No. 08-15290
No. 08-15154

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PIERRE C. BIEN-AIME,
Plaintiff-Appellant,
v.
NANAK'S LANDSCAPING, INC.,
Defendant-Appellee.

and

RESIAS POLYCARPE And REYNOLD SULLY,
Plaintiffs-Appellants,
v.
E & S LANDSCAPING SERVICE, INC. and
ERNST MAYARD,
Defendants-Appellees.

On Appeals from the United States District Court
For the Southern District of Florida

BRIEF FOR THE SECRETARY OF LABOR AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS

CAROL DeDEO
Deputy Solicitor for
National Operations

STEVEN J. MANDEL
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

MARY J. RIESER
Attorney

U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave., N.W.
N-2716
Washington, D.C. 20210
(202) 693-5555

Bien-Aime v. Nanak's Landscaping, Inc.
No. 08-15290 and
Polycarpe et al. v. E&S Landscaping Service, Inc., et al.
No. 08-15154

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rules 26.1-1 through 26.1-3, the undersigned attorney for the Secretary of Labor certifies that the following is a list of the trial judge(s), and all attorneys, persons, associations or persons, firm, partnerships or corporations that have an interest in the outcome of this case:

1. Bien-Aime, Pierre C., Appellant
2. Burr & Smith, LLP, Counsel for Appellant
3. DeDeo, Carol, Deputy Solicitor for National Operations, U.S. Department of Labor
4. E&S Landscaping Service, Inc., Appellee
5. Feingold, Barry G., Esq., Counsel for Appellees
6. Frieden, Paul L., Counsel for Appellate Litigation, U.S. Department of Labor
7. Garre, Gregory F., United States Solicitor General
8. Glasser, Boreth & Kleppin, P.A., Counsel for Appellees
9. Jacob, Gregory F., Solicitor of Labor
10. King, Honorable James L., United States District Judge
11. Kleppin, Chris, Esq., Counsel for Appellees
12. Lenard, Honorable Joan A., United States District Judge

13. Longoria, Marguerite M., Esq., Counsel for Appellants
14. Mandel, Steven J., Associate Solicitor of Labor, U.S. Department of Labor
15. Mayard, Ernst, Appellee
16. Nanak’s Landscaping, Inc. Appellee
17. Polycarpe, Resias, Appellant
18. Remer & Georges-Pierre, PLLC, Counsel for Appellants
19. Remer, Jason S., Esq., Counsel for Appellants
20. Rieser, Mary J., Attorney, U.S. Department of Labor
21. Smith, Sam J., Esq., Counsel for Appellants
22. Sully, Reynold, Appellant

Date:_____

_____
Mary J. Rieser
Attorney

U.S. Department of Labor
Washington, D.C. 20210

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BRIEF FOR THE SECRETARY OF LABOR AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

Pursuant to Federal Rule of Appellate Procedure 29, the Secretary of Labor ("Secretary") submits this brief as *amicus curiae* in support of Plaintiffs-Appellants. The district courts in the above-captioned cases incorrectly held that enterprise coverage under the Fair Labor Standards Act ("FLSA" or "Act"), *see* 29 U.S.C. 203(s)(1)(A)(i), does not extend to two landscaping companies, irrespective whether employees of those companies handled tools, office supplies, or landscaping

materials from out of state in the course of performing their jobs. The 1974 amendments to the FLSA added companies that have employees handling "materials" (in addition to "goods") that have moved in interstate commerce to the definition of an "enterprise engaged in commerce or in the production of goods for commerce."[1] The 1974 legislative history clearly shows that, by adding the word "materials" to the statute, Congress intended to expand enterprise coverage to companies that have employees who handle equipment from out of state that is used in the employer's business; this legislative history is dispositive. By failing to take into account these 1974 amendments and the accompanying legislative history, the district courts construed FLSA enterprise coverage too narrowly.[2]

---

[1] "'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." 29 U.S.C. 203(b).

