint alleged that Defendants willfully failed to properly record and pay for employees' hours worked, resulting in violations of the minimum wage, overtime, and recordkeeping requirements of sections 6, 7, and 11(c) of the FLSA, respectively. Def's ER at 75-77 (Compl. at 7–9); *see* 29 U.S.C. 206, 207, 211(c). The complaint also alleged that Defendants violated the anti-retaliation provision of section 15(a)(3) of the FLSA by retaliating against employees who Defendants' believed were cooperating with the DOL's investigation. Def's ER at 77–78 (Compl. at 9–10); *see* 29 U.S.C. 215(a)(3). The Secretary sought unpaid minimum wage and overtime compensation and an equal amount in liquidated damages, compensatory damages for retaliation, and a permanent injunction to enjoin Defendants from

[2] Citations to the Trial Transcript ("Tr.") refer to the Court Reporter's page numbers in the upper right corner of each page, which are consecutive from the March 2, 2015 transcript through the March 5, 2015 trial transcript. The Secretary's excerpts from the transcript are included at the end of the Secretary's Excerpts of Record ("DOL ER") beginning on DOL ER 150.

committing future violations of the FLSA. Def's ER at 76–80 (Compl. at 8–12); *see* 29 U.S.C. 216(c), 217.

District Court Judge Lasnik presided over a four-day jury trial beginning March 2, 2015 in Seattle, Washington. The Secretary presented testimony from eight of Defendants' former employees and three DOL investigators, and Defendants presented testimony from Huang, Zhao, and three former employees. On March 5, 2015, the jury reached a unanimous verdict in favor of the Secretary. Def's ER at 15 (Am. Special Verdict Form). On March 24, 2015, Judge Lasnik entered a judgment permanently enjoining Defendants from violating the FLSA, and ordering payment of damages totaling $1,337,519.20 for unpaid wages and an equal amount of liquidated damages to 101 former employees, as well as compensatory damages for retaliation to four employees. Def's ER at 4 (Mar. 24, 2015 Judgment). Zhao filed a notice of appeal in this Court on April 23, 2015.[3]

[3] As noted in the Statement of Related Cases, Defendant Huang "Jackie" Jie simultaneously filed an appeal arising from the same district court judgment. Huang's opening brief is nearly identical to Zhao's except that Zhao's brief contains additional arguments about her employer status and good faith defense. Because these cases have not been consolidated, the Secretary has filed separate briefs in response to those filed by Zhao and Huang. The Secretary notes that his briefs are substantially similar with the exception of two sections of this response to Zhao's brief—issue 1, portions of section II, and the portion of Section V.A that responds only to Zhao's good faith defense—which do not appear in the Secretary's response to Huang's brief. Where Zhao and Huang have raised identical arguments, the Secretary's brief refers to them collectively as Defendants.

B. Statement of Facts

1. The Operation of the Restaurant and the Spa

Zhao and her then-husband Huang "Jackie" Jie managed and ran the Restaurant and the Spa. Zhao and Huang were married from 1990 until they divorced in 2013. Tr. 321:13–18. The parties stipulated to several facts related to the operation of the Restaurant and Spa and the relationship between the Defendants and the employees. Tr. 366:6–7. In particular, the parties stipulated that Huang, the Restaurant, and the Spa employed the employees listed on Trial Exhibit 18. Tr. 366:23–367:6; DOL ER at 61 (Trial Ex. 18). The parties also stipulated that the Restaurant and Spa were engaged in the operation of an enterprise that "one, . . . conducted related activities performed through unified operation or common control for a common business purpose; two, . . . employed workers in handling, selling or otherwise working on goods or materials that were moved in or produced for commerce; and three, the annual dollar volume of business done by the related entities exceeds $500,000 for each year applicable to these proceedings." Tr. 367:17–368:7. The parties additionally stipulated that the Restaurant operated in Bellis Fair Mall in Bellingham, Washington, from July 2004 to December 31, 2014, and that the Spa operated in Bellis Fair Mall from November 2009 until at least the date of the trial and in Alderwood Mall in

Lynnwood, Washington, from November 10, 2009 until January 31, 2012. Tr. 366:8–16.

2. Zhao's Role in the Restaurant and Spa

Restaurant and Spa employees considered Zhao to be their boss in addition to Huang. Tr. 173:2; 183:24–25; 191:2–3; 212:12–14; 218:10–11; 236:19–20. Zhao recruited and hired at least two employees, Huo Yan Jun and Nicole Han, to work in the Restaurant. Tr. 143:7–17; 234:20–21. Zhao went to the Spa daily and regularly told Spa employees what to do, including when to perform cleaning tasks, when to solicit business, and what attire is appropriate. Tr. 172:16–24; 173:2–3; 173:21–174:6; 191:3–11; 208:13–14. For example, Zhao told a Spa employee to take off his jacket on a day when it was cold inside the mall because it "didn't look very good," Tr. 191:3–11. Zhao also told Spa employees "to stand outside the door [to solicit customers]" and to clean the bathroom or towels, Tr. 172:20–21, and she told at least one employee to "[e]at faster" during a break, Tr. 180:11–17. Zhao regularly told Restaurant employees when to arrive at work, when to leave, and when to take breaks. Tr. 149:12–18; 185:22–186:2; 212:20–24; 218:16–17; 234:17–22. She trained Restaurant employees and "t[old] them what to do." Tr. 322: 11–15. Huang also deferred to Zhao's final decision whether to permit a Restaurant employee to take a day off. Tr. 238.

Zhao's 2013 tax return included a profit or loss statement listing her as the proprietor of the Spa ("JJ Comfort Zone"). Tr. 395:1–11; DOL ER at 50 (Pl's Trial Ex. 5). Zhao at times gave Restaurant employees their paychecks or the portions of their wages paid in cash. Tr. 144:24–25; 213:21. She also signed county health records and State of Washington inspection documents as the "person in charge" at the Restaurant. Tr. 366:19–21; 333:4–334:8; DOL ER at 77 (Trial Ex. 23).

3. Recordkeeping and Pay Practices

Full-time employees at the Restaurant worked an average of 72 hours per week and were paid a straight monthly salary ranging from $1,600 to $2,600 per month, with no overtime pay. Tr. 79:1–4. Spa employees worked an average of 71 to 73 hours per week and were paid a percentage of daily sales (divided among the employees), regardless of hours worked, and with no overtime pay. Tr. 81:16–20. The district court found that Defendants failed to record and maintain required payroll records. Tr. 13:12–16. For instance, Defendants did not keep records of a lodging or food credit, and did not claim such a credit during the DOL investigation. Tr. 273:21–23; 274:8–12. The parties stipulated that "Defendants deducted amounts from employees' wages for rent payments" and that "[i]n most cases, this amount was $10 per day." Tr. 368:16–18; 202:17–25. The rent payments were deducted from the Spa employees' pay before they were paid. Tr.

174:10–18. The apartment for which seven to eight Spa workers collectively paid Defendants (approximately $2,100 to $2,400 per month) had two bedrooms; three people slept in the living room. Tr. 171:20–172:10. The DOL investigation concluded that the deductions for rent were not permissible deductions. Tr. 274:15–275:4.

4. Falsification of Records and Retaliation Against Employees

Defendants threatened and coerced several employees to keep them from cooperating with the DOL's investigation. Nicole Han, who was initially a full time employee at the Restaurant, was told by both Zhao and Huang that her hours were cut because she did not help her employers provide false information about pay practices. Tr. 235:24–237:12. Zhao threatened Ms. Han that if she did not cooperate with their requests to make false statements, Zhao would fire her and she "would not be able to find a job in Bellingham because [Zhao] was acquainted with many business owners there." Tr. 241:5–13. Zhao repeatedly directed Ms. Han to refuse to talk with any DOL investigator and to discourage the investigator from calling back, or if she spoke to an investigator, to write down the questions, say she was too busy to respond at that time, and "immediately telephone" Zhao so that Zhao could "direct [Ms. Han] as to how to call back to give my response." Tr. 239:14–240:8. Zhao also ordered Ms. Han to create false time sheets and encouraged her to copy the times and total hours worked from other documents.

Tr. 242:14–243:21. Huang repeatedly told Ms. Han not to talk "too casually" with the DOL investigator, and he requested that she give false information to his attorney, and that Ms. Han change her telephone number so that the DOL investigator could not reach her. Tr. 241:14–242:4. On December 19, 2014, Huang fired Ms. Han by taking her into the public food court and shouting at her loudly that another employee was willing to make false statements and that Ms. Han was "disobedient" because she did not help him evade the DOL investigation. Tr. 244:19–245:20.

In May 2012, after DOL's investigation was underway, Huang ordered Zi Hao Gao to fill out a time sheet with false work hours of no more than 40 hours per week "in order to deal with the Department of Labor's investigation." Tr. 220:23–221:6. In August 2012, Huang told Mr. Gao that there was a rule that work hours could not exceed 40 hours per week, and they needed the false time sheets in case the DOL investigator came by the Restaurant again. Tr. 221:23–222:23. Mr. Gao believed that he had to prepare the false time sheets because he was told to do so by his employer, and that "if I didn't do what he asked me to do, I thought that I might lose my job," Tr. 222:24–223:4. Mr. Gao's colleague also told him that she believed that if he did not fill out the time sheet he would not be paid. Tr. 223:11–22. Mr. Gao attempted to "hint" that the information on the time sheets was false

by noting that a particular date included as a work day on the time sheet was a holiday, when the mall had been closed. Tr. 225:4–20.

Rui Qiang Xin was also discouraged from speaking with the DOL investigator; specifically, when investigator Ming Sproule came to the Spa, Huang told Mr. Xin "not to say anything randomly" to the investigator. Tr. 191:15–192:6. Similarly, Huang told Zong Min Wang to say "as little as possible." Tr. 206:18–25. Mr. Xin was also ordered to fill out a time sheet for himself and his girlfriend with false work hours indicating they worked no more than 160 hours per month, and was told they could not record more than 160 hours because the DOL was investigating. Tr. 192:16–194:8.

