No. 11-3069

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

HILDA L. SOLIS,
SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
Plaintiff-Appellee,

v.

HILL COUNTRY FARMS, INC., d/b/a
HENRY'S TURKEY SERVICES;
KENNETH HENRY, individually,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Iowa

BRIEF FOR THE SECRETARY OF LABOR

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

This case arises under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201, et seq. The Secretary of Labor, United States Department of Labor, filed a complaint against Hill Country Farms, Inc., d/b/a Henry's Turkey Services, Inc. and Kenneth Henry, asserting willful violations of the minimum wage, overtime, and record keeping provisions of the statute, and seeking liquidated damages. The United States District Court for the Southern District of Iowa granted summary judgment in favor of the Secretary of Labor, ruling that Hill Country Farms willfully violated the Fair Labor Standards Act and awarding back wages and liquidated damages. The district court's decision is before this Court on appeal.

The Secretary of Labor believes that oral argument is not necessary in this case because the question whether Hill Country Farms, Inc., d/b/a Henry's Turkey Services, Inc. and Kenneth Henry are employers who willfully violated the FLSA may be decided on the briefs.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

Cases--Continued: Page

Cases--Continued: Page

Cases--Continued: Page

Federal Statutes:

Federal Statutes--continued: Page

Federal Regulations:

Federal Rules:

Federal Rules--continued: Page

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STATEMENT OF JURISDICTION

The district court had jurisdiction over this case pursuant to 29 U.S.C. 217 of the Fair Labor Standards Act of 1938 ("FLSA" or "Act"), and pursuant to 28 U.S.C. 1331 (federal question) and 28 U.S.C. 1345 (suits commenced by an agency or officer of the United States).

This Court has jurisdiction over this appeal pursuant to 28 U.S.C. 1291 (final decisions of district courts). On April 21, 2011, the district court issued a ruling granting partial summary judgment in favor of the Plaintiff-Appellee Secretary of

Labor ("Secretary") and against Defendants-Appellants Hill Country Farms, Inc., d/b/a Henry's Turkey Services, and Kenneth Henry (collectively, "Defendants"), concluding that they willfully violated the FLSA. *See* JA 352-72.[1] On July 18, 2011, in response to a motion by the Secretary, the court entered a Consent Injunction permanently enjoining and restraining Defendants from violating the provisions of 29 U.S.C. 215(a)(2) (minimum wage and overtime) and 215(a)(5) (recordkeeping) of the FLSA. *See* JA 373-76.[2] On July 20, 2011, the district court entered final judgment against Defendants. *See* JA 377. Defendants filed a timely Notice of Appeal on September 15, 2011, within 60 days of the entry of judgment. *See* JA 378; *see also* Fed. R. App. P. 4(a)(1)(B).

STATEMENT OF THE ISSUES WITH APPOSITE CASES

1. Whether the district court correctly concluded that Hill Country Farms and Kenneth Henry were employers within the meaning of the FLSA, jointly and severally liable for back wages

[1] References to the Joint Appendix filed with this Court by Defendants on November 29, 2011 will be denoted "JA" followed by a page number; references to the Defendants' brief on appeal will be to "App. Br." followed by a page number.

[2] The district court had set a bench trial for May 16, 2011 to decide the remaining issues. The Consent Injunction, however, disposed of the remaining issues by resolving the question of future compliance and dismissing, with prejudice, allegations relating to six supervisory employees.

due the mentally disabled employees who worked in the West Liberty Foods' turkey processing plant and at the bunkhouse.

The apposite statutory provisions concerning this issue are 29 U.S.C. 203(d), (e), and (g). The four most apposite cases are *Falk v. Brennan*, 414 U.S. 190 (U.S. 1973); *Darby v. Bratch*, 287 F.3d 673 (8th Cir. 2002); *Herman v. RSR Sec. Servs. Ltd.*, 172 F.3d 132 (2d Cir. 1999); and *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962 (6th Cir. 1991).

2. Whether the district court correctly concluded that Hill Country Farms and Kenneth Henry willfully violated the FLSA when, in the face of two prior Wage-Hour investigations and their promises of future compliance, they continued to violate the Act.

The apposite statutory provision concerning this issue is 29 U.S.C. 255(a). The four most apposite cases are *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128 (1988); *Jarrett v. ERC Properties, Inc.*, 211 F.3d 1078 (8th Cir. 2000); *Herman v. Palo Group Foster Home, Inc.*, 183 F.3d 468 (6th Cir. 1999); and *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962 (6th Cir. 1991).

STATEMENT OF THE CASE

A. Nature of the Case and Course of Proceedings

On November 17, 2009, the Secretary brought an action against Defendants in the United States District Court for the Southern District of Iowa, to enjoin them from violating the

FLSA's minimum wage, overtime, and recordkeeping provisions (sections 6, 7, 11(c), 15(a)(2), and 15(a)(5)) pursuant to 29 U.S.C. 217, and to recover back pay due their mentally disabled employees, together with an equal amount as liquidated damages pursuant to 29 U.S.C. 216(c) of the FLSA. *See* JA 005-017. Following discovery, the Secretary filed a motion for partial summary judgment on December 17, 2010. *See* JA 023-67. By decision dated April 21, 2011, United States District Court Judge Harold D. Vieter granted partial summary judgment for the Secretary, concluding that Defendants willfully violated the FLSA and awarding back wages for a three-year period and an equal amount in liquidated damages. *See* JA 352-72. The district court entered a Consent Injunction on July 18, 2011, disposing of the remaining issues. *See* JA 373-76. On July 20, 2011, the district court granted final judgment in favor of the Secretary and against Defendants, finding them jointly and severally liable for unpaid wages in the amount of $880,777.17, plus an equal amount in liquidated damages, for total damages of $1,761,554.34, plus post-judgment interest pursuant to 28 U.S.C. 1961. *See* JA 377. This appeal followed. *See* JA 378.

B. Statement of Facts[3]

1. Hill Country Farms, Inc., d/b/a Henry's Turkey Services, is a for-profit corporation located in Goldthwaite, Texas that was formed by merger and was involved in a variety of agricultural activities. *See* JA 354.[4] T. H. Johnson had owned and operated Hill Country Farms in the mid-1960s and employed mentally disabled men in the business; Kenneth Henry had been the owner of Henry's Turkey Services. *Id.* In 1972, the two companies merged; Henry has been a 50 percent owner and vice-president or president of Hill Country Farms since that time. *Id.*; JA 081-82, 085.[5] In the late 1970s, Henry and Johnson negotiated an agreement with Louis Rich Foods to supply mentally disabled workers to work at its turkey processing plant in West Liberty, Iowa. *Id.*; JA 094-95. In 1996, West Liberty Foods bought the turkey processing plant from Louis Rich Foods and

[3] The statement of facts is based on the district court's factual background, which is derived from facts that are either "not disputed or are [D]efendants' version of disputed facts." *See* JA 354; *see also* Fed. R. Civ. P. 56(a).

[4] It is undisputed that Hill Country Farms, Inc. is an enterprise engaged in commerce within the meaning of the FLSA. *See* 29 U.S.C. 203(r); *see also* JA 007-08; JA 072-74 (Defendant's Response to Plaintiff's Requests for Admissions).

[5] The company has consistently used the names Hill Country Farms, Henry's Turkey Services, and Hill Country Farms, Inc., d/b/a Henry's Turkey Services interchangeably. *See* JA 354; *see also* JA 082, 085, 143 (Deposition of Kenneth Henry). For the sake of clarity, references to the company itself in this brief will be to Hill Country Farms.

entered into a contract with Hill Country Farms, designating it as "the contractor," and requiring it to provide an adequate number of "contractor's employees" and "at least two crew chiefs" to work in the turkey processing plant. *See* JA 355. West Liberty Foods informed Hill Country Farms of the positions it needed to fill on the processing line and Hill Country Farms assigned the disabled men to fill the positions. *Id.* This contract continued from year to year with minor amendments. *Id.*; JA 096.

