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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

LAVON GODFREY and GARY GILBERT, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

OAKLAND PORT SERVICES CORP., d/b/a AB TRUCKING, and DOES 1 through 20, inclusive,

Defendants.

Case No. RG08379099

PLAINTIFFS'NOTICE OF LODGING OF FEDERAL AUTHORITIES IN SUPPORT OF OPENING POST-TRIAL BRIEF

Trial Date: February 14, 2012
Judge: Hon. Robert B. Freedman

EXHIBIT	AUTHORITY
A	*Dole v. Odd Fellows Home Endowment Bd.* (4th Cir. 1990) 912 F.2d 689
B	*Ontiveros v. Zamora* (2009) 2009 U.S. Dist. LEXIS 13073
C	*Reich v. Bay, Inc.* (5th Cir. 1994) 23 F.3d 110
D	*Reich v. Japan Enters. Corp.* (9th Cir. 1996) 1996 U.S. App. LEXIS 17677
E	*United States v. Meyers* (9th Cir. 1988) 847 F.2d 1408
F	*United States v. Rizk* (9th Cir. 2011) 660 F.3d 1125

//

G *Wirtz v. Savannah Bank & Trust Co.*
(5th Cir. 1966) 362 F.2d 857

Dated: April 12, 2012

WEINBERG, ROGER & ROSENFELD
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118212/664208

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Exhibit A

Exhibit A

LexisNexis®

ELIZABETH H. DOLE, Secretary of Labor, United States Department of Labor, Plaintiff-Appellee, v. ODD FELLOWS HOME ENDOWMENT BOARD, a corporation trading as the I.O.O.F. HOME OF ELKINS, WEST VIRGINIA, and the BOARD OF DIRECTORS OF THE ODD FELLOWS HOME, a corporation trading and doing business as the I.O.O.F. HOME OF ELKINS, WEST VIRGINIA, Defendants-Appellants

No. 89-2455

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

912 F.2d 689; 1990 U.S. App. LEXIS 14568; 116 Lab. Cas. (CCH) P35,379; 29 Wage & Hour Cas. (BNA) 1537

July 16, 1990, Argued
August 21, 1990, Decided

SUBSEQUENT HISTORY: [**1] Rehearing and Rehearing In Banc Denied September 17, 1990, Reported at: *1990 U.S. App. LEXIS 22985*.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of West Virginia, at Clarksburg. William M. Kidd, Senior District Judge. 84-96-E(K).

DISPOSITION: AFFIRMED.

COUNSEL: Argued: Richard Lynn Mills, Rood and Mills, L.C., Huntington, West Virginia, for Appellant, Board of Directors of the Odd Fellows Home.

James Timothy Meisel, Huntington, West Virginia, for Appellant Odd Fellows Home Endowment Board.

Wendy Beth Bader, United States Department of Labor, Washington, District of Columbia, for Appellee.

On Brief: Robert P. Davis, Solicitor of Labor, Monica Gallagher, Associate Solicitor, Linda Jan S. Pack, Counsel for Appellate Litigation, Marshall H. Harris, Regional Solicitor, United States Department of Labor, Washington, District of Columbia, for Appellee.

JUDGES: Ervin, Chief Judge, and Phillips and Murnaghan, Circuit Judges.

OPINION BY: PHILLIPS

OPINION

[*690] PHILLIPS, Circuit Judge.

The question is whether the Fair Labor Standards Act applies to the Independent Order of Odd Fellows Home in Elkins, West Virginia. The Secretary of Labor [**2] brought this suit against the Odd Fellows Home Endowment Board and the Board of Directors of the Odd Fellows Home seeking to enjoin appellants from violating the minimum wage, overtime, and recordkeeping requirements of the Act. The district [*691] court granted partial summary judgment in favor of the Secretary on the coverage issue and later granted the requested injunctive relief, enjoining appellants from further violations and ordering payment of back wages plus prejudgment interest. Appellants challenge the district court's ruling on the applicability of the Act. Finding no error, we affirm.

I

The Grand Lodge of the Independent Order of Odd Fellows Lodge of West Virginia has owned and operated the Odd Fellows Home ("the Home") in Elkins, West Virginia, since 1910. [1] The Home cares for Odd Fellows members in good standing who are unable to earn a livelihood due to infirmities, age, or physical affliction, and are without means of support. The Home also provides care for infirm or helpless wives or widows of such members, and helpless children of members. [2] From 1980

to 1987, the Home averaged approximately 13 to 16 residents, all aged 65 years or older.

1 The West Virginia Code provides statutory authority for the establishment of Odd Fellows homes. *See W. Va. Code § 35-3-1* (1985) ("It shall be lawful for the grand lodges of the . . . Independent Order of Odd Fellows . . . to acquire . . . and hold the same for the purpose of establishing . . . homes or asylums for the care and support of orphans and widows of deceased members, and of *disabled and aged members of said organizations in indigent circumstances*, respectively, such quantity of real estate within this State, as shall be necessary. . . .") (emphasis added).

[**3]

2 Indigent or aged members of Rebekah Lodges in West Virginia also may receive care at the Home.

The Board of Directors of the Home ("Home Board") manages the affairs of the Home. The Odd Fellows Home Endowment Board ("Endowment Board") collects, maintains, and invests funds for disbursement to the Home Board for the maintenance and operation of the Home. The Grand Lodge controls the Home Board, electing four of the Home Board's seven members from the Lodge's membership and appointing its Grand Master and Grand Secretary to serve as ex officio members. [3] The members of the Home Board are also the members of the Endowment Board.

3 The seventh board member is from the Rebekah Assembly.

The Home Board employs a superintendent to manage the day-to-day affairs of the Home and a farm manager to manage the farm property owned by the Home. The Home employs personal attendants, who assist residents in taking care of their [**4] personal care needs, housekeepers, laundry attendants, cooks and dining room attendants, and maintenance workers. Most of the output from the farm is consumed at the Home; some of the surplus produced is sold. The Home also purchases products for use at the home, including food, laundry supplies, and other materials that have moved in interstate commerce.

The Secretary of Labor ("the Secretary") initially brought a civil action under the Fair Labor Standards Act ("FLSA" or "the Act"), *29 U.S.C. §§ 201-219*, against the Home in 1976. The Secretary voluntarily dismissed that action without prejudice in 1978. Department of Labor personnel continued to investigate the Home to determine compliance with the FLSA. This action was filed May 25, 1984, pursuant to section 17 of the Act, *id.* § 217, seeking to enjoin the Endowment Board and the Home Board [4] from violating the minimum wage, overtime, and recordkeeping provisions of the Act. The Secretary also sought to enjoin appellants from withholding back wages allegedly owed to the Home's employees.

4 This action was initially filed against only the Endowment Board. The Secretary later amended her complaint to add the Home Board as a defendant.

[**5] Appellants moved for summary judgment; the Secretary responded and filed a cross-motion for partial summary judgment on the coverage issue. The district court referred the case to a magistrate for proposed findings of fact and a recommended disposition. [5] The magistrate concluded that appellants' operations constituted an "enterprise engaged in commerce or in the [*692] production of goods for commerce," and that the Home was "an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution." *See id. § 203(r), (s)*. The magistrate recommended that the Secretary's motion for partial summary judgment be granted; the district court, after de novo review, adopted the findings and recommendations of the magistrate.

5 *See 28 U.S.C. § 636(b)(1)(B)*; *Fed. R. Civ. P. 72(b)*.

After the parties filed proposed pretrial orders, the district court referred the case to a magistrate, designated as a special [**6] master, [6] for consideration of the back wages issue. The magistrate reaffirmed his conclusion that appellants' activities constituted an enterprise engaged in commerce within the meaning of the Act. The magistrate recommended that the court enter a permanent injunction restraining future violations of the Act and ordering payment of withheld minimum wage and overtime compensation in the amount of $ 177,509.60, plus prejudgment interest and costs. The district court adopted the magistrate's report, enjoining future violations of the Act and restraining the withholding of unpaid minimum wage and overtime compensation.

6 *See 28 U.S.C. § 636(b)(2)*; *Fed. R. Civ. P. 53(b)*.

This appeal followed. Appellants' principal claim is that the Act is inapplicable to their activities as a matter of law. Alternatively, although they filed the initial summary judgment motion, they now claim that genuine issues of material fact on the coverage issue should preclude summary judgment. Finally, they [**7] contend that the Secretary should be estopped from attempting to enforce the Act against the Home because of the government's previous non-enforcement of the Act. We ad-

dress the coverage issue first, and then the estoppel question.

II

A

The minimum wage and maximum hour provisions of the Act apply to the employees of any "enterprise" engaged in commerce or in the production of goods for commerce. *29 U.S.C. §§ 206, 207.* The Act defines "enterprise" as follows:

> "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units . . ., but shall not include the related activities performed for such enterprise by an independent contractor. . . .

Id. § 203(r). [7] The Act thus requires a three-part showing to bring an entity or entities within the definition of enterprise: 1) the entity or entities must engage in "related activities," 2) performed through "unified operation" or "common control," 3) for a common [**8] business purpose. *See Brock v. Hamad, 867 F.2d 804, 806 (4th Cir. 1989)* (per curiam).

> 7 The statutory definition of "enterprise" was amended in 1989, effective April 1, 1990. *See 29 U.S.C. § 203(r)(1) (1990).* The relevant provisions quoted in the text were not affected by the amendment.

Activities are deemed "related" for purposes of the Act when they are the same or similar, such as those of individual retail stores in a chain, or when they are "auxiliary or service activities." *See 29 C.F.R. § 779.206(a) (1989)* (quoting S. Rep. No. 145, 87th Cong., 1st Sess. 41 (1961)). Auxiliary and service activities include generally "all activities which are necessary to the operation and maintenance of the particular business," such as warehousing, bookkeeping, or advertising. *Id.; see also id. § 779.208* (additional activities which are "related activities"). When different business entities are involved, the critical inquiry is whether there is "'operational [**9] interdependence in fact.'" *See Donovan v. Easton Land & Dev., Inc., 723 F.2d 1549, 1551 (11th Cir. 1984)* (quoting *Brennan v. Veterans Cleaning Serv., Inc., 482 F.2d 1362, 1367 (5th Cir. 1973)).* Entities which provide mutually supportive services [*693] to the substantial advantage of each entity are operationally interdependent and may be treated as a single enterprise under the Act. *See Easton Land & Dev., 723 F.2d at 1551-52* (hotel and lounge are not single enterprise where each operated separately and no substantial advantages accrued to hotel by operation of the lounge); *Veterans Cleaning Serv., 482 F.2d at 1366-67* (operational interdependence and shared public image of three separate corporations involved in the "cleaning business"); *Wirtz v. Savannah Bank & Trust Co., 362 F.2d 857, 860-61 (5th Cir. 1966)* (bank's operation of office building and leasing of space to outside tenants auxiliary to its principal business); *Marshall v. Elks Club, 444 F. Supp. 957, 966 (S.D.W. Va. 1977)* ("symbiotic relationship" of club and lodge support finding of single enterprise).

The [**10] Secretary's regulations define "unified operation" as "combining, uniting, or organizing [related activities'] performance so that they are in effect a single business unit or an organized business system which is an economic unit directed to the accomplishment of a common business purpose." *29 C.F.R. § 779.217 (1989).* "Control" is the power to "direct, restrict, regulate, govern, or administer the performance" of the related activities, and "common control" exists "where the performance of the described activities are controlled by one person or by a number of persons, corporations, or other organizational units acting together." *Id. § 779.221.* While ownership may be an important factor in determining common control, the focus of the inquiry is the *performance* of the related activities. Common control of performance may be established in the absence of common ownership. *Id. §§ 779.222, 779.224.*

The Act itself defines as activities performed for a "business purpose" activities "in connection with the operation of . . . an institution primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution, [**11] " regardless of whether such institution is operated for profit or not for profit. *29 U.S.C. § 203(r)(1).* [8] Homes for the care of the aged are covered by the Act, *see, e.g., Marshall v. Sunshine & Leisure, Inc., 496 F. Supp. 354 (M.D. Fla. 1980);* homes for the care of indigents are not covered by the Act, *see Brennan v. Harrison County Mississippi, 505 F.2d 901 (5th Cir. 1975).*

> 8 This provision is now contained in *29 U.S.C. § 203(r)(2)(A) (1990).*

B

The Act applies to an "enterprise" only if "engaged in commerce or in the production of goods for com-

merce." The statutory definition includes an enterprise which has employees "handling, selling, or otherwise working on goods or materials that have been moved in . . . commerce," and which is engaged in the operation of an institution "primarily engaged in the care of the sick, the aged, the mentally ill or defective who reside on the premises of such institution." *29 U.S.C. § 203* [**12] *(s)(5)*. [9] Local business activities are subject to the Act when the enterprise employs workers who handle goods or materials that have moved in interstate commerce. *See Brock v. Hamad, 867 F.2d at 808.*

9 As amended in 1989, the Act now provides that an enterprise engaged in the operation of an institution primarily engaged in the care of the sick or aged who reside on the premises of such institution is an enterprise engaged in commerce. *29 U.S.C. § 203(s)(1)(B) (1990)*. The statute no longer explicitly requires that the employees of such an institution must have handled, sold, or otherwise worked on goods that had moved in interstate commerce.

III

In reviewing the district court's grant of summary judgment, we apply the same standard as the trial court. *See Helm v. Western Md. Ry., 838 F.2d 729, 734 (4th Cir. 1988)*. We agree with the district court that there was no genuine issue of any material fact and the Secretary was entitled to a judgment [**13] as a matter of law. *Fed. R. Civ. P. 56(c)*. On the undisputed facts of record, the Home Board and the Endowment Board performed related activities [*694] through a unified operation and common control for a common business purpose. And the employees of the enterprise handled goods or materials that had moved in interstate commerce. The FLSA is applicable to the activities of the Home Board and the Endowment Board.

A

The activities of the Home Board and the Endowment Board are related. They are mutually supportive entities that exist to operate and maintain the Home. The Home Board manages the day-to-day operations of the Home. It is dependent on the Endowment Board for a substantial part of the funds required to operate the Home. The Endowment Board exists to manage funds ultimately disbursed to the Home Board for the operation of the Home. The Endowment Board's only function is to perform auxiliary services that are essential to the continued operation of the Home Board and thus the Home. *Cf. 29 C.F.R. § 779.208(j) (1989)* (operation of employee benefit and insurance plans is "related activity"). Though such activities might have been performed by a single entity, which [**14] itself would have been subject to the Act, division of related activities between separate entities does not preclude application of the Act to the enterprise consisting of such entities. *See 29 U.S.C. § 203(r)*.

Unified operation and common control are also clear. Both the Home Board and the Endowment Board are arms of the Grand Lodge. The two boards constitute an "organized business system" that exists to fund and maintain the Home. The very same persons serve as members of both boards. The seven persons on the boards had the requisite power to direct the performance of activities of the respective boards and ultimately the Home. *Cf. Donovan v. Grim Hotel Co., 747 F.2d 966, 969-71 (5th Cir. 1984)* (common control of five hotel corporations established; each corporation had same board of directors and president, who exercised ultimate authority).

Appellants' common "business purpose" is the operation of an institution primarily engaged in the care of the sick or aged. Under its Rules and Regulations, the Home cares for members who become residents because they are unable to earn a living "by reason of infirmities or age." Residents are [**15] cared for in "sickness and in health." All of the residents of the Home during the relevant period were over age 65. Employees of the Home attend to the personal care needs of residents and provide cooking, cleaning, and laundry services. Residents are checked regularly, medicines are dispensed, and a physician visits the home at least once per week to see residents in need of a doctor's care. The record amply supports the magistrate's finding that the services provided by the Home to its residents are "abundantly greater than services associated with a mere boarding house." The Home is an institution primarily engaged in the care of its sick or aged residents.

Appellants' arguments to the contrary are unavailing. They claim that they are not an "enterprise" because even if their activities are related, they are performed "for" the Home, not as a part of it. *See 29 C.F.R. § 779.205 (1989)* (activities that are related may be excluded from enterprise if performed only "for" enterprise and not as a part of it by independent contractor). The auxiliary money management services performed by the Endowment Board and the operation of the Home by the Home Board are related activities; [**16] when performed through common control and for a common business purpose the activities constitute an enterprise. Appellants' contention that unified operation or common control is lacking because there is no "for-profit" business activity or purpose is both inapposite and incorrect. Unified operation and common control is demonstrated by the identity of the boards. Further, the operation of the Home as an institution for the care of the aged meets the statutory definition

912 F.2d 689, *; 1990 U.S. App. LEXIS 14568, **;
116 Lab. Cas. (CCH) P35,379; 29 Wage & Hour Cas. (BNA) 1537

of common business purpose, whether operated for profit or not.

Appellants' reliance on *Brennan v. Harrison County, Mississippi, 505 F.2d 901 (5th Cir. 1975)*, is misplaced. The Harrison [*695] County Home was a home for paupers; the Mississippi legislature made indigence, not illness or age, the indispensable prerequisite for the operation of the home. *505 F.2d at 902-04*. Odd Fellows members, however, may become residents of the Home only if unable to earn a livelihood *by reason of infirmities or age*, and only aged members were residents during the relevant period. *See Sunshine & Leisure, Inc., 496 F. Supp. at 357-58*. The district court found and we agree [**17] that no genuine dispute existed respecting the ultimate fact that the Home is an institution primarily engaged in the care of the sick or aged. Congress has made the determination that such an institution may be an "enterprise" within the meaning of the Act.

B

We also agree with the district court that there is no genuine dispute that the employees of the Home handled or otherwise worked on goods or materials that moved in interstate commerce. The Home's employees, *inter alia*, prepared and served food to the residents, washed the residents' laundry and cleaned the Home, and performed maintenance tasks, all the time using goods and materials that had traveled in interstate commerce. Appellants' contention that the Home was in some sense the "ultimate consumer" of the goods and materials that moved in interstate commerce does not preclude application of the Act. *See Brock v. Hamad, 867 F.2d at 807-08*.

The determination that the Home Board and the Endowment Board constitute an enterprise engaged in the operation of an institution primarily engaged in the care of the sick or aged, together with the determination that the Home's employees handled goods or materials [**18] that moved in interstate commerce, mandates the ultimate conclusion that the enterprise is engaged in commerce for purposes of the Act. We therefore hold that the Act's requirements apply to the Home Board and the Endowment Board.

IV

Finally, appellants contend that the Secretary should be estopped from seeking enforcement of the Act. Apparently relying on both general equitable principles and the statutory authority in *29 U.S.C. § 259* (Portal-to-Portal Act), appellants assert that the government's "protracted non-enforcement policy" is grounds for dismissing this action. In support of this contention, appellants cite a letter, sent by the Home Board to the Department of Labor in 1971 in apparent response to inquiries initiated by the Wage and Hour Division, outlining the Home Board's position that the Act should not apply to employees of the Home. In addition, appellants cite the Secretary's 1978 voluntary dismissal of the action initiated against the Home in 1976. Appellants' argument is not further articulated, but we infer that their contention is that since some time in the 1970s the government has been following a policy of non-enforcement of the Act [**19] with respect to the Home.

Appellants' contention is entirely without merit. It is "well settled that the Government may not be estopped on the same terms as any other litigant." *Heckler v. Community Health Servs., 467 U.S. 51, 60, 81 L. Ed. 2d 42, 104 S. Ct. 2218 (1984)*. Though the Supreme Court has left open the possibility that in some case the government might be estopped from seeking to enforce the law against a private party, "the private party surely cannot prevail without at least demonstrating that the traditional elements of estoppel are present." *Id. at 61*. In this case, appellants have shown no detrimental reliance, let alone the reasonableness of any such reliance. To the contrary, if appellants experienced any consequence of the government's asserted policy of non-enforcement, it was the beneficial consequence of being able to retain for a time money that should have been paid to the Home's employees. *See id. at 61*.

Appellants' reliance on the good faith defense in *29 U.S.C. § 259* is also unavailing. Under *§ 259*, an employer is [*696] excused from failure to comply with the requirements [**20] of the Act "if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any written administrative regulation, order, ruling, approval, or interpretation, of the [Wage and Hour Division of the Department of Labor], or any administrative practice or enforcement policy of such agency with respect to the class of employers to which he belonged." *29 U.S.C. § 259(a)*. Here, there was no written regulation, order, ruling, approval, or interpretation that could have been relied on. *See Hodgson v. Royal Crown Bottling Co., 465 F.2d 473, 476 (5th Cir. 1972)* (voluntary dismissal by Secretary is not "administrative ruling") (per curiam). Similarly, there was no showing of the "affirmative action" required to evidence adoption of an enforcement policy. *See 29 C.F.R. § 790.18(h) (1989)*. The fact that the operations of the Home were investigated for some time is not evidence of any affirmative act of non-enforcement.

