No. 17-4111

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

R. ALEXANDER ACOSTA, SECRETARY OF LABOR,
U.S. DEPARTMENT OF LABOR,
Plaintiff-Appellee,

v.

FORECLOSURE CONNECTION, INC., ET AL.,
Defendants-Appellants.

On Appeal from the United States District Court for the District of Utah,
Honorable Dale A. Kimball, Case No. 2:15-cv-00653-DAK

SUPPLEMENTAL BRIEF OF THE SECRETARY OF LABOR

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GLOSSARY

Pursuant to 10th Circuit Local Rule 28.2(C)(6), the following is a glossary of acronyms used in this brief:

"Barber, Jr." means Mychal Scott Barber.

"Barber, Sr." means Mychal Barber.

"Decision" means Findings of Fact & Conclusions of Law.

"FLSA or Act" means Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201 *et seq*.

"Foreclosure" means Foreclosure Connection, Inc. and Jason Williams.

"Secretary" means Secretary of Labor, U.S. Department of Labor.

"WHD" means Wage and Hour Division, U.S. Department of Labor.

Pursuant to this Court's order of May 17, 2018, the Secretary of Labor ("Secretary") submits this supplemental brief addressing whether he "has authority to bring a civil action seeking damages for an alleged violation of the anti-retaliation provision of the Fair Labor Standards Act [("FLSA" or "Act")], 29 U.S.C. § 215(a)(3)." The Secretary does have such authority. The Supreme Court's opinion in *Mitchell v. Robert DeMario Jewelry, Inc*., 361 U.S. 288 (1960), squarely holds that based on the district courts' broad equitable powers and the purposes served by the Secretary's bringing actions alleging violations of the FLSA's anti-retaliation provision, the Secretary may seek the reimbursement of lost wages resulting from a violation of section 215(a)(3) in a case brought pursuant to 29 U.S.C. 217. *Id.* at 289-96. In addition, because the FLSA indicates that the Secretary may seek "legal or equitable relief" in cases vindicating employees' rights under section 215(a)(3) and such relief includes liquidated damages in an amount equal to lost wages, the Secretary may also seek that remedy in this context.

BACKGROUND

A. Procedural History

The Secretary brought this action pursuant to 29 U.S.C. 216 and 217 seeking injunctive relief prohibiting Foreclosure Connection, Inc. and Jason Williams (collectively, "Foreclosure") from violating the FLSA and a monetary award

reimbursing Mychal Barber ("Barber, Sr.") and Mychal Scott Barber ("Barber, Jr.") for losses resulting from Foreclosure's violation of section 15(a)(3), including wages lost while unemployed and liquidated damages. Aplt. App. Vol. 1 at 12-23 (Secretary's Complaint). Pursuant to the parties' agreement to proceed without a jury—reflected in a jointly signed pre-trial order, *id.* at 41-42—the district court held a bench trial in this matter in January 2017, *id.* at 6-7.

Based on the evidence presented at that trial, the district court determined that Foreclosure had violated the FLSA's anti-retaliation provision by firing Barber, Sr. and Barber, Jr. because those employees had filed a complaint with the Wage and Hour Division ("WHD") about not receiving overtime compensation. Findings of Fact & Conclusions of Law at 17-20, 32-34 (May 8, 2017) ("Decision"). The court also found that Foreclosure willfully violated the FLSA—in particular, Foreclosure knew that its practices, including creating false records and instructing employees to lie, were unlawful and were deliberately intended to deceive WHD—and therefore could not show that it had acted with good faith or a reasonable belief that it was in compliance with the Act, meaning an award of liquidated damages was appropriate. *Id.* at 12-16, 34-37 (citing, *inter alia*, 29 U.S.C. 260).