2. Hill Country Farms was the caretaker of the mentally disabled men and referred to them as "the boys." *See* JA 354. While the disabled men were working at the turkey processing plant, including during the relevant time period from November 16, 2006 through February 7, 2009, they lived in a converted school house in Atalissa, Iowa, known as the bunkhouse, which Hill Country Farms leased from the city for $600 per month. *See* JA 354-55. Hill Country Farms designated three disabled men to work at the bunkhouse, where they did housekeeping chores and prepared meals, and assigned the other disabled employees to work in the turkey processing plant. *See* JA 355.

Hill Country Farms' crew chiefs transported the mentally disabled workers to and from the plant in Hill Country Farms' vans and supervised their work on the processing line. *See* JA 358. The disabled men worked on the turkey plant processing

line in the evisceration department and commingled with West Liberty Foods' non-disabled employees. *See* JA 357-58. The mentally disabled men arrived at the plant no later than 4:45 a.m., went to the locker room to change into the required gear, and proceeded downstairs to the processing line where they were expected to be waiting at 5:00 a.m. in time for the first turkey to come down the line. *See* JA 358. The disabled employees' line time started at 5:00 a.m. when the processing line started, and ended when the processing line stopped. *Id.* The workers had a one-half hour unpaid lunch break. *Id.* When the line stopped, the disabled workers returned to the locker room, removed the required items, dressed, returned to the van, and were driven back to the bunkhouse. *Id*. Hill Country Farms' crew chiefs filled out the time records for the disabled employees who worked at both the turkey plant and the bunkhouse. *See* JA 358. The crew chiefs sent the records to the main corporate office in Goldthwaite, Texas, where they were transcribed onto Hill Country Farms' monthly time sheets. *Id*.[6]

3. Henry and T. H. Johnson negotiated with West Liberty Foods, determining the rate of pay for the disabled employees who worked at the turkey processing plant. *See* JA 356. West

[6] Each time sheet was divided into sections for "Actual Income," "in kind Room & Board," and "in kind Care." *See* JA 358. The amounts were the same for each disabled worker. *Id*.

Liberty Foods paid Hill Country Farms for the plant workers' labor on a weekly basis, multiplying the number of turkeys processed by the number of disabled men working on the processing line, and multiplying the sub-total by the rate per turkey to determine the total compensation. *Id*. Hill Country Farms deposited the West Liberty Foods' check at a bank in Goldthwaite, Texas into an account entitled "Henry's Turkey Services - Iowa." *Id*. Hill Country Farms received over $500,000 per year in 2006, 2007, and 2008 from West Liberty Foods for work performed at the turkey processing plant by the mentally disabled workers. *See* JA 357.[7]

During the period from November 16, 2006 to February 7, 2009, Hill Country Farms paid the disabled men $65.00 per month in cash wages (which the men received after Hill Country Farms helped the men cash their pay checks), and reported that amount to government agencies as wages. *See* JA 110-14, 357, 359. It prepared timesheets and pay checks for the disabled employees, withheld Social Security and Medicare taxes, completed W-2 Wage and Tax statements for each worker, and listed the disabled

[7] This finding is supported by the undisputed Declaration of Allen Hansen, the Corporate Controller for West Liberty Foods, who provided computer print-outs of the weekly amounts paid by West Liberty Foods as well as the total amounts paid for the time period from November 12, 2006 to February 6, 2009. *See* JA 215-227; *see also* JA 072-73.

workers as employees on documents submitted to the Texas Workforce Commission's Unemployment Tax Services. *See* JA 357.[8]

4. Hill Country Farms' accountant and corporate secretary, Robert Berry, calculated Hill Country Farms' claimed costs of "Room and Board" and "in kind Care." *See* JA 358.[9] Berry made one yearly computation for both categories and applied the amounts to all disabled workers. *See* JA 358-59. For example, in calculating room and board, Berry relied on Hill Country Farms' end of year financial statements, extrapolated and added all costs that he decided related to room and board, divided the sum by 12 months and then divided the sub-total by the number of disabled workers. *Id.* The recorded room and board calculation would appear on each worker's pay stub as part of total wages during the following year. *See* JA 359. The same amount was charged as room and board for each disabled worker every month for the year. *Id.* Berry used the same method to determine the amount of "in kind Care" reported on each disabled worker's pay stub as wages. *Id*. Hill Country Farms' charge for room and board and in-kind care increased every year, but the disabled workers' cash wages never rose above $65.00 per month. *See* JA

[8] These findings are supported by Kenneth Henry's Deposition testimony, Jane Ann Johnson's Deposition testimony, and the Defendant's Admissions. *See* JA 111-14; JA 200-02; and JA 073.

[9] Robert Berry's Deposition testimony supports these findings. *See* JA 158-71.

359. For instance, in 2007, Hill Country Farms charged each disabled employee $426.28 per month for room and board; in 2008, the company increased the amount to $487.00 per month. *See* JA 357.

5. Henry talked on the phone to Hill Country Farms' co-owner T. H. Johnson from one to ten times per week. *See* JA 356. In 2005, when Johnson became ill (prior to the relevant time period in this case), Henry became more actively involved in the business in Iowa, including handling the financial responsibilities of the operation, scheduling the crew chiefs at the bunkhouse, and approving the hiring of workers in Iowa. *Id.* Between 2006 and February 7, 2009, Henry increased his involvement in running the bunkhouse, more closely supervising crew chiefs, at one point directing crew chief Randy Neubauer to cut the hours that supervisors were working at the bunkhouse. *Id*. Henry made several trips to Iowa in 2007 and 2008 to more closely oversee operations. *Id.* In 2008, Henry and Jane Ann Johnson, T.H. Johnson's wife, decided to close the bunkhouse and cease providing workers to West Liberty Foods. *See* JA 360. Henry informed West Liberty Foods of the decision and determined when each of the workers would stop working. *Id.* Henry also

replaced crew chiefs Randy and Dru Neubauer with Warren Davis to oversee shutting down the bunkhouse. *Id.*[10]

6. Jane Ann Johnson was Hill Country Farms' co-owner and corporate treasurer during the period from November 16, 2006 through February 7, 2009. *See* JA 356. Jane Johnson performed the company's duties relating to the Social Security ("SS") and Supplemental Security Income ("SSI") benefits of the disabled men. *Id.* Hill Country Farms was the designated representative payee of the SS and SSI benefits for each disabled man. *See* JA 357. The monthly benefits were directly deposited into each worker's individual bank account at the Mills County State Bank in Goldthwaite, Texas. *Id.* Each month, Jane Johnson wrote and signed checks from each disabled man's bank account made payable to Hill Country Farms to reimburse it for room and board. *Id.* In addition, Jane Johnson regularly wrote checks on each worker's account to reimburse Hill Country Farms for "ledger" expenses, including doctor's bills, clothing, entertainment, and spending money. *Id.* Jane Johnson maintained the check ledger. *Id.*[11]

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[10] Kenneth Henry's Deposition Testimony supports these findings and those in the preceding section. *See* JA 075-154.

[11] Jane Ann Johnson's Deposition testimony supports these findings. *See* JA 195-214.

7. The Department of Labor's Wage and Hour Division ("Wage-Hour") investigated Hill Country Farms on two prior occasions. *See* JA 359.[12] Wage-Hour conducted the first investigation in 1997 and found that Hill Country Farms had violated section 7 of the FLSA, 29 U.S.C. 207, by failing to compensate its mentally disabled employees at one and one-half times the regular rate of pay for hours worked over 40 in a work week. *Id*. In 2003, Wage-Hour investigated Hill Country Farms' pay practices for the period from 1999 through 2001. *Id.* Hill Country Farms was again found in violation of the overtime pay provisions of the FLSA by failing to properly compensate its disabled employees for hours worked over 40 in a work week. *Id.* After each investigation, Hill Country Farms paid the back wages and agreed to future compliance. *Id.* In 2003, Wage-Hour explained the requirements of the FLSA and provided Hill Country Farms with documents addressing records to be kept by employers, hours worked, overtime compensation, and section 3(m) (29 U.S.C. 203(m)) requirements, including the statutory section and regulations specifically covering section 3(m). *See* JA 359-60.[13]

[12] The undisputed Declaration of Michael Staebell, the District Director for the Wage-Hour office in Des Moines, Iowa supports these findings. *See* JA 298-301.

