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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91215699
Party	Plaintiff Boston Scientific Corporation, on behalf of itself and its subsidiaries, Asthmatx, Inc.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the matter of Application Serial No.: 85/806,379  
Filed: December 19, 2012  
For the mark: HOLAIRA  
Published in the Trademark Official Gazette on December 3, 2013

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Boston Scientific Corp. and  
Asthmatx, Inc.

Opposers,

v.

Opposition No. 91215699

Holaira, Inc.

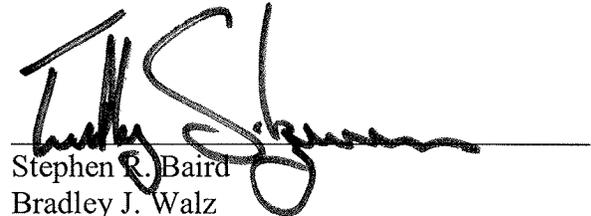
Applicant.

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**OPPOSERS' NON-CONFIDENTIAL REPLY IN SUPPORT OF OBJECTIONS TO  
APPLICANT'S EVIDENCE AND OPPOSERS' NON-CONFIDENTIAL RESPONSE TO  
APPLICANT'S EVIDENTIARY OBJECTIONS**

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**OPPOSERS' NON-CONFIDENTIAL REPLY TO APPLICANT'S  
RESPONSE TO OPPOSERS' EVIDENTIARY OBJECTIONS**

**I. APPLICANT'S EVIDENCE OF THIRD-PARTY MARKS HAS NO RELEVANCE**

**A. The Third-Party Marks Are Too Dissimilar to Be Relevant**

Applicant's argument that it "has a right to present evidence of similar of third-party marks" is unresponsive to the clear precedent cited by Opposers. "Substantially different marks . . . are not relevant" to the strength of a senior user's mark. *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle SA.*, 103 U.S.P.Q.2d 1435, 1440–41 (Fed. Cir. 2012). In *Midwestern Pet Foods*, the opposer claimed that applicant's WAGGIN' STRIPS mark would create a likelihood of confusion with the opposer's BEGGIN' STRIPS mark. *Id.* The applicant claimed the opposer's mark was weak based on third-party use of marks such as MINI BACON FLAVOR STRIPS, WAGGIN' TRAIN, and BARK N BAC'N marks. *Id.* The Board disregarded these marks as "not relevant" because "none of the third-party marks are close to the marks at issue in this case." *Id.* at 1440–41. None of Applicant's cited third-party marks are as phonetically similar as ALAIR® and HOLAIRA and only 7 of the marks include the same LAIR letter string. Like *Midwestern Pet Foods*, these marks are "not relevant."

The decisions cited by Applicant are distinguishable. In *Juice Generation, Inc. v. G.S. Enters. LLC*, the applicant, opposer, and the cited third-party marks all included the phrase PEACE LOVE. 115 U.S.P.Q.2d 1671, 1674 n.1 (Fed. Cir. 2015). In *Jack Wolfskin*, the applicant, opposer, and the cited third-party marks all included designs of paw prints. *Jack Wolfskin Ausrustung Fur Draussen GMBH & Co. KGAA v. New Millenium Sports, S.L.U.*, 116 U.S.P.Q.2d 1129, 1136 n.2 (Fed. Cir. 2014). This is not the case here, where the ALAIR® and

HOLAIRA mark are near homonyms and, in any event, the vast majority of the third-party marks do not even share the same LAIR element.

The only decision which could be remotely construed to support Applicant's claim is *Shoe Corp. of Am.* There, the C.C.P.A. concluded that no confusion was likely between LAZY PALS and LAZY BONES, both for footwear, based in part on third-party registrations of LAZY LACER, LAZY LAD, LAZY JOE, LAZY DOGS, and LAZY H, all registered for footwear. *Shoe Corp. of Am. V. Juvenile Shoe Corp. of Am.*, 121 U.S.P.Q. 510, 512 (C.C.P.A. 1959). However, each of these marks consists of the same structure: LAZY + [term], where the blank is filled with a familiar term. In contrast, Applicant has admitted that the parties' marks are coined terms "with no generally understood meanings." [App. Tr. Br. at 28]. Also unlike *Shoe Corp. of Am.*, the third-party marks were not as phonetically similar as ALAIR® and HOLAIRA, which are naturally pronounced as "near homonyms." [Dkt. No. 14, Ex. 27, Nunberg Decl. ¶ 17.] As a result, because the third-party marks are not as similar to Opposers' mark as is Applicant's mark, these third-party marks are irrelevant and therefore inadmissible.