[2] Three other decisions have been issued granting summary judgment to employers on substantially similar issues in the United States District Court for the Southern District of Florida, and are on appeal to the Eleventh Circuit. *See Milbourn v. Aarmada Protections Systems 2000, Inc.,* No. 08-60269, -- F. Supp.2d --, 2008 WL 5044550 (S.D. Fla. Nov. 20, 2008); *Morales v. M&M Painting and Cleaning Corp.*, No. 07-23089, 2008 WL 4372891 (S.D. Fla. Sept. 24, 2008); and *Lamonica v. Safe Hurricane Shutters, Inc.,* 578 F. Supp.2d 1363 (S.D. Fla. 2008). These cases have not been consolidated with the instant case. There is a fourth related decision granting summary judgment to the employer -- *Velasquez v. All Florida Security Corp.*, No. 07-23159, 2008 WL 5232916 (S.D. Fla. Dec. 15, 2008) -- which has not yet been appealed to the Eleventh Circuit.

INTEREST OF THE SECRETARY OF LABOR

The Secretary, who administers and enforces the FLSA, *see* 29 U.S.C. 204(a),(b), 216(c), 217, has a substantial interest in the correct construction of section 3(s)(1)(A)(i) of the Act, 29 U.S.C. 203(s)(1)(A)(i), because establishing enterprise coverage, a threshold requirement, is central to achieving FLSA compliance. Indeed, an affirmance by this Court of the district court decisions could lead to the exclusion of employees in low wage jobs (often performed for smaller businesses that might be viewed as "local" business establishments, such as restaurants, day care providers, and janitorial and landscaping firms) from the protection of the FLSA in this Circuit. Moreover, the decisions on appeal are contrary not only to dispositive legislative history and to appellate and other district court precedent, but to Department of Labor opinion letters interpreting enterprise coverage to apply to businesses that have employees who, in the course of performing their jobs, handle materials that have moved in interstate commerce.

STATEMENT OF THE ISSUE

Whether businesses whose employees, in the course of performing their jobs, use supplies or tools that have traveled in interstate commerce are "enterprises engaged in commerce" as defined in section 203(s)(1)(A)(i) of the FLSA.

STATEMENT OF THE CASE

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

The plaintiff employees in *Polycarpe and Bien-Aime* filed, in relevant part, complaints alleging violations of the overtime provisions of the FLSA, 29 U.S.C. 207. In *Polycarpe*, the employer, E & S Landscaping, filed a Motion for Summary Judgment on July 7, 2008, alleging that it was a local business and, therefore, did not fall within enterprise coverage under the FLSA.[3] Judge James Lawrence King of the United States District Court for the Southern District of Florida issued a decision on August 15, 2008, granting summary judgment in favor of E & S Landscaping, and dismissing the complaint. In *Bien-Aime*, Nanak's Landscaping filed a Motion for Summary Judgment on May 10, 2008 asserting, in relevant part, that enterprise coverage did not apply because it is a local business. On August 12, 2008, Judge Joan A. Lenard of the United States District Court for the Southern District of Florida issued a decision granting summary judgment in favor of Nanak's Landscaping and dismissing the complaint. The employees in both cases appealed the decisions to this Court. This Court consolidated the two cases while they were on appeal on November 10, 2008.

[3] The parties, in both cases, stipulated that the annual gross volume of sales or business done was not less than $500,000. See 29 U.S.C. 203(s)(1)(A)(ii).

B. Statement of Facts

E & S Landscaping Service, Inc. operates a landscaping business in the State of Florida. Order Granting Defendant's Motion for Summary Judgment ("*Polycarpe* Order") at 7.[4] Its employees worked as laborers performing duties which included weeding, edging, blowing, raking, and pulling weeds. *Id.* at 2. Employees who were not employed as laborers worked in the office providing clerical support. *Id.* The employees maintain that in performing their jobs they used materials -- e.g., weed eaters, edgers, trimmers, lawn mowers, blowers, chain saws, trucks, tractors, pencils, paper, and pens -- that had traveled in interstate commerce. Appellants' Brief at 6-8.[5] The company purchased gasoline, which had been transported interstate; used

[4] The *Polycarpe* decision is reported at 572 F. Supp.2d 1318 (S.D. Fla. Aug. 15, 2008). The *Bien-Aime* decision is reported at 572 F. Supp.2d 1312 (S.D. Fla. Aug. 12, 2008).

