UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 05-21276-CIV-HUCK/SIMONTON

[redacted],

Plaintiff,

v.

[Defendant A], a/k/a
[Defendant A] & [Defendant B]

Defendants.
_____/

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO ALTER OR AMEND A JUDGMENT PURSUANT TO RULE 59(E) OF THE FEDERAL RULES OF CIVIL PROCEDURE

Defendants, [Defendant A] and [Defendant B] ("Defendants"), through their undersigned attorneys, hereby respond to Plaintiff's Motion to Alter or Amend a Judgment Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, and state:

BACKGROUND

Plaintiff has filed this action pursuant to § 207 of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201 *et seq*., for failure to pay overtime wages. The Court granted in part and denied in part the Defendants' Motion to Dismiss, which it had converted into a Motion for Summary Judgment. The Court found that Defendant [Defendant A] is not subject to "enterprise coverage" under the FLSA because [Defendant A] has annual sales of less than $500,000.00, but the Court also found that Plaintiff could possibly enjoy "individual coverage" because a reasonable jury could find that he installed automotive parts and used cleaners that had traveled in interstate commerce. Plaintiff subsequently filed a Motion to Alter or Amend a Judgment Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure (hereinafter Plaintiff's Motion to

Alter or Amend), which asks the Court to grant judgment in its favor on the issue of individual coverage, even though the Plaintiff never filed a motion for summary judgment on this issue.

Plaintiff's Motion to Alter or Amend should be denied for the following reasons: 1) the Motion inaccurately states that Defendant's counsel had no objection to Plaintiff's filing his Motion to Alter or Amend; 2) the relief Plaintiff seeks is entirely inappropriate under Federal Rules of Civil Procedure 59(e) and 56(d) because there has been no final judgment issued by the Court that could be altered or amended; 3) the Plaintiff's Motion is a transparent request to obtain summary judgment in his favor on the issue of whether individual coverage applies to Plaintiff after the time for filing dispositive motions in this case has expired; and 4) Defendants' Motion for Reconsideration of the Court's Order on Defendant's Motion for Summary Judgment is now pending before the Court, and because that Motion concerns the legal standard to be applied in determining whether individual coverage applies to Plaintiff, that Motion should be considered contemporaneously with the Plaintiff's instant motion. These arguments will be discussed in turn.

MEMORANDUM OF LAW

I. Defendants do object to Plaintiff's filing his Motion to Alter or Amend a Judgment Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure

As served on Defendants' counsel, Plaintiff's Motion to Alter or Amend contains the statement, "Plaintiff certifies that opposing counsel was contacted before this motion was submitted, and opposing counsel had no objection to this motion being filed." (*See Plaintiff's Motion to Alter or Amend a Judgment Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure*, at 2-3, attached hereto as *Exhibit 1*).

This statement is false. Plaintiff's counsel did not contact Defendants' counsel over the

telephone or via e-mail concerning the Motion, nor did counsel for the parties exchange any writings concerning the Motion. Because Plaintiff's Motion states that it was "submitted," Defendants' counsel can only presume that Plaintiff's counsel knowingly served on Defendants a signed document containing a material misrepresentation intended to mislead not only Defendants' counsel but also the Court, although late on Wednesday, September 14, 2005, Plaintiff's attorney said he did not file it. As explained in detail in Section II *infra*, Defendants' counsel strongly objects to Plaintiff's Motion.

Further still, the Certificate of Service in Plaintiff's Motion to Alter or Amend is signed and dated September 13, 2005, but the fax date at the top of the page reads September 14, 2005, at 2:46 p.m. *Exhibit 1* at 1-3. The actual fax came in the afternoon on September 14, 2005. Thus, it appears that Plaintiff's counsel has willfully delayed serving the Motion containing the material misrepresentation on Defendants' counsel.

In sum, Plaintiff's counsel has attempted to represent to the Court that the parties agree that the issue of "individual coverage" under the FLSA is no longer a disputed issue of fact in this case. Nothing could be further from the truth. As outlined in Section II *infra*, the Court, in its Order on Defendants' Motion for Summary Judgment, has ruled that while summary judgment is inappropriate as to the issue of Plaintiff's "individual coverage" status, that issue is one in which serious disagreement remains between the parties, and thus should proceed to trial.