**B. The Third-Party Marks Are Not Used in Connection with Similar Products**

Applicant does not disagree that third-party marks must be used on similar products in order to be relevant. App. Ev. Br. at 12 ("Applicant has a right to present evidence of similar third-party marks registered in connection with similar products. . . ."). However, Applicant presents no factual or legal argument as to how the goods identified in its evidence of third-party marks are similar to Applicant's and Opposers' medical devices for treatment of obstructive lung diseases. The mere fact that the products involve a general function or purpose—medicine or breathing—does not make them sufficiently similar to render a senior user's mark weak.

*Midwestern Pet Foods, Inc.*, 103 U.S.P.Q.2d at 1441 (finding pet food to be too unrelated from third-party marks used in connection with pet leashes or pet grooming services).

Opposers defined the relevant market as medical devices for the treatment of obstructive lung diseases. [Dkt. No. 22, Passafaro Dep. at 17:13–19.] Applicant did not object to this market definition. In fact, Opposers and Applicant both agreed that pharmaceuticals do not compete with the parties’ medical devices and that the medical devices and pharmaceuticals are not marketed in the same channels of trade. [Dkt. No. 29, Wahr Dep. at 107:20–108:23; Dkt. No. 22, Passafaro Dep. at 166:15–23, 172:11–19.] Accordingly, Applicant’s evidence of third-party marks that do not involve medical devices for treating respiratory diseases is irrelevant to the strength of Opposers’ mark and therefore inadmissible.

## **II. APPLICANT’S EVIDENCE OF THIRD-PARTY MARKS WAS UNTIMELY AND PREJUDICED OPPOSERS**

Applicant does not dispute that Applicant was required to produce these documents. Instead Applicant claims that “Applicant did not possess the objected-to documents until they were obtained and compiled by Applicant during its testimony period.” App. Ev. Br. at 9. However, Applicant admits that it questioned Opposers’ witness regarding a number of third-party marks on April 9, 2015 based upon a search performed by third-party Corsearch on Aug. 18, 1999, prior to Opposers’ adoption of the ALAIR® mark. App. Ev. Br. at 11. That deposition occurred on April 9, 2015, more than three months prior to July 3, 2015, the date upon which Applicant claims to have become aware of these third-party marks.

Applicant argues that “Opposers were well aware of the issue” based on the discussion of this report during Ms. Passafaro’s testimony. App. Ev. Br. at 11. Applicant claims that the report makes the issue so obvious that Opposers had to have known that Applicant planned to rely on such evidence. However, Opposers produced this search to Applicant on September 10,

2014. App. Tr. Br. Appendix 1, Hansen Aff. ¶ 3, Ex. A. Even though Applicant was in possession of the report for almost a year, Applicant claims that it had no evidence of third-party registrations, had not done any investigation into third-party registrations, and had no intent to rely on such documents until July 3, 2015. It defies logic that knowledge of this search put Opposers on notice of Applicant's intent to rely on third-party marks, but yet even though Applicant possessed the search for nearly a year, Applicant claims it had no knowledge or documents regarding third-party marks until July 3, 2015. Accordingly, Applicant's claim that it did not intend to rely upon, or have any evidence of, third-party marks is unpersuasive.

Applicant also argues that Opposers were not prejudiced by its delay. Applicant claims that Opposers "were capable of researching the issue themselves," however Opposers could not have known that Applicant intended to rely upon registrations based on foreign registrations, registrations for marks that are not as similar in sight, sound, or meaning, or registrations that identify goods that are outside the market for Applicant's and Opposers' goods. [Dkt. No. 29, Wahr Dep. at 107:20–108:23; Dkt. No. 22, Passafaro Dep. at 166:15–23, 172:11–19.]

