No. 06-11032-EE

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

TAMMY BUCKNER,

Plaintiff-Appellee,

v.

FLORIDA HABILITATION NETWORK, INC.,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida, Fort Myers Division

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BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

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Buckner v. Florida Habilitation Network, Inc., No. 06-11032-EE

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rules 26.1-1 through 26.1-3, I hereby certify that the following is a complete list of all persons and entities currently known to the Secretary of Labor that have an interest in the outcome of this appeal:

1. Buckner, Tammy
2. Celler, Richard B., Esq.
3. Celler Legal Group
4. Chao, Elaine L., Secretary of Labor
5. Elder Care Option, Inc.
6. Fernandez, Ricardo
7. Florida Habilitation Network, Inc.
8. Fowler White Boggs Banker, P.A.
9. Frazier, Douglas N., U.S. Magistrate Judge
10. Frieden, Paul L., Esq.
11. Hull, Joanna, Esq.
12. Mandel, Steven J., Esq.
13. McAuliffe, Michael F., Esq.
14. McDowell, Lawrence S., Esq.

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16. Neil Rose, P.A.

17. Radzely, Howard M., Solicitor of Labor

18. Rose, Neil, Esq.

19. Rosenberg, Robin L., Esq.

20. Rosenberg & McAuliffe, PL

21. Sandridge, Hala A., Esq.

22. Silva, Carlos

23. Steele, John E., U.S. District Judge for the Middle District of Florida

24. Wheeler, Denise L., Esq.

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BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT

INTEREST OF THE SECRETARY OF LABOR

Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this Brief as *amicus curiae* in support of Defendant-Appellant. The Secretary supports Defendant-Appellant's argument that the Department of Labor's ("Department") regulation at 29 C.F.R. 552.109(a), which exempts companionship services employees employed by third parties from the Fair Labor Standards Act's ("FLSA" or "Act") minimum wage and overtime requirements, is entitled to controlling deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984),

because it is a legislative rule that permissibly interprets the Act's companionship services exemption at section 13(a)(15), 29 U.S.C. 213(a)(15). The Secretary has a substantial interest in defending the regulation at issue because she administers and enforces the FLSA. *See* 29 U.S.C. 204, 216, 217. The Department promulgated this regulation pursuant to the Secretary's expressly delegated authority to "define[] and delimit[] by regulation[]" the terms in section 13(a)(15), which exempts companionship services employees from the FLSA's minimum wage and overtime requirements. *See* 29 U.S.C. 213(a)(15). The Department authoritatively interpreted this regulation in Wage and Hour Advisory Memorandum No. 2005-1, *Application of Section 13(a)(15) to Third Party Employers* (Dec. 1, 2005).[1]

STATEMENT OF THE ISSUE

Whether the Department's regulation at 29 C.F.R. 552.109(a), which exempts companionship services employees employed by third party employers from the FLSA's minimum wage and overtime requirements, is entitled to controlling *Chevron* deference because it is a legislative rule that permissibly interprets the Act's companionship services exemption at section 13(a)(15).

[1] A copy of the Department's Advisory Memorandum is included in the addendum to this brief.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below

Plaintiff Tammy Buckner ("Buckner") alleges that she and other similarly situated individuals were not paid overtime compensation as required by the FLSA. *Buckner v. Florida Habilitation Network, Inc.*, No. 2:05-cv-422-FtM-29DNF, slip op. at 2 (M.D. Fla. Jan. 10, 2006). Buckner's employer, Florida Habilitation Network, Inc. ("FHN"), argues that these employees are exempt from the FLSA's overtime requirements under the Act's "companionship services" exemption, 29 U.S.C. 213(a)(15). *Id.* FHN moved for judgment on the pleadings, which the parties agreed to convert to a motion for summary judgment. *Id.* at 1. FHN also moved, in the alternative, to certify a controlling question of law. *Id.* at 1-2.

The district court denied FHN's Motion for Judgment on the Pleadings. *Buckner*, No. 2:05-cv-422-FtM-29DNF, slip op. at 12. The court concluded that the FLSA's companionship services exemption "does not include employees such as plaintiff, who are or were employed by third parties and performed companionship services in the homes of someone other than the employer." *Id.* at 7. Pursuant to FHN's alternative Motion to Certify Controlling Question of Law, the district court certified, under 28 U.S.C. 1292(b), two questions for review:

> (1) "What level of deference is due to 29 C.F.R. § 552.3 and 29 C.F.R. § 552.109(a)?"; and
>
> (2) "Is a domestic service employee who is employed by a third party employer rather than directly by the family of the person receiving care . . . exempt from the overtime requirements of the FLSA pursuant to the companion services exemption?"

Id. at 12. This Court granted FHN's Petition for Permission to Appeal under 28 U.S.C. 1292(b) on February 10, 2006. *See Florida Habilitation Network v. Buckner*, No. 06-90003-I (11th Cir. Feb. 10, 2006).

B. Statement of Facts

FHN is a Florida corporation that employs caregivers to provide services in customers' homes, and is an enterprise covered by the FLSA. *Buckner*, No. 2:05-cv-422-FtM-29DNF, slip op. at 2. Buckner and other similarly-situated individuals worked for FHN, providing caregiver services to mentally disabled patients outside of FHN's premises. *Id.* at 2-3. FHN paid these employees on an hourly basis for their services. *Id.* at 3. Buckner and the other caregivers regularly worked in excess of 40 hours per work week, but were paid "straight time" for all hours worked in excess of 40 hours in a work week. *Id.*

C. The District Court's Decision

The parties agree that Buckner and the other caregivers were employees of FHN and not of the persons receiving their services, and that they performed "companionship services" for

qualified individuals. *Buckner,* No. 2:05-cv-422-FtM-29DNF, slip op. at 4. Thus, the only issue presented to the district court was whether these employees were employed in "domestic service employment" and therefore exempt from the Act's overtime requirements pursuant to section 13(a)(15). *Id.* at 5.

The court noted that the meaning of "domestic service employment" is not found in the Act, but accorded controlling deference to the Secretary's regulation at 29 C.F.R. 552.3 defining the term. *Buckner,* No. 2:05-cv-422-FtM-29DNF, slip op. at 5-6. The court concluded that this regulation "clearly requires that the services be performed by an employee of the person who receives the services, and not by an employee of a third party." *Id.* at 6. Thus, the district court determined that Buckner was not included within the term "domestic service employment" because she was "employed by [a] third part[y] and performed companionship services in the homes of someone other than the employer." *Id.* at 7.

The district court discounted the Department's regulation at 29 C.F.R. 552.109(a), which applies the companionship services exemption to employees employed by third parties, because it determined that this regulation was an "interpretive regulation" entitled to little weight. *Buckner,* No. 2:05-cv-422-FtM-29DNF, slip op. at 7, 10-11. In making this determination, the court relied on the Second Circuit's decision

in *Coke v. Long Island Care at Home, Ltd.*, 376 F.3d 118 (2d Cir. 2004), *vacated and remanded by* 126 S. Ct. 1189 (Jan. 23, 2006), which held that 29 C.F.R. 552.109(a) is not entitled to *Chevron* deference because the Department "did not intend to use the legislative power delegated in § 213(a)(15) when it promulgated § 552.109(a)." 376 F.3d at 131.[2] The district court, like the Second Circuit in *Coke*, applied the less deferential standard of *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 164 (1944), and concluded that "§ 552.109(a) is entitled to little weight and does not control to the extent that it is inconsistent with § 552.3." *Buckner,* No. 2:05-cv-422-FtM-29DNF, slip op. at 11.

SUMMARY OF THE ARGUMENT

The Department's regulation at 29 C.F.R. 552.109(a), which exempts companionship services employees employed by third parties from the Act's minimum wage and overtime requirements, qualifies for *Chevron* deference because it was promulgated pursuant to an express congressional delegation of authority and after notice and comment. *See United States v. Mead Corp.*, 533

[2] The Supreme Court vacated the Second Circuit's decision in *Coke* and remanded for further consideration in light of the Department's Wage and Hour Advisory Memorandum No. 2005-1 (Dec. 1, 2005). The Second Circuit recently ordered supplemental briefing in *Coke*, requesting the parties to address how the Department's Advisory Memorandum affects the issues presented in that case. *Coke*, No. 03-7666 (2d Cir. Apr. 7, 2006) (order for supplemental briefing).

U.S. 218, 226-27, 229-30, 121 S. Ct. 2164, 2171, 2172-73 (2001); *Auer v. Robbins*, 519 U.S. 452, 457-58, 117 S. Ct. 905, 909-10 (1997). The district court's conclusion to the contrary, based on the Second Circuit's decision in *Coke*, is erroneous.

The Supreme Court has vacated the Second Circuit's decision in *Coke* and remanded the case for further consideration in light of the Department's Wage and Hour Advisory Memorandum No. 2005-1. *See* 126 S. Ct. 1189. The Advisory Memorandum, in turn, states that the Department has always considered 29 C.F.R. 552.109(a) to be an "authoritative and legally binding" legislative rule. *See* Dep't of Labor Wage and Hour Advisory Memorandum No. 2005-1, at 7 (Dec. 1, 2005). Because this regulation satisfies the prerequisites for *Chevron* deference -- it was promulgated pursuant to Congress's express delegation of rulemaking authority and after notice and comment -- it must be upheld unless it is arbitrary, capricious, or manifestly contrary to the statute. *See Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1179 (11th Cir. 2003).

Section 552.109(a) clearly passes this test; it is a reasonable interpretation of the statutory exemption. The exemption in section 13(a)(15) applies to "any employee employed in domestic service employment to provide companionship services." 29 U.S.C. 213(a)(15). This language is naturally read to exempt any employee who provides companionship services

to an aged or infirm individual in a private home. The statute does not draw any distinction between companions who are employed by the owners of the homes in which they are working and companions who are instead employed by third party employers. Furthermore, Congress enacted section 13(a)(15) to ensure that working people would be able to afford companion services, a rationale that applies equally to all companions, irrespective of the identity of their employer.

Further, the Department's statement that third party employment is addressed only in section 552.109(a), and not in section 552.3,[3] *see* Wage and Hour Advisory Memorandum No. 2005-1, at 7, is entitled to controlling deference because it is the agency's interpretation of its own regulations. *See Auer*, 519 U.S. at 461, 117 S. Ct. at 911. Thus, there is no conflict between sections 552.3 (addressing the kind of work that qualifies as domestic service and where it must be performed) and 552.109(a) (specifically addressing third party employment).

In sum, the district court should have accorded *Chevron* deference to section 552.109(a) because it reasonably interprets

[3] Section 552.3, incorporating relevant portions of the legislative history, states that "[a]s used in section 13(a)(15) of the Act, the term *domestic service employment* refers to services of a household nature performed by an employee in or about a private home . . . of the person by whom he or she is employed." 29 C.F.R. 552.3 (emphasis in original).

the FLSA's companionship services exemption as applying to employees employed by third parties.

ARGUMENT

SECTION 552.109(a) OF THE DEPARTMENT'S REGULATIONS, WHICH EXEMPTS COMPANIONSHIP SERVICES EMPLOYEES EMPLOYED BY THIRD PARTIES FROM THE FLSA'S MINIMUM WAGE AND OVERTIME REQUIREMENTS, IS ENTITLED TO CONTROLLING *CHEVRON* DEFERENCE BECAUSE IT IS A LEGISLATIVE RULE THAT PERMISSIBLY INTERPRETS THE FLSA'S "COMPANIONSHIP SERVICES" EXEMPTION AT SECTION 13(a)(15)

A. Statutory and Regulatory Provisions

The FLSA generally requires covered employers to pay overtime compensation at a rate of one and one-half times an employee's regular rate of pay for hours of work exceeding 40 hours in a work week. *See* 29 U.S.C. 207(a)(1). This requirement applies to employees employed in domestic service in a household. *See* 29 U.S.C. 207(l). However, section 13(a)(15) of the FLSA exempts from coverage "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)." 29 U.S.C. 213(a)(15).

The Secretary promulgated regulations, contained in 29 C.F.R. Part 552, pursuant to her expressly delegated authority to "define[] and delimit[]" the terms in section 13(a)(15)'s companionship services exemption. 29 U.S.C. 213(a)(15). These regulations define "companionship services" as "those services

which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs." 29 C.F.R. 552.6. The regulations also specifically state that section 13(a)(15)'s "companionship services" exemption applies to employees employed by third-parties:

> Employees who are engaged in providing companionship services, as defined in § 552.6, and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime pay requirements by virtue of section 13(a)(15).

29 C.F.R. 552.109(a).[4] A separate regulation states that "domestic service employment," as used in section 13(a)(15) of the Act, "refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed." 29 C.F.R. 552.3.

B. The Department's Regulation at 29 C.F.R. 552.109(a) Qualifies for *Chevron* Deference.

1. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S. Ct. 2778 (1984), establishes that a reviewing court must defer to an implementing agency's reasonable interpretation of an ambiguous statute under certain conditions. *See, e.g., Nat'l Cable & Telecomms. Ass'n v. Brand*

[4] Part 552 is subdivided into Subpart A, entitled "General Regulations," and Subpart B, entitled "Interpretations." 29 C.F.R. 552.3 and 552.6 are in Subpart A, while 29 C.F.R. 552.109 is in Subpart B. The stated authority for all these provisions is section 13(a)(15).

X Internet Servs., 125 S. Ct. 2688, 2699 (2005). The *Chevron* framework applies where: (1) Congress expressly delegated authority to the agency to make rules carrying the force of law; and (2) the agency promulgated such rules pursuant to that authority. *See United States v. Mead Corp.*, 533 U.S. 218, 226-27, 121 S. Ct. 2164, 2171 (2001); *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1178 (11th Cir. 2003). "[A] very good indicator of delegation meriting *Chevron* treatment [can be found] in express congressional authorizations to engage in the process of rulemaking . . . that produces the regulations . . . for which deference is claimed." *Mead*, 533 U.S. at 229, 121 S. Ct. at 2172. Thus, regulations promulgated pursuant to express congressional authorization and after notice and comment qualify for *Chevron* deference and must be upheld if reasonable. *Id.*

The Department's regulation at 29 C.F.R. 552.109(a) satisfies these criteria for *Chevron* deference.[5] Congress

[5] The district court's first certified question relates to the appropriate level of deference for both 29 C.F.R. 552.3 and 552.109(a). But every court that has addressed these regulations, including the Second Circuit in *Coke*, has determined that section 552.3 is entitled to controlling deference. *See, e.g.*, *Coke*, 376 F.3d at 124 (noting, in dictum, that section 552.3 was "promulgated in clear exercise of the authority delegated by § 213(a)(15)"); *Welding v. Bios Corp.*, 353 F.3d 1214, 1217-18 (10th Cir. 2004) (section 552.3's requirement that work be performed in a private home controls question of whether employer must pay overtime); *Madison v. Res. for Human Dev., Inc.*, 233 F.3d 175, 181 (3d Cir. 2000) (according *Chevron* deference to 29 C.F.R. 552.3 because it is a formal regulation issued after notice and comment that

expressly delegated to the Secretary the authority to "define[] and delimit[] by regulation" the terms of section 13(a)(15)'s "companionship services" exemption. 29 U.S.C. 213(a)(15). The Supreme Court has held that regulations issued pursuant to such authority are entitled to *Chevron* deference. In *Auer*, 519 U.S. at 456-58, 117 S. Ct. at 909-10, for example, the Supreme Court accorded *Chevron* deference to regulations promulgated under the Secretary's authority to "define[] and delimit[]" the FLSA's exemption in 29 U.S.C. 213(a)(1) for employees employed in an executive, administrative, or professional capacity.

More generally, Congress delegated to the Secretary the authority "to prescribe necessary rules, regulations, and orders" regarding the 1974 amendments to the Fair Labor Standards Act, which extended the statute's coverage to domestic service workers and included the companionship services exemption. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 29(b), 88 Stat. 55, 76 (1974). That provision also gives the Secretary authority to promulgate binding legal rules. *See, e.g., Brand X*, 125 S. Ct. at 2699; *Shotz*, 344 F.3d at 1179 n.25. The Department expressly stated that it was exercising its legislative rulemaking authority under section 13(a)(15) and

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reasonably interprets FLSA section 13(a)(15)). Thus, there is no dispute about the appropriate level of deference to be accorded section 552.3, and this brief focuses on the level of deference due section 552.109(a).

the 1974 amendments when it promulgated section 552.109(a). *See* 29 C.F.R. Part 552 (citing section 13(a)(15) and section 29(b) of the 1974 FLSA amendments as authority for all the regulations in Part 552, including section 552.109(a)); 39 Fed. Reg. 35,382 (Oct. 1, 1974) (proposing regulations pursuant to this authority).

Section 552.109(a) also satisfies the second criterion for *Chevron* deference because the Secretary promulgated this regulation after notice and comment. *See* 39 Fed. Reg. at 35,382 (proposed rule); 40 Fed. Reg. 7404 (Feb. 20, 1975) (final rule). Such rules are clearly entitled to controlling deference from courts. *See Mead*, 533 U.S. at 229-31, 121 S. Ct. at 2172-73; *Chevron*, 467 U.S. at 858-59, 865-66, 104 S. Ct. at 2789-90, 2792-93.[6]

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[6] Although Buckner does not appear to have raised the argument, the district court suggested, following the Second Circuit's decision in *Coke*, that 29 C.F.R. 552.109(a) is procedurally defective under the Administrative Procedure Act ("APA"), 5 U.S.C. 551 *et seq.*, because the originally proposed rule took a position opposite that taken in the final rule. *See Buckner*, No. 2:05-cv-422-FtM-29DNF, slip op. at 8. This contention is without merit. The Department published the proposed text of the rule, giving notice of the subject matter at issue in the rulemaking, and therefore satisfied the APA's notice requirements. Because the Department had a duty to consider comments it received, and modification of proposed rules in light of such comments is at the very "heart of the rulemaking process," the Department did not violate the APA when it promulgated section 552.109(a). *See Penzoil v. Fed. Energy Regulatory Comm'n*, 645 F.2d 360, 371-72 (5th Cir. Aug. 21, 1981) ("Simply because a different rule is adopted does not require a new notice and comment procedure if, as required by [APA

Moreover, the Department recently clarified that it has always considered, and continues to treat, 29 C.F.R. 552.109(a) as an "authoritative and legally binding" legislative rule. Dep't of Labor Wage and Hour Advisory Memorandum No. 2005-1, at 7 (Dec. 1, 2005). Specifically, the Advisory Memorandum states that "at the time the final rule [enacting 29 C.F.R. 552.109(a)] was promulgated, the Department believed that the availability of the companionship exemption to third party employers turned decisively on its pronouncement in the regulations -- something that could be true only of a legislative rule." *Id.* Thus, the district court's conclusion that section 552.109(a) "is not a formal regulation promulgated pursuant to express Congressional authority" is clearly in error. *Buckner,* No. 2:05-cv-422-FtM-29DNF, slip op. at 9.