Accordingly, the district court entered a permanent injunction prohibiting Foreclosure from violating the FLSA in the future, Aplt. App. Vol. 1 at 43-45, and also "order[ed] Defendants to pay back wages and liquidated damages" to the Barbers, Decision at 38. The district court's award accounted for wages the Barbers lost because Foreclosure refused to issue them paychecks after terminating them, even though they had unpaid hours worked that week, and because they were unemployed from the date of their unlawful termination through Barber, Jr.'s returning to school on August 27, 2015, and Barber, Sr.'s securing new employment on December 29, 2016. Decision at 20-21. The award also included liquidated damages in an amount equal to those sums. *Id.*[1] At no point during the litigation before the district court or on appeal to this Court did Foreclosure object to the types of relief sought or awarded.[2]

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[1] The post-trial award additionally included overtime compensation for hours worked over 40 in each workweek during which Barber, Sr. and Barber, Jr. were employed by Foreclosure as well as liquidated damages in amounts equal to those sums. Decision at 20-21. This portion of the award was based on the district court's finding, supported by evidence presented at trial, that Foreclosure did not pay overtime compensation to its employees, *see id.* at 6; *see also, e.g.*, Aplt. App. Vol. 3 at 77, 209-10, Vol. 5 at 223 (Tr. 299-300, 388, 882) (testimony of Barber, Jr., Barber, Sr., and Foreclosure's foreman that Foreclosure paid employees the same rate for all hours worked, even hours over 40 in a workweek). Foreclosure made no objection to the inclusion of this relief in the court's award.

[2] Foreclosure did contest the amount of lost pay the Secretary requested on behalf of Barber, Sr., arguing that Barber, Sr.'s period of unemployment was unusually lengthy. *See* Decision at 22. On that ground, the district court reduced by 15

B. Relevant Statutory Provisions

The FLSA includes two provisions setting out remedies the Secretary may seek as well as, in a provision creating a private right of action for employees under the Act, references to the Secretary's authority to secure relief.

First, section 217 permits the Secretary to bring suits seeking injunctive relief for violations of the FLSA, including the Act's anti-retaliation provision. *See* 29 U.S.C. 217. Specifically, "[t]he district courts … shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title …." *Id.*[3]

Second, section 216(c) permits the Secretary to bring suits on behalf of employees "to recover the amount of unpaid minimum wages or overtime compensation and an equal amount as liquidated damages." 29 U.S.C. 216(c).

In addition, section 216(b) describes the remedies available to employees who bring private suits against their employers and, importantly, refers to certain types of actions the Secretary may file. With respect to violations of the prohibition on retaliation, section 216(b) provides that employers "shall be liable

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percent the amount of back wages (and, accordingly, liquidated damages) that Foreclosure was obligated to pay to Barber, Sr. *Id.* at 22, 38.

[3] Section 217 also notes that the relief for which it provides "includ[es] in the case of violations of section 215(a)(2) of this title"—the prohibition on violating the Act's minimum wage and overtime compensation requirements—"the restraint of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter." 29 U.S.C. 217.

for such *legal or equitable relief* as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation … the payment of wages lost and an additional equal amount as liquidated damages."
29 U.S.C. 216(b) (emphasis added). Section 216(b) goes on to describe in similar terms the relief the Secretary may seek for a violation of section 215(a)(3) under section 217, providing that an employee's private right of action "shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which … *legal or equitable relief* is sought as a result of alleged violations of section 215(a)(3) of this title." *Id.* (emphasis added).

ARGUMENT

The FLSA provides the Secretary with authority to seek the reimbursement of lost wages, as well as liquidated damages in an amount equal to such wages, in a case alleging a violation of the statute's anti-retaliation provision, section 215(a)(3). *See* 29 U.S.C. 215(a)(3), 216, 217.

I. THE SECRETARY HAS AUTHORITY TO SEEK RECOVERY OF WAGES LOST BECAUSE OF A VIOLATION OF SECTION 215(a)(3)

The Supreme Court has in significant part resolved the question framed in this Court's order for supplemental briefing. In *Mitchell v. Robert DeMario Jewelry, Inc*., 361 U.S. 288 (1960), the Court considered "whether, in an action

brought by the Secretary of Labor to enjoin violations of s[ection 2]15(a)(3), [s]ection [2]17 empowers a District Court to order reimbursement for loss of wages caused by an unlawful discharge or other discrimination." *Id.* at 289. The Court squarely held that section 217 does create that authority. *Id.* at 289-96.