[5] It is our understanding that the employers did not assert or substantiate on summary judgment that the materials used by the employees did not travel in interstate commerce. In response, employees showed, at minimum, that some of the tools and equipment that they used were purchased from national chains, such as Office Depot, Home Depot, and Staples. Thus, even if the record does not definitely establish that the tools and supplies used by employees in these cases traveled in interstate commerce prior to their being used by the employees during the course of their jobs, the employees' factual submissions to that effect appear to be sufficient to survive summary judgment. *See Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, __ S. Ct. __, 2009 WL 160424, at *2 n.1 (U.S. Jan. 26, 2009) (at the summary judgment stage, a court must view all facts and draw all reasonable inferences in favor of the nonmoving party).

credit cards, which were issued by companies that had out-of-state headquarters; used bank accounts, which were administered by companies that maintained out-of-state headquarters; and had an internet website that could be viewed by out-of-state individuals. *Polycarpe* Order at 6.[6]

Nanak's Landscaping, Inc. is a corporation operating a landscaping business in the State of Florida. Order Granting Defendant's Motion for Summary Judgment and Closing Case (*Bien-Aime* Order) at 2. The plaintiff-employee in question was a laborer who performed landscaping work, including weeding, edging, leaf and grass blowing, raking, and pulling weeds, using tools and equipment purchased in Florida. *Id.* at 2, 7. The employees maintain that in performing their jobs they used materials -- e.g., lawn mowers, weed eaters, trimmers, chain saws, trucks, trailers, edger blades, and pencils, paper, and pens -- that had traveled in interstate commerce. Appellants' Brief at 5-6. The company maintains an internet site, places orders for paper supplies over the telephone using 1-800 numbers, uses a FAX machine, uses credit cards to purchase gasoline and equipment, accepts checks for its services, and has

[6] In this amicus brief, the Secretary addresses only whether the handling of office supplies, tools, and landscaping equipment that have moved in interstate commerce as "materials" would be sufficient to establish enterprise coverage.

a line of credit with a bank (Wachovia). *Bien-Aime* Order at 2-3.

C. The Decisions of the District Court

1. In holding (on summary judgment) that there was no enterprise coverage under the FLSA, the district court in *Polycarpe v. E & S Landscaping Service, Inc.* examined the language of the FLSA at 29 U.S.C. 203(s)(1)(A)(i) and, focusing solely on "goods" moved in interstate commerce, concluded that no enterprise coverage existed because the office supplies, tools, and landscaping equipment utilized by the employees were purchased from a local retail store, and therefore had "come to rest -- i.e., any journey of an interstate nature had ended -- and were then utilized to transact the landscaping business, which was entirely local in nature." *Polycarpe* Order at 5. The district court also rejected the employees' argument that the company was an enterprise "engaged in commerce" because it purchased gasoline, which had been transported interstate, used credit cards and bank accounts with banks with out-of-state headquarters, and advertised on the internet. *Id.* at 6. Finally, the district court determined that the use of telephones, including cell phones, for making out-of-state calls did not satisfy the "engaged in commerce" requirement, because "they were not regular and recurrent activities." *Id.* at 7. The court concluded that "[t]he fact that the Defendant Company

provided services of an exclusively local nature is dispositive." *Id.* at 8.

2. In *Bien-Aime v. Nanak's Landscaping, Inc.,* the district court concluded that the undisputed facts alleged by plaintiff regarding the activities of the landscaping business were insufficient to raise a genuine issue of material fact on the issue of enterprise coverage, because Nanak's "business involves the landscaping of properties solely with[in] the State of Florida and does not affect interstate commerce in the manner intended to trigger application of the FLSA." *Bien-Aime* Order at 11. The district court further concluded that "were it to rely on the facts argued by Plaintiff in support of enterprise coverage (and ignore that, for all intents and purposes, Defendant is a local landscaping business) to find that Section 207(a) applies in this case, the application of the FLSA would be nearly limitless in this modern era, where nearly every business (especially those grossing over $500,000) advertises its business on the internet, uses telephones, fax machines, and credit cards issued from national banks in the operation of its business, and maintains bank accounts with national banks for business-related financial transactions." *Id.* Finally, the district court relied on *Walling v. Jacksonville Paper Co.*, 317 U.S. 564, 571 (1943), a case that was decided prior to the introduction of enterprise coverage in 1961, in concluding that

"[a]pplication of the FLSA in this case would clearly undermine the intent of Congress in enacting the FLSA, which was to leave local business to the protection of the states." *Id.* at 11-12 (internal quotation marks omitted).