2. The district court reasoned that section 552.109(a) is an interpretive rule entitled only to *Skidmore* deference because it is contained in Part 552's "Interpretations" subpart. As an initial matter, the district court relied on the Second Circuit's decision in *Coke*, which has been vacated and remanded by the Supreme Court for further consideration in light of the

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section] 553(b)(3), the notice of proposed rulemaking includes the terms or substance of the proposed rule or a description of the subjects and issues involved."). Fifth Circuit decisions issued before October 1, 1981 are binding precedent in the Eleventh Circuit. *See Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. Nov. 3, 1981).

Department's Advisory Memorandum, which clearly states that the Department intended for section 552.109(a) to be a legally binding legislative rule.

Moreover, an agency's label for a rule is not dispositive. *Chamber of Commerce v. Occupational Safety & Health Admin.*, 636 F.2d 464, 468 (D.C. Cir. 1980) ("The administrative agency's own label is indicative but not dispositive; we do not classify a rule as interpretive just because the agency says it is."); *Brown Express, Inc. v. United States*, 607 F.2d 695, 700 (5th Cir. 1979) (agency's label is not conclusive). Indeed, the Supreme Court has under similar circumstances accorded *Chevron* deference to another Department FLSA regulation that was issued pursuant to notice-and-comment rulemaking, despite the fact that it was set out in an "Interpretations" subpart. *See Auer*, 519 U.S. at 457-58, 117 S. Ct. at 909 (deference to 29 C.F.R. 541.118(a) (2003)).[7] The Third and Ninth Circuits similarly have accorded *Chevron* deference to a regulation contained in Part 552's "Interpretations" subpart. *See Madison*, 233 F.3d at 181 (according *Chevron* deference to 29 C.F.R. 552.101 because, like

[7] Section 541.118(a) established a salary basis test for determining when an employee was employed in an executive, administrative, or professional capacity and thereby exempt from the FLSA's minimum wage and overtime requirements. The Department has since amended the Part 541 regulations, and the current regulations are no longer divided into "General" and "Interpretations" subparts. *See* 69 Fed. Reg. 22,122 (Apr. 23, 2004).

section 552.3, it is a formal regulation resulting from notice and comment rulemaking); *McCune v. Oregon Senior Servs. Div.*, 894 F.2d 1107, 1110 (9th Cir. 1990) (upholding 29 C.F.R. 552.106 because it is a reasonable interpretation of a statute the Secretary is charged with administering). Thus, the mere fact that section 552.109(a) is contained in a subpart entitled "Interpretations" does not change the level of deference that should be accorded to it as a legislative rule. Indeed, a far more relevant consideration, in addition to the source of the agency's authority and the procedure used to issue the rule, is whether the regulation is "one affecting individual rights and obligations." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302, 99 S. Ct. 1705, 1718 (1979) (internal quotation marks omitted). Section 552.109(a) unquestionably falls into this category.

3. Every other court that has considered this issue, with the exception of the Second Circuit's vacated decision in *Coke*, has applied *Chevron* deference to 29 C.F.R. 552.109(a) and concluded that the companionship services exemption applies to domestic service employees employed by third party employers. *See, e.g., Johnston v. Volunteers of Am., Inc.,* 213 F.3d 559, 562 (10th Cir. 2000) (deferring to 29 C.F.R. 552.109(a)); *Welding v. Bios Corp.*, 353 F.3d 1214, 1217 n.3 (10th Cir. 2004) (following *Johnston*); *Terwilliger v. Home of Hope, Inc.*, 21 F. Supp. 2d 1294, 1299 n.2 (N.D. Okla. 1998) (deferring to section

552.109(a)). And most recently, a district court in this Circuit, after a comprehensive analysis of the issue, concluded that section 552.109(a) should be reviewed under the *Chevron* standard, and upheld the regulation as a permissible construction of the FLSA's companionship services exemption. *See Fernandez v. Elder Care Option, Inc.*, Case No. 03-21998, slip op. at 35-36, 46 (S.D. Fla. July 29, 2005), *appeal docketed*, No. 05-16806 (11th Cir. Dec. 5, 2005), *stayed pending outcome in Buckner, No. 06-11032* (March 20, 2006).[8] This Court should similarly accord *Chevron* deference to section 552.109(a).

C. Section 552.109(a) is a Permissible Construction of the FLSA's Companionship Services Exemption.

1. The FLSA's companionship services exemption is silent regarding third party employment. *See* 29 U.S.C. 213(a)(15). "Because Congress has not 'directly spoken to the precise question at issue,' [a reviewing court] must sustain the Secretary's approach so long as it is 'based on a permissible construction of the statute.'" *Auer*, 519 U.S. at 457, 117 S. Ct. at 909 (quoting *Chevron*, 467 U.S. at 842-43, 104 S. Ct. at 2781-82); *see also Cadet v. Bulger*, 377 F.3d 1173, 1185 (11th Cir. 2004) (where statute is silent or ambiguous, court must defer to agency's reasonable interpretation). "That [the court] may prefer a different interpretation is not enough to deny

[8] A copy of the *Fernandez* decision is included in the addendum to this brief.

deference to the agency interpretation." *Heimmermann v. First Union Mortgage Corp.*, 305 F.3d 1257, 1263 (11th Cir. 2002).

"An agency's interpretation is reasonable and controlling unless it is arbitrary, capricious, or manifestly contrary to the statute." *Cadet*, 377 F.3d at 1185 (internal quotation marks omitted); *see also Shotz*, 344 F.3d at 1179 (rules issued pursuant to express congressional delegation of authority and after notice and comment are "entitled to controlling weight unless they are procedurally flawed, substantively arbitrary and capricious, or plainly contradict the statute"). Section 552.109(a) clearly satisfies this standard.

2. Section 13(a)(15), on its face, does not limit the companionship services exemption to employees employed by the individuals receiving their services. *See* 29 U.S.C. 213(a)(15). Rather, the exemption applies to "any employee employed in domestic service employment to provide companionship services." *Id.* Congress's use of the term "any" is naturally read to include all employees providing such services, regardless of who employs them. *See, e.g.*, *United States v. Gonzales*, 520 U.S. 1, 5, 117 S. Ct. 1032, 1035 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, one or some indiscriminately of whatever kind. . . . Congress did not add any language limiting the breadth of that word, and so we must read [a statute prohibiting certain convictions to run concurrently with

'any' other term of imprisonment] as referring to all term[s] of imprisonment") (internal quotation marks omitted). The statutory exemption, by its terms, is not limited based on the identity of the employer.

Like the plain language of the statute, the legislative history does not suggest that the companionship services exemption is limited to companions employed by the individual receiving care. In fact, in enacting section 13(a)(15), Congress was concerned that working people would not be able to pay for companionship services if they were required to pay FLSA wages. *See* 119 Cong. Rec. 24,794, 24,797 (1973) (statement of Sen. Dominick, discussing letter from Hilda R. Poppell); *id.* at 24,798 (statement of Sen. Johnston); *id.* at 24,801 (statement of Sen. Burdick); *see also Welding*, 353 F.3d at 1217 ("Congress created the 'companionship services' exemption to enable guardians of the elderly and disabled to financially afford to have their wards cared for in their own private homes as opposed to institutionalizing them.") (quoting *Lott v. Rigby*, 746 F. Supp. 1084, 1087 (N.D. Ga. 1990)). This affordability concern applies regardless whether the companionship services are provided by the direct hiring of an employee or through the use of an agency. Thus, applying the exemption to employees employed by third parties furthers the congressional purpose behind the Act. *Cf. McCune*, 894 F.2d at 1110 (rationale that

"many private individuals . . . may . . . be forced to forego the option of receiving [companionship] services in their homes if the cost of the services increases" provides a "sound policy reason[] for applying the exemption to companions as defined by the Secretary [in 29 C.F.R. 552.6]").

This is especially true when one considers the changes that have occurred during the approximately 25 years since section 13(a)(15) was enacted. For example, "[t]he number of for-profit agencies [providing such services] . . . increased from approximately 47 in 1975 to 3,129 in 1999." *Fernandez*, No. 03-21998, slip op. at 15 (citing 66 Fed. Reg. 5481, 5483 (Jan. 19, 2001)). Given the number of agencies now providing these services, "[i]f the companionship services exemption to the FLSA was narrowed to only those employees hired directly by a family member or head of household, then the exemption would encompass only 2% of employees providing companionship services in private homes." *Id.* at 45-46 (citing 66 Fed. Reg. at 5483). This cannot be what Congress intended when it exempted these employees from the FLSA's minimum wage and overtime requirements.[9]

[9] The rule that FLSA exemptions must be narrowly construed and should be withheld unless a person fits plainly and unmistakably within their terms and spirit is a rule of judicial construction that does not "limit[] . . . the Secretary's power to resolve ambiguities in h[er] own regulations." *Auer*, 519 U.S. at 462-63, 117 S. Ct. at 912. Indeed, "[a] rule requiring the

Congress never directly addressed the issue of employer identity during its consideration of the companionship services exemption but, rather, focused on the employee's activities and where those activities are performed. Both the congressional committee reports and the congressional debates on the provision repeatedly emphasize that the key factors in determining whether an employee qualifies for the companionship services exemption are the nature of the employee's activities and the place where the activities are performed. *See, e.g.*, H.R. Rep. No. 93-913, at 33 (1974) ("The bill exempts . . . employees employed *in the capacity* of companion to an individual who, by reason of older age or infirmity, necessitates a companion.") (emphasis added); 119 Cong. Rec. 24,801 (describing tasks performed by companions) (statements of Sens. Burdick and Williams); S. Rep. No. 93-300, at 22 (1973) ("The domestic service must be performed *in a private home* which is a fixed place of abode of an individual or family.") (emphasis added); S. Rep. No. 93-690, at 20 (1974) (same).

While the legislative history refers to the Social Security Act regulations defining "domestic service" (a term used in 29 U.S.C. 213(a)(15)) and a "generally accepted meaning" of the

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Secretary to construe h[er] own regulations narrowly would make little sense, since [s]he is free to write the regulations as broadly as [s]he wishes, subject only to the limits imposed by the statute." *Id.*, 519 U.S. at 463, 117 S. Ct. at 912.

term that "relates to services of a household nature performed by an employee *in or about a private home of the person by whom he or she is employed*," S. Rep. No. 93-300, at 22 (emphasis added); *see also* H.R. Rep. No. 93-913, at 35-36; S. Rep. No. 93-690, at 20; 119 Cong. Rec. at 24,799 (statement of Sen. Williams), these isolated references do not reveal an intent to impose a limitation based on the identity of the employer. As the Department has clearly explained in its Advisory Memorandum No. 2005-1, this language was "not intended to address the issue of third party employment, but rather [is] an extraneous vestige of the language's origin in the Social Security regulations" that is meant to address the kind of work that generally qualifies as domestic service under the FLSA. Wage and Hour Advisory Memorandum No. 2005-1, at 4 (citing social security regulation 20 C.F.R. 404.1057 (describing "[d]omestic service in the employer's home") and social security tax regulation 26 C.F.R. 31.3121(a)(7)-1(a)(2) (describing "[d]omestic service in a private home of the employer")). Thus, there was no clear congressional intent to impose a limitation on the exemption based on the identity of the employer. *See Fernandez*, No. 03-21998, slip op. at 44-45 ("Most of the statements of the Congressmen focus on the nature of companionship services (e.g., 'elder-sitting' or providing companionship to an elderly person through conversation and shared activities) and the location of

such services (ensuring affordable care for the elderly within their own homes), rather than the employer.").

In light of section 13(a)(15)'s text, which applies to "any" employee employed in domestic service employment to provide companionship services, and the clear legislative intent to keep companionship services affordable, the Department made a permissible policy choice when it applied the companionship services exemption to third party care providers in 29 C.F.R. 552.109(a).

Indeed, the district court in *Fernandez* reached exactly this conclusion. It determined that section 552.109(a) is a permissible construction of the Act's companionship services exemption because it is consistent with section 13(a)(15)'s language and the legislative intent behind this provision. *See Fernandez*, No. 03-21998, slip op. at 39-43. Specifically, that court concluded that the Department's regulation promotes Congress's purpose to keep companionship services affordable to those who need them. *See id.* at 43-46. For these reasons, the *Fernandez* court upheld section 552.109(a).

3. The district court determined that section 552.109(a) conflicts with the Department's regulation at 29 C.F.R. 552.3, which, according to the court, limits the companionship services exemption to employees employed by the person receiving such

services. Contrary to the court's conclusion, however, section 552.3 contains no such "clear" meaning.

The language in section 552.3 was borrowed, essentially verbatim, from the Act's legislative history. *See* Wage and Hour Advisory Memorandum No. 2005-1 at 4-5. In turn, the legislative history, as discussed above, drew on the definition of domestic service found in regulations issued under the Social Security Act, 42 U.S.C. 401 *et seq*. *See supra* pp. 21-22. Congress's references to the Social Security regulations were intended to emphasize the nature of the employee's activities and where those activities are performed, not to limit the exemption to certain employers. *See supra* pp. 21-22; *see also* Wage and Hour Advisory Memorandum No. 2005-1, at 4 (citing legislative history focusing on requirement that work be performed in a private home to qualify as domestic service employment). When the Department incorporated this language from the legislative history into section 552.3, it intended to incorporate these two limitations, but gave no thought to imposing any others. For example, the Department "signaled its understanding that the sentence [referring to the private home of the employer] should be read as addressing place of performance but as not speaking to third party employment" by inserting "a parenthetical explaining that . . . a private home can either be fixed or temporary," thereby clearly emphasizing the importance of place of performance,

rather than the employer's identity. Wage and Hour Advisory Memorandum No. 2005-1 at 5.

There is no indication that the Department ever considered the potential impact of section 552.3 on the coverage of third party employees, much less that it actually intended the provision to entirely exclude them. To the contrary, at the time the regulation was promulgated the Department demonstrated its belief that section 552.3 did not resolve the issue of third party employment by including a separate section expressly addressing the subject, section 552.109. *See* 40 Fed. Reg. at 7407. This would have been entirely unnecessary if the definition of domestic service employment in section 552.3 had already excluded employees of third parties.[10] In sum, all sources indicate that neither Congress nor the Department intended the sentence that was incorporated into section 552.3 to be construed as excluding employees who are employed by third party employers from the definition of domestic service employment.

In fact, if section 552.3 were construed as excluding all employees of third party employers from the definition of

[10] The Department deliberately chose to include third party employees within the companionship services exemption when it promulgated section 552.109(a) after careful consideration of comments it received during the notice-and-comment process. *See* Wage and Hour Advisory Memorandum No. 2005-1, at 2-3; n. 5, *supra*.

domestic service employment, it would have the perverse effect of excluding many domestic service workers from FLSA coverage in the first place, despite Congress's express intent "to include within the coverage of the Act *all* employees whose vocation is domestic service," with the exception only of casual babysitters and companions for the aged and infirm. S. Rep. No. 93-690, at 20 (emphasis added); *see also* H.R. Conf. Rep. No 93-413, at 27 (1973) (same).[11] Prior to the 1974 amendments that extended the FLSA's protections to domestic service workers, only workers employed by "covered enterprises," which at that time meant businesses with annual gross sales of at least $250,000 that employed at least two employees in interstate commerce, were covered under the Act. *See* 29 U.S.C. 203(s) (1970). Two categories of domestic workers generally were not covered prior to the amendments: those employed by homeowners because there usually was no basis for individual coverage and those employed by third parties that did not meet the test for enterprise coverage. Congress clearly intended the 1974 amendments generally to cover both these categories of workers, with only a

[11] As the Department explained in its Advisory Memorandum, although section 552.3 states that it defines domestic service employment "[a]s used in section 13(a)(15) of the Act," "the Department in fact intended the provision to supply a general definition of the term as used throughout the Act." Wage and Hour Advisory Memorandum No. 2005-1, at 5 n.1. Thus, section 552.3's definition applies equally to the general coverage of domestic service workers and the companionship services exemption.

few expressly enumerated exceptions. *See* S. Rep. No. 93-690, at 20 (expressing Congress's intent to extend coverage to *all* employees whose vocation is domestic service, subject to enumerated exceptions); H.R. Conf. Rep. No 93-413, at 27 (same). But if section 552.3 is construed as excluding third party employers from the definition of domestic service employment, then those domestic workers who are employed by third party employers that are not covered enterprises would to this very day not be covered by the FLSA. That result is contrary to clear congressional intent, and cannot be correct. *See* Wage and Hour Advisory Memorandum No. 2005-1, at 5.

The Department's reading of its regulations is consistent with well-settled principles of regulatory construction. Courts must read regulations "so as to give effect, if possible, to all of its provisions." *Jay v. Boyd*, 351 U.S. 345, 360, 76 S. Ct. 919, 928 (1956); *see also APWU v. Potter*, 343 F.3d 619, 626 (2d Cir. 2003) (“A basic tenet of statutory construction, equally applicable to regulatory construction, is that a text should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error.") (internal quotation marks omitted). The Department's interpretation that sections 552.3 and 552.109(a) are

complementary, and not contradictory, harmonizes the two provisions and gives effect to each of them.[12]

The Department has stated that "[t]he regulations address the issue of third party employment in only one place -- section 552.109(a), which clearly and explicitly provides that companions employed by third parties can qualify for the exemption." Wage and Hour Advisory Memorandum No. 2005-1, at 2. The Department's interpretation of its own regulations in the Advisory Memorandum -- that only section 552.109(a), and not section 552.3, addresses the issue of third party employment -- is entitled to controlling deference. *See Auer*, 519 U.S. at 461-63, 117 S. Ct. at 911-12 (agency's interpretation of its own regulations entitled to controlling deference); *Cadet*, 377 F.3d at 1186 (same). Indeed, two recent appellate decisions in FLSA cases reiterate the principle that controlling deference should be accorded to the Department's interpretation of its own ambiguous legislative rules. *See Acs v. Detroit Edison Co.*, No. 05-1042, 2006 WL 954180, at *6 (6th Cir. Apr. 14, 2006)

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[12] *See also* Wage and Hour Advisory Memorandum No. 2005-1, at 6 (Department's interpretation avoids an internal inconsistency with 29 C.F.R. 552.101(a)'s inclusion in domestic service employment of "private household workers," a phrase understood by the Department and Congress to include employees of third party employers). Because section 552.101(a) clearly states that at least some domestic workers employed by third parties are included within the definition of domestic service employees, it makes no sense to construe section 552.3's language that domestic service be performed "in or about a private home . . . of the [employer]" as excluding them. *Id*.