The Supreme Court first explained that as a general matter, a court's authority to award monetary relief when exercising equitable jurisdiction need not be explicitly provided by statute. *See Robert DeMario Jewelry*, 361 U.S. at 290-91. Instead, as the Court had held in a prior case, where Congress has granted a government actor the power to seek injunctive relief, "'[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that [equitable] jurisdiction,'" including "the implied power to order reimbursement." *Id.* (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 397-98 (1946)); *see id.* (noting that "'since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake'" (quoting *Warner Holding Co.*, 328 U.S. at 397-98)).

This principle, the Supreme Court explained, applies to the FLSA: in crafting the Act's remedies provisions, Congress "must be taken to have acted cognizant of the historic power of equity to provide complete relief in the light of

statutory purposes." *Robert DeMario Jewelry*, 361 U.S. at 291-92. Those purposes—"to achieve … certain minimum labor standards"—depend on "information and complaints received from employees," meaning that "effective enforcement could … only be expected if employees felt free to approach officials with their grievances." *Id.* at 292 (citing 29 U.S.C. 202). Accordingly, "[b]y the proscription of retaliatory acts set forth in s[ection 2]15(a)(3), and its enforcement in equity by the Secretary pursuant to s[ection 2]17, Congress sought to foster a climate in which compliance with the substantive provisions of the Act would be enhanced." *Id.* Specifically, because "the prospect of discharge and the total loss of wages for the indeterminate period necessary to seek and obtain reinstatement" would dissuade employees from making complaints, "the significance of reimbursement of lost wages" is "apparent." *Id.* at 292-93.

For these reasons, the Supreme Court concluded, "in an action by the Secretary to restrain violations of [section 2]15(a)(3), a District Court has jurisdiction to order an employer to reimburse employees, unlawfully discharged or otherwise discriminated against, for wages lost because of that discharge or discrimination." *Robert DeMario Jewelry*, 361 U.S. at 296.[4] Thus, *Robert*

[4] Shortly after *Robert DeMario Jewelry* was issued, Congress amended section 217 to explicitly permit district courts to restrain the withholding of unpaid minimum wage and overtime compensation in suits brought under the provision. *See* Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 12(b), 75 Stat. 65,

DeMario Jewelry controls here and establishes that the Secretary properly sought reimbursement of lost wages in this case.[5]

Accordingly, the Secretary has authority under section 217 to seek reimbursement for wages lost because of a section 215(a)(3) violation and properly did so in this case.

74-75 (May 5, 1961). The legislative history cites *Robert DeMario Jewelry* in stating that the amendment did not affect courts' ability to award lost wages for violations of the FLSA's anti-retaliation provision. *See* S. Rep. No. 87-145 (1961), *reprinted in* 1961 U.S. Code Cong. & Ad. News 1620, 1659 (noting that the amendment of section 217 "does not change the present authority of the courts to order reimbursement for losses incurred by an employee due to discriminatory discharge in violation of section [2]15(a)(3) of the act (Mitchell v. DeMario, 361 U.S. 288)").

[5] This Court has recognized the principles set forth in *Robert DeMario Jewelry* in a manner that reinforces that the Secretary appropriately sought reimbursement of lost wages in this case. In *United States v. Rx Depot, Inc.*, 438 F.3d 1052 (10th Cir. 2006), this Court concluded that disgorgement of unlawfully obtained profits was an available remedy under the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 301-397, which—in language identical to that in section 217—grants district courts "'jurisdiction, for cause shown to restrain violations'" of its provisions. *Rx Depot*, 438 F.3d at 1054-61 (quoting 21 U.S.C. 332(a)). This Court explained that "when a statute invokes general equity jurisdiction, courts are permitted to utilize any equitable remedy to further the purposes of the statute absent a clear legislative command or necessary and inescapable inference restricting the remedies available." *Id.* at 1055 (citing *Robert DeMario Jewelry*, 361 U.S. 288; *Warner Holding Co.*, 328 U.S. 395); *see id.* (reiterating that "inclusive [statutory] language is not required" to provide authority for a court granted equitable jurisdiction to award reimbursement of monetary losses (citing *Robert DeMario Jewelry*, 361 U.S. at 289, 291-92)).

