No. 11-12277

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JEFFERY FAVORS,

Appellant,

v.

APPLE CREEK MANAGEMENT COMPANY, INC.,

Appellee.

On Appeal from the United States District Court
for the Northern District of Georgia

BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE*

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

DEAN A. ROMHILT
Attorney

U.S. Department of Labor
Office of the Solicitor
200 Constitution Avenue, N.W.
Room N-2716
Washington, D.C. 20210
(202) 693-5550

FAVORS v. APPLE CREEK MANAGEMENT, Case No. 11-12277

CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

To the Secretary's knowledge at this time, the following persons and entities have or may have an interest in the outcome of this appeal:

1. Apple Creek Management Company, Inc. (Appellee)
2. Brand, Jennifer S. (Associate Solicitor, U.S. Dep't of Labor)
3. Davidson, Fuller & Sloan, LLP (attorneys for Appellee)
4. Favors, Jeffery (Appellant)
5. Frieden, Paul L. (Counsel, U.S. Dep't of Labor)
6. Fuller, Stephen P. (attorney for Appellee)
7. Pannell, Jr., Charles A. (Judge, U.S. District Court for the Northern District of Georgia)
8. Romhilt, Dean A. (Attorney, U.S. Dep't of Labor)
9. Smith, M. Patricia (Solicitor, U.S. Dep't of Labor)
10. United States Department of Labor (*amicus curiae*)

/s/ Dean A. Romhilt
DEAN A. ROMHILT

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INTEREST AND AUTHORITY OF THE SECRETARY

The Secretary of Labor ("Secretary") files this brief as *amicus curiae* on behalf of the U.S. Department of Labor ("Department"), whom this Court invited to participate in this appeal. The Department has a strong interest in the proper judicial interpretation of the limitations on garnishment in Title III of the Consumer Credit Protection Act ("CCPA"), 15 U.S.C. 1671-1677, because the Secretary administers and enforces the CCPA, see 15 U.S.C. 1673(a), 1675, 1676. Moreover, the Department has issued guidance on the CCPA, including Wage and Hour Opinion Letters and Chapter 16 of its Field Operations

Handbook ("FOH"), and has a strong interest in ensuring that its guidance is given appropriate deference. In addition, the Department has a strong interest in the proper judicial interpretation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 201, et seq., because the Secretary administers and enforces the FLSA, see 29 U.S.C. 204, 211(a), 216(c), 217.

STATEMENT OF THE ISSUES

1. Whether tips, as paid under the circumstances of this case, should be included as "earnings" when calculating how much pay may be garnished in compliance with the CCPA's limitations on garnishment.

2. Whether the Department's position, as set out in its Opinion Letters and FOH as well as in this brief, is entitled to deference.

3. Whether Appellee Apple Creek Management Company, Inc. ("Apple Creek") violated the FLSA's minimum wage requirement as a result of violating the CCPA.[1]

STATUTORY BACKGROUND

1. The CCPA

The CCPA protects individuals who are subject to garnishment. See 15 U.S.C. 1671-1677. Congress enacted the

[1] In addition to the "earnings" and deference questions, this Court specifically invited the Department to address any other issues related to the FLSA claim by Appellant Jeffery Favors ("Favors") against Apple Creek.

protections in 1968 based on its findings that unrestricted garnishment "encourages the making of predatory extensions of credit," garnishment "frequently results in loss of employment by the debtor," and there were "great disparities" among states' garnishment laws which "destroyed the uniformity of the bankruptcy laws." 15 U.S.C. 1671(a).

The CCPA defines "garnishment" as "any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt." 15 U.S.C. 1672(c). It defines "earnings" as "compensation paid or payable for personal services, whether denominated as wages, salary, commission, bonus, or otherwise, and includes periodic payments pursuant to a pension or retirement program." 15 U.S.C. 1672(a). Earnings less deductions "required by law" are an employee's "disposable earnings." 15 U.S.C. 1672(b).