(controlling deference to Wage-Hour Division opinion letter); *Belt v. EmCare, Inc.*, No. 05-40370, 2006 WL 758277, at *9 (5th Cir. Mar. 24, 2006) (controlling deference to Department's interpretation contained in amicus brief, Wage-Hour opinion letter, and Wage-Hour Field Operations Handbook). Thus, this Court should accord controlling *Auer* deference to the Department's position, as expressed in the Advisory Memorandum and this amicus brief, that there is no conflict between the regulations, and that 29 C.F.R. 552.109(a) alone addresses the question of third party employment.[13]

[13] Any ambiguity created by the Department's previous statements in its notices of proposed rulemaking that sections 552.3 and 552.109(a) were inconsistent, *see, e.g.,* 66 Fed. Reg. at 5485, has been resolved by the Department's Advisory Memorandum, which expressly repudiates and withdraws those statements. *See* Wage and Hour Advisory Memorandum No. 2005-1, at 7. Even if the Department had not expressly withdrawn these statements, this Court should give them little weight because they were expressed in proposing amendments to section 552.109 that were never promulgated. *See Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 845, 106 S. Ct. 3245, 3253 (1986) ("It goes without saying that a proposed regulation does not represent an agency's considered interpretation of its statute and that an agency is entitled to consider alternative interpretations before settling on the view it considers most sound."); *see also Fernandez*, No. 03-21998, slip op. at 46 n.27 (finding, based on *Chevron*, that the proposed changes to section 552.109(a) do not undermine its authority). In addition, the perception that the Department has changed its position regarding whether sections 552.3 and 552.109(a) conflict does not lessen the deference that these regulations receive. *See Brand X*, 125 S. Ct. at 2699 ("Agency inconsistency [with past practice] is not a basis for declining to analyze the agency's interpretation under the *Chevron* framework.").

Thus, since section 552.109(a) is entitled to controlling deference, and in the Department's considered view is the only regulation that deals directly with the exempt status of companions employed by third parties, it is dispositive.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's decision and uphold 29 C.F.R. 552.109(a) as a permissible interpretation of the FLSA's companionship services exemption.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(c)(5) and (d), and 32(a)(7)(C), I certify the following with respect to the foregoing Brief for the Secretary of Labor as *Amicus Curiae*:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,723 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface with 10.5 characters per inch, using Microsoft Office Word 2003, Courier New font, 12 point type.

_____ _____

Date

Joanna Hull
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of April, 2006, I sent by Federal Express overnight delivery the original and six copies of the foregoing Brief for the Secretary of Labor as *Amicus Curiae* to the Clerk of the United States Court of Appeals for the Eleventh Circuit, 56 Forsyth Street, N.W., Atlanta, GA 30303. In addition, on this same date I uploaded an electronic version of this brief to this Court's website.

I also certify that one copy of this brief has been served on each of the following counsel of record by Federal Express overnight delivery this 28th day of April, 2006:

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ADDENDUM

U.S. Department of Labor
Employment Standards Administration
Wage and Hour Division
Washington, D.C. 20210

December 1, 2005

WAGE AND HOUR ADVISORY MEMORANDUM No. 2005-1

MEMORANDUM FOR: REGIONAL ADMINISTRATORS
DISTRICT DIRECTORS

FROM: ALFRED B. ROBINSON, JR.
Deputy Administrator

SUBJECT: Application of Section 13(a)(15) to Third Party Employers

Policy and Interpretation for Applying the Section 13(a)(15) Exemption
The purpose of this memorandum is to advise staff how to apply the Section 13(a)(15) companionship services exemption in light of the Second Circuit's decision in *Coke v. Long Island Care at Home*, 376 F.3d 118 (2nd Cir. 2004). As indicated in Opinion Letter FLSA 2005-12, the Division continues to adhere to its regulation, set out at 29 C.F.R. § 552.109(a), exempting companions who are employed by third parties from the minimum wage and overtime requirements of the FLSA. Regional Administrators and District Directors are instructed to continue to apply the exemption in states outside the Second Circuit.

Rationale for Applying the Exemption
The following explains and justifies the Division's policy to continue to apply the section 13(a)(15) exemption in all jurisdictions except those that comprise the Second Circuit Court of Appeals.

The text of the FLSA makes the applicability of the companionship exemption dependent upon the nature of an employee's activities and the place of their performance, without regard to the identity of the employer. Section 13(a)(15) exempts "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)." 29 U.S.C. § 213(a)(15). This language is naturally read to exempt any employee who provides companionship services to an aged or infirm individual in a private home. The statute does not draw any distinction between companions who are employed by the owners of the homes in which they are working and companions who are instead employed by third party employers.

The Department's regulations explicitly state that the companionship exemption applies to companions employed by third party employers. The Department promulgated the Part 552 regulations pursuant to its express statutory authority under section 13(a)(15) to define and delimit the terms of the exemption, as well as its additional authority to issue regulations to implement the 1974 FLSA amendments. 40 Fed. Reg. 7404 (1975); see Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 29(b), 88 Stat. 55, 76 (authority to issue implementing regulations). Section 552.109(a) of Part 552 provides:

> Employees who are engaged in providing companionship services, as defined in § 552.6, and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime requirements by virtue of section 13(a)(15).

In promulgating 29 C.F.R. § 552.109(a), the Department explained that applying the exemption to employees of third parties "is more consistent with the statutory language and prior practices concerning other similarly worded exemptions." 40 Fed. Reg. 7404, 7405 (1975). The Department continues to agree with that assessment because the statutory phrase "any employee" indicates that the exemption is naturally read to apply based on the activities of the employee, not identity of the

employer. See, e.g., 29 C.F.R. § 780.303 (exemption in 29 U.S.C. § 213(a)(6)(A) for "any employee employed in agriculture" turns on "the activities of the employee rather than those of his employer"); 29 C.F.R. § 780.403 (exemption in 29 U.S.C. § 213(b)(12) for "any employee employed in" certain activities "may not apply to some employees of an employer engaged almost exclusively in activities within the exemption, and it may apply to some employees of an employer engaged almost exclusively in other activities").

Section 552.109(a) is also consistent with the policy objectives that Congress was pursuing in creating the companionship exemption. Soon after the regulations were promulgated, the Department explained that Congress was mindful of the special problems of working fathers and mothers who need a person to care for an elderly invalid in their home. Opinion Letter from Wage & Hour Div., Dep't of Labor, WH-368, 1975 WL 40991 (Nov. 25, 1975). In particular, legislators were concerned that working people could not afford to pay for companionship services if they had to pay FLSA wages. See 119 Cong. Rec. 24,797 (statement of Sen. Dominick, discussing letter from Hilda R. Poppell); id. at 24,798 (statement of Sen. Johnston); id. at 24,801 (statement of Sen. Burdick). That cost concern applies whether the working person obtains the companionship services by directly hiring an employee or by obtaining the services through a third party.

In *Coke v. Long Island*, supra, the Second Circuit ruled that section 552.109(a) of the Department's regulations is inconsistent with congressional intent and with section 552.3 of the regulations. The Department disagrees. As explained above, Congress created the exemption to ensure that working families in need of companionship services would be able to obtain them, a concern that has nothing to do with the source of the companions' employment. Thus, it is unsurprising that the text of the statute focuses exclusively on the nature of the activities that companions perform and does not even hint that the source of a companion's employment is a relevant factor. Presumably, if Congress had wanted to limit the companionship exemption to employees of a particular employer, it would have said so expressly, as it has done with other FLSA exemptions. See, e.g., 29 U.S.C. § 213(a)(3) (exemption for "any employee employed by an establishment which is an amusement or recreational establishment, organized camp, or religious or non-profit educational conference center"); 29 U.S.C. § 213(b)(3) ("any employee of a carrier by air").

Moreover, the congressional committee reports that discuss section 13(a)(15) repeatedly emphasize that the key factors in determining whether an employee qualifies for the companionship exemption are the nature of the employee's activities, *see, e.g.*, H.R. Rep. No. 93-913, at 33 (1974) ("The bill exempts ... employees employed *in the capacity* of companion to an individual who, by reason of age or necessity, necessitates a companion.") (emphasis added); S. Rep. No. 93-690, at 20 (1974) ("It is not, however, the Committee's intent to include within the term 'domestic service' *such activities as* casual babysitting and acting as a companion.") (emphasis added); 119 Cong. Rec. 24,801 (1973) (describing tasks performed by companions) (statements of Sens. Burdick and Williams); H.R. Conf. Rep. No. 93-413, at 27 (1973) (explaining that the kinds of services that are performed by trained personnel such as nurses do not fall within the exemption), and the place that the activities are performed. *See, e.g.*, S. Rep. No. 93-300, at 22 (1973) ("The domestic service must be performed in a private home which is a fixed place of abode of an individual or family"); S. Rep. No. 93-690, supra, at 20 (same); 119 Cong. Rec. at 24,799 ("A dwelling used primarily as a boarding or lodging house for the purpose of supplying such services to the public, as a business enterprise, is not a private home.") (statement of Sen. Williams).

The Department's regulations are not only consistent with congressional intent, but they are also internally consistent. The regulations address the issue of third party employment in only one place – section 552.109(a), which clearly and explicitly provides that companions employed by third parties can qualify for the exemption. The Department intentionally chose to include third party employees within the exemption after careful deliberation. When the regulations were first proposed, the Department drafted section 552.109 to exclude companions employed by third party employers from the exemption. 39 Fed. Reg. 35382, 35385 (1974). After reviewing the comments it received, however, the Department reconsidered its position. When the regulations were issued in final form,

the Department adopted the present language of section 552.109(a), which expressly includes companions employed by third party employers within the exemption. The Department explained that "[o]n further consideration, [it had] concluded that these exemptions can be available to such third party employers since they apply to 'any employee' engaged 'in' the enumerated services. This interpretation is more consistent with the statutory language and prior practices concerning other similarly worded exemptions." 40 Fed. Reg. 7404, 7405 (1975).

The Department's January 19, 2001 NPRM and the Second Circuit's decision in *Coke v. Long Island* identified a conflict between section 552.109(a)'s pronouncement that the companionship exemption extends to third party employers and section 552.3's definition of "domestic service employment." *See* 66 Fed. Reg. at 5485; *Coke v. Long Island*, 376 F.3d at 133-34. The Department has reviewed section 552.3 and another regulation, 29 C.F.R. 552.101(a), which also addresses the concept of "domestic service employment." The regulations' definition of "domestic service employment" is relevant to determining the scope of the companionship exemption because the text of section 13(a)(15) exempts only those companions who are "employed in domestic service employment to provide companionship services." Thus, the statute seems to contemplate that to qualify for the exemption, an employee must both "provide companionship services" and be "employed in domestic service employment." If the definition of "domestic service employment" in sections 552.3 and 552.101(a) is properly read as excluding all third party employees, then those provision can fairly be said to be significantly in tension with section 552.109(a), which expressly includes companions employed by third party employers.

The Department does not believe, however, that sections 552.3 and 552.101(a), when properly read in context, speak to the issue of third party employment. Neither provision explicitly mentions the subject. And unlike section 552.109(a), there is no indication that the Department ever considered the potential impact of the provisions on the coverage of third party employees, much less that it actually intended the provisions to entirely exclude them. To the contrary, at the time the regulations were promulgated the Department seems to have believed that sections 552.3 and 552.101(a) did not resolve the issue of third party employment, since it included a separate section – section 552.109 – in both the NPRM and the final rule to expressly address the subject.

Admittedly, there are phrases in sections 552.3 and 552.101(a) that could potentially be read to exclude third party employees from the definition of "domestic service employment." Section 552.3 provides:

> As used in section 13(a)(15) of the Act, the term *domestic service employment* refers to services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed. The term includes employees such as cooks, waiters, butlers, valets, maids, housekeepers, governesses, nurses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, and chauffeurs of automobiles for family use. It also includes babysitters employed on other than a casual basis. This listing is illustrative and not exhaustive.

And section 552.101(a) explains:

> The definition of *domestic service employment* contained in §552.3 is derived from the regulations issued under the Social Security Act (20 CFR 404.1057) and from the "generally accepted meaning" of the term. Accordingly, the term includes persons who are frequently referred to as "private household workers." See S. Rep. 93-690, p. 20. The domestic service must be performed in or about the private home of the employer whether that home is a fixed place of abode or a temporary dwelling as in the case of an individual or family traveling on vacation. A separate

nature performed by an employee in or about a private home of the person by whom he or she is employed." The fact that the sentence is immediately followed by a descriptive passage elaborating on the sentence's requirement that domestic service employment must be performed in a private home, but making no mention at all of the issue of third party employment, makes it clear that the sole purpose of the sentence is to specify the place where domestic service employment must be performed.

The sentence from the committee report is incorporated virtually verbatim into section 552.3, with the only modification being the addition of a brief parenthetical specifying that a private home can be fixed or temporary. In the view of the Department, when the sentence was imported into the regulations from the committee report, it carried with it the meaning ascribed to it by Congress. The Department signaled its understanding that the sentence should be read as addressing place of performance but as not speaking to third party employment in two distinct ways. First, the one change the Department made to the sentence was the insertion of a parenthetical explaining that, with respect to the place of performance, a private home can either be fixed or temporary. The insertion of the parenthetical shows that the Department was primarily concerned with clarifying the operative effect of the regulation on the place of performance requirement. Second, the Department drafted a separate regulatory provision specifically to address the issue of third party employment. This would have been entirely unnecessary if the definition of domestic service employment excluded third party employment – particularly at the NPRM stage, when the meaning of the two provisions would have been aligned. In sum, all signs indicate that neither Congress nor the Department intended the sentence that first appeared in the committee report and was then incorporated into section 552.3 to be construed as excluding employees who are employed by third party employers from the definition of domestic service employment.

In fact, if the sentence in question were construed as excluding all employees of third party employers from the definition of domestic service employment, it would have the perverse effect of excluding many domestic workers from the coverage of the FLSA – despite Congress' express intent "to include within the coverage of the Act all employees whose vocation is domestic service," excepting only casual babysitters and companions for the aged and infirm. *See* S. Rep. No. 93-690, supra, at 20 (emphasis added); see also H.R. Conf. Rep. No. 93-413, at 27 (1973); S. Conf. Rep. No. 93-358, at 27 (1973). Prior to the enactment of the 1974 amendments, the only domestic workers that were covered by the FLSA were those employed by "covered enterprises," which are currently defined by the FLSA as businesses with annual gross sales of at least $500,000 that employ at least two employees in interstate commerce. *See* 29 U.S.C. § 203(s); see also 29 U.S.C. § 203(s) (1970) ($250,000 threshold applicable at time of 1974 amendments). Two categories of domestic workers generally were not covered prior to the amendments: those employed by homeowners because there usually was no basis for individual coverage and those employed by third party employers that did not meet the test for enterprise coverage. There can be no question that Congress intended for the 1974 amendments generally to cover both of these categories, with only a few expressly enumerated exceptions. Yet if the sentence in the committee report is construed as excluding all third party employers from the definition of domestic service employment, then those domestic workers who are employed by third party employers that are not covered enterprises would to this very day not be covered by the FLSA.[1] That result is contrary to Congress' express intent, and cannot be correct.

[1] Unlike the sentence in the committee report, section 552.3 of the regulations purports to define domestic service employment only "[a]s used in section 13(a)(15) of the Act." As mentioned previously, however, since the Department copied the sentence from the committee report virtually verbatim into the regulations, there is no reason to believe that the Department intended for it to have a different meaning than the one that was attached to it by Congress. Indeed, there is good reason to believe that despite section 552.3's purported limitation of the definition to the companionship exemption, the Department in fact intended the provision to supply a general definition of the term as used throughout the Act. First, there is no other provision in the regulations that supplies an alternative definition of domestic service employment. Second, the examples that the regulation provides of workers that qualify as domestic service employees – including

Sections 552.3 and 552.101(a) should also not be read as addressing the issue of third party employment because doing so would render them inconsistent with themselves. Section 552.101, which elaborates on the definition of domestic service employment provided by section 552.3, specifies that "private household workers" are included within the definition of domestic service employees. The term "private household workers" has long been understood by both Congress and the Department to include the employees of third party employers. During the time Congress was considering the 1974 amendments to the FLSA, the Department submitted reports defining the term as:

> [A]nyone aged 14 and over working for wages, including pay-in-kind, in or about a private residence who was employed by (1) a member of the household occupying that residence or (2) a household service business whose services had been requested by a member of the household occupying that residence.

See Department's 1973 Report to Congress on Minimum Wage and Maximum Hours Standards under the Fair Labor Standards Act at 27; 1974 Report at 31-32. The second prong of the definition unambiguously includes domestic workers who are employed by third party employers. It is not surprising that the Department incorporated private household workers into the regulations' definition of domestic service employment, since Congress referred to the Department's reports on several occasions, *see* H.R. Rep. 92-232, supra, at 31; H.R. Rep. No. 93-913, supra, at 33; S. Rep. No. 93-690, supra, at 19-20; 119 Cong. Rec. 24,796 (statement of Sen. Dominick), and repeatedly used the phrase "private household workers" interchangeably with the term "domestic service employees." *See* H.R. Rep. No. 93-233, supra, at 31 (using the term "domestic service employees" and "private household workers" in a single paragraph to describe the same set of employees); S. Rep. No. 93-300, supra, at 21-22 (describing the same set of employees in successive paragraphs using the interchangeable terms "private household workers," "domestics," "household workers," and "domestic workers"); H.R. Rep. No. 93-913, supra, at 33; S. Rep. No. 93-690, supra, at 19. In fact, the Department's definition of "private household worker" was quoted in full during the floor debate in the Senate on the amendments to the FLSA. *See* 119 Cong. Rec. at 24,796 (statement of Sen. Dominick). Since section 552.101(a) clearly states that at least some domestic workers employed by third party employers are included within the definition of domestic service employees, it makes no sense to construe the ambiguous language requiring that domestic service "be performed in or about the private home of the employer" as designed to exclude them.