V

The Home Board and the Endowment Board constitute an enterprise engaged in commerce within the meaning of the Fair Labor Standards Act. We therefore affirm the district [**21] court's ruling that the Act applies and the court's further order enjoining appellants

from future noncompliance and restraining the withholding of compensation owed to the Home's employees.

AFFIRMED.

Exhibit B

Exhibit B

JOSE ONTIVEROS, Plaintiff, v. ROBERT ZAMORA and ZAMORA AUTOMOTIVE GROUP (form unknown), Defendants.

NO. CIV. S-08-567 LKK/DAD

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

2009 U.S. Dist. LEXIS 13073

February 20, 2009, Decided
February 20, 2009, Filed

COUNSEL: [*1] For Jose Ontiveros, Plaintiff: Hector Rodriguez Martinez, LEAD ATTORNEY, Law Office of Mallison & Martinez, Lafayette, CA; Stanley S. Mallison, LEAD ATTORNEY, Marco A. Palau, Law Offices Of Mallison and Martinez, Lafayette, CA.

For Robert Zamora, Zamora Automotive Group, Stockton Auto Cars, Inc., Defendants: Rafael G. Nendel-Flores, LEAD ATTORNEY, Fisher & Phillips LLP, Irvine, CA.

JUDGES: LAWRENCE K. KARLTON, UNITED STATES DISTRICT COURT SENIOR JUDGE.

OPINION BY: LAWRENCE K. KARLTON

OPINION

ORDER

Plaintiff is a former employee of defendant Zamora Automotive Group and/or Robert Zamora ("Zamora"), who has brought suit on behalf of himself and a putative class alleging violations of state labor laws and of the California Unfair Competition law, *Cal. Bus. & Prof. Code §§ 1700 et seq.* Also named as defendants are several other business entities alleged to comprise the Zamora Automotive Group. Pending before the court is Zamora's and Zamora Automotive Group's motion for judgment on the pleadings. The court resolves the motion on the papers.

I. BACKGROUND

1

1 All allegations described herein derive from plaintiff's Second Amended Complaint and are taken as true for the purposes of this motion only.

Plaintiff alleges that he [*2] and the other members of the purported class were employed as automobile mechanics by Zamora and Zamora Automotive Group and were non-exempt employees. Plaintiff has brought suit on ten causes of action, alleging that defendants failed to pay overtime wages, to pay minimum wages, to provide rest periods, to pay timely wages, to provide accurate, itemized wage statements, and to pay reporting time wages. Plaintiff also alleges that defendants obtained unlawful "kickbacks" by requiring employees to contribute a portion of their wages to defendants' payment of other employees. Finally, plaintiff alleges that defendants' violations of the California Labor Code and of federal I.R.S. and Fair Labor Standards laws constituted unlawful business practices under *California Business and Professions Code §§ 1700 et seq.* and that all of the alleged misconduct constitute unfair business practice under the same statute. [2] Plaintiff seeks civil penalties under *California Labor Code §§ 2698 et seq.* (the Private Attorneys General Act) and other statutes, compensatory damages, restitution and other injunctive relief, a declaratory judgment, and attorneys' fees.

2 Plaintiff asserts and defendants do not [*3] dispute that jurisdiction in this court is proper under the Class Action Fairness Act, *28 U.S.C. § 1332.* Plaintiff also asserts that jurisdiction is proper under *28 U.S.C. § 1331*, although the court is not inclined to agree given that the only invocation of federal law in the complaint is that

alleged violations of federal statutes provide some of the grounds for plaintiff's claims under the state Unfair Competition Law. See *Rains v. Criterion Sys., Inc., 80 F.3d 339, 346 (9th Cir. 1996)* ("When a claim can be supported by alternative and independent theories -- one of which is a state law theory and one of which is a federal law theory -- federal question jurisdiction does not attach because federal law is not a necessary element of the claim.").

Plaintiff makes various allegations regarding defendant Zamora's role in the events giving rise to the causes of action. He alleges that Zamora "owns and controls" Zamora Automotive Group and "is a joint employer of the class" or, alternatively, that it is an alter-ego, non-registered dba of Zamora. Second Amended Complaint ("SAC") PP 11, 12. Zamora is also alleged to "exercise[] control over the labor practices of Zamora Automotive Group and [*4] [to have] caused the violations" set forth in the complaint. Id. P 11.

Plaintiff further alleges that the automobile dealerships named as defendants were agents of Zamora. Id.; see also id. P 23. He alleges that Zamora was Vice President, Secretary, and Chief Financial Officers of all or almost all of the named dealerships and that some of them were registered dbas of Zamora. Id. P 13. Zamora is alleged to own over fifty percent of the shares of some of these dealerships and to be responsible for setting policies concerning the payment of wages at all of them, which was the cause of the harms claimed by plaintiff. Id. PP 14-22. Essentially, plaintiff's theory is that "[a]lthough Robert Zamora has set up an elaborate scheme of corporations, all of the employees are managed and employed as though it were one business operated by Robert Zamora." Id. P 36.

II. STANDARD FOR MOTION FOR JUDGMENT ON THE PLEADINGS UNDER FEDERAL RULE OF CIVIL PROCEDURE 12(C)

A motion for judgment on the pleadings may be brought "[a]fter the pleadings are closed but within such time as to not delay the trial." *Fed. R. Civ. P. 12(c)*. All allegations of fact by the party opposing a motion for judgment on the pleadings [*5] are accepted as true. *Doleman v. Meiji Mut. Life Ins. Co., 727 F.2d 1480, 1482 (9th Cir. 1984)*. A "dismissal on the pleadings for failure to state a claim is proper only if 'the movant clearly establishes that no material issue of fact remains to be resolved and that he is entitled to judgment as a matter of law.'" Id. (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1368, at 690 (1969)); see also *McGlinchy v. Shell Chemical Co., 845 F.2d 802, 810 (9th Cir. 1988)*.

When a *Rule 12(c)* motion is used to raise the defense of failure to state a claim, the motion is subject to the same test as a motion under *Rule 12(b)(6)*. *McGlinchy, 845 F.2d at 810*; *Aldabe v. Aldabe, 616 F.2d 1089, 1093 (9th Cir. 1989)*. Thus, the motion will be granted only if the movant establishes that "no relief could be granted under any set of facts that could be proven consistent with the allegations." *Hishon v. King & Spalding, 467 U.S. 69, 73, 104 S. Ct. 2229, 81 L. Ed. 2d 59 (1984)*; see also *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*; *Newman v. Universal Pictures, 813 F.2d 1519, 1521-22 (9th Cir. 1987)*. The court must accept all material allegations of the complaint as true and all doubts must be resolved in the light most [*6] favorable to the plaintiff. *N.L. Indus. Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986)*.

III. ANALYSIS

Defendants move for judgment on the pleadings on two grounds. First, they contend that the compensation scheme they utilized for plaintiff and the purported other class members is lawful, as a matter of law. Second, defendant Zamora argues that plaintiff has not adequately pled a basis for his liability, as a corporate officer cannot be liable for the violations of the Labor Code plaintiff alleges. The court considers each argument in turn. For the reasons stated herein, the court denies the motion in part and grants it in part.

A. Lawfulness of the Compensation Scheme

Although not pled in detail in plaintiff's complaint, plaintiff and defendants both agree that the corporate defendants used a "flag rate" or "piece rate" compensation system for the automobile mechanics they employed. See Mot. for J. on the Pleadings at 8-10; Opp'n to Mot. for J. on the Pleadings at 7-9. This compensation method pays employees set rates for completing certain tasks or producing units of goods. Cal. Div. of Labor Standards Enforcement Policies & Interpretations Manual ("DLSE Manual") § 2.5.1. [3] For example, [*7] under a piece rate system, a mechanic would be paid a fixed amount per type of automotive repair he completed based on the estimated time it would take to perform that repair, regardless of how much time it actually took him. Id. § 2.5.2(1) ("Examples of piece rate plans [include]: Automobile mechanics paid on a 'book rate' (i.e., brake job, one hour and fifty minutes, tune-up, one hour, etc.) usually based on the Chilton Manual or similar"). Plaintiff alleges that this payment system violates California labor laws because it does not compensate employees for work they perform that is not "piece" work, such as attending meetings and training sessions, setting up their work stations, and having a state-mandated work break. See Opp'n to Mot. for J. on the Pleadings at 8-9. De-

fendants argue that the piece rate system is lawful, as a matter of law, so long as the average hourly compensation for employees does not fall below the minimum wage.

> 3 Defendants request that the court take judicial notice of the DLSE Manual. A court may take judicial notice of a fact not subject to reasonable dispute, either because the fact is generally known within the territorial jurisdiction of the trial court [*8] or because the fact is capable of accurate and ready determination from sources whose accuracy cannot reasonably questioned. *Fed. R. Evid. 201(b)*. A court shall take judicial notice of a judicially noticeable fact "if requested by a party and supplied with the necessary information." *Fed. R. Evid. 201(d)*.
>
> Here, the DLSE Manual is a public document, and therefore the court is able to accurately and readily determine its contents. Defendants have complied with *Federal Rule of Evidence 201(d)* by requesting judicial notice and supplying the court with a copy of the applicable sections of the DLSE Manual. Therefore, the court takes judicial notice of the DLSE Manual.

It appears that plaintiff has alleged a valid theory of recovery on this issue such that judgment on the pleadings is not appropriate. In *Armenta v. Osmose, Inc., 135 Cal. App. 4th 314, 37 Cal. Rptr. 3d 460 (2005)*, the California Court of Appeals held that an employer who uses an averaging method to determine employees' hourly wages may violate the state minimum wage law, because the law requires employees to be paid for each hour worked. In Armenta, the plaintiffs were employed by a company that maintained utility poles for utility companies. *135 Cal. App. 4th at 316.* [*9] Employees' time was considered "productive," if it directly related to maintaining the poles, or "nonproductive," which included tasks like travel time, engaging in safety meetings, loading vehicles, completing paperwork, and maintaining the vehicles. *Id. at 317-18*. Employees were only paid for "productive" time, but the employer argued that this did not violate state minimum wage laws because the amount compensated for "productive" time averaged to an hourly wage that exceeded the state minimum. *Id. at 319*.

The Court of Appeals rejected this theory. Although an averaging method may be lawful under the federal Fair Labor Standards Act and although California labor law was partially patterned on federal law, the California statutes "reveal[] a clear legislative intent to protect the minimum wage rights of California employees to a greater extent than federally." *Id. at 322-24*. The court observed that California Wage Order No. 4, which is the relevant state regulation, provided that employees be paid not less than the minimum wage "for all hours worked," evincing the intent that employees be paid for each hour worked. *Id. at 323*. It also observed that *Labor Code sections 221* and *222* prohibited [*10] employers from withhold or collect from employees any portion of their wages that had been agreed upon; in the defendants' averaging compensation scheme, a portion of the employee's wage per "productive" hour was effectively withheld and used as compensation for the "non-productive" hours. Id. Moreover, the averaging scheme contravened *Labor Code section 223*, which bars employers from secretly paying a lower wage than that set by statute or contract. Id. Finally, the court observed that the state labor codes were more generous generally that the comparable federal statutes in setting forth minimum wage standards. *Id. at 324*.

Defendants attempt to distinguish Armenta on the grounds that the employers in that case designed the compensation scheme so as not to compensate employees for "nonproductive" hours, because the employers instructed employees not to report nonproductive hours and because the employees in Armenta were purportedly paid on hourly rates, not piece rates. These factual differences do not appear dispositive, as the Armenta court plainly held "[t]he averaging method used by the federal courts for assessing a violation of the federal minimum wage law does not apply" to [*11] alleged violations of California minimum wage laws. *135 Cal. App. 4th at 323*. Here, plaintiff alleges that defendants utilized a compensation scheme that possessed the same central characteristics which the Armenta court rejected, in that employees are not necessarily compensated for every hour worked and an employee is compensated for non-piece rate hours with wages accrued during piece hours. This method of compensation is what the Armenta court found violated *Labor Code sections 221*, *222*, and *223*. *Id. at 323*.

Defendants also contend that the California Court of Appeals' decision in *Fitz-Gerald v. SkyWest Airlines, 155 Cal. App. 4th 411, 65 Cal. Rptr. 3d 913 (2007)*, both demonstrates the narrowness of the holding in Armenta and the lawfulness of the compensation scheme at issue in this case. Defendants' argument is unpersuasive. In SkyWest, the court of appeals upheld a grant of summary judgment to the defendant employer on the grounds that the plaintiff employees' action for violation of state minimum wage laws was preempted under the Railway Labor Act, because the employer was an airline. *155 Cal. App. 4th at 415-16*. The SkyWest court expressly distinguished Armenta on the grounds that the latter did [*12] not deal with preemption, which was the central issue in *SkyWest. Id. at 416-17*. Similarly, there is no indication that federal preemption is relevant to the in-

stant case and therefore *SkyWest* has little applicability to the allegations here. It certainly does not, despite defendants' contention otherwise, stand for the proposition that the compensation scheme alleged here is lawful under state law.

As defendants observe, the SkyWest court characterized Armenta's holding as "[a]n employer may not invoke a federal minimum wage averaging formula to defend against a minimum wage claim where the employer, in violation of its own wage agreement, pays no wage for an hour worked." *155 Cal. App. 4th at 417.* Defendants argue that because plaintiff does not allege that defendants violated its own wage agreement, its conduct cannot be held unlawful. Defendants' interpretation distorts the holding of Armenta. As discussed above, *Labor Code section 223* bars an employer from secretly withholding a portion of an employee's agreed upon wage in order to use that wage to pay the employee for other time worked. *Labor Code sections 221* and *222* prohibit an employer from paying an employee less than minimum [*13] wage for each hour worked, whether through a wage agreement or not. The SkyWest court recognized this to be the basis for the Armenta court's holding. See *SkyWest, 155 Cal. App. 4th at 417 & n. 2.* In other words, neither the *Armenta* nor the *SkyWest* court held that an employer may violate *Labor Code sections 221*, *222*, or *223* so long as the employer does not violate its own wage agreements. *SkyWest*, therefore, does not provide grounds for granting defendants' motion.

Finally, defendants argue that their compensation scheme is lawful because they did not preclude employees from earning piece rate compensation. Defendants rely on section 47.7 of the DLSE Manual, which discusses piece rate compensation and provides, "if, as a result of the directions of the employer, the compensation received by piece rate . . . workers is reduced because they are precluded, by such directions of the employer, from earning . . . piece rate compensation during a period of time, the employee must be paid at least the minimum wage. . . ." Defendants argue that plaintiff has not alleged that defendants precluded him from earning piece rate compensation and therefore the compensation scheme is valid according [*14] to the DLSE. This position appears to be an unduly narrow reading of plaintiff's allegations. Plaintiff alleges that there are activities that are necessary and incidental to performing the work for which an employee can receive piece rate compensation, such as preparing one's work station or attending training. See Opp'n at 8-9. Because these tasks are essential to the piece rate work and are uncompensated, the compensation scheme would appear to violate the minimum wage laws as well as run afoul of the DLSE's interpretation thereof. Accordingly, it appears that plaintiff has alleged a valid theory of recovery.

Moreover, even if defendants' narrower interpretation of the DLSE Manual's pronouncement is correct, it would not be proper to grant their motion. It is simply not the case that there are no possible set of facts consistent with plaintiff's allegations that would permit his recovery. See *Hishon, 467 U.S. at 73*. If defendants are correct, that a piece rate system is lawful so long as an employee is paid minimum wage for times during which he is precluded by his employer from earning a piece rate, it is appropriate to permit the plaintiff to conduct discovery in order to develop [*15] facts on this issue.

B. Basis of Liability of Defendant Zamora

Defendant Zamora moves for judgment on the pleadings on the grounds that, as a corporate officer, he cannot be liable for violations of state wage and hour laws. Defendant's status as a corporate officer may not alone be the basis of his liability. Plaintiff has also pled, alternatively, that Zamora is plaintiff's joint employer or the alter ego of the corporate defendant or the person who caused the Labor Code violations. Plaintiff has successfully pled that Zamora is a joint employer and that he caused the violations at issue, but has not adequately pled that Zamora is an alter ego of the corporate defendants. Defendant's motion is granted to that extent.

Preliminarily, defendant Zamora is correct that the California Supreme Court has held that a corporate officer cannot be liable for the wage and hour violations of the corporation on the basis of his status alone. In *Reynolds v. Bement, 36 Cal. 4th 1075, 32 Cal. Rptr. 3d 483, 116 P.3d 1162 (2005)*, the California Supreme Court considered whether plaintiff employees could allege that individual defendants, who were all officers, directors, or otherwise agents of their corporate employer, were liable for violations [*16] of state labor laws. Plaintiffs had alleged that these individual defendants "directly or indirectly . . . employed or exercised control over wages, hours, or working conditions of Class members" and "caus[ed] the corporate defendants to violate the overtime regulations . . . and commit other statutory violations." *Reynolds, 36 Cal. 4th at 1081*. Plaintiffs alleged violations of the state minimum wage and overtime laws, as well as other Labor Code violations. *Id. at 1083*.

The court rejected plaintiffs' assertions that the individual defendants could be liable for Labor Code violations. *Id. at 1087-88*. The court observed that the relevant Labor Code sections did not define "employer," but rejected plaintiffs' argument that the Industrial Welfare Commission's ("IWC") definition should be read into the statutes. *Id. at 1084-86*. The IWC creates regulations for employment throughout the state, set forth in Wage Or-

ders. *Id. at 1084*, citing *Tidewater Marine Western, Inc. v. Bradshaw, 14 Cal. 4th 557, 561, 59 Cal. Rptr. 2d 186, 927 P.2d 296 (1996)*. Wage Order 9, which applies to the automobile industry, defines "employer" as one who "exercises control over the wages, hours, or working conditions of any person." *Id. at 1085*; see [*17] also IWC Wage Order No. 9-2001(2)(G). The court concluded that there was no indication that the legislature intended to incorporate this definition in the Labor Code sections. *Id. at 1086*.

Instead, the court explained, a term that is undefined in a statute should be interpreted in accordance with common law. *Id. at 1086-87*. Under California common law, individual agents, officers, or employees of a corporate employer have not been encompassed in the term "employer" in the context of Labor Code violations. *Id. at 1087-88*. The court relied in part on *Oppenheimer v. Robinson, 150 Cal. App. 2d 420, 424, 309 P.2d 887 (1957)*, where a railroad superintendent had been held not to be the plaintiff's employer, in an action to recover unpaid wages, because he had not been a party to the employment contract or otherwise had a duty to pay the plaintiff's wages. See also *Shoemaker v. Myers, 52 Cal. 3d 1, 24, 276 Cal. Rptr. 303, 801 P.2d 1054 (1990)* ("corporate agents and employees acting for and on behalf of a corporation cannot be held liable for inducing a breach of a corporation's contract"). The court recognized that a corporate agent may be liable to an employee on an alter ego theory or where a statute expressly provides for it. *Reynolds, 36 Cal. 4th at 1089* [*18] & n. 10. Accordingly, to the extent that plaintiff alleges that Zamora is liable for Labor Code violations simply by virtue of being the owner of Zamora Automotive Group or otherwise controlling it, this theory must fail.

Plaintiff has adequately alleged, however, that Zamora "caused" the Labor Code violations, which may cause him to be subject to civil penalties. *Labor Code § 558* provides, "Any employer or other person acting on behalf of an employer who violates, or causes to be violated, . . . any provision regulating hours and days of work in any order of the Industrial Welfare Commission shall be subject to a civil penalty . . . ." As the Reynolds court acknowledged, the text of this section expands liability to include agents of the employer. See *Reynolds, 36 Cal. 4th at 1089*. Here, plaintiff has alleged that Zamora, in his capacity as owner of Zamora Automotive Group, "caused" the wage and hour violations alleged in the complaint, including regulations set forth in IWC Wage Orders. SAC PP 11, 51, 59, 97, 98. Plaintiff's claims based on violations of IWC regulations are therefore adequately pled against defendant Zamora. [4]

4 The California Private Attorney General Act, *Cal. Labor Code § 2699*, [*19] permits a civil action to be brought for any violation of a Labor Code provision that provides for a civil penalty.