[13] Specifically, Wage-Hour provided Hill Country Farms with the following: (1) 29 C.F.R. Part 516, "Records To Be Kept By Employers," including 516.27, "'Board, lodging, or other facilities' under section 3(m) of the Act"; (2) 29 C.F.R. Part

The company, however, continued to use the formula it had set up years before to calculate wages. *See* JA 360.

8. Wage-Hour investigator Kevin O'Brien calculated the amount of minimum wage and overtime compensation that Hill Country Farms failed to pay its disabled workers, who worked at the turkey processing plant and the bunkhouse, beginning with the pay period ending on November 26, 2006 and finishing with the pay period ending on February 7, 2009. *See* JA 360-61.[14] The investigator based the hours worked each week by the disabled employees working at West Liberty Foods on the weekly line operating times. *Id*. He examined Hill Country Farms' time sheets to determine whether any employee was absent and, if so, subtracted those hours to reflect the actual hours worked each week by that employee. *See* JA 361. The investigator added 15 minutes of time to compensate for the time between 4:45 a.m. when the disabled workers arrived at the processing plant and donned their gear to the 5:00 a.m. time when the processing line

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778, "Overtime Compensation"; (3) 29 C.F.R. Part 785, "Hours Worked," which addresses what constitutes working time for purposes of minimum wage and overtime; (4) 29 C.F.R. Part 531, "Wage Payments Under the Fair Labor Standards Act," including specific regulations covering section 3(m); and (5) section 3(m) of the Act. *See* JA 359-60.

[14] The Declaration of Kevin O'Brien, a Wage-Hour investigator for over 35 years, supports these findings. *See* JA 232-38. Although Defendants disputed Wage-Hour's computations, they did not submit evidentiary material to establish a genuine issue of material fact. *See* JA 369-70.

started moving, because Hill Country Farms did not record that time. *Id*. For each week that a disabled worker worked 40 or fewer hours, the investigator multiplied the number of hours by the applicable federal minimum wage. *Id.* For work weeks where hours exceeded forty, the investigator multiplied the first forty hours by the applicable Iowa minimum wage, and multiplied hours in excess of forty by one and one-half times the Iowa minimum wage. *Id.* The investigator credited Hill Country Farms with $15.00 per week for each employee (the pro rated share of the $65.00 monthly wage that it had paid) to obtain the total weekly back wages due each employee who worked at the turkey processing plant. *Id.* The investigator similarly calculated the wages due the bunkhouse workers. *Id*. The investigator used the company's time sheets, when available, to determine the hours worked there. *Id.* For weeks where there were no time sheets, the investigator computed the work weeks based on forty hours. *Id.* The investigator determined that Hill Country Farms owed 31 disabled employees a total of $880,777.17 in unpaid minimum wage and overtime compensation covering a three-year period. *Id*.

C. The District Court's Decision

1. The district court first determined that Hill Country Farms and Henry were employers of the disabled workers within the meaning of section 3(d) of the FLSA. *See* JA 362-67; *see*

also 29 U.S.C. 203(d). The court rejected Hill Country Farms' argument that West Liberty Foods was the exclusive employer, observing that under the FLSA, employees may have more than one employer. *See* JA 363.

a. The district court concluded that Hill Country Farms was an employer of the disabled workers. *See* JA 363-64. Applying an "economic reality" test, the district court found that the undisputed facts demonstrated that Hill Country Farms "negotiated with West Liberty Foods to provide its workers" and, additionally, "negotiated the compensation rates with West Liberty Foods, took payments from it in exchange for the workers' labor," and "asserted control as their employer." *See* JA 364. The district court further found that "Hill Country Farms listed the workers as employees with the Texas Workforce Commission's Unemployment Tax Services, paid their Medicare and Social Security taxes, and submitted W-2 tax forms on their behalf. Moreover, defendant Henry, in his deposition, stated that Hill Country Farms was [the mentally disabled employees'] employer." *Id*. The court added that "Defendants offer no separate argument in respect to the bunkhouse workers, in effect conceding that they were [Hill Country Farms'] employees." *Id*.

b. The district court also concluded that Henry was an employer of the disabled workers, responsible for complying with

the FLSA. *See* JA 364-67.[15] In support of its conclusion, the court found:

> Henry was a significant owner of the company, holding 50% of its stock. He also had the power to control, and controlled, significant aspects of the corporation's day-to-day functions, having negotiated the compensation from West Liberty Foods and actively controlling the company's finances. He also made decisions in respect to scheduling at the bunkhouse, and after deciding to quit providing workers to West Liberty Foods he determined the order in which the plant workers would stop working there. Considering his stock ownership, his control over company finances, and his exercise of control over the operation's day-to-day functions, and despite living in Texas and delegating some aspects of the day-to-day functions of the company to other employees, Henry was an employer of the turkey plant and bunkhouse workers under the FLSA.

See JA 367.

2. The district court held that Hill Country Farms and Henry's violations were "willful," extending the statute of limitations from two to three years. *See* JA 368; *see also* 29 U.S.C. 255(a). In reaching its conclusion, the district court referred to the undisputed fact that Wage-Hour had investigated Hill Country Farms on two prior occasions, in 1997 and 2003, found it in violation of the FLSA's overtime pay provisions, obtained back wages, and received promises of future compliance

[15] Contrary to Defendants' statement on appeal, the Secretary did not seek to hold Jane Ann Johnson individually liable for the company's FLSA violations. Therefore, the district court appropriately did not address the question whether she was an employer under the Act.

from the company. *See* JA 368. Additionally, the district court considered that following its 2003 investigation, Wage-Hour had provided relevant materials to Hill Country Farms and explained how to comply with the FLSA's provisions. *Id.* The district court concluded that, despite Wage-Hour's guidance, Hill Country Farms did not change its pay practices. *Id*.

> Hill Country Farms, however, did not make changes to its wage formula. Every month, the company reimbursed itself for room and board from the employees' checking accounts funded by SS and SSI benefits. It also deducted room and board expenses from employees' wages, always reducing each employee's pay to the exact amount that would not decrease his SS or SSI benefits.

Id. Finally, the district court found that Henry was aware of Wage-Hour's investigations, its findings, and instructions for future compliance with the minimum wage, overtime, 3(m) credits, and recordkeeping requirements. *Id.* Thus, the district court concluded that "both defendants willfully violated minimum wage and overtime laws, and accordingly, the statutory limitations period is three years." *Id*.

3. The district court assessed liquidated damages against Hill Country Farms and Henry in an amount equal to the unpaid wages, pursuant to 29 U.S.C. 216(b). The court concluded, based on Wage-Hour's prior investigations and Hill Country Farms' failure to comply with the FLSA, that Defendants did not carry their burden of proving, pursuant to 29 U.S.C. 260, that they

acted in good faith and had reasonable grounds to believe that they were not in violation of the Act. *See* JA 369.[16]

4. The district court rejected Defendants' challenge to the accuracy of the back wages, as well as their allegations that Wage-Hour's accounting methodology was improper. The court observed that Defendants "provide no explanation as to why the accounting is improper." *See* JA 370. In this regard, the district court's local rule requires a non-movant opposing a motion for summary judgment to support its denial of a statement of undisputed material facts by citing to the record. *Id.*[17] The

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[16] On appeal, Defendants state in their Summary and Waiver of Oral Argument (App. Br. at ii) that they request review of the district court's ruling on their liability for liquidated damages, but did not identify liquidated damages as an issue or present any argument concerning liquidated damages in their appellate brief. Having offered no argument as to why the district court's ruling was in error, Defendants have waived any challenge to the court's holding on liquidated damages. *See, e.g., Chay-Velasquez v. Ashcroft*, 367 F.3d 751, 756 (8th Cir. 2004) ("Since there was no meaningful argument on this claim in his opening brief, it is waived."); *see also Jackson v. United Parcel Serv., Inc.*, 643 F.3d 1081, 1088 (8th Cir. 2011).