C. District Court Trial Proceedings, Jury Verdict, and Judgment

1. Jury Instructions

At several points during the trial proceedings, the district court judge and counsels discussed the jury instructions. Tr. 249–251; 276:14–280:19; 354:7–361:19. Defendants' counsel had multiple opportunities to object to and to lodge formal exceptions to the final jury instructions and the special verdict form, but in each instance he did not raise any objections. Tr. 358:15–359:6; 360:5–8; 361:18–19. Defendants also agreed with the Plaintiff's Proposed Jury Instructions, which were submitted to the district court on February 25, 2015, and which the district

court used as the basis for the final jury instructions. DOL ER at 9 (Pl's Proposed Jury Instr.).

The twenty-seven final jury instructions and stipulations were given to the jury and read aloud by the judge prior to closing arguments on March 4, 2015. DOL ER at 99 (Court's Instr. to the Jury); Tr. 365–89. In relevant part, the jury instructions advised the jury as follows: Instruction Number 10 describes the Secretary's FLSA minimum wage, overtime, recordkeeping, and retaliation claims, and also explains that Defendants deny all of the claims and deny that Zhao (referred to in the instructions as "Jenny") is an employer for purposes of the FLSA. DOL ER at 109; Tr. 373:9–374:11. Instruction Number 12 explains that the court had already determined that the Defendants failed to keep accurate and complete payroll records and failed to preserve evidence relevant to this litigation. DOL ER at 111; Tr. 374:17–375:10. Instruction Number 14 explains the economic reality factors that the jury should consider to determine whether Zhao is an employer. DOL ER at 113. The instruction also explains that if Zhao is not found to be an employer, then she must prevail on the claims against her. *Id.*; Tr. 376:13–377:9. Instruction Number 17 explains the elements that the jury must find to determine that the Defendants violated the FLSA anti-retaliation provision. DOL ER at 116; Tr. 379:24–381:5. Instruction Number 18 explains that the jury should determine damages for the claims on which the Secretary prevails. DOL

ER at 117; Tr. 381:6–23. Instruction Number 21 explains factors for considering whether Defendants proved that their failure to pay minimum wage and overtime was in good faith. DOL ER at 120; Tr. 384:15–385:2. Instruction Number 23 explains that Defendants' violations are willful if the Defendants "knew or recklessly disregarded the possibility that their failure to pay employees the federal minimum wage and required overtime compensation violated federal law." DOL ER at 122; Tr. 385:22–386:13.

The district court judge, after discussing the matter with the parties, withdrew two proposed jury instructions.[4] The proposed instruction referred to as Number 15 in the trial transcript (Pl's Proposed Jury Instr. 4) indicated that the jury "should decide the case as to each defendant separately." DOL ER at 13 (Pl's. Proposed Jury Instr. 4); Tr. 277:25–278:1; 359:5–6. The judge also removed the instruction referred to as Number 20 in the trial transcript (Pl's Proposed Jury Instr. 39), which explained that the Secretary seeks liability only from those defendants who are determined to be employers, and if the jury found more than one

[4] The numbers of the jury instructions discussed in the transcript refer to a draft of the jury instructions that was handed out in hard copy to the parties by Judge Lasnik on March 3, 2015, but which was not posted to the docket. Tr. 249:15–19. Therefore, the only source in the docket of the *draft* jury instructions is the Plaintiff's Proposed Jury Instructions, which were posted to the docket on February 25, 2015 (Docket No. 132). DOL ER at 9–49. The Secretary has identified that the removed instruction referred to as Number 15 in the transcript corresponds with proposed Instruction Number 4, and that the instruction referred to as Number 20 in the transcript corresponds with proposed Instruction Number 39. DOL ER at 13, 48.

defendant liable for damages, the jury should determine only the Secretary's total damages and the court would allocate responsibility for paying the damages. DOL ER at 48 (Pl's Proposed Jury Instr. 39); Tr. 355:16–17.

2. The Jury's Verdict and the Judgment

The jury's unanimous verdict was recorded on the Amended Special Verdict Form on March 5, 2015. Def's ER at 15–18. The jury was instructed to answer each question on the form in the order in which it was presented. Having been instructed as to the relevant factors to determine employer status and informed that all Defendants other than Zhao stipulated to employer status, the jury found that Zhao "is also an employer." *Id.*; DOL ER at 113 (Instr. 14); Tr. 366:23–367:2. The Amended Special Verdict Form defined "Defendants" as "all those who you have determined are employers." Def's ER at 15. The jury answered "yes" to questions 2(b) and 3(b), which asked if the jury finds that the "Defendants' failure to pay their employees . . . [the minimum wage and overtime] was willful." Def's ER at 16. The jury found that Defendants retaliated against four employees, and awarded damages to those individuals: Nicole Han, Zhong Min Wang, Rui Quiang Xin, and Xi Hao Gao. Def's ER at 17. In response to the final question on the verdict form, "do you find that Defendants have proved by a preponderance of the evidence that their failure to pay employees minimum wage and/or overtime was in good faith," the jury answered "no." Def's ER at 18.

Following the jury's verdict, Judge Lasnik stated that the court expected that the Secretary was "going to ask for doubling of the award pursuant to liquidated damages, which I don't see any reason not to do it." Tr. 430:15–17. Defendants' counsel was given the opportunity to object to the form of the Judgment at the March 24, 2015 hearing for entry of the Judgment, as well as prior to the Secretary's filing of the proposed judgment, but he made no objection. DOL ER at 129 (Mar. 24, 2015 Hearing Transcript 3:10–14); DOL ER at 127 (Notice of Lodging of Proposed Judgment) (noting that counsel for Defendants had no objection to the form or entry of the proposed judgment). Judge Lasnik entered the Judgment on March 24, 2015, ordering injunctive relief and payment of $1,337,519.20 in damages to be paid jointly and severally by Defendants Huang, Zhao, the Restaurant, and the Spa. The judge ordered and adjudged that Defendants pay the "sum of $652,859.62 as liquidated damages," which was the amount of damages for minimum wage and overtime violations found by the jury. Def's ER at 8 (J. at 5).

SUMMARY OF ARGUMENT

The jury properly concluded that Defendants willfully violated the minimum wage, overtime, and anti-retaliation provisions of the FLSA and owed $652,859.62 in back wages for unpaid work and $31,800 in damages for retaliation. The district

court also properly ordered an amount equal to the back wage award as liquidated damages, and held Defendants jointly and severally liable for all of the damages.

1. As a threshold matter, despite numerous opportunities, Defendants failed to object to or preserve any errors in the jury instructions or the special verdict form. Defendants therefore waived all arguments related to the special verdict form, and the standard of review for the jury instructions, in the discretion of the Court, is clear error.

2. If this Court considers the substance of the jury instructions, the jury was properly instructed to determine if Zhao was an employer of all of the employees at the Restaurant and the Spa because it was clear to the jury and the parties that this case was about *all* of the employees, i.e., the employees at both the Restaurant and the Spa. And, although the jury instruction itself did not parse out whether Zhao was the employer of the employees of the Restaurant and the Spa separately, the evidence showed that Zhao was an employer of both sets of employees. The employees in the Restaurant and the Spa considered Zhao to be their boss and received daily supervision from her, Zhao hired at least two employees and threatened to fire at least one employee, Zhao told employees when to take breaks and gave some employees their pay, and Huang deferred to Zhao's decision on whether an employee could take time off. Having been instructed to determine Zhao's employer status under the traditional "economic reality" factors, the jury

therefore properly found that Zhao was an employer of all of the employees at the Restaurant and the Spa. Thus, any possible error as to the jury instruction on employer status was harmless.

3. Similarly, the jury was properly instructed to determine whether Defendants' violations were willful with respect to all of the employees because the jury could not have realistically untangled Defendants' willfulness with regard to each group of employees where the violations and Defendants' actions were substantially related and overlapping. Moreover, even though the jury instruction did not parse out the Restaurant and the Spa employees vis-à-vis the willfulness of Defendants' minimum wage and overtime violations, the evidence supports the jury's willfulness finding for all of the employees. Defendants were specifically made aware of their FLSA obligations via information they received from their accountant and subsequently from meeting with the DOL investigator after the investigation began in February 2012. Defendants demonstrated at minimum reckless disregard for their FLSA obligations when, rather than correcting their pay practices, they began to falsify time records after learning that they had an obligation to pay the minimum wage and overtime. Thus, any possible error in regard to the jury instruction on willfulness would have been harmless.

4. The jury was also properly instructed that adverse action under the FLSA's anti-retaliation provision includes fear of future harm. The standard for

adverse action under the FLSA is whether the action, which may include threats, might have chilled the protected activity of a "reasonable worker" under the conditions of the particular workplace. Here, the employees at issue reasonably feared that, if they did not comply with their employers' demands to lie to DOL investigators and create falsified time records, they would lose their jobs or lose pay. The belief that they would be retaliated against for not acceding to the demands of Defendants was objectively reasonable in a small workplace with primarily immigrant staff, where other employees in the workplace also shared the belief and at least one employee had her hours cut and was told that she was terminated because she was "disobedient" in refusing to comply with similar demands.

5. To avoid liquidated damages under the FLSA, Defendants must show subjective good faith and an objectively reasonable basis for their belief that they were not violating the FLSA. The district court therefore properly awarded liquidated damages to fully compensate the employees for lost minimum wages and overtime because Defendants failed to show that they acted in good faith and had objectively reasonable grounds for believing that their failure to pay the minimum wage and overtime when an employee worked more than 40 hours in a work week did not violate the FLSA. Defendants demonstrated no efforts to conform their behavior to any guidance they received about FLSA compliance

from an accountant or the DOL investigator. To the contrary, Defendants evidenced bad faith by waging an overt campaign to require their employees to falsify time records for the purpose of evading detection of their overtime violations. Moreover, Huang's assertion that he believed that providing some employees with room and board was sufficient compensation is not objectively reasonable because Defendants failed to document the actual cost of the lodging and charged some employees rent for overcrowded housing. Similarly, Zhao's assertions that she was not on notice of her obligations under the FLSA also are not objectively reasonable because she affirmatively ordered an employee to falsify records for the purpose of misleading DOL investigators. Finally, contrary to Defendants' argument on appeal, the district court retained, and exercised, its discretion over whether to award liquidated damages even though the jury had issued findings on Defendants' good faith defense.

