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

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

PETITIONERS CHIPOTLE MEXICAN GRILL, INC.'S AND CHIPOTLE SERVICES, LLC'S OPPOSITION TO EMERGENCY MOTION OF RESPONDENTS CARMEN ALVAREZ AND HER COUNSEL FOR STAY PENDING APPEAL

Chipotle Mexican Grill, Inc. and Chipotle Services, LLC (collectively "Chipotle"), through their undersigned counsel, state as follows in opposition to the Emergency Motion of Respondents Carmen Alvarez and Her Counsel for Stay Pending Appeal ("Motion"):

INTRODUCTION

Respondents' Motion is a cautionary tale in calculated risk-taking. Respondents doggedly pursued suing Chipotle in "reckless disregard" and "disobedience" of this Court's Order. (Dkt. 129 at 26.) They rejected Chipotle's offer to simply withdraw their allegations concerning the Final Rule—i.e., the "Contemptuous Allegations." (Nov. 6, 2017 Tr. at 32:23-33:16, attached as Exhibit 1.) In rejecting that offer, they assumed the risk that this Court could rule against them. And this Court did—in a contempt finding that requires them to withdraw those allegations and entitles Chipotle to "compensation for fees and expenses tied to this contempt proceeding" ("Contempt Order"). (Dkt. 129 at 26.)

Respondents do not deny that they were and remain "ready and willing" to continue pursuing their Contemptuous Allegations. (Dkt. 129 at 25.) Instead, Respondents now complain

of that which they had every reason to anticipate would result if they lost their gamble. The Final Rule was never implemented—a fact that no amount of stays or appeals can alter. The Contemptuous Allegations are thus baseless. Respondents' plea to now stay the consequences of their gamble and protect their bottom line lacks legal support and is fundamentally unfair to Chipotle. For the reasons set forth below, Respondents' Motion should be denied, the compensatory fees and expenses awarded, and the file closed on the Final Rule's validity.

LEGAL STANDARD

This Court has broad discretion to stay proceedings. *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). "A stay is not a matter of right, even if irreparable injury might otherwise result." *Ind. State Police Pension Tr. v. Chrysler LLC*, 556 U.S. 960, 961 (2009). "It is instead an exercise of judicial discretion, and the party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.*; *Nken v. Holder*, 556 U.S. 418, 433-34 (2009).

Courts determining whether to issue a stay pending appeal may consider such factors as (1) whether the movant is likely to succeed on the merits; (2) whether the movant would suffer irreparable harm absent a stay; (3) whether granting the stay would substantially harm other parties; and (4) whether granting the stay would serve the public interest. *In re First S. Sav. Ass'n*, 820 F.2d 700, 704 (5th Cir. 1987); *see also Nken*, 556 U.S. at 426. Each part of this test must be met. *Nevada v. U.S. Dep't of Labor*, 227 F. Supp. 3d 696, 698 (E.D. Tex. 2017).

The Fifth Circuit has stated that "the movant need not always show a 'probability' of success on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." *Ruiz v. Estelle*, 650 F.2d 555, 565-66 (5th Cir. 1981). Where the "balance of the equities is not heavily tilted in the movant's favor, the movant must then make a more

substantial showing of likelihood of success on the merits." *Id*. Moreover, where the non-movant will suffer injury as a result of the stay, the movant must make a clear case of hardship. *Landis,* 299 at 255; *Ind. State Police Pension Tr.*, 556 U.S. at 961.

Because here, Respondents have failed to show that the equitable balance "heavily" tips in their favor, they must make a "clear case" of hardship and their burden is "substantial" to show a likelihood of success on the merits. As set forth below, they have failed to do so.

ARGUMENT

I. The Equities Do Not Heavily Tip in Respondents' Favor

A. Chipotle Will Be Harmed If the Stay is Granted

Respondents' assertion that Chipotle will "suffer no significant harm" if the Contempt Order is stayed pending appeal is simply false. Chipotle has been sued for allegedly violating a law that does not exist. Nothing Respondents do in this Court or on appeal will implement the Final Rule or give the New Jersey Action's allegations concerning it any merit.