[17] Local Rule 56.b provides, in relevant part:

> A response to an individual statement of material fact that is not expressly admitted must be supported by references to those specific pages, paragraphs, or parts of the pleadings, depositions, answers to interrogatories, admissions, exhibits, and affidavits that support the resisting party's refusal to admit the statement, with citations to the appendix containing that part of the record. The failure to respond, with appropriate citations to the appendix, to an individual statement of material fact constitutes an admission of that fact.

district court stated that on January 13, 2011, it "ordered defendants to amend their response to the Secretary's statement of undisputed material facts" to comply with the local rule, and warned that "failure to do so would constitute an admission of all facts in the Secretary's statement of material facts." *Id*. When Defendants failed to provide references to the appendix in support of their challenge to the Secretary's facts concerning the Wage-Hour investigator's accounting, the district court concluded that "Defendants, by failing to respond with appropriate citations to the appendix, have thereby admitted that the Secretary's accounting is correct." *See* JA 370.[18]

The district court also determined that Hill Country Farms was not entitled to credit for room and board pursuant to 29 U.S.C. 203(m), which includes as wages "the reasonable cost . . . to the employer of furnishing [the] employee with board, lodging, or other facilities, . . . customarily furnished by such employer to his employees . . . ." The regulations provide that the reasonable cost cannot exceed the actual cost to the employer. *See* 29 C.F.R. 531.3(a). The district court concluded

[18] In their brief on appeal before this Court, Defendants do not challenge the district court's ruling on this point. Therefore, Defendants have waived this issue. *See, e.g., XO Mo., Inc. v. City of Md. Heights*, 362 F.3d 1023, 1025 (8th Cir. 2004) (concluding that an issue not raised on appeal is waived); *Etheridge v. United States*, 241 F.3d 619, 622 (8th Cir. 2001) (same).

that Hill Country Farms had not provided documents establishing the cost of providing lodging. *See* JA 371. Moreover, the district court concluded that Hill Country Farms had applied the employees' SS and SSI benefits to their room, board, and in-kind care. *Id.* The court further determined that Hill Country Farms had not met its burden of showing that its reasonable cost of providing room and board was "in excess of SS and SSI benefits amounts." *See* JA 371-72; 29 C.F.R. 516.27. Therefore, the district court determined that "no credit toward the workers' wages is available." [19]

SUMMARY OF THE ARGUMENT

The legal issues presented by this case -- Defendants' liability as employers and willfulness -- are straightforward, although the circumstances from which the case arises are not. Defendants grossly underpaid mentally disabled employees, failing to pay them the required minimum wage and overtime compensation under the FLSA that they were due. The district court's decision awarding the mentally disabled employees approximately $1,700,000 in damages (back wages and liquidated damages) should be upheld in order to provide these most vulnerable members of our society the wages that they earned by

[19] Defendants do not raise the issue of section 3(m) credits on appeal. Therefore, they have waived any argument concerning credit for "room and board" and "in kind care." *See, e.g., XO Mo.*, 362 F.3d at 1025.

virtue of the work that they performed. Placing liability for those back wages on both Hill Country Farms and Henry as individually and severally liable employers is in accord with the broad definition of the term employer under the FLSA.

1. The undisputed facts establish that between November 17, 2006 and February 7, 2009, Hill Country Farms and Kenneth Henry employed mentally disabled men and supervised their work at the West Liberty Foods' turkey processing plant and at the bunkhouse in Atalissa, Iowa, where the disabled employees were housed. Hill Country Farms and Henry failed to pay 31 disabled employees the minimum wage and overtime pay they were due. While West Liberty Foods paid Hill Country Farms over $500,000 per year for the disabled employees' work at the turkey processing plant, Hill Country Farms paid actual cash wages of $65 per month to each of the disabled men for all hours worked. Hill Country Farms paid the same $65 per month cash wage to its disabled bunkhouse employees. Hill Country Farms was the designated representative payee of Social Security and Supplemental Security Income Benefits for each disabled employee, and reimbursed itself for Room and Board from those benefits.

2. The district court correctly concluded that Hill Country Farms was an employer within the meaning of the FLSA. The uncontroverted facts show that Hill Country Farms determined

where the disabled employees worked, designated specific employees to perform certain jobs on West Liberty Foods' processing line and at the bunkhouse, supervised the employees' work (through its crew chiefs/supervisors), and determined the employees' pay rate and the manner in which the employees were paid. The undisputed facts also establish that Hill Country Farms prepared and maintained all the employees' time records and payroll records, deducted payroll taxes, and issued the employees' pay checks. Thus, the economic reality overwhelmingly shows that Hill Country Farms was the employer of the mentally disabled workers in this case. To argue otherwise is to ignore that reality.

The district court also correctly concluded that Henry was an employer within the meaning of the FLSA. Kenneth Henry is the president and 50 percent co-owner of Hill Country Farms. The uncontested facts demonstrate that Henry was the decision-maker for Hill Country Farms and controlled the day-to-day operations of the corporation in relation to the mentally disabled employees. Henry negotiated the agreement with West Liberty Foods to provide the disabled workers at its turkey processing plant, determined their rates of pay, approved hiring decisions, conferred with Hill Country Farms' co-owner on a regular basis, regularly visited the disabled workers and their supervisors in Iowa, and (together with Jane Anne Johnson)

decided when to terminate the contract with West Liberty Foods and to remove the disabled employees from the bunkhouse. Thus, the economic reality clearly shows that Kenneth Henry had operational control of the company vis-à-vis the mentally disabled workers, thereby rendering him individually liable.

3. Additionally, the district court correctly concluded that Defendants willfully violated the FLSA because Hill Country Farms and Henry either knew or showed reckless disregard as to whether their conduct was prohibited by the Act. The undisputed facts demonstrate that Wage-Hour investigated Hill Country Farms twice (in 1997 and 2003) prior to the most recent investigation that culminated in the instant case, found violations of the FLSA overtime and record keeping provisions, provided materials to Hill Country Farms concerning compliance, including copies of the applicable regulations (dealing with both minimum wage and overtime), and advised the company about how to comply with the FLSA. Hill Country Farms paid the back wages due as a result of the two previous investigations and promised future compliance, but nevertheless continued to engage in illegitimate pay practices. The undisputed facts thus establish that Hill Country Farms and Henry knew how to comply with the FLSA, but chose not do so. At the very least, they recklessly disregarded their obligation to comply with the Act.