The governing rules of legal interpretation require the Department to adopt a reading of the regulations that harmonizes them and renders them internally consistent as a whole. *See Jay v. Boyd*, 351 U.S. 345, 360 (1956) (Court must read regulations "so as to give effect, if possible, to all of its provisions"); *APWU v. Potter*, 343 F.3d 619, 626 (2d Cir. 2003) ("[A] basic tenet of statutory construction, equally applicable to regulatory construction, [is] that [a text] should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error") (citations and internal quotations omitted); *Miller v. AT&T Corp.*, 250 F.3d 820, 832 (4th Cir. 2001) ("Whenever possible, this court must reconcile apparently conflicting provisions"). If sections 552.3 and 552.101(a) were read to exclude third party employees from the definition of domestic service employment, it would not only create a conflict with section 552.109(a), but it would also be inconsistent with section 552.101(a)'s inclusion of "private household workers" within the definition of domestic service employment and with Congress's express intent "to include within the coverage of the Act all employees whose vocation is domestic service." *See* S. Rep. No. 93-690, supra, at 20; H.R. Conf. Rep. No. 93-413, supra, at 27; S. Conf. Rep. No. 93-358, supra, at 27. By contrast, when sections 552.3 and 552.101(a) are read as requiring that domestic service

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gardeners, handymen, janitors, grooms, and valets -- have little or nothing to do with the provision of companionship services, but instead fall within the broader category of domestic workers generally. *See* 29 C.F.R. 552.3.

employment be performed in private homes, but as not addressing the issue of third party employment, the regulations are fully harmonized and rendered internally consistent. Consequently, the Department reads sections 552.3 and 552.101(a) as not addressing the issue of third party employment. Read in that context, I find no inconsistency between sections 552.3 and 552.109(a). All prior statements by the Department to the contrary, including the Department's January 19, 2001 NPRM, *see* 66 Fed. Reg. at 5485, are hereby repudiated and withdrawn.

The Department is aware that the Second Circuit suggested in *Coke v. Long Island Health Care, Ltd.*, 376 F.3d at 131-33, that the Department's regulations governing third party employment were intended to be advisory interpretations only, and that they therefore do not have the force and effect of law. That is not the case; the Department considers the third party employment regulations at 29 C.F.R. 552.109 to be authoritative and legally binding. When the Department promulgated the final regulations in February 1975, it noted that as originally proposed, section 552.109(a) "would not have *allowed* the [FLSA] section 13(a)(15) or the [FLSA] section 13(b)(21) exemption for employees who, although providing companionship services, are employed by an employer or agency other than the family or household using their services." 40 Fed. Reg. 7404-05 (emphasis added). The Department stated in the final rule that it had changed its mind, "conclud[ing] that these exemptions *can be available* to such third party employers since they apply to 'any employee' engaged 'in' the enumerated services." *Id.* at 7405 (emphasis added). The highlighted language makes it clear that at the time the final rule was promulgated, the Department believed that the availability of the companionship exemption to third party employers turned decisively on its pronouncement in the regulations – something that could be true only of a legislative rule. Accordingly, the Department has always treated the third party employment regulations as legally binding legislative rules, and it will continue to do so on an ongoing basis.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 03-21998-CIV-LENARD/KLEIN

RICARDO FERNANDEZ,

Plaintiff,

vs.

ELDER CARE OPTION, INC., CARLOS SILVA,

Defendants.

_____/

ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO LIABILITY (D.E. 28); ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (D.E. 36)

THIS CAUSE is before the Court upon the Parties Cross-Motions for Summary Judgment.

On September 7, 2004, Plaintiff filed Plaintiff's Motion for Partial Summary Judgment as to Liability. (D.E. 28.) On September 7, 2004, Plaintiff also filed a Statement of Material Facts. (D.E. 29.) On September 8, 2004, Plaintiff filed several documents in support of his Motion for Partial Summary Judgment including, Plaintiff's Affidavit (D.E. 32), the Deposition of Fernando Arciniega (D.E. 33), the Deposition of Carlos Silva (D.E. 34), and the Deposition of Armando Hernandez (D.E. 35). On September 23, 2004, Defendant filed a Response to Plaintiff's Motion for Partial Summary Judgment and Incorporated Memorandum of Law. (D.E. 45.) Defendant also filed a Statement of Disputed Facts in Response to Plaintiff's Motion for Partial Summary Judgment. (D.E. 51.) On

September 28, 2004, Plaintiff filed a Reply in Support of the Motion for Partial Summary Judgment. (D.E. 46.)

On September 11, 2004, Defendants filed a Motion for Summary Judgment and Incorporated Memorandum of Law. (D.E. 36.) Defendants also filed a Statement of Undisputed Material Facts. (D.E. 37.) On September 14, 2004, Defendants filed documents in support of the Defendants' Motion for Summary Judgment including the Declaration of Robin Sands (D.E. 38), the Deposition of Ricardo Fernandez (D.E. 40), and the Deposition of Fernando Arciniega (D.E. 42). On September 28, 2004, Plaintiff filed a Response and an accompanying Affidavit by the Plaintiff. (D.E. 47.) Plaintiff also filed a Statement of Disputed Material Facts in Response to Defendants' Motion for Summary Judgment. (D.E. 53.) On October 1, 2004, Defendants filed a Reply in Support of their Motion for Summary Judgment. (D.E. 48.)

On January 10, 2005, a Pretrial Conference was held before the Honorable Joan A. Lenard. (D.E. 61.) At the Pretrial Conference, the Court noted that it had reviewed the Parties' pending Cross-Motions for Summary Judgment. The Court further stated that it required additional briefing regarding the enforceability of Department of Labor Regulation, 29 C.F.R. § 552.109(a). (D.E. 62.) On February 18, 2005, Plaintiff filed a Supplemental Brief. (D.E. 64.) On March 1, 2005, Defendant filed a Supplemental Brief and the Declaration of Fernando Arciniega in support thereof. (D.E. 65, 66.) On March 7, 2005, Plaintiff filed a Response to Defendant's Supplemental Brief and a Motion to Strike the

Deposition of Arciniega. (D.E. 67.) On March 9, 2005, Defendant filed a Reply in support of its Supplemental Brief and a second Declaration of Fernando Arciniega. (D.E. 69, 70.)

Upon review of the Cross-Motions for Summary Judgment, the Supplemental Briefings and the record, the Court finds as follows.

I. Factual and Procedural Background

On July 25, 2003, Plaintiff filed the instant action, under the Fair Labor Standards Act (FLSA), Title 29 U.S.C. §§201-2016. (D.E. 1.) In his Complaint, Plaintiff alleges that he worked an average of eighty-four (84) hours per week for the Defendants from on or about August 1999 to on or about May 2002. Id. at ¶ 11. The Plaintiff states that he is owed both minimum wages and overtime wages for the hours he worked on behalf of the Defendants. Id. at 2.

The Plaintiff, Ricardo Fernandez, began working for Defendant Elder Care Option, Inc. ("Elder Care") in August of 1999. (D.E. 40, P. Dep. at 22.) The Plaintiff describes his work with Elder care as acting as a "nurse assistant" and cleaning-up after his clients. Id. at 24. Plaintiff stated that when he was initially placed by Elder Care with a client, he received the name and address of the client. Id. at 24. Plaintiff stated that Elder Care did not inform him of the client's needs. Id.

At the beginning of his employment with Elder Care, the Plaintiff cared for an elderly man who was quite ill. Id. at 24. The Plaintiff had to change him in bed, bathe him in bed, and the man was mentally incompetent. Id. Thereafter, for about two years or more, Plaintiff

provided services to Harry Sands. (Compl. at ¶ 11; P. Dep. at 26, 28.) Robin Sands, Mr. Sands' daughter, states that Plaintiff was hired as a companion for Mr. Sands. (Decl. of Robin Sands.) Mr. Sands was approximately 80 years old when Plaintiff started providing services to him. (P. Dep. at 27.) The Plaintiff provided Mr. Sands services until he died. Id. at 50. The Plaintiff does not remember providing services to any other clients or patients on behalf of Elder Care, other than the two mentioned herein. Id. at 28.

Plaintiff worked at Mr. Sands' residence at night from approximately 8 pm to 8 am. Id. at 27. For his regular twelve hour shift, Plaintiff was paid $ 80.00 per night. Id. at 27; (see also Arciniega Dep. at 43.) Plaintiff sometimes worked fourteen hours, and for the additional two hours he received additional pay per hour. (P. Dep. at 27.) After he cared for Mr. Sands, Plaintiff would go home to rest until about one o'clock. Id. at 43. He would also attend training in therapy massage in the late afternoon before returning to Mr. Sands' residence. Id. at 43. Plaintiff did not have another regular full-time or part-time job. Id. at 43. Although on his day off,[1] the Plaintiff worked placing products at Latin supermarkets. Id. at 42-43.

While acting as a companion to Mr. Sands, Plaintiff would bring his own cot to Mr. Sands' home. Id. at 28. Plaintiff always worked in a uniform, that the Plaintiff provided. Id. at 44. Elder Care did not require the Plaintiff to wear a uniform. Id. at 45. Plaintiff

[1] In his Affidavit, Plaintiff states that he worked seven days per week. (D.E. 30, P. Aff. at ¶ 2.) In his Deposition, Plaintiff describes his work placing products at Latin supermarkets on his "day off." (P. Dep. at 42-43.) It is unclear how to reconcile the Plaintiff's Affidavit and his Deposition.

would report to Elder Care and tell them "everything about the job." Id. Plaintiff would report anything abnormal to Elder Care. Id. at 49.

When the Plaintiff arrived at Mr. Sands' home, Mr. Sands had almost always not eaten dinner. Id. at 32. The Plaintiff would make Mr. Sands a sandwich, maybe a salad, and give him milk or coffee or ice cream. Id. at 32, 33. After dinner, the Plaintiff would clean the dishes. Id. at 34. Mr. Sands would go to the living room to watch TV. Id. at 32. The Plaintiff would stay near Mr. Sands in case Mr. Sands wanted to get up and go somewhere or go to the bathroom. Id. at 34. Around ten, the Plaintiff would assist Mr. Sands in undressing and lying down to sleep. Id. at 33. Mr. Sands, however, often would get up during the night to go to the bathroom. Id. at 35. Mr. Sands would often urinate outside the toilet, and the Plaintiff would have to clean-up after Mr. Sands. Id. at 35-36, 37. Mr. Sands would often have bowel movements on the floor, outside the bathroom. Id. at 34, 37. Because of Mr. Sands' frequent uncontrolled urination and bowel movements, the Plaintiff spent a lot of time cleaning Mr. Sands after he had soiled himself, dressing Mr. Sands in clean clothes, and cleaning the carpets in Mr. Sands' apartment. Id. at 35. In the morning, except in the winter when Mr. Sands bathed later in the day, Plaintiff would sponge bathe him. Id. at 37. In the morning, the Plaintiff would also dress and shave Mr. Sands. Id. at 38. The Plaintiff made coffee and two toasts with butter at about seven in the morning for Mr. Sands. Id. The person who cared for Mr. Sands during the day shift would normally take

Mr. Sands to a cafeteria for breakfast [2] at about ten. Id. at 32, 38.

In his Affidavit, Plaintiff generally describes the duties above in terms of the hours per night. Plaintiff states that he would spend two (2) hours cleaning the house and doing house related chores, including, but not limited to, general cleaning, making the bed, fixing the room, and throwing away the garbage. (D.E. 30, P. Aff. at ¶ 3.) Plaintiff states that he would spend one (1) hour preparing and serving breakfast. Id. at ¶ 4. Plaintiff also states that he spent about two (2) hours washing and drying clothes. Id. at ¶ 5. In his Deposition, the Plaintiff also states that he spent at least three and a half (3 1/2) hours daily cleaning carpets of urine and bowel movements. (P. Dep. at 38.) It appears that there was not a "cleaning person" to perform general household cleaning. (P. Dep. at 26.) Although the Plaintiff clearly spent time performing cleaning chores as part of his work for Mr. Sands, Robin Sands, Mr. Sands' daughter, states in her Declaration that the Plaintiff was not hired to perform, nor was he responsible for general house cleaning duties. (D.E. 38, Robin Decl. at ¶ 7.)

Plaintiff's employer[3] is Elder Care Option, Inc, a for-profit agency providing

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[2] In his Affidavit, Plaintiff states that he spent one hour preparing and serving breakfast, including cleaning, picking up, washing and drying utensils after breakfast had been served. (D.E. 30, P. Aff. at ¶ 4.) The Plaintiff's Deposition conflicts with the Plaintiff's Affidavit as to his typical responsibilities with regard to breakfast.

[3] Elder Care considers the Plaintiff to be an independent contractor, rather than an employee. The Court has referred to Elder Care Option, Inc. as an "employer" and the Plaintiff as an "employee," but the Court notes for the record that the Plaintiff's employment status is a matter in dispute. The Court addresses the status of the Plaintiff's employment in Part *III of this* Opinion.

companionship services to the elderly. Fernando Arciniega is the Vice President of Operations for Elder Care. (D.E. 33, Arciniega Dep. at 3.) Arciniega manages the day to day operations of Elder Care. Id. at 5-7. Arciniega describes the services that his company provides as custodial care with companionship to the elderly in their homes. Id. at 7-8. Arciniega believes that his employees may work as companions to the elderly more than forty hours per week. Id. at 22. His understanding is based on advice he received from his attorney and also from attending labor conferences, including a recent conference offered by the Miami Chamber of Commerce. Id. at 24-25, 27. The services the employees provide vary by client, but include light housekeeping, light meal preparation, taking clients on appointments and errands. Id. at 8. Arciniega states that Elder Care does not offer elderly individuals general cleaning services, such as cleaning windows or sweeping floors. Id. at 28; see also Silva Dep. at 27-28. Elder Care's employees must act as companions and be with their clients at all times. Id. at 17.

Clients pay Elder Care for the companionship services provided by its employees and Elder Care, in turn, pays 80% of the fee collected to employees, such as the Plaintiff, who render the companionship services. (Arciniega Dep. at 19, 44.) The price of the services provided by its employees is determined by Elder Care. Id. at 57,64. Elder Care would pay the Plaintiff the money he was owed for the services he provided, even if a client failed to pay Elder Care for those services. Id. at 62. Elder Care briefs its employees on the services and expectations of the client before the employees begin work with a client. Id. at 53-54.

When offering an assignment to an employee, Elder Care informs the employee of whether it is a night shift, day shift, etc. (See id. at 39-40, 41-42.) Elder care advertises its services in the yellow pages, on the internet and in magazines for the elderly. (Id. at 73-74.) Elder Care provides liability insurance and workers compensation insurance to its employees, such as the Plaintiff. (Id. at 45.) Elder Care visits each of its clients monthly. (Id. at 84.)

Carlos Silva is the President of Elder Care Option, Inc., and owns 80% of Elder Care. (D.E. 1, Compl. at ¶ 5; Arciniega Dep. at 70, 71.) Carlos Silva is not involved in the day to day operations of Elder Care. (Silva Dep. at 4, 24-26; Arciniega Dep. at 5-7.) Carlos Silva instead is involved in developing Elder's Care marketing strategy. Id. at 4-5, 30.

II. Department of Labor Regulation, 29 C.F.R. § 552.109(a)

The record indicates that Plaintiff was hired through a third party, Elder Care Option, Inc., to work in Mr. Sands' private home as a companion. If Plaintiff's duties in caring for Mr. Sands are companionship services,[4] then under the current Department of Labor regulations Plaintiff is exempt from FLSA coverage and therefore is not entitled to minimum wage or overtime compensation, as alleged in his Complaint.

Plaintiff requests that this Court decline to enforce the Department of Labor regulation 29 C.F.R. § 552.109(a) exempting from FLSA coverage elderly caretakers, who are employees of third party corporations. The Second Circuit recently rule that the Department

[4] The Court notes for the record that it is disputed (1) whether Plaintiff is an employee of Defendant Elder Care Option, Inc. and (2) whether the Plaintiff's duties in caring for Mr. Sands constituted providing "companionship services" as that term has been defined by the Department of Labor regulations, 29 C.F.R. § 552.6.

of Labor regulation at issue, 29 C.F.R. § 552.109(a), was not entitled to deference and declined to enforce it. Coke v. Long Island Care At Home, Ltd., 376 F.3d 118, 129-135 (2d Cir. 2004; compare Johnston v. Volunteers of America, Inc., 213 F.3d 559, 562 (10th Cir. 2000)(finding that 29 C.F.R. § 552.109(a) is entitled to judicial deference). Plaintiff requests that this Court follow the Second Circuit, as opposed to the Tenth Circuit, and decline to enforce regulation 29 C.F.R. § 552.109(a).

The deference to be accorded Department of Labor regulation 29 C.F.R. § 552.109(a) appears to be a question of first impression in this Circuit. Prior to ruling on the Parties' Cross-Motions for Summary Judgment, the Court finds it appropriate to determine as a matter of law the appropriate level of deference to accord the regulation.[5]

A. Background re Department of Labor Regulation, 29 C.F.R. § 552.109(a)

The Fair Labor Standards Act (FLSA), enacted by Congress in 1938, requires employers to pay their employees not less than one and one-half times the hourly rate for all hours worked over forty in a workweek. 29 U.S.C. § 207(a)(1). The FLSA is remedial and humanitarian in purpose. Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123, 321 U.S. 590, 597, 64 S.Ct. 698, 703 (1944). It was designed to protect certain groups of the

[5] Defendants argued that the Court need not reach the question of whether 29 C.F.R. § 552.109(a) is enforceable, because the Defendants are not liable as a matter of law pursuant to the FLSA's complete good faith reliance defense found in 29 U.S.C. § 259. (D.E. 65, D. Supp. Brief at 11-12.) The Court has reviewed this argument, but has decided not to take the route suggested by the Defendants. The deference to be accorded 29 C.F.R. § 552.109(a) is an important legal issue of first impression in this Circuit. It is not clear how this legal issue will be addressed or ultimately resolved by the courts, if district courts presented with the issue *evade it* by relying on the good faith defense found in 29 U.S.C. § 259.

population from substandard wages and excessive hours that endangered their health and well-being. See Booklyn Sav. Bank v. O'Neil, 324 U.S. 697, 65 S.Ct. 895 (1945). The FLSA did not initially apply to all employees; periodic amendments to the Act extended its coverage to a broader range of low-paying occupations. See Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, 75 Stat. 65; Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 830. By 1974, FLSA coverage had been extended to employees who worked for "a covered enterprise," which most likely would have included any employees, employed by a third party enterprise, who worked as a companion or caretaker to an elderly person.[6] See 66 Fed. Reg. 5481, 5485; see also 29 U.S.C. § 206(a)(extending FLSA coverage to employees of enterprises, which engage in interstate commerce and have an annual gross volume of sales equal or greater to $ 500,000).

In 1974, Congress amended the FLSA to broaden its coverage to a new set of workers, employees who perform domestic services in households. See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55. The Senate Committee Report indicates that Congress intended to extend FLSA protection to those employed within the home as cooks, butlers, valets, maids, housekeepers, governesses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, chauffeurs, and the like. See S. Rep. No. 93-960, at 20 (1974); see also H.R. Rep. No. 93-913, at 35-36 (1974).

