IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

STATE OF NEVADA, *et al*.,	§	
Plaintiffs,	§	
	§	
VS.	§	**CIVIL ACTION NO.: 4:16-CV-731-ALM**
	§	
UNITED STATES DEPARTMENT	§	
OF LABOR, *et al*.,	§	
Defendants.	§	

PETITIONERS CHIPOTLE MEXICAN GRILL, INC.'S AND CHIPOTLE SERVICES, LLC'S MOTION FOR CONTEMPT

INTRODUCTION

Respondent Carmen Alvarez and her counsel have intentionally disregarded this Court's November 22, 2016 order ("Order") by filing a lawsuit in the United States District Court for the District of New Jersey against Petitioners Chipotle Mexican Grill, Inc. and Chipotle Services, LLC (together, "Petitioners") to enforce the very regulations that Order enjoined from becoming effective. (*See generally* N.J. Compl., attached as Exhibit 1.) Specifically, that Order enjoined the nationwide implementation and enforcement of proposed revisions to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq*. ("Final Rule") concerning threshold salary guidelines for overtime exemptions. Ms. Alvarez and her counsel contend that the Order simply does not apply to her because it solely limited the United States Department of Labor ("DOL") from implementing and enforcing the Final Rule, and "did not stay the effective date of the Rule or otherwise prevent the Rule from going into effect" as between employers and private litigants. (Ex. 1, ¶ 32.)

Ms. Alvarez and her counsels' interpretation of the Order is wrong. The Order binds not only the parties to it, but "other persons who are in active concert or participation" with a party to

it. Fed. R. Civ. P. 65(d)(2)(C). "This is derived from the commonlaw [sic] doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control." *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 14 (1945) (quotations in original). Ms. Alvarez and Chipotle are both covered by and subject to the FLSA. *See* 29 U.S.C. § 203(d), (e), (s) (defining employee and employer under FLSA). And the DOL represented Ms. Alvarez's interests before this Court. They are accordingly bound by the Order.

This Court possesses the inherent authority to enforce its own injunctive decree and to punish those who disobey it. *Waffenschmidt v. MacKay*, 763 F.2d 711, 716 (5th Cir. 1985). And Rule 71 of the Federal Rules of Civil Procedure provides that "[w]hen an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party." Fed. R. Civ. P. 71. Ms. Alvarez and her counsels' dismissive attitude towards this Court and disregard for the sanctity of its Order—at Chipotle's expense—cannot be condoned. The Order's purpose in enforcing a nationwide injunction was to protect both employees and employers from being subject to differing standards determinative of FLSA exemptions. Ms. Alvarez and her counsels' conduct is directly contrary to that purpose and will cost Chipotle untold amounts in fees and expenses in defending against a rule that never became effective. Chipotle therefore respectfully requests that this Court issue an order finding Ms. Alvarez and her counsel in contempt of the Order, enjoining them from attempting to enforce the Final Rule, and awarding Chipotle its reasonable attorneys' fees and costs incurred in connection with these contempt proceedings.

STATEMENT OF THE ISSUES

I. Does this Court's injunction enjoining the nationwide implementation and enforcement of the Final Rule enjoin Ms. Alvarez and her counsel from enforcing the Final Rule against Chipotle?

II. Are Ms. Alvarez and her counsel, by virtue of filing the New Jersey lawsuit, attempting to enforce the Final Rule against Chipotle, in contempt of this Court's Order?

III. As a result of Ms. Alvarez's and her counsels' contempt, should this Court enter an order preventing them from further pursuing enforcement of the Final Rule and awarding Chipotle its reasonable attorney's fees and costs incurred in connection with their contempt?

PERTINENT FACTUAL BACKGROUND

A. President Obama's Attempt to Modify the Salary Test

The FLSA requires employers (like Chipotle) to compensate certain employees who work in excess of 40 hours a week "at a rate not less than one and one-half times the regular rate at which [they] are employed." 29 U.S.C. § 207(a)(1). Exempt from this requirement is "any employee employed in a bona fide executive, administrative, or professional capacity," as defined by the DOL. 29 U.S.C. § 213(a)(1). At all times relevant, the DOL has defined these exemptions by reference to whether: (a) the employee was paid a salary of at least $455 per workweek; and (b) the employee performed certain types of duties as their "primary" duties. *See* 29 C.F.R. § 541.100 et seq.; 69 Fed. Reg. 22122, 22261-62 (April 23, 2004).