Plaintiff has also pled adequately that Zamora is the joint employer of plaintiff. Under California law, whether entities are joint employers of an employee depends on a factual inquiry into the "totality of the working relationship of the parties," rather than application of a particular test such as the "interference test" or "economic realities test." *Vernon v. State, 116 Cal. App. 4th 114, 125 n. 7, 10 Cal. Rptr. 3d 121 (2004)*. Instead, the court considers the nature of the work relationship, "with emphasis upon the extent to which the defendant controls the plaintiff's performance of employment duties." *Id. at 124, 126*. Courts have found myriad facts to be relevant, including whether the defendant pays the employee's salary and taxes, owns the equipment necessary for the employee to perform his job, has authority to hire, train, fire, or discipline the employee, or has discretion to set the employee's salary. *Id. at 125* (collecting cases). Here, plaintiff has alleged some facts that Zamora was plaintiff's joint employer. He alleges that Zamora owns the dealership where plaintiff works [*20] and that he controls compensation and other labor policies, including monitoring the implementation of those policies. SAC PP 11, 14-22. These allegations are sufficient to state a claim against Zamora on the basis of his joint employment of plaintiff.

Finally, plaintiff has not adequately pled that Zamora is the alter ego of defendant Zamora Automotive Group. Under an alter ego theory, the stockholders of a corporation may be individually liable where it would be equitable to do so. *Assoc. Vendors, Inc. v. Oakland Meat Co., Inc., 210 Cal. App. 2d 825, 837, 26 Cal. Rptr. 806 (1962)*. Generally, alter ego liability is considered equitable where there is a unity of interests and ownership between the corporation and the individual and if the corporation alone were held liable, there would be an inequitable result. *Id.* Factors that courts have found militated towards finding alter ego liability include commingling of assets, treatment of the assets of the corporation as the individual's own, failure to maintain corporate records, employment of the same employees and attorneys, undercapitalization, and use of the corporation as a shell for the individual. *Id. at 838-40* (collecting cases).

Here, plaintiff has [*21] pled facts adequate to allege that there is a unity of interests between the corporate defendants and Zamora. He alleges that Zamora owns and controls fifty-one percent of the shares of Zamora Automotive Group and many of the individual dealerships and that he is the President, Vice President, and Secretary and/or Chief Financial Officer at all of them. SAC PP 13-22. He also alleges that Zamora dictates the day-to-day business at these dealerships to the extent that he controls the implementation of wage po-

lices. Id. PP 11, 14-22. These allegations suffice to plead a unity of interests between Zamora and the corporate defendants. See, e.g., *Assoc. Vendors, 210 Cal. App. 2d at 837*; *Talbot v. Fresno-Pacific Corp., 181 Cal. App. 2d 425, 5 Cal. Rptr. 361 (1960)*; *Goldberg v. Engelberg, 34 Cal. App. 2d 10, 92 P.2d 935 (1939)*.

Nevertheless, plaintiff not pled facts that suggest that failure to impose alter ego liability would lead to an inequitable result. Plaintiff alleges that Zamora is the owner of Zamora Automotive Group, which is comprised of individual dealerships, which Zamora also controls and holds stock. SAC PP 11-22. He does not allege, however, that any of the individual dealerships or Zamora Automotive Group [*22] are undercapitalized, lack corporate assets, are shells created to avoid personal liability or any other facts that suggest that it would be inequitable to hold only the corporate defendants liable for their acts. This renders deficient plaintiff's allegations against Zamora on an alter-ego theory. See *Assoc. Vendors, supra.*

IV. CONCLUSION

For the reasons stated herein, defendant's motion to dismiss is GRANTED IN PART and DENIED IN PART. Plaintiff is granted fifteen days from the date of this order to file an amended complaint.

IT IS SO ORDERED.

DATED: February 20, 2009.

/s/ Lawrence K Karlton

LAWRENCE K. KARLTON

SENIOR JUDGE

UNITED STATES DISTRICT COURT

Exhibit C

Exhibit C

Robert B. REICH, Secretary of Labor, United States Department of Labor, Plaintiff-Appellee, v. BAY, INC., BBI, Inc., a Corporation; and Allen Berry, Defendants-Appellants.

No. 93-7505.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

23 F.3d 110; 1994 U.S. App. LEXIS 14934; 128 Lab. Cas. (CCH) P33,104; 2 Wage & Hour Cas. 2d (BNA) 136

June 17, 1994, Decided

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Southern District of Texas. D.C. DOCKET NUMBER CA C90-0331. JUDGE Melinda Harmon

DISPOSITION: AFFIRMED.

COUNSEL: For Defendants-Appellants: FULBRIGHT & JAWORSKI, Neil Martin, Houston, TX. out see 10/12/93. Neil Martin, GARDERE & WYNNE, Houston, TX.

For Plaintiff-Appellee: Anthony Parham, Office of the Solicitor, USDOL, Dallas, TX. Paula Wright Coleman, Cnsel., William J. Stone, U.S. Dept. of Labor, Washington, D.C.

JUDGES: Before WOOD, * SMITH, and DUHE, Circuit Judges.

* Circuit Judge of the Seventh Circuit, sitting by designation.

OPINION BY: HARLINGTON WOOD

OPINION

[*112] HARLINGTON WOOD, Jr., Circuit Judge.

This appeal arises from proceedings the Secretary of Labor (the Secretary) instigated against Bay, Inc. (Bay), BBI, Inc. (BBI), and BBI president Allen Berry for violations of the Fair Labor Standards Act of 1938, *29 U.S.C. § 201 et seq.* (FLSA). Bay is a general contractor that provides construction management, materials, equipment, and other services to refineries. BBI, now defunct, was a subcontractor that provided labor and labor supervision to Bay and other companies. From February 2, 1988 until December 31, 1990, Bay obtained labor through BBI in order to minimize worker's compensation and insurance expenses.

BBI provided two different types of employees to Bay, rig welders and single-hand welders. Rig welders owned their own welding rigs and rented them to Bay for a separately negotiated fee. Single-hand welders, rather than owning their own welding rigs, would utilize equipment owned by Bay. BBI [**2] paid both classifications of welders predetermined hourly rates for straight-time and overtime. In addition to the hourly wage payments BBI paid to rig welders, Bay negotiated equipment rental rates with the rig welders. Thus, in each pay period each rig welder received two checks, one from Bay for rig rental and one from BBI for earned wages.

The rate structure for rig welders changed significantly for overtime hours. Although BBI paid rig welders time-and-a-half for time worked exceeding forty hours, Bay correspondingly reduced the rental rate for rigs used more than forty hours a week to offset roughly the increased hourly wage rate. Because the reduction in rental fees offset overtime wage increases, rig welders effectively received little overtime compensation, although in name BBI was paying them the required time-and-a-half.

The Secretary charged Bay and BBI with violating the FLSA, contending that their pay structure intentionally circumvented FLSA overtime provisions. Bay and

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BBI argue that their practice of discounting rig rental rates simply was the result of economic considerations, and that wages and rental fees are two distinct and independent transactions. Bay and BBI [**3] also contend that they are not sufficiently interrelated to justify examining in conjunction Bay's rig rental rates and BBI's hourly wage rates.

Regarding the interrelatedness of Bay and BBI, the two companies share the same principal office and place of business, a building wholly owned by Berry Contracting, Inc. [1] The building is identified only by the sign [*113] "Berry." One person was responsible for maintaining the business records of both Bay and BBI, and did so in the same location of the Berry building. BBI paid an administration fee for payroll and accounts receivable to Bay.

1 Although BBI's offices were recorded as the home of Kenneth Berry, Allen Berry, the president, worked out the fourth floor of the Berry building.

In addition, members of the Berry family owned and controlled both companies. [2] The officers of Bay include: Ken Luhan, President; K.L. Berry, Vice-President and Assistant Secretary; D.W. Berry, M.G. Berry, Robert M. Davis, Howard Kovar, James G. Gilbert, and Don Spangler, Vice Presidents; and [**4] Charlene Washburn, Secretary-Treasurer. Bay directors include M.L. Berry, Laura Berry, and K.L. Berry. Marvin and Laura Berry own all shares of Lone Star Equipment, Inc. (Lone Star), which owns Berry Contracting, Inc., which in turn owns Bay.

2 Marvin L. and Laura Berry are the parents of Kenneth, Allen, Dennis, and Marvin G. Berry.

BBI also was owned by the Berry family. From December 1987 to November 1988, brothers Kenneth, David, and Martin Berry owned BBI. Kenneth was president, and David and Allen were vice-presidents, and Marvin was a vice-president, assistant secretary, and treasurer. From November 1988 until the demise of BBI in December 1990, another Berry brother, Allen, wholly owned BBI. Allen served as president, and his wife Cathy became secretary and treasurer. Kenneth, David, Marvin, and Allen served as directors of BBI throughout its existence.

The following "Memorandum of Understanding" also illustrates how Bay and BBI were interrelated:

MEMORANDUM OF UNDERSTANDING

Pertaining to Pay Rate for

Rig [**5] Welders and their Rigs

I ... understand and agree that while employed as a Rig Welder (WR) by Bay, Inc./BBI, Inc. that my pay will be calculated as follows:

FIRST 40 HOURS (each pay period) for welder at $ 10.50 per hour; first 49 hours for Rig (Equipment) at $ 12.00 per hour for a *total* of $ 22.50 per hour.

HOURS OVER 40 (Overtime) (each pay period) for welder at $ 15.75 per hour; hours over 40 for Rig (Equipment) at $ 7.00 per hour for a total of $ 22.75 per hour.

Other BBI employment forms contained the name of a Bay supervisor or the name or initials of Bay's personnel manager, Jim Hedges. These forms contained wage information, lease rate information for the rig welders' rigs, and federal withholding information. Bay used these forms to calculate the proper wage information and rental amount due to rig welders. Although rig welders received wage checks from BBI, Bay was responsible for calculating the wages pursuant to a payroll servicing agreement with BBI. Bay also performed the following other functions for BBI: (1) paid for and ran advertisements; (2) helped interview prospective employees; (3) supervised BBI employees in some instances, [**6] and had the authority to fire; (4) scheduled, assigned, and reviewed the work of BBI's welder employees; and (5) performed random drug testing of BBI employees.

Although BBI had one other client, BBI went out of business in December, 1990, when Bay stopped using BBI employees. Bay accounted for at least 907 of BBI's business. From January 1, 1991 to December 31, 1991, Bay used the services of Professional Constructors, Inc. (PCI) to obtain labor, and after January 1, 1992, ceased the practice of "subcontracting" an intermediate company to obtain labor.

On December 24, 1990, the Secretary filed this action against Bay, BBI, and Allen Berry, the president of BBI, seeking injunctive relief under FLSA Sections 7 and 15(a)(2). The Secretary seeks to enjoin defendants from willfully violating the overtime and record-keeping provisions of the FLSA and "to restrain the defendants from withholding the back wages determined to be due their employees for defendants' willful violations of the Act, an injunction to prohibit future violations of the Act's overtime and record-keeping provisions, and prejudgment interest."

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Both parties moved for summary judgment. The district court denied the defendants' [**7] motion, but granted the Secretary's motion. The court entered judgment for the [*114] Secretary in the amount of $ 152,186.93 plus prejudgment interest, and enjoined defendants from future violations of the overtime and record-keeping provisions of the FLSA. The defendants filed a timely appeal from the district court judgment.

ANALYSIS

A. Single Enterprise

At the outset, we must determine whether Bay and BBI were a single enterprise for the purposes of *29 U.S.C. § 203(r)*. Whether Bay and BBI were a single enterprise is a question of law, which we review de novo. *Donovan v. Weber, 723 F.2d 1388, 1391-92 (8th Cir.1984)*; *Dunlop v. Ashy, 555 F.2d 1228, 1229 (5th Cir.1977)*. To establish that two entities functioned as a single enterprise, the Secretary must demonstrate that the entities: (1) engaged in related activities; (2) were a unified operation or under common control; and (3) shared a common business purpose. *29 U.S.C. § 203(r)*; *Ashy, 555 F.2d at 1229*. In addressing each of these elements, we must construe liberally the [**8] FLSA while applying it "with reason and in a common sense fashion." *Ashy, 555 F.2d at 1234*.

1. Related Activities

Because the FLSA does not define the term "related activities," the district court relied on *29 C.F.R. § 779.206*, *citing* S.Rep. No. 145, 87th Cong., 1st Sess. at 41, for a definition. That section of the Code of Federal Regulations indicates that

> activities will be regarded as 'related' when they are the same or similar or when they are auxiliary or service activities such as warehousing, bookkeeping, purchasing, advertising, including, generally, all activities which are necessary to the operation and maintenance of the particular business.... The Senate Report on the 1966 amendments makes it plain that related, even if somewhat different, business activities can frequently be part of the same enterprise, and that activities having a reasonable connection with the major purpose of an enterprise would be considered related.

Id.

Under this definition the district court properly concluded that Bay and BBI engaged in related activities. The two companies shared office space under one name, "Berry," the family name of the owners [**9] of both companies. Bay and BBI also shared several officers and directors. Bay provided BBI with bookkeeping, payroll, recruitment, and advertising services. Both companies kept business records in the same area, and the same individual controlled the records of both companies.

Although Bay is in the business of leasing equipment and BBI was in the business of providing labor, two different purposes, the two entities operations were inextricably linked. Supplying Bay with labor constituted 907 of BBI's business, Bay received the majority of its blue collar labor from BBI, and BBI closed its shop when Bay ceased utilizing its services. The examples discussed in Code of Federal Regulations support this conclusion. See *29 C.F.R. § 779.306*; *see also Brennan v. Veterans Cleaning Serv., Inc., 482 F.2d 1362, 1366-67 (5th Cir.1973)* (discussing the meaning of "related" and "auxiliary and service activities"). Bay and BBI had extensive related activities for the purposes of *Section 203(r)*.

2. Unified Operation or Common Control

Section 203(r) also requires proof of either common control or unified operation of the companies. *29 U.S.C. § 203* [**10] *(r)*; *Dunlop v. Lourub Pharmacy, Inc., 525 F.2d 235, 236 (6th Cir.1975)*. The Code of Federal Regulations provides guidance as to what constitutes "common control":

> The word "control" may be defined as the act of fact of controlling; power or authority to control; directing or restraining domination. "Control" thus includes the power or authority to control.... [It] includes the power to direct, restrict, regulate, govern, or administer the performance of the activities. "Common" control includes the sharing of control and it is not limited to sole control or complete control by one [*115] person or corporation. "Common" control therefore exists where the performance of the described activities are controlled by one person or by a number of persons, corporations, or other organizational units acting together.

29 C.F.R. § 779.221.

The similarities between those in control of Bay and BBI were extensive:

Berry Family Member Bay Positions BBI Positions

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Kenneth Vice-President, Assistant Secretary, and Director Director

Dennis Vice President Director

Marvin G. Vice President [**11] Director

Marvin L. Director & Owner

Laura Director & Owner

Allen Sole Owner

11/88-12/90;

Director

The only individuals unrelated to the Berry family who held management positions in BBI were Howard Kovar, James G. Gilbert, Jr. and Donald Spangler, vice-presidents; and Charlene Washburn, Secretary-Treasurer.

In determining whether Bay and BBI had common control, "the determinative question is whether a common entity has the power to control the related business operations." *Donovan v. Easton Land & Development, Inc., 723 F.2d 1549, 1552-53 (11th Cir.1984)*, citing *Shultz v. Mack Farland & Sons Roofing Co., 413 F.2d 1296, 1301 (5th Cir.1969)*. At the time Bay and BBI entered into the labor arrangement at issue, three of the Berry brothers held positions of control in both companies, and members of the Berry family owned both companies. These facts support the conclusion that Bay and BBI were under common control. *See Mack Farland, 413 F.2d at 1301* ("Common control may exist ... despite the separate management of the individual establishments.").

Bay and BBI also had a unified operation. [**12] The Code of Federal Regulations also informs on the definition of a unified operation:

> Whether there is unified operation of related activities will thus be of concern primarily in those cases where the related activities are separately owned or controlled but where, through arrangement, agreement or otherwise, they are so performed as to constitute a unified business system organized for a common business purpose.

29 C.F.R. § 779.220 (1993). Bay performed many different functions for BBI, including advertising for recruitment, payroll, and bookkeeping. As the district court explained, Bay and BBI

> were mutually parasitic. Both Bay and BBI received benefits because of their unification. Bay saved money by having BBI administer the worker's compensation, insurance and unemployment coverage. BBI benefitted from its relationship with Bay through reduced administrative costs, increased rent, and combined recruitment costs.

These facts suggest that BBI and Bay were engaged in a unified business operation. *See Easton Land, 723 F.2d at 1552.*

3. Common Business Purpose

Having established that Bay and BBI were engaged in related activities and [**13] had unified operation or common control, it becomes manifest that Bay and BBI also shared a common business purpose. A common business purpose exists if "the separate corporations engaged in complementary businesses, [*116] and were to a significant degree operationally interdependent." *Donovan v. Janitorial Services, Inc., 672 F.2d 528, 530 (5th Cir.1982). See also Donovan v. Grim Hotel Co., 747 F.2d 966, 971 (5th Cir.1984)*; *Brennan v. Veterans Cleaning Serv., Inc., 482 F.2d 1362, 1367 (5th Cir.1973)*. As previously explained, Bay and BBI complemented and depended on each other; Bay filled its labor needs with BBI employees, and constituted over 907 of BBI's business. Bay and BBI do not raise any arguments that challenge this conclusion. Because all three elements of an enterprise are satisfied, the district court correctly held that Bay and BBI were a single enterprise for the purposes of the FLSA from February 2, 1988 to December 31, 1990.

B. Violation of the FLSA

Whether the compensation method used by Bay and BBI violated the FLSA is the central issue presented by this appeal. The defendants [**14] rely on *Durkin v. Santiam Lumber Co., 115 F. Supp. 548 (D.Or.1953)*, as persuasive authority that their compensation method was permissible. In *Santiam Lumber,* truck drivers who owned their own truck received two payments: their salary and a rental payment for use of their truck. *Id. at 549.* When the drivers were required to work overtime, their rental payment decreased and their wage rate increased. *Id.* The district court held that an owner-operator can occupy a dual role, as "both an entrepreneur owning capital equipment and a laborer operating such equipment." *Id. at 550.* The court reached that conclusion because the

non-labor costs of operating log-hauling trucks decreased as use increased. *Id.* [3]

> 3 Although we have not conducted an in-depth study of the log-hauling industry, we wonder whether the district court in *Santiam Lumber* took into account the depreciation surely associated with increased truck usage in reaching its cost determination.

[**15] The district court in this case, however, found that *Santiam Lumber* was wrongly decided. The district court reasoned that *Santiam Lumber* treated the employees as independent contractors, which they were not. Instead, the district court relied on *Donovan v. Global Divers & Contractors, Inc., 25 Wage & Hour Cas. (BNA) 605, 93 Lab. Cas. (CCH) P34,168, 1982 WL 2162 (W.D.La.1982)*, and *Goldberg v. Maine Asphalt Road Corp., 206 F. Supp. 913 (D.Me.1962)*.

In *Global Divers,* the employer paid its employees an hourly rate plus overtime compensation, and a gear rental fee. 1982 WL 2162, at * 1. After the employee worked a specific number of hours, in most cases the daily rental fee was reduced by the amount of overtime compensation paid to the employee on that day. *Id.* The court held that this practice violated the FLSA, explaining that the FLSA was intended to reduce the burden of working lengthy hours and to put financial pressure on employers to spread employment, and that Global Divers' compensation scheme circumvented these goals. *Id.* at * 3. *See also Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 42, 65 S. Ct. 11, 14, 89 L. Ed. 29 (1944)*. [**16]

Similarly, in *Maine Asphalt* the employer hired employees who owned their own trucks. *206 F. Supp. at 913*. The employer paid each driver their wages and a truck rental fee. *Id.* When the employee worked overtime their wage was increased by 507 and the truck rental was reduced by an equal amount. *Id.* The court held that this practice violated the FLSA, noting the absence of an independent economic or other reason for the offsetting rates of compensation. *Id. at 915-16*.

The defendants attempt to distinguish *Global Divers* and *Maine Asphalt* by pointing out that in those cases, employees were required as a condition of employment to furnish their own equipment, whereas they were not at Bay and BBI. This argument is without merit for two reasons. First, nothing in the *Maine Asphalt* opinion reveals that employees were required to furnish their own equipment--the defendant's claimed distinction therefore does not exist. Second, giving employees the option of either renting their equipment out at reduced rates after 40 hours or not renting it out at all is a false choice. Bay and BBI could no more do that under [**17] the FLSA than give their single-hand welders (those without rigs) the choice [*117] of either forgoing additional overtime compensation or finding a different employer.