II. THE SECRETARY HAS AUTHORITY TO SEEK LIQUIDATED DAMAGES IN AN AMOUNT EQUAL TO WAGES LOST BECAUSE OF A VIOLATION OF SECTION 215(a)(3)

The FLSA's remedies provisions permit the Secretary to seek liquidated damages in an amount equal to lost wages in suits he brings to remedy violations of the Act's anti-retaliation provision.

1. The statutory text indicates that the Secretary may seek relief in retaliation cases that would traditionally be considered legal in nature. Section 216(b) refers to "the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which … *legal or equitable relief* is sought as a result of alleged violations of section 215(a)(3) of this title." 29 U.S.C. 216(b) (emphasis added). This language shows that Congress intended that *both* categories of relief would be available to the Secretary in an action brought for a violation of the FLSA's anti-retaliation provision.

First, to conclude that the Secretary cannot seek legal as well as equitable relief in retaliation cases would inappropriately treat this language in section 216(b) as superfluous or void rather than to give it meaning as required by a fundamental principle of statutory construction. *See, e.g.*, *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute." (quoting *United States v. Menasche*, 348 U.S. 528, 538-39

(1955)) (internal quotation marks omitted)); *Chevron Mining Inc. v. United States*, 863 F.3d 1261, 1274 (10th Cir. 2017) ("It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." (quoting *TRW Inc.*, 534 U.S. at 31) (internal quotation marks omitted)). Put differently, to read section 217 as permitting the Secretary to request only injunctive relief for a violation of section 15(a)(3) would fail to give effect to the portion of section 216(b) referring to the Secretary's recovery of legal relief in a section 217 retaliation action.

Second, section 216(b) uses the term "legal or equitable relief" twice, in one instance explicitly specifying that such relief includes liquidated damages, and the two references must be understood to have the same meaning. *See Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 501 (1998) (referring to "the established canon of construction that similar language contained within the same section of a statute must be accorded a consistent meaning"); *United States v. Porter*, 745 F.3d 1035, 1042 (10th Cir. 2014) (referring to "'[t]he normal rule of statutory construction [that] assumes that identical words used in different parts of the same act are intended to have the same meaning'" (quoting *Sorenson v. Sec'y of Treasury*, 475 U.S. 851, 860 (1986))). Specifically, section 216(b) explains that

"[a]ny employer who violates the provisions of section 215(a)(3) of this title shall be liable for such *legal or equitable relief* as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation … the payment of wages lost and *an additional equal amount as liquidated damages*." 29 U.S.C. 216(b) (emphases added).[6] This statutory text plainly states that liquidated damages are included in the meaning of the term "legal or equitable relief." Therefore, when section 216(b) subsequently refers to "legal or equitable relief" that the Secretary may seek in section 215(a)(3) cases, that term necessarily encompasses a broad set of remedies that includes liquidated damages.

2. This understanding of the statutory text is fully consistent with case law addressing the typical scope of authority of courts sitting in equity. This precedent supports the proposition that the award of liquidated damages by district courts exercising equitable jurisdiction in section 217 retaliation cases is appropriate.

To the extent liquidated damages should be understood to constitute a legal remedy, they may appropriately be awarded in a section 217 retaliation action based on the longstanding principle that courts exercising equitable jurisdiction may award incidental legal relief. The Supreme Court has explained that where

[6] Based on this provision, there is no question but that the Barbers could have sought liquidated damages in an amount equal to lost wages had they filed a private suit alleging termination in violation of section 215(a)(3).