In March 2014, President Obama issued a memorandum directing the Secretary of Labor to "modernize and streamline the existing overtime regulations for executive, administrative, and professional employees." *Nevada v. U.S. Dep't of Labor*, 218 F. Supp. 3d 520, 524 (E.D. Tex. 2016), appeal docketed, 16-41606 (5th Cir.). In response, the DOL published a Notice of Proposed Rulemaking to revise 29 C.F.R. Part 541, to which it received more than 293,000 comments. *Id.*

at 525. In May 2016, it published the final version of those revisions, i.e., the Final Rule. Under the Final Rule, the minimum salary level for exempt employees would increase from $455 per week to $921 per week. *Id*. The Final Rule also included an "automatic updating mechanism" to adjust that minimum salary level every three years based upon certain regional benchmarks. *Id*. This Court enjoined the Final Rule from becoming effective on November 22, 2016. *See generally Nevada*, 218 F. Supp. 3d. at 533-34. In its 19-page, well-reasoned Order concluding that the *Nevada* Plaintiffs had established a *prima facie* case that the Final Rule lacked statutory authority, this Court ruled as follows:

> Finally, the Court has authority to enjoin the Final Rule on a nationwide basis and decides that it is appropriate in this case, and therefore GRANTS the State Plaintiffs' Emergency Motion for Preliminary Injunction (Dkt. #10).
>
> Therefore, the Department's Final Rule described at 81 Fed. Reg. 32,391 is hereby enjoined. Specifically, Defendants are enjoined from implementing and enforcing the following regulations as amended by 91 Fed. Reg. 32,391; 29 C.F.R. §§ 541.100, 541.200, 541.204, 541.300, 541.400, 541.600, 541.602, 541.604, 541.605, and 541.607 pending further order of this Court.

Id. at 534. The case was subsequently appealed, and is pending before the Fifth Circuit, but this Court's Order remains intact. *See Nevada v. U.S. Dep't of Labor*, Fifth Circuit Case No. 16-41606.

Notably, in its June 30, 2017 reply brief to the Fifth Circuit, the DOL abandoned the Final Rule as presently drafted. (Reply Br. at 17, attached as Exhibit 2 (stating DOL "has decided not to advocate for the specific salary level ($921 per week) set in the final rule at this time and intends to undertake further rulemaking to determine what the salary level should be.").) Instead, the DOL left open the ability to revisit the rule pending further comment. (*Id*.)

B. Ms. Alvarez Sues Chipotle for Its Purported Failure to Implement and Comply with the Final Rule

Over six months after the Order, and in flagrant disregard of its unambiguous language precluding the Final Rule from taking effect, Ms. Alvarez—a former Chipotle Apprentice[1]—filed a lawsuit alleging that Chipotle violated the FLSA and New Jersey State Wage and Hour Law ("NJWHL")[2] by, as pertinent here, failing to abide by the Final Rule and pay her overtime to which she was allegedly entitled. Ms. Alvarez purports to bring her claims on behalf of herself and others "similarly situated" and seeks certification of an FLSA collective and Fed. R. Civ. P. 23(a) and (b)(3) class action. (Ex. 1, ¶ 3.)

In her lawsuit, Ms. Alvarez acknowledges this Court's Order. (*See Id.*, ¶ 31 (citing Order).) However, she disclaims its applicability to her. Specifically, she alleges:

> 32. Although it preliminarily enjoined the Department of Labor from implementing and enforcing the Overtime Rule, the Eastern District of Texas did not stay the effective date of the Rule or otherwise prevent the Rule from going into effect. Therefore, as a rule duly promulgated pursuant to the requirements of the APA, the Rule went into effect on December 1, 2016.
>
> 33. Because the Eastern District of Texas's preliminary injunction was limited to implementation and enforcement of the Overtime Rule by the Department of Labor and its officials, it did not affect the ability of persons not party to the *Nevada* case, including Plaintiff and similarly situated employees, to bring private lawsuits pursuant to the FLSA's private cause of action, 29 U.S.C. § 216(b), to enforce their right to overtime pay under the Rule, nor did it prevent non-parties from bringing lawsuits under state law.

(*Id.*, ¶¶ 32-33.) Ms. Alvarez therefore claims that Chipotle's election not to classify and pay her in accordance with the Final Rule provides a basis for FLSA and NJWHL liability, even though she

[1] Chipotle has a category of employees it refers to as Apprentices. (Ex. 1, ¶ 25.) Chipotle classifies its Apprentices outside of California and New York as executive and/or administrative employees exempt from FLSA and NJWHL overtime requirements based upon their significant salaries and the nature of their primary duties. (*Id.*, ¶ 26.)

[2] The NJWHL is analogous in all substantive respects to the FLSA.

concedes that the very agency tasked with implementing and enforcing the Final Rule—the DOL—is enjoined from doing so. (*Id*., ¶¶ 34-37.)

Notably, this is the second lawsuit in which Ms. Alvarez's counsel, Cohen Millstein Sellers & Toll PLLC (Joseph Sellers and Miriam R. Nemeth) and Outten & Golden LLP (Justin M. Swartz) have made similar arguments in an attempt to evade this Court's Order. (*See* Motion to Amend and Docket in *Krokos v. The Fresh Market, Inc.*, Dist. of Mass. Case No. 1:16-cv-12082-IT, attached as Exhibit 3, at 35.)

LEGAL STANDARD AND JURISDICTION

It is well-established that federal courts possess the "inherent authority to enforce their own injunctive decrees" and to punish those who disobey them. *Waffenschmidt*, 763 F.2d at 716; *see also Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) (internal quotations and citations omitted) ("[I]t is firmly established that the power to punish for contempts [sic] is inherent in all courts. This power reaches both conduct before and that beyond the court's confines, for the underlying concern that gave rise to the contempt power was not . . . merely the disruption of court proceedings. Rather, it was disobedience to the orders of the Judiciary, regardless of whether such disobedience interfered with the conduct of trial.").