The reasoning of *Global Divers* and *Maine Asphalt* fits well in this case. As *Global Divers* and *Maine Asphalt* noted, one of the primary purposes of the FLSA is to financially pressure employers to spread employment. Permitting negligible net pay increases for overtime hours worked, as occurred with Bay and BBI, would eviscerate the incentive provided by the FLSA to use more workers for forty hours rather than fewer workers for longer hours. Although the defendants argue that the number of rig hours (the hours that the rig is utilized in any given week) did not necessarily correspond with the man hours (amount of time that the rig welders actually work) for each employee, a review of the record suggests that on the whole the number of man hours and rig hours largely offset, in effect avoiding the overtime provisions of the FLSA. The net effect was to provide less than time-and-a-half compensation to Bay and BBI employees, violating the FLSA.

The defendants also argue that their method of computing wages was not [**18] a scheme to circumvent the FLSA, but rather was necessary to compete in the marketplace. That argument is fallacious, however, for all employers competing in the marketplace must comply with the overtime provisions of the FLSA. The defendants have provided no credible economic or other explanation of why the reduction in rental rates largely offsets the overtime pay increases mandated by the FLSA. The district court therefore correctly concluded that the compensation method of Bay and BBI impermissibly circumvented the FLSA.

C. Wilfulness

As a final issue, the defendants argue that their violations of the FLSA were not willful, and therefore were subject to a two-year, rather than three-year, statute of limitations. *See 29 U.S.C. § 255(a)*. The proper test for determining whether a party acted willfully is contained in *McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133, 108 S. Ct. 1677, 1681, 100 L. Ed. 2d 115 (1988)*. [4] In *Richland Shoe,* the Court held that violations under the FLSA are willful if the employer "knew or showed reckless disregard for the matter of whether its conduct [**19] was prohibited by the statute." *Id.*

> 4 The district court incorrectly applied a slightly different test. To find willfulness "entails a determination of whether "there is substantial evidence in the record to support a finding that the employer knew or suspected that his actions might violate the FLSA." *Donovan v. Sabine Irrigation, 695 F.2d 190, 196 (5th Cir.1983)*. The court in *Sabine Irrigation* cited *Coleman v. Jiffy*

23 F.3d 110, *; 1994 U.S. App. LEXIS 14934, **;
128 Lab. Cas. (CCH) P33,104; 2 Wage & Hour Cas. 2d (BNA) 136

June Farms, Inc., 458 F.2d 1139, 1142 (5th Cir.1971), cert. denied, 409 U.S. 948, 93 S. Ct. 292, 34 L. Ed. 2d 219 (1972), as the source for the test on willfulness. *Jiffy June,* however, was criticized and rejected by the *Richland Shoe* Court because it "virtually obliterates any distinction between willful and nonwillful violations." *Richland Shoe, 486 U.S. at 132-34, 108 S. Ct. at 1681-82.*

The conduct of Bay [**20] and BBI falls within the *Richland Shoe* definition of wilful. Bobby Scott, the District Director for the local Wage and Hour office, contacted Don Spangler, one of the defendants' representatives, and informed him that the overtime payment practices of Bay and BBI violated the FLSA. Continuing the payment practices without further investigation into the alleged violation could constitute "reckless disregard" of the FLSA. Bay and BBI had sufficient time after hearing from Mr. Scott to investigate their payment practices and correct the problem. The fact that Bay continued a substantially similar arrangement with PCI after BBI became defunct bolsters this conclusion. The district court correctly decided to apply the three-year statute of limitations.

The district court order granting summary judgment in favor of the plaintiff, enjoining the defendants from paying less than time-and-a-half overtime compensation, and awarding their employees $ 152,186.93 in withheld overtime compensation is AFFIRMED.

Exhibit D

Exhibit D

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ROBERT B. REICH, Secretary of Labor, United States Department of Labor, Plaintiff-Appellant, Cross-Appellee, v. JAPAN ENTERPRISES CORPORATION, a corporation, AMERIANA CORPORATION, a corporation, SAIPAN FUTABA GROUP CORPORATION, a corporation, TAKAHARU KOMODA, an individual, and HIDEAKI SAWADA, an individual, Defendants-Appellees, Cross-Appellants.

Nos. 94-17151, 95-15074

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

1996 U.S. App. LEXIS 17677

June 6, 1996, Argued and Submitted, Seattle, Washington
July 10, 1996, FILED

NOTICE: [*1] RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: *91 F.3d 154, 1996 U.S. App. LEXIS 36775.*

PRIOR HISTORY: Appeal from the United States District Court for the District of Northern Mariana Islands. D.C. No. CV-92-00005-ARM. Alex R. Munson, Chief District Judge, Presiding.

DISPOSITION: AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

COUNSEL: For ROBERT B. REICH, Secretary of Labor, United States Department of Labor, Plaintiff - Appellant (94-17151): Claire B. White, Esq., U.S. Department of Labor, Washington, DC. Faye von Wrangel, Esq., OFFICE OF THE SOLICITOR, U.S. Department of Labor, Seattle, WA. Steven R. DeSmith, Attorney, UNITED STATES DEPARTMENT OF LABOR, Office of the Solicitor, San Francisco, CA.

For JAPAN ENTERPRISES CORPORATION, a corporation, dba Happiness Club, Mayten Club and Micronesia Club, Defendant - Appellee (94-17151): Steven B. Frank, FRANK & ROSEN, Seattle, WA. Brian W. McMahon, Saipan, CM.

For TAKAHARU KOMODA, an individual, Defendant - Appellee (94-17151): Steven B. Frank, (See above). Brian W. McMahon, (See above).

For ROBERT B. REICH, Secretary of Labor, United States Department of Labor, Plaintiff [*2] - Appellee (95-15074): Claire B. White, Esq., Claire B. White, Esq., (See above). U.S. Department of Labor, Washington, DC. William J. Stone, Esq., U.S. Department of Labor, Fair Labor Standards Division, Washington, DC.

For JAPAN ENTERPRISES CORPORATION, a corporation, dba Happiness Club, Mayten Club and Micronesia Club, Defendant - Appellant (95-15074): Steven B. Frank, FRANK & ROSEN, Seattle, WA. Brian W. McMahon, Saipan, CM. Steven Bert Frank, Esq., FRANK & ROSEN, Seattle, WA.

For TAKAHARU KOMODA, an individual, Defendant - Appellant (95-15074): Steven B. Frank, (See above). Brian W. McMahon, (See above). Steven Bert Frank, Esq., (See above).

JUDGES: Before: BROWNING, WRIGHT and T.G. NELSON, Circuit Judges.

OPINION

MEMORANDUM *

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by *Ninth Circuit Rule 36-3.*

The Department of Labor brought a Fair Labor Standards Act (FLSA) enforcement action against three Saipan corporations and [*3] two persons alleging statutory violations. *See 29 U.S.C. §§ 201-19*. The defendants own nightclubs, hiring young Filipinas to work as hostesses and dancers. The district court concluded that the defendants had violated several FLSA provisions, but limited damages, finding that the violations were not willful and that defendant Saipan Futaba Group (SFG) was not part of the enterprise. Both parties appeal. We affirm in part, reverse in part and remand.

Because we adopt the district court's findings of fact, we do not repeat them here. We note that many of the court's conclusions depended on whom the court found credible and chose to believe. We give special deference to the court's credibility findings. *United States v. Ramos, 923 F.2d 1346, 1356 (9th Cir. 1991)*.

ANALYSIS:

I. *Enterprise Liability*

The FLSA minimum wage and overtime provisions apply to employees of an "enterprise" engaged in interstate commerce. *See 29 U.S.C. § 203(r)*. Before trial, the three corporations and Komoda stipulated that they were an enterprise for purposes of FLSA liability. Despite the stipulation, the district court held that SFG was not part of that enterprise. The court did [*4] not specifically point to any facts as the basis for its opinion, but noted that at the time the stipulation was signed, SFG had not yet been named as a party.

Whether companies constitute an enterprise is a three-part test. *See id.*; *Martin v. Deiriggi, 985 F.2d 129, 133 (4th Cir. 1992)*. They must (1) perform related activities; (2) under unified operations or common control; (3) for a common business purpose. *Id.* We review *de novo* a determination of enterprise liability. *Brock v. Hamad, 867 F.2d 804, 806 (4th Cir. 1989)*. [1] We hold that for FLSA purposes, SFG was a part of the nightclub enterprise.

1 A company qualifies individually as an "enterprise" if it has an annual gross sales volume of more than $ 500,000. *29 U.S.C. § 203(s)(1)(a)(ii)*. Because we hold that SFG was part of the enterprise, we do not reach the government's contention that SFG is individually liable based on its 1990 gross income. We note, however, that the district court erred by considering the *average* gross income over the three years instead of each annual amount. *See id.*

[*5] A. ***Related Activities***

Related activities are "operation[s] through substantial ownership or control of a number of firms engaged in similar types of business activities." S. Rep. No. 1487, 89th Cong., 2d Sess., 1966 U.S.C.C.A.N. 3002, 3009. Activities are related if they are "the same or similar." S. Rep. No. 145, 87th Cong., 1st Sess. 31, 1961 U.S.C.C.A.N. 1620, 1660. Although each corporation offered slightly different entertainment, all three were nightclubs catering to visiting businessmen, serving alcoholic beverages and featuring young Filipinas. *See Donovan v. Grim Hotel Co., 747 F.2d 966, 970 (5th Cir. 1984)* (rejecting argument that hotels did not have related activities where some served short-term guests and others served long-term guests), *cert. denied, 471 U.S. 1124, 86 L. Ed. 2d 272, 105 S. Ct. 2654 (1985)*. Moreover, the clubs shared the same barracks, the same rules and regulations, and the same promotion agency, which provided employees only for them. The defendants, including SFG, clearly performed related activities.

B. *Common Control or Unified Operations*

In determining whether there is common control, courts heavily emphasize common [*6] ownership. *See, e.g., Reich v. Bay, Inc., 23 F.3d 110, 115 (5th Cir. 1994)*; *Grim Hotel, 747 F.2d at 970*; *Donovan v. Easton Land & Dev., Inc., 723 F.2d 1549, 1552 (11th Cir. 1984)*. Komoda, the owner of Japan Enterprise Corporation's (JEC's) Micronesia Club and previous owner of Ameriana's Happiness Club, is the common link of ownership among the companies. Although Eizo Tambo was the president and majority owner of SFG, Komoda contributed substantially to the funding and organization of the corporation. *See 29 C.F.R. § 779.221* ("'Common' control includes the sharing of control and it is not limited to sole control or complete control by one person or corporation."). Komoda was an SFG director and the secretary/treasurer, described himself as the vice president, and owned 25% of the shares.

Other factors also demonstrate that SFG was under common control by the enterprise. Komoda hired SFG's two managers from nightclubs he owned in Japan. He directed the Mayten managers to begin complying with the FLSA as each violation surfaced. *See Grim Hotel, 747 F.2d at 970* (two factors are of the "utmost significance": whether a common person had the power to hire and fire [*7] the manager in each company and whether a common person could approve adherence to the FLSA). 'When SFG dissolved, Komoda signed the dissolution papers. *See Easton Land, 723 F.2d at 1552* ("Determinative question is whether a common entity has the power to control the related business operations."). We conclude that SFG was under common control.

C. *Common Business Purpose*

"Common business purpose" is not defined by the FLSA, but the test is about the same as the one for relat-

ed activities. *See Brock v. Executive Towers, Inc., 796 F.2d 698, 700 (4th Cir. 1986)*; *cf. Brennan v. Veterans Cleaning Serv., Inc., 482 F.2d 1362, 1367 (5th Cir. 1973)* ("More than a common goal to make a profit . . . must be shown to satisfy the requirement."). These nightclubs shared a common purpose, which was to provide entertainment, alcohol and female companionship for businessmen.

D. *Conclusion*

SFG has related activities and a common purpose with the other defendants. Although it is less clear whether SFG was subject to common control by the enterprise, "the Fair Labor Standards Act is to be construed liberally because by it Congress intended to protect the country's workers." [*8] *Grim Hotel, 747 F.2d at 971*. We hold that SFG was part of the enterprise within the intent of the FLSA.

II. Komoda's and Sawada's Liability as Employers

The district court found that Komoda and Sawada were each an "employer" only as to his own company. An employer "includes any person acting directly or indirectly in the interest of an employer in relation to an employee." *29 U.S.C. § 203(d)*. To be an employer, the person is not necessarily required to have an ownership interest or control of day-to-day operations. *See Reich v. Circle C Investments, Inc., 998 F.2d 324, 329 (5th Cir. 1993)*. "'The remedial purposes of the FLSA require the courts to define 'employer' more broadly than the term would be interpreted in traditional common law applications.'" *Dole v. Elliott Travel & Tours, Inc., 942 F.2d 962, 965 (6th Cir. 1991)* (citation omitted). The application of the statute is reviewed *de novo*, the underlying facts for clear error. *Id.*

The government points to little evidence that Komoda was directly involved in Ameriana's New Happiness Club after he "sold" it to Sawada. Sawada and his wife owned 100% of the stock and Komoda did not work there. The [*9] court's finding is neither clearly erroneous nor legally incorrect. Komoda, however, was an employer of the Mayten Club. He was a corporate officer with a substantial ownership interest and was directly involved in decisions affecting the employees. *See Donovan v. Agnew, 712 F.2d 1509, 1511 (1st Cir. 1983)*; *see also Elliott Travel, 942 F.2d at 965*; *Grim Hotel, 747 F.2d at 971*. Komoda is personally liable for the violations at JEC and SFG.

The district court held that Sawada was personally liable for violations at Ameriana's New Happiness Club. We hold that he is also liable for violations at JEC where he served as general manager for the Micronesia Club. *See Agnew, 712 F.2d at 1510* ("There may be several simultaneous employers."). He was in charge of the employees at the club and managed the day-to-day operations. He represented JEC as a corporate agent. He regularly traveled to the Philippines to recruit employees and he signed their employment contracts. The fact that Sawada does not have an ownership interest in JEC is not determinative. *See Donovan v. Sabine Irrigation Co., Inc., 695 F.2d 190, 195* (5th Cir.), *cert. denied, 463 U.S. 1207, 103 S. Ct. 3537, 77 L. Ed. 2d 1387 (1983)*. We hold [*10] that he was an employer at JEC for purposes of FLSA liability.

III. Willfulness

The government appeals the district court's finding that the defendants' FLSA violations were not willful. Willful violations are subject to a three-year statute of limitations and nonwillful violations to a two-year statute. *29 U.S.C. § 255(a)*. Although we review *de novo* whether statutory violations are willful, *see Baker v. Delta Air Lines, Inc., 6 F.3d 632, 644 (9th Cir. 1993)* (reviewing ADEA violation), the district court's decision was based on its factual findings which we review only for clear error.

To be willful, the government must show that the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *McLaughlin v. Richland Shoe Co., 486 U.S. 128, 133, 100 L. Ed. 2d 115, 108 S. Ct. 1677 (1988)*. The Supreme Court has rejected the argument that mere awareness of the FLSA is sufficient to prove willfulness. *Id.* "If an employer acts unreasonably, but not recklessly, in determining its legal obligation, its action" is not willful. *Id. at 135 n.13*.

Although the defendants violated several FLSA requirements, the [*11] court found that when each violation was brought to the attention of the defendants, they corrected the problem. Moreover, several of the issues involved in the violations, such as whether restricted hours require compensation, are not completely clear areas of law. *See Reich v. Gateway Press, Inc., 13 F.3d 685, 703 (3d Cir. 1994)* (violations not willful where there are "close questions of law and fact"). Applying the *McLaughlin* test to the court's findings of fact, we cannot say that the defendants' conduct was willful.

IV. Promotions and Recruitment Costs

A. *Relationship with Komoda*

The government argues that the district court clearly erred in finding that Komoda had no agency relationship with the two promotions companies, I.V. Promotions and Inaoya Promotions. Because the defendants did not use I.V. Promotions within the two-year limitations period, we do not consider whether the court's finding as to that company was correct. As to Inaoya, the district court's

finding is supported by testimony and is not clearly erroneous. *See Anderson v. Bessemer City, 470 U.S. 564, 573-74, 84 L. Ed. 2d 518, 105 S. Ct. 1504 (1985)* ("If the district court's account [*12] of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.").

B. *Payments to the Recruiting Company*

An employer may not require employees to make payments for "facilities" that would reduce their hourly pay below the minimum wage. *29 C.F.R. § 531.3(d)*. The government argues that the defendants are obliged to reimburse the employees for their recruitment costs, but cites no case, statute or regulation that requires an employer to pay recruiting costs to a third-party recruiter. [2]

> 2 The government cites *Marshall v. Glassboro Serv. Assoc.*, 24 Wage and Hour Cas. 1297 (B.N.A.) (D.N.J. 1980) for the proposition that "costs associated with the new hire of employees are to be borne by the employer." The case does not so hold. It says only that in that case the employer was required to pay the employees' initial transportation costs. The employers, here, paid the women's airfare from Manila to Saipan.

[*13] The government also argues that any deductions from the employees' paychecks were an illegal kickback. *See 29 C.F.R. §§ 531.35, 531.40.* FLSA regulations prevent an employer from deducting from an employee's paycheck on behalf of a third-party if the deduction directly or indirectly benefits the employer. *See 29 C.F.R. §§ 531.40(a); Brennan v. Veterans Cleaning Serv., Inc., 482 F.2d 1362, 1370 (5th Cir. 1973)*. The regulations seek to prevent employers from pushing their costs of doing business onto their employees.

Although this argument may have prevailed in relation to the enterprises' earlier collection practices, there was little evidence that the defendants directly or indirectly made or benefited from deductions during the limitations period. During the relevant time, the employees received full paychecks, then deposited all or a portion into a separate bank account. The court made an explicit finding that the employees repaid their notes voluntarily and that these collection methods were not coercive. This finding was supported by evidence at trial.

Based on the court's explicit findings, we hold that the defendants were not responsible for paying for the employees' [*14] recruiting costs.

V. Recordkeeping Violations

The government challenges the court's finding that the defendants had not violated their FLSA recordkeeping obligations. This finding was supported by some evidence and was not clearly erroneous. *See Service Employees, 955 F.2d 1312, 1317 n.7.* We affirm.

VI. Failure to Issue a Permanent Injunction

The government contends that the court abused its discretion in refusing to issue a permanent injunction. *See United States v. Yacoubian, 24 F.3d 1, 3 (9th Cir. 1994)*. In FLSA cases, a district court does not have unfettered discretion on whether to grant an injunction. "Although the district court has discretion to deny injunctive relief in appropriate cases, this discretion is limited by consideration of the importance of prospective relief as a means of ensuring compliance with the provisions of the FLSA." *Brock v. Shirk, 833 F.2d 1326, 1331 (9th Cir. 1987), judgment vacated on other grounds, 488 U.S. 806, 109 S. Ct. 38, 102 L. Ed. 2d 18 (1988); see also Brock v. Big Bear Market No. 3, 825 F.2d 1381, 1383 (9th Cir. 1987)* ("The exercise of discretion is not unbridled.").

Our precedent weighs heavily in favor of issuing an injunction [*15] once a defendant has been found to have violated the Act. In *Marshall v. Chala Enters., Inc., 645 F.2d 799, 804 (9th Cir. 1981)*, we held that the district court abused its discretion where it failed to issue an injunction although the plaintiff was in present compliance, promised future compliance, and had learned an expensive lesson from the litigation. The court emphasized that:

> 'The injunction subjects the defendants to no penalty, to no hardship. It requires the defendants to do what the Act requires anyway -- to comply with the law . . . . The manifest difficulty of the Government's inspecting, investigating, and litigating every complaint of a violation weighs heavily in favor of enforcement by injunction -- *after* the court has found an unquestionable violation of the Act.'
>
> In exercising its discretion, the district court must give substantial weight to the fact that the Secretary seeks to vindicate a public, and not a private, right.

Id. (citations omitted). Multiple violations of the FLSA favor granting of an injunction. *See Big Bear, 825 F.2d at 1383.*

Although the court found that the defendants were not likely to violate the Act in the [*16] future, its deci-

sion is not consistent with our precedent or with the remedial goals of the FLSA. We reverse and remand for imposition of a permanent injunction.