ARGUMENT

I. Standard of Review

A. Defendants Did Not Object to Any of the Jury Instructions Given or Withheld or to the Special Verdict Form.[5]

Federal Rule of Civil Procedure 51(c)(1) provides that "[a] party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection." Fed. R. Civ. P. 51(c)(1). Where the court informs the parties of the proposed instructions before giving them to the jury, and gives the parties an opportunity to object before the instructions are delivered, an objection is timely only if made at the time that the opportunity is provided by the court. Fed. R. Civ. P. 51(b)–(c).

Defendants raise several arguments regarding the jury instructions and the special verdict form; however, in no instance did Defendants object or preserve a claim of error pursuant to Federal Rule of Civil Procedure 51 ("Rule 51"). Specifically, Defendants have not properly preserved an error as to any of the instructions because Defendants' counsel took no exceptions to those instructions when the district court provided them with the opportunity to take formal exceptions prior to delivering them to the jury. *See* Tr. 361:18–19. Likewise,

[5] The waiver argument pervades the discrete arguments made below in that it is the threshold argument advanced. For the ease of this Court, and to avoid unnecessary repetition, the Secretary includes that argument in the Standard of Review section rather than fully explicating that argument in each separate substantive argument made below.

Defendants did not object to the special verdict form despite having the opportunity to review it and to object. *See* Tr. 358:15–359:4. Prior to seeking formal exceptions, the district court specifically asked Defendants' counsel on March 4, 2015 whether anything in the jury instructions "jumps out at you as this is just wrong or you left something out or anything like that," to which Defendants' counsel simply answered "No." Tr. 360:5–8. In addition, the district court sought Defendants' view on the court's decision to remove the instruction referred to as Number 15, and Defendants' counsel stated that Defendants were in agreement, albeit "reluctantly," with the court's decision to remove the instruction and to clarify on the special verdict form that "Defendants" included whomever the jury determined to be employers. *See* Tr. 358:15–359:6. Even if Defendants' counsel's reluctant agreement somehow constituted an objection, which it does not, the subsequent assertion that Zhao's employer status was "still a factual issue," Tr. 358:22, failed to "state[] distinctly the matter objected to and the grounds for the objection," Fed. R. Civ. P. 51(c)(1), and furthermore is unrelated to the arguments raised on appeal. Moreover, Defendants agreed, with no changes, to the proposed jury instructions submitted to the district court on February 25, 2015. DOL ER at at 9 (Pl's Proposed Jury Instr.). Thus, because under Rule 51, a party may only assign error to an instruction given if the party properly objected, and may only assign error to the failure to give an instruction if the party requested it and

properly objected to it not being given, *see* Fed. R. Civ. P. 51(d)(1), Defendants failed to properly assign error to the instructions here.

B. Plain Error Review of Jury Instructions is Limited to Obvious Errors Affecting Substantial Rights.

Pursuant to Rule 51(d)(2), however, this "court *may* consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) *if* the error affects substantial rights." Fed. R. Civ. P. 51 (d)(2) (emphasis added). Because Defendants failed to object to any of the jury instructions given or not given, it is in this Court's discretion to consider whether there is a plain error in the instructions, *if* the alleged error affects substantial rights.

This Court has recently explained that under Rule 51(d)(2), "when reviewing civil jury instructions for plain error, we must consider, as we do in the criminal context, whether (1) there was an error; (2) the error was obvious; and (3) the error affected substantial rights." *C.B. v. City of Sonora*, 769 F.3d 1005, 1017–18 (9th Cir. 2014), *cert. denied*, 135 S. Ct. 1482 (2015).[6] The scope of "plain error" review in civil cases as "similar to, but stricter than, the plain error standard of

[6] This Court also noted that in 2003 "Rule 51 was amended to provide for plain error review when a party fails to preserve an objection . . . ." *City of Sonora*, 769 F.3d at 1016. And, this Court noted, "[w]e have since indicated, in dictum, that this amendment abrogated our prior case law, *see Hunter v. Cnty. of Sacramento*, 652 F.3d 1225, 1230 n. 5 (9th Cir. 2011), and we now so hold." *Id.* The case that Defendants cite supporting plain error review, *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981), is not directly applicable because it discusses Rule 51 prior to the 2003 amendments. *See* Zhao Br. at 13.

review applied in criminal cases." *Id.* at 1016. As this Court in *City of Sonora* explained, the "stakes are lower in the civil context and . . . we find it appropriate to consider the costs of correcting an error, and—in borderline cases—the effect that a verdict may have on nonparties." *Id.* at 1018. This Court concluded that "we should exercise our discretion to correct errors under Rule 51(d)(2) only if 'review is needed to prevent a miscarriage of justice, meaning that the error seriously impaired the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* at 1019 (quoting *Diaz-Fonseca v. Puerto Rico*, 451 F.3d 13, 36 (1st Cir. 2006)).

Thus, even if the court finds an error in the jury instructions, if it is "harmless, it does not warrant reversal." *Hunter*, 652 F.3d at 1232 (internal quotation marks and citations omitted).

C. Failure to Object to the Special Verdict Form Constitutes Complete Waiver of Those Arguments on Appeal.

Failure to object to the form of the questions on the verdict form until after the jury has rendered its verdict constitutes a complete waiver of those arguments. *See Yeti by Molly, Ltd. v. Deckers Outdoor Corp*., 259 F.3d 1101, 1109 (9th Cir. 2001) (concluding that the defendants waived objections to the form of the questions on the verdict form by failing to raise them until after the verdict was announced and the jury was released). Where the objection is not waived, a

special verdict form is reviewed for abuse of discretion. *See, e.g.*, Menlo *Logistics, Inc. v. W. Express, Inc.*, 269 F. App'x 715, 719 (9th Cir. 2008) (unpublished).

D. The Jury's Factual Findings and Mixed Questions of Fact and Law

The court's review of a jury's factual findings is limited, and "where the findings are supported by substantial evidence they may not be disturbed on appeal." *Moore v. Telfon Commc'ns Corp*., 589 F.2d 959, 964 (9th Cir. 1978) (citing *Schepp v. Langmade*, 416 F.2d 276, 278 (9th Cir. 1969)). Whether an employer has acted willfully under the FLSA is a mixed question of fact and law; "the factual findings underpinning the determination [are reviewed] for clear error," while the ultimate conclusion is reviewed de novo. *Alvarez v. IBP, Inc.*, 339 F.3d 894, 908 (9th Cir. 2003), *aff'd*, 546 U.S. 21 (2005). The same standard of review is applicable to a determination of what constitutes good faith. *See Bratt v. Cnty of L.A.*, 912 F.2d 1066, 1071 (9th Cir. 1990) ("We review such [mixed] questions de novo to the extent they involve application of legal principles to established facts, and for clear error to the extent they involve an inquiry that is essentially factual."). Similarly, courts generally consider the question of employer status to be a question of law that is reviewed de novo, but "the underlying facts are reviewed under the clearly erroneous standard . . . ." *Bonnette v. Cal. Health & Welfare Agency*, 704 F.2d 1465, 1469 (9th Cir. 1983), *abrogated*

on other grounds by Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 539 (1985)).

II. THE JURY WAS PROPERLY INSTRUCTED TO DECIDE ZHAO'S EMPLOYER STATUS AS TO ALL OF THE EMPLOYEES OF THE RESTAURANT AND SPA WHERE DEFENDANTS FAILED TO OBJECT TO THE INSTRUCTIONS AND THE JURY UNDERSTOOD THAT THE CASE WAS ABOUT ALL OF THE EMPLOYEES; IN ANY EVENT, THE JURY HAD SUFFICIENT EVIDENCE TO FIND THAT ZHAO WAS AN EMPLOYER OF ALL THE EMPLOYEES

Zhao argues that the jury should have been instructed to determine her status as an employer with respect to the Restaurant and Spa employees separately. Zhao Br. at 14. As discussed above, Defendants did not object to any of the jury instructions or the special verdict form. Defendants thus waived any objections to the special verdict form. *See Yeti by Molly, Ltd*, 259 F.3d at 1109. It is in this Court's discretion, however, whether to consider if there exists clear error in the jury instructions that were given or withheld regarding Zhao's employer status. *See City of Sonora*, 769 F.3d at 1017–18. The jury instructions were proper, and do not rise to the level of plain error, in that they did not separate out the employees of the Restaurant and the Spa for purposes of determining Zhao's employer status, because the jury was not confused as to its task; the jury understood that this case was about *all* of the employees at the Restaurant and the Spa. Even if this Court were to conclude that the the jury instructions contain an error in that regard, no substantial right is implicated because the evidence

presented to the jury shows that Zhao was an employer of all of the employees. Thus, even if the instructions regarding Zhao's employer status contained an error, the error would be harmless.

A. Zhao Has Not Shown That the Jury Instructions Regarding Employer Status Were in Error Because They Did Not Distinguish Between the Spa and Restaurant Employees; Indeed, the Jury Understood That This Case Was About *All* of the Employees of the Spa and Restaurant.