> Courts do not sit for the idle ceremony of making orders and pronouncing judgments, the enforcement of which may be flouted, obstructed, and violated with impunity, with no power in the tribunal to punish the offender. [Federal] courts, equally with those of the state, are possessed of ample power to protect the administration of justice from being thus hampered or interfered with.

Waffenschmidt, 763 F.2d at 716 (bracket in original) (quoting *Berry v. Midtown Serv. Corp.*, 104 F.2d 107, 110 (2d Cir. 1939)); *see also In re Bradley*, 588 F.3d 254, 265 (5th Cir. 2009) (brackets in original) (quotations and citations omitted) ("[The Supreme Court] has described civil contempt in broad terms, encompassing sanctions that prevent experimentation with disobedience of the law,

and remedial powers determined by the requirements of full remedial relief, as necessary to effect compliance with [the court's] decree.").[3]

"It is elementary that the court against which a contempt is committed has exclusive jurisdiction to punish for such contempt." *Texas Capital Bank v. Dallas Rodester, Ltd.*, 2015 WL 12910774, *1 (June 5, 2015 E.D. Tex.) (quoting *United States v. Barnett*, 330 F.3d 369, 385 (5th Cir. 1963)). "Enforcement of an injunction through a contempt proceeding must occur in the issuing jurisdiction because contempt is an affront to the court issuing the order." *Waffenschmidt*, 763 F.2d at 716; *see also Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 452 (1932) (holding enforcement of injunction through contempt proceeding must occur in issuing jurisdiction because contempt is an affront to the court issuing the order). The reason is plain: the court's power to "make an order carries with it the equal power to punish for disobedience of that order." *Waffenschmidt*, 763 F.2d at 716 (quoting *In re Debbs*, 158 U.S. 564, 594-95 (1895)) (observing further that submitting the question to another tribunal would "operate to deprive the proceeding of half its efficiency"). Accordingly, "violation of an injunctive order is cognizable in the court which issued the injunction regardless of where the violation occurred" and a "court may therefore hold an enjoined party in contempt, regardless of the state in which the person violates the court's orders." *Id*. (brackets and citations omitted).

Importantly, the Federal Rules of Civil Procedure and Fifth Circuit precedent make clear that the contempt power of an issuing court extends over nonparties who violate an injunction outside that court's territorial jurisdiction. Rule 71 of the Federal Rules of Civil Procedure provides

[3] Courts have also rested civil contempt power upon 18 U.S.C. § 401. *See also S.E.C. v. Pinez*, 52 F. Supp. 2d 205, 209 (D. Mass. 1999) (internal quotations omitted) (citing cases) ("Although 18 U.S.C. § 401 is a criminal statute, and, by its terms, gives federal courts the power to punish, many courts have relied upon the statute as authority for civil contempt as well.").

that "[w]hen an order grants relief for a nonparty or may be enforced against a nonparty, the procedure for enforcing the order is the same as for a party." Fed. R. Civ. P. 71. As the Second Circuit observed, "[i]t seems clear that Rule 71 was intended to assure that process be made available to enforce court orders in favor of and against persons who are properly affected by them, even if they are not parties to the action." *Lasky v. Quinlan*, 558 F.2d 1133, 1137 (2d Cir. 1977) (under prior version of Rule 71); *see* Fed. R. Civ. P. 71 cmts. (observing that amendments to rule since 1937 adoption were nonsubstantive). And, as the Ninth Circuit more recently observed, "Rule 71 was designed to memorialize the common sense rule that courts can enforce their orders against both parties and non-parties." *Westlake N. Prop. Owners Ass'n v. City of Thousand Oaks*, 915 F.2d 1301, 1304 (9th Cir. 1990) (citing *Lasky* for same proposition) (under prior version of Rule 71); *see also* Fed. R. Civ. P. 71 cmts.

Because the "nationwide scope of an injunction carries with it the concomitant power of the court to reach out to nonparties who knowingly violate its orders," *Waffenschmidt*, 763 F.2d at 717 (citing cases), it necessarily follows that the issuing court enjoys personal jurisdiction over nonparties that act in violation of that order. This includes nonparties residing outside the territorial jurisdiction of the court who, with actual notice of the court's order, actively aid and abet another in violating the order. *Waffenschmidt*, 763 F.2d at 714; *Gemco Latinoamerica, Inc. v. Seiko Time Corp*., 61 F.3d 94, 98 (1st Cir. 1995) ("A nonparty, although not directly bound by the order, may be held in civil contempt if it knowingly aids or abets a party in violating the court order."). To conclude otherwise would allow a nationwide injunction's purpose to "easily be thwarted." *Waffenschmidt*, 763 F.2d at 717 (articulating principle that knowing violation of injunction subjects nonparty violators to jurisdiction of issuing court).