SUMMARY OF ARGUMENT

The courts in these cases clearly erred in their analysis of "enterprise" coverage. They applied a concept of enterprise coverage that failed to acknowledge the 1974 FLSA amendments, which modified the definition of "enterprise engaged in commerce" to include companies that have employees handling out-of-state "materials," in addition to "goods" (which has a limiting statutory definition, *see* 29 U.S.C. 203(i)). The courts below thus disregarded the clear intent of Congress in adding the word "materials," as evinced by the unusually explicit legislative history that accompanied the 1974 amendments to the FLSA. According to that unambiguous legislative history, the words "or materials" were added to ensure that the FLSA applied to an enterprise that, in the course of its business activities, "consumed" materials that had moved in interstate commerce. The courts' analyses in these two cases also diverge from the rulings of every appellate court of which we are aware that has analyzed enterprise coverage since the FLSA was amended in 1974, including the decision of the former Fifth Circuit in *Dunlop v. Industrial America Corp.*, 516

F.2d 498, 501-02 & n.8 (1975), which clearly points to the broader definition of an "enterprise engaged in commerce" adopted by Congress when it added the word "materials" in 1974. The decisions further ignore the Wage and Hour Division's interpretation as set forth in its opinion letters, which are entitled to deference.

ARGUMENT

AN "ENTERPRISE ENGAGED IN COMMERCE" UNDER SECTION 203(s)(1)(A)(i) OF THE FLSA INCLUDES EMPLOYEES HANDLING "MATERIALS" THAT HAVE MOVED IN INTERSTATE COMMERCE, AND THUS ENCOMPASSES BUSINESSES WHOSE EMPLOYEES, IN THE COURSE OF PERFORMING THEIR JOBS, USE SUPPLIES OR TOOLS THAT HAVE TRAVELED IN INTERSTATE COMMERCE

1. Prior to 1961, the application of the FLSA was based solely on whether an individual employee was covered, i.e., was "engaged in commerce or the production of goods for commerce."[7] The FLSA Amendments of 1961 substantially broadened the Act by adding enterprise coverage. Thus, after 1961, the FLSA also applied to all non-exempt employees of an enterprise engaged in commerce or in the production of goods for commerce. Fair Labor Standards Amendments of 1961, secs. 2(c), 5(b), and 6(a), §§

[7] Section 7(a)(1) of the FLSA states that "[N]o employer shall employ any of his employees who in any workweek is . . . employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed." 29 U.S.C. 207(a)(1).

3(r) and (s), 6(b), and 7(a), 75 Stat. 65, 65-67, 69; *see Tony & Susan Alamo Foundation v. Sec'y of Labor*, 471 U.S. 290, 295 n.8 (1985) ("Enterprise coverage substantially broadened the scope of the Act to include any employee of an enterprise engaged in interstate commerce, as defined by the Act.").

Section 3(s)(1) of the FLSA, as amended in 1974, provides, in relevant part:

> "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise that –
>
> (A)(i) has employees engaged in commerce or in the production of goods for commerce, *or* that has employees handling, selling, or otherwise working on goods *or materials* that have been moved in or produced for commerce by any person . . . .

29 U.S.C. 203(s)(1)(A)(i) (emphases added).[8] The FLSA Amendments of 1974 thus explicitly prescribe that enterprise coverage includes the handling by employees of out-of-state goods *or materials* consumed in the course of the employer's business.[9] As

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[8] Prior to the 1974 amendments, section 3(s)(1)(A)(i) stated:

> "Enterprise engaged in commerce or in the production of goods for commerce" means an enterprise which has employees engaged in commerce or in the production of goods for commerce, including employees handling, selling, or otherwise working on *goods* that have been moved in or produced for commerce by any person . . . .