Courts disapprove of stays where a lesser measure is adequate to protect the moving party's interest. *See Dellinger v. Mitchell*, 442 F.2d 782, 787 (D.C. Cir. 1971); *see also Coastal (Bermuda) Ltd. v. E.W. Saybolt & Co.*, 761 F.2d 198, 203 n.6 (5th Cir. 1985) ("Where a discretionary stay is proposed, something close to genuine necessity should be the mother of its invocation."). Such an option exists here—Respondents may comply with the Contempt Order and withdraw the Contemptuous Allegations in New Jersey. If the Final Rule is in some fashion resurrected on appeal, Respondents may amend their complaint accordingly. This course of action would not harm Respondents. Given the Final Rule was never implemented in the first place, any theory that it was violated could not plausibly start running until such time as the appellate court made a sudden change in the rule's fate. Such a significant change in the law would be grounds to amend. *See McBeth v. Gabrielli Truck Sales, Ltd.*, 731 F. Supp. 2d 316, 320-21 (E.D.N.Y. 2010)

(permitting amendment of complaint following Supreme Court reversal of Second Circuit opinion); *Gregory v. Harris-Teeter Supermarkets, Inc.*, 728 F. Supp. 1259, 1260 (W.D.N.C. 1990) (finding "apparent changes in the law" warranted leave to amend complaint); *Vanguard Sav. & Loan Ass'n v. Banks*, 1995 WL 379999, at *2 (E.D. Pa. June 27, 1995) ("[I]f a party moves to amend its pleadings to comply with a recent change in the applicable law, the court should freely grant the motion."). On this ground alone the Court can deny Respondents' Motion.

Respondents' argument to the contrary assume that the Respondents' proposal to the New Jersey District Court to stay the New Jersey Action "until this issue is completely resolved" ameliorates the harm to Chipotle.[1] (Ex. A.) It does not.

For every day that the New Jersey Action is stayed, Chipotle is further harmed.[2] Respondents define their "proposed FLSA Collective" to include New Jersey Apprentices "employed by Chipotle between June 7, 2014, and until the date of final judgment in this matter." (Jun. 7, 2017 N.J. Compl., ¶ 61, attached as Exhibit 2.) They similarly define their "Rule 23 Class" to include all New Jersey Apprentices Chipotle has or will employ "at any time between June 7, 2015 and the date of final judgment in this matter." (*Id*., ¶ 71.) Thus the proposed stay works to their benefit and Chipotle's detriment: If the New Jersey Action is indefinitely stayed, there is no "date of final judgment" on the foreseeable horizon, and the potential class and collective grow indefinitely. As a result, Chipotle faces increased discovery burdens and difficulties along with expanding legal fees and costs (both its own and in exposure for Respondents' fees and costs). Respondents acknowledge as much, as they believe there are hundreds potential class and collective members. (Ex. 2, ¶¶ 64, 73(a).)

[1] The requested extension's fate remains undetermined. (Mar. 21, 2018 Or., attached as Exhibit 3.)

[2] Chipotle believes the New Jersey Action lacks merit in its entirety and that no class or collective can or will be certified. Chipotle reserves all arguments and defenses in that proceeding.

Accordingly, because Chipotle will suffer injury, Respondents must make a "clear case of hardship" to justify a stay. *Landis,* 299 U.S. at 255; *Ind. State Police Pension Tr.*, 556 U.S. at 961.

B. Respondents Cannot Make a Clear Case of Hardship

Respondents' argue that they will suffer "weighty harm if the Contempt Order remains in effect" in the form of mooting their appeal and diminished profits. (Dkt. 131 at 13.) Neither category satisfies the irreparable harm inquiry under the circumstances of this case.

1. The Fifth Circuit Could Fashion Adequate Relief

"Ordinarily, compliance with a contempt order renders the appeal moot because the appellate court is left with no remedy to afford the appellant. However, there is an exception to the general principle: where compliance does not prevent [the appellate] court from fashioning adequate relief, a live controversy exists and the appeal is not moot." *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1394 (9th Cir. 1991) (internal citation omitted) (because contemnor could be reinstated after complying with contempt order, appeal was not moot).