The jury was instructed to check "yes" on the special verdict form if it determined that the Secretary proved by a preponderance of the evidence that Zhao was an employer under the "economic reality" factors applied by this Court. Def's ER at 15 (Am. Special Verdict Form); Tr. 376–77. Throughout the trial, the parties and the court presented the issue of Zhao's employer status to the jury as a reflection of her relationship with all of the employees. For example, Huang and the corporate Defendants stipulated that they were "employers" under the FLSA of all of the employees listed on Exhibit 18; the corporate Defendants also stipulated that they were engaged in the operation of a single enterprise. *See* Tr. 366:23–367:25. Exhibit 18, to which Defendants did not object, includes all of the Restaurant and Spa employees together, which necessarily indicates to the jury that both parties viewed the employment relationship at issue to be vis-à-vis all of the employees. *See* DOL ER at 61 (Pl's Trial Ex. 18). The parties further stipulated that the Secretary believes that Zhao "is an employing defendant who is liable as a defendant for *all* violations," and that Defendants believe Zhao "is not an

employing defendant and she is not liable as a defendant for *all* violations." Tr. 367:7–13 (emphases added). These stipulations, read in tandem with the jury instructions, signaled that the jury should determine whether the Secretary proved by a preponderance of the evidence that Zhao was an employer of *all* of the employees.[7] Thus, if the jury did not find that the Secretary proved Zhao's employer status for all the employees, the jury would have had to answer "no" to the employer status question on the verdict form.

Defendants also seem to argue that because the corporate defendants (which are not parties to this appeal) are not "joint employers" of the employees, "Defendants' liability had to be separately established and apportioned with respect to the Spa Employees and Restaurant employees." Zhao Br. 16–17.[8] This

[7] Zhao speculates that if the jury had been asked to consider Zhao's employer status for the Restaurant and the Spa separately, the jury "should have found . . . that Zhao was not an employer of the Spa employees." Zhao Br. at 17. But the record indicates that it is more likely that if the jury had been uncertain about whether Zhao was an employer of all or only a sub-group of the employees, it would have sought counsel from the judge. During its deliberations, the jury sent out several questions to the judge regarding the special verdict form, and those questions did not indicate any confusion about how to respond to the employer status question. *See* Tr. 416–17.

[8] Defendants also assert several facts that are not in the record regarding the relationship between the Restaurant and the Spa and the pay practices at the Restaurant. *See* Zhao Br. at 15. Moreover, Defendants assert facts not in the record that conflict with Defendants' stipulation at trial that the Restaurant and Spa were an enterprise conducting related activities through unified operation or common control for a common business purpose. *See id.*; Tr. 367–368.

argument is flawed because Defendants confuse Zhao's individual employer status with the concept of "joint employment."[9] Zhao is liable for the damages of all of the employees, as were the other Defendants that stipulated to being employers, because the jury found that she was liable as an employer of all of the employees. The test to determine employer status test was plainly and accurately explained in Jury Instruction Number 14. *See* DOL ER at 113 (Instr. 14). Because the only employer status issue for the jury was whether Zhao was an employer and the evidence supported the finding that she was an employer for both the Restaurant and Spa employees, it was unnecessary to consider the relationship between the other employers. *See* Tr. 366–367. Moreover, because Zhao was found to be an employer of all of the Restaurant and Spa employees, the court properly held her jointly and severally liable for the damages owed to those employees. *See* Def's ER at 9 (J. at 6); *see also Solis v. Best Miracle Corp*., 709 F. Supp. 2d 843, 849–50 (C.D. Cal. 2010) (citing *Boucher v. Shaw*, 572 F.3d 1087, 1094 (9th Cir. 2009), for

[9] The Secretary does not even argue that the record indicates that a "joint employment" relationship existed between the employers here. In fact, in its decision denying Defendants' motion for summary judgment, the district court recognized that the Secretary did not argue that Defendants were joint employers. *See* DOL ER at 1 (Order Denying Defs' Mot. for Summ. J.). It also bears noting that the corporate Defendants' stipulated to enterprise coverage, Tr. 367:20–25, and although the analysis of joint employment and single enterprise coverage under the FLSA are "technically separate issues," they are based on substantially the same and related facts. *See Chao v. A-One Med. Servs., Inc*., 346 F.3d 908, 917 (9th Cir. 2003), *cert. denied* 124 S.Ct. 2095 (2004).

the proposition that employers are jointly and severally liable for damages of FLSA-covered employees), *aff'd*, 464 F. App'x 649 (9th Cir. 2011).

In addition, Zhao generally asserts in her issues presented that the district court "improperly with[drew] the proposed jury instructions regarding the separate determination of liability for each defendant and apportionment of damages for each defendant." Zhao Br. at 2. Although Zhao did not address this argument in detail, she appears to claim that including the two proposed instructions that were withdrawn (Instructions 15 and 20 in the transcript) would resolve her concerns with how the jury determined Zhao's employer status. *Id.* at 8–9. This argument fails, however, because neither instruction would have led the jury to determine Zhao's liability with respect to the Restaurant and the Spa employees separately.

The instruction referred to as Number 15 in the transcript (Pl's Proposed Instr. 4) simply stated that the jury "should decide the case as to each Defendant separately." DOL ER at 13; Tr. 277–78. This instruction would have led the jury down exactly the same path that it in fact took: determining Zhao's employer status in relation to all of the employees independently from that of the other employers. Similarly, the instruction referred to as Number 20 (Pl's Prop. Instr. 39) advised in relevant part that the jury should "determine the *liability* of each defendant to the Secretary separately," and if more than one defendant is liable, to "determine the Secretary's total damages," and "not [to] attempt to divide the

damages among the defendants." DOL ER at 48; Tr. 355. Including this instruction also would not have affected the determination of Zhao's liability regarding all of the employees as Zhao suggests, because it similarly would have led the jury to determine whether Zhao was responsible as an employer, and then to determine only the total damages owed. It was the court's responsibility to allocate responsibility for the payment of the damages, which it did by assigning joint and several liability to all of the Defendants. *See* Def's ER at 9 (J. at 6).

Thus, contrary to Zhao's assertions, even if the district court had not withdrawn these two proposed jury instructions, the jury would still have been properly instructed to determine Zhao's liability with respect to all of the employees. Furthermore, a district court's failure to give an instruction is "harmless" where the evidence supports the verdict even if the instruction had been given. *Lambert v. Ackerley*, 180 F.3d 997, 1008 (9th Cir. 1999) (citing *Benigni v. City of Hemet*, 879 F.2d 473, 480 (9th Cir. 1988)). As explained below, the evidence supports the jury's verdict finding that Zhao was an employer of all of the employees.

B. The Evidence Supports the Jury's Finding That Zhao Was an Employer of All of the Restaurant and the Spa Employees.

The term "employer" is defined in section 3 of the FLSA to include "any person acting directly or indirectly in the interest of an employer in relation to an employee . . . ." 29 U.S.C. 203(d). The FLSA further defines "employ" to

"include[] to suffer or permit to work." 29 U.S.C. 203(g). The Ninth Circuit applies a four-factor "economic reality" test to determine employer status under the FLSA: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Gilbreath v. Cutter Biological, Inc*., 931 F.2d 1320, 1324 (9th Cir.1991); *see Bonnette*, 704 F.2d at 1469. However, these factors are "merely guidelines." *Gilbreath*, 931 F.2d at 1324. In determining employer status, the court must look to the "totality of the circumstances," *Hale v. State of Ariz.*, 993 F.2d 1387, 1394 (9th Cir. 1993), because the "[t]he touchstone is the 'economic reality' of the relationship." *Boucher*, 572 F.3d at 1091 (quoting *Goldberg v. Whitaker House Coop., Inc.,* 366 U.S. 28, 33 (1961)).

An employer includes any person who "exercises control over the nature and structure of the employment relationship, or economic control over the relationship . . . ." *Lambert*, 180 F.3d at 1012 (internal quotations and citations omitted). An employee may have multiple individual employers within the same business entity. *See, e.g.*, *Boucher*, 572 F.3d at 1090 (finding three company managers liable as employers). And a supervisor can be held liable as an employer even if the supervisor is not a corporate officer. *See Lamonica v. Safe Hurricane Shutters,*

Inc., 711 F.3d 1299, 1310 (11th Cir. 2013) (noting that "operational control" is more relevant to employer liability than official titles).

For example, in an analogous case, a business owner's spouse who had authority to hire and fire, supervised employees and controlled work schedules, and prepared fraudulent time cards and asked employees to sign them, was an employer because his actions satisfied three elements of the "economic reality" test. *See Best Miracle Corp.*, 709 F. Supp. 2d at 849. In another similar case, a district court found that a restaurant manager was an employer under the "economic realities" test because he "exercised significant managerial authority," had authority to fire and discipline employees, assigned work, gave employees their pay, and generally understood the conditions of the employees' pay. *Yu G. Ke v. Saigon Grill, Inc.*, 595 F. Supp. 2d 240, 265 (S.D.N.Y. 2008) (concluding additionally that the restaurant owner's spouse was individually liable as an employer because, among other things, she made hiring decisions, assigned work hours, informed workers of their pay rate, monitored performance, disciplined employees, held an ownership interest in the corporation, and threatened employees who complained about wages).

Here, the jury had sufficient evidence to find that Zhao was an employer of all the employees under section 3(d) of the FLSA and the traditional "economic reality" test applied in the Ninth Circuit. The evidence demonstrated that Zhao

was an employer because she acted directly and indirectly in the interest of an employer in relation to the employees of both the Restaurant and the Spa. *See* 29 U.S.C. 203(d). The jury heard from eight employee witnesses—three from the Spa and five from the Restaurant—who testified that Zhao behaved as a "boss" and employer toward them and other employees. *See* Tr. 173:2; 183:24–25; 191:2–3; 212:12–14; 218:10–11; 236:19–20.

Specifically, employees testified that Zhao supervised work at the Spa and the Restaurant every day. Tr. 172:20–24; 322:11–15. Zhao hired at least two employees and threatened to fire at least one employee at the Restaurant. Tr. 143:7–17; 234:20–21; 241:5–13. Zhao supervised and controlled employee work at the Spa and Restaurant by directing break times and lengths, informing employees of their work hours, and training and directing work. Tr. 172:16–24; 173:2–174:6; 191:3–11; 208:13–14. Huang deferred to Zhao's decision whether to permit a Restaurant employee to take a day off. Tr. 238. At the Spa, Zhao directed employees to wear certain clothing, to solicit business, and when to take meal breaks and for how long. Tr. 172:20–21; 191:3–11. Zhao also formally asserted herself as an employer by signing health inspection documents as a "person in charge" at the Restaurant, DOL ER at 77 (Trial Ex. 23), and identifying herself as an owner of the Spa on her 2013 tax return, DOL ER at 50 (Trial Ex. 5). Moreover, Zhao asserted herself as an employer with regard to recordkeeping

when she ordered a Restaurant employee to make false statements to investigators and to refuse to talk with the DOL investigators about hours and pay. *See* Tr. 238–41. This evidence more than sufficiently supports the jury's conclusion under the "economic reality" test that Zhao was an employer of all of the employees who worked at the Spa and the Restaurant.