The district court thus correctly concluded that the disabled employees are due a total of $1,761,554.34 in unpaid minimum wages, overtime compensation, and liquidated damages based on Hill Country Farms and Henry's willful violations of the FLSA and their failure to prove that they acted in good faith and had reasonable grounds to believe that they were in compliance.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT HILL COUNTRY FARMS AND KENNETH HENRY WERE EMPLOYERS WITHIN THE MEANING OF THE FLSA, JOINTLY AND SEVERALLY LIABLE FOR VIOLATIONS OF THE MINIMUM WAGE AND OVERTIME PROVISIONS OF THE ACT

A. Standard of Review

This Court reviews a district court's grant of summary judgment de novo. *See, e.g., Chao v. Barbeque Ventures, LLC*, 547 F.3d 938, 941 (8th Cir. 2008); *Copeland v. Abb, Inc.*, 521 F.3d 1010, 1012 (8th Cir. 2008). Summary judgment is appropriate "'if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.'" *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir. 2011) (quoting Fed. R. Civ. P. 56(c)(2)).[20] The movant must inform the district court

[20] The Secretary's Motion for Partial Summary Judgment includes a Statement of Undisputed Facts and an Appendix with 21 exhibits,

of the basis for its summary judgment motion and identify "'those portions of [the record] . . . which it believes demonstrate the absence of a genuine issue of material fact.'" *Id*. (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (alteration in original)). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The non-movant "'must do more than simply show that there is some metaphysical doubt as to the material facts.'" *Torgerson*, 643 F.3d at 1042 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586-87 (1986)). The non-movant must submit evidentiary material that identifies "specific facts showing that there is a genuine issue for trial." *Id*.; *see* Fed. R. Civ. P. 56(e)(2). "[F]acts must be viewed in the light most favorable to the nonmoving party only if there is a genuine dispute as to those facts." *Torgerson*, 643 F.3d at 1042 (internal quotation marks and citation omitted). If this Court determines that there are no genuine issues of material fact

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containing, *inter alia*, excerpts from the Depositions of Kenneth Henry, Jane Ann Johnson, Robert Berry, and Della McCoy (Hill Country Farms' representatives); the Declarations of Michael Staebell and Kevin O'Brien (Wage-Hour employees); and, the Declarations of Tara Lindsay, Allen Hansen, and Dan Waters (West Liberty Foods' representatives).

after reviewing the record in the light most favorable to the nonmoving party, it should affirm the district court's decision. *See Darby v. Bratch*, 287 F.3d 673, 678 (8th Cir. 2002).

B. Hill Country Farms Is An Employer Within The Meaning Of The FLSA In Relation To The Disabled Employees As A Matter Of Law.

1. The FLSA requires "[e]very employer" to pay its employees no less than the minimum wage and mandates that "no employer" shall fail to abide by the Act's overtime compensation requirements. *See* 29 U.S.C. 206 and 207. The Act defines "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee . . . ." 29 U.S.C. 203(d). The term "employee" is defined as "any individual employed by an employer." 29 U.S.C. 203(e)(1). The FLSA defines the word "employ" to include "to suffer or permit to work." 29 U.S.C. 203(g). The Supreme Court has consistently construed these terms broadly, in harmony with the FLSA's remedial purpose, applying an "economic reality" test rather than common law definitions to determine employer status. *See Falk v. Brennan*, 414 U.S. 190, 195 (1973); *Chao v. Hotel Oasis, Inc.*, 493 F.3d 26, 33-34 (1st Cir. 2007); *Reich v. Circle C. Invs., Inc.*, 998 F.2d 324, 329 (5th Cir. 1993); *Dole v. Elliott Travel & Tours, Inc.*, 942 F.2d 962, 965 (6th Cir. 1991); *Donovan v. Grim Hotel Co.*, 747 F.2d 966, 971-72 (5th Cir. 1984); *Donovan v. Agnew*, 712 F.2d 1509, 1510 (1st Cir. 1983); *Bonnette*

v. Cal. Health & Welfare Agency, 704 F.2d 1465, 1469 (9th Cir. 1983); *Donovan v. Sabine Irrigation Co.,* 695 F.2d 190, 194 (5th Cir. 1983); *cf. Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326 (1992) (noting that the FLSA "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles"); *Goldberg v. Whitaker House Coop., Inc.,* 366 U.S. 28, 33 (1961) (considering "economic reality" rather than "technical concepts" to determine that homeworkers were employees). The FLSA is "remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil . . . . Those are the rights that Congress has specifically legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner." *Tenn. Coal, Iron & R.R. v. Muscoda Local No. 123,* 321 U.S. 590, 597 (1944); *see Specht v. City of Sioux Falls*, 639 F.3d 814, 819 (8th Cir. 2011) (stating that courts should broadly interpret the FLSA).

The "economic reality" test for employer status includes, but is not limited to, a determination whether the alleged employer had the power to control the employees. *See Herman v. RSR Sec. Servs., Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999). Courts have utilized various nonexclusive factors in reaching that determination, including "'whether the alleged employer (1) had

the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records.'" *Id*. (quoting *Carter v. Duchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir. 1984), in turn quoting *Bonnette*, 704 F.2d at 1470). No one factor is dispositive; the determination of an employment relationship is not based on "'isolated factors but rather upon the circumstances of the whole activity.'" *Boucher v. Shaw*, 572 F.3d 1087, 1091 (9th Cir. 2009) (quoting *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947)).[21]

2. The undisputed facts support the district court's conclusion that Hill Country Farms is an employer of the disabled workers. Specifically, the documents, depositions, declarations, admissions, and answers to interrogatories that the Secretary submitted to the district court in support of her

[21] The Second Circuit, for instance, has been careful to state that it "has treated employment for FLSA purposes as a flexible concept to be determined on a case-by-case basis by review of the totality of the circumstances." *Barfield v. N.Y.C. Health & Hosps. Corp.*, 537 F.3d 132, 141-42 (2d Cir. 2008). In *Barfield*, the Second Circuit went on to state that the factors it has relied upon "state no rigid rule for the identification of an FLSA employer. To the contrary . . . they provide 'a nonexclusive and overlapping set of factors' to ensure that the economic realities test mandated by the Supreme Court is sufficiently comprehensive and flexible to give proper effect to the broad language of the FLSA." *Id.* at 143 (quoting *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 75-76 (2d Cir. 2003)).

motion for summary judgment establish that Hill Country Farms is an employer under the FLSA. Hill Country Farms had the power to hire and fire the disabled employees, supervised their work (through crew chiefs/supervisors), determined the rate and method of payment, and maintained employment records, all of which are indicia of an employment relationship. *See, e.g., Barfield*, 537 F.3d at 144-48; *Morrison v. Int'l Programs Consortium, Inc.*, 253 F.3d 5, 11 (D.C. Cir. 2001); *RSR Sec. Servs.*, 172 F.3d at 139. Significantly, Henry, the company's president, admitted in his deposition testimony that Hill Country Farms employed the disabled workers:

> Q. Going back to Exhibit No. 1, Appendix A, and now referring to all the individuals that are listed there. . . . Were those all employees of Hill Country Farms doing business as Henry['s] Turkey Services?
>
> A. Yes.
>
> *See* JA 153.
>
> * * * *
>
> Q. Was Hill Country Farms doing business as Henry['s] Turkey Services the employer regardless of whether [the employees] were working at the bunkhouse or whether they were working at the plant?
>
> A. Sure.

JA 153-54; *cf. Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988) ("[A]n employer's admission that his workers are

employees covered by the FLSA is highly probative.") (internal citations omitted).

It is undisputed that Hill Country Farms contracted with West Liberty Foods to provide disabled workers, referring to them as its employees, to work on the evisceration line at the turkey processing plant in West Liberty, Iowa. *See* JA 134-38, 174-85.[22] It is also undisputed that Hill Country Farms designated the specific employee who was to perform a particular job on the evisceration line. Indeed, Henry's deposition testimony supports this fact:

> [W]e did rotate some people. . . . [I]f you had somebody pulling crops over here and they got kind of tired of doing that, they would go over here and pull the guts. . . . [I]f we were having a problem with a boy . . . we'd find that [t]here were some jobs that were harder and some jobs that were just easier. So we would shuffle those people into the easier job, like cutting hearts and livers and things like that . . . . And just for the sake of the boredom, you move people. . . . [W]e could move amongst the jobs that we had.

JA 100-01.