29 U.S.C. 203(s)(1)(A)(i) (emphasis added).

[9] "'Using' goods or materials which have moved in interstate commerce constitutes a 'handling' within the meaning of 29 U.S.C. 203(s)." *Donovan v. Pointon*, 717 F.2d 1320 1322-23 (10th

stated in the committee report:

> In addition to expanding coverage, the bill amends section 3(s) by changing the word "including" to "or" to reflect more clearly that the "including" clause was intended as an additional basis of coverage. This is, in fact, the interpretation given to the clause by the courts. The bill also adds the words "or materials" after the word "goods" to make clear the Congressional intent to include within this additional basis of coverage the handling of goods consumed in the employer's business, as, *e.g.*, the soap used by a laundry. The "handling" language was added based on a retrospective view of the effect of substandard wage conditions.
>
> . . . .
>
> Although a few district courts have erroneously construed the "handling" clause as being inapplicable to employees who handle goods used in their employer's own commercial operations, the only court of appeals to decide this question, *Brennan v. Dillion*, 483 F.2d 1334 (C.A. 10), and the majority of the district courts have held otherwise and the addition of the words "and materials" will clarify this point.

S. Rep. No. 690, 93rd Cong., 2d Sess. (1974), p. 17 (citations omitted). Thus, absent the addition of the word "materials," enterprise coverage arguably would not have encompassed handling out-of-state materials (such as tools or office supplies) used in the course of one's business. *See* 29 U.S.C. 203(i) (defining "goods" as specifically "not includ[ing] goods after their delivery into the actual physical possession of the ultimate consumer [of those goods]"). By adding "materials," however,

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Cir. 1983) (citing *Marshall v. Brunner*, 668 F.2d 748 (3d Cir. 1982); *Donovan v. Scoles*, 652 F.2d 16 (9th Cir. 1981)).

Congress left no doubt that it intended to include within the scope of enterprise coverage the activities of employees using *materials* (such as tools or office supplies) that have previously traveled in interstate commerce. Because the legislative history is dispositive, a court need go no further in its analysis of the meaning of enterprise coverage as it relates to handling materials that have moved in interstate commerce. *See Davis v. Southern Energy Homes, Inc.*, 305 F.3d 1268, 1278 (11th Cir. 2002) (it is consistent with *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984), to use legislative history as a primary tool to decipher congressional intent).

2. In addition to failing to take into account this dispositive legislative history, the courts below also incorrectly relied on *Thorne v. All Reservation Servs., Inc.*, 448 F.3d 1264 (11th Cir. 2006), an *individual* coverage case, instead of looking to FLSA *enterprise* decisions issued by courts of appeals since the 1974 FLSA amendments. Those appellate decisions have consistently interpreted the amended statutory provision at 29 U.S.C. 203(s)(1)(A)(i) to cover businesses that satisfy the annual dollar volume threshold and whose employees handle (and do not necessarily resell) materials that have traveled in interstate commerce. Thus, in *Dole v. Odd Fellows Home Endowment Board,* 912 F.2d 689, 693-95 (4th Cir. 1990), the

court of appeals held that an institution whose employees prepared and served food to residents, washed residents' laundry, and cleaned and performed maintenance using goods and materials that had traveled in interstate commerce was covered by the FLSA. In *Brock v. Hamad,* 867 F.2d 804, 805, 807-08 (4th Cir. 1989), where it was it was stipulated that the employer (who managed and controlled various rental properties) had bought goods that had been in interstate commerce and were used during the course of the employees' employment, the appellate court concluded that "it is well established that local business activities fall within the FLSA when an enterprise employs workers who handle goods or materials that have moved or have been produced in interstate commerce." The Fourth Circuit in *Hamad* specifically rejected the employer's argument that relied on section 3(i)'s exclusion from the definition of "goods" those goods delivered "into the actual physical possession of the ultimate consumer," 29 U.S.C. 203(i); rather, the court stated that "[w]hen section 203(i) is read in conjunction with Section 203(s), which covers 'employees handling, selling, or otherwise working on goods or materials,' it seems that defendant's argument must fail." *Id.* at 807. In *Donovan v. Pointon*, 717 F.2d 1320, 1322-23 (10th Cir. 1983), the court held that a real estate business whose employees performed land development work using various types of construction machinery, including earth

movers, bulldozers, scrapers, tractors, and chain saws manufactured out of state was a covered enterprise. And, in *Marshall v. Brunner*, 668 F.2d 748, 751-52 (3d Cir. 1982), the court of appeals held that a business that used trucks, truck bodies, tires, batteries, accessories, containers, shovels, brooms, oils, and gas manufactured out of state and moved in interstate commerce was covered by the FLSA.