Therefore, even if this Court found that the jury instructions about Zhao's liability as an employer contained an error, no substantial right is implicated because the jury had sufficient evidence to find that Zhao was an employer of *all* of the employees. Any possible error would not require reversal and a new trial, because "an error in instructing the jury in a civil case does not require reversal if the error was 'more probably than not harmless.'" *Lambert v. Ackerley*, 180 F.3d at 1008 (quoting *Coursen v. A.H. Robins Co.*, 764 F.2d 1329, 1337 (9th Cir.1985)).

III. THE JURY WAS PROPERLY INSTRUCTED TO DECIDE WHETHER DEFENDANTS' VIOLATIONS WERE WILLFUL WITH RESPECT TO ALL OF THE EMPLOYEES WHERE DEFENDANTS FAILED TO OBJECT TO THE INSTRUCTIONS AND DISTINGUISHING DEFENDANTS' WILLFULNESS WITH REGARD TO EACH EMPLOYEE WOULD NOT HAVE BEEN PRACTICAL; NONETHELESS, THE JURY HAD SUFFICIENT EVIDENCE TO FIND THAT DEFENDANTS ACTED WILLFULLY

Defendants argue that the jury should have been asked on the special verdict form and in the jury instructions to separately consider whether each Defendant willfully violated the FLSA as to the Restaurant or the Spa employees. Zhao Br. at 14, 17. As discussed above, Defendants waived all objections to the special

verdict form by failing to object to that form at any time, and the court therefore need not consider Defendants' arguments relating to the form of the questions on the special verdict form. As for the jury instructions on willfulness, to which Defendants also did not object, the jury was properly instructed to consider Defendants' actions with respect to all of the employees because it would not have been practical for the jury to distinguish Defendants' willful behavior with regard to each employee. And in any event, the evidence supports the jury's finding that Defendants' violations were willful with respect to *all* of the employees. Thus, even if the instructions regarding Defendants' willfulness contained an error, any possible error would be harmless.

A. The District Court Properly Instructed the Jury to Determine the Willfulness of Defendants' Minimum Wage and Overtime Violations With Regard to All of the Employees Because Defendants' Actions and Inactions in Relation to All of the Employees Were Substantially Intertwined.

The district court properly instructed the jury to determine whether Defendants' minimum wage and overtime violations were willful with regard to all employees, because the violations were substantively the same with respect to each employee and it would have been impractical for the jury to parse out which of Defendants' actions and inactions were specific to each subset of employees.[10] As

[10] Defendants also have not shown, nor does the record support, that the actions of Zhao and Huang were sufficiently dissimilar in terms of willfulness to justify considering them each separately. Moreover, considering each defendant

an initial matter, Huang admitted that he is individually liable as an employer for all of the violations found by the jury by stipulating that he employed all of the employees listed on Trial Exhibit 18. *See* Tr. at 366:23–367:6. The jury's first finding was that Zhao was also an employer of all of the employees. *See* Def's ER at 15 (Am. Special Verdict Form). And in a subsequent finding, the jury determined that Defendants violated the FLSA minimum wage and overtime requirements in their capacity as employers of all of the employees at the Restaurant and the Spa. *Id.* at 2. Further, as discussed in detail below, when Defendants were made aware of their FLSA obligations through meeting with the DOL investigator and receiving guidance from their accountant, that information was applicable to all of the employees. *See* Tr. 83–84; 123–25. Moreover, Defendants' reckless disregard of their FLSA obligations—by ordering Spa and Restaurant employees to falsify records for the purpose of evading detection of their FLSA violations—affected all of the employees at the Restaurant and the Spa. *See* Tr. 192–94 (Spa employee), 220–21, 242–43 (Restaurant employees). Defendants' failure to comply and their cover-up schemes in relation to the

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separately would not affect their liability, because the jury properly found both Huang and Zhao to be employers of all of the employees, and they are therefore jointly and severally liable for the unpaid wages of all of the employees. *See Solis v. Best Miracle Corp*., 709 F. Supp. 2d at 849 (citing *Boucher*, 572 F.3d at 1094); *see also Lee v. Coahoma Cnty, Miss.*, 937 F.2d 220, 226 (5th Cir. 1991) (noting that an individual manager who is an employer under the FLSA may be jointly and severally liable for damages under the FLSA).

Restaurant and the Spa employees were, as demonstrated below, so intertwined that, even if the jury had been instructed to consider Zhao and Huang's willfulness in relation to each subset of employees, it would have been extremely difficult for the jury to tease out when Defendants' behavior was willful in relation to one subset versus the other.

Moreover, Defendants appear to claim on appeal that this issue would have been cured had the court not withdrawn the two proposed instructions discussed in the transcript (Instructions 15 and 20). *See* Zhao Br. at 2, 17. Here, as above, the withdrawn instructions would not have affected the verdict as Defendants suggest. However, neither instruction, which went to separating out the Defendants' liability and determining total damages, would have affected Defendants' concerns on appeal that their willfulness should have been separately determined with respect to the Restaurant and the Spa employees.

The instruction referred to as Number 15 in the transcript, (Pl's Proposed Jury Instr. 4), advising the jury to decide the case as to each Defendant separately, would have led the jury to do just what it did: determine whether Defendants' violations in relation to all of the employees were willful. *See* DOL ER at 13. Relatedly, because under Instruction Number 20 the jury would have been told *not* to apportion damages and to find only the Secretary's *total* damages (if more than one Defendant is liable), *see* DOL ER at 48 (Pl's Proposed Jury Instr. 39), it would

have had no impact on the jury's verdict relating to willfulness vis-à-vis all of the employees. Thus, contrary to Defendants' assertions, the district court did not err by withdrawing these two proposed jury instructions; simply put, the giving of these instructions would not have resulted in the outcome that Defendants' suggest because the jury still would have considered Defendants' willfulness with respect to all of the employees at the Spa and the Restaurant.

B. The Evidence Supports the Jury's Finding That Defendants at Least Recklessly, If Not Knowingly, Disregarded Whether Their Pay Practices Violated the FLSA.

Section 6(a) of the Portal-to-Portal Act, 29 U.S.C. 255(a), provides for a statute of limitations of three years rather than two years for a willful violation of the FLSA. The Supreme Court has held that violations are willful where the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by" the Act. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988); *see Chao v. A-One Med. Servs., Inc.*, 346 F.3d 908, 918 (9th Cir. 2003); *Serv. Emps. Int'l Union, Local 102 v. Cnty of San Diego*, 60 F.3d 1346, 1356 (9th Cir. 1995), *cert. denied*, 516 U.S. 1072 (1996). Willfulness exists where an employer "attempts to evade compliance." *Alvarez v. IBP, Inc.*, 339 F.3d at 909. In particular, an employer's violations are deemed willful where the employer destroyed or otherwise withheld records "to impede the Department [of Labor's] investigation." *Martin v. Deiriggi*, 985 F.2d 129, 135 (4th Cir. 1992); *see, e.g.*,

Solis v. SCA Rest. Corp., 938 F. Supp. 2d 380, 404 (E.D.N.Y. 2013) (concluding that an employer willfully violated the FLSA by "creating false records and requesting employees lie once the DOL began their investigation," and an injunction was therefore appropriate).

Here, the jury had sufficient evidence to find that Defendants at least recklessly, if not also knowingly, disregarded that their pay practices violated the minimum wage and overtime provisions of the FLSA. In particular, the evidence shows that Defendants openly ordered their employees to create falsified time sheets so that they could avoid DOL's detection of their minimum wage and overtime violations. Tr. 192:16–194:8 (Spa employee), Tr. 220:23–221:6, 242:14–243:21 (Restaurant employees). Moreover, Defendants do not contest that their accountant, Diana Long, gave them a document in English and Chinese, explaining the requirements of the FLSA. *See* DOL ER at 136 (Trial Ex. 19); Tr. 123:20–125. The DOL investigation further concluded that the payroll records that Defendants did provide during the investigation were incomplete and inaccurate, because they did not reflect all employees, either did not record any hours worked or did not reflect all hours worked, and did not accurately reflect employees' pay because the records showed that employees were paid hourly when in fact they were paid either a monthly salary (Restaurant) or a cut of daily sales (Spa), regardless of the actual hours worked. Tr. 89–91.

In February and August, 2012, DOL Investigator Ming Sproule met with Huang and explained the recordkeeping, minimum wage, and overtime provisions to him in English and Chinese, after which Defendants began to falsify time records to hide overtime hours. Tr. 83–84; 125:23–127:12. Specifically, Zhao told Nicole Han that she would be fired if she did not help cover up Defendants' violations. Tr. 241:5–13. Huang ordered another employee to falsify time sheets "in order to deal with the Department of Labor's investigation." Tr. 220:23–221:6. Defendants also strongly discouraged employees at the Restaurant and the Spa from speaking with the investigator, telling them not to speak "too casually," Tr. 241, "not to say anything randomly," Tr. 191, and to say "as little as possible," Tr. 206. In sum, Defendants' repeated efforts to evade detection of violations at the Restaurant and the Spa, and to involve their employees in a cover-up, show that they were aware that their pay practices were unlawful with respect to all of the employees and that they recklessly disregarded their FLSA obligations.

Because the jury was properly instructed to determine whether Defendants' violations of the FLSA were willful with respect to all of the employees, Defendants' argument on appeal as to the insufficiency of the instructions should be rejected. However, even if this Court were to find that a clear error existed as to the instruction on willfulness, any such error would be harmless because, as

discussed above, the jury had sufficient facts to find that Defendants' violations were willful with respect to all of the employees.