The CCPA provides two primary protections. First, it limits the amount that may be garnished per week to the lesser of 25 per cent of disposable earnings or the amount of disposable earnings which exceeds 30 times the FLSA's minimum wage. See 15 U.S.C. 1673(a). Thus, when an employer receives a garnishment order, the employer must determine the worker's disposable earnings in order to calculate how much pay, if any,

may be garnished in compliance with the CCPA's limitations.[2] Second, the CCPA prohibits employers from discharging an employee because "his earnings have been subjected to garnishment for any one indebtedness." 15 U.S.C. 1674(a).

2. The FLSA

The FLSA requires covered employers to pay non-exempt employees a minimum wage (currently $7.25) for each hour worked and overtime at a premium rate of one and one-half times the regular rate for each hour worked over 40 in a week. See 29 U.S.C. 206, 207. Some states prescribe a higher minimum wage as permitted by the FLSA, see 29 U.S.C. 218(a); however, Georgia does not. Section 3(m) of the FLSA defines "wages" for tipped employees as the cash wage paid directly by the employer (which must be at least $2.13 per hour) plus "an additional amount on account of the tips received by such employee" from customers equal to the difference between the cash wage paid and the minimum wage due. 29 U.S.C. 203(m).[3] The additional amount based on the employee's tips from customers that is defined by

[2] There are two exceptions to the limitations on garnishment. First, if the garnishment is "to enforce any order for the support of any person," different limitations apply that allow a higher percentage of disposable earnings to be garnished. 15 U.S.C. 1673(b)(2). Second, garnishments that seek to collect certain types of debts are not subject to the limitations. See 15 U.S.C. 1673(b)(1).

[3] The FLSA defines a "tipped employee" as "any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips." 29 U.S.C. 203(t).

section 3(m) as "wages" is known as the "tip credit" and may not exceed $5.12 per hour ($7.25 less $2.13). See id.; 29 C.F.R. 531.59(b). Tips received by an employee in excess of the tip credit amount (or all tips received by the employee if the employer does not take a tip credit and pays the full minimum wage itself) are not wages for purposes of the FLSA. See 29 U.S.C. 203(m); 29 C.F.R. 531.60 (tips received by the employee in excess of the tip credit "are not payments made by the employer to the employee as remuneration for employment within the meaning of the [FLSA]").

Section 3(m) thus permits an employer to satisfy its FLSA minimum wage obligation by paying a tipped employee a direct wage of at least $2.13 per hour and taking a tip credit based on the tips received by the employee from customers. See 29 U.S.C. 203(m).[4] The amount of the tip credit "may not exceed the value of the tips actually received by an employee" and equals the difference between the direct cash wage paid by the employer and the minimum wage due. Id. The employer must pay additional cash wages to the employee up to the minimum wage due if the tips actually received by the employee plus the cash wage paid fall short of the minimum wage due. See 29 C.F.R. 531.59(b). And if a tipped employee works overtime, section 3(m)'s

[4] Several states prohibit employers from taking tip credits to satisfy state minimum wage obligations; however, Georgia does not prohibit employers from taking tip credits.

definition of "wages" means that the tipped employee's regular rate (to calculate the premium rate due for the overtime) includes cash wages paid directly by the employer plus the amount of any tip credit taken – but not the value of any tips received in excess of the tip credit. 29 U.S.C. 203(m). "Any tips received by the employee in excess of the tip credit need not be included in the regular rate. Such tips are not payments made by the employer to the employee as remuneration for employment within the meaning of the [FLSA]." 29 C.F.R. 531.60.

SUMMARY OF ARGUMENT

The CCPA's definition of "earnings" reaches compensation from employers to workers for personal services performed. See 15 U.S.C. 1672(a) (defining "earnings" as "compensation paid or payable for personal services . . ."). Each example of "earnings" in the definition is a payment by employers to their workers. See id. Tips, on the other hand, are gratuities from customers that are presented to a tipped employee as a matter of custom and not because of an obligation or any personal services relationship between the customer and the employee. Accordingly, the CCPA generally excludes tips from "earnings."