Although there is no published Eleventh Circuit decision directly analyzing enterprise coverage in light of the 1974 FLSA amendments, in *Dunlop v. Industrial America Corp.,* 516 F.2d 498 (5th Cir. 1975), the former Fifth Circuit recognized their import.[10] There, the court stated:

> We think Congress did not intend by such indirect means and with no clear statement of legislative intent to expand coverage of the Fair Labor Standards Act [by the 1961 and 1966 amendments to the Act] to every enterprise in the nation doing business of $250,000 a year . . . . Congress recently said it thought that was the effect of its prior amendments, and amended the act [in 1974] to achieve that result. But that amendment is prospective only and Congress' failure to make clear its intentions in 1961 and 1966, if such they were, do not enable us to achieve what Congress itself did not do until 1974.

Id. at 501-02. Significantly, in describing those 1974 amendments, the court stated:

> This latest amendment leaves the definition of goods intact but *circumvents* it by a broader definition of "enterprise

[10] *See Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (all Fifth Circuit decisions issued prior to October 1, 1981 are binding in the Eleventh Circuit).

> engaged in commerce." The new definition includes enterprises with "employees handling, selling, or otherwise working on goods *or materials* that have been moved in . . . commerce . . ."

Id. at 502 n.8 (emphasis added).[11]

3. In contrast to the decisions in the cases on appeal here, other district court judges within the Eleventh Circuit (including two judges in the Southern District of Florida) have reached conclusions more in line with the appellate courts that have addressed enterprise coverage since 1974, concluding that "local" businesses whose employees handle materials that have moved in interstate commerce are covered by the FLSA if they

[11] In an unpublished decision that is not inconsistent with the other cited appellate decisions, this Court concluded that there was no enterprise coverage based on the employee's loading of supplies and materials during the course of his construction work, because the plaintiff "offers no specific argument or any evidence that any of the goods purchased from Home Depot had been moved in or produced for interstate commerce." *Scott v. K.W. Max Investments, Inc.*, 256 Fed. Appx. 244, 248 (11th Cir. 2007). Similarly, in another unpublished decision, this Court recently concluded that a lawn maintenance company was not a covered enterprise under the FLSA, stating that "[e]ven assuming arguendo that it is true that the vast majority of businesses grossing over $500,000 are involved in interstate commerce, this does not mean that the district court should presume that Appellees are engaged in interstate commerce without any evidence presented by Appellants." *Sandoval v. Florida Paradise Lawn Maintenance, Inc.*, 2008 WL 5250274, at *2 (11th Cir. Dec. 18, 2008). While citing to the district court's decision in Polycarpe (without any discussion of the 1974 amendments' addition of the word "materials"), this Court affirmed the district court's granting of summary judgment for the employer because of a failure on the part of the employees to make a sufficient factual showing -- "Appellants did not produce any evidence to dispute Appellees' affidavit stating that all of the products used in their businesses were purchased and produced locally." *Id.* at *3.

meet the dollar volume threshold. Thus, in *Exime v. E.W. Ventures, Inc.*, ___ F.Supp.2d ___, 2008 WL 5381294 (S.D. Fla. Dec. 23, 2008), the district court denied summary judgment to the employer, a commercial dry cleaning business, on the issue of enterprise coverage. The court determined that "Defendants purchased essential cleaning, pressing, and delivery equipment manufactured outside Florida state, which Defendants' employees used, on a daily basis, to operate the dry cleaning business." *Exime*, 2008 WL 5381294, at *6. Significantly, the district court stated that the Senate Report accompanying the 1974 FLSA amendments "demonstrates a clear Congressional intent to expand enterprise jurisdiction to companies whose employees handle interstate materials used in the employer's own business, *regardless of whether that employer is the ultimate consumer of those materials.* In other words, the additional term 'materials' broadens FLSA jurisdiction by substantially constricting the 'ultimate consumer' defense now asserted by Defendants." *Id.* at 4. The court specifically stated that "the plain meaning of 'materials' is not limited by an ultimate consumer exclusion." *Id.* at 5. Finally, noting the centrality of the 1974 legislative history, the district court concluded that "the enterprise commerce test, quite simply, embraces all businesses whose employees regularly handle materials previously moved across inter-state lines." *Id.*