ARGUMENT

I. THE ORDER ENJOINS MS. ALVAREZ FROM ENFORCING THE FINAL RULE AGAINST CHIPOTLE

This Court's Order enjoined the Final Rule's implementation and enforcement without limitation. Because the Order enjoined the implementation or enforcement of the Final Rule, there is no basis for Ms. Alvarez or her counsel to seek enforcement of it as against Chipotle. As such, Ms. Alvarez and her counsel should be prohibited from violating this Court's Order and held in contempt for the same.

A. The Order Prevents Nationwide Implementation and Enforcement of the Final Rule

The mandate of an injunction issued by a federal district court runs nationwide. *Waffenschmidt*, 763 F.2d at 716; *see also Texas v. United States*, 809 F.3d 134, 188 (5th Cir. 2015) (internal quotations omitted) ("[T]he Constitution vests the District Court with the judicial Power of the United States. That power is not limited to the district wherein the court sits but extends across the country. It is not beyond the power of a court, in appropriate circumstances, to issue a nationwide injunction."); *Bresgal v. Brock*, 843 F.2d 1163, 1170 (9th Cir. 1987) ("[T]here is no bar against class-wide, and nationwide relief in federal district or circuit court when it is appropriate.").

Federal district courts are vested with the authority to issue nationwide injunctions with respect to agency actions. *See Earth Island v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007) ("The nationwide injunction, as applied to our decision to affirm the district court's invalidation of [an agency regulation] is compelled by the text of the Administrative Procedure Act . . . . The district court did not abuse its discretion in issuing a nationwide injunction."). As this Court is aware, it had the authority to set aside an agency rule under the Administrative Procedure Act ("APA") and did so in its Order. 5 U.S.C. § 706(2)(C) ("the reviewing court shall . . . hold unlawful and set

aside agency action . . . found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."); *see* 5 U.S.C. § 551(13) ("'agency action' includes the whole or a part of an agency rule . . . ."). This authority has been repeatedly recognized as it relates to the subject matter here. *See Texas v. United States*, No. 7:16-cv-54, 2016 WL 4426495, at *17 (N.D. Tex. Aug. 21, 2016) (issuing a nationwide injunction to ban enforcement of a Department of Education rule related to transgender bathroom policies); *Nat'l Fed. of Indep. Bus. v. Perez*, No. 5:16-cv-66, 2016 WL 3766121, at *46 (N.D. Tex. June 21, 2016) (issuing a nationwide injunction to bar implementation of the Department's "Advice Exemption Interpretation").

Here, the Order plainly enjoins the Final Rule "on a nationwide basis" and determined that a "nationwide injunction protects both employees and employers from being subject to different EAP exemptions based on location." *Nevada*, 218 F. Supp. 3d at 534. Further, the Order specifically enjoined the DOL from "implementing and enforcing" the Final Rule. *Id*. (emphasis added). Stated differently, the Order stopped the Final Rule from taking effect and all persons or entities are therefore bound.

B. The Order Relieves Chipotle from Any Compliance Obligations with the Final Rule

This Court's Order enjoining implementation and enforcement of the Final Rule directly affects Chipotle as an employer subject to FLSA regulations.

Contrary to Ms. Alvarez's complaint, § 216(b)'s private right of action does not remove Chipotle from the purview of the Order's injunction. Ms. Alvarez's theory is premised on the assumption that an unidentified corollary set of regulations exist—separate and apart from those the Order enjoined—that apply solely to regulate "private" employment relationships that she may sue to enforce under § 216(b). The FLSA's plain language refutes that assumption.

Specifically, Chipotle is an employer, as defined in the FLSA, and therefore subject to the FLSA's provision.[4] 29 U.S.C. § 203(d), (s) (defining employee and employer under FLSA). Section 216(b)'s private cause of action is limited to enforcing one of two scenarios identified in that subsection's first two sentences: first, where an employer does not compensate an employee at the minimum wage or for overtime, and second, where an employer discharges or discriminates against an employee who has instituted an FLSA complaint. 29 U.S.C. § 216(b) (emphasis added) ("An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer"). Ms. Alvarez's complaint here seeks relief under the first; that is, that she was not paid overtime to which she was allegedly entitled under 29 U.S.C. § 207. (Ex. 1, ¶ 20.)

Section 207 sets forth the FLSA's overtime regulations. And § 213(a)(1) expressly states that "section 207 of this title shall not apply with respect to any employee employed in a bona fide executive, administrative, or professional capacity." Congress delegated to the Secretary of Labor the power to define those terms through regulations interpreting this exemption. Those regulations—found in 29 C.F.R. § 541—are the precise regulations the Final Rule sought to modify and that the Order enjoined, but that Ms. Alvarez now seeks to enforce. (Ex. 1, ¶¶ 23-43.) Her allegation that some other, undefined regulations exist outside the scope of 29 C.F.R. § 541 that this Court did not enjoin lacks credibility, is unsupported by the statute, and should be rejected.