The CCPA's definition of "earnings" does, however, include "wages," 15 U.S.C. 1672(a), and wages for tipped employees are defined by the FLSA to include the amount of any tip credit claimed by the employer but not any tips received by the

employee in excess of the tip credit amount, see 29 U.S.C. 203(m). Thus, both the cash wage paid directly by the employer plus any tip credit claimed by the employer, but not any tips received by the employee in excess of the tip credit amount, should be included as "earnings" when calculating how much to garnish in compliance with the CCPA's limitations.

The Department addressed this precise issue in a December 5, 1979 Opinion Letter, in which it determined that the employer's direct wage payment and the amount of any tip credit — but not any tips in excess of the tip credit — are included when calculating the disposable earnings subject to the CCPA's garnishment limitations. The Department's position in this Opinion Letter, its additional guidance, and this amicus brief should be given deference. See Skidmore v. Swift & Co., 323 U.S. 134, 65 S. Ct. 161 (1944).

In this case, because Apple Creek included all of Favors' tips as earnings (as opposed to including only the tip credit amount) when calculating the amount of his pay to garnish, Apple Creek necessarily garnished from his pay an amount that exceeded what the CCPA permits. Apple Creek's CCPA violation resulted in an FLSA violation. Specifically, Apple Creek paid Favors at an FLSA minimum wage rate; only the direct cash wage paid and the tip credit are wages for purposes of the FLSA. See 29 U.S.C. 203(m). Apple Creek may not credit the amount that it garnished

in excess of what the CCPA permits toward its FLSA minimum wage obligation to Favors. See 29 C.F.R. 531.39(b). Thus, the amount that Apple Creek garnished in excess of what the CCPA permits was an improper deduction from Favors' pay for purposes of the FLSA and resulted in a violation of the FLSA's minimum wage requirement.

ARGUMENT

I. ALTHOUGH THE CCPA GENERALLY EXCLUDES TIPS FROM EARNINGS, THE AMOUNT OF ANY TIP CREDIT IS INCLUDED IN EARNINGS WHEN CALCULATING HOW MUCH PAY MAY BE GARNISHED

A. The CCPA Generally Excludes Tips From Earnings.

The CCPA's definition of "earnings" does not reach all compensation or income, but instead reaches just "compensation paid or payable for personal services." 15 U.S.C. 1672(a). "There is every indication that Congress, in an effort to avoid the necessity of bankruptcy, sought to regulate garnishment in its usual sense as a levy on periodic payments of compensation needed to support the wage earner and his family on a week-to-week, month-to-month basis." Kokoszka v. Belford, 417 U.S. 642, 651, 94 S. Ct. 2431, 2436 (1974) (income tax refund is not "earnings" under CCPA). "It is clear, then, both from the language of the statute, and the legislative intent, that 'earnings' means periodic payments of compensation and does not pertain to every asset that is traceable in some way to such

compensation." In re Kokoszka, 479 F.2d 990, 997 (2d Cir. 1973) (internal citations omitted), aff'd, 417 U.S. 642, 94 S. Ct. 2431 (1974); see U.S. v. Cooper, No. 02-40069-SAC, 2006 WL 3512936, at *5-6 (D. Kan. Nov. 1, 2006) (lump settlement not "earnings" under CCPA; lump sum was not received "as part of a regularly issued paycheck or pursuant to any routine expectation for compensation for services"); In re Welty, 217 B.R. 907, 910-11 (D. Wyo. 1998) (accounts receivable of business not "earnings" under CCPA).