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[6] The number of enterprises employing individuals to provide companionship services to the elderly was much lower in 1975 than it is today. Available statistics indicate that in 1975 only forty seven (47) for profit, freestanding agencies provided these types of services. *66 Fed. Reg.* at 5483.

Although Congress extended FLSA coverage to domestic service employees working in private homes, Congress carved out certain distinct exceptions,[7] including an exception from FLSA coverage of those domestic service employees who provide companionship services to the elderly and infirm in their homes. 29 U.S.C. § 213(a)(15).

The Congressional record indicates several potential reasons for the companionship exemption. Congressional members were concerned about the record keeping burden that would be placed on household employers, if they had to pay minimum wage to the neighborhood friend who might be asked to sit with an elderly mother. 19 Cong. Rec. 24,801 (1973)(Statement of Sen. Burdick). Congressional members also seemed to question whether "companionship services," such as watching TV, reading, or talking with an elderly person should be the type of work subject to FLSA regulation. 19 Cong. Rec. 24,797 (1973)(Statement of Sen. Dominick). Members of Congress appeared to perceive the individual providing companionship services to an elderly or infirm person to be playing the role of an "elder sitter," which they found comparable to the role of a "baby sitter." 19 Cong. Rec. 24, 801 (1973)(Statement of Sen. Williams); 19 Cong. Rec. 24,801 (1973)(Comments of Sen. Javits); 19 Cong. Rec. 24,798 (Statement of Sen. Johnston). In addition, certain Congressmen strongly believed that extending FLSA coverage to domestic service employees who provide companionship

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[7] Congress withheld FLSA coverage from "casual babysitters" and "elder-care sitters." Congress also defined and delimited the applicability of the overtime FLSA provisions to domestic servants who reside in the household in which they work.

services would render unaffordable care for the elderly within the home, and would force families to resort to the services of a nursing home. 18 Cong. Rec. 24, 715 (1972)(Comments of Sen. Taft); Cong. Rec. 24, 715 (1972)(Statement of Sen. Dominick). For perhaps all of the reasons summarized herein, Congress reached a bipartisan agreement that those domestic service employees who provide companionship services would not be covered by the FLSA.

The Department of Labor issued regulations implementing both the new FLSA coverage of "domestic services employees" and the "companionship services" exemption thereto. In October of 1974, the Department of Labor issued proposed regulations, in Part 552, Subpart A , titled "General Regulations," defining the terms "domestic service employment," 29 C.F.R. 552.3, and "companionship services" for the aged or infirm, 29 C.F.R. § 552.6. "Domestic service employment" was defined as, "services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed." 29 C.F.R. § 552.3. "Companionship services" for the aged or infirm were defined as,

> those services which provide fellowship, care and protection for a person, who because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services related to the care of the aged or infirm person. They may also include the performance of general household work; provided, however, that such work is incidental, i.e. does not exceed 20 percent of the total weekly hours worked...

29 C.F.R. § 552.6. In Subpart B, titled "Interpretations," the Department of Labor proposed additional regulations that set out in more detail the implementation of both the extension of FLSA coverage to domestic employees and the details of the companionship services exception.[8]

In this Subpart B, "Interpretations," the Department of Labor in 1974 initially published a regulation limiting the exception for companionship services to employees employed by a homeowner or a family member. The first version of § 552.109 published for notice and comment by the Department of Labor in 1974 interpreted the exemption as follows:

> Employees who are engaged in providing .. companionship services and who are employed by an employer other than the families or households using such services, are not exempt [from FLSA coverage] if the third party employer is a covered enterprise meeting the tests of sections 3(r) and 3(s)(1) of the Act. This results from the fact that their employment was subject to the Act prior to the 1974 Amendments and it was not the purpose of those Amendments to deny the Act's protection to previously covered domestic employees.

Employment of Domestic Service Employees, 39 Fed. Reg. 35,382, 35,385 (Oct. 1,

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[8] For example, the Department of Labor in Subpart B, titled "Interpretations," set out the minimum wage rate (§ 552.100(a)(1)); the rules for how much employers could deduct as credits the benefits employers provided to domestic service employees in the forms of meals, lodging, and other facilities (§ 552.100(b, c & d)); and the record keeping requirements for household employers to take such credits (§ 552.100(c & d)). The Department of Labor in Subpart B, titled "Interpretations," also addressed issues of FLSA statutory interpretation, such as whether a yard maintenance worker was an independent contractor exempt from the FLSA or a domestic service employee covered by the FLSA (§ 552.107) or whether domestic service performed in a temporary vacation home were subject to the FLSA (§ 552.101).

1974)(proposal for 29 C.F.R. § 552.109(a)). In February of 1975, after receiving comments, the Department of Labor revised the exemption as to third-party employers to the form the regulation takes today:

> Employees who are engaged in providing companionship services, as defined in § 552.6, and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime pay requirements by virtue of section 13(a)(15).

Application of the FLSA to Domestic Service, 40 Fed. Reg. 7,404, 7,407 (Feb. 20, 1975)(codified as 29 C.F.R. § 552.109(a)). In making this change, the Department of Labor noted that the companionship services exemption could be available to third party employers as the statute, 29 U.S.C. § 231(a)(15), exempted "any employee" engaged in companionship services. 40 Fed. Reg. at 7,405.

In the intervening years, 1974 to the present, the Department of Labor has issued proposals for revising § 552.109(a). In 1993, the Department of Labor suggested that § 552.109(a) should be revised to clarify that the exemption for domestic service employees providing companionship services applies only to employees of third-party employers, "when the individuals are also employed by the family or household utilizing their services, i.e. a joint employment relationship must exist." *Application of the FLSA to Domestic Service*, 58 Fed. Reg. 69310, 69310 (Dec. 30, 1993)(notice of proposed rulemaking; request for comments). In support thereof, the Department of Labor stated that the proposed change would reconcile the definition of "domestic service

employment" found in § 552.3[9] with the terms of § 552.109(a). 58 Fed. Reg. at 69,311. Few comments were received despite an extended notice period. *Application of the FLSA to Domestic Service*, 60 Fed. Reg. 46,797, 46,797-46,798 (Sept. 8, 1995)(notice of proposed rulemaking; request for comments).

In 2001, the Department of Labor again proposed a change to § 552.109(a), this time citing the changes in care of the elderly from 1975 to 2000. *Application of the FLSA to Domestic Service*, 66 Fed. Reg. 5,481 (Jan. 19, 2001)(notice of proposed rulemaking; request for comments). The Department of Labor noted the companionship services industry had changed dramatically since 1975. 66 Fed. Reg. at 5,483. The number of for-profit agencies had increased from approximately 47 in 1975 to 3,129 in 1999, and continues to be a rapidly growing sector of the economy. Id. These for profit agencies grew from 2% of total Medicare certified agencies to over 40% by 1999. Id. At the same time, the number of employees providing companionship services who are employed solely by a household or family has dropped to about 2%. Id. Companionship service employees today often work jointly for a range of employers including: household or family members, state and local governments, third party for-profit agencies, hospital related and not-for-profit agencies. Id. The number of employees providing companionship services has grown to more than 430,400 people working as home health

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[9] "Domestic service employment" is defined in § 552.3 as "services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed. 29 C.F.R. § 552.3 (emphasis added).

aides and 255,960 people working as personal and home care aides. Id. Available data suggests that providing companionship services is the primary occupation of these employees. Id. The earnings of companionship service providers remain among the lowest in the service industry. Id. Finally, the Department of Labor noted that the federal government pays for about 55% of the costs associated with companionship services. Id.

Having reviewed the changes in the industry, the Department of Labor recommended several changes to the regulations implementing the companionship services exemption.[10] With respect to § 552.109(a), the Department of Labor again pointed to the inconsistency between § 552.3 (defining domestic service employment) and § 552.109(a). 66 Fed. Reg. at 5,485. The Department of Labor recommended changing both § 552.3 and § 552.109(a) to reflect that employees of third-party employers, whether solely employed by the third party or jointly employed by the third-party and a family or household member, are not considered "domestic service employees" and are therefore not subject to the "companionship services" exemption for domestic service employees. 66 Fed. Reg. at 5,488. The proposed changes to the regulations would have extended to employees, providing companionship services in homes, the legal rights they had in

[10] The Department of Labor offered three separate proposals for redefining "companionship services" to clarify that the exemption is meant to apply to employees who provide fellowship, friendship, and/or a close personal interaction. See 66 Fed. Reg. at 5,484-5,485.

1974.[11] Specifically, if an employee providing companionship services in a private home works for a "covered enterprise," as that term is defined by the FLSA, then that employee would be entitled to FSLA wage and overtime protections. In recommending this change to § 552.109(a), the Department of Labor found that the change would not have a significant economic or budgetary impact on affected entities. 66 Fed. Reg. at 5,486. In April of 2002, the Department of Labor withdrew the proposed amendments suggested two years earlier and in support thereof stated that numerous commentators, including multiple government agencies, seriously called into question the assertion that the proposed changes would have little economic impact. *Application of the FLSA to Domestic Service*, 67 Fed. Reg. 16,668 (April 8, 2002)(withdrawal of proposed rule).

B. Parties' Arguments

B1. Plaintiff's Arguments

In response to the Court's Order requesting a supplemental brief on the issue of the deference to be accorded regulation 29 C.F.R. § 552.109(a), Plaintiff filed the Appellate Brief and Reply provided to the Second Circuit in Coke v. Long Island Care at Home, Ltd., 376 F.3d 118.[12] (D.E. 65, App. Brief and App. Reply.) Having reviewed the

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[11] The Court notes, however, that in 1974 very few employees providing companionship services worked for a covered enterprise and therefore few companionship service employees had these protections at that time.

[12] The Appellate Brief and Appellate Reply cite to Second Circuit jurisprudence, which is persuasive authority but not binding authority in this action. Plaintiff's Supplemental Brief unfortunately dose not provide the Court with an analysis of the legal issues under relevant Eleventh Circuit authority.

Appellate Brief and Reply, the plaintiff in Coke argues first that the regulation was an interpretation entitled only to Skidmore deference, e.g. it is valid only to the extent that it has the power to persuade the Court. (App. Brief at 10.) In support thereof, the plaintiff asserts that the Department of Labor was not expressly delegated the authority to determine whether employees hired by third party agencies are exempt. Id. The plaintiff further argues that the DOL itself divided its regulations into "General Regulations," promulgated pursuant to its express authority, and "Interpretations" made without express authority. Id. at 10-11. Plaintiff further argues that, even if the Court does not find Skidmore deference to be appropriate, regulation 29 C.F.R. § 552.109(a) is invalid under the Administrative Procedure Act (APA) because the DOL reversed its interpretation in 1975 without allowing opportunity for notice and comment. Id. at 37-40.

Having argued that the regulation is only valid to the extent of its power to persuade, the plaintiff turns to a series of arguments as to why the regulation lacks persuasive power. Plaintiff first reminds the Court that exemptions to the FLSA are to be narrowly construed. Id. at 14. The plaintiff further argues that (1) the regulation is inconsistent with the statutory text, (2) the regulation departs from Congressional intent, (c) the regulation is inconsistent with other regulations, and (d) the regulation has twice been undermined by the statements of the Department of Labor (DOL) itself. Id. at 28-37,40-43.

In arguing that the regulation is inconsistent with the statutory act, Plaintiff states

that, "the Act, 29 U.S.C. § 213(a)(15), does not exempt employees employed to provide companionship services to the elderly or infirm. Rather, it exempts only employees 'employed in domestic service employment to provide companionship services' to the aged or infirm." Id. at 28. Plaintiff then asserts that "the third-party regulation found in § 552.109(a) renders the phrase 'employed in domestic service employment' superfluous." Id.

Plaintiff also argues that the congressional record indicates that the purpose of the amendments in 1975 was to extend FLSA coverage to domestics employed in the home by households. Id. at 29, 32-34. The Plaintiff then argues that the Department of Labor regulation § 552.109(a) is contrary to the congressional intent in that it actually retracts FLSA coverage from previously covered companionship employees working full-time in the home but hired by third parties. Id. at 29-30. Plaintiff also asserts that Congress did not intend to exclude from coverage full-time, bread-winners who provide companionship services. (Reply at 17, n.10.)

Plaintiff then points out the Department of Labor's own publications for proposed changes to the rule that admit internal inconsistencies between DOL regulations and admit that prior to 1975 companionship service employees of third-parties were afforded FLSA protections by the "covered enterprise" statutory provision. Id. at 35-37, 40-43. Plaintiff argues that the Department of Labor has never adequately explained its reasoning in support of regulation § 552.109(a). Id. at 40-43.

B2. Defendant's Arguments

Defendant argues first that regulation 29 C.F.R. § 552.109(a) is entitled to Chevron deference, i.e. that it should be accorded deference unless it is procedurally defective, arbitrary or capricious or manifestly contrary to the statute. (D.E. 65, D. Supp. at 2.) In support thereof, Defendant asserts that Congress left a gap for the Department of Labor to fill; specifically, the Secretary of the Department of Labor was to "define and delimit" the terms of the companionship services exemption. Id. at 2-3; citing 29 U.S.C. § 213(a)(15). Defendant further argues that § 552.019(a) was the product of notice and comment rulemaking, which is an additional reason to provide it Chevron deference. Id. at 3.

Defendant further asserts that § 552.109(a) is consistent with the congressional purpose of the FLSA and its 1974 amendments. Id. at 4. In support thereof, Defendant argues that Congress created the companionship services exemption to enable families to afford care for the elderly in their own private homes as opposed to institutionalization. Id. at 4-5. The exemption from FLSA coverage allows for this type of care to a greater degree than would be possible if third-party employers of companionship service employees were subject to the FLSA. Id. at 4-5. The Defendant argues that Congressional history indicates that Congress intended to exempt a defined category of employees from FLSA coverage based on where (private homes) and what they did (providing companionship services for the elderly or infirm). Id. at 5. Defendant also

points out that Section 552.109(a) has been in effect for almost thirty (30) years and Congress has not acted in the interim. Id. at 9.

Defendant also argues that § 552.109(a) and § 552.3 (defining domestic service employment) are not inconsistent, when applied to the facts in this case. Id. at 6. Defendant notes that "domestic service employment" is defined as "services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed." 29 C.F.R. § 552.3. Defendant argues that the Plaintiff in this action was jointly employed by Mr. Sands in his private home and by Elder Care, and accordingly both regulations could reasonably be applied to the Plaintiff without any inconsistency arising therefrom. Id. at 6-7.

Defendant further argues that it would be illogical and counter-productive to create a circumstance where the applicability of the FLSA's companionship exemption hinges solely on whether a third party is involved in placing the provider of companionship services. Id. at 10. "Determining Section 552.109(a) is unenforceable when an employee is jointly employed, as in this case, by a placement service and an individual in his/her own home, would create a situation where some persons, who cannot independently find such companionship services and look to placement agencies, cannot afford the services just because they could not locate and directly hire the person performing the same work." Id.

C. Analysis

C1. Indicators that Congress Intended a Regulation to be Accorded Chevron Deference

The first determination before the Court is what level of deference to accord regulation 29 C.F.R. § 552.109(a). Plaintiff asserts that this Court should follow the Second Circuit in Coke and find that the regulation is due only Skidmore deference, i.e. it is only valid to the extent of its power to persuade. (D.E. 64, P. Supp. at App. Brief at 10.) Defendant argues that the regulation should be accorded Chevron deference, i.e. it should be enforced unless it is procedurally defective, arbitrary or capricious or manifestly contrary to the statute. (D.E. 65, D. Supp. at 2.)

The "limit of Chevron [or Skidmore] deference is not marked by a hard-edged rule." United States v. Mead, 533 U.S. 237 n.18, 121 S.Ct. 2164, 2176 (2000). Instead, the Court finds that there are at least three indicators which are important in determining whether Congress would have intended to accord a regulation the benefit of Chevron deference.

The first indicator is the actual terms of the congressional delegation of authority to the agency. Mead, 533 U.S. at 231-232, 121 S.Ct. at 2174. If Congress clearly did not confer on the agency the authority to promulgate rules or regulations pursuant to the statute then Skidmore, as opposed to Chevron deference, should be accorded. See e.g., General Elec. Co. v. Gilbert, 429 U.S. 125, 141, 97 S.Ct. 401,410- 411 (1976)(superceded by statute)(finding that Congress delegated to EEOC the authority to issue procedural regulations to carry out the provisions of the statute but not the authority to issue

substantive regulations and accordingly substantive regulation was entitled to only Skidmore deference). Although Congress must confer authority to the agency, the delegation need not be express. "The Court in Chevron recognized that Congress not only engages in express delegation of specific interpretive authority, but that 'sometimes the legislative delegation to an agency on a particular question is implicit'." Mead, 533 U.S. at 229, 121 S.Ct. at 2172 (quoting Chevron, 467 U.S. at 844, 104 S.Ct. 2778). The Court must look not only at the terms of the delegation of authority, but also evaluate whether it is "apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to speak with the force of law when it addresses ambiguities in the statute or fills a space in the enacted law, even one about which 'Congress did not actually have an intent' as to a particular result." Id. (quoting Chevron, 467 U.S. at 845, 104 S.Ct. 2778).

The second indicator is related to the institutional role of an agency in resolving competing interests and formulating policy, as opposed to a court of law. Agencies often employ notice and comment rulemaking in enforcing Congressional statutes. Pursuant to the Administrative Procedure Act, notice and comment rulemaking requires the agency to publish in the Federal Register "the terms of substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). After providing notice, the agency "shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(c).

The agency must then consider the comments or the record in proposing a final rule. See United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 758, 92 S.Ct. 1941 (1972). A regulation that is the fruit of notice and comment rule making is frequently entitled to Chevron deference. Mead, 533 U.S. at 230, n.12, 121 S.Ct. at 2173 (citations omitted). That said, the lack of notice and comment rulemaking does not determine the deference to be afforded to a regulation, as Chevron deference has been accorded even when an agency's interpretation was not a product of notice and comment rulemaking. Id. at 231, 121 S.Ct. at 1273 (citing Nations Bank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256-257, 115 S.Ct. 810 (1995)); see also Barnhart, 535 U.S. at 221, 122 S.Ct. at 1271; see also Heimmermann v. First Union Mortg. Corp., 305 F.3d 1257, 1262 (11th Cir. 2002).

The Court also notes that it appears to be important whether the regulation is issued by the agency for the purpose of clarifying rights and obligations generally[13] or whether the agency ruling is a fact-specific inquiry into the application of the regulation to particular parties. In 1979, the Supreme Court stated that "an important touchstone for distinguishing those [agency] rules that may be binding or have the force of law" is whether the rule is one "affecting individual rights and obligations." Chrysler Corp. v.