"the equitable jurisdiction of the court has properly been invoked for injunctive purposes, the court has the power to decide all relevant matters in dispute and to award complete relief even though the decree includes that which might be conferred by a court of law." *Warner Holding Co.*, 328 U.S. at 399 (citing *Alexander v. Hillman*, 296 U.S. 222, 241, 242 (1935)). This Court and other circuit courts of appeals have invoked the same principle. *See, e.g.*, *Brooks v. Yarbrough*, 37 F.2d 527, 530 (10th Cir. 1930) (describing the "well settled principle" that if a court sits in equity but "legal claims ... are dependent upon, or germane to the matter of equitable jurisdiction," "the court will proceed to a final determination of all the matters in issue, although in doing so it may establish purely legal rights and give purely legal remedies which would otherwise be beyond its power" (citing, *inter alia*, *United States v. Union Pac. Ry. Co*., 160 U.S. 1, 50, 52 (1895))); *FTC v. Bronson Partners, LLC*, 654 F.3d 359, 368-69 (2d Cir. 2011) ("[W]hen a court is statutorily authorized to enjoin unlawful conduct, it may invoke the full range of its remedial powers—both legal and equitable—in fashioning an order that affords 'complete relief.'" (citing *Warner Holding Co.*, 328 U.S. 395))); *Medtronic, Inc. v. Intermedics, In*c., 725 F.2d 440, 442 (7th Cir. 1984) ("[A] plaintiff in equity could ask the equity court to grant him legal as well as equitable relief—for example, damages as well as an injunction—

under the equity clean-up doctrine." (citing, *inter alia*, *Wright v. Scotton*, 121 A. 69, 76 (Del. 1923))).

Moreover, although monetary relief is traditionally considered a legal remedy, liquidated damages sought by the Secretary in retaliation cases brought under section 217 could properly be considered an equitable remedy and therefore plainly within the scope of relief the Secretary may request under section 217 for a violation of section 215(a)(3), as section 216(b) indicates. As this Court has explained, the Supreme Court recognizes that exceptions apply to "the general rule that monetary relief constitutes a legal remedy." *Adams v. Cyprus Amax Minerals Co.*, 149 F.3d 1156, 1161 (10th Cir. 1998); *see CIGNA Corp. v. Amara*, 563 U.S. 421, 441 (2011) (noting in discussing a district court's award of a monetary remedy that "the fact that this relief takes the form of a money payment does not remove it from the category of traditionally equitable relief"). For instance, "[a]n award of money damages may be considered an equitable rather than legal remedy if … the monetary award is '"incidental to or intertwined with injunctive relief."' *Cyprus Amax Minerals Co.*, 149 F.3d at 1161 (quoting *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570-71 (1990)). Here, liquidated damages were incidental to and intertwined with the Secretary's request for, and the district court's entry of, an injunction prohibiting

Foreclosure from continuing to engage in FLSA violations, including being enjoined from retaliating against employees who complain about FLSA violations, committing overtime compensation violations, interfering with WHD's investigation by instructing employees not to speak to or to lie to WHD, and interfering with WHD's investigation by creating false records including independent contractor agreements and 1099 forms. Aplee. Supp. App. 16-18. This injunctive relief was fundamental to the Secretary's case, because a court order prohibiting continued interference with WHD's investigation and any additional retaliation against employees permits WHD to proceed with its consideration of Foreclosure's practice of not paying overtime compensation to its employees and, importantly, to do so without putting more of those employees at risk of harm. Providing reimbursement to the Barbers, who were harmed by the very actions Foreclosure must now cease, is secondary to, as well as directly connected to, the injunction prohibiting Foreclosure from engaging in egregious violations of the FLSA's requirements.

In addition, "[a]n award of money damages may be considered an equitable rather than legal remedy if … the damages are restitutionary, 'such as in "action[s] for disgorgement of improper profits …."'" *Cyprus Amax Minerals Co.*, 149 F.3d at 1161 (quoting *Terry*, 494 U.S. at 570-71). As explained in more detail

below, the Supreme Court and this Court have considered liquidated damages for FLSA violations to compensate employees for the harm of delayed payment of wages. *See, e.g.*, *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945); *Jordan v. U.S. Postal Serv.*, 379 F.3d 1196, 1202 (10th Cir. 2004).