By defining "earnings" as "compensation paid or payable for personal services," 15 U.S.C. 1672(a), "earnings" reach payments by employers to their workers in exchange for the work they perform. Indeed, there must be a personal services relationship between the payor and the payee for the compensation paid to be earnings under the CCPA. See id. "An interpretation of the [CCPA] which limits its application to employers . . . is consistent with the congressional purposes evident on the face of the [CCPA] and from the legislative history." Usery v. First Nat'l Bank of Ariz., 586 F.2d 107, 110 (9th Cir. 1978). In finding that the CCPA does not apply to non-employer garnishees, the Ninth Circuit further noted that the CCPA is concerned with "preserving the stability of the employer-employee relationship in the face of the garnishment." Id.

Moreover, the types of payments that the CCPA expressly identifies as "earnings" — wages, salary, commissions, bonuses, and periodic pension and retirement payments, 15 U.S.C. 1672(a) — are payments made by employers to their workers. Yet, there are even some payments by employers to their workers that are not "earnings." For example, a lump sum severance payment may not be "earnings." See Aetna Cas. & Sur. Co. v. Rodco Autobody, 965 F. Supp. 104, 109 (D. Mass. 1996); Pallante v. Int'l Venture Invs., Ltd., 622 F. Supp. 667, 668-69 (N.D. Ohio 1985) ("The determinative factor in deciding whether severance pay is subject to the [CCPA] is whether the monies are received in periodic payments. The fact that a severance payment is made in a lump sum places it outside the [CCPA].").

In addition, by using "withheld" in the definition of "garnishment," 15 U.S.C. 1672(c) ("any legal or equitable procedure through which the earnings of any individual are required to be withheld for payment of any debt"), an amount must be in the employer's possession and payable by it to be considered "earnings" (one can withhold only something that is already in its possession). See Hodgson v. Christopher, 365 F. Supp. 583, 587 (D.N.D. 1973) ("withheld" means possession by the employer; whenever wages "remain in the possession of the employer, they are 'withheld' within the context of the [CCPA]").

Tips, unlike employer-paid compensation, are gratuities presented by customers. The Department has described tips as follows:

> A tip is a sum presented by a customer as a gift or gratuity in recognition of some service performed for him. It is to be distinguished from payment of a charge, if any, made for the service. Whether a tip is to be given, and its amount, are matters determined solely by the customer, who has the right to determine who shall be the recipient of the gratuity.

29 C.F.R. 531.52. Tips are not paid by employers, and employers generally do not have control over tips.[5] Tips are paid by customers, and the customers have no personal services relationship with the tipped employees (the tipped employees provide personal services to their employer, a restaurant in this case). Significantly, customers have *no obligation* to provide a tip or otherwise pay the tipped employees. Moreover, tips are not included in the non-exhaustive list of payments that the CCPA expressly identifies as "earnings." See 15 U.S.C. 1672(a). In fact, tips are different in kind from those payments that are identified as "earnings" by the CCPA. As discussed supra, the identified payments are payments made by an employer to its workers for work performed, see id. — not gratuity payments made by third-parties.

[5] Even if tips are pooled, the employer must still pay out the full amount of tips received to the tipped employees participating in the tip pool. See 29 C.F.R. 531.52, 531.54.

For the foregoing reasons, the CCPA is properly interpreted to exclude tips, as broadly understood, from "earnings." In this case, Apple Creek thus violated the CCPA by including *all* of Favors' tips as earnings to calculate the amount of his pay to garnish.

B. Because Earnings Include "Wages," the Amount of Any Tip Credit Is Included in Earnings When Calculating How Much Pay May Be Garnished.

The CCPA expressly includes "wages" as "earnings" without defining "wages." 15 U.S.C. 1672(a). It is telling, however, that Congress expressly included "wages" in the CCPA's definition of "earnings." Id.; Pub. L. 90-321, tit. III, § 302(a), 82 Stat. 146, 163 (1968). Just two years prior, Congress had amended the FLSA's definition of "wages" for tipped employees to permit employers to claim a tip credit and include the amount of the tip credit as "wages." See 29 U.S.C. 203(m); Pub. L. 89-601, tit. I, § 101(a), 80 Stat. 830, 830 (1966). Thus, because any tip credit claimed is wages for purposes of the FLSA, a tipped employee's earnings when calculating the amount that the CCPA permits to be garnished necessarily includes the tip credit amount. Therefore, when determining a tipped employee's earnings to calculate the amount to garnish

under the CCPA, the employer must include both its direct wage payments and the amount of any tip credit claimed.[6]