Rather, because the Order enjoined implementation and enforcement of the Final Rule, which would have modified 29 C.F.R. § 541, and Chipotle must comply with 29 C.F.R. § 541 in

[4] This statement is made without waiver or prejudice to Chipotle Mexican Grill, Inc.'s affirmative defense in the New Jersey action that Ms. Alvarez has asserted her FLSA claims against the wrong entity.

employing Ms. Alvarez and determining whether she is exempt from § 207's overtime provisions, the Order grants relief to Chipotle and any other employer.

C. The Order Prevents Ms. Alvarez and Her Counsel from Seeking to Enforce the Enjoined Final Rule

The Order binds Ms. Alvarez and prohibits her from enforcing the Final Rule against Chipotle through her lawsuit. Her bold statements that the Order "did not affect the ability of persons not party to the *Nevada* case, including [Alvarez] and similarly situated employees, to bring private lawsuits pursuant to the FLSA's private cause of action, 29 U.S.C. § 216(b), to enforce their right to overtime pay under the Rule, nor did it prevent non-parties from bringing lawsuits under state law," is wrong.

The effect of a nationwide injunction enjoining an agency rule is to award nationwide relief to all parties affected by the rule, not merely the parties prevailing in the lawsuit. *Nat'l Mining Ass'n v. U.S. Army Corps of Eng'rs*, 145 F.3d 1399, 1409 (D.C. Cir. 1998) ("We have made clear that '[w]hen a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed.'") (quoting *Harmon v. Thornburgh*, 878 F.2d 484, 495, n.21 (D.C. Cir. 1989)); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890, n.2 (1990) ("If there is in fact some specific order or regulation. . .and if that order or regulation is final, and has become ripe for review. . . it can of course be challenged under the APA by a person adversely affected—and the entire [order or regulation], insofar as the content of that particular action is concerned, would thereby be affected.").

That injunction binds not only the parties, but "other persons who are in active concert or participation" with a party. Fed. R. Civ. P. 65(d)(2)(C). "This is derived from the commonlaw [sic] doctrine that a decree of injunction not only binds the parties defendant but also those identified

with them in interest, in 'privity' with them, represented by them or subject to their control." *Regal Knitwear Co.*, 324 U.S. at 14 (quotations in original).

In some circumstances, a representative body's participation in a case binds not only itself, but its constituents. For example, "citizens of a State who claim rights pursuant to state law may be deemed 'in privity' with a State and be bound by an injunction or decree to which only the State is a party." *Dolman v. United States*, 439 U.S. 1395, 1396 (1978); *cf. United States v. Baker*, 641 F.2d 1311, 1314, n.5 (9th Cir. 1981) ("[N]onparties who interfere with the implementation of court orders establishing public rights may be enjoined . . . ."). The rationale is plain: the State represents the public rights of its citizens in the proceedings, and, like the State, the individuals are bound by its judgment. *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340-41 (1958) (citing cases and cited with approval in *Dolman*, 439 U.S. at 1396). The rule has been applied to bind nonparties to a judgment where the nonparties are individuals and groups represented by a State, which was a party to the relevant proceedings, and "they, in their common public rights as citizens of the State, were represented by the State in those proceedings." *City of Tacoma*, 357 U.S. at 340-41.

That rationale—that the representative body binds itself and its constituents—applies here to bind Ms. Alvarez and her counsel to the Order. As set forth above, the right to be compensated for overtime is a public right derived solely from § 207 (and analogous state provisions), the statute under which she brings her complaint. *See* 29 U.S.C. § 207(a)(1) (establishing overtime compensation requirements for employees engaged in commerce). Indeed, by asserting a claim under the FLSA she concedes she is subject to its provisions. *See* 29 U.S.C. § 203(e) (defining employee); 29 U.S.C. § 216(b) (permitting "employee" to sue). It therefore cannot be reasonably disputed that Ms. Alvarez "identifies with" the DOL's interests in enforcing the Final Rule, and that the Department correspondingly represented her interests before this Court. Indeed:

> The purpose of the Department of Labor is to foster, promote, and develop the welfare of the wage earners, job seekers, and retirees of the United States; improve working conditions; advance opportunities for profitable employment; and assure work-related benefits and rights.

Dep't of Labor Mission Statement, https://www.dol.gov/general/aboutdol/mission (last accessed 6/26/2017), attached as Exhibit 4; *see also* 29 U.S.C. § 204 (creating Wage and Hour Division to administer FLSA).

In opposing the injunction, the DOL devoted nearly two pages to explaining the "profoundly harmful impact" enjoining the Final Rule would have on the public. (Dkt. No. 37, Opp'n to Emergency Mot. for Stay, at 46.) The DOL—in great depth and at great length—argued that denying the injunction was necessary to protect low wage workers who would otherwise "be denied additional pay" and forced to work long hours. (*Id*. at 47.) And, the DOL argued, "[s]taying the Final Rule is likely to adversely impact some employees now entitled to overtime protection"—the core allegation of Ms. Alvarez's complaint. (*Id*.; *see* Ex. 1, ¶¶ 39-46 (seeking overtime compensation).) Stated differently, the DOL represented Ms. Alvarez's interests in the *Nevada* lawsuit. Accordingly, the DOL and Ms. Alvarez are in privity for purposes of this contempt motion, and the order is enforceable against Ms. Alvarez, and by extension, her counsel. *See* Fed. R. Civ. P. 65(d)(2)(B) (binding attorneys to injunctive relief).