Therefore, circumstances in which monetary relief constitutes an equitable remedy exist here. And to the extent liquidated damages are properly considered equitable relief in this context, there can be no question about the Secretary's authority to seek them in a section 217 retaliation action. *See Robert DeMario Jewelry*, 361 U.S. at 291-92 (discussing the district courts' broad power to award relief under section 217's grant of equitable authority to restrain FLSA violations).

Accordingly, that section 217 permits the Secretary to seek relief from courts sitting in equitable jurisdiction does not preclude him from seeking liquidated damages in section 215(a)(3) cases—as permitted by the statutory text—regardless of whether such relief is best understood to be legal or equitable.

3. In addition, if the statute failed to give the Secretary the ability to seek liquidated damages in a section 217 retaliation case, that would defeat a primary purpose of section 217: "to restore the status quo interfered with by the unlawful conduct of the employer." *Walling v. O'Grady*, 146 F.2d 422, 423 (2d Cir. 1944), *agreed with by Robert DeMario Jewelry*, 361 U.S. 288; *see Brock v. Casey Truck*

Sales, Inc., 839 F.2d 872, 879 (2d Cir. 1988) ("'The purposes of a restitutionary injunction under section [2]17 are to make whole employees who have unlawfully been deprived of wages ….'" (quoting *Donovan v. Sovereign Sec., Ltd*., 726 F.2d 55, 58 (2d Cir. 1984))). Courts exercising equitable jurisdiction are intended to have authority to provide "complete relief" for harm caused by retaliation prohibited by the FLSA. *Robert DeMario Jewelry*, 361 U.S. at 292. And, according to this Court and the Supreme Court, "'liquidated damages are not a penalty exacted by the law, but rather compensation to the employee occasioned by the delay in receiving wages due caused by the employer's violation of the FLSA.'" *Jordan*, 379 F.3d at 1202 (quoting *Herman v. RSR Sec. Servs., Ltd*., 172 F.3d 132, 142 (2d Cir. 1999)); *see Brooklyn Sav. Bank*, 324 U.S. at 707 (noting that the liquidated damages remedy "constitutes compensation for the retention of a workman's pay which might [otherwise] result in damages too obscure and difficult of proof for estimate" (citing *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572 (1942))). The Secretary's ability to seek "make whole" relief for violations of section 215(a)(3) is therefore strengthened if he has the authority to request the payment of liquidated damages. And, as explained above, Congress has so provided.

4. Finally, the Secretary notes that a set of cases addressing a related topic neither precludes the relief sought here nor controls the resolution of the issue presented here. Specifically, several courts of appeals have addressed the circumstances under which the Secretary may seek liquidated damages in section 215(a)(2) suits, that is, actions for violations of the FLSA's minimum wage and overtime compensation requirements, when the Secretary brings such cases under section 217.[7] Some courts have disallowed the Secretary from doing so. *See, e.g.*, *Reich v. Tiller Helicopter Servs., Inc.*, 8 F.3d 1018, 1035 (5th Cir. 1993) (explaining that because "there is no right to a jury on the issue of the employer's liability for back pay damages or the amount of such damages" in a suit brought under section 217, "the Secretary is only entitled to recover liquidated damages from an employer who is found liable for back pay damages in a legal action brought pursuant to [section] 216(c)"); *Brock v. Superior Care, Inc*., 840 F.2d 1054, 1064 (2d Cir. 1988) ("The FLSA does not allow liquidated damages where, as … [in this case brought pursuant only to section 217], the employer has no right to a jury on the underlying issue of unpaid overtime compensation.").

[7] The Secretary may, of course, request liquidated damages in an amount equal to back wages for unpaid minimum wage and overtime compensation in a case brought under section 216(c), as directly permitted by the statutory text. 29 U.S.C. 216(c).