The Department's position that any tip credit amount is included in a tipped employee's earnings to calculate the amount of pay that the CCPA permits to be garnished is particularly informed by its experience and responsibility for enforcing the CCPA. See 15 U.S.C. 1676.[7] For example, failing to include the tip credit in a tipped employee's earnings to calculate the amount of pay that the CCPA permits to be garnished would in effect immunize from garnishment tipped employees whose employers claim a tip credit. Because the FLSA permits employers to pay tipped employees a direct cash wage of as low as $2.13 per hour and to claim a tip credit to satisfy their minimum wage obligations, such tipped employees would almost never reach the threshold of $217.50 in weekly disposable earnings imposed by the CCPA for garnishment. In this case, Apple Creek paid Favors $3.13 per hour or $125.20 for a 40-hour week. Failing to include the tip credit that Apple Creek

[6] For purposes of this calculation, a tipped employee's earnings under the CCPA will be the FLSA minimum wage in states like Georgia that do not have a higher minimum wage, given that the amount of the tip credit is capped by section 3(m) of the FLSA at the difference between the minimum wage and the cash wage paid directly by the employer.

[7] The Department's enforcement of the CCPA includes receiving and seeking to resolve complaints that allege violations of the CCPA, as well as responding to inquiries and providing guidance regarding the CCPA.

claimed ($4.12 per hour) would result in Favors' not reaching the CCPA's threshold of $217.50 in weekly disposable earnings and thus not having any pay to garnish. Such a result would be contrary to the purpose of the CCPA; although the CCPA limits garnishment, it permits "'the continued orderly payment of consumer debts.'" Kokoszka, 417 U.S. at 651, 94 S. Ct. at 2436 (quoting H.R. Rep. No. 1040, 90th Cong., 1st Sess., 21 (1967)).

Moreover, failing to include the tip credit in a tipped employee's earnings to calculate the amount of pay that the CCPA permits to be garnished would result in differing treatment among tipped employees. Tipped employees whose employer does not take a tip credit (whether because the employer chooses not to or because tip credits are prohibited by state law) must be paid at least the minimum wage directly by the employer and would have earnings of $290 for a 40-hour week (applying the FLSA minimum wage of $7.25). Such tipped employees would likely have disposable earnings in excess of $217.50 that could be garnished. If the tip credit is not included in earnings, then tipped employees whose employer takes a tip credit would have earnings under the CCPA equal to only their direct cash wages and, as explained supra, would have disposable earnings that would likely never reach the $217.50 required for garnishment to occur. Thus, tipped employees would be treated differently under the CCPA depending on whether their employer claimed a tip

credit and not for any reason actually pertinent to the CCPA, which contains no suggestion that whether a tipped employee is subject to garnishment depends on whether the employer claims a tip credit. Including the tip credit amount claimed in tipped employees' earnings to calculate the amount of pay to garnish avoids such unequal treatment.

In sum, a tipped employee's "wages" for purposes of the FLSA include the amount of any tip credit claimed. 29 U.S.C. 203(m). The CCPA includes "wages" as "earnings," 15 U.S.C. 1672(a), and including the amount of any tip credit as "wages" and therefore "earnings" when calculating the amount of pay to garnish under the CCPA results in the consistent treatment of "wages" whether the CCPA's restrictions on garnishment or the FLSA's minimum wage and overtime requirements apply. The Department's position thus harmonizes the two statutes' enforcement schemes. In this case, Apple Creek should have included the amount of the tip credit that it claimed to satisfy its minimum wage obligation to Favors — but not *all* of his tips — in his earnings when calculating the amount of his pay to garnish.