VII. Confinement and Restricted Time

Defendants appeal the court's conclusion that employees must be paid for the four hours each day that they were confined to the barracks and for the approximately three hours each day they were "restricted." Whether an employee must be compensated for off-duty hours is a question of law reviewed *de novo*. *Berry v. County of Sonoma, 30 F.3d 1174, 1180 (9th Cir. 1994), cert. denied, 513 U.S. 1150, 130 L. Ed. 2d 1067, 115 S. Ct. 1100 (1995)*. Underlying facts are reviewed for clear error. *Id.* Whether an employee is able to use non-work time effectively is a factual question. *Id.*

The court found that the women were confined to the employer-owned barracks from 2:00 a.m. to 6:00 a.m. Between 6:00 a.m. and 8:00 p.m., they could leave the barracks only by signing out, giving a destination and being accompanied by two or more employees. The court found that these restrictions prevented the employees from being able to use their non-work time effectively for their own purposes. There [*17] is ample evidence to support these findings, including the defendants' own rules and regulations.

Defendants contend that sleep-time compensation cases, in which employees must sleep at the employer's premises to be available if needed for work, and on-call time cases are the most analogous. *See, e.g., Skidmore v. Swift & Co., 323 U.S. 134, 137, 89 L. Ed. 124, 65 S. Ct. 161 (1944)* (sleep time); *Owens v. Local No. 169, 971 F.2d 347, 350 (9th Cir. 1992)* (on-call time).

The on-call and sleep time cases, however, are not determinative. The employees here were not on-call. They were confined in the barracks and severely restricted during their "free time" without any "legally recognized justification" or work-related need. Under these unique circumstances, we affirm the award of compensation for four hours of confinement time and three hours of restricted time.

VIII. Employees' Dresses

Defendants argue that the district court erred as a matter of law in holding that they should pay for the employees' cocktail dresses worn at work. Where the nature of an employer's business requires the employee to wear a uniform, the employer may not require her to pay for it if [*18] the cost of purchase and cleaning brings the average wage below the minimum wage. *See 29 C.F.R. §§ 531.3(d)(1),(2), 531.32(c)*. Whether a prescribed outfit is considered a "uniform" is made on a case-by-case basis. *See* 6A Lab. Rel. Rep. P 95:109.

Defendants would have us say that this situation is similar to a requirement that male employees wear white shirts and dark trousers on the job. Those.men would be required to pay for their own outfits. *See* Wage Hour Publication 1428 (March 1984). We find no similarity. These "sexy" dresses were of no use except at the nightclubs and were not worn elsewhere. [3]

3 Defendants make much out of one employee's testimony that she once wore the top of an outfit to church. The guidelines, however, do not say that an outfit may never be worn elsewhere. It is possible that a portion of the outfit could be worn outside work but still be the financial responsibility of the employer. *See, e.g., Reich v. Priba Corp., 890 F. Supp. 586, 596-97 (N.D. Tex. 1995)*; *Hodgson v. Newport Motel, Inc.*, 87 Lab. Cas. P 33,830 (S.D. Fla. 1979).

[*19] The uniforms must be paid for by the defendants.

CONCLUSION:

We affirm in part, reverse in part and remand. The defendants' request for attorney's fees pursuant to the Equal Access to Justice Act, *28 U.S.C. § 2412(a)(1), (b), (d)(1)(A)*, is denied. The parties will bear their own costs on this appeal.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.

Exhibit E

Exhibit E

United States of America, Plaintiff-Appellee, v. Anthony Meyers, a/k/a Tony Meyers, Defendant-Appellant

No. 87-3087

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

847 F.2d 1408; 1988 U.S. App. LEXIS 7443; 25 Fed. R. Evid. Serv. (Callaghan) 1317

March 10, 1988, Argued and Submitted
June 2, 1988, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the District of Montana, D.C. No. CR-87-8-CCL, Charles C. Lovell, District Judge, Presiding.

COUNSEL: Edmund F. Sheehy, Jr., Cannon & Sheehy, Helena, Montana, for the Defendant-Appellant.

Pete Dunbar, Assistant United States Attorney, Billings, Montana, for the Plaintiff-Appellee.

JUDGES: Thomas Tang and William C. Canby, Jr., Circuit Judges, and Bruce R. Thompson, * District Judge.

* Honorable Bruce R. Thompson, Senior United States District Judge for the District of Nevada, sitting by designation.

OPINION BY: TANG

OPINION

[*1410] TANG, Circuit Judge:

Anthony Meyers (Meyers) appeals his conviction following jury trial for conspiracy to distribute cocaine in violation of *21 U.S.C. §§ 846, 841(a)(1)*. Meyers challenges the sufficiency of the evidence against him and contends the district court erred in (1) denying his motion to transfer place of prosecution and trial; (2) admitting into evidence a chart summarizing certain phone calls and events; and (3) sentencing him to a 25 year term under the Narcotics Penalties and Enforcement Act of 1986 (1986 Act), rather than the prior 1984 Act.

We affirm [**2] the conviction. We also affirm the district court's sentencing of Meyers under the increased penalty provisions of *21 U.S.C. § 841(b)* as amended in the Narcotics Penalties and Enforcement Act of 1986. We conclude that the enhanced penalty provisions became effective immediately, on the date of enactment, October 27, 1986, and thus that the imposition of a 25 year term, as to this defendant whose underlying offense occurred after the effective date, was not error.

BACKGROUND

On February 25, 1987, an indictment was filed against Franz Magdalener (Magdalener) charging him with several offenses including conspiracy to distribute cocaine in the State of Montana and elsewhere. Approximately one month later, a superseding indictment was filed charging Magdalener and ten other individuals, including Meyers, with conspiracy to distribute cocaine in Montana and elsewhere. In April 1987, Meyers turned himself in to the FBI office in West Palm Beach, Florida. Pursuant to the order of the Montana district court, Meyers was transported to Montana for his arraignment on May 1, 1987 where he entered a plea of not-guilty. All of the defendants charged in the indictment, [**3] with the exception of Meyers and Jay Pinder, entered into plea agreements with the United States. After a four day trial in June, the jury returned its verdict of guilty against Meyers and Pinder.

At trial, Magdalener testified that in 1985, he and Terry Norman Toepper (Toepper) discussed obtaining a large amount of marijuana for importation into the United States and later discussed obtaining marijuana as well as cocaine for the purpose of resale. Toepper was residing in Bozeman, Montana and Magdalener was in Florida.

In October of 1986, Toepper approached the FBI in Bozeman, Montana and advised them that he had infor-

mation about individuals engaged in the transportation of cocaine from Florida to Montana. In cooperation with the FBI, Toepper agreed to wear a recording device and to record his phone calls. In December of 1986, Toepper traveled to Florida to obtain a kilo of cocaine and remained there for approximately a week.

On December 12, 1986, Rusty Ward, an indicted co-conspirator, arranged for Toepper to meet John DeCicco, another indicted [*1411] co-conspirator but fugitive as of this writing. After several attempts to contact individuals to obtain a kilo of cocaine, [**4] DeCicco and Toepper went to Jupiter, Florida, and met with appellant Meyers. After going to Meyers' house, Toepper, DeCicco and Meyers then proceeded to Davie, near Fort Lauderdale, to see "Mike," also known as Michael Miller.

When they arrived in Davie, Meyers left DeCicco and Toepper at a shopping center and went to a house belonging to Miller. Upon returning to the shopping center, Meyers advised that he had received a couple hundred dollars from Miller. The three men then headed back toward Jupiter, Florida. Prior to leaving Fort Lauderdale, Toepper was shown some samples of cocaine by DeCicco and, according to Toepper, DeCicco said that these came from Meyers. Upon returning to Jupiter, the three men went to Brian's Bar. DeCicco and Toepper then dropped Meyers off at his home and went to another bar, which Toepper described as the Apple Bar Lounge. Rusty Ward called Toepper at this bar and told him to come to the Inlet Bar. At the Inlet Bar, Toepper gave Rusty Ward the keys to his rental automobile. After being there a short while, Ward returned the keys to Toepper and told him the brief case with the kilo was outside in the car behind the bar. The kilo of cocaine was then recovered [**5] by the FBI upon Toepper's return to his hotel. It was Toepper's contention that this kilo was intended to be shipped to Montana.

DISCUSSION

I. *Motion to Transfer Place of Prosecution and Trial*

Meyers moved the district court, under *Rules 18* and *21 of the Fed. R. Crim. P.*, to transfer the prosecution and trial against him to the appropriate United States District Court for the State of Florida on the grounds that (1) there was nothing to indicate his involvement in a conspiracy to distribute cocaine to Montana, and (2) his only overt acts, if any, occurred in Florida.

We review a ruling on a motion for change of venue for an abuse of discretion. *United States v. Birges, 723 F.2d 666, 674* (9th Cir.), *cert. denied, 466 U.S. 943, 80 L. Ed. 2d 472, 104 S. Ct. 1926 (1984)*.

Rule 18 provides, in part, that "the prosecution shall be had in a district in which the offense was committed." *Fed. R. Crim. P. 18*. So long as overt acts in furtherance of the conspiracy [**6] occurred within the State of Montana, venue was proper in that district. As we have consistently explained, "venue is appropriate in any district where an overt act committed in the course of the conspiracy occurred." *United States v. Schoor, 597 F.2d 1303, 1308 (9th Cir. 1979)*; *see also, United States v. Prueitt, 540 F.2d 995, 1006 (9th Cir. 1976), cert. denied, 429 U.S. 1063, 97 S. Ct. 790, 50 L. Ed. 2d 780 (1977)*; *United States v. Barnard, 490 F.2d 907, 910 (9th Cir. 1973), cert. denied, 416 U.S. 959, 40 L. Ed. 2d 310, 94 S. Ct. 1976 (1974)*. It is not necessary that Meyers himself have entered or otherwise committed an overt act within the district, as long as one of his co-conspirators did. *See United States v. Williams, 536 F.2d 810, 812* (9th Cir.), *cert. denied, 429 U.S. 839, 50 L. Ed. 2d 106, 97 S. Ct. 110 (1976)* (venue for conspiracy was proper in district in which appellant's co-conspirator committed overt act); *cf., United States v. Parrish, 736 F.2d 152, 158 (5th Cir. 1984)* (venue of drug prosecution in Louisiana was proper, even [**7] as to defendant who was not shown to have ever been in Louisiana in furtherance of conspiracy). Thus, where at least two of Meyers' co-conspirators, Terry Toepper and Rusty Ward, committed numerous overt acts in Montana, venue was proper in that district.

II. *Admission of Exhibit 15*

Meyers also argues the district court erred in admitting under *Fed. R. Evid. 1006*, exhibit 15, a chart summarizing the phone calls and events observed by surveillance teams on December 12, 1986.

This Court reviews a district court's evidentiary rulings for an abuse of discretion. *United States v. Gwaltney, 790 F.2d 1378, 1382 (9th Cir. 1986), cert. denied, 479 U.S. 1104, 107 S. Ct. 1337, 94 L. Ed. 2d 187 (1987)*. [*1412] Even if error is found, nonconstitutional errors do not require reversal unless it is "more probable than not" that they affected the verdict. *United States v. Soulard, 730 F.2d 1292, 1296 (9th Cir. 1984)*; *Fed. R. Crim. P. 52(a)*.

The proponent of a summary of "voluminous writings" under *Fed. R. Evid. 1006* must, in this Circuit, [**8] establish that the underlying materials upon which the summary is based are admissible in evidence. *United States v. Johnson, 594 F.2d 1253, 1255* (9th Cir.), *cert. denied, 444 U.S. 964, 62 L. Ed. 2d 376, 100 S. Ct. 451 (1979)*; *City of Phoenix v. Com/Systems, Inc., 706 F.2d 1033, 1038 (9th Cir. 1983)* (summary admissible only if underlying documents admissible, voluminous and available for inspection). Although the underlying

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materials must be "admissible," they need not be "admitted" in every case. *Johnson, 594 F.2d at 1257, n.6.*

Exhibit 15 summarized (1) a record of long distance phone calls of various co-conspirators and (2) the surveillance logs of two FBI teams. At the time exhibit 15 was offered, the telephone logs had been admitted and FBI Special Agent Reid Robertson, head of the surveillance team of December 12, 1986 had fully testified. Later in the trial, Special Agent Gunnar Askeland, also a member of the surveillance team, testified and was cross-examined as to the contents of the chart and the matters observed on the day in question. The surveillance logs themselves had also been made available [**9] for inspection by the defense but were never formally admitted into evidence.

The surveillance reports, though not admitted, were admissible under the business record exception to the hearsay rule. *Fed. R. Evid. 803(6).* It is established that "entries in a police report which result from the officer's own observations and knowledge may be admitted, but that statements made by third persons under no business duty to report may not." *United States v. Pazsint, 703 F.2d 420, 424 (9th Cir. 1983).* The fact that two surveillance teams were operating on December 12, 1986 does not alter the fact that *all* the officers would have been "acting routinely, under a duty of accuracy, with employer reliance on the result." *Id.* (quoting *Clark v. City of Los Angeles, 650 F.2d 1033, 1037 (9th Cir. 1981), cert. denied, 456 U.S. 927, 72 L. Ed. 2d 443, 102 S. Ct. 1974 (1982)).* There is no evidence in the record indicating that the surveillance reports improperly incorporated the statements of third persons under no business duty to report. Thus, the [**10] *Johnson* test of underlying admissibility is satisfied in this case.

Further, the cross-examination of Agents Robertson and Askeland allowed the defendant to question fully two of the central participants on the surveillance team and thereby alert the jury to any alleged discrepancies in the chart. *See United States v. Poschwatta, 829 F.2d 1477, 1481 (9th Cir. 1987), cert. denied, 484 U.S. 1064, 108 S. Ct. 1024, 98 L. Ed. 2d 989 (1988)* (finding no abuse in admission of charts where underlying figures already admitted and opportunity to cross-examine witness provided). Finally, the sequence of events on the 12th of December was indeed confusing and the chart arguably contributed to the clarity of the presentation. *Id.; see also, United States v. Gardner, 611 F.2d 770, 776 (9th Cir. 1980).*

III. *Sufficiency of the Evidence*

Meyers also argues the evidence was insufficient to sustain his conviction for conspiracy to distribute cocaine. At best, Meyers concedes, the evidence suggests that he may have been in possession of five samples of cocaine in Florida, but not in any event, that he made a knowing entry into a conspiracy [**11] to obtain cocaine for distribution in Montana.

In assessing the sufficiency of the evidence, our inquiry is whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Calabrese, 825 F.2d 1342, 1348 (9th Cir. 1987).*

The essential elements of a conspiracy are (1) an agreement to engage in [*1413] criminal activity, (2) one or more overt acts taken to implement the agreement, and (3) the requisite intent to commit the substantive crime. *United States v. Indelicato, 800 F.2d 1482, 1483 (9th Cir. 1986)* (per curiam). Once the existence of the conspiracy is shown, evidence establishing beyond a reasonable doubt a knowing connection of the defendant with the conspiracy, even though the connection is slight, is sufficient to convict [**12] him of knowing participation in the conspiracy. *United States v. Fleishman, 684 F.2d 1329, 1340-41* (9th Cir.), *cert. denied, 459 U.S. 1044, 74 L. Ed. 2d 614, 103 S. Ct. 464 (1982).* However, the connection to the conspiracy must be shown to be "knowledgeable"; that is, "the government must prove beyond a reasonable doubt that the defendant knew of his connection to the *charged* conspiracy." *United States v. Federico, 658 F.2d 1337, 1344 (9th Cir. 1981), rejected on other grounds, United States v. DeBright, 730 F.2d 1255 (9th Cir. 1984)* (en banc) (emphasis added).

The evidence against Meyers, though not overwhelming, is sufficient to support the conviction. The United States established the existence of a conspiracy between Terry Toepper, Franz Magdalener, Rusty Ward and others, [1] as set out in the indictment, to "find sources of controlled substances, including marijuana and cocaine"; "secure buyers . . . in Montana and elsewhere"; "transport . . . to Montana and elsewhere"; and "distribute" said substances for profit. To sustain the conviction against Meyers, the evidence must show a knowing connection to [**13] that conspiracy, however slight. The testimony of Toepper and the tape recordings of conversations held between Toepper, DeCicco and Meyers on December 12, 1986 support the jury's finding that Meyer knowingly took part in the conspiracy to distribute cocaine, and in particular, in the effort to "find sources."

1 The testimony of Magdalener implicated Dan Hellios, John McElvy, Kathy Polejewski, Harold Livingston, David McElvy and Jeff Sailors.

The Toepper testimony and recordings established that on December 12, 1986, after several attempts to contact individuals to obtain a kilo of cocaine, DeCicco and Toepper met with Meyers in Jupiter, Florida. It was

DeCicco's impression that Tony [Meyers], who "knows more people than I do", would "know how to get a hold of Mike." The three men proceeded to Davie, in the area of Fort Lauderdale, to see "Mike," a.k.a. Michael Miller. Meyers left DeCicco and Toepper for approximately an hour, went to Miller's house, and returned with some samples of cocaine. According [**14] to Toepper's testimony, Meyers "came back and said that he couldn't get it right then, but he could get it at six o'clock that evening." The three men returned to Jupiter and went to Brian's Bar. DeCicco and Toepper then dropped Meyers off at his home and went to another bar in Jupiter, the Apple Bar Lounge. At the Apple Bar, DeCicco placed some calls, at least one, he told Toepper, to Meyers. Rusty Ward then called Toepper at the Apple Bar and told him to come to the Inlet Bar, where the cocaine transaction closed.

The tape recordings indicate that Meyers was an important connection for Toepper and Magdalener to Miller, a cocaine supplier, if not the supplier in this case. Meyers clearly understood that Toepper, Ward and DeCicco were seeking to purchase one kilo of cocaine, assisted these men in establishing a link to a known supplier, and transferred samples of cocaine to DeCicco and Toepper prior to the closing of the deal. These facts establish more than an "unwitting" connection to the scheme to distribute cocaine.

The evidence on whether or not Meyers knew the cocaine was destined specifically for Montana is conflicting. Nonetheless, we note that the indictment itself did [**15] not charge a conspiracy to distribute in Montana exclusively; rather it stated "in Montana and elsewhere." In addition, under the relevant standard of review, "all reasonable inferences from the evidence must be drawn in favor of the government." *Federico, 658 F.2d at 1343*. Toepper testified that during the drive from Jupiter to [*1414] Davie, Meyers, DeCicco and he discussed that he was from Montana. The jury was entitled to believe or disbelieve this testimony. *See, e.g., United States v. Larm, 824 F.2d 780, 783 (9th Cir. 1987), cert. denied, 484 U.S. 1078, 108 S. Ct. 1057, 98 L. Ed. 2d 1019 (1988)*. Although the transcripts of the tapes do not record Toepper's mentioning of Montana to Meyers, they clearly record such statements to DeCicco on at least two instances.

Finally, given the substantial quantity of cocaine involved in this case, the jury could also reasonably conclude that Meyers knew that such a narcotic, in such an amount, was not likely to stay in Florida and was destined for redistribution elsewhere. *See, e.g., United States v. Smith, 609 F.2d 1294, 1300 (9th Cir. 1979)* (jury could conclude [**16] defendants knew that drugs are frequently dispensed through a network of suppliers, wholesalers, and retailers in different states); *see also, United States v. Smith, 832 F.2d 1167 (9th Cir. 1987)* (quantity may be sufficient for jury to infer intent to redistribute). In sum, we conclude slight but sufficient evidence linked Meyers to the conspiracy.

IV. *Sentencing*

A. Effective Date of 1986 Act

Meyers also challenges the district court's imposition of a 25 year sentence under the enhanced penalty provisions of the Narcotics Penalties and Enforcement Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, 2-8 (1986) ("1986 Act"). [2] *See 21 U.S.C. § 841(b) (Supp. IV 1986)*. Meyers contends the penalty provisions of the Controlled Substances Penalties Amendments Act, Pub. L. No. 98-473, 98 Stat. 2030 (1984) ("1984 Act"), in fact apply in this case. *21 U.S.C. § 841(b) (Supp. II 1984)*. Alternately, Meyers argues neither the 1984 nor the 1986 amendments to the penalty provisions apply because both amendments were tied to the effective date set out in section 235 of the Sentencing Reform Act of 1984, November 1, 1987. Following [**17] review of the relevant legislation, we conclude the most rational construction of the statutory scheme is that the increased penalty provisions of the 1986 Act became effective immediately on October 27, 1986. Thus, Meyers was correctly sentenced on July 24, 1987 to 25 years under the 1986 Act.