But other courts have ruled differently, permitting the Secretary to seek liquidated damages in cases brought primarily under section 217 as long as defendants were on notice of their right to a jury trial. For example, in *Martin v. Deiriggi*, 985 F.2d 129 (4th Cir. 1992), the Fourth Circuit affirmed a district court's award of liquidated damages because the Secretary had pled a claim for such relief under section 216(c), thereby putting the defendant-employers on notice that their obligation to demand a jury trial was triggered even though the Secretary sought back wages for minimum wage and overtime compensation violations under section 217. *See id.* at 135 (distinguishing *Superior Care* and further explaining that "[b]y failing to make a timely demand," the employers had "waived their jury right").

Most significantly, this Court has permitted such an award in circumstances similar to those in this case. In *Department of Labor v. City of Sapulpa*, 30 F.3d 1285 (10th Cir. 1994), this Court held that "the entitlement to liquidated damages [was] properly raised and within the jurisdiction of the district court" in a minimum wage and overtime case brought under section 217 because "[n]either party asked for a jury trial or raised in the district court or on appeal the issue of the court's authority to grant liquidated damages if it found a violation." *Id.* at 1288 n.5. This Court noted that the Secretary's complaint "request[ed] liquidated

damages and in the prayer for relief cited 29 U.S.C. § 216(c)" and that "[t]he pretrial order recites that one issue is entitlement to liquidated damages under 29 U.S.C. § 216(c)." *Id.* The circumstances in this case are meaningfully similar. The Secretary's complaint against Foreclosure included a prayer for relief noting that the Secretary sought, among other things, "liquidated damages equal to the amount of lost wages" under section 216(c). *See* Aplt. App. Vol. 1 at 21. And the pre-trial order jointly filed by the Secretary and Foreclosure and signed by the district court indicated with an "X" that "[t]he case was set for trial" "without," rather than "with," "a jury", Aplt. App. Vol. 1 at 41, meaning that Foreclosure affirmatively waived its jury right and that the award of liquidated damages was not improper on that basis. Moreover, as this Court is aware and as was a relevant factor in *City of Sapulpa*, Foreclosure did not challenge the Secretary's authority to seek liquidated damages at any point in this case.

In addition, all of these cases address remedies for violations of the FLSA's minimum wage and overtime compensation requirements, which the Act treats differently than it does remedies for violations of section 215(a)(3). *See* 29 U.S.C. 216(c) (directly permitting suits by the Secretary for back wages owed because of minimum wage and overtime compensation violations as well as for liquidated damages without addressing section 215(a)(3) violations);

29 U.S.C. 217 (making explicit the availability of an injunction ordering "the restraint of any withholding of payment of minimum wages or overtime compensation" without specifying what relief is available for a section 215(a)(3) violation); S. Rep. No. 87-145 (1961), *reprinted in* 1961 U.S. Code Cong. & Ad. News 1620, 1659 (noting that the text in section 217 regarding relief available for minimum wage and overtime violations does not affect the relief available for anti-retaliation provision violations); *Robert DeMario Jewelry*, 361 U.S. at 294-95 (rejecting an argument about the implications of relief available for minimum wage and overtime compensation violations on the relief available for section 215(a)(3) violations because "[i]n effectuating the policies of the Act the proper reach of equity power in suits by the Secretary under the wage provisions of the statute, and that in suits under the discharge provision, are attended by quite different considerations"). Because of these distinctions, the case law addressing the availability of liquidated damages in suits alleging minimum wage and overtime violations does not resolve the question raised here about remedies in an action alleging violations of the FLSA's anti-retaliation provision.

* * *

For these reasons, the Secretary's request that Foreclosure pay liquidated damages to the Barbers in this action was permissible under the FLSA.[8]

CONCLUSION

The district court's award in this case was properly requested by the Secretary, as the FLSA authorizes him to seek legal or equitable relief on behalf of employees who suffer discrimination prohibited by section 215(a)(3).