II. MS. ALVAREZ AND HER COUNSEL ARE IN CONTEMPT OF THIS COURT'S ORDER

To succeed on a motion for contempt, the movant need only establish by clear and convincing evidence that: (1) a court order was in effect; (2) the order required or prohibited certain conduct by the respondent; and (3) the respondent failed to comply with the court's order. *United States v. City of Jackson, Miss.*, 359 F.3d 727, 731 (5th Cir. 2004); *Piggly Wiggly Clarksville, Inc. v. Mrs. Baird's Bakeries*, 177 F.3d 380, 382 (5th Cir. 1999). In the contempt context, "clear and convincing evidence" is "that weight of proof which produces in the mind of the trier of fact a firm

belief or conviction as to truth of the allegations sought to be established, evidence so clear, direct and weighty and convincing as to enable the fact finder to come to a clear conviction, without hesitancy, of the truth of the precise facts of the case." *Travelhost, Inc. v. Blandford*, 68 F.3d 958, 961 (5th Cir. 1995) (internal quotation marks omitted) (quoting *In re Medrano*, 956 F.2d 101, 102 (5th Cir. 1992)) (adopting in contempt context definition of clear and convincing evidence used in attorney disbarment proceeding). The aggrieved party institutes the proceeding and controls the litigation in a civil contempt motion. *La. Ed. Ass'n v. Richland Parish Sch. Bd.*, 421 F. Supp. 973, 975 (W.D. La. 1976) (citing 11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2960 at 587-88 (1973)), aff'd, 585 F.2d 518 (5th Cir. 1978).

"In civil contempt proceedings the question is not one of intent but whether the alleged contemnors have complied with the court's order." *Jim Walter Resources, Inc. v. Intern'l Union, United Mine Workers of America*, 609 F.2d 165, 168 (5th Cir. 1980) (internal quotations omitted). "Good faith is not a defense to civil contempt; the question is whether the alleged contemnor complied with the court's order." *Chao v. Transocean Offshore, Inc.*, 276 F.3d 725, 728 (5th Cir. 2002). Chipotle has made this showing here as to both Ms. Alvarez and her counsel.

A. Chipotle Has Demonstrated by Clear and Convincing Evidence that Ms. Alvarez is in Contempt of the Order

As the first element, the Order was indisputably in effect at the time Ms. Alvarez filed her lawsuit. While that Order was appealed to the Fifth Circuit Court of Appeals on December 1, 2016, that Order remains in full effect during the pendency of that appeal. *See* Fed. R. Civ. P. 62(c); Fed. R. App. P. 8(a)(1)-(2); *see also Hovey v. McDonald*, 109 U.S. 150, 161 (1883) ("[A]n appeal from a decree granting, refusing, or dissolving an injunction does not disturb its operative effect."); *Deering Milliken, Inc. v. F.T.C.*, 647 F.2d 1124, 1129 (D.C. Cir. 1978) ("[T]he vitality of [a district court] judgment is undiminished by pendency of the appeal. Unless a stay is granted either by the

court rendering the judgment or by the court to which the appeal is taken, the judgment remains operative.").

Second, the Order prohibited Ms. Alvarez and her counsel from enforcing the Final Rule, as her lawsuit attempts to do here. The Order not only unequivocally forbade enforcement of the Final Rule, but enjoined it from even taking effect. *Nevada*, 218 F. Supp. 3d at 534. Its nationwide scope was deliberate: "[T]he Court has authority to enjoin the Final Rule on a nationwide basis and decides that it is appropriate in this case." *Id.* And, as stated above, when a federal district court issues a nationwide injunction on an agency rule, that injunction sets aside the rule itself and precludes the rule from having legal effect. *Nat'l Mining Ass'n*, 145 F.3d at 1409; *Lujan*, 497 U.S. at 890, n.2.

Furthermore, even if the Order did not expressly prohibit a third party from bringing suit under the enjoined Final Rule, this Court's directive that the Final Rule "is hereby enjoined" is sufficient to be reasonably understood as prohibiting Ms. Alvarez's lawsuit. *See Test Masters Educ. Servs., Inc. v. Robin Singh Educ.l Servs., Inc.*, 799 F.3d 437, 454 (5th Cir. 2015) (quotations omitted) (in entering injunctions, a court "enjoys a degree of flexibility in vindicating its authority against actions that, while not expressly prohibited, nonetheless violate the reasonably understood terms of the order."). This is particularly true given this Court's purpose in ordering a nationwide injunction was to protect both employees and employers from being subject to differing FLSA exemptions. *Nevada*, 218 F. Supp. 3d at 534. Chipotle has therefore satisfied the second element of contempt.