IV. THE JURY WAS PROPERLY INSTRUCTED THAT ADVERSE ACTION UNDER THE FLSA'S ANTI-RETALIATION PROVISION INCLUDES FEAR OF FUTURE HARM, AND THE EVIDENCE SHOWS THAT THE EMPLOYEES HAD AN OBJECTIVELY REASONABLE FEAR OF ECONOMIC HARM IF THEY DID NOT LIE ABOUT THEIR PAY AT THEIR EMPLOYERS' BEHEST

1. Defendants argue that the jury instruction on retaliation improperly stated the element of "adverse action" because it included fear of future action that would negatively affect the employee. Zhao Br. at 18–19. As discussed above, Defendants failed to object to the jury instruction on retaliation. There is, however, no clear error in that instruction. Rather, the jury was properly instructed on the adverse action element in Instruction 17, because the scope of prohibited retaliation under section 15(a)(3) of the FLSA is broadly interpreted to prevent employees from being dissuaded from asserting concerns about their pay by fear of economic retaliation, and the reasonableness of the employee's fear is analyzed in the context of their particular working environment.

The FLSA's anti-retaliation provision, 29 U.S.C. 215(a)(3), prohibits "any person . . . to discharge *or in any other manner* discriminate against any employee" because the employee has engaged in protected activity under the FLSA. (Emphasis added.) As this Court has noted, because "the FLSA is a remedial statute, it must be interpreted broadly," and the FLSA's anti-retaliation provision,

in particular, should be interpreted to "prevent employees' fear of economic retaliation for voicing grievances about substandard conditions." *Lambert*, 180 F.3d at 1003 (internal quotation marks and citations omitted); *see Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) (explaining that Congress chose to rely on employee complaints to enforce the FLSA, because "effective enforcement could thus only be expected if employees felt free to approach officials with their grievances").

The language describing the prohibited adverse action under section 15(a)(3) of the FLSA is nearly identical to that of the anti-retaliation provision under section 704(a) of Title VII, which prohibits an employer from "discriminat[ing] against any of his employees . . ." for engaging in protected activity under Title VII. 42 U.S.C. 2000e-3; *see, e.g.*, *McBurnie v. City of Prescott*, 511 F. App'x 624, 625 (9th Cir. 2013) (unpublished) (noting that Title VII's anti-retaliation provision is "substantially identical to [the] FLSA anti-retaliation provision"); *see also Ford v. Alfaro*, 785 F.2d 835, 841 (9th Cir. 1986) (analogizing between the FLSA's anti-retaliation provision and similar sections of the National Labor Relations Act). Thus, cases analyzing the scope of the adverse action prohibited under analogous anti-retaliation provisions are applicable to determining the scope of adverse action under section 15(a)(3) of the FLSA. *See id.*

In particular, the Supreme Court's decision in *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53 (2006), broadly interpreted the term "discriminate" under Title VII to include harm that is not directly related to "ultimate employment decisions." *Id.* at 67 (internal quotation marks and citation omitted). The Court in *Burlington Northern* established that the standard for adverse action is whether "a reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'" *Id.* at 68 (quoting *Rochon v. Gonzales*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)). Applying this objective standard requires careful consideration of the context of the particular workplace, the "'real social impact of workplace behavior . . . ,'" *id.* at 69 (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81–82 (1998)), and recognition that "an 'act that would be immaterial in some situations is material in others,'" *id.* (quoting *Washington v. Ill. Dep't. of Revenue*, 420 F.3d 658, 661 (7th Cir. 2005)).

Courts have found that adverse action prohibited under section 15(a)(3) includes threats of future action. *See, e.g.*, *Ford*, 785 F.2d at 841 (threats of future physical harm); *Soler v. G & U, Inc.*, 690 F.2d 301, 302–03 (2d Cir. 1982) (threats of retaliation are "undoubtedly" prohibited by section 15(a)(3)). *Cf. Brodheim v. Cry*, 584 F.3d 1262, 1270 (9th Cir. 2009) (emphasizing, in the context of First Amendment retaliation, that "the mere *threat* of harm can be an adverse action,

regardless of whether it is carried out because the threat itself can have a chilling effect"). Under the *Burlington Northern* standard, the objective reasonableness of the employee's experience of adverse action is analyzed through the lens of the employee's work environment; thus, fear of future action that would negatively affect the employee properly falls within the scope of adverse action, particularly in a workplace with a small number of low-wage employees, most of whom do not speak English, whose employer overtly violated wage and hour regulations and instructed employees to falsify records.

Defendants cite *Connor v. Celanese, Ltd.*, 428 F. Supp. 2d 628 (S.D. Tex. Mar. 31, 2006), for the proposition that an "ultimate employment decision" is required to demonstrate discrimination under section 15(a)(3). *See* Zhao Br. at 19. However, *Connor v. Celanese, Ltd.* was decided three months prior to *Burlington Northern*, which was decided on June 22, 2006, and its holding requiring an "ultimate employment decision" is in direct conflict with the Supreme Court's subsequent holding that retaliation may be found even if an "ultimate employment decision" is not taken. *See Burlington N.*, 548 U.S. at 67. Defendants also cite *Solis v. SCA Rest. Corp.*, 938 F. Supp. 2d 380 (E.D.N.Y. 2013), for the proposition that an express threat to terminate constitutes an adverse employment decision. Zhao Br. at 19-20. The district court in *SCA Restaurant Corp*. correctly stated the *Burlington Northern* standard, and noted that under Second Circuit precedent, even

where the employees were not actually fired, "an action by an employer that carries the 'possibility of termination' is a disadvantageous action." 938 F. Supp. 2d at 399 (quoting *Mullins v. City of N.Y.*, 626 F.3d 47, 54 (2d Cir. 2010)). The mere fact that the district court concluded that the direct threat of termination was an adverse action under section 15(a)(3), however, does not suggest any limitation on the scope of adverse action where the employers' threat may be indirect.

2. Moreover, the jury had sufficient facts to find that Mr. Gao, Mr. Xin, and Mr. Wang experienced adverse action when they were ordered not to cooperate with the DOL investigators and to manufacture fake time sheets in a work environment in which it was reasonable for the employees to believe that they risked economic harm if they did not acquiesce to their employers' demands. *See* Tr. 192:16–194:8; 206:18–25; 222:24–223:4; 233:11–22; 241:5–13.[11]

An objectively reasonable employee would be dissuaded from providing information about their employers' pay practices to the DOL in the work environment in which Mr. Gao, Mr. Xin, and Mr. Wang found themselves. By ordering these employees not to cooperate with the DOL investigator, Defendants overtly communicated that they would be displeased if the employees exercised their right to tell the investigator about their employers' actual pay practices. *See* Tr. 192:16–194:8; 206:18–25; 222:24–223:4; 233:11–22; 241:5–13. Moreover,

[11] On appeal, Defendants do not challenge the jury's verdict that Nicole Han was retaliated against and owed damages for such retaliation. *See* Zhao Br. at 20.

Mr. Gao testified that "if I didn't do what [Huang] asked me to do [create a false time sheet], I thought that I might lose my job." This belief was objectively reasonable because another employee also told Mr. Gao that she believed he would suffer retaliation if he did not create a false time sheet. *See* Tr. 223:11–22. In a small workplace with approximately five employees, as was the case with the Restaurant here (Tr. 336:16–19), it is reasonable for an employee to believe that the employer is likely to discover who shared information with the investigator. And, Mr. Gao's exercise of his statutory rights was in fact chilled, because instead of telling the investigator that his time sheet was falsified, he attempted to subtly hint at it so as to avoid the expected retaliation from his employers. *See* Tr. 225:4–20. Similarly, Mr. Xin was ordered to create a fake time sheet for himself and his girlfriend, which he was told was going to be used to mislead the DOL. Tr. 192:16–194:8. Additionally, in a workplace where many employees rented housing from the employer, Tr. 202, and relied on the employer for transportation, Tr. 187, it was reasonable for employees to believe that, if they did not do as they were told, they would suffer material harm. Furthermore, Nicole Han's subsequent reduction of hours and firing for refusing to assist Defendants in "cheat[ing] on the Department of Labor" show that these employees' fears of retaliation for refusing to cooperate with their employers' demands were realistic and reasonable. *See* Tr. 244–45.

V. THE DISTRICT COURT PROPERLY AWARDED LIQUIDATED DAMAGES BECAUSE DEFENDANTS' VIOLATIONS WERE WILLFUL AND THEY CREATED FALSIFIED RECORDS RATHER THAN COMPLY WITH THE FLSA; ALSO, THE DISTRICT COURT HAD DISCRETION OVER LIQUIDATED DAMAGES EVEN WHERE THE JURY CONSIDERED GOOD FAITH

A. The District Court Properly Awarded Liquidated Damages Because Defendants Failed to Show That They Acted in Good Faith and Had Objectively Reasonable Grounds To Believe That Their Actions Were Not in Violation of the FLSA.

Defendants assert that it was an abuse of discretion for the court to award liquidated damages because "Defendants put forward evidence that they were acting in good faith . . . ." Zhao Br. at 23. Defendants' argument fails, however, because the district court's award of liquidated damages was proper where the jury found Defendants' minimum wage and overtime violations were willful, and Defendants did not show that they acted in good faith and had objectively reasonable grounds to believe that their actions were not in violation of the FLSA.[12]

As an initial matter, a finding by the district court that Defendants had demonstrated good faith would have directly conflicted with the jury's finding that

[12] For the same reasons discussed above in section III.A., Defendants have not shown that it was an error that the jury instructions did not distinguish between the employees of the Restaurant and the Spa with respect to Defendants' good faith defense to liquidated damages. And for the same reasons explained above in footnote 10, Defendants also have not shown that it was an error not to instruct the jury to distinguish between Huang and Zhao's good faith defense, because as employers of all of the employees, Defendants are jointly and severally liable.