Nonetheless, if this Court has any doubt as to the Secretary's authority to obtain monetary relief in this case, the Secretary respectfully requests the Court to remand to the district court to allow it to consider the issue, in keeping with the general practice of not addressing issues presented for the first time on appeal. *See Singleton v. Wulff*, 428 U.S. 106, 120-21 (1976) (ordering remand to district court so that the petitioner would "have the opportunity to present whatever legal

[8] If this Court reverses the district court's award of liquidated damages in an amount equal to wages the Barbers lost as a result of their unlawful termination, the Secretary respectfully requests that the Court remand the case for the award of prejudgment interest on the amount of lost wages instead. *See Doty v. Elias*, 733 F.2d 720, 726 (10th Cir. 1984) (explaining that either liquidated damages or prejudgment interest, but not both, is appropriate in an FLSA case (citing *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697 (1945))); *Superior Care*, 840 F.2d at 1064-65 ("Once we have disallowed liquidated damages, there is no reason to deny the Secretary the opportunity to collect prejudgment interest …."); *Casey Truck Sales*, 839 F.2d at 880-81 (holding that "prejudgment interest is normally an appropriate component of a restitutionary back pay award under section [2]17 of the FLSA" in significant part because "a prejudgment interest award removes whatever incentive an employer might have to derive a benefit from retaliatory discharges or from delaying the conclusion of remedial litigation").

arguments he may have" with respect to an issue not addressed below, and noting that courts of appeals are "justified in resolving an issue not passed on below" only in limited circumstances such as when "the proper resolution is beyond any doubt" or "'injustice might otherwise result'" (citing *Turner v. City of Memphis*, 369 U.S. 350 (1962); quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941))).[9]

Respectfully submitted,

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[9] Alternatively, although the Secretary respectfully acknowledges that this Court inquired about this issue, he also notes that this Court is not bound to address it or to require that the district court consider it. Foreclosure waived any argument that the monetary relief ordered in this case was improper by failing to object to it before the district court or this Court, *see Schrock v. Wyeth, Inc.*, 727 F.3d 1273, 1284 (10th Cir. 2013) ("Arguments that were not raised below are 'waived for purposes of appeal.'" (quoting *Quigley v. Rosenthal*, 327 F.3d 1044, 1069 (10th Cir. 2003)); *COPE v. Kan. State Bd. of Educ.*, 821 F.3d 1215, 1223 (10th Cir. 2016) ("Appellants do not raise this argument in their opening brief, and so it is waived." (citing *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998)), *cert. denied*, 137 S. Ct. 475 (2016), and it is clear that this case was properly before the district court because the Secretary may and did seek traditional injunctive relief in this action.

CERTIFICATE OF COMPLIANCE

I hereby certify that this supplemental brief complies with the length limitation set forth in Federal Rule of Appellate Procedure 32(a)(7)(B) because it is 5,324 words long (excluding the parts of the motion exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii)).

I hereby certify that this supplemental brief also complies with the typeface and typestyle requirements of Federal Rules of Appellate Procedure 32(a)(4), (5) and (6). This supplemental brief was prepared in a proportionally spaced typeface using Microsoft Word 2016 with 14-point Times New Roman font in text and footnotes, and all page margins are one inch.

s/Sarah Marcus
Sarah Kay Marcus, Senior Attorney

ANTI-VIRUS CERTIFICATION

I hereby certify that a virus check, using McAfee VirusScan Enterprise and AntiSpyware Enterprise 8.8, was performed on the PDF version of this filing and no viruses were found.

s/Sarah Marcus
Sarah Kay Marcus, Senior Attorney

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I hereby certify that all required privacy redactions have been made per Tenth Circuit Rule 25.5, and seven hard copies of the supplemental brief being submitted to the Court are exact copies of the version submitted electronically via the Court's CM/ECF system.

s/Sarah Marcus
Sarah Kay Marcus, Senior Attorney

CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2018, I electronically filed the foregoing supplemental brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

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