Third, Ms. Alvarez failed to abide by the Order. By filing suit trying to enforce the unimplemented Final Rule against Chipotle, Ms. Alvarez has attempted to give legal effect to an agency rule that this Court held in abeyance. *See Maples v. Thomas*, 565 U.S. 266, 280 (2012)

(citing *Coleman v. Thompson*, 501 U.S. 722, 753-55 (1991)) ("[T]he attorney is the prisoner's agent, and under 'well-settled' principles of agency law, the principal bears the risk of negligent conduct on the part of his agent."); *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 92 (1990) ("Under our system of representative litigation, 'each party is deemed bound by the acts of his lawyer-agent. . . ."). Her attempt to justify her actions by redefining the injunction's scope to apply solely to the DOL is contrary to the Order's plain language and intent, demonstrates a disregard for the Order, and is grounds for contempt. *See Howat v. Kansas*, 258 U.S. 181, 190 (1922) ("It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.); *Locke v. United States*, 75 F.2d 157, 159 (5th Cir. 1935) ("Willful disobedience of an injunction, however erroneous, issued by a court having jurisdiction while such injunction is in force unreversed constitutes contempt of court."). Her attempt to circumvent this Court's injunction and enforce an agency rule that this Court plainly prevented from becoming effective should not be permitted. *Nevada*, F. Supp. 3d at 534. Chipotle has therefore satisfied the third element.

B. Ms. Alvarez's Counsel Are Also in Contempt of the Order

Under the circumstances here, Ms. Alvarez's counsel are equally responsible for her contemptuous actions.

A court's order binds not only the parties—or, as the case is here, an individual clearly enjoined by the order—but also binds anyone acting in concert with the enjoined individual to violate the court's order. *See Waffenschmidt*, 763 F.2d at 717-18 (holding that order "binds not only the parties subject thereto, but also nonparties who act with the enjoined party" and that nonparty with notice of the court's order may be held in contempt once shown to be in "active

concert or participation" with enjoined party). Furthermore, attorneys with actual notice of the order who represent such an individual are equally bound by the order. *See also* Fed. R. Civ. P. 65(d)(2)(B) (emphasis added) ("The order binds only the following who receive actual notice of it by personal service or otherwise: the parties' officers, agents, servants, employees, and attorneys;").

Moreover, lawyers must not knowingly disobey court orders unless it is by an open refusal premised on one of two exceptions: either an assertion that no valid obligation exists, or the client's willingness to accept any sanctions arising from such disobedience. Tex. Discipl. R. Prof'l Conduct 3.04(d) (a lawyer shall not "knowingly disobey, or advise the client to disobey, an obligation under the standing rules of or a ruling by a tribunal except for an open refusal based either on an assertion that no valid obligation exists or on the client's willingness to accept any sanctions arising from such disobedience."); N.J. Rules Prof'l Conduct R. 3.4(c) ("A lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;").

Here, the first exception is not applicable for all the reasons set forth above. The Order prohibits implementation and enforcement of the Final Rule on a nationwide basis. And, if the second exception applies (and Ms. Alvarez has acquiesced to sanctions for disobeying the Order), then she has accepted the consequences of her actions and contempt is appropriate.

Rather, Ms. Alvarez's counsels' actions demonstrate a clear and purposeful decision to actively bring her lawsuit—seeking to enforce the Final Rule—in violation of the Order. The lengths taken to avoid the Order in the complaint indisputably demonstrate that Ms. Alvarez's counsel are aware of it. (*See* Ex. 1, ¶¶ 31-34.) Indeed, this is the second lawsuit in which Outten & Golden LLP (Mr. Swartz) and Cohen Millstein Sellers & Toll PLLC (Joseph Sellers and Miriam

R. Nemeth) have alleged the Order simply does not apply to private employer and employee relationships. (*See* Ex. 3 at 4-7 (May 8, 2017 motion to amend) (asserting identical allegations concerning Order's applicability).) And the same firm has—on at least ten separate occasions—touted Ms. Alvarez's lawsuit on its website and in national media. *See* http://www.outtengolden.com/class-action-news?page=1 (last accessed 7/24/2017, also attached as Exhibit 5). Under these circumstances, it is hard to envision a more concrete example of lawyers actively assisting a client to violate a court order.

Because: (1) an order of this Court was in effect at the time Ms. Alvarez and her counsel filed the Lawsuit; (2) the Order prohibited their conduct; and (3) Ms. Alvarez and her counsel failed to comply with the Order, Ms. Alvarez and her counsel should be found in contempt.

III. AS A RESULT OF MS. ALVAREZ'S AND HER COUNSELS' ACTIONS, THIS COURT SHOULD ENTER AN ORDER PREVENTING THEM FROM FURTHER PURSUING ENFORCEMENT OF THE FINAL RULE AND AWARDING CHIPOTLE ITS REASONABLE ATTORNEYS' FEES AND COSTS INCURRED IN CONNECTION WITH THEIR CONTEMPT