2 The district court originally sentenced Meyers on July 24, 1987 to 25 years with a special parole term of 4 years to follow. Subsequently, on September 16, 1987, the court, under *Fed. R. Crim. P. 35(a)*, amended its judgment to delete the imposition of the 4 year special parole term. Accordingly, any questions regarding the application of the special parole or supervised release provisions are not before us in this appeal.

Prior to 1984, the penalty provisions of *21 U.S.C. § 841* for violations involving narcotic drugs, provided for a term of imprisonment of not more than 15 years, a fine of not more than $ 25,000, or both. *21 U.S.C. § 841(b)(1)(A) (1982)*. In 1984, [**18] Congress amended the penalty provisions of *21 U.S.C. § 841* in the Controlled Substances Penalties Amendments Act. *See* Pub. L. 98-473, 98 Stat. 2068-69, § 501 *et seq.* (1984); *21 U.S.C. § 841(b)(Supp. II 1984)*. For violations of *section 841(a)* involving, as in the instant case, a kilogram or more of a narcotic drug, the statute provided that "such person shall be sentenced to a term of imprisonment of not more than 20 years, a fine of not more than $ 250,000, or both." Pub. L. 98-473, 98 Stat. 2068, § 502 (1984). The increased penalty provisions of the 1984 Act became effective upon their enactment on October 12, 1984. *Calabrese, 825 F.2d at 1346; cf., United States v.*

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Shaffer, 789 F.2d 682 (9th Cir. 1986) (provision granting government right to appeal under Comprehensive Crime Control Act of 1984 effective as of enactment on October 12, 1984).

In 1986, the penalty provisions were amended again, in the Narcotics Penalties and Enforcement Act of 1986, part of the comprehensive Anti-Drug Abuse Act of 1986. Pub. L. 99-570, 100 Stat. 3207, § 1001 et seq. (1986); [**19] *21 U.S.C. § 841(b) (Supp. IV 1986). Section 841(b)* was amended to provide that in the case of violations involving 500 grams or more of a mixture containing cocaine, "such person shall be sentenced to a term of imprisonment [*1415] which may not be less than 5 years and not more than 40 years . . . a fine not to exceed . . . $ 2,000,000 if the defendant is an individual . . . or both." Pub. L. 99-570, 100 Stat. 3207, 3-4, § 1002 (1986); *21 U.S.C. § 841(b)(1)(B) (Supp. IV 1986).*

Meyers argues that the 1986 amendments to the penalty provisions did not become effective immediately upon the statute's enactment on October 27, 1986, but rather that the amendments were tied to certain provisions of the 1986 Act delaying the effective date to November 1, 1987. Specifically, Meyers notes the following section:

> The amendments made by this section shall take effect on the date of the taking effect of *section 3583 of Title 18, United States Code*. [November 1, 1987]. Narcotics Penalties and Enforcement Act of 1986, Pub. L. 99-570, § 1004(b), 100 Stat. 3207-6.

The district [**20] court concluded that the reference to "this section" in the above quotation only referred to section 1004 of the 1986 Act which amended the Controlled Substances Act and the Controlled Substances Import and Export Act by striking the term "special parole term" and inserting "term of supervised release." The district court found the effective date of the enhanced sentencing provisions was not tied to *18 U.S.C. § 3583* and that only the amendments to the special parole provisions were delayed to 1987.

We agree with this construction of the statute. The only specific mention of a delayed effective date occurs in those sections modifying or eliminating special parole terms or "terms of supervised release," *see, e.g.*, Pub. L. 99-570, §§ 1004(b), 1006(a)(4), or those sections requiring application of the guidelines issued by the Sentencing Commission, such as those provisions providing for a court's limited authority to impose a sentence below a statutory minimum, see Pub. L. 99-570, § 1007(b), § 1009(b). The lengthy sections amending the penalty provisions of *21 U.S.C. § 841(b)* make no mention of a delayed effective date. *See* Pub. [**21] L. 99-570, §§ 1002, 1003. Under general principles of statutory construction, "in the absence of an express provision in the statute itself, an act takes effect on the date of its enactment." *Shaffer, 789 F.2d at 686* (quoting cases). This date would be, as the government contended below, October 27, 1986, the date of the Act's approval by the President. [3]

> 3 Although no circuit court has squarely confronted the question of when the enhanced penalty provisions of *§ 841(b)(1)* of the 1986 Act became effective, one district court, in upholding the constitutionality of the penalty provisions, assumed the amendments became effective on October 27, 1986. *See United States v. Restrepo, 676 F. Supp. 368, 378 (D. Mass. 1987).*

At oral argument, we requested the parties to address the applicability, if any, of the provisions and effective date of the Sentencing Reform Act of 1984, Pub. L. [**22] 98-473, 98 Stat. 2030-31, § 235(b)(1)(1984) and a recent decision of this Court construing that Act, *United States v. Rewald, 835 F.2d 215, 216 (9th Cir. 1987). Rewald* indicated the Sentencing Reform Act of 1984 became effective on November 1, 1987 and that the sentencing guidelines developed by the Sentencing Commission do not apply to conduct that occurred prior to November 1, 1987. [4] In this case, our inquiry was directed to the question of whether the effective date set out in section 235 of the Sentencing Reform Act of 1984 also operated to delay the effective date of the 1986 amendments to the penalty provisions of *21 U.S.C. § 841(b)*. We conclude it does not.

> 4 Rewald's appeal was dismissed for lack of jurisdiction. We found that since Rewald had been sentenced approximately two years prior to the effective date of the Sentencing Reform Act of 1984, and since that Act does not apply to conduct committed prior to November 1, 1987, the Court lacked jurisdiction to hear the appeal. *See Rewald, 835 F.2d at 216.*

[**23] Section 235 of the Sentencing Reform Act of 1984 was enacted in Chapter II of the Comprehensive Crime Control Act of 1984. Pub. L. 98-473, 98 Stat. 1837 (1984). [5] [*1416] Chapter II made substantial amendments to the general sentencing provisions of the United States Code, *18 U.S.C. § 3551 et seq.*, and also, *inter alia*, provided for the establishment of the United States Sentencing Commission. *See* Sentencing Reform Act of 1984, Pub. L. 98-473, 98 Stat. 1987, 2017. Section 235 of Chapter II provides that "this chapter shall

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take effect on the first day of the first calendar month beginning twenty-four months after the date of enactment. . ." Sentencing Reform Act of 1984, Pub. L. 98-473, 98 Stat. 2031, § 235(a)(1). Congress subsequently extended the effective date by 12 months. *See* 28 U.S.C. § 3551 (Supp. IV 1986)(chapter effective 36 months after enactment). Thus, it is clear the changes enacted by Sentencing Reform Act of 1984, and in particular, the sentencing guidelines and policy recommendations of the United States Sentencing Commission, took effect November 1, 1987. *Id.; see also, Rewald, 835 F.2d at 216.* [**24]

5 The Comprehensive Crime Control Act of 1984 contained a total of 23 chapters. *See* A. Patridge, The Crime Control and Fine Enforcement Acts of 1984: A Synopsis (Federal Judicial Center 1985).

The 1984 amendments to the penalty provisions of *21 U.S.C. § 841*, however, fall within an entirely different chapter, Chapter V of the Comprehensive Crime Control Act of 1984. Pub. L. 98-473, 98 Stat. 2068, § 501 *et seq.* Consequently, Meyers errs when he contends the effective date set out in Chapter II of the Sentencing Reform Act controls the application of the amendments set forth in Chapter V of the Controlled Substances Penalties Amendments Act of 1984. As we stated in *Calabrese*, the increased penalties of the 1984 Act became effective immediately on October 12, 1984. *Calabrese, 825 F.2d at 1345-46.* Given that the 1984 amendments to the penalty provisions were not tied to the effective date of the Sentencing Reform Act, there is little reason to find that [**25] the 1986 amendments were so tied. This is especially true where, as noted above, the only specific mention of a delayed effective date in the 1986 Act occurs in those provisions relating to special parole or the application of the sentencing guidelines. Accordingly, we hold the 1986 amendments to the penalty provisions of *21 U.S.C. § 841*, as provided in the Narcotics Penalties and Enforcement Act of 1986, became effective immediately on October 27, 1986.

B. Disparate Sentencing

Finally, Meyers argues that even if he was properly sentenced under the 1986 Act, his sentence of 25 years was improper because excessively disparate from the sentences imposed on other defendants. We review a district court's sentencing decision for an abuse of discretion. *United States v. Messer, 785 F.2d 832, 834 (9th Cir. 1986).* A sentence which falls within statutory limits is ordinarily not reviewable unless there exist constitutional concerns. *United States v. Tucker, 404 U.S. 443, 446-47, 30 L. Ed. 2d 592, 92 S. Ct. 589 (1972);* [**26] *Messer, 785 F.2d at 834.* Disparate sentences alone normally do not constitute an abuse of discretion. *United States v. Endicott, 803 F.2d 506, 510 (9th Cir. 1986).*

However, Meyers also contends that the court imposed a more severe sentence because he exercised his constitutional right to stand trial. This argument has no support in the record. To the contrary, the district court specifically assured defense counsel that the sentence would not be enhanced because Meyers went to trial. The court also explained that in imposing the sentence, it had taken Meyers' prior record into account, as well as his actions in this case. On the facts presented, and given our finding that Meyers was properly sentenced under the 1986 Act, there was no abuse of discretion such as that demonstrated in *United States v. Medina-Cervantes, 690 F.2d 715, 716 (9th Cir. 1982). See also, United States v. Carter, 804 F.2d 508, 513 (9th Cir. 1986).* Accordingly, we find no abuse of discretion in the imposition of a 25-year sentence.

CONCLUSION

We conclude the evidence against Meyers was sufficient to establish a knowing connection to a [**27] conspiracy to distribute cocaine "in Montana and elsewhere," and thus affirm the conviction.

We also uphold Meyers' sentencing under the enhanced penalty provisions of the 1986 Act because those provisions became [*1417] effective on October 27, 1986. Given the permissible range of sentences under the 1986 Act, the imposition of a 25 year term did not constitute an abuse of discretion.

AFFIRMED.

Exhibit F

Exhibit F

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. LILA MARIE RIZK, Defendant-Appellant.

No. 10-50051

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

660 F.3d 1125; 2011 U.S. App. LEXIS 21113; 86 Fed. R. Evid. Serv. (Callaghan) 1139

August 31, 2011, Argued and Submitted, Pasadena, California
October 19, 2011, Filed

PRIOR HISTORY: [**1]

Appeal from the United States District Court for the Central District of California. D.C. No. 2:07-cr-00755-DDP-3. Dean D. Pregerson, District Judge, Presiding.

COUNSEL: Michael N. Friedman, United Defense Group, LLP, Studio City, California, for the defendant-appellant.

Jeremy D. Matz, Michael J. Raphael, and Monica E. Tait, United States Attorney's Office, Los Angeles, California, for the plaintiff-appellee.

JUDGES: Before: Mary M. Schroeder and Ronald M. Gould, Circuit Judges, and Michael Patrick McCuskey, Chief District Judge.* Opinion by Judge Gould.

* The Honorable Michael Patrick McCuskey, Chief District Judge for the U.S. District Court for Central Illinois, Urbana, sitting by designation.

OPINION BY: Ronald M. Gould

OPINION

[*1127] GOULD, Circuit Judge:

Lila Rizk appeals her jury conviction for one count of conspiracy in violation of *18 U.S.C. § 371*; one count of bank fraud in violation of *18 U.S.C. § 1344(1)*; and thirteen counts of loan fraud in violation of *18 U.S.C. § 1014*. Rizk contends that the district court committed prejudicial error by admitting two summary charts under *Federal Rule of Evidence 1006*. Rizk also contends that there was insufficient evidence to support each of her convictions. Rizk further contends that [**2] the district court erred in ordering her to pay restitution in the full amount of the victim lenders' loss, despite a prior civil settlement with the victim lenders that included a release from liability. We have jurisdiction under *28 U.S.C. § 1291*, and we affirm.

I

A

Lila Rizk was a licensed real estate appraiser based in Orange County, California. [*1128] She did business with Mark Abrams, a mortgage broker, and his business partner Charles Elliott Fitzgerald, a real estate developer. Between July 2000 and January 2003, Abrams, Fitzgerald, and others associated with them initiated and carried out a scheme to defraud mortgage lenders. Abrams and Fitzgerald purchased homes in exclusive California communities at or near their true market values. In the purchase contracts they required sellers and their agents to keep the purchase prices confidential. Abrams and Fitzgerald then applied for loans in amounts far greater than the actual purchase prices. To deceive mortgage lenders into believing the loans were adequately secured by the properties, Abrams, Fitzgerald, and their associates made phony purchase contracts and gained inflated appraisal reports for the homes. Relying on this false documentation, [**3] mortgage lenders funded and bought loans in amounts exceeding the homes' actual purchase prices and market values. As a result, Abrams and Fitzgerald made, while the defrauded victim lenders lost, millions of dollars. Losses to these lenders in total exceeded $40 million.

Rizk actively participated in the mortgage fraud scheme. The lenders required appraisals before they would approve home loans. The appraisals generated by Rizk made the homes appear to be worth much more than their true values. The lenders relied on Rizk's inflated appraisals in funding and buying the loans. In providing the inflated appraisals, Rizk followed an array of improper and risk-enhancing practices. Rizk improperly ignored the original sellers' list prices, often hundreds of thousands or millions of dollars less than her appraisals. Rizk did not use genuinely comparable properties. Rizk used as "comparable" properties homes that were distant from, differed from, or had sold long before the homes being appraised. Rizk also used homes, for which she had previously given inflated appraisals, as "comparable" properties. Both from the improper acts that she did in fashioning appraisals, and from her failure to [**4] use appropriate practices in determining market values of comparable properties, there was abundant evidence that Rizk did not exercise an independent professional judgment in making her appraisals for Abrams and Fitzgerald.

B

Before trial, the government moved in limine to introduce charts summarizing the properties involved in the scheme. The charts listed 96 properties in chronological order of the corresponding loan transactions. The first chart showed the following data for each property: 1) the actual escrow closing date and the date reported to the lender; 2) the actual sale price and the price reported to the lender; 3) the amount of the loan funded; 4) whether the real estate agents who participated in the scheme received a commission; 5) if so, how much; 6) the named appraisers on the appraisals submitted to the lender; and 7) whether Rizk provided records about the transaction to the government under subpoena.

The second chart showed the following data for each property: 1) the appraisal date; 2) the appraisal value submitted to the lender; 3) the named appraisers on the appraisals submitted to the lender; and 4) the addresses of comparable properties used in the appraisal. [**5] This chart used color-coding to show how Rizk used properties she had previously appraised at inflated values as comparables in later appraisals.

The district court granted the government's motion, concluding over objection that the charts were admissible under [*1129] *Federal Rule of Evidence 1006*. Rizk and her co-defendants had argued that the charts were overbroad, including properties not specifically named in the indictment.[1] The district court, however, accepted that the purpose of the charts was to show the full scope of the fraudulent scheme and that the indictment "expressly include[d] more than the nine listed properties." And so the district court held that the summary evidence was within the scope of the indictment. The district court also stated that Rizk and her co-defendants had been given the underlying documents showing what was described in the summary charts, and that they had ample time to review them before trial.

1 The overt acts and substantive counts of the indictment identified only nine specific properties. But the indictment alleged that the defendants committed the enumerated overt acts, "among others," in furtherance of the conspiracy.

Rizk was a named appraiser in [**6] only 39 of the 96 transactions shown on the charts. But at trial the government presented evidence showing that Rizk had prepared the appraisals for all 96 transactions. The summary charts showed that Rizk had produced records to the government regarding transactions in which she was not a named appraiser. These records included sketches, notes, emails, and at least one appraisal matching a submitted appraisal. The government introduced testimony that later in the scheme, Rizk's coconspirators removed her name from the appraisals and substituted the names of unwitting appraisers not connected to the scheme. Her co-conspirators testified that Rizk knew and was relieved that her name was no longer being used on the appraisals. And the government showed that Rizk continued to receive compensation from Abrams and Fitzgerald long after the submitted appraisals stopped bearing her name.

At trial, Rizk admitted that her appraisals were too high, but argued that she made them in good faith and that she lacked knowledge of the conspiracy. Rizk argued that Abrams exploited her because she was based in Orange County and "didn't know" Los Angeles, Beverly Hills, or Bel Air, which housed the subject [**7] properties she appraised. She said that the only sale price she was given for a property was the falsified, inflated sale price (not the true sale price kept confidential) and that she used the price she was given as her starting point. She said that Abrams gave her the deficient comparable properties and misrepresented them to her, that she believed Abrams was credible, and that she did not know she was using bad comparables. Rizk also contested the government's proffer that she had performed the appraisals in all 96 transactions listed on the summary charts. She claimed that for some properties, Abrams, Fitzgerald, and their associates had produced the appraisals and forged her name. In short, Rizk's defense was that despite her failure to perform the due diligence required of her in making the appraisals, she did not knowingly participate in the scheme, and lacked the required intent to support a conviction for conspiracy, bank fraud, and loan fraud.

From the evidence presented to it, the jury might have viewed Rizk as a key and knowing participant in a

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deliberate fraud, or as an innocent and unknowing dupe used and manipulated by the ringleaders of the fraud. However, the jury did [**8] not believe Rizk's account. It found her guilty on all counts.

Rizk then filed a motion for acquittal, which the district court denied. The district court sentenced Rizk to a three-year prison term, to be followed by a three-year term of supervised release, and it ordered [*1130] forfeiture and restitution. Pursuant to the Mandatory Victim Restitution Act, *18 U.S.C. § 3663A et seq.*, the district court ordered restitution in the total amount of the victims' loss, $46,515,846. This restitution order did not account for a prior civil settlement between Rizk and the victim lenders, in which the victim lenders agreed to release all claims against Rizk in consideration of her payment of $967,083.68, which was the limit of her errors and omissions insurance policy. The district court entered judgment and Rizk timely appealed.

We address in turn Rizk's contentions on appeal.

II

Rizk challenges the admission of the charts summarizing the real estate transactions involved in the fraud scheme. First, she contends that the charts let the government put facts before the jury without presenting evidence of those facts. Second, she complains that because the charts cover transactions not specifically referenced [**9] in the indictment, they were "other acts" evidence under *Federal Rule of Evidence 404(b)*. Third, she asserts that because the "other acts" evidence admitted under *Rule 404(b)* in the charts was unfairly prejudicial, this evidence should have been excluded under *Federal Rule of Evidence 403*.

A

We review a district court's decision to admit evidence for abuse of discretion. *Boyd v. City & County of San Francisco., 576 F.3d 938, 943 (9th Cir. 2009)*.

Before addressing the particular challenges that Rizk makes to the admission of the summary charts under *Federal Rule of Evidence 1006*, it is helpful to set forth a clear and concise statement of the rule and its underlying reason. *Rule 1006* provides: "The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation." "The purpose of the rule is to allow the use of summaries when the documents are unmanageable or when the summaries would be useful to the judge and jury." *Davis & Cox v. Summa Corp., 751 F.2d 1507, 1516 (9th Cir. 1985), superseded by statute, 28 U.S.C. § 1961, as recognized in Northrop Corp. v. Triad Int'l Mktg. S.A., 842 F.2d 1154, 1156 (9th Cir. 1988)*.

A [**10] proponent of summary evidence must establish that the underlying materials upon which the summary is based (1) are admissible in evidence and (2) were made available to the opposing party for inspection. *Amarel v. Connell, 102 F.3d 1494, 1516 (9th Cir. 1996)*. These materials must be admissible, but need not themselves be admitted into evidence. *United States v. Meyers, 847 F.2d 1408, 1412 (9th Cir. 1988)*. The availability requirement ensures that the opposing party has "an opportunity to verify the reliability and accuracy of the summary prior to trial." *Paddack v. Dave Christensen, Inc., 745 F.2d 1254, 1261 (9th Cir. 1984)*.

Here, the district court did not abuse its discretion in admitting the government's summary charts under *Rule 1006*. The underlying materials for the charts were standard real estate records that were both admissible in evidence and made available to Rizk for inspection. Rizk does not argue that the government did not establish the two requirements for admissibility. Rather, she argues that the government did not present evidence supporting the information in the charts, i.e., that it did not introduce the underlying [*1131] records at trial.[2] But Rizk's contention is without [**11] merit because *Rule 1006* allows precisely what Rizk labels prejudicial error. *Rule 1006* permits admission of summaries based on voluminous records that cannot readily be presented in evidence to a jury and comprehended. It is essential that the underlying records from which the summaries are made be admissible in evidence, and available to the opposing party for inspection, but the underlying evidence does not itself have to be admitted in evidence and presented to the jury.