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[13] An agency typically may only prescribe binding law clarifying individual rights and obligations, if the agency is acting pursuant to delegated authority from Congress and pursuant to the procedures for issuing such rules, typically notice and comment rulemaking. Chrysler Corp., 441 U.S. at 302-303, 99 S.Ct. at 1718. In this way, the three indicators discussed by the Court are interrelated.

Brown, 441 U.S. 281, 302, 99 S.Ct. 1705, 1718 (1979); see also Mead, 433 U.S. at 226, 121 S.Ct. at 2170. Also, in determining the deference to be accorded a regulation which broadly affects individual rights and obligations, the Court will "normally accord particular deference to an agency interpretation of "longstanding" duration." Barnhart, 535 U.S. at 220, 122 S.Ct. at 1270. Particularly if Congress has amended or reenacted the relevant statutory provisions without change. Id. at 220, 122 S.Ct. at 1270-1271.

Regulations issued by an agency pursuant to a delegation (implicit or explicit) of Congressional authority, formulated through a process of notice and comment rulemaking, and effecting rights and obligations generally under a statutory scheme, are typically accorded Chevron judicial deference. See e.g. Chevron, 467 U.S. 837, 104 S.Ct. 2778 (1984)(deferring to EPA regulation interpreting statutory term "stationary source" as setting plant-wide emission standards); Barnhart v. Walton, 535 U.S. 212, 122 S.Ct. 1265 (2002)(deferring to Social Security regulation interpreting statutory term "inability to engage in any substantial gainful activity" as including a twelve (12) month requirement); Batterton v. Francis, 432 U.S. 416, 97 S.Ct. 2399 (1977)(deferring to Health, Education and Welfare's regulation interpreting the statutory term "unemployment" as not including, at the option of the State, a father whose unemployment results from participation in a labor dispute); Auer v. Robbins, 519 U.S. 452, 456, 117 S.Ct. 905, 909 (1997)(deferring to DOL regulation interpreting the statutory exemption from the FLSA for "bona fide executive, administrative or professional employees" as only encompassing employees

whose salary is not subject to reduction due to variations in quality or quantity of work performed).

In contrast, agency rulings that are fact-specific interpretations of a statute or regulation by an agency on the basis of the agency's expertise or policy position are typically accorded Skidmore deference, e.g. they are upheld to the extent of the interpretation's power to persuade. See e.g., Skidmore, 63 S.Ct. 161, 323 U.S. 134 (1944)(finding that Department of Labor Administrator's conclusions as to what constitutes "working time" in Defendant's fire hall station was entitled to deference to the extent of the ruling's power to persuade); Mead, 433 U.S. at 233, 121 S.Ct. at 2174-2175 (finding that 10,000 - 15,000 classification rulings issued by 46 different Customs offices as to specific imports were entitled only to Skidmore deference); Christensen v. Harris County, 529 U.S. 576, 120 S.Ct. 1655 (2000)(finding that DOL opinion letter, interpreting regulation as to Harris County's Sheriffs Officers' accrual and use of comp time, was entitled to only Skidmore deference); Arriaga v. Florida Pacific Farms, 305 F.3d 1228 (11th Cir. 2002)(finding that DOL opinion letter, interpreting whether transportation costs were primarily for the benefit of the Defendant employer, was entitled to only Skidmore deference).

C2. Determining the Deference Due to Regulation 29 C.F.R. § 552.109(a)

Having reviewed the indicators relevant to a determination of whether Congress intended for an agency to have the authority to issue binding regulations, the Court turns

to an application of those indicators to regulation 29 C.F.R. § 552.109(a). The first issue before the Court is the delegation of authority by Congress to the Department of Labor to issue regulations such as 29 C.F.R. § 552.109(a). In the companionship services exemption, 29 U.S.C. § 213(a)(15), Congress stated that the minimum wage and maximum hour requirements of the FLSA shall not apply with respect to "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)." (emphasis added).

Plaintiff argues that the terms of the delegation of authority to the Department of Labor allowed only for the agency to define the terms of the exemption; for example, the agency was granted the authority to define the terms "domestic service employment" and "companionship services." Plaintiff asserts that the statutory power "to define and delimit" the terms of the exemption did not include a delegation of power to the agency to determine whether employees of third party agencies should be exempt from FLSA coverage. Plaintiff further argues that the Department of Labor's own notice publications in the Federal Register indicate that the agency believed it only had statutory authority to issue definitions of the terms contained within the exemption as binding regulations. In contrast, Plaintiff argues that the Department of Labor separately issued "Interpretations" knowing it did so without a Congressional grant of authority. (D.E. 65, App. Brief at 10-11; see also Coke, 376 F.3d at 131.)

The Court begins by looking at the merits of Plaintiff's argument that the Department of Labor's own publications indicate that it enacted § 552.109(a) without a Congressional grant of authority. The Department of Labor's first proposed notice and comment rulemaking in the Federal Register stated,

> To implement the 1974 Amendments, it is proposed to make certain changes to the record keeping requirements of 29 C.F.R. Part 516 and to add a new 29 C.F.R. Part 522 defining and delimiting, in Subpart A, the terms "domestic service employee", "employee employed on a casual basis in domestic service employment to provide babysitting services" and "employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves" and setting forth, in Subpart B, a statement of general policy and interpretation concerning the application of the [FLSA] to domestic service employees. These amendments and additions are proposed pursuant to authority in sections 11(c) and 13(a)(15) of the Fair Labor Standards Act...."

Employment of Domestic Service Employees, 39 Fed. Reg. 35,382 (Oct. 1, 1974) (emphasis added). In Subpart A, titled "General Regulations," the Secretary defined the terms "domestic service employment", 29 C.F.R. § 552.3, "babysitting," 29 C.F.R. § 552.4, "casual basis," 29 C.F.R. § 552.5, and "companionship services," 29 C.F.R. § 552.6. In Subpart B, titled "Interpretations," the Secretary proposed additional regulations that further defined the scope of the "companionship services" exemption, including what work locations constituted a "home" or household, 29 C.F.R. § 552.101, and whether employees providing companionship services in a home or household should be exempt, if they were employed by third-parties, 29 C.F.R. § 552.109(a). In Subpart B,

the agency also proposed new regulations on record keeping requirements for employers of domestic employees. See 29 C.F.R. § 552.100 (c & d), 29 C.F.R. § 552.110(a, b & c).

Looking first at the text announcing the Department of Labor's new regulations, the Court notes that the agency initially appears to limit its authority from Congress "to define and to delimit" the terms of the companionship services exemption to the "General Regulations" listed in Subpart A.[14] However, the Department of Labor's understanding of its grant of congressional power appears to broaden in the last sentence of text, which concludes with "these amendments and additions are proposed pursuant to authority in sections 11(c) and 13(a)(15) of the Fair Labor Standards Act." "These amendments and additions" refers to the regulations being proposed in both Subpart A and Subpart B. The Department of Labor states that the "amendments and additions" are based in part on the statutory grant of authority found in 29 U.S.C. § 211(c), which grants the agency the power to prescribe regulations as to the record keeping requirements under the FLSA.[15]

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[14] The announcement begins, "To implement the 1974 Amendments, it is proposed to .... add a new 29 C.F.R. Part 522 defining and delimiting, in Subpart A, the terms "domestic service employee", "employee employed on a casual basis in domestic service employment to provide babysitting services" and "employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves." 39 Fed. Reg. at 35,382.

[15] 29 U.S.C. § 211(c) states in pertinent part: "Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder....." (emphasis added).

The agency also states that the "amendments and additions" are based on the statutory grant of authority found in 29 U.S.C. § 213(a)(15), to "define and delimit" the terms of the companionship services exemption. The Department of Labor therefore concludes its announcement of the proposed regulations contained in both Subpart A and Subpart B by stating that they were issued pursuant to statutory grants of authority.

Furthermore, having reviewed the regulations contained in Subpart B, the Court finds therein regulations that were clearly issued pursuant to a delegation of authority from Congress. The Department of Labor includes in Subpart B, "Interpretations," regulations setting forth the record keeping requirements for household employers of domestic service employees. See e.g., 29 C.F.R. § 552.100 (c & d), 29 C.F.R. § 552.110(a, b & c). These record keeping requirements were issued by the Department of Labor pursuant to an express grant of authority from Congress found in 29 U.S.C. § 211(c)(stating that employer shall preserve such records and make such reports "to the Administrator as he shall prescribe by regulation").

The record keeping regulations contained within Subpart B cast serious doubt on Plaintiff's argument that Subpart B, was titled "Interpretations," to indicate that the agency lacked Congressional authority to issue regulations on the matters contained therein. Instead, the Court finds that the label "Interpretations" signals that the Department of Labor was interpreting gaps in the FLSA statutes, as opposed to the

"General Regulations" defining terms contained within the FLSA statutes.[16] For example, the record keeping requirements issued by the agency did not define any terms contained in any Congressional statute but instead filled the gap delegated to the agency as to what records to require and how long such records needed to be maintained and by whom. Interpretative regulations filling gaps in a statutory scheme are entitled to Chevron deference, so long as Congress delegated to the agency the authority to fill the gaps contained within the statute. See e.g, Heimmermann, 305 F.3d at 1261 (according Chevron deference to an agency interpretation/ statement of policy that was issued pursuant to a statutory grant of authority).

The Court therefore finds it appropriate to look at the terms of the Congressional grant of authority to the Department of Labor in the companionship services exemption, 29 U.S.C. § 213(a)(15), to determine if Congress intended the agency to fill gaps contained therein. Congress granted the Secretary of the Department of Labor authority to "define and delimit" the terms of the exemption for companionship service providers. The Court notes that "to delimit" is a broader term than to define; "to delimit" is to "determine the limit or boundaries of." The Secretary of the Department of Labor was therefore conferred the authority to both define the terms of the companionship services

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[16] The Court notes that in a more recent postings in the Federal Register, the Department of Labor referred to the regulations in Subpart A and Subpart B as regulations "defining and interpreting the minimum wage and overtime exemption under section 13(a)(15)..." 66 Fed. Reg. at 20,411. This statement by the Department of Labor appear to indicate that the agency divides the regulations into Subpart A and B based on the type of regulation (e.g. regulations defining terms in the exemption or regulations interpreting the statute).

exemption and to determine the boundaries or the scope of the exemption.

In evaluating the breadth of the Congressional delegation of authority to the Department of Labor "to define and delimit" the scope of the exemption, the Court finds instructive the Supreme Court's findings in Auer v. Robbins, 519 U.S. 452, 117 S.Ct. 905 (1997)(according Chevron deference to Department of Labor regulation implementing the "bona fide executive, administrative or professional" exemption to FLSA). In Auer, the plaintiffs challenged a Department of Labor regulation issued to implement the exception to the FLSA for "bona fide executive, administrative, or professional" employees. Auer, 519 U.S. 452, 117 S.Ct. 905. The Supreme Court found that Congress granted the Secretary of the Department of Labor "broad authority to 'define and delimit' the scope of the exemption for executive, administrative and professional employees." Id. at 456, 117 S.Ct. at 909 (citing 29 U.S.C. § 213(a)(1)).[17] In Auer, the broad authority delegated to the agency was more than the power to define terms contained in the exemption (such as "bona fide executive") and encompassed the power to determine what factors were relevant to defining the boundaries of the FSLA exemption. The Auer opinion upheld the Department of Labor regulation's use a "salary test" for exempt status which required that an employee be paid on a salary basis and that his salary not be subject to reduction for

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[17] 29 U.S.C. (a)(1) states in pertinent part: "[the minimum and maximum hour requirements shall not apply with respect to]--- any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of outside salesman (as such terms are defined and delimited from time to time by regulations of the Secretary ....). (emphasis added).

variations in quality or quantity of work performed. Id. As in the statute analyzed in Auer, Title 29 U.S.C. § 213(a)(15) grants the Department of Labor the power to "define and delimit" the terms of the companionship services exemption. Pursuant to the reasoning of the Supreme Court in Auer, this Court finds that the authority "to define and delimit" the terms of the companionship services exemption is a broad grant of statutory authority which includes the authority not only to define terms contained within the exemption but also to fill gaps within the exemption related to the scope thereof.

Having found that the Department of Labor issued regulation, 29 C.F.R. § 552.109(a) pursuant to a grant of Congressional authority to define the scope of the exemption, the Court turns to a second important indicator of the deference to be accorded the regulation. The Department of Labor issued regulation, 29 U.S.C. § 213(a)(15), pursuant to notice and comment rulemaking. In October of 1974, the Department of Labor issued a regulation that only exempted from the FLSA companionship service providers working in the home and directly employed by the homeowner or a family member. 39 Fed. Reg. at 35,385. In February of 1975, after receiving comments, the Department of Labor broadened the exemption to include companionship service providers working in the home, regardless of whether they were directly employed by the homeowner or a third-party corporation. 40 Fed. Reg. at 7,407. In the intervening years, whenever considering changes to the regulation, the Department of Labor has consistently provided notice and opportunity for comment. 58 Fed. Reg. at

69,310; 60 Fed. Reg. at 46,797-798; 66 Fed. Reg. at 5,5488. Because regulation 29 C.F.R. § 552.109(a) is the fruit of notice and comment rulemaking, it is entitled to greater deference from this Court. Mead, 533 U.S. at 230, n.12, 121 S.Ct. at 2173 (citations omitted).

In reaching the determination that regulation 29 C.F.R. § 552.109(a) is the fruit of notice and comment rulemaking, the Court rejects Plaintiff's argument that the regulation is procedurally defective because the DOL reversed the regulation in 1975 from the proposed rule, without allowing opportunity for notice and comment. (D.E. 65, App. Brief at 37-40(citing National Bank Media Coalition v. F.C.C., 791 F2d 1016 (2d Cir. 1986)[18]). If a different rule is adopted from the one initially proposed by the agency, a new notice and comment procedure is required only if the initial notice of proposed rulemaking was not sufficient to apprise interested parties of the issues involved. Pennzoil v. Federal Energy Regulatory Com'n, 645 F.2d 360, 371(5th Cir. Aug. 21, 1981)[19]; see also American Medical Ass'n v. United States, 887 F.2d 760, 767-769 (7th

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[18] The Court finds that the case cited by the Plaintiff is clearly distinguishable from this action. In National Bank Media Coalition v. F.C.C., 791 F.2d 1016(2d Cir. 1986), the Second Circuit found that the FCC violated the APA by reversing its position in its final rule and by not allowing for meaningful opportunity to comment. The FCC reversal was due to technical data in the possession of the agency throughout the notice and comment period that but was not ever made available for public comment. In the instant action, there is no allegation that a meaningful opportunity to comment on the issues raised by the proposed rule was denied to the plaintiff or others similarly situated.

[19] The United States Court of Appeals for the Eleventh Circuit has adopted as binding precedent all decisions rendered by the former Fifth Circuit, prior to October 1, 1981. Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981).

Cir. 1989); BASF Wyandotte Corp. v. Costle, 598 F.2d 637, 642 (1st Cir. 1979), cert denied sub. nom., 444 U.S. 1096, 100 S.Ct. 1063(1980). In this case, the initial proposed rule, to exclude from FLSA coverage only companionship service employees employed directly by a household or family member, gave notice of the issue at stake that was sufficient to apprise interested parties. "The obligation to comment is not limited to those adversely affected by a proposal." American Medical Ass'n, 887 F.2d at 768-769 (citing Chocolate Mfrs. Ass'n v. Block, 755 F.2d 1098, 1107 (4th Cir. 1985); Association of Am. Railroads v. Adams, 484 F.Supp. 1077, 1085 (D.D.C. 1987)). Since the Department of Labor had a duty to consider submitted comments, and since modification of proposed rules in light of comments is the "heart of the rulemaking process," it does not violate the Administrative Procedure Act that the Department of Labor changed the proposed rule from its initial form. See Pennzoil, 645 F.2d at 372.

The Court therefore turns to the third factor typically considered in determining whether to accord Chevron deference. The Court finds that regulation 29 C.F.R. § 552.109(a) is a regulation broadly effecting the rights and obligations of employers under the FLSA. It is not comparable to the highly fact specific interpretations of a statute or regulation that are often accorded Skidmore deference. See e.g., Skidmore, 63 S.Ct. 161, 323 U.S. 134; Mead, 433 U.S. at 233, 121 S.Ct. at 2174-2175; Christensen 529 U.S. 576, 120 S.Ct. 1655 (2000)); Arriaga, 305 F.3d 1228.

Because regulation 29 C.F.R. § 552.109(a) was (a) issued pursuant to

Congressional authority to the Department of Labor to "define and limit" the companionship services exemption, under 19 U.S.C. § 215(a)(13); (b) the fruit of notice and comment rulemaking; and (c) affects individual rights and obligations under the FLSA, the Court finds that the regulation should be accorded Chevron deference.

C3. Applying Chevron Deference to 29 C.F.R. § 552.109(a)

When a court reviews an agency's construction of a statute, under Chevron, it is confronted with two questions. Shotz v. City of Plantation, Fla., 244 F.3d 1161, 1178 (11th Cir. 2003). First, always is the question whether Congress has directly spoken to the precise question at issue. Id. If the statute speaks clearly "to the precise question at issue," the court must give effect to the "unambiguously expressed intent of Congress." Barnhart v. Walton, 535 U.S. 212, 217-218, 122 S.Ct. 1265, 1269 (2002)(citing Chevron, 467 U.S. at 842-843, 104 S.Ct. 2778). If however, the statute "is silent or ambiguous with respect to the specific issue, the court "must sustain the Agency's interpretation if it is "based on a permissible construction." Barnhart, 535 U.S. at 218, 122 S.Ct. at 1269 (citing Chevron, 467 U.S. at 843, 104 S.Ct. 2778); see also Shotz, 244 F.3d at 1161.

The Court addresses first Plaintiff's argument that regulation § 552.109(a) is inconsistent with the statutory Act, 29 U.S.C. § 213(a)(15). Plaintiff states that, "the Act, 29 U.S.C. § 213(a)(15), does not exempt employees employed to provide companionship services to the elderly or infirm. Rather, it exempts only employees 'employed in domestic service employment to provide companionship services' to the aged or infirm."

Id. at 28. Plaintiff then asserts that "the third-party regulation found in § 552.109(a) renders the phrase 'employed in domestic service employment' superfluous." Id.

Having carefully reviewed the language of the statute, the Court finds no merit to Plaintiff's argument that regulation § 552.109(a) is inconsistent with the text of the statutory Act, 29 U.S.C. § 213(a)(15). The statute setting forth the companionship services exemption states in pertinent part:

> [minimum wage and maximum hour requirements shall not apply with respect to] any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary).