This Court enjoys "broad discretion" in fashioning the appropriate remedy for civil contempt. *In re Gen. Motors Corp*., 61 F.3d 256, 259 (4th Cir. 1995). Civil contempt can serve two purposes. The first is to serve as a coercive sanction to enforce compliance with an order of the court. *United States v. McMillan*, 53 F. Supp. 2d 895, 907 (S.D. Miss. 1999) (citing Supreme Court precedent); *see also Lance v. Plummer*, 353 F.2d 585, 592 (5th Cir. 1965) ("[R]emedial or coercive sanctions may be imposed in civil contempt proceedings, such as are designed to compensate the complainant for losses sustained and coerce obedience for the benefit of the complainant."). The second is to compensate the injured party for losses or damages sustained as a result of the contemnor's noncompliance. *McMillan*, 53 F. Supp. 2d at 907; *see also Norman Bridge Drug Co. v. Banner*, 529 F.2d 822, 827 (5th Cir. 1976) (Compensatory civil contempt

"includes losses flowing from noncompliance and expenses reasonably and necessarily incurred in the attempt to enforce compliance."). This includes the "cost of bringing the violation to the attention of the court" *Cook v. Ochsner Found. Hosp.*, 559 F.2d 270, 272 (5th Cir.1977), and "may include an award of attorneys' fees," including "costs, expenses, and attorneys' fees incurred by [the injured party] in any activity related to the civil contempt phase of [the] case, including but not limited to the motion, hearing, and post-hearing suggestions." *City of Jackson, Miss.* 318 F. Supp. 2d 395, 409 (S.D. Miss. 2002), *aff'd sub nom*, *United States v. City of Jackson, Miss.*, 359 F.3d 727 (5th Cir. 2004). Here, sanctions to both coerce obedience and compensate Chipotle are appropriate.

The circumstances here plainly demonstrate that absent additional formal restraint, Ms. Alvarez and her counsel will continue pursuing enforcement of the Final Rule against Chipotle. An order setting forth the following is therefore warranted: (a) affirming that the Order applies to Ms. Alvarez, and all proposed plaintiffs similarly situated to her; (b) precluding her from enforcing the Final Rule on behalf of herself and all others similarly situated to her; and (c) directing Ms. Alvarez and her counsel to withdraw their allegations, both individual and representative, concerning the Final Rule against Chipotle within seven days of this Court's order.

A sanction compensating Chipotle for the fees and expenses it has incurred in connection with this contempt proceeding is also appropriate. Given the context of these proceedings, the lack of support for enforcement of the Final Rule against Chipotle, and that Ms. Alvarez's allegations concerning the Final Rule are in all probability driven by her counsel, awarding those sanctions solely and personally against her counsel is appropriate. *See* 28 U.S.C. § 1927 ("Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by

the court to satisfy personally the costs, expenses, and attorneys' fees reasonably incurred because of such conduct."). Indeed, Ms. Alvarez's complaint, to the extent it seeks enforcement of the Final Rule, is both "unreasonable" and reckless such that sanctions against her counsel are appropriate. *See Edwards v. Gen Motors Corp.*, 153 F.3d 242, 246 (5th Cir. 1998) (holding there must be "evidence of bad faith, improper motive, or reckless disregard of duty owed to the court" to show behavior was both unreasonable and vexatious); *In re Osborne*, 375 B.R. 216, 224-25 (M.D. La. 2007) (citing *Cruz v. Savage*, 896 F.2d 626, 631-32 (1st Cir. 1990)) ("Unreasonable and vexatious conduct is harassing or annoying, or evinces the intentional or reckless pursuit of a claim, defense or position that is or should be known by the lawyer to be unwarranted in fact or law.").

CONCLUSION

Wherefore, for the reasons set forth above, Chipotle respectfully requests that this Court enter an order finding Ms. Alvarez and her counsel in contempt of the Order, preventing them from, individually and collectively, pursuing enforcement of the Final Rule in the New Jersey action, and awarding monetary sanctions solely and personally against Ms. Alvarez's counsel for their reckless disregard of the Order.

Dated: August 1, 2017.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

Undersigned counsel certifies compliance with the meet and confer requirement of LOCAL RULE CV-7(h). On July 28, 2017, Petitioner's Texas local counsel Laura Hallmon, and lead attorney Kendra Beckwith (pro hac vice pending in New Jersey and Texas) participated in a telephone conference with Petitioner's New Jersey local counsel Abigail Nitka, and Brian Murphy (who will serve as Petitioner's New Jersey local counsel upon admission pro hac vice), conferring with Respondent Carmen Alvarez' lead counsel Joseph M. Sellers and Justin M. Swartz regarding the filing and merits of Petitioner's motion. The participants expressed their views concerning the dispute. No agreement could be reached because Respondent Carmen Alvarez' counsel have indicated they are not subject to the preliminary injunction by this Court and, pursuit of the New Jersey action is not contempt of the ruling of this Court, and discussions have conclusively ended in an impasse, leaving an open issue for this Court to resolve.

/s/ Laura Hallmon
Laura Hallmon

CERTIFICATE OF SERVICE

Undersigned counsel certifies that on August 1, 2017, the foregoing Motion for Contempt, was filed electronically with the Clerk of the Court for the U.S. District Court, Eastern District of Texas, by submission through the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to all counsel of record, each of whom have consented to accept said Notice as service of this document by electronic means. Counsel for Respondent Carmen Alvarez will be served by electronic mail as follows:

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