2 Rizk complains that the government did not establish, among other things, the fair market value of each property listed on the charts. But this contention--about what the charts did not include--goes to their weight rather than their admissibility. *See United States v. Scholl, 166 F.3d 964, 978 (9th Cir. 1999)* ("'Generally, objections that an exhibit may contain inaccuracies, ambiguities, or omissions go to the weight and not the admissibility of the evidence.'" (quoting *United States v. Keplinger, 776 F.2d 678, 694 (7th Cir. 1985)*)).

B

We review de novo whether a summary chart falls within the scope of *Rule 404(b)*. *United States v. Soliman, 813 F.2d 277, 278 (9th Cir. 1987)*.[3]

3 In opposition to the government's motion [**12] in limine, Rizk and her codefendants argued that the summary charts were overbroad

because they included properties not specifically named in the indictment. Because Rizk's 404(b) argument on appeal is similar in substance to the defendants' argument below, we treat her 404(b) argument as one raised before the district court.

Rule 404(b) provides that evidence of "other crimes, wrongs, or acts" is inadmissible to prove character or criminal propensity but is admissible for other purposes, such as proof of intent, plan, or knowledge. *Fed. R. Evid. 404(b)*. "This rule is inapplicable, however, where the evidence the government seeks to introduce is directly related to, or inextricably intertwined with, the crime charged in the indictment." *United States v. Lillard, 354 F.3d 850, 854 (9th Cir. 2003)*. Summary evidence admitted under *Rule 1006* may thus be outside *Rule 404(b)*'s scope. For example, in *United States v. Montgomery, 384 F.3d 1050, 1062 (9th Cir.2004)*, we held that each action listed in the government's summary exhibit "was 'inextricably intertwined' with the conspiracy, and therefore not subject to *Rule 404(b)*, because each occurred within the temporal scope of the conspiracy [**13] and comprised the conspiracy." *See also Soliman, 813 F.2d at 279* (finding that summary chart was not "other crimes" evidence). *Cf. United States v. Robinson, 774 F.2d 261, 264, 276 (8th Cir. 1985)* ("The summary properly included all 105 applicants [rather than the 15 named in the indictment], because information regarding all of these individuals was relevant in delineating the enormous scope of the [loan fraud] scheme.").

The rule is well established that the government in a conspiracy case may submit proof on the full scope of the conspiracy; it is not limited in its proof to the overt acts alleged in the indictment. This is consistent with our own prior precedent and that of other circuits. *See, e.g., Montgomery, 384 F.3d at 1061-62*; *Lillard, 354 F.3d at 854*; *United States v. Williams, 989 F.2d 1061, 1070 (9th Cir. 1993)* (finding no abuse of discretion where district court admitted evidence of "uncharged transactions" that were "closely linked to" events charged in drug conspiracy); *United States v. Bonanno, 467 F.2d 14, 17 (9th Cir. 1972)* ("One of the charges in the indictment alleged conspiracy. In conspiracy prosecutions, the Government has considerable leeway in offering evidence [**14] of other offenses [not charged in the indictment]."); [*1132] *United States v. Janati, 374 F.3d 263, 270 (4th Cir. 2004)* ("It is well established that when seeking to prove a conspiracy, the government is permitted to present evidence of acts committed in furtherance of the conspiracy even though they are not all specifically described in the indictment."); *United States v. Powers, 168 F.3d 741, 749 (5th Cir. 1999)* ("[W]here a conspiracy is charged, acts that are not alleged in the indictment may be admissible as part of the Government's proof."); *United States v. Thai, 29 F.3d 785, 812 (2d Cir. 1994)* ("When the indictment contains a conspiracy charge, uncharged acts may be admissible as direct evidence of the conspiracy itself. It is clear the Government may offer proof of acts not included within the indictment, as long as they are within the scope of the conspiracy." (internal citations and quotation marks omitted)); *United States v. Lewis, 759 F.2d 1316, 1344 (8th Cir. 1985)* ("[I]n conspiracy cases, the government is not limited in its proof to establishing the overt acts specified in the indictment."); *see also United States v. Gold, 743 F.2d 800, 813 (11th Cir. 1984)* (distinguishing [**15] evidence of "facts different from those alleged in the indictment" from "facts which, although not specifically mentioned in [the overt acts section of] the indictment, are entirely consistent with its allegations").

The district court did not abuse its discretion in concluding that the government's summary charts were within the scope of the indictment. The real estate transactions shown on the charts were "inextricably intertwined" with the conspiracy charge and were not "other acts" subject to *Rule 404(b)*. *See Lillard, 354 F.3d at 854*. Rizk challenges the charts' admission because they included transactions not specified in the indictment and appraisals not bearing her name. But the indictment alleges a conspiracy. The government offered the summary charts to show the full scope of that conspiracy and as proof that the non-specified transactions were not "other acts" at all--that is, that Rizk had prepared the appraisals for all 96 transactions in furtherance of the conspiracy.

C

The district court has broad discretion to admit potentially prejudicial evidence under *Rule 403*, which provides that "evidence may be excluded if its probative value is substantially outweighed by the danger [**16] of unfair prejudice." *Boyd, 576 F.3d at 948*. We generally review the application of *Rule 403* for abuse of discretion. *Id.* But where a party did not object to the district court's admission on *Rule 403* grounds, we review for plain error. *United States v. Plunk, 153 F.3d 1011, 1019 n.7 (9th Cir. 1998), overruled on other grounds by United States v. Hankey, 203 F.3d 1160, 1169 n.7 (9th Cir. 2000)*. The review for plain error is even more deferential than review for abuse of discretion. "Under plain-error review, reversal is permitted only when there is (1) error that is (2) plain, (3) affects substantial rights, and (4) 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *United States v. Cruz, 554 F.3d 840, 845 (9th Cir. 2009)* (quoting *Johnson v. United States, 520 U.S. 461, 467, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997)*). "[I]n view of the inherently fact-specific nature of the *Rule 403* balancing inquiry, and the special deference to which district courts' decisions to admit evidence pursuant to that Rule are entitled,

it is the rare exception when a district court's decision to admit evidence under *Rule 403* constitutes plain error." *Plunk, 153 F.3d at 1019 n.7* (internal citations [**17] omitted).

The making of rulings on disputed points of evidence is the bread and butter of trial. It comes up every day in a trial, [*1133] it represents a mainstay part of the controversy, and a district court must generally make rulings quickly and on the spot to keep the proceedings fair and to move them toward completion. Also, the district court has discretion in some cases properly to admit evidence subject to a limiting instruction given the jury to avoid or lessen any undue prejudice. For such reasons, it is very important that a party objecting to evidence being admitted give the court the grounds of objection. Because Rizk did not make a *Rule 403* objection before the district court, we review this challenge to introduction of the summary charts only for plain error.

Rizk contends on appeal that the district court insufficiently weighed the prejudicial effect of the summary charts. She argues that the charts' comparison of true and inflated sales prices for the 96 homes was unfairly prejudicial because it permitted the inference that for each home the appraisal was fraudulent and Rizk had prepared it, though she was the named appraiser in less than half of the transactions.

To the extent [**18] that Rizk's *Rule 403* argument is predicated on her contention that the summary charts were "other acts" evidence subject to *Rule 404(b)*, we reject it. Rizk relies on *Huddleston v. United States, 485 U.S. 681, 688, 108 S. Ct. 1496, 99 L. Ed. 2d 771 (1988)*, in which the Supreme Court addressed the potential prejudicial effect of *Rule 404(b)* evidence in relation to *Rule 403*. But here, because we hold that the charts were not subject to *Rule 404(b)*, there was no danger that the jury would misuse the so-called "uncharged other acts" to conclude that Rizk had a criminal propensity to inflate appraisals generally. The key danger to Rizk was that the jury would believe the government's proof that Rizk had in fact inflated the appraisals in the 96 listed transactions. There was no *Rule 404(b)* problem, and so her *Huddleston* argument is unavailing.

Even if we view Rizk's *Rule 403* argument as independent of her *Rule 404(b)* contention, we are not persuaded that she has shown grounds for relief. We have previously rejected *Rule 403* challenges to the admission of summary evidence that was relevant and not unfairly prejudicial. *See, e.g., Montgomery, 384 F.3d at 1062* (explaining that summary exhibit was relevant because it outlined [**19] scope of conspiracy and was not unfairly prejudicial because limiting instruction was given and "defendants had notice of the exhibit and an opportunity to cross-examine"). The same rule and practice has been followed in other circuits. *See, e.g., United States v. Boesen, 541 F.3d 838, 848-49 (8th Cir. 2008)* (holding that defendant suffered no unfair prejudice because charts represented accurate summaries, "and evidence is not unfairly prejudicial merely because it tends to prove a defendant's guilt"); *United States v. Seelig, 622 F.2d 207, 214 (6th Cir. 1980)* (rejecting argument that summaries more prejudicial than probative because summaries showed 1,409 sales but only 32 mentioned in indictment).

Applying these principles, we conclude that a jury rationally could view the summary charts as proof of the scope of the conspiracy and of Rizk's broad participation in it.[4] Because the charts supported [*1134] the government's theory that Rizk prepared the appraisals in all 96 transactions, the charts may have had impact tending to show Rizk's guilt, but they were not unfairly prejudicial. *See Seelig, 622 F.2d at 214*. Rizk had an opportunity to inspect the documents underlying the charts, to [**20] cross-examine the government witnesses who prepared them, and to argue to the jury that Rizk did not prepare inflated appraisals in all 96 transactions. *See Montgomery, 384 F.3d at 1062*. Because the charts' probative value was not substantially outweighed by the danger of unfair prejudice, the district court did not err, let alone plainly err, in admitting them.

4 In her Reply Brief, Rizk frames her objection that the charts exceeded the indictment's scope as a relevance challenge based on *Federal Rule of Evidence 401*. Rizk has waived this argument because she develops it for the first time in her Reply Brief and because she did not give *Rule 401* as a ground of objection before the district court. *See Jachetta v. United States, 653 F.3d 898, 2011 WL 3250450, at *11 (9th Cir. 2011)*. In any case, in light of our conclusion above, her argument is unpersuasive. The 96 transactions listed on the charts were relevant to the scope of the conspiracy and Rizk's broad participation in it.

III

Rizk argues that the evidence at trial was insufficient to sustain her convictions because the government did not establish that she had knowledge of the objective of the conspiracy and [**21] that she had the requisite intent to commit bank fraud and loan fraud. After trial, Rizk moved for a judgment of acquittal under *Federal Rule of Criminal Procedure 29(c)*, and the district court denied her motion.

We review de novo the denial of Rizk's *Rule 29* motion and her challenge to the sufficiency of the evidence; the standard to be applied is the same. *United States v.*

Gonzalez-Diaz, 630 F.3d 1239, 1242 (9th Cir. 2011); *United States v. Bennett, 621 F.3d 1131, 1135 (9th Cir. 2010)*. The standard of review is not favorable to Rizk's appellate claim. We do not retry the evidence afresh. Instead, with a sufficiency of evidence challenge, we ask "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979))*. This leads us to consider the elements of the crimes for which Rizk was convicted, and how a rational jury could view the evidence presented thereon.

A

"To prove a conspiracy under *18 U.S.C. § 371*, the government must establish: (1) an agreement to engage in criminal activity, (2) one or more overt acts taken [**22] to implement the agreement, and (3) the requisite intent to commit the substantive crime." *United States v. Sullivan, 522 F.3d 967, 976 (9th Cir. 2008)*. "Knowledge of the objective of the conspiracy is an essential element." *United States v. Krasovich, 819 F.2d 253, 255 (9th Cir. 1987)*. "However, the government need not prove knowledge with direct evidence; circumstantial evidence and the inferences drawn from that evidence can sustain a conspiracy conviction." *United States v. Wright, 215 F.3d 1020, 1028 (9th Cir. 2000)*.

Rizk contends that the evidence was insufficient to establish that she knew of the objective of the conspiracy. We disagree. Rizk selectively identifies evidence from the record tending to show her unwitting participation in the scheme. For example, she points to testimony that her co-conspirators kept certain information from her related to the fraud. But the government did not have to present direct evidence that Rizk knew every detail about the conspiracy. *See Wright, 215 F.3d at 1028*. The government needed only to present sufficient evidence from which any rational jury could infer that Rizk knew the conspiracy's objective. *See id*.

[*1135] The jury heard testimony that [**23] Rizk knew her appraisals were used to gain loans on properties. Abrams testified to Rizk's requests that actual list prices be removed from the Multiple Listing Service database, and that properties be re-listed on the database at higher prices, before she issued her inflated appraisals. Evidence at trial showed that Rizk appraised homes at or near values the scheme's leaders asked for, and that her appraisal values far exceeded homes' true market values, often by two to three hundred percent. Finally, the government presented evidence that Rizk prepared appraisals to be signed in the name of her co-defendant Scott Robinson and that later in the scheme, Rizk knew and was relieved that other appraisers' names were being fraudulently substituted in place of her own. From this evidence, viewed in the light most favorable to the government, a rational jury could have determined beyond a reasonable doubt that Rizk had knowledge of the objective of the conspiracy.

B

The essential elements of bank fraud under *18 U.S.C. § 1344(1)* are: "(1) that the defendant knowingly executed or attempted to execute a scheme to defraud a financial institution; (2) that the defendant did so with the intent to [**24] defraud; and (3) that the financial institution was insured by the FDIC [Federal Deposit Insurance Corporation]." *United States v. Warshak, 631 F.3d 266, 312 (6th Cir. 2010)*. Intent to defraud may be established by circumstantial evidence. *Sullivan, 522 F.3d at 974* (holding, in mail and wire fraud case, that "the scheme itself may be probative circumstantial evidence of an intent to defraud").

Rizk argues that the government had to prove an additional element, intent to expose a lender to a risk of loss. She contends that there was insufficient evidence to sustain her conviction for bank fraud because the government did not do so. This circuit "has never adopted a 'risk of loss' analysis in bank fraud cases." *United States v. Wolfswinkel, 44 F.3d 782, 786 (9th Cir. 1995)*. Here, as in *Wolfswinkel*, we need not decide whether risk of loss is an essential element of bank fraud because "the government offered sufficient evidence at trial to prove that the conduct for which [Rizk] was convicted exposed at least one bank to a risk of loss." *Id*. Rizk was an experienced appraiser. Rizk knew that her appraisals were being used to finance the purchase of properties. In making her appraisals, Rizk [**25] was unduly influenced by the values put forth by Abrams and Fitzgerald. Rizk did not gain truly comparable properties to make her appraisals but instead looked at properties different in nature or location or time of sale, and eventually at her own previously inflated appraisals. An independent skilled or expert view on market values of the subject properties was missing in action. The lenders, to their detriment, relied on her appraisals. The victim lenders' losses from the fraud totaled more than $46 million. Rizk had an exculpatory explanation, that she was duped and used by the fraud's ringleaders. But a jury did not have to accept this view. We conclude that a rational jury could have found beyond a reasonable doubt that Rizk intended to defraud the lenders and to expose them to a risk of loss.

C

To convict a defendant of loan fraud under *18 U.S.C. § 1014*, the government must prove that he or she "knowingly ma[de] any false statement or report, or

willfully overvalue[d] any land, property or security" regarding a loan, to an FDIC-insured bank, for the purpose of influencing [*1136] the bank's actions. *18 U.S.C. § 1014*; *see United States v. Wells, 519 U.S. 482, 490, 117 S. Ct. 921, 137 L. Ed. 2d 107 (1997)*; *United States v. Tannehill, 49 F.3d 1049, 1055 (5th Cir. 1995)*.

United [**26] *States v. Tannehill* illustrates how circumstantial evidence can establish intentional overvaluation of property. In that case, the defendant challenged his *§ 1014* convictions on the ground that there was insufficient evidence that he knew his appraisals were false. *Tannehill, 49 F.3d at 1055*. The court rejected his argument, concluding that "[t]here was ample evidence from which a rational juror could have found that [the defendant] knew that [his] appraisals overvalued the property." *Id.* Evidence cited in support of the court's conclusion included that the appraisals valued the property at 20 to 30 percent higher than its sale price; that other sales in the area were poor; that the appraisal discrepancies were too great to be the product of negligence; and that an experienced appraiser should have detected the discrepancies. *Id. at 1055-56*.

Rizk argues that the government did not establish that she knowingly overvalued the properties or that she knew her appraisals enabled Abrams to fraudulently obtain loans. But here, as in *Tannehill*, there was "ample evidence" to allow a rational jury to find that Rizk willfully overvalued property. *See 18 U.S.C. § 1014*; *49 F.3d at 1055*. She overvalued [**27] properties by two to three hundred percent. She used larger homes and homes in more desirable neighborhoods as comparables, and she later used her own previously inflated appraisals to arrive at subsequent inflated values. Rizk's actions are inconsistent with her claim that she made the appraisals in good faith, and as an experienced appraiser, she should have known better. *See Tannehill, 49 F.3d at 1055-56*. In light of our conclusion above that there was sufficient evidence that Rizk knew the conspiracy's objective, her argument that she did not know the intended purpose of her appraisals is unavailing. A rational jury could have determined beyond a reasonable doubt that Rizk knew the intended purpose was to obtain loans in furtherance of the conspiracy, and that she prepared the inflated appraisals for the purpose of influencing the lenders' actions. *See 18 U.S.C. § 1014*.

IV

Rizk's final challenge is to the district court's restitution order that she pay $46,515,846 to the victim lenders. She argues that the order conflicts with a prior civil settlement before the same district judge. The settlement agreement provided that, in exchange for Rizk's payment of $967,083.68, the policy [**28] limit of her errors and omissions insurance policy, the victim lenders would release all claims against Rizk for losses they sustained because of her appraisals. Because Rizk did not raise this issue before the district court, we review again for plain error. *United States v. Van Alstyne, 584 F.3d 803, 819 (9th Cir. 2009)*.

The Mandatory Victim Restitution Act ("MVRA") requires a district court, in sentencing a defendant convicted of certain offenses, including an offense against property committed by fraud, *see 18 U.S.C. § 3663A(c)(1)(A)(ii)*, to order restitution to each victim "in the full amount of each victim's losses." *Id. § 3664(f)(1)(A)*; *see id. § 3663A(a)(1)*; *United States v. Edwards, 595 F.3d 1004, 1012-13 (9th Cir. 2010)*. The MVRA applies even where the victims have received compensation from another source: "In no case shall the fact that a victim has received or is entitled to receive compensation with respect to a loss from insurance or any other source be considered in determining the amount of [*1137] restitution." *18 U.S.C. § 3664(f)(1)(B)*. If a victim receives compensation for a loss from insurance or any other source, the MVRA requires the district court to order restitution [**29] to "the person who provided or is obligated to provide compensation," but only after all victims have been fully compensated for their losses. *Id. § 3664(j)(1)*. Finally, the amount of restitution is offset by "any amount later recovered as compensatory damages for the same loss by the victim" in civil proceedings. *Id. § 3664(j)(2)*; *Edwards, 595 F.3d at 1013*.

In *United States v. Edwards*, we rejected a defendant's contention that a prior bankruptcy settlement precluded a later criminal restitution order. *595 F.3d at 1013*. Our holding in *Edwards* applies to prior civil settlements, because there we affirmed the continued viability of *United States v. Cloud, 872 F.2d 846 (9th Cir. 1989)*. In *Cloud*, a defendant convicted of bank fraud had entered into a prior settlement agreement with the defrauded bank, and the bank had entered into a settlement agreement with its insurer. *872 F.2d at 853*. In the agreements, the victims had agreed to release all claims against the defendant. *Id.* We concluded that neither the bank nor the insurer could waive, through settlement, its "right" to restitution under the Victim and Witness Protection Act ("VWPA"), the predecessor statute to the MVRA, because a purpose [**30] of criminal restitution is to penalize. *Id. at 854*. In *Edwards*, we concluded that the MVRA does not alter *Cloud* and held that "[c]riminal restitution is mandatory under the MVRA and cannot be waived by a prior civil settlement." *595 F.3d at 1014*; *see also United States v. Bearden, 274 F.3d 1031, 1040-41 (6th Cir. 2001)* (collecting cases from other circuits).