II. THE DEPARTMENT'S GUIDANCE SUPPORTS ITS POSITION, AND ITS GUIDANCE AND POSITION SHOULD BE ACCORDED DEFERENCE

The Department's December 5, 1979 Opinion Letter (copy attached as Exhibit A) directly addresses the issue raised by

this Court.[8] The Department stated in this Opinion Letter that the answer "depends on whether tips presented by third parties can be included in the definition of 'earnings' in [15 U.S.C. 1672]," which includes "wages." Noting that section 3(m) of the FLSA defines "wages" for tipped employees as the employer's direct cash payment plus any tip credit claimed, the Department determined:

> Accordingly, since tips in such cases may be counted by an employer as wages paid to an employee, it is our opinion that a tipped employee's pay to which the garnishment restrictions are to be applied is the sum of the claimed tip credit and cash wage paid by the employer minus all deductions required by law to be withheld.

Thus, the employer's direct wage payment and any tip credit claimed (which together equal the minimum wage) are both included when calculating the disposable earnings subject to the CCPA's garnishment limitations. The Department further determined that any tips in excess of the tip credit claimed by the employer are not included when calculating the disposable earnings subject to the garnishment limitations:

> Conversely, we do not find any legal basis to support a view that tips (those in excess of the amount need[ed] to satisfy the employer claimed tip credit, or where no tip credit is claimed by the employer) paid directly to the employees by third persons who are strangers to the employment relationship between an employee and the employer are within the definitions of "earnings." Tips

[8] The December 5, 1979 Opinion Letter is not available on Westlaw, and neither the parties in their briefs nor this Court in its request to the Department to file an amicus brief mentioned it.

> which are in the hands of the employee, cannot be withheld by the employer. Tips in such cases are characterized as gifts. Hence, they would then not be "earnings" paid to the employee by an employer. Therefore, such tips received by an employee whether in cash or on charge card slips would not be subject to a garnishment levy.

In sum, the Department has directly addressed the issue presented by this Court.

The Department generally addressed the treatment of tips under the CCPA in chapter 16 of its FOH, section 16a07 (copy attached as Exhibit B; available at http://www.dol.gov/whd/FOH/FOH_Ch16.pdf, pg. 5). Section 16a07 is entitled "Applicability of the CCPA to tips and gratuities" and states:

> The application of garnishments to tips and gratuities under the CCPA is similar to the treatment of their ownership under the FLSA.
>
> (a) Bona fide tips are not subject to the provisions of the CCPA. A garnishment is inherently a procedural device designed to reach and sequester earnings held by the garnishee (usually the employer). Tips paid directly to an employee by a customer are not "earnings" within the meaning of sec 302 of the CCPA, since they do not pass to the employer. This includes gratuities transferred free and clear to an employee at the direction of credit customers who add tips to the bill.
>
> (b) Service charges added to a customer's bill constitute "earnings" within the meaning of sec 302 when passed on to the employee. As such, they are subject to the provisions of the CCPA. The following examples demonstrate the point.
>
> (1) A restaurant charges a customer 15% of the check, as a service charge, and in turn pays this amount to the server (debtor). Since this is an automatic charge, there is no gratuity by the customer. The compensation passed from the employer (garnishee) to the server.

> (2) The employment agreement is such that the customer's tips belong to the employer and must be credited or turned over to the employer.

Notably, section 16a07 begins by cross-referencing the FLSA. It addresses generally whether the employer or the employee owns and possesses tips. To flesh out the ownership issue, section 16a07 distinguishes between tips paid directly to the employee by the customer and service charges added and collected by the employer and then paid by the employer to the employee. This section is focused on tips paid directly to the employee by the customer and does not address tip credits. Because tips belong to the employee, this section states that tips are not earnings that may be taken from the employee pursuant to garnishment. Section 16a07 is thus concerned that bona fide tips — as opposed to service charges — be fully retained by the employee and be shielded from garnishment.[9]

In the December 9, 1970 Opinion Letter (copy attached as Exhibit C; available at 1970 WL 26464), the Department responded to the question "whether proper credits for tips, meals and lodging are included in the computation of an employee's earnings under the [CCPA]." The Department stated that

> tips are generally not considered within the meaning of the term "earnings" because garnishment is inherently a procedural device to reach assets in the hands of the

[9] There is no dispute in this case that Apple Creek actually garnished only from the direct cash wages that it paid to Favors.