Here, Respondents' appeal will not be mooted by complying with the Contempt Order. The appellate court may still fashion adequate relief by ordering Respondents to re-plead their allegations in the New Jersey Action and overturning any attorneys' fees and expenses awarded. Moreover, the question of whether Respondents' actions in the New Jersey Action were in contempt of this Court's Injunction (they were) is distinct from the question of whether the Final Rule went into effect (it did not). The former remains ripe for appellate review because the Injunction was in place at the time Respondents filed the New Jersey Action. *Test Masters Educ. Servs., Inc. v. Robin Singh Educ. Servs., Inc.*, 799 F.3d 437, 454 (5th Cir. 2015) (requiring order to be in place at time contemptuous action is taken). The latter has been repeatedly and resoundingly answered in the negative and cannot be collaterally challenged on appeal here.

2. Speculative Financial and Reputational Harm Are Insufficient

The Attorney Respondents' irreparable injury arguments are transparent, self-serving, and made without regard for their client, Respondent Alvarez. Within the nearly two pages the Attorney Respondents spend arguing irreparable harm, they mention her only once—in conjunction with themselves. (Dkt. 131 at 13 (complying with the Contempt Order "would constitute irreparable harm to both Ms. Alvarez and her Counsel.").) The Attorney Respondents go to great lengths in their multiple-page declarations to explain the pecuniary loss and stigma they may now face—but present no corresponding declaration from Respondent Alvarez detailing what consequences a federal contempt order will have on her livelihood or reputation going forward. The Attorney Respondents make no argument that Respondent Alvarez will personally suffer harm if the allegations are withdrawn. Absent such evidence, this Court can conclude only that Respondent Alvarez will not be irreparably harmed in complying with the Contempt Order, undercutting any "clear case of hardship" here.

The Attorney Respondents' remaining efforts to support a "clear case of hardship" for themselves collapses. They claim they will be irreparably injured if the Contempt Order is not stayed because it will reduce their firms' bottom lines (and presumably their individual profits) and have a "stigmatic effect" on the "quality and integrity" of their work (presumably further damaging their bottom line). (Dkt. 131 at 13-14 (citing Sellers, Swartz, and Savitz Decls.).) Nonetheless, they continue to comment about this case to the media, drawing further attention to these proceedings. (Mar. 20, 2018 BNA Article, at 2, attached as Exhibit 4 (Respondent Swartz stating they "respectfully disagree with the ruling and are considering their options.").)

E.I. du Pont de Nemours & Co v. Phillips Petroleum Co., 659 F. Supp. 92 (D. Del. 1987), is instructive. There, the defendant-patent infringer argued for a stay of an injunction permanently enjoining it from continuing to infringe, manufacture, use, or sell any product infringing on the

plaintiff's patent. *Id*. at 93. In addressing the same irreparable harm test applicable here, the court rejected the defendant's claim that it "will lose customers and business which it will probably be unable to recover if the Court's decision is reversed." *Id*. at 94. The court observed that "in reality, the only harm that [the defendant] will suffer if the injunction is not stayed is the loss of profits from the sale and use of infringing products." *Id*. (noting that it had "already found that massive infringement has occurred in the past and now [defendant] begs that it be permitted to continue to infringe."). The court observed that the defendant took a calculated risk in its business decisions, and "should not be heard to complain when it loses its gamble and reaps predictable results." *Id*. at 95 (internal quotations omitted) (citing *Polaroid Corp. v. Eastman Kodak Co.*, 641 F. Supp. 828, 343-44 (D. Mass. 1985)).

Phillips applies by analogy here. Simply because the Contempt Order threatens the Attorney Respondents' principal business model of bringing class and collective actions across the country (an apparent sixty-four class actions collectively amongst them in the past year alone) does not make the injury a "textbook example of irreparable injury." (Dkt. 131 at 14.) They made the calculated business decision to pursue the Contemptuous Allegations; they cannot now complain of its consequences.