It is further uncontroverted that Hill Country Farms' crew chiefs/supervisors transported the mentally disabled employees to and from the turkey processing plant every day in vans owned by Hill Country Farms, ensured that the employees donned the

[22] In his Declaration, Dan Waters, West Liberty Foods' vice president and general counsel identified the contract and amendments referenced in JA 174-85, as the controlling documents between the two companies. *See* JA 172-73.

appropriate protective gear and were waiting for the line to start at 5:00 a.m., supervised their work at the processing plant, and drove them back to the bunkhouse after they finished their work for the day. *See* JA 103-08, 234-35. The facts also establish that Hill Country Farms supervised and paid three disabled employees who worked at the bunkhouse in Atalissa, Iowa. *See* JA 119-21, 125, 234-35. Additionally, the record establishes that Hill Country Farms maintained employment records for the disabled employees, including their timesheets, and issued their paychecks. *See* JA 111-14, 116-18, 139, 189-94, 201-02, 233-34. Finally, the district court found it significant that Hill Country Farms negotiated the compensation rates and received payments from West Liberty Foods for the disabled employees' work, claimed them as employees for purposes of certain government records, and paid their Medicare and Social Security taxes. *See* JA 073, 110, 115-18.

Thus, Hill Country Farms provided and controlled the mentally disabled workers, and treated them in every respect as employees. It therefore is not plausible for Hill Country Farms to now come forward and claim that it is not these workers' employer. As Defendants stated in their brief on appeal: "These unskilled workers are mentally retarded individuals who are under the care and keep of Hill Country Farms, Inc., a Texas agricultural corporation." App. Br. at 19. The dependency of

the disabled workers on Hill Country Farms supports the existence of an employment relationship between them. Therefore, the district court correctly concluded that "the economic reality is that Henry Turkey Services [i.e., Hill Country Farms] asserted control as their employer." *See* JA 364.

3. Defendants argue on appeal that West Liberty Foods, not Hill Country Farms, was the employer responsible for paying minimum wage and overtime compensation to the mentally disabled employees. Defendants further assert that the disabled employees did not perform any services for Hill Country Farms. App. Br. at 19-21.[23] The Secretary, however, did not name West Liberty Foods in the complaint, but brought the action against Hill Country Farms and Henry. *See* JA 005-17. As the district court observed: "Whether West Liberty Foods would qualify as an employer is beside the point, because all entities qualifying as an employer are responsible for complying with the FLSA and subject to its remedies." *See* JA 363. It is well settled that

[23] Contrary to Defendants' brief on appeal (*see, e.g.,* App. Br. at 11), the issue before this Court is not whether the mentally disabled employees were independent contractors (they surely were not) but, rather, whether the Defendants were their employers. The Supreme Court case relied upon by Defendants (App. Br. at 13-14) concluded that beef boners working alongside other workers at a slaughterhouse contributed to operations constituting an integrated unit devoted primarily to the production of boneless beef; thus, beef boners were employees of the slaughter house (which closely managed them), not independent contractors. *See Rutherford Food Corp.*, 331 U.S. at 726-31. This case is of no help to Defendants.

the FLSA contemplates the possibility that more than one employer may be responsible for compliance with the Act.[24] The question in this case is whether Hill Country Farms (as the company) and Henry (individually) are employers of the disabled employees.[25]

[24] *See, e.g., Falk*, 414 U.S. at 195 (concluding that a real estate management firm was an employer within the meaning of the FLSA of maintenance workers who were concededly employees of the property owners, because of the real estate firm's "managerial responsibilities at each of the buildings, which gave it substantial control of the terms and conditions of the work of these employees"); *Schultz v. Capital Int'l Sec., Inc.*, 466 F.3d 298, 305-06 (4th Cir. 2006) (concluding that Saudi prince and CIS were joint employers of agents); *Donovan v. DialAmerica Mktg., Inc.*, 757 F.2d 1376, 1387-88 (3d Cir. 1985) (concluding that telemarketing company and distributors who recruited researchers were joint employers); *Bonnette*, 704 F.2d at 1469-70 (concluding that chore workers providing domestic services were jointly employed by state agency and individual recipients).

[25] Defendants also rely on *Heath v. Perdue Farms, Inc.*, 87 F. Supp. 2d 452 (D. Md. 2000) to support their argument. App. Br. at 15-18. This reliance is misplaced. In *Heath*, the district court concluded that Perdue was the employer of both the crew leaders and the chicken catchers at issue based on the fact that Perdue controlled every aspect of the chicken catchers' work and based on the status of the crew leaders as non-independent contractors. 87 F. Supp. 2d at 457-59. It is difficult to discern how this case is of any assistance to Defendants.

C. Kenneth Henry Is An Employer Under The FLSA In Relation To The Mentally Disabled Employees As A Matter Of Law And Is Thus Individually Liable.[26]

1. As noted in *Bratch*, "[t]his Court has addressed the issue of personal liability of an employer under the FLSA" and has "implicitly assumed . . . that individual liability does exist under the FLSA." 287 F.3d at 681 (internal citation omitted). This Court has also recognized that "a combination of stock ownership, management, direction and the right to hire and fire employees" could support a conclusion that a corporate president and majority stockholder is an employer within the meaning of the FLSA. *Wirtz v. Pure Ice Co., Inc.*, 322 F.2d 259, 263 (8th Cir. 1963) (deciding that corporate officer was not an employer where, though capable of doing so, he did not act in the interest of the company vis-a-vis its employees);[27] *see Chambers Constr. Co. v. Mitchell*, 233 F.2d 717, 724 (8th Cir. 1956) (concluding that president of corporation was an FLSA

[26] Defendants offer no discrete argument on appeal addressing the district court's conclusion that Henry was an individual employer under the FLSA. Although arguably waived, the argument challenging individual employer liability may be inferred from Defendants' argument that the mentally disabled employees were employed exclusively by West Liberty Foods. The Secretary therefore addresses this issue on its merits.

[27] "There is little question from the record but what [the individual in question] as the majority stockholder and dominant personality in Pure Ice Company, Inc., could have taken over and supervised the relationship between the corporation and its employees had he decided to do so. A careful reading of the record, however, indicates that he did not do so." *Pure Ice Co.*, 322 F.2d at 262.

employer, subject to injunction, where he actively managed corporation, hired supervisors and home office personnel, and controlled in varying degrees wages paid to all employees).

Other circuits have held that a corporate officer may be individually liable for FLSA violations, where the officer exercises control of the corporation. The First Circuit, for instance, has concluded that "[t]he overwhelming weight of authority is that a corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages." *Chao v. Hotel Oasis, Inc.*, 493 F.3d 26, 34 (1st Cir. 2007) (internal quotation marks and citation omitted) (holding "corporate officer principally in charge of directing employment practices, such as hiring and firing employees, requiring employees to attend meetings unpaid, and setting employees' wages and schedules" and who "was thus instrumental in 'causing' the corporation to violate the FLSA" was an employer within the purview of the Act); *Donovan v. Agnew*, 712 F.2d at 1514 (holding "corporate officers with a significant ownership interest who had operational control of significant aspects of the corporation's day to day functions, including compensation of employees, and who personally made decisions to continue operations despite financial adversity," could be held personally liable for back wages under the FLSA).