In another recent decision from a district court in the Southern District of Florida, enterprise coverage was found to exist in similar circumstances. *See Galdames v. N & D Investment Corp.*, 2008 WL 4372889 (S.D. Fla. September 24, 2008). The defendant, a commercial laundry business, had employees who were engaged in washing, drying, pressing and folding linens and clothing, using commercial washing machines, thermal ironers, bleach, and other chemicals and supplies. The business satisfied the dollar volume requirement, but argued that it was not an enterprise because it did not have two or more employees engaged in commerce. The district court ruled against the defendant and held that enterprise coverage applied. The court eschewed reliance on *Scott v. K.W. Max Investments*, 256 Fed. Appx. 244 (11th Cir. Oct. 2, 2007) (unpublished) (*see* n.11, *supra*), and *Lamonica v. Safe Hurricane Shutters, Inc.*, No. 07-61295-CIV-COHN (S.D. Fla. September 23, 2008), stating that those cases "rely specifically on an analysis of 'goods' purchased or moved in interstate commerce. Neither [case] recognize[s] or analyze[s] the significance of the addition of the words 'or materials' to Section 203(s)." *Galdames*, 2008 WL 4372889, at *4. Similarly, the district court determined that *Thorne v. All Restoration Services* was inapplicable because the issue in that case was individual coverage. *Id.* Moreover, the district court observed that "while for individual coverage an

employee may be required to be directly participating in the actual movement of persons or things in interstate commerce, for enterprise coverage to exist the requirement is less strict, only necessitating a showing that two or more employees handled or worked on goods *or materials* that *have been moved* in interstate commerce." *Id.* (emphases in original) (internal quotation marks and citations omitted).

Likewise, in *Marshall v. Whitehead*, 463 F. Supp. 1329 (M.D. Fla. 1978), the district court concluded that a local fill dirt operation was a covered enterprise under the FLSA where the employees handled petroleum products, tires, and mechanical parts to maintain trucks and equipment. The court stated:

> It appears clear to the Court that, regardless of the conflict which has arisen among the courts on the question of enterprise coverage, prior to the 1974 amendments to the Act, based solely upon the handling by employees of articles used in an employer's own business which have traveled interstate, there almost certainly can be no question as to the intended scope of Section 3(s) so as to include such employees after the passage of the said amendments.

Id. at 1337 (footnote omitted). The district court in *Whitehead* acknowledged the significance of the former Fifth Circuit's decision in *Dunlop v. Industrial America Corp.*, *supra*:

> Impliedly, . . . the Fifth Circuit [in *Dunlop v. Industrial America Corp.*] indicated that its interpretation of the effect of the amended Section 3(s) would extend coverage of the Act to employers such as the defendants herein, who conduct a wholly intrastate business, but whose employees, in the course of that business, use and handle any products, including gasoline, oil, and tires in operating

> and maintaining equipment and trucks, which products have moved in interstate commerce, even though the products are purchased locally.

Id. at 1338; *see Daniel v. Pizza Zone Italian Grill & Sports Bar, Inc.,* 2008 WL 793660, at *1 (M.D. Fla. Mar. 24, 2008) ("[E]nterprise coverage embraces virtually every business whose annual gross volume of sales or business is $500,000 or more . . . .") (footnote omitted); *Goldberg v. Graser*, 365 S.2d 770, 772-73 (Fla. Dist. Ct. App. 1979) (an apartment complex that employed maintenance workers who handled materials that had traveled in interstate commerce was covered by the FLSA).

4. District courts in other circuits consistently have found enterprise coverage where a business satisfies the annual dollar volume threshold and has employees who handle materials that have moved in interstate commerce, even if the materials were purchased within the state and were consumed by the business itself. Thus, in *Archie v. Grand Central Partnership, Inc.*, 997 F. Supp. 504, 530 (S.D.N.Y. 1998), the district court stated:

> The bill [in 1974] also adds the word 'or materials' after the word 'goods' to make clear the Congressional intent to include within this additional basis of coverage the handling of goods consumed in the employer's business, as, e.g., the soap used by a laundry . . . . Since 1974, courts facing the issue presented here have unanimously come to the same conclusion: local business activities fall within the reach of the FLSA when an enterprise employs workers who handle goods or materials that have moved or been produced in interstate commerce.