II. The relief Plaintiff seeks is entirely inappropriate under Federal Rules of Civil Procedure 59(e) and 56(d)

A Rule 59(e) motion is properly raised after the entry of *final* judgment on a disputed issue. "[T]he decision whether a particular pending motion falls under Rule 59(e) will of necessity determine whether an otherwise final judgment is appealable." *Osterneck v. Ernst and Whinney*, 489 U.S. 169, 177 (1989). The rule itself states that "[a]ny motion to alter or amend a

judgment shall be filed no later than 10 days after the entry of the judgment." Fed. R. Civ. P. 59(e). In the instant case, there has been no final judgment entered as to whether Plaintiff is a covered employee under the FLSA, nor has there been a *grant* of summary judgment on that issue. Rather, the Court has only *denied* summary judgment, thus the factual question of individual coverage remains in dispute, and there is no judgment to alter or amend. Plaintiff's Rule 59(e) motion is entirely premature and misplaced.

Moreover, like all of the Federal Rules of Civil Procedure, Rule 59(e) serves a particular, narrow function. "[T]he narrow purpose of [a Rule 59(e) motion is to] allow a party to correct manifest errors of law or fact or to present newly discovered evidence." *Waltman v. Int'l Paper Co.,* 875 F.2d 468, 473 (5th Cir.1989). "A Rule 59(e) motion is appropriate 'if the district court: (1) is presented with newly discovered evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is an intervening change in controlling law.'" *Circuit City Stores, Inc. v. Mantor*, 417 F.3d 1060, 1064 (9th Cir. 2005) (citing *Sch. Dist. No. 1J, Multnomah County v. ACandS, Inc.,* 5 F.3d 1255, 1263 (9th Cir.1993) "[A] Rule 59(e) motion is appropriate where the court has misapprehended the facts, a party's position, or the controlling law." *Dean v. Gilette*, 2005 WL 1631093 at *2 (D. Kan. 2005) (citing *Servants of Paraclete v. Does,* 204 F.3d 1005, 1012 (10th Cir.2000).

Here, Plaintiff has not only inappropriately submitted his Rule 59(e) motion prior to final judgment on the disputed issue of fact, but also fails to bring his Rule 59(e) motion upon any of the bases recognized by the federal courts. Plaintiff does not move the Court to correct a clear error of law or fact, or to consider new evidence, or to address an intervening change in any controlling law. Instead, Plaintiff is attempting to subvert the trial process by taking a hotly disputed factual issue away from a jury. In its Order on Defendants' Motion for Summary

Judgment, the Court clearly noted that

> it is not unreasonable to conclude that Plaintiff was 'engaged in commerce,' as that term is contemplated under the FLSA, by virtue of his duties as a mechanic installing automotive parts, which had traveled in interstate commerce, in [Defendant A]'s customers' motor vehicles….Therefore, summary judgment on the question of individual coverage under the FLSA is inappropriate.

Thus, as the Court has recognized, whether Plaintiff is an employee covered by the FLSA remains a factual issue to be determined by a jury at trial.

Under Federal Rule of Civil Procedure 56, in a case not fully adjudicated on a motion for summary judgment, those facts about which controversy remains, such as the applicability of "individual coverage" to the Plaintiff in this case, shall not be deemed established for purposes of trial. Fed. R. Civ. P. 56(d). Whether Plaintiff enjoys individual coverage under the FLSA is a material fact that is "actually and in good faith controverted." Fed. R. Civ. P. 56(d).

In his Motion to Alter or Amend, Plaintiff is blatantly seeking to subvert the trial process by asking the Court to convert a partial *denial* of a motion for summary judgment into a *grant* of summary judgment concerning a disputed factual issue. Plaintiff is thus confused as to the law, and is now attempting to foist his confusion upon the Court. A denial of summary judgment means precisely that: the Court has determined that summary judgment as to a disputed issue of fact is inappropriate, and that same disputed issue of fact is therefore to be determined at trial by a jury, rather than by the Court. Fed. R. Civ. P. 56(d). Defendants thus move the Court to either stand by its Order on Defendants' Motion for Summary Judgment and thereby deny Plaintiff's Motion to Alter or Amend, or grant Defendants' Motion for Reconsideration.

III. The Plaintiff's Motion is a transparent attempt to obtain summary judgment on the issue of whether Plaintiff is entitled to individual coverage without having to file such a motion; the deadline to file such a motion has passed

This Court's Order Setting Civil Jury Trial Date and Pretrial Schedule of May 31, 2005, ordered that all dispositive motions in this case be filed 40 days prior to the trial date. The same Order set the trial for October 17, 2005, making the deadline for filing all dispositive motions September 7, 2005. Thus, the deadline for filing dispositive motions in this case has passed.