> garnishee, here the employer. Typically, tips are paid by a third person to an employee, and do not pass through the hands of the employer.

The Department further stated that service charges imposed by a restaurant and in turn paid to the employee, as distinguished from tips, would be earnings. Although the question presented by the December 9, 1970 Opinion Letter is closely related to the issue presented by this Court, the Department's response at that time focused on whether tips belong to the employer or the employee. Unlike the 1979 Opinion Letter, the 1970 Opinion Letter does not specifically address the tip credit vis-à-vis garnishment.

The Department's position interpreting the CCPA vis-à-vis the FLSA, as set forth in the guidance that it has issued and in this amicus brief, should be given Skidmore deference. See 323 U.S. at 140, 65 S. Ct. at 164 (Department's rulings, interpretations, and opinions, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance"); see also Kasten v. Saint-Gobain Performance Plastics Corp., 131 S. Ct. 1325, 1335 (2011) (citing Skidmore and giving "a degree of weight" to the Department's views about the meaning of the FLSA's anti-retaliation provision in light of Congress' delegation to the Department of the power to enforce the FLSA); Christensen v.

Harris Cnty., 529 U.S. 576, 587, 120 S. Ct. 1655, 1663 (2000) (Department's statutory interpretations in formats such as opinion letters, enforcement guides, and agency manuals are "entitled to respect" under Skidmore to the extent they have the "power to persuade"); Dade Cnty., Fla. v. Alvarez, 124 F.3d 1380, 1385 (11th Cir. 1997) (citing Skidmore and stating that the Department's opinion letters provided "valuable guidance" to judging facts of case). Skidmore deference is appropriate because the Department's position is informed by its experience in enforcing the CCPA, is consistent with its December 5, 1979 Opinion Letter, ensures that the CCPA and the FLSA are administered harmoniously, and reflects a thorough and reasoned consideration of the issue.

III. APPLE CREEK'S CCPA VIOLATION MEANS THAT IT FAILED TO PAY FAVORS THE FLSA MINIMUM WAGE

As explained supra, Apple Creek violated the CCPA by including all of Favors' tips — as opposed to just the amount of the tip credit that it claimed — in his earnings when calculating the amount of his pay to garnish under the CCPA's limitations. By including all of Favors' tips as earnings when calculating the amount of his pay to garnish, Apple Creek necessarily garnished from his pay an amount that exceeded what the CCPA permits. The district court held that the CCPA does not provide a private cause of action for improper garnishments,

and it declined to imply a private cause of action. Even if that holding is correct and Favors has no remedy under the CCPA, determining whether Apple Creek garnished an excessive amount from Favors' pay in violation of the CCPA is necessary to evaluate the merits of his FLSA minimum wage claim.

Specifically, Favors' wages from Apple Creek under the FLSA equaled the FLSA minimum wage ($7.25 hourly). See 29 U.S.C. 203(m). His wages under the FLSA included the cash wage received directly from Apple Creek ($3.13 hourly) plus the tip credit amount that it claimed, which cannot be more than the difference between the FLSA minimum wage and the direct cash wage paid to him ($4.12 hourly). See id. Any tips received by Favors in excess of the tip credit amount were not wages for purposes of the FLSA. See id.; 29 C.F.R. 531.60. Because Favors was paid the FLSA minimum wage, any improper deductions from his pay by Apple Creek necessarily resulted in an FLSA minimum wage violation.