Rizk's argument that her prior civil settlement precluded the district court's restitution order is foreclosed

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by our decision in *Edwards*. The MVRA required the district court to order restitution to the victim lenders. We hold that the district court did not err in ordering restitution to be paid to the victim lenders, despite the fact that they had given a release of all claims against Rizk in the prior civil action.

But the district court did err in ordering Rizk to pay $46,515,846 to the victim lenders. Because Rizk's insurer paid the victim lenders $967,083.68 pursuant to the settlement agreement, the district court should have ordered Rizk to pay, first, $45,548,762.32 to the victim lenders, and then, $967,083.68 to Rizk's insurer. *See 18 U.S.C. § 3664(j)(1)*.

A district court may not order restitution such that victims will [**31] receive an amount greater than their actual losses; to do so is plain error. *See United States v. Fu Sheng Kuo, 620 F.3d 1158, 1163-66 (9th Cir. 2010)*. In the MVRA, Congress provided that an insurer shall receive restitution for compensating a fraud victim, after the victim is made whole. *See 18 U.S.C. § 3664(j)(1)*. Congress also provided that restitution to a victim shall be reduced by any amount the victim later recovers in a civil proceeding. *See id. § 3664(j)(2)*. Though the MVRA seeks to fully compensate victims for their losses, *see id. § 3664(f)(1)(A)*, these provisions ensure that victims do not through restitution receive an amount exceeding their losses.

Under the current restitution order, which is properly before us on this appeal, the victim lenders will receive $967,083.68 more than their actual losses, so imposition of the order in this respect was plain error. We vacate the restitution order and remand with instructions that the district court enter a corrected order. The new restitution order shall reduce the restitution owed to the victim lenders by [*1138] $967,083.68 and order that amount paid to Rizk's insurer only after the victim lenders have been fully compensated.

V

Rizk's [**32] convictions are **AFFIRMED** on all counts. The district court's restitution order is **VACATED** and **REMANDED** with instructions.

Exhibit G

Exhibit G

W. Willard Wirtz, Secretary of Labor, United States Department of Labor, Appellant v. Savannah Bank & Trust Company of Savannah, Appellee

No. 22356

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

362 F.2d 857; 1966 U.S. App. LEXIS 5683; 10 Fed. R. Serv. 2d (Callaghan) 263

June 27, 1966

DISPOSITION: [**1] Reversed and remanded

JUDGES: Tuttle, Chief Judge, Thornberry, Circuit Judge, and Lynne, District Judge.

OPINION BY: THORNBERRY

OPINION

[*858] THORNBERRY, C.J.:

The state-chartered Savannah Bank & Trust Company of Savannah, Georgia, owns a fifteen story building located in Savannah -- the first four floors (22%) are occupied by the Bank, and the remaining eleven floors (78%) are rented to various tenants. The dispute here involves the asserted coverage, under the minimum wage provisions of the Fair Labor Standards Act, *29 U.S.C. § 201 et seq.*, of the Bank employees whose duties are limited to the portion of the building leased to tenants. [1]

1 There are two other district court decisions involving basically the same issues as presented here. *Wirtz v. Columbian Mutual Life Ins. Co., W.D. Tenn. 1965, 246 F. Supp. 198* (on appeal to the 6th Cir.); *Wirtz v. First National Bank & Trust Co., W.D. Okla. 1965, 239 F. Supp. 613* (on appeal to the 10th Cir.).

[**2] The Bank admits that the employees engaged in its banking operations are subject to the Act and are paid in accordance with the minimum wage provisions. These include maintenance employees whose duties relate to space occupied by the Bank. The Bank, however, denies that the employees whose duties are restricted to the rental office portion of the building are covered by the Act. As a result, the elevator starter and the maids employed to clean the tenant floors are paid less than the minimum wage; while the maids for the Bank floors, the watchmen and the maintenance men are paid in accordance with the Act.

The Secretary of Labor does not contend that the employees working on the leased floors were covered by the minimum wage provisions prior to 1961, but he asserts that the 1961 Amendments to the Act which added the "enterprise" provisions extended coverage to them. Essentially these provisions require the [*859] payment of the minimum wage to any employee who "is employed in an enterprise engaged in commerce or in the production of goods for commerce, . . . by an establishment described in *section 203(s)(3)* or *(5)* of this title." *29 U.S.C. § 206* [**3] *(b)*. The following definitions are relevant in applying this provision:

> 203(r) "Enterprise" means the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units including departments of an establishment operated through leasing arrangements, but shall not include the related activities performed for such enterprise by an independent contractor: * * *
>
> 203(s) "Enterprise engaged in commerce or in the production of goods for commerce" means any of the following in the activities of which employees are so engaged, including employees handling,

selling, or otherwise working on goods that have been moved in or produced for commerce by any person: * * *

> (3) any establishment of any such enterprise, except establishments and enterprises referred to in other paragraphs of this subsection, which has employees engaged in commerce or in the production of goods for commerce if the annual gross volume of sales of such enterprise is not less than $1,000,000; * * *
>
> I. Definition [**4] of "Enterprise"

The statutory definition of "enterprise" requires the existence of three elements: (1) related activities, (2) unified operation or common control, and (3) a common business purpose. The Bank admits the presence of the second element, common control, but denies the existence of the other elements. To determine whether there is related activity "performed . . . for a common business purpose," we must first examine the relationship of the operation of the Bank and the office building.

A senior Bank official directs the operation and maintenance of the entire building. Rental rates are established by the finance committee of the Bank, and rent receipts are handled by the trust department. Rental income, depreciation, building repairs and taxes attributable to the office portion of the building are included in the Bank's income tax return. The Bank does not pay rent for the space it occupies. The maintenance crew consists of fifteen maids (one for each floor), a supervisor of maids, maintenance men, an elevator starter and watchmen. All these employees, except the four maids assigned to clean the Bank floors, are carried on a separate payroll. Only [**5] the office building maids and the elevator starter, however, are paid less than the minimum wage. From these facts it is clear that the Bank and the office building are operated as a single unit, with the exception of the separate payroll for the office building employees. Common control, as conceded by the Bank, is obviously present.

The legislative history provides some assistance in ascertaining the meaning of "related activities performed . . . for a common business purpose." The Report of the Senate Committee on Labor and Public Welfare [3] states that the "enterprise" provisions are designed to extend coverage to all employees of any establishment (with certain exceptions)

> "which now has some employees who are and others who are not individually engaged in commerce, or in the production of goods for commerce, if the establishment is in an enterprise which has an annual gross volume of sales of not less than $1 million. . . . The purpose of this provision is to eliminate fragmentation of coverage in the establishments of these large enterprises and prevent continuance of a [*860] situation in which some of the employees in such an establishment have the protection [**6] of the act while others who work side by side with them do not . . .
>
> * * *
>
> "Related activities conducted by separate business entities will be considered a part of the same enterprise where they are joined either through unified operation or common control into a unified business system or economic unit to serve a common business purpose.
>
> "The bill's approach is to treat as separate enterprises those businesses which are unrelated to each other. For example, if a single company owns several retail apparel stores and is also engaged in the lumbering business, the sales of the lumbering business would not be included in the annual dollar volume in determining whether the $1 million test under section 3(a)(1) has been met. The employees of the lumbering business would not be included in the 'enterprise' even if the $1 million test were met since they are not engaged in the 'related activities' of the retail stores.
>
> "Within the meaning of this term, activities are 'related' when they are the same or similar, such as those of the individual retail or service stores in a chain, or departments of an establishment operated through leasing arrangements. *They are also 'related'* [**7] *when they are auxiliary and service activities such as central office and warehousing activities and bookkeeping, auditing, purchasing,*

> *advertising, and other services.* Likewise, activities are 'related' when they are part of a vertical structure such as the manufacturing, warehousing, and retailing of a particular product or products under unified operation or common control for a common business purpose."

See also H.R. Rep. No. 75, 87th Cong., 1st Sess. 7-8 [hereinafter cited as H.R. Rep.]

> 2 S. Rep. No. 145, 87 Cong., 1st Sess. 31 (1961) [hereinafter cited as S. Rep.].

The Secretary asserts that "the management of the bank building as an integral part of defendant's banking operations clearly serves the essential 'auxiliary and service' function of providing the Bank with the premises for conducting its present business, as well as space in which to expand in the future." We agree. The operation of the office building cannot be divorced from that of the Bank, as contended by the [**8] appellee. The appellee admits that the primary purpose of constructing a building with space far in excess of the actual needs of the banking operation is to spread the very high cost of real estate in the downtown area. Thus, the revenue-producing capacity of the office space in the Bank building is necessary to enable the Bank to occupy its present location. In addition to providing space for future expansion, the building stands as a symbol in the public mind of the stability and the position of the Bank in the community. As candidly revealed by appellee, there are also certain tax advantages to the Bank which result from the ownership of real estate under State law. Thus, there is a very real relationship between the operation of the office building and the *Bank. Wirtz v. Columbian Mutual Ins. Co., W.D. Tenn. 1965, 246 F. Supp. 198, 201-202.*

Several of these connecting factors between the Bank and the office building would not be present if the two operations were physically separated into two buildings located at some distance from each other. Thus, an office building owned by the Bank on the other side of the city or in another city would not serve the functions [**9] of spreading the cost of the real estate upon which the Bank is built or of providing room for Bank expansion. Nor would the two separate buildings be likely to evoke the public image created by a large bank office complex. The arguments pressed by the appellee seem to treat the Bank and the office building as if the two operations were completely separated in this manner and to ignore [*861] the ramifications of their physical connection. n2a

> UNKNOWN n2a Our reference to Bank ownership of a separate office building is not meant to infer the legality of such ownership but to illustrate the ramifications of physical connection.

Many of the same considerations discussed above are also relevant in determining the existence of "common business purpose." The reference to this term in the legislative history is brief:

> "In order for 'related activities' to be part of an enterprise they must be performed for a 'common business purpose.' Eleemosynary, religious, or educational and similar activities of organizations [**10] which are not operated for profit are not included in the term 'enterprise' as used in this bill. Such activities performed by non-profit organizations are not activities performed for a common business purpose."

S. Rep. at 41; H.R. Rep. at 8. If we were to consider this statement alone, it would appear that the term was merely designed to eliminate non-profit activities from the coverage of the enterprise provisions. We need not, however, rely exclusively on this quotation since a common business purpose is found in the operation of the office building to enable the Bank to locate in a desirable downtown area, to provide space for future expansion, to improve the Bank's profit position, both from the standpoint of revenue and taxes, and to strengthen the image of the Bank in the public eye. We, therefore, conclude that the Bank and the operation of the office building constitute an "enterprise" under the provisions of the Fair Labor Standards Act since they are "related activities performed . . . through . . . common control . . . . for a common business purpose. . . ."

II. Gross Sales of One Million Dollars

The next prerequisite to coverage under the Act is the [**11] requirement that "the annual gross volume of sales of such enterprise is not less than $1,000,000 . . . ." *29 U.S.C. § 203(s)(3).* The Secretary's Complaint in the District Court alleged that "Defendant's annual gross volume of sales, including its sales of office building space, is not less than $1,000,000.00." The Bank admitted the allegation contained in that paragraph of the Complaint with the exception that it denied the existence of a related business activity performed for a common business purpose. Defendant also stated that it would show that "the gross volume of *rentals* in its office building is less than $1,000,000.00." Although it does not appear from the record that the Bank ever asserted in

the district court that its sales were less than the necessary amount, it now attempts to repudiate the admission found in its Answer of August 23, 1962, and to persuade this Court to permit it to amend that Answer "to conform to the evidence heretofore introduced at the trial of this cause without objection . . . ." The evidence to which the appellee refers is the Bank's Annual Report for the year 1962, introduced by the Secretary. The Report allegedly [**12] shows that the Bank has no sales.

Rule 15(b) of the Federal Rules of Civil Procedure provides for amendments of the pleadings to conform to the evidence "when issues not raised by the pleadings are tried by express or implied consent of the parties . . . ." *Rule 15(b)*, however, by its own terms is not applicable here since the matter was raised by the Secretary's Complaint and admitted by the Bank. Nor was the question of the amount of sales litigated by the parties "by express or implied consent." The Annual Report was offered as evidence of the relationship of the Bank and the operation of the office building. That the Report also indicates the amount of income of the Bank does not bring it within the terms of *Rule 15(b)*. See *Simms v. Andrews, 118 F.2d 803, 807* [3] *(10th Cir. 1941)*.

3 "The right to amend pleadings to conform to the proof proceeds upon the theory that by such amendment the pleadings are brought in line with the actual issues upon which the case was tried, even though such issues were not stated in the pleadings as originally drawn. In such case it is the duty of the court, after the evidence upon the supposed issue has been introduced without objection, to permit the amendment. *Rule 15(b)* . . . . This rule, however, does not authorize such an amendment merely because evidence which is competent and material upon the issues created by the pleadings incidentally tends to prove another fact not within the issues in this case."

[**13] [*862] This motion on appeal in the guise of a *Rule 15(b)* amendment seeks not only to nullify an earlier admission but also to assert a new defense not previously pleaded. This cannot be done. See Systems Inc. v. Bridge Electronics Co., 3d *Cir. 1964, 335 F.2d 465, 466-67*; United States v. Sinor, 5th *Cir. 1956, 238 F.2d 271, 277*, cert. denied, *353 U.S. 985, 77 S. Ct. 1287, 1 L. Ed. 2d 1144*; *Simms v. Andrews, supra*; 1A Barron & Holtzoff, Federal Practice and Procedure § 449, at 780 (Wright ed. 1960); 3 Moore, Federal Practice para. 15.13, at 991-92 (1964). The motion to amend appellee's answer is therefore denied.

Even if the amendment were proper, we would be constrained to agree with the analysis of the District Court in *Wirtz v. Columbian Mutual Life Ins. Co., supra, at 203-04*, which concludes that Congress, in prescribing the million dollar test for *Section 203(s)* enterprises, intended to go beyond a restricted definition of the term "sales" to establish a standard of coverage based upon the size of a business. This position finds considerable support in the legislative history of the amendments as [**14] seen from the following quotation from the Senate Report:

> "The million dollar test is *an economic test.* It is the line which the Congress must draw in determining who shall and who shall not be covered by a minimum wage. It is a way of saying that anyone who is operating *a business of that size* in commerce can afford to pay his employees the minimum wage under this law."

S. Rep. at 5. In its discussion of the method of calculating the annual dollar volume, the Senate Report uses the terms "gross receipts" and "gross business" interchangeably with "sales." [4]

4 "8. *Measuring the annual dollar volume of sales*

Under the bill, an 'enterprise ' in section 3(s)(1), (3), and (4) [3(s)(4) was renumbered as 3(s)(3) in the bill as enacted] must have $1 million or more in annual sales. The method of calculating *the requisite dollar volume of sales or business* will be the same as is now followed under the law with respect to calculating the annual dollar volume of sales in retail and service establishments, and in laundries under the exemptions provided in section 13(a) (2), (3), (4), and (13) of the Act. The procedure for making the calculation is set forth in the Department's Interpretative Bulletin * * *. As it is there stated, the 'annual dollar volume of sales' consists of the gross receipts from all types of sales during a 12-month period.

* * *

"In applying this rule, *the gross receipts or gross business* of an 'enterprise' for such 12 month period will constitute its annual dollar volume for that period even though the establishment did not operate throughout the entire year.

"When a new business is commenced, the employer will necessarily be unable for a time to determine its annual dollar volume on the basis of the preceding annual period described above, because the business will have no *gross receipts*

during such period. In such cases, for purposes of determining the applicability of the act in workweeks falling within the calendar quarter in which the business commenced operations, the *gross receipts* of such new business during the period which it has been in operation will be taken as representative of its annual dollar volume in applying the test of section 3(s). Thereafter, the analysis can be based on the period described above."

S. Rep. at 38

[**15] *Section 203(k)* of the Act defines "sale" or "sell" to include "any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition." The Bank contends that the term "sales" must be given a "literal interpretation" and that such an interpretation would not include rental receipts, interest on loans and securities or income [*863] from services. [5] It is, however, difficult to accept this proposition when other sub-sections of 203(s) refer to annual gross volume of sales of service establishments [203(s) (1)], from operating streetcars and buses [203(s) (2)] and of gasoline service establishments [203(s) (5)]. Thus it is clear that "sales" at least is broad enough to encompass certain service enterprises. This conclusion is further bolstered by the statement in the legislative history that the "enterprise" provisions would extend coverage to additional employees in such enterprises as "wholesale, trade, finance, insurance, real estate, transportation, communications, and public utilities, and business, accounting, and similar services . . .," S. Rep. at 31, thus including a number of industries which would not qualify under a restricted [**16] definition of "sales."

5 The Bank's income in 1962 consisted of the following:

Interest on loans	$ 1,671,801.02
Interest on securities	521,725.16
Income from services	456,523.45
Rental from office space	113,494.27
Total	$ 2,763,543.90

The Bank calls attention to 203(s)(4) which speaks in terms of the annual gross volume of *business* in reference to construction enterprises to support its contention that Congress knew how to establish a standard based upon the size of the business rather than upon the volume of "sales." See *Wirtz v. First National Bank & Trust Co., W.D. Okla. 1965, 239 F. Supp. 613, 618*. This single provision does not convince us that Congress intended to draw such a distinction in the face of statements in the legislative history which would indicate the contrary intention.

The definition of "sale" to include "any sale" in effect leaves us without much guidance. It cannot be doubted that "sale" has a broader meaning than that urged by the [**17] Bank, since the Act specifically includes certain service industries, such as streetcars and buses. In the light of the liberal interpretation that we are required to place upon the Act, [6] it is not farfetched to interpret "sales" to include interest on loans and securities and rental from office space. In reality, leasing an office is a "sale" of space in a building for a certain period, just as a loan is the "sale" of the use of an amount of money. We conclude, therefore, that the gross-volume-of-sales test was intended as a measure of the size of the enterprise and that the income reported by the Bank satisfies this test.

6 *Mitchell v. Lublin, McGaughy & Assoc., 1959, 358 U.S. 207, 211, 79 S. Ct. 260, 264, 3 L. Ed. 2d 243*; *Mitchell v. C.W. Vollmer & Co., 1955, 349 U.S. 427, 429, 75 S. Ct. 860, 862, 99 L. Ed. 1196*; Mitchell v. Empire Gas Engineering Co., 5th *Cir. 1958, 256 F.2d 781, 784*.

III. Establishment

The final requirement under the enterprise provisions [**18] for imposing coverage in the instant situation is that there be "employees engaged in commerce or in the production of goods for commerce" in "any establishment of any such enterprise." *§ 203(s)(3)*. While no definition of the crucial term "establishment" is found in the Act, the term has been interpreted in the context of other provisions of the Act prior to the 1961 Amendments to mean "a distinct physical place of business." *A. H. Phillips, Inc. v. Walling, 1945, 324 U.S. 490, 496, 65 S. Ct. 807, 810, 89 L. Ed. 1095*; Mitchell v. Gammill, 5th *Cir. 1957, 245 F.2d 207, 211*. Since Congress did not indicate an intention to deviate from this definition of the term when it added the 1961 Amendments, we must

conclude that the "establishment" in the present case is the entire building, including the Bank operation. Inasmuch as the Bank admits that the employees in its banking and trust operation are engaged in commerce, this last prerequisite of coverage is satisfied.

The application here of the minimum wage laws to the employees working in the office portion of the Bank building is clearly in harmony with the purpose of the "enterprise" amendments to eliminate [**19] [*864] situations in which some employees in an establishment of a large enterprise have the protection of the Act while others who work side by side with them do not.

The judgment of the district court is Reversed and Remanded.

PROOF OF SERVICE
(CCP §1013)

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On April 13, 2012, I served the following documents in the manner described below:

PLAINTIFFS' NOTICE OF LODGING OF FEDERAL AUTHORITIES IN SUPPORT OF OPENING POST-TRIAL BRIEF

☐ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Parcel Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Alameda, California.

☑ (BY OVERNIGHT MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by United Parcel Service for overnight delivery.

☐ (BY PERSONAL DELIVERY) I caused such envelope to be delivered by hand to each addressee below.

☐ (BY MESSENGER SERVICE) by consigning the document(s) to an authorized courier and/or process server for hand delivery on this date.

☐ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from jkoffler@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

Mr. Guy A. Bryant
Bryant & Brown
476 3rd Street
Oakland, CA 94607
(510) 836-7564 (fax)
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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 13, 2012, at Alameda, California.

Karen Scott

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