Plaintiff, in his Motion to Alter or Amend, quite correctly notes that, in the Court's Order on Defendants' Motion for Summary Judgment, "the Court did not concretely state that individual coverage applies to the Plaintiff." (*Exhibit 1* at 2). As noted in Section II *supra*, that is precisely the point of the Court's Order on Defendants' Motion for Summary Judgment: the issue of whether Plaintiff is covered under the FLSA is not appropriate for summary judgment, but should be decided by a jury at trial. Plaintiff is attempting to circumvent the Scheduling Order issued by the Court by requesting that the Court treat Plaintiff's present Motion to Alter or Amend as a dispositive motion on the issue of whether Plaintiff is covered by the FLSA. Defendants respectfully request that the Court not condone Plaintiff's attempt to circumvent the clear deadline for dispositive motions laid down by the Court over three months ago.

Even if the Court were to treat Plaintiff's Motion to Alter or Amend as a motion for summary judgment, Plaintiff's motion does not contain a Statement of Material Facts, as is required by Local Rule 7.5, which the Local Rule requires precisely in order to allow opposing counsel the opportunity to rebut any facts that remain in dispute. Violations of Local Rules in general require denial. *Damon v. Fleming Supermarkets of Florida, Inc.*, slip op. (Case No. 97-0230-CIV-LENARD) (S.D. Fla. Jan. 9, 1999) (adopting report and recommendation of Magistrate Brown striking motion to tax costs from the record for defendant's failure to file

certificate of conferral as required by Local Rule 7.3); *Longariello v. School Bd. of Monroe County*, 1996 LEXIS 21661, at *6 (S.D. Fla. 1996) (denying motion for summary judgment in part upon movant's failure to comply with Local Rule 7.5 by not filing a concise statement of facts); *Hoglund v. Limbach Constructors, Inc.*, 1998 LEXIS 8577 at *9-14 (S.D. Fla. 1998) (holding that a party's failure to comply with clear mandate of Local Rule 26.1.G.6(b) constituted waiver of party's privilege objection over production of her diary); *Beer Nuts, Inc. v. King Nut Co.*, 477 F.2d 326, 329-30 (6th Cir.), *cert. denied*, 414 U.S. 858 (1973) (holding that the district court properly denied a motion to compel for failure to adhere to the requirement of the local rules that the moving party must "notify the court of its attempts to resolve the controversy").

Moreover, the courts, including the former Fifth Circuit in a binding opinion, have issued strong language to the effect that a court's local rules are more than mere inconveniences, but rather must be obeyed. *Wirtz v. Hooper-Holmes Bureau, Inc.*, 327 F.2d 939, 943 (5th Cir. 1964) (stating that "Local Rules for the conduct of trial courts are desirable and necessary, and such rules should not be ignored or declared invalid except for compelling reasons"); *Wiss v. Weinberger*, 415 F. Supp. 293, 294 n.4 (E.D. Pa. 1976) (stating that "non-compliance with any local rule is a practice to be *strongly condemned* and one which will be penalized if the circumstances warrant such action") (emphasis in original). The Defendants' violations of Local Rule 7.1.A.3(a) require that their Motion be denied.

IV. Because a Motion for Reconsideration is pending before the Court, any motion filed by Plaintiff should be considered contemporaneously with it

On September 14, 2005, Defendants filed with the Court and served on Plaintiff's counsel a Motion for Reconsider of the Court's Order on Defendants' Motion for Summary Judgment (hereinafter Defendants' Motion for Reconsideration). That motion is incorporated by reference in its entirety into this Response.

Defendants' Motion for Reconsideration concerns the correct legal standard to be applied in determining individual coverage under the FLSA. Defendants believe that the Court's partial grant of summary judgment, which found that Defendant [Defendant A] is not subject to "enterprise coverage" under the FLSA, precludes the use of the legal standard whereby an employee is covered if he merely handles goods that have traveled through interstate commerce. As the United States Supreme Court has held,

> "[i]n the Fair Labor Standards Act, 29 U.S.C.A. s 201 et seq., Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of federal authority….So handlers of goods for a wholesaler who moves them interstate on order or to meet the needs of specified customers are in commerce, while those employees who handle goods after acquisition by a merchant for general local disposition are not."

McLeod v. Threlkeld, 319 U.S. 491, 493 (1943). Because Defendants believe that the Court's finding that Defendant [Defendant A] is not subject to "enterprise coverage" necessarily requires that the more stringent standard for finding that the employee himself was "engaged in commerce" be applied, Defendants respectfully submit that the Court consider Defendants' Motion for Reconsideration contemporaneously with any motion Plaintiff may file regarding the issue of whether Plaintiff is covered by the FLSA.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiff's Motion to Alter or Amend a Judgment Pursuant to Rule 59(e) of the Federal Rules of Civil Procedure.