Defendants violations of the FLSA minimum wage and overtime provisions were willful. *See* Def's ER at 16 (Am. Special Verdict Form). Indeed, this Court has stated that "[o]f course, a finding of good faith is plainly inconsistent with a finding of willfulness." *A-One Med. Servs., Inc.*, 346 F.3d at 920. Because the willfulness and good faith inquiries are fundamentally the same question, the jury's decision on willfulness can be understood to preclude the court's finding of good faith. *See Alvarez Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1166 (11th Cir. 2008) (holding that "in an FLSA case a jury's finding in deciding the limitations period question that the employer acted willfully precludes the court from finding that the employer acted in good faith when it decides the liquidated damages question," and noting that that holding is in accord with similar holdings in the Second, Fifth, Sixth, Ninth, and Tenth Circuits). Thus, if this Court finds that the jury properly determined that Defendants violations were willful, it does not need to determine whether the district court also had sufficient evidence to determine that Defendants' lacked good faith. But even putting aside the jury's verdict on willfulness, Defendants presented no evidence to support a finding of good faith.

Section 16(c) of the FLSA authorizes the Secretary to "recover the amount of the unpaid minimum wages or overtime compensation and an equal amount as liquidated damages." 29 U.S.C. 216(c). Liquidated damages may be withheld

only if the employer shows that the "act or omission" that resulted in the violations "was in good faith *and* that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA] . . . ." 29 U.S.C. 260 (emphasis added); *see Alvarez v. IBP, Inc.*, 339 F.3d at 910; *Local 246 Util. Workers Union of Am. v. S. Cal. Edison Co.*, 83 F.3d 292, 297 (9th Cir. 1996) ("If the employer fails to carry that burden, liquidated damages are mandatory."). Even if these criteria are met, however, a court may still, in the exercise of its discretion award liquidated damages. *Local 246 Until. Workers Union*, 83 F.3d at 298.

Liquidated damages are compensatory rather than punitive; they compensate employees for losses suffered because of the failure to receive their lawful wage in a timely manner. *See Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572 (1942); *see also Biggs v. Wilson*, 1 F.3d 1537, 1542 (9th Cir. 1993). Thus, "[t]he employer bears the burden of proving good faith and reasonableness, but the burden is a difficult one, with double damages being the norm and single damages the exception." *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132, 142 (2d Cir. 1999); *see A-One Med. Servs., Inc.*, 346 F.3d at 920. Indeed, "unless both predicate facts are show by the employer [subjective good faith and objective reasonableness], the district court is without discretion to avoid imposing liquidated damages." *Brock v. Claridge Hotel & Casino*, 846 F.2d 180, 187 (3d Cir. 1988).

To establish good faith, an employer must "take the steps necessary to ensure its practices complied with the FLSA," *Alvarez*, 339 F.3d at 910 (internal quotation marks and citation omitted); in other words, the employer must "ascertain the dictates of the FLSA and then act to comply with them," *RSR Sec. Servs.*, 172 F.3d at 142. A showing that there was no intentional violation is not sufficient to establish good faith. *See Reich v. S. New Eng. Telecomm. Corp.*, 121 F.3d 58, 71 (2d Cir. 1997); *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 909 (3d Cir. 1991). Nor is conforming with an industry-wide practice sufficient to establish good faith. *Cooper Elec. Supply Co.*, 940 F.2d at 910 ("[T]he employer's adherence to customary and widespread industry practices that violate the Act's overtime pay provision is not evidence of an objectively reasonable good faith violation."); *see S. New Eng. Telecomm. Corp.*, 121 F.3d at 71. A "reckless belief" that a particular pay practice would justify nonpayment of overtime or minimum wages is insufficient where the employer "had [not] secured some objective authority, or at the very least sought advice, on the legality" of the pay practice. *A-One Med. Servs.*, 346 F.3d at 920.

Huang argues that he "believed that the employees were being fairly compensate[d] under the FLSA because he was providing transportation, food and room and board to the Restaurant and Spa employees," and providing those things was a "traditional method of compensation in the Chinese community." Zhao Br.

at 22. Huang's argument fails, however, because even if Defendants had shown that such pay practices are common in the Chinese community, conforming with industry-wide practice is not sufficient to show an objectively reasonable basis for their actions. *See*, *e.g.*, *Cooper Elec. Supply Co.*, 940 F.2d at 910. Furthermore, Huang's assertion does not even demonstrate subjective good faith, because Defendants stipulated that they "deducted amounts from employees' wages for rent payments" and that "[i]n most cases, this amount was $10 per day." Tr. 368:16–18; 202:17–25. The rent payments were deducted from the Spa employees' pay before they were paid, Tr. 174:10–18, and Defendants did not claim a lodging or food credit during the DOL investigation, Tr. 274:8–12.[13] The Wage and Hour Division investigation concluded that the deductions for rent were not permissible deductions under the FLSA. Tr. 274:15–275:4. The DOL investigators' conclusion was reasonable because Defendants did not keep records of a lodging or food credit as required by section 3(m) of the FLSA, Tr. 273:21–23, and even if

[13] Defendants cite a single district court case, *Cook v. C. Economou Cheese Corp.*, 17 Wage and Hour Cas. (BNA) 302 (D. Vt. 1966), for the proposition that providing "a house, rent-free" demonstrates a good faith failure to pay overtime. Zhao Br. at 22. The court in *Cook*, however, provided minimal reasoning, and specified that the housing provided to the farm manager was "rent free," which stands in contrast to Defendants' stipulation that they charged employees $10 per day for rent. And, *Cook* indicates that the employee there was provided with an entire house, whereas the employees here were provided with (to the extent they did not pay rent) crowded shared rooms. (This case does not appear to be cited in any Westlaw database; for the convenience of the court, the Secretary has attached as Addendum B to his brief a copy of this decision.)

they had, Defendants did not demonstrate that the housing or food allegedly provided was credited at a "reasonable cost, as determined by the Administrator," 29 U.S.C. 203(m).[14]

Huang also failed to demonstrate good faith because he does not even assert that he attempted to comply with the FLSA or to seek advice on the legality of Defendants' pay practices; in fact, Huang admitted that, at least for the Spa employees, "[t]he eight hour work schedule was really meant for reporting tax. It didn't really accurately reflect the actual work hours." Tr. 342:11–13. Even more brazenly, Huang told employees that he wanted them to falsify time records because he knew that records showing employees working more than 40 hours per week would show that he failed to pay overtime. *See* Tr. 192:16–194:8; 220:23–222:23; 241:14–242:4. Huang patently failed to demonstrate a subjective belief that he was in compliance with the FLSA, and even if he did demonstrate subjective good faith, his alleged belief that he was complying with the law was objectively unreasonable.

Zhao's assertions of good faith on appeal also fail. Zhao essentially reasserts that she was only an employee, and that she was "not separately put on notice of her alleged violation of the FLSA by the Dept. of Labor . . . ." Zhao Br.

[14] For example, the apartment for which seven to eight Spa workers collectively paid Defendants approximately $2,100 to $2,400 per month had two bedrooms with three people sleeping in the living room. Tr. 171:20–172:10.

at 23. As discussed in detail above, the jury had ample evidence to determine that Zhao was an employer who is liable for all of the FLSA violations found by the jury. And Zhao's complicity in the violations, and lack of subjective good faith, is evidenced by her threatening Ms. Han with firing if she did not make false statements about Defendants' pay practices to investigators and ordering Ms. Han to produce false time sheets. *See* Tr. 239:14–240:8; 241:5–13. Zhao's assertion that she did not interact with the DOL investigators also fails to show good faith because an employer need not have been put on notice of alleged violations by DOL to have acted in bad faith. The obligation to comply with the FLSA and to determine how to comply falls squarely on the employer and Zhao not only indicates that she knew that Defendants' pay practices were wrong, but she also does not point to any evidence that she attempted to comply. Thus, this court should affirm the district court's award of liquidated damages.

B. The District Court Exercised Its Discretion to Consider the Jury's Views on Defendants' Good Faith Defense.

Defendants also argue that "[a]lthough the [district] court imposed liquidated damages after the jury trial, any discretion not to award liquidated damages was eliminated by the submittal of the good faith defense to [the] jury," and it was "plain error for the court to let the jury to decide the good faith defense." Zhao Br.

at 21.[15] Defendants' argument fails because nothing in the record suggests that the district court did not exercise its discretion over the award of liquidated damages.

> Section 11 of the Portal to Portal Act provides that
>
> > if the employer shows to the satisfaction of the court that the act or omission giving rise to [a violation of the FLSA minimum wages or overtime provisions] was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may in its sound discretion, award no liquidated damages . . . .

29 U.S.C. 260. The Secretary does not dispute that the language of this section indicates that the discretion to decide not to award liquidated damages under the FLSA lies with the court rather than with the jury. *See Sanford-Orlando Kennel Club, Inc.*, 515 F.3d at 1163. The court may, however, obtain and consider the jury's views on the issue of the good faith defense. *See*, *e.g.*, *Ulit v. Advocate S. Suburban Hosp.*, No. 08-cv-2698, 2009 WL 5174686 at *1 (N.D. Ill. 2009) (considering the jury's "advisory verdict" on good faith); *Moon v. Technodent Nat'l, Inc.*, No. 5:06-cv-358-ORL, 2008 WL 2117053, at *1 (M.D. Fla. 2008) (same); *Robinson v. Food Service of Belton, Inc.*, 415 F. Supp. 2d 1232, 1239–40 (D. Kan. 2005) (on a motion for judgment as a matter of law following jury trial, considering the jury's verdict on good faith to be "advisory"); *Templet v. Hard*

[15] As discussed above, Defendants did not object to the special verdict form, and therefore waived any arguments on appeal related to it.

Rock Constr. Co., No. Civ.A. 02-0929, 2003 WL 22717768, at *1–2 (E.D. La. 2003).