The Second, Fifth, Sixth, and Ninth circuits, likewise, have concluded that a corporate officer may be an employer, jointly and severally liable for the payment of back wages under the FLSA. In *RSR Security Services*, the Second Circuit concluded that a corporate officer who earned 50 percent of the company's stock, hired employees, occasionally supervised and controlled work schedules, participated in the method of payment, occasionally signed checks, and was involved in the company's operations, was an employer under the FLSA. *See* 172 F.3d at 140. In *Lambert v. Ackerley*, 180 F.3d 997 (9th Cir. 1999), the Ninth Circuit concluded that the chief operating officer and chief executive officer who "exercised economic and operational control over the employment relationship" were employers within the meaning of the FLSA. *Id.* at 1012. The Sixth Circuit, in *Fegley v. Higgins*, 19 F.3d 1126 (6th Cir. 1994), concluded that the CEO of a corporation was an employer under the FLSA where he had a significant ownership interest, controlled significant functions of the business, determined salaries, and made hiring decisions. *Id.* at 1131. Similarly, in *Elliott Travel & Tours, Inc.*, the Sixth Circuit concluded that the chief corporate officer, who had a significant ownership interest and control over significant aspects of the corporation's day-to-day operations, was an employer within the meaning of the FLSA. *See* 942 F.2d at 966. The Sixth Circuit

emphasized that to be an individual employer that person need not have exclusive control of the company's day-to-day functions; rather, the person need only have operational control over significant aspects of the company's day-to-day functions. *Id.* In *Grim Hotel Co.,* the Fifth Circuit held that a corporate officer was an employer where he began and controlled the hotel corporations, held their purse strings, guided their policies, could authorize compliance with the FLSA, solved major problems, and had ultimate control over wages. *See* 747 F.2d at 972; *cf. Perez v. Sanford-Orlando Kennel Club, Inc.*, 515 F.3d 1150, 1160-62 (11th Cir. 2008) (concluding that officer who was the majority shareholder was not employer under FLSA where he did not take part in day-to-day operations, had not been involved in supervision or hiring and firing of employees, and had no role in determining compensation).

2. The undisputed facts demonstrate that Henry was an employer within the meaning of the FLSA, jointly and severally liable with the corporation for violating the FLSA. Henry was the co-owner of Hill Country Farms and the president of the corporation, owning a 50 percent share of stock. *See* JA 079-80, 85. Henry also had the authority to control, and did control, significant aspects of the corporation's day-to-day functions. For instance, Henry had a leading role in negotiating the agreement with West Liberty Foods, including the rate of

compensation for the work performed at the turkey processing plant, and actively controlled Hill Country Farms' finances. *See* JA 367.[28] Henry also demonstrated an intimate knowledge of the day-to-day activities of the disabled workers, describing the jobs that they performed at the turkey processing plant in minute detail. *See* JA 097-101, 103-08. In his deposition testimony, Henry explained that he kept in close contact with the co-owner, T. H. Johnson, talking with him from one to ten times per week. *See* JA 102. Additionally, Henry testified that he became even more actively involved in the day-to-day functions of Hill Country Farms beginning in 2005, following the onset of T. H. Johnson's illness, visiting Iowa many times during the relevant period. *See* JA 125-27.[29] Henry also described the method Hill Country Farms used to record the disabled employees' time, and designed a scheduling form for the bunkhouse. JA 131, 139-43. He further testified about the manner in which the company paid the disabled employees, stating that he determined their rate of pay, and describing Hill Country Farms' financial operations in detail. *See* JA 110-18,

[28] Henry testified that he was involved in negotiating the original contract with Louis Rich Foods. After West Liberty Foods bought Louis Rich Foods, it continued the contract with Hill Country Farms. *See* JA 094-96, 134-35, 137-38.

[29] Although Henry seems to confuse the date of T. H. Johnson's illness and subsequent death, a close review of the deposition record reveals that Johnson died in February 2008 after a long illness. *See* JA 126-27.

144-45, 147-48. Quoting from Henry's deposition testimony is instructive:

> Q. Who made the decision on the rate of pay for these individuals?
>
> A. Oh, the company did. Our company.
>
> Q. Hill Country Farms doing business as Henry's Turkey Services?
>
> A. Yeah.
>
> Q. Okay. And would that be you and Mr. Johnson?
>
> A. Yeah.

See JA 110.

As Henry testified, Hill Country Farms paid the mentally disabled employees very little for their work. "Basically, the boys got a check for $70 in their hand. They got $70. And a few deductions out of that. So sixty-five dollars and something cents they got." *See* JA 111. Henry's testimony demonstrated that he was very involved in the actual pay practices:

> They got a check that showed the deductions that was taken out of their check, and those deductions, there was room and board and in-kind care, and then you had your regular government deductions, whatever they were. So the guys got a check and they signed the check.
>
> The check was taken to the bank and cashed. And that cash money was put in a little small envelope, and they brought that back. And each boy was paid out of his individual envelope with his name on it. And he got a percentage of his money right then. . . . [H]e would basically get the biggest part of it on that payday and then get five or ten dollars the next three

> weeks, or if it was four weeks, it would be a little less.

See JA 111. Henry further explained the frequency with which Hill Country Farms compensated its disabled employees:

> Q. So this $65 cash, they were paid on a monthly basis?
>
> A. Yes.

Id.

Henry also made scheduling decisions for the bunkhouse, including the decision to close it down and to stop providing workers to West Liberty Foods, and determined the order in which the turkey plant workers would stop working. *See* JA 120-25, 132-33. According to Henry, he was the "boss." *See* JA 128-29. At his deposition, Henry testified about his role in cutting the workers' hours: "As a boss, you look at these kinds of things and say, Hey, how do we justify that? . . . You've got to work it out to where . . . we don't get into so many overtime hours at the bunkhouse.'" *Id*. Henry further testified: "[A]s a boss, I'm looking out for the company, and I'm looking out for the dollars that are going out compared to what we're getting. You know, if we don't need but one person and we got three, that's wrong." JA 129. Henry testified, concerning his role in shutting down the bunkhouse: "I sent an ex-employee of ours who worked for us for years . . . to Iowa to help with this transition, to get the bunkhouse shut down . . . ." *See* JA 132.

As this deposition testimony demonstrates, Henry was a corporate official and owner who was far more than a mere figurehead. He was, in his own words, the "boss." *See RSR Sec. Servs.*, 172 F.3d at 137 (employees viewed person deemed individually liable as the "boss," a view that the person did not discourage). To allow Henry to escape individual employer liability in light of his high position, substantial ownership interest, and active role in the company would defeat the broad remedial reading that has been given to the term "employer" in the FLSA, and would absolve someone from liability who was necessarily responsible for the rank exploitation of the mentally disabled employees. Thus, the district court correctly concluded that, based on Henry's stock ownership, his control over company finances, and his exercise of control over the operation's day-to-day functions, Henry was an employer of the disabled employees who worked at the turkey processing plant and the bunkhouse.

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT HILL COUNTRY FARMS AND KENNETH HENRY ENGAGED IN WILLFUL VIOLATIONS OF THE FLSA BASED ON EVIDENCE THAT WAGE-HOUR HAD INVESTIGATED THE COMPANY ON TWO OTHER OCCASIONS, FOUND SIMILAR VIOLATIONS, AND INSTRUCTED DEFENDANTS CONCERNING COMPLIANCE WITH THE FLSA

1. The statute of limitations for filing an action under the FLSA is two years, "except that a cause of action arising out of a willful violation may be commenced within three years

after the cause of action accrued." 29 U.S.C. 255(a). Violations are "willful" if "the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute." *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 133 (1988) (citing *Trans World Airlines, Inc. v. Thruston*, 469 U.S. 111 (1985)); *see Jarrett v. ERC Props., Inc.*, 211 F.3d 1078, 1083 (8th Cir. 2000) (finding basis for willful violation where "[n]o defense witness contradicted, or attempted to explain, the testimony of two former site managers that they were told, categorically, by two regional supervisors, that ERC would not pay overtime"); *see generally Simpson v. Merchs. & Planters Bank*, 441 F.3d 572, 579-80 (8th Cir. 2006). Courts have held that violations are willful where there is evidence of prior violations. Thus, in *RSR Security Services*, the Second Circuit concluded that the corporate chairman willfully violated the FLSA where he recklessly relied on information from company's president, whom he knew had previously violated the Act. *See* 172 F.3d at 141-42. The Sixth Circuit, in *Herman v. Palo Group Foster Home, Inc.*, 183 F.3d 468 (6th Cir. 1999), concluded that there was a willful violation where there was "undisputed evidence that [corporate president] had actual notice of the requirements of the Act" because "[h]e had been investigated for violations twice in the past, paid unpaid overtime wages, received explanations of what was required to

comply with the Act, and assured [the Department of Labor] that he would comply in the future." *Id.* at 474. In *Reich v. Monfort, Inc.*, 144 F.3d 1329 (10th Cir. 1998), the Tenth Circuit concluded that conduct was willful where the company's managers had known that activity was compensable "at least since an audit in 1984 and the same issues were resolved at a sister plant . . . in July 1989." *Id.* at 1334. The Tenth Circuit rejected defendant's argument "that its settlement of other claims of a similar nature does not support a conclusion that the violations were willful because they were not litigated." *Id.* at 1334-35. Finally, in *Elliott Travel & Tours, Inc.*, the Sixth Circuit concluded that there were willful violations based on the undisputed statement in the Wage-Hour area director's affidavit that the employer had engaged in prior violations of the FLSA. *See* 942 F.2d at 966-67. In the words of the Sixth Circuit, "[i]t is undisputed that [the individually liable employer] had actual notice of the requirements of the FLSA by virtue of earlier violations, his agreement to pay unpaid overtime wages, and his assurance of future compliance with the FLSA." *Id.* at 967.