Deductions from Favors' minimum wage pay that were required by law for the benefit of a third person (such as proper garnishments) would not reduce his pay below the minimum wage because "payment to the third person for the benefit and credit of the employee will be considered equivalent, for the purposes of the [FLSA], to payment to the employee." 29 C.F.R. 531.39(a). However, when deductions made pursuant to

garnishment orders exceed the amount permitted by the CCPA, "the excess will not be considered equivalent to payment of wages to the employee for purpose of the [FLSA]." 29 C.F.R. 531.39(b). Thus, when an employer withholds from an FLSA minimum wage employee's pay an amount in excess of what the CCPA permits, the employer necessarily fails to pay the minimum wage required by the FLSA. See id. Here, Apple Creek withheld from Favors' pay (which was at the FLSA minimum wage rate) an amount in excess of what the CCPA permits, and that excessive withholding was an improper deduction from his pay that resulted in an FLSA minimum wage violation. The amount of the minimum wage violation is determined on a week-by-week basis; in each week in which Apple Creek garnished amounts from Favors' pay, the unpaid minimum wage due Favors under the FLSA would be the amount that it garnished in excess of what the CCPA permits. Apple Creek would thus be liable to Favors for back pay in an amount equal to the total unpaid minimum wages plus any other remedies available under the FLSA. See 29 U.S.C. 216(b).

Finally, Apple Creek asserts that, even if it violated the CCPA, it paid Favors the FLSA minimum wage because the wages that it paid him directly, plus all of the tips that he received less the amounts that it garnished, still resulted in an hourly rate that was higher than the FLSA minimum wage. Even if true, this assertion ignores section 3(m)'s mandate that wages under

the FLSA include direct cash wages plus any tip credit claimed, but not any additional tips received. See 29 U.S.C. 203(m); 29 C.F.R. 531.59(b), 531.60. Apple Creek cannot include all of Favors' tips as wages and assert that it paid him the minimum wage required by the FLSA; only the tip credit amount is wages. See 29 U.S.C. 203(m). Consistent with section 3(m), Favors' wages from Apple Creek were the FLSA minimum wage less the amount that Apple Creek garnished in excess of what the CCPA permits. Apple Creek thus violated the FLSA's minimum wage obligation notwithstanding its assertion.

CONCLUSION

For the foregoing reasons, the Secretary respectfully requests that the Court: (1) rule, consistent with the Department's position, that although the CCPA generally excludes tips from earnings, the amount of any tip credit claimed is included in earnings when calculating how much pay may be garnished; (2) give Skidmore deference to the Department's position and its guidance that supports the position; and (3) find that Apple Creek's CCPA violation necessarily resulted in its paying Favors less than the minimum wage required by the FLSA.

Respectfully submitted,

M. PATRICIA SMITH
Solicitor of Labor

JENNIFER S. BRAND
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

/s/ Dean A. Romhilt
DEAN A. ROMHILT
Attorney
U.S. Department of Labor
Office of the Solicitor
200 Constitution Avenue, N.W.
Room N-2716
Washington, D.C. 20210
(202) 693-5550

CERTIFICATE OF COMPLIANCE

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

(1) was prepared in a monospaced typeface using Microsoft Office Word 2003 utilizing Courier New 12-point font containing no more than 10.5 characters per inch, and

(2) complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(d) because it contains 5,329 words, excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

/s/ Dean A. Romhilt
DEAN A. ROMHILT

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief for the Secretary of Labor as *Amicus Curiae* was served this 25th day of June, 2012, via the Court's ECF system and by pre-paid overnight delivery, on the following:

Jeffery Favors
2133 Lawrenceville Suwanee Road
Suite 12
Suwanee, GA 30024

Stephen P. Fuller
Davidson, Fuller & Sloan, LLP
10475 Medlock Bridge Road, Suite 820
Johns Creek, GA 30097-4437

/s/ Dean A. Romhilt
DEAN A. ROMHILT

EXHIBIT A

EXHIBIT B

EXHIBIT C