29 U.S.C. § 213(a)(15)(emphasis added). There is no basis for Plaintiff's argument that regulation § 552.109(a)[20] renders the statutory text "employed in domestic service employment" superfluous or meaningless. First, the Court notes that both the statute 29 U.S.C. § 213(a)(15) and regulation § 552.109(a) have been in effect since 1975. In the last thirty years, the statutory phrase "employed in domestic service employment" found in 29 U.S.C. § 213(a)(15) has played a critical role in jurisprudence interpreting the scope of the exemption. Persons providing companionship services provide those services in a range of settings including private homes, residential homes offering support services for

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[20] 29 C.F.R. § 552.109(a) states, "Employees who are engaged in providing companionship services, as defined in § 552.6, and who are employed by an employer or agency other than the family or household using their services, are exempt from the Act's minimum wage and overtime pay requirements by virtue of section 13(a)(15)."

the elderly or infirm, institutionalized settings, and other hybrid models of care. Significant litigation has occurred in defining whether companionship services provided in a residential home or in a hybrid institutionalized/private home setting constitute "domestic service employment" for purposes of Title 29 U.S.C. § 213(a)(15). See e.g., Johnston v. Volunteers of America, Inc., 213 F.3d 559 (10th Cir. 2000); Lott v. Rigby, 746 F. Supp. 1084 (N.D. Ga. 1990); Linn v. Developmental Servs. of Tulsa, Inc., 891 F.Supp. 574, 580 (N.D. Okla. 1995); Madison v. Resources for Human Development, Inc., 39 F.Supp.2nd 542 (E.D. Pa. 1999); Bowler v. Deseret Village Ass'n, Inc., 922 P.2d 8 (Utah 1996); Terwilliger v. Home of Hope, Inc., 21 F.Supp.2d 1294 (N.D. Okla. 1998). The statutory phrase "in domestic service employment" has played an important role in limiting the scope of the exemption to companionship services in private homes. There is no basis for Plaintiff to argue that the phrase "in domestic service employment" has been rendered superfluous or meaningless.

Having found that regulation § 552.109(a) does not conflict with the statutory text of the companionship services exemption, the Court notes that regulation § 552.109(a) does conflict with another regulation, specifically regulation § 552.3[21] defining the term "domestic service employment." In the statute itself, Congress did not define the term

[21] The Department of Labor defined the term, "domestic service employment" as "services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed." 29 C.F.R. § 552.3 (emphasis added). In contrast, the regulation at issue, 29 C.F.R. § 552.109(a), provides that any employee employed in a private home to provide companionship services to the elderly is exempt, including employees who are employed by third-parties.

"domestic service employment" or "companionship services," but instead delegated the definition of the term to the Department of Labor. In defining the term "domestic service employment" in regulation § 552.3 the Department of Labor limited the companionship services exemption to employees (a) working in a private home and (b) employed by the homeowner. In defining the scope or boundaries of "companionship services" in regulation § 552.109(a) the Department of Labor provided that employees hired by third-parties to provide companionship services in a private home are encompassed within the exemption. The Department of Labor has noticed that § 552.109(a) and § 552.3 are difficult to reconcile, unless one assumes a joint employment relationship (e.g. that the employee although recruited by a third party is actually working in the home at the direction of the home owner). 58 Fed. Reg. 69,310-69,311. This ambiguity or tension between the regulations § 552.3 and § 552.109(a) is not dispositive to a Chevron analysis.

In employing Chevron, the Court instead is directed to look first to whether the statute speaks clearly "to the precise question at issue." Barnhart, 535 U.S. at 217-218, 122 S.Ct. at 1269. The text of statute 29 U.S.C. § 213(a)(15) does not address whether or not employees, "employed in domestic service employment to provide companionship services," includes only those individuals employed in private homes by the household or family member. Congress did not define in the statute the term, "domestic service employment." Accordingly, the precise issue before this Court was not addressed by Congress in the statute.

Given that the statute is silent with respect to the specific issue of third-party employment, the Court must determine whether the Department of Labor's regulation 29 C.F.R. § 552.109(a) is a permissible construction of the companionship services exemption. "If the [agency's] choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, [the courts] should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." Chevron, 467 U.S. at 845, 104 S.Ct. at 2783. The Court is obliged to accept the agency's position if Congress has not previously spoken to the point at issue and the agency's interpretation is reasonable. Mead, 533 U.S. at 229, 121 S.Ct. at 2172 (citing Chevron, 467 U.S. at 842-845, 104 S.Ct. 2778.)

Plaintiff argues that the legislative history of the FLSA and the 1974 Amendments indicates that Congress would not have sanctioned a construction of the companionship services exemption, which includes employees of third-party employers.[22] In support thereof, Plaintiff states that in 1974, Congress intended to extend FLSA coverage to domestics employed in the home by households. (App. Brief at 29, 32-34.) The Plaintiff

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[22] Plaintiff also argues that exemptions to the FLSA should be narrowly construed and that the Department of Labor failed to act according to this principle in issuing regulation 29 C.F.R. § 552.109(a). (D.E. 65, App. Brief at 14.) When interpreting the scope of an exemption to the FLSA, a court is obliged to interpret the exemption narrowly in order to effect the remedial purposes of the FLSA. Mitchell v. Kentucky Finance Co., 359 U.S. 290, 295 (1959). An agency, delegated the authority to "define and delimit" an exemption to the FLSA, is only obliged to "reasonably" construe the statutory exemption.

further argues that regulation 29 C.F.R. § 552.109(a) is contrary to Congressional intent in that it actually retracts FLSA coverage from previously covered employees working full-time in the home but hired by third-parties. Id. at 29-30. Plaintiff then asserts that Congress could not have intended for the companionship services exception to the extension of coverage to domestic service employees to be more extensive than the extension itself. Id.

Having reviewed the legislative history, the Court finds that Plaintiff is correct in that the intent of the 1974 Amendments was to extend FLSA coverage to domestics employed in the home by households. See also Smith v. Bellsouth Telecommunications, Inc., 273 F.3d 1303, 1308 n.6 (11th Cir. 2001)(citing H.R. Rep. No. 93-913 (1974), reprinted in 1974 U.S.C.C.A.N. 2811, 2811)(stating that the legislative history of the 1974 amendments indicates that the amendments were meant to expand - not narrow - the coverage of the Act). In enacting the 1974 Amendments, Congress intended to extend FLSA coverage to a new set of workers, employees who perform domestic services in households. See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55. The Senate Committee Report indicates that Congress intended to extend FLSA protection to those employed within the home as cooks, butlers, valets, maids, housekeepers, governesses, janitors, laundresses, caretakers, handymen, gardeners, footmen, grooms, chauffeurs, and the like. See S. Rep. No. 93-960, at 20 (1974); see also H.R.Rep. No. 93-913, at 35-36 (1974). Although Congress extended the FLSA to

domestic service employees working in private homes and employed by households in order to protect these low-wage earners, Congress specifically refrained from extending FLSA coverage to certain services provided in private homes. Congress withheld FLSA coverage from "casual babysitters" and "elder-care sitters." 29 U.S.C. § 213(a)(15).[23] Plaintiff has not cited to any portion of the Congressional record speaking directly to Congress' intent as to "elder-care sitters," employed by third-parties, as opposed to those employed directly by households. This Court has not identified any portion of the Congressional record addressing this specific issue; probably because these third party employers were relatively rare at the time. In 1974, there were few for-profit free-standing agencies providing employees to private homes to act as companions to the elderly; they composed approximately 2% of total Medicare certified agencies. 66 Fed. Reg. at 5,483. Furthermore, from the perspective of 1974,[24] the regulation 29 C.F.R. § 552.109(a) did not retract FLSA coverage to any great extent, due to the small number of "elder-sitters" that were hired by third-party employers at that time. Accordingly, in

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[23] The full text of 29 U.S.C. § 213(a)(15) reads: [minimum wage and maximum hour requirements shall not apply with respect to] "any employee employed on a casual basis in domestic service employment to provide babysitting services or any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves (as such terms are defined and delimited by regulations of the Secretary)."

[24] The Court notes, however, that with the rapid growth over the past several decades of third-party employers of companionship services there is today a large number of employees exempt from FLSA coverage. See 66 Fed. Reg. at 5,483 (stating that there are more than 430,400 people working as home health aides and 255,960 people working as personal and home care aides.)

1975, when regulation 29 C.F.R. § 552.109(a) was issued in its final form, the regulation did not create an exemption that substantially frustrated the Congressional purpose to expand FLSA coverage through the 1974 Amendments.

The Court therefore turns to whether regulation 29 C.F.R. § 552.109(a) is a permissible construction of the "elder-sitter" exception, as conceived by Congress. If the [agency's] choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, [the courts] should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." Chevron, 467 U.S. at 845, 104 S.Ct. at 2783. A review of the Congressional record does not indicate a single policy underpinning the exception for companionship purposes, but instead reveals a number of potential reasons for the exemption. In part, Congressmen seemed to question whether "companionship services," such as watching TV, reading, or talking with an elderly person should be the type of work subject to FLSA minimum wage and overtime regulations. 19 Cong. Rec. 24,797 (1973)(Statement Sen. Dominick). Members of Congress were also concerned about the record keeping burden that would be placed on household employers, if they had to comply with the FLSA for "elderly-sitters." 19 Cong. Rec. 24,801 (1973)(Statement Sen. Burdick). Certain Congressmen strongly advocated that extending FLSA coverage to employees who provide companionship services to the elderly in their private homes would render unaffordable care for the elderly within the home and would

force families to resort to the services of a nursing home. 18 Cong. Rec. 24,715 (1972)(Comments of Sent. Taft); 18 Cong. Rec. 24,715 (1972)(Statement Sen. Dominick). It is also worth noting that if Congress had sought to protect full-time breadwinners providing companionship services, Congress could have exempted only casual "elder-sitters" (e.g. elder-sitters who provide services on a part-time or intermittent basis to assist a family as needed). Instead, Congress exempted those who provide baby-sitting services on a casual basis, but did not similarly limit the exemption to casual elder-sitters.[25] 29 U.S.C. § 213(a)(15).

Having reviewed the potential purposes of the "companionship services" exemption, the Court finds that regulation 29 C.F.R. § 552.109(a), extending the exemption to third-party employers, does not appear to conflict with the purposes behind the exemption. Most of the statements of the Congressmen focus on the nature of companionship services (e.g. "elder-sitting" or providing companionship to an elderly person through conversation and shared activities) and the location of such services

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[25] Plaintiff argues that Congress did not intend to exclude from FLSA coverage full time bread winners who provide companionship services to the elderly. (D.E. 65, App. Brief at 34.) Although there are excerpts from the Congressional record with respect to domestic employees generally that support Plaintiff's assertion, the actual text of the exemption 29 U.S.C. § 213(a)(15) and the legislative history as a whole does not support Plaintiff's argument. The Congressional record clearly indicates that Congressmen perceived the individual proving companionship services to an elderly person to be playing the role of an "elder sitter,"comparable to a "baby sitter" 19 Cong. Rec. 24,801(1973)(Statement Sen. Williams); 19 Cong. Rec. 24,801 (1973)(Comments Sen. Javis); 19 Cong. Rec. 24,798 (Statement Sen. Johnston). Despite the similarities Congress perceived between the two employments, Congress specifically chose in the same clause to narrow the exemption to only "casual" baby-sitters and not to similarly *limit the* exemption for "elder-sitters." 29 U.S.C. § 213(a)(15).

(ensuring affordable care for the elderly within their own homes), rather than the employer. Limiting the record keeping burden on households was one reason for the exemption, which clearly is not a reason for exempting third-party employers. But the Department of Labor could have reasonably concluded that exempting third-party employers would advance another purpose of the exemption, affordable care to the elderly in their private homes.

The Court notes that the Department of Labor has revisited whether regulation 29 C.F.R. § 525.109(a) should continue to exempt third-party employers, and has specifically withdrawn proposals to narrow the exemption to exclude third-party employers because of concerns about the potential impact on costs of providing companionship services to the elderly in their homes.[26] 67 Fed. Reg. 16,668. If the companionship services exemption to the FLSA was narrowed to only those employees hired directly by a family member or the head of household, then the exemption would encompass only 2% of

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[26] Predicting the potential economic effects of the regulation is a complex task. If third party employers were subject to the FLSA, then they appear to have at least two possible choices. One choice would be to begin paying minimum wage and overtime to all existing employees providing companionship services in private homes, and to eventually pass on the additional labor cost through increased prices. This would clearly cause an increase in the cost of companionship services to the elderly in their homes. Alternatively, third party employers could immediately hire additional employees in order to avoid paying overtime costs to existing employees, but thereby incurring costs associated with having a larger workforce. These costs would increase to some extent the cost of companionship services to the elderly in their homes. It would also decrease the continuity of care to the elderly. The services provided to the elderly by home aides are often of an intimate nature, such as assisting the elderly in bathing or toileting. Elderly persons may be slow or resistant to entering into such an intimate relationship with additional caretakers. There is a potential risk that decreasing the continuity of care to the elderly will result in a higher number of incidents of serious health problems and the costs associated therewith.

employees providing companionship services in private homes. 66 Fed. Reg. at 5,483. The Department of Labor proposed narrowing the exemption to only this small class of employees in 2001, but withdrew the proposal in 2002 citing concerns raised by "numerous commentators on the proposed rule, including multiple government agencies" that such a change in the regulation would have a substantial economic impact. 67 Fed. Reg. 16,668. This finding by the Department of Labor is consistent with rulings of courts which have found that regulation 29 C.F.R. § 552.109(a), by exempting all employees who provide companionship services in private homes, forwards the goal of ensuring that there is an affordable means of providing companionship services to the elderly or infirm in their private homes. See e.g., Salyer v. Ohio Bureau of Workers' Compensation, 83 F.3d 784, 788 (6th Cir. 1996); McCune v. Oregon Sr. Services Div., 894 F.2d 1107, 1110 (9th Cir. 1990).

Having reviewed the Congressional history, the Court finds that regulation, 29 C.F.R. § 552.109(a) is a permissible construction of the exemption provided in 29 U.S.C. § 213(a)(15). This interpretation was the fruit of notice and comment rulemaking during the 1974-1975 period and again withstood proposed changes in 2001-2002.[27] Particular

[27] The Court does not find that the proposed changes to the regulation undermine its authority. "An initial agency's interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." Chevron, 467 U.S. at 864, 104 S.Ct. at 2792. This is particularly true with regards to regulation 29 C.F.R. § 552.109(a) given the rapid growth of third party employers of employees providing companionship services from 1974 to the present. See 66 Fed. Reg. 5,481.

deference is normally accorded an agency interpretation that is one of long-standing. Barnhart, 535 U.S. at 221, 122 S.Ct. at 1271. In reaching the determination that regulation 29 C.F.R. § 552.109(a) is a permissible construction of the exemption for companionship services, the Court is not unsympathetic to the low wages of the large number of employees, employed by third-parties, who provide companionship services to the elderly in their homes. The earnings of these employees remain among the lowest in the service industry. 66 Fed. Reg. at 5,483. Nonetheless, there are strong policy reasons for exempting these employees from FLSA coverage in order to ensure affordable care and higher continuity of care to the elderly in their private homes. The policy choice or resolution of competing interests required to implement the companionship services exemption is most appropriately addressed in the legislative or executive branches.[28] In regulation 29 C.F.R. § 552.109(a), the Department of Labor has reasonably interpreted the companionship services exemption to apply to third-party employers of employees providing such services in private homes.

III. Plaintiff's Motion for Partial Summary Judgment as to Liability

A. Parties' Arguments

Plaintiff argues that it is uncontested that he worked overtime hours for the

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[28]Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. Chevron, 467 U.S. at 865, 104 S.Ct. at 1793.

Defendant for which he was not paid. (P. Mot. for Summ. J. at 2.) Plaintiff urges the Court to reject Defendant's claim that Plaintiff is exempt from the FLSA's overtime provisions, pursuant to the "companionship services" exemption. (P. Mot. for Summ. J. at 1.) Plaintiff advances two arguments in support thereof, first Plaintiff asserts that the companionship exemption does not apply to a third party employer, and second, Plaintiff argues that the companionship exemption does not apply to him because he spent more than 40% of his work time performing household cleaning services. Id. Plaintiff also asserts that he is entitled to summary judgment as to the joint and several liability of Carlos Silva for any wages due to the Plaintiff. Id. at 5-7.

Defendants respond that Plaintiff is exempt from the FLSA's overtime provisions, pursuant to the companionship services exemption. (D.E. 45, Resp. to P. Mot. Summ. J. at 2.) The Defendants also argue that the cleaning, cooking, washing and other services provided by the Plaintiff were solely in connection to caring for Mr. Sands. Id. at 3. Defendants offer the Declaration of Robin Sands as evidence that the Plaintiff was hired as a companion, and that he was not hired, nor was he responsible for performing general household work at Mr. Sands' residence. Id. The Defendants also argue that the Plaintiff's Affidavit stating that he performed general household duties conflicts with his Deposition testimony in which he never once mentioned general household cleaning unrelated to Mr. Sands' specific needs. Id. at 6, 7.

The Defendant Carlos Silva asserts that he is not an employer of the Plaintiff. Id.

at 12. He asserts his ownership interest in Elder Care is not sufficient to attach liability to him for the Plaintiff's FLSA claims. Id. Carlos Silva states that Mr. Arciniega ran Elder Care. Id. Carlos Silva refutes Plaintiff's claims that he had any involvement at all in managing or supervising the Plaintiff, determining the Plaintiff's pay, or running the day to day operations of Elder Care. Id.

B. Standard of Review

On a motion for summary judgment, the court is to construe the evidence and factual inferences arising therefrom in the light most favorable to the nonmoving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). Summary judgment can be entered on a claim only if it is shown "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The Supreme Court has explained the summary judgment standard as follows:

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be no genuine issue as to any material fact, since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The trial court's function at this juncture is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986). A dispute about a material fact is genuine if the evidence is

such that a reasonable jury could return a verdict for the nonmoving party. Anderson, 477 U.S. at 248; see also Barfield v. Brierton, 883 F.2d 923, 933 (11th Cir. 1989).

The party asking for summary judgment "always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the 'pleadings, depositions, answers to interrogatories, and admissions of file, together with affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." Celotex, 477 U.S. at 323. Once this initial demonstration under Rule 56(c) is made, the burden of production, not persuasion, shifts to the nonmoving party. The nonmoving party must "go beyond the pleadings and by [his] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" Id. at 324; see also FED. R. CIV. P. 56(e). In meeting this burden the nonmoving party "must do more than simply show that there is a metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). That party must demonstrate that there is a "genuine issue for trial." Id. at 587. An action is void of a material issue for trial "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." Id.