Indeed, the extent to which the Attorney Respondents truly calculated their risk in taking that gamble must be considered. The Attorney Respondents were given an opportunity to avoid the Contempt Order. Chipotle asked the Attorney Respondents during the conferral on these proceedings to "just pull down your allegations, that's all we're asking, and they refused." (Ex. 1, 33:1-3.) The Attorney Respondents—presumably fully apprised of the disclosure requirements and adequacy considerations necessary to sustain their business models—continued to pursue "a claim that they should have known was unwarranted in law or fact." (Dkt. 129 at 26.) That the

Attorney Respondents must now live with the consequences of electing to do so—in damage to both their finances and reputation—does not make the injury irreparable, much less meet the "clearer case of hardship" they are required to prove here. *Landis,* 299 U.S. at 255.

Moreover, the perceived financial harm the Attorney Respondents claim will occur is speculative, at most. Remote and future consequences are insufficient to establish irreparable harm. *See Belcher v. Birmingham Trust Nat'l Bank,* 395 F.2d 685, 686 (5th Cir. 1968). For example, they assert that their ability to appear *pro hac vice* will be "threatened," but not that it will be barred. (Ex. B, ¶ 5 (contempt "may provide a ground on which admission may be denied.") (emphasis added); Ex. C, ¶ 5 (same); Ex. D, ¶ 6 (same).). That harm—even if merely threatened—is not irreparable. The ABA Model Rule on Pro Hac Vice on which they rely states that the disclosure period for formal contempt proceedings is limited to "a written order issued in the last [five (5)] years." (ABA Model Rule, attached as Exhibit 5.) Because the disclosure period will at some point expire, the harm is transient, not "irreparable."

Their further contention that they "may now be questioned" as to their adequacy to serve as class counsel is similarly speculative. (Ex. B, ¶ 7 ("Citation of contempt may affect my firm's ability to qualify as counsel for the class pursuant to Rule 23, Fed. R. Civ. P."); Ex. C, ¶ 6 (same); Ex. D, ¶ 7 (same).) So too is their assumption that but for this contempt proceeding they would have been retained in numerous state and local government proceedings and/or appointed as class or collective counsel. (Ex. B, ¶ 6.)

Finally, even if Respondents' harm is deemed sufficiently irreparable (it is not), it does not, on balance, outweigh the harm to Chipotle or the public in staying the Contempt Order. And in any event, a "stay is not a matter of right, even if irreparable injury might otherwise result." *Ind.*

State Police Pension Tr., 556 U.S. at 961. Respondents have therefore failed to demonstrate they will be irreparably harmed absent a stay of the Contempt Order.

C. Public Interest Favors Denying Respondents' Motion

Respondents contend that "to the extent the public interest is implicated" by the "difficult and consequential" questions this case allegedly raises, it weighs in favor of a stay. That contention fails for two reasons. (Dkt. 131 at 15.)

First, it ignores the public interest in efficiently resolving the New Jersey Action. In their New Jersey complaint, Respondents averred that public interests were at play in allowing a class action to go forward and that "a collective action will provide the most efficient mechanism for adjudicating" their claims. (Ex. 2, ¶¶ 68, 73(f).) In response to Chipotle's request for a temporary stay of the New Jersey Action pending the outcome of the present contempt motion, Respondents claimed that "the potential for indefinite delay" weighed against staying that action. (Aug. 22, 2017 Opp'n to Stay, attached as Exhibit 6, at 15.) Respondents should not now be permitted to place their personal interests in sustaining a nationwide class action practice above the interests of those putative New Jersey plaintiffs. And in any event, Respondents' willingness to continually modify their position on a stay in the New Jersey Action undermines any credibility in their present representations. (*See* Nov. 14, 2017 Or., at 1, attached as Exhibit 7 (stating that following contempt hearing, Respondents withdrew opposition to requested stay); Nov. 9, 2017 Ltr. from Savitz to New Jersey District Court, at 1, attached as Exhibit 8 (withdrawing opposition to stay "consistent with arguments Plaintiff made to the Eastern District of Texas").)