In *Dole v. Bishop,* 740 F. Supp. 1221, 1225-26 (S.D. Miss. 1990), the district court stated that "[t]his [1974] amendment adding the words 'or materials' leads to the result that virtually every enterprise in the nation doing the requisite dollar volume of business is covered by the FLSA." The district court in *Marshall v. Davis,* 526 F. Supp. 325, 327-28 (M.D. Tenn. 1981), concluded that an apartment complex is an enterprise where its maintenance employees handled goods and materials, such as light bulbs, cleaning chemicals, paints, floor finishing chemicals, replacement lock sets, panes of glass, replacement parts for stoves, and refrigerators, that have moved in interstate commerce. The district court's language is instructive:

> The term "goods" is no longer the sole frame of reference in addressing the issue of employee handling of items moved in interstate commerce. The seemingly redundant addition of the phrase "or materials" to [section] 203(s) unequivocally clarified Congressional intent to broaden the scope of enterprise coverage. The term "materials" is neither burdened nor restricted with the "ultimate consumer" exemption found in the "goods" definition.

Id. at 328. In *Marshall v. Baker*, 500 F. Supp. 145, 149 (N.D.N.Y. 1980), the district court concluded that "[b]oth on its face and when read in conjunction with the pertinent legislative history, then, the definition of 'enterprise engaged in commerce or in the production of goods for commerce' would seem to include a local business whose employees use materials which have at some point moved in interstate commerce." And, in

Brennan v. Jaffey, 380 F. Supp. 373, 379 (D. Del. 1974), the district court held that an apartment complex whose maintenance personnel used supplies which had moved in interstate commerce was a covered enterprise. The district court in *Jaffey* reviewed the 1974 legislative history and concluded: "The 1974 Report, . . ., is of considerable significance in ascertaining what was intended when the amendment became effective May 1, 1974, by inserting the word 'materials' in § 203(s). It clearly discloses a legislative purpose to make the minimum wage, overtime and record keeping provisions of the Act applicable to employers, such as the defendant, after its effective date." *Id.* at 379.

5. Finally, the Wage and Hour Division has issued opinion letters stating that enterprise coverage includes employees who have handled materials in the course of performing their duties that, although purchased locally, have moved in interstate commerce. Thus, a 1982 Wage and Hour Opinion Letter, 1982 WL 213484 (April 21, 1982), states that a plumbing contractor involved in construction and reconstruction activities would be a covered enterprise if it employed two plumbers who handled such materials as fixtures, tools, furnaces, air conditioners, piping, solder, joint compound, valves, and pumps that have been

moved in commerce.[12] And, in another Wage and Hour Opinion Letter, 1997 WL 958726 (January 22, 1997), the agency concluded that enterprise coverage applied to the fast food restaurants in question if employees used any products, supplies, or equipment that had moved interstate, e.g., "the coffee served, cleaning supplies utilized, cooking equipment . . . operated." Although these opinion letters do not specifically refer to the 1974 legislative history, they clearly are based on the 1974 statutory amendment to the definition of "enterprise engaged in commerce." To the extent that this Court believes that it is necessary to go beyond the dispositive legislative history, the opinion letters are entitled to deference under *Skidmore v. Swift*, 323 U.S. 134 (1944). *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

[12] Although the word "goods" is used in the opinion letter, it is the handling of "materials" that seems to be indicated.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court decisions.

Respectfully submitted,

CAROL DeDEO
Deputy Solicitor for
National Operations

STEVEN J. MANDEL
Associate Solicitor

PAUL L. FRIEDEN
Counsel for Appellate Litigation

_____
MARY J. RIESER
Attorney
U.S. Department of Labor
Office of the Solicitor
200 Constitution Ave., N.W.
N-2716
Washington, D.C. 20210
(202) 693-5555

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 _____ 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: _____

_____
Mary Rieser
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of January, 2009, 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 _____ day of January, 2009:

Sam J. Smith
Marguerite M. Longoria
Burr & Smith, LLP
442 W. Kennedy Blvd.
Suite 300
Tampa, FL 33606-1495

Chris Kleppin
Barry G. Feingold
Glasser, Boreth & Kleppin, P.A.
8751 W. Broward Blvd.
Suite 105
Plantation FL 33324-2630

Jason S. Remer
Remer & Georges-Pierre, PLLC
100 Biscayne Blvd.
Suite 2800
Miami, FL 33132-2305

_____
Mary J. Rieser
Attorney