Here, there is nothing in the record to suggest that the district court did not consider the issue of good faith and liquidated damages to be within its discretion nor is there anything to indicate that the district court did not exercise that discretion. Judge Lasnik's statement after the verdict that he expected the Secretary to seek liquidated damages, "which I don't see any reason not to do it," demonstrates that he viewed the issue of liquidated damages to remain in his domain. *See* Tr. 430:15–17. By signing the Judgment, in which Judge Lasnik "ordered and adjudged" that Defendants pay the "additional sum of $652,859.62 as liquidated damages," he exercised his discretion to award liquidated damages; he could have chosen not to award liquidated damages if he believed that Defendants had demonstrated a good faith defense. *See* Def's ER at 8 (J. at 5). It makes no difference whether the jury may have believed its verdict to be binding; because the issue raised on appeal is whether the court exercised its discretion, what is relevant is whether the district court understood that it had ultimate discretion over the issue of liquidated damages. The record demonstrates that the district court

judge considered the final decision on liquidated damages to be a matter for the court.[16]

CONCLUSION

For the foregoing reasons, this Court should affirm the jury's verdict and the district court's judgment in all respects.

Respectfully submitted,

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[16] Even if this Court were to conclude that the district court improperly presented the issue of good faith to the jury, the appropriate relief would be to remand the issue of the good faith defense and liquidated damages to the district court so that it can provide reasoning for its exercise of discretion. If this Court finds remand appropriate for more explanation from the district court, no additional evidentiary hearing is necessary, because Defendants had the full opportunity to present their good faith defense at trial, and an additional hearing "would not shed any additional light on the issues." *Robinson*, 415 F.Supp.2d at 1239 n.3.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, counsel for the Secretary identifies *Secretary of Labor v. Huang "Jackie" Jie*, No. 15-35323, as a related case involving the same or closely related legal issues arising from the same transaction and events, which is currently pending in the Ninth Circuit, on appeal from the same district court judgment from the United States District Court for the Western District of Washington (*Secretary of Labor v. Huang "Jackie" Jie, Zhao "Jenny" Zeng Hong, Pacific Coast Foods, Inc., d/b/a J & J Mongolian Grill, and J & J Comfort Zone, Inc., d/b/a/ Spa Therapy*, Case No. 2:13-cv-00877-RSL). *See supra* n.3, explaining that the Secretary's briefs in response to the briefs filed by Zhao and Huang are substantially similar with the exception of two sections in response to arguments raised only by Zhao.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

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CERTIFICATE OF SERVICE AND ECF COMPLIANCE

I certify that on this 30th day of September, 2015, I caused the Secretary of Labor's Response Brief to be electronically filed via the Court's CM/ECF system. I certify that I served this brief electronically on all counsel of record through the Court's electronic filing system.

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ADDENDUM A

RELEVANT STATUTORY PROVISIONS

FAIR LABOR STANDARDS ACT,
29 U.S.C. 201 *et seq*.

29 U.S.C. 203

§ 203. Definitions

As used in this chapter--

* * * * *

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

* * * * *

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

* * * * *

(m) "Wage" paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees: *Provided*, That the cost of board, lodging, or other facilities shall not be included as a part of the wage paid to any employee to the extent it is excluded therefrom under the terms of a bona fide collective-bargaining agreement applicable to the particular employee: *Provided further*, That the Secretary is authorized to determine the fair value of such board, lodging, or other facilities for defined classes of employees and in defined areas, based on average cost to the employer or to groups of employers similarly situated, or average value to groups of employees, or other appropriate measures of fair value. Such evaluations, where applicable and pertinent, shall be used in lieu of actual measure of cost in determining the wage paid to any employee. In determining the wage an employer is required to pay a tipped employee,

the amount paid such employee by the employee's employer shall be an amount equal to--

(1) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on August 20, 1996; and

(2) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in paragraph (1) and the wage in effect under section 206(a)(1) of this title.

The additional amount on account of tips may not exceed the value of the tips actually received by an employee. The preceding 2 sentences shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

* * * * *

29 U.S.C. 215

§ 215. Prohibited acts; prima facie evidence

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person--

* * * * *

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee;

* * * * *

PORTAL-TO-PORTAL ACT,
29 U.S.C. 251 *et seq.*

29 U.S.C. 255

§ 255. Statute of limitations

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], the Walsh-Healey Act, or the Bacon-Davis Act--

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

29 U.S.C. 260

§ 260. Liquidated damages

In any action commenced prior to or on or after May 14, 1947 to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216 of this title.

FEDERAL RULE OF CIVIL PROCEDURE

Fed. R. Civ. P. 51

Rule 51. Instructions to the Jury; Objections; Preserving a Claim of Error

(a) Requests.

(1) *Before or at the Close of the Evidence.* At the close of the evidence or at any earlier reasonable time that the court orders, a party may file and furnish to every other party written requests for the jury instructions it wants the court to give.

(2) *After the Close of the Evidence.* After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated by an earlier time that the court set for requests; and

(B) with the court's permission, file untimely requests for instructions on any issue.

(b) Instructions. The court:

(1) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;

(2) must give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered; and

(3) may instruct the jury at any time before the jury is discharged.

(c) Objections.

(1) *How to Make.* A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection.

(2) *When to Make.* An objection is timely if:

(A) a party objects at the opportunity provided under Rule 51(b)(2); or

(B) a party was not informed of an instruction or action on a request before that opportunity to object, and the party objects promptly after learning that the instruction or request will be, or has been, given or refused.

(d) Assigning Error; Plain Error.

(1) *Assigning Error.* A party may assign as error:

(A) an error in an instruction actually given, if that party properly objected; or

(B) a failure to give an instruction, if that party properly requested it and--unless the court rejected the request in a definitive ruling on the record--also properly objected.

(2) *Plain Error.* A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.

ADDENDUM B

COOK v. ECONOMOU CHEESE CORP.

U.S. District Court, District of Vermont

COOK et al. v. C. ECONOMOU CHEESE CORPORATION, No. 4221 January 18, 1966

FAIR LABOR STANDARDS ACT

—Enforcement — Employer wage suit—Class action—Judgment • 40.4446

In class action brought by employees under FLSA, back overtime pay, liquidated damages, and reasonable attorneys' fees are awarded to employees, although liquidated damages are denied for employee whose job was manager of employer's farm and who received a house, rent free, and mileage related to his work.—Cook v. C. Economou Cheese Corp. (DC Vt, 1966) 17 WH Cases 302.

Class action by employees to recover back overtime pay, liquidated damages, and attorneys' fees under Fair Labor Standards Act. Judgment for employees.

Full Text of Opinion

GIBSON, District Judge:—The plaintiffs, George O. Cook, Carroll G. Clark, Joseph L. Hendee and Robert L. Brace, instituted this action under the Fair Labor Standards Act, 29 U.S.C. § 201-216 alleging that the defendant failed to pay plaintiffs for overtime worked in accordance with the provisions of said Act. Trial by court was held in Rutland, Vermont on December 1, 1965 and continued on December 20, 1965.

Findings of Fact

1. George O. Cook was employed by C. Economou Cheese Corporation between March 18, 1963 and December 10, 1964.

2. Carroll G. Clark was employed by C. Economou Cheese Corporation between March 22, 1963 and September 30, 1964.

3. Joseph L. Hendee was employed by C. Economou Cheese Corporation between March 25, 1963 and May 27, 1964.

4. Robert L. Brace was employed by C. Economou Cheese Corporation between April 30, 1964 and November 28, 1964.

5. During the time that the four above-named employees were employed by the defendant, the employees were engaged in the production of goods or in commerce as defined by the Fair Labor Standards Act, 29 U.S.C. § 201-216 and therefore were within the provisions of the said Act.

6. The defendant-employer has not pleaded any exemption to the Fair Labor Standards Act and therefore has waived any such exemption.

7. During the time that the four above-named employees were employed by the defendant they regularly worked more than forty hours per workweek for the defendant.

8. During the time of employment, the employees-plaintiffs were never paid at the rate of one and one-half times their regular wage rates for the hours they worked in excess of forty hours per workweek.

9. The unpaid overtime compensation under the Fair Labor Standards Act due the plaintiff George O. Cook for the period of employment between March 18, 1963 and December 10, 1964 is $936.95.

10. The unpaid overtime compensation under the Fair Labor Standards Act due the plaintiff Carroll G. Clark for the period of employment bebetween March 22, 1963 and September 30, 1964 is $1240.68.

11. The unpaid overtime compensation under the Fair Labor Standards Act due to the plaintiff Joseph L. Hendee for the period of employment between March 25, 1963 and May 27, 1964 is $932.06.

12. The unpaid overtime compensation under the Fair Labor Standards Act due the plaintiff Robert L. Brace for the period of employment between April 30, 1964 and November 28, 1964 is $178.71.

13. The defendant, C. Economou Cheese Corporation, has not shown to the satisfaction of the Court that the omission of overtime compensation due the plaintiffs, Geroge O. Cook, Joseph L. Hendee and Robert L. Brace, was in good faith and based on reasonable grounds, and therefore, the Court finds that liquidated damages be awarded pursuant to 29 U.S.C. § 216(b).

14. Since the plaintiff, Carroll G. Clark, was employed as manager of the farm owned and operated by the defendant and as part of his compensation as manager received a house, rent free, and mileage related to his work, the Court finds that liquidated damages should not be awarded to Carroll G. Clark.

15. The liquidated damages to be awarded to George O. Cook pursuant to § 216(b) are $936.95.

16. The liquidated damages to be awarded to Joseph L. Hendee pursuant to § 216(b) are $932.06.

17. The liquidated damages to be awarded to Robert L. Brace pursuant to § 216(b) are $178.71.

18. Under 29 U.S.C. § 216(b), the Court, in addition to any judgment awarded to the plaintiffs, shall allow a reasonable attorney's fees to be paid by the defendant. The Court finds that the sum of $1334.00 is a reasonable attorney's fee and orders the defendant to pay same.

Order

The Court, therefore, orders the defendant to pay forthwith to the plaintiffs a total of $3288.40 in compensatory damages; a total of $2047.72 in liquidated damages; and to the attorney for plaintiffs a total of $1334.00 as a reasonable attorney's fee.