Second, the public has a strong interest in enforcing court orders. Staying the Contempt Order here will continue to inject unacceptable uncertainty into FLSA compliance. The Business Plaintiffs understood the Order to bar a private cause of action. (Ex. 1 at 69:21-70:17.) The DOL understood the Final Rule to be enjoined. (*Id*. at 67:21-69:20.) The public is thus best served by

the clarity that will come in requiring Respondents to amend their complaint to remove the Contemptuous Allegations and reconcile their pleadings with the Final Rule's defunct status.

II. Respondents Have Failed to Make a Substantial Showing of Likelihood of Success on the Merits

Because Respondents have failed to demonstrate the equities heavily tip in their favor, they must make a substantial showing that this case involves a "serious legal question" and presents a "substantial case on the merits." *See Ruiz*, 650 F.2d at 565-66. Respondents do not meet that substantial burden here.

A. Respondents Have Not Made a Substantial Showing of a Serious Legal Question

Respondents assert that this case presents a serious legal question because (1) contempt is a serious matter, (2) the questions have "'broad impact' beyond the case at hand, and (3) the "practical seriousness of the contempt finding for Respondents is borne out by their showing of irreparable harm." (Dkt. 131 at 3-4.) Those assertions are inadequate.

Initially, the third ground fails for the reasons in section I.B, *supra* pages 5-9. The professional consequences the Attorney Respondents now face are a result of their own calculated risk-taking. Accordingly, that ground fails to establish the existence of a substantial legal question.

As to the first ground, Chipotle agrees that contempt is a "serious matter." *N.L.R.B. v. Schill Steel Products.*, 480 F.2d 586 (5th Cir. 1973), on which Respondents rely, confirms that "a flagrant attempt to avoid the consequences of an order of [the] court" with bad faith, "contradictory legal arguments," "obviously not based on the facts and the record" is indeed a "serious matter." *Id*. at 596. And that is precisely what is present here: Respondents "recklessly disregarded a duty owed to the Court" and "pursued a claim that they should have known was unwarranted in fact or law." (Dkt. 129 at 26.)

But a "serious matter" does not necessarily a "serious legal question" make. *Compare Schill Steel*, 480 F.2d at 596 (noting contempt is a "serious matter"), *with Ruiz*, 650 F.2d at 565-66 (holding movants must make substantial showing of a "serious legal question"). A serious legal question is one with "far-reaching effects or public concerns[.]" *Wildmon v. Berwick Universal Pictures*, 983 F.2d 21, 23 (5th Cir. 1992). It is not sufficient that the case involves important and complex issues. *O'Donnell v. Harris Cty.*, 260 F. Supp. 3d 810, 818 (S.D. Tex. 2017) (finding preliminary injunction enjoining the use of secured money bail for indigent defendants did not implicate "serious legal question" warranting stay); *see also Sec. & Exch. Comm'n v. Farmer*, 2013 WL 12137757, at *1 (N.D. Tex. Dec. 19, 2013) (finding mere "pointing out that the issue is one of first impression in the Fifth Circuit" insufficient to show "case presents a serious legal question with broad implications").

Here, at most, this matter involves interpretation of the Injunction to determine whether it applies to Respondents (it does) and an assessment of whether Respondents' actions violated it (they did). There is nothing far-reaching or of public concern in that routine, albeit complex, analysis. *City of El Paso, Tex. v. El Paso Entm't Comm'n, Inc.*, 2009 WL 2143922, at *2 (W.D. Tex. July 8, 2009) (finding interpretation and construction of consent decree not a "serious legal question"). That Respondents are largely plaintiffs' class action lawyers that market themselves nationwide does not make this matter important—particularly given "the sheer dearth of parties so confused by" the Injunction. (Dkt. 129 at 21.) Respondents' first ground therefore fails.