C. Analysis

The first argument raised by the Plaintiff is that he is not exempt from FLSA's overtime provisions, pursuant to the companionship services exemption. (P. Mot. for

Summ. J. at 1.) In support thereof, Plaintiff asserts that the companionship services exemption does not apply to employees of third party employers and cites Coke, 376 F.3d 118, in support thereof. Id. This Court has determined not to follow the Second Circuit's opinion in Coke, and has instead found that the regulation exempting employees of third parties is a permissible construction of the companionship services exemption. Supra 8-43. Accordingly, the Court rejects Plaintiff's first argument in support of his Motion for Summary Judgment.

In the alternative, Plaintiff argues that the companionship services statutory exemption does not apply to him due to the nature of his work for Elder Care Services. Plaintiff asserts that he spent well over 40% of his work time performing household cleaning for Elder Care's clients. (P. Mot. Summ. J. at 1.) The Plaintiff then argues that the companionship services exemption can not apply to him since it applies only to employees that spend 20% or less time on household work. Id. at 4. Plaintiff therefore concludes that he is not subject to the exemption and should be allowed to proceed with his claims under the FLSA.

The Department of Labor has defined "companionship services" as follows:

> those services which provide fellowship, care and protection for a person, who because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person such as meal preparation, bed making, washing of clothes, and other similar services related to the care of the aged or infirm person. They may also include the performance of general household work; provided, however, that such work is incidental, i.e. does not exceed 20 percent of the total weekly hours worked...

29 C.F.R. § 552.6 (emphasis added).[29] The statute allows for an employee providing companionship services to perform "household work related to the care of the aged or infirm person" without any limitation thereof.[30] Id. Many of the employment activities that Plaintiff describes in his Deposition would be appropriately categorized as "household work related to the care" of Mr. Sand. For example, the following activities of the Plaintiff were directly related to the care of Mr Sands: (1) making Mr. Sands coffee

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[29] Plaintiff argues that the Court should not defer to regulation 29 C.F.R. § 552.6. (P. Mot. Summ. J. at 5.) Plaintiff asserts that the definition of companionship services is defined too broadly in regulation 29 C.F.R. § 552.6 and is a deviation from Congressional intent. In support thereof, Plaintiff cites to an unreported opinion from a district court in Illinois, Harris, et. al. v. Dorothy L. Sims Registry, 2001 WL 78448, 2001 U.S. Dist. Lexis 23263 (N.D. Il. 2001). This Court follows the opinions of the Sixth, Ninth, and Tenth Circuit Courts who have addressed this issue and have found regulation 29 C.F.R. § 552.6 is entitled to Chevron deference and is a permissible construction of the statutory exemption for companionship services. Coke, 376 F.3d at 125-129; Johnston, 213 F.3d at 565; Salyer, 83 F.3d at 787; McCune, 894 F.2d at 110.

[30] The Court notes that the Department of Labor in 2001 offered three separate proposals for refining "companionship services" to clarify that the exemption is meant to apply to employees who primarily provide fellowship, friendship, and/or a close personal interaction to their elderly clients. See 66 Fed. Reg. at 5,484-5,485. The Department of Labor ultimately kept the current language which defines "companionship services" as "services which provide fellowship, care and protection" but which also allows for unlimited household chores to be included in such services. This definition appears to capture well the Plaintiff's work for Mr. Sands. Although the Plaintiff's work frequently consisted of cleaning-up after Mr. Sands, the Plaintiff nonetheless was more than a housekeeper or janitor; he clearly developed a friendship with Mr. Sands and the Plaintiff saw himself as there to care for and protect Mr. Sands. The Plaintiff stated that he was there "to do everything [Mr. Sands] needed and to assist him on everything." (P. Dep. at 32.) Plaintiff further stated that, "whenever he was ready to get up, I would be right there to help him." Id. at 34. The Plaintiff even placed his bed right next to Mr. Sands, so that if Mr. Sands woke-up, the Plaintiff would be there for him. Id. at 47. The Plaintiff also said that he would tell Mr. Sands, while he was bathing him, that he needed to clean his hair to impress the girls at the cafeteria. Id. at 37. During his Deposition, Plaintiff complained that other people had not watched Mr. Sands closely enough. (P. Dep. at 49.) Plaintiff was asked, "It sounds like you were a trusted companion to him while he was alive?," to which Plaintiff responded, "Yes. I loved him like he was my father." (P. Dep. at 50.)

Accordingly, the Court finds that the definition of "companionship services" found in regulation 29 C.F.R. § 552.6 is not too broad nor is it unreasonable as applied to the Plaintiff.

and toast in the morning, (2) making Mr. Sands a sandwich, a salad and providing him milk or ice cream; (3) making the bed; and (4) cleaning up bed clothes and carpets due to Mr. Sands' uncontrolled urination and bowel movements. Accordingly, Plaintiff may have spent more than 40% of his time on household chores, but to the extent that those chores were related to Mr. Sands' care, the Plaintiff qualifies as an employee providing companionship services and is thereby exempt from the FLSA.

Plaintiff filed an Affidavit in which he states that he performed activities of a general household nature: e.g. throwing away garbage, fixing the room, laundry chores. (D.E. 30, P. Aff. at ¶ 3.) It is not possible to discern from the Affidavit whether or not Plaintiff spent more than 20%[31] of his time performing general household chores, unrelated to the care of Mr. Sands.[32] Furthermore, the Defendant adamantly disputes that

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[31] The Plaintiff alleges he worked on average a twelve (12) hour shift. Accordingly, twenty percent (20%) of his time would be roughly 2 hours and twenty five minutes. Plaintiff states that he spent two (2) hours cleaning the house and doing house related chores, e.g. making the bed, fixing the room and throwing away the garbage. (P. Aff. at ¶ 3.) Some of those activities (bed-making) are directly related to the care of Mr. Sands and therefore some of the two hours would not be properly included in determining whether Plaintiff spent more than twenty percent (20%) of his time performing general household chores. Plaintiff also states that he spent about two (2) hours washing and drying clothes, but he does not provide sufficient detail for the Court to determine whether the laundry was related to the care of Mr. Sands or a general household chore. Accordingly, the Plaintiff has not shown that he spent more than twenty percent (20%) of his time, or 2 hours and twenty five minutes, performing general household chores.

[32] Defendant assumes that Plaintiff's laundry chores were related to Mr. Sands care (D. Resp. at 5), which is a reasonable assumption based on Plaintiff's testimony in his Deposition that Mr. Sands constantly had uncontrolled urination and bowel movements. (P. Dep. at 34-35, 37-39.) Nonetheless, the record also reflects that there was not a person to perform general household chores, such as laundry. (P. Dep. at 26.) Accordingly, the Court finds it is unclear from Plaintiff's Affidavit whether the laundry chores were directly related to Mr. Sands' care or whether the washing and drying of clothes were duties performed by the Plaintiff for Mr. Sands

Plaintiff spent more than 20% of his time performing general household chores and points to Plaintiff's own Deposition in support thereof. (D. Resp. at 6.) In his Deposition, Plaintiff never once mentions performing any general household cleaning duties. Id. (citing P. Dep. at 32-40.) The Defendant also points to the Declaration of Robin Sands stating that the Plaintiff was hired to perform companionship services, not to perform general household work. (D.E. 38, Robin Decl. at ¶ 7.) Robin Sands statements are consistent with the statements of both Vice President of Operations of Elder Care, Fernando Arciniega, and President of Elder Care, Carlos Silva, who both state that their company provides companions to the elderly, who perform only light or incidental household chores. (Arciniega Dep. at 28; see also Silva Dep. at 27-28.)

Accordingly, the Court finds that there is a genuine issue of material fact in dispute between the Parties; specifically, the percentage of time Plaintiff spent performing household chores of a general nature, unrelated to the care of Mr. Sands. The Court therefore denies Plaintiff's Motion for Summary Judgment both as to Defendant Elder Care's liability and Defendant Carlos Silvia's liability under the FLSA.[33]

III. Defendant's Motion for Summary Judgment (D.E. 36)

A. Parties' Arguments

Defendants argue first that the Plaintiff was hired as an independent subcontractor

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in order to ensure that clothes and bed sheets were periodically cleaned.

[33] Plaintiff also requested summary judgment against Defendant Carlos Silva on the basis that he was jointly and severally liable for Plaintiff's wage claims. (P. Mot. Summ. J. at 5.)

and that Elder Care acted only as a placement service to clients and companionship workers. (D. Mot. Summ. J. at 3, 6-7.) The Defendants therefore conclude that Elder Care is not an employer of the Plaintiff subject to the FLSA. Id. at 3,7. The Defendants argue next that even if this Court finds that the Elder Care is a third party employer, the Defendant is exempt under the DOL regulations for third-party employers who provide companionship services, 28 U.S.C. § 552.109. Id. at 3-4, n.2. Furthermore, even if this Court finds the DOL regulation exempting third party employers to be invalid, the Defendants reasonably relied on the DOL regulation and are entitled to the safe harbor provision of the FLSA, 29 U.S.C. § 259. Id. at 8, n.3; see also D.E. 48, Reply at 4-5.

The Defendants also argue that the cleaning, cooking, washing and other services provided by the Plaintiff were solely in connection to caring for Mr. Sands. Id. at 8-10. Defendants offer the Declaration of Robin Sands as evidence that the Plaintiff was hired as a companion, and that he was not hired, nor was he responsible for performing general household work at Mr. Sands' residence. Id. at 9. The Defendants also argue that the Plaintiff's Affidavit stating that he performed general household duties conflicts with his Deposition testimony in which he never once mentioned general household cleaning unrelated to Mr. Sands' specific needs. Id. at 9-10.

Plaintiff responds first that he was an employee of the Defendant and not an independent contractor. (D.E. 47, Resp. at 2-13.) The Plaintiff again argues that the Court should follow the Second Circuit in Coke and decline to enforce regulation 29 C.F.R. § 552.109(a) (id. at 1), or in the alternative that the Plaintiff's work did not qualify

as "companionship services" in that he performed general household work more than 20% of the time (id. at 1-2.)

B. Standard of Review

On a motion for summary judgment, the court is to construe the evidence and factual inferences arising therefrom in the light most favorable to the nonmoving party. Adickes, 398 U.S. at 157. Summary judgment can be entered on a claim only if it is shown "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). The trial court's function at this juncture is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986). A dispute about a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. Anderson, 477 U.S. at 248; see also Barfield v. Brierton, 883 F.2d 923, 933 (11th Cir. 1989).

C. Analysis

Defendants argue first that the Plaintiff was hired as an independent subcontractor and that Elder Care acted only as a placement service to clients and companionship workers. (D. Mot. Summ. J. at 3, 6-7.) The Defendants therefore conclude that Elder Care is not an employer of the Plaintiff subject to the FLSA. Id. at 3,7. To determine whether or not the Plaintiff acted as an employee of the Defendant, the Court must analyze the following five factors: (1) the degree of control exercised by the alleged employer; (2) the extent of the relative investments of the putative employee and

employer; (3) the degree to which the employee's opportunity for profit and loss is determined by the employer; (4) the skill and initiative required in performing the job; and (5) the permanency of the relationship. Brock v. Mr. W. Fireworks, Inc., 814 F.2d 1042, 1043 (5th Cir. 1987)(citations omitted). These five factors are "tools to be used to gauge the degree of dependence" of the alleged employee on the defendant business. Id. at 1044 (quoting Usery v. Pilgrim Equipment Co., 527 F.2d 1308, 1311 (5th Cir.), cert denied, 429 U.S. 826, 97 S.Ct. 82 (1976)).[34] The final and determinative question must be whether the totality of the five factors establishes that the plaintiff was economically dependent on the defendant business. Id. (quoting Usery, 527 F.2d at 1311); see also Robicheaux v. Radcliff Material, Inc., 697 F.2d 662, 665 (5th Cir. 1983)(describing the "economic dependence" of the worker to be the "touchstone" for a finding that the worker acted as an employee for the defendant business).

The Court finds first that Elder Care exercised control over the Plaintiff's work as a companion to the elderly. Elder Care briefs the companionship service provider on the services and expectations of a client before the employees being work with the client. (Arciniega Dep. at 53-54.) When offering an assignment, Elder Care informs the companionship service provider whether it is a night shift, day shift, hourly job, etc. Id. at 39-40, 41-42. It is therefore Elder Care, rather than Plaintiff, who determines with the

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[34] The Court of Appeals for the Eleventh Circuit has adopted as binding precedent all decisions rendered by the former Fifth Circuit prior to October 1, 1981. Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981).

client what services are to provided and at what time those services are needed. Once Plaintiff has been assigned to work with a client, the Plaintiff may make decisions as to how he performs his work, such as whether or not to wear a uniform or whether to bring his own bed. (P. Dep. at 28, 44.) The Court notes, however, that "lack of supervision over minor regular tasks cannot be bootstrapped into an appearance of real independence. Control is only significant when it shows an individual exerts such a control over a meaningful part of the business that [he] stands as a separate economic entity." Brock, 814 F.2d at 1049 (citing Usery, 527 F.2d at 1312-1313.) The Plaintiff did exercise meaningful control over effecting the quality of care provided to the client. (See e.g., P. Dep. at 32, 34, 47.) Elder Care, however, also visited each of the clients on a monthly basis, which provided an opportunity for clients to directly inform Elder Care of any problems in the quality of care provided. (Arciniega Dep. at 84.) Furthermore, Plaintiff testified that he would report to Elder Care and tell them "everything about the job." (P. Dep. at 45.) Given the supervision of Elder Care, the Court finds that the Plaintiff did not exercise a level control over his services such that he should be considered a distinct and separate economic entity from Elder Care.

The Court further finds that Elder Care invested substantially in the business and that Elder Care determined the profitability of the business. Elder Care paid for advertising and marketing of companionship services to the elderly in the yellow pages, on the internet and in magazines. (Arciniega Dep. at 73-74.) Elder Care provided liability insurance and workers compensation insurance to its companionship service

providers. Id. at 45. In comparison, the Plaintiff provided his own uniform and his own cot. (P. Dep. at 28, 44.) Clearly, Elder Care invested substantially more in the business. The Court further notes that the profitability of the business was largely determined by Elder Care. The price of the services of the companionship providers was determined by Elder Care in conjunction with the client. (Arciniega Dep. at 57,64.) Elder Care also determined that it would pay companionship providers 80% of the fee collected from the client. Id. at 19, 44. Elder Care paid providers the money they were owed for services provided, whether or not a client paid. Id. at 62. Accordingly, Elder Care both controlled the pricing of services and absorbed the impact on profitability of client defaults on payment obligations. The Court therefore finds no evidence in the record that Plaintiff exercised decision-making power over the profitability of his services.

The Court further finds that Plaintiff's work did not require a level of skill, nor a level of initiative, such that Plaintiff should be considered an independent contractor. The Plaintiff's work did not require him to provide skilled medical care to his clients. (See P. Dep. at 13, 48.) The Plaintiff's work as a companion did not require him to take business initiative. In fact, the services to be provided, the timing for the provision of services, the pricing, etc. were all decisions taken by Elder Care. The Court further notes that Defendant has not offered any facts to the Court tending to show either the Plaintiff's expertise or his initiative. (See D. Mot. Summ. J. at 6-7.)

Turning to the fifth and final factor, the Court notes that the Plaintiff worked six days a week, twelve (12) hours a day for the Defendant Elder Care for a period of two

and a half to three years. During that period of time, Plaintiff primarily acted as a companion to Mr. Sands. (See P. Dep. at 28-29, 41, 43.) Although the Plaintiff could turn down work from the employer, this fact is not particularly relevant. The Court's analysis is not driven by what the Plaintiff could have done but as a matter of economic reality what the Plaintiff actually did. Brock, 814 F.2d at 1047. Plaintiff was as a matter of economic reality dependent for his wages on Elder Care throughout the two and a half to three year period that Plaintiff acted as a provider of companionship services.

Having reviewed all five factors, the Court finds that (1) the Plaintiff did not exercise the degree of control necessary for the Court to consider him a separate business entity from Elder Care; (2) the Plaintiff did not substantially invest in the business as compared to the Defendant Elder Care's investments in advertising, marketing and liability insurance; (3) the Plaintiff did not have profit or loss accountability for the services he provided; (4) the Plaintiff did not utilize the level of skill or initiative characteristic of independent entities; and (5) the Plaintiff was a full-time employee of the Defendant for a period of two and a half to three years. All of these factors tend to indicate that the Plaintiff was economically dependent on Defendant Elder Care. Accordingly, the Court finds that the Plaintiff was an employee of the Defendant during the requisite time period. Defendant's Motion for Summary Judgment therefore is unpersuasive to the extent that Defendant argues that it was not Plaintiff's employer.

The Defendant argues next, that even if it was the Plaintiff's employer, it is exempt from the FLSA as a third party employer who provides companionship services to the

elderly in their private homes. (D. Mot. Summ. J. at 3-4, n.2.) This Court has ruled that regulation 29 C.F.R. § 552.109(a), exempting third party employers from the FLSA, is a permissible construction of the companionship services exemption. Accordingly, Defendant is exempt pursuant to regulation 29 C.F.R. § 552.109(a).[35] Nonetheless, the Court reaffirms its earlier ruling that there is a genuine material fact in dispute between the Parties as to whether Plaintiff provided "companionship services" as that term is defined by regulation, 29 C.F.R. 552.6. Specifically, there are material facts in dispute as to the percentage of time Plaintiff spent performing household chores of a general nature, unrelated to the care of Mr. Sands. It is not for this Court to weigh the Plaintiff's Deposition testimony against the Plaintiff's Affidavit, but instead it is the role of a jury to assess the Plaintiff's credibility and the facts in dispute. The Court therefore denies Defendant's Motion for Summary Judgment in order to allow this factual issue to proceed to trial.

Accordingly, it is hereby

ORDERED AND ADJUDGED that

1. Plaintiff's Motion for Partial Summary Judgment as to Liability (D.E. 28), filed on September 7, 2004, is **DENIED.**

2. Defendants' Motion for Summary Judgment (D.E. 36), filed September 11,

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[35] Because the Court has ruled that regulation 29 C.F.R. § 552.109(a) is a permissible construction of the companionship services statutory exemption, the Court does not address Defendant's arguments predicated on this Court finding the regulation to be invalid. (D. Mot. for Summ. J. at 8, n.3; see also Reply at 4-5.)

2004, is **DENIED.**

DONE AND ORDERED in Chambers at Miami, Florida this 29 day of June, 2005.

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

Cc: U.S. Magistrate Judge Theodore Klein

All counsel of record

03-21998-CIV-LENARD/KLEIN