2. It is undisputed that Hill Country Farms and Henry had actual knowledge of the overtime and record keeping provisions of the FLSA prior to the violations in this case. As the district court correctly observed, "[o]n two prior occasions [in

1997 and 2003], the Wage and Hour Division investigated Hill Country Farms, found that the company had violated FLSA overtime wage requirements, and the company agreed to pay back wages and comply with that and other FLSA requirements in the future." *See* JA 368. Moreover, the court properly found that "[a]fter the second investigation, the Wage and Hour Division explained in detail the FLSA's requirements including, but not limited to, minimum wages, overtime compensation, 3(m) credits and recordkeeping, and provided Hill Country Farms with materials detailing how to comply." *Id.* The district court observed, however, that "Hill Country Farms did not make any changes to its wage formula"; instead, it continued its illicit practices. *Id*. The record also supports the district court's conclusion that Henry, who "negotiated the pay rates with West Liberty Foods and controlled the corporation's financial decision making" was also "aware of the two Wage and Hour investigations, its findings, its instructions for the future, and Hill Country Farms' agreement to comply with minimum wage, overtime compensation, 3(m) credits, and record keeping requirements." *Id*.

The undisputed facts therefore establish that both Hill Country Farms and Henry willfully violated the FLSA. Substantial record evidence demonstrates that Defendants had violated the FLSA twice in the past, yet continued to commit

violations of the Act despite having been specifically told of the requirements of the statute and promising to comply with those requirements in the future. Even if the violations are deemed not to be knowing, Defendants, at minimum, recklessly disregarded whether or not their conduct was prohibited by the Act.

3. On appeal, Defendants assert that the district court erred by not requiring the Secretary to introduce records of Wage-Hour's prior investigations to support its conclusion that Defendants engaged in willful violations. App. Br. at 2. Defendants devote their page and a half argument on willfulness to a paraphrase of a portion of the decision in *Reich v. Tiller Helicopter Services, Inc.*, 8 F.3d 1018, 1036 (5th Cir. 1993). In *Tiller*, the Fifth Circuit concluded that there were no "records of the 1982 investigation from which the district court could determine that the violations underlying it were substantially similar to the violations underlying this action." *Id.* The Appendix to the Secretary's summary judgment motion, however, included the Declaration of Michael Staebell, the Wage-Hour District Director for the Des Moines, Iowa office, in which he specifically describes the two prior investigations in 1997 and 2003. *See* JA 298-301.

Staebell was the Assistant District Director at the time of the second investigation and stated that he had personal

knowledge of that investigation, which covered the period from October 17, 1999 through October 20, 2001. *See* JA 298; *see also* Fed. R. Civ. P. 56(c)(4) (affidavit or declaration used to support or oppose a motion for summary judgment must be based on personal knowledge). Among other violations, Staebell stated that the 2003 investigation revealed record keeping and overtime violations. *See* JA 300. Staebell stated that Hill Country Farms "was informed that its records to support its Section 3(m) credits were improper in that the records included, among other things, costs related to individuals working in Texas, construction costs and business costs." *Id*. Staebell further stated: "Forty-three disabled employees who worked either at West Liberty Foods processing plant and/or in the bunkhouse in Atalissa, Iowa were determined to be due $19,684.00 in overtime back wages [there were minor minimum wage violations] due to [Hill Country Farms'] failure to pay the employees one and one-half times their regular rates of pay for hours worked over 40 in a workweek." *Id*. Additionally, Staebell stated that "[o]n 9/2/03, during the final conference with [Hill Country Farms], Wage and Hour discussed with [Hill Country Farms] in detail the issues and documentation requirements of Section 3(m) and explained the basis for the agency's determination of overtime compensation owed." *Id*. According to Staebell, at the final conference, Wage-Hour provided Hill Country Farms with the

regulations and documents describing how to comply with the record keeping and overtime requirements of the FLSA. *See* JA 300-01. Among the materials distributed to Hill Country Farms was 29 C.F.R. Part 785 -- "Hours Worked," which relates to the minimum wage and overtime requirements of the FLSA. Hill Country Farms promised to comply in the future. See JA 301.

Further, as part of its 2007-2009 investigation of Hill Country Farms, Wage-Hour reviewed its internal case tracking system and found that it also had investigated Hill Country Farms in 1997. *See* JA 301. Staebell stated that "[a]s a result of that investigation, Wage and Hour determined that [Hill Country Farms] had failed to pay its employees one and one-half times their regular rates of pay for all hours worked over 40 in a workweek." *Id*. According to Staebell, Hill Country Farms agreed to pay the back wages due and to future compliance. *Id*.

Hill Country Farms offered no evidence to dispute Staebell's declaration regarding prior investigations finding violations of the overtime provisions of the FLSA. App. Br. at 10; *see* JA 359-60. To the contrary, both Henry and Berry (Hill Country Farms' accountant and corporate secretary) admitted that they were aware that Wage-Hour had investigated Hill Country Farms and found overtime violations. As Henry testified in his deposition, "when we had the audit back in '03 . . . we were criticized for the way that we were doing the overtime." *See* JA

149. Berry testified in his deposition that he was involved in the 2001 to 2003 audit in which Hill Country Farms was found to owe overtime to mentally disabled employees. *See* JA 166. Berry testified: "I did see the little four or five page letter that Department of Labor gave [Hill Country Farms] and where it lists the individuals and the amounts so they had very concrete direction on . . . how to pay them." *See* JA 167. Berry also testified: "I saw the cancelled checks [to pay the overtime due]." *Id*. Berry further testified that "[t]he actual amount the Department of Labor determined was $20,000." *Id*. Berry's testimony, as well as that of Henry, bolsters Staebell's declaration describing the investigation that occurred in 2003 rather than refuting it. Therefore, the district court correctly concluded, based on undisputed facts, that Hill Country Farms and Henry willfully violated the FLSA either knowingly or with reckless disregard as to its obligations under the FLSA.[30]

[30] As noted *supra*, Defendants did not make an argument on appeal challenging the district court's assessment of liquidated damages. Therefore, the Secretary does not address this issue except to note that liquidated damages are the norm where violations are found pursuant to 29 U.S.C. 216(c), unless Defendants carry their burden of proving that they acted in good faith and had reasonable grounds for believing that they were not in violation of the Act. *See* 29 U.S.C. 260; *Barbeque Ventures, LLC*, 547 F.3d at 941-42. Defendants did not do so in this case. *See* JA 369.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's judgment in favor of the Secretary and against Defendants, concluding that Hill Country Farms and Kenneth Henry willfully violated the FLSA and holding them jointly and severally liable for back wages and liquidated damages.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Brief for the Secretary of Labor was served this 24th day of January 2012 via the Court's ECF system on the following:

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