Finally, as to the second ground, Respondents' exaggeration of the "broad impact" this case may have beyond these litigants should be rejected. In *United States v. Baylor University Medical Center*, the "broad impact" had the potential to open "the doors of private institutions to the probing tools of" a federal investigation. 711 F.2d 38, 40 (5th Cir. 1983) (ruling in context of

whether Medicare and Medicaid payments constitute federal financial assistance under the Rehabilitation Act); *see also Nat'l Treasury Emp. Union v. Von Rabb*, 808 F.2d 1057, 1059 (5th Cir. 1987) (finding constitutional issues surrounding drug testing program of substantial import to "Custom Service and its employees and to the citizens of this country"). Whether a single congressional hearing on the propriety of nationwide injunctions demonstrates a "robust national debate" is an immaterial question for another day. (Dkt. 131 at 4 n.4.) Respondents—despite their repeated efforts—cannot collaterally attack the Order. *See United States v. United Mine Workers of Am.*, 330 U.S. 258, 293-94 (1947) ("[U]ntil its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected, and disobedience of them is contempt of its lawful authority, to be punished."). The purported "broad impact" of the issues presented in this case are in fact limited to only those would-be plaintiffs similarly situated to Alvarez. Yet "Alvarez could cite no other plaintiff who construed the Injunction in the same way she did."(Dkt. 129 at 20.) And the Order's numerous citations to Fifth Circuit law demonstrate the contempt here is well-grounded in established precedent. Respondents' second ground therefore fails.

Because Respondents have failed to demonstrate the existence of a "serious legal question," their Motion should be denied.

B. Respondents Have No Substantial Case on the Merits

A "substantial case on the merits" requires less than a showing of probability of success on the merits but more than a mere possibility of relief. *O'Donnell*, 260 F. Supp. at 815. Contentions that simply ask the court to reach a different conclusion do not present a substantial case on the merits in favor of a stay. *See id.* at 818. Indeed, asserting the same arguments previously addressed—and rejected—by the court do not have a strong probability of success. *City of El Paso, Tex.*, 2009 WL 2143922, at *2; *see also Nat'l Football League Players Ass'n v. Nat'l Football*

League, 2017 WL 4124105, at *1 (E.D. Tex. Sept. 18, 2017). And where a court's order is reviewed for an abuse of discretion on appeal, the movants' probability of success is "correspondingly diminished." *City of El Paso, Tex.*, at *1.

Respondents recognize that they are already starting at a disadvantage. (Dkt. 131 at 5.) Yet they still argue that "the questions are close enough" and their "arguments are 'substantial' enough, to warrant a stay pending appeal under the circumstances." (Dkt. 131 at 5.) Respondents are wrong.

Respondents' case is meritless. Respondents cannot avoid that they "recklessly disregarded a duty owed to the Court" and "pursued a claim that they should have known was unwarranted in fact or law." (Dkt. 129 at 26.) In so doing, they violated this Court's Injunction. (*Id*. at 25.) "Respondents could find no precedent to support their reading of the Court's Order because none exists." (*Id*. at 26 (emphasis added).) This is not, as they claim, a substantial case on the merits, but is the very definition of an "unreasonable and vexatious"—or unsubstantial—matter. *See In re Osborne*, 375 B.R. 216, 224-25 (M.D. La. 2007) (quotations omitted) ("Unreasonable and vexatious conduct is harassing or annoying, or evinces the intentional or reckless pursuit of a claim, defense or position that is or should be known by the lawyer to be unwarranted in fact or law.").

At their core, Respondents' arguments amount to nothing more than a complaint that this Court should have reached a different conclusion. For all the following reasons, this Court applied the facts to the appropriate legal principles. The Fifth Circuit will therefore likely review the Order solely for an abuse of discretion on appeal. *Nat. Gas Pipeline Co. of Am. v. Energy Gathering, Inc.*, 86 F.3d 464, 467 (5th Cir. 1996) ("We review contempt orders and sanctions imposed under a court's inherent powers under the abuse of discretion standard."). Accordingly, as detailed below, Respondents' arguments "are not likely to win on the merits." *See Nat'l Football League Player Ass'n*, 2017 WL 4124105, at * 5 ("Indeed, the NFL's arguments all suggest that the Court did not

apply the correct law to the case, which is an argument the Court finds is not likely to win on the merits.").

1. The Injunction Binds Respondents

Despite being "the only people in the entire country" to take the position that the Order did not apply to them, providing "no precedent to support their reading of the Court's [Injunction] because none exists," and receiving this Court's twenty-six page Contempt Order disagreeing with every argument they presented, Respondents still blindly maintain that the Injunction does not apply to them. (Tr. at 10:16-18; Dkt. 129 at 26.)

Respondents rely principally on Rule 65(d)'s plain language and their own self-serving declarations to support this argument. (Dkt. 131 at 6 (quoting Sellers and Swartz Decls.).) This Court squarely rejected that argument, based on long-standing Fifth Circuit precedent. Their disagreement with how this Court resolved it does not make the issue "substantial" for purposes of their Motion.

Respondents' argument concerning privity is equally repetitive and unfounded. (Dkt. 129 at 7-10.) The assertion that the Department of Labor did not represent Respondent Alvarez's interests is an exercise in legal gymnastics, premised on a tortured reading that ignores that Rule 65 binds those in "active concert or participation with" parties to an injunction. Fed. R. Civ. P. 65(d)(2)(C). "Common sense rather than complex legal analysis" makes clear this includes Alvarez and, by extension, her counsel. (Dkt. 129 at 20.) And their argument as to "adequate" and "virtual representation" is nothing more than a disagreement with the Contempt Order's conclusion, premised on arguments this Court has rejected. (Dkt. 131 at 8-10.)

2. The Injunction Clearly Barred Filing Private Lawsuits

Respondents assert that because the Injunction did not "'specifically' address private FLSA lawsuits," a person could "reasonably fail to grasp that he was personally restrained from pursuing

a private lawsuit (be it meritorious or not) in another court." (Dkt. 131 at 11.) Again, Respondents appear to be the only people in the entire country to "fail to grasp" that the Injunction's language enjoining the DOL from "implementing and enforcing" the Final Rule was anything other than clear and unambiguous. (Dkt. 60 at 19; Ex. 1 at 10:16-21.) Indeed, by enjoining the Rule's implementation altogether, there was simply nothing to enforce—privately or otherwise. And Respondents provide no support for the proposition that because "three experts in civil procedure did not understand the Court's order to proscribe the filing of private lawsuits" their failure to grasp the Injunction's clear meaning was excused.[3] (Dkt. 131 at 11.)

3. This Court Has Personal Jurisdiction Over Respondents

Finally, Respondents' claim that they have a substantial case on the merits concerning personal jurisdiction yet again retreads already worn-down arguments. Respondents had notice of the Injunction. (Dkt. 129 at 5-6.) Respondents received notice "[a]t each and every step of this contempt proceeding." (*Id*. at 10.) And Respondents "enjoyed substantially compliant service and suffered no prejudice" as a result of Chipotle's service efforts. (*Id*. at 10.) This Court's application of *Waffenschmidt v. MacKay,* 763 F.2d 711 (5th Cir. 1985), here is therefore nothing more than a routine application of the Fifth Circuit's well-established principle that extraterritorial nonparties with actual notice of the court's order cannot assist in its violation. (*Id*. at 5-6.)

CONCLUSION

For the reasons set forth above, Respondents' Motion should be denied in its entirety.

[3] Respondents' reliance on those alleged experts further fails in light of this Court's observation that those opinions "lack supporting case law or even a clear explanation for so construing the injunction." (Dkt. 129 at 22 n.8.)

Dated: March 23, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

Undersigned counsel certifies that on March 23, 2017, the foregoing **PETITIONERS CHIPOTLE MEXICAN GRILL, INC.'S AND CHIPOTLE SERVICES, LLC'S OPPOSITION TO EMERGENCY MOTION OF RESPONDENTS CARMEN ALVAREZ AND HER COUNSEL FOR STAY PENDING APPEAL** was filed electronically with the Clerk of the Court for the U.S. District Court, Eastern District of Texas, by submission through the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to all counsel of record, each of whom have consented to accept said Notice as service of this document by electronic means. Counsel for Respondents will be served by electronic mail as follows:

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