Opposers were denied an opportunity to take discovery depositions and written discovery regarding the issue. Opposers were also denied the opportunity to question Ms. Passafaro and Mr. Wahr regarding the issue. Each of these lost opportunities unduly prejudiced Opposers.

### **III. THE THIRD-PARTY DOCUMENTS ARE INADMISSIBLE**

#### **A. Opposers Did Not Waive any Objections**

##### **1. Opposers Did not Waive Their Objections to the Search Report**

Applicant argues that Opposers waived their objections to the search report. App. Ev. Br. at 14. Applicant is correct that Opposers did not object when Applicant's counsel asked general questions regarding certain marks that also appeared in the search report, but those questions did

not rely upon, or introduce as evidence, the statements regarding use or filing dates made in the search report. For example, whether Opposers were aware of the ALTAIR mark is not a question that introduced hearsay evidence into the record. [Dkt. No. 22, Passafaro Dep. at 68:15–18.] However, when Applicant’s counsel attempted to insert a statement from the Corsearch search report regarding use or application dates for the marks into the deposition testimony, Opposers’ counsel objected. [*Id.* at 73:15–18.] Opposers renewed the objections in its evidentiary brief. Therefore, Opposers have not waived these objections.

Further, substantive objections to “testimony depositions are not waived for failure to make them during or before the taking of the deposition, provided that the ground for objection is not one that might have been obviated or removed if presented at that time.” TBMP § 707.03(c). The TBMP specifically identifies “hearsay” as one of these objections that “are not waived for failure to make them during or before the taking of the deposition.” *Id.* Accordingly, even if Opposers had failed to object, such a failure would not preclude Opposers from asserting a hearsay objection at this stage.

Additionally, Applicant was not denied an opportunity to correct the error. Opposers objected to statements in the search report as hearsay. [Dkt. No. 22, Passafaro Dep. at 73:15–18.] Applicant’s counsel made no attempt to gather any additional information or testimony to address the objection. [*Id.*] Applicant cannot now claim that it was denied an opportunity to elicit additional testimony when the reality is that Applicant’s counsel simply chose not to do so.

Further, the ground for the hearsay objection could not have been obviated or removed. Corsearch created the ALAIR trademark search report in July of 2002. [Dkt. No. 22, Passafaro Dep. at 66:1–6, App. Ex. 1.] Ms. Passafaro joined Asthmatx in 2005. [*Id.* at 66:11–16.] Ms. Passafaro had never seen the search report. [*Id.* at 66:9–10.] As a result, Ms. Passafaro did not

have any personal knowledge regarding the statements made in the document. Therefore, the ground for a hearsay objection could not have been obviated, regardless of any additional questions posed by Applicant's counsel.

2. Opposers Did not Waive Objections to the Consultant's Presentation

Applicant argues that Opposers waived their objections to the consultant's presentation. App. Ev. Br. at 14. Applicant is correct that Opposers did not object when Applicant's counsel merely referenced the presentation. However, when Applicant's counsel attempted to insert a hearsay statement for the truth of the matter asserted, Opposers' counsel objected. [*Id.* at 153:18–22.] Opposers renewed the objections in its evidentiary brief. Therefore, Opposers have not waived these objections.

Further, as noted above, the TBMP specifically identifies "hearsay" as one of these objections that "are not waived for failure to make them during or before the taking of the deposition." TBMP § 707.03(c). Accordingly, Opposers could assert the objection even if Opposers had failed to object during the deposition testimony.

Additionally, Applicant was not denied an opportunity to correct the error. Opposers objected to statements in the search report as hearsay. [*Id.*] Applicant's counsel made no attempt to gather any additional information or testimony to overcome the hearsay objection. [*Id.*] Again, Applicant was not denied an opportunity to elicit additional testimony; Applicant's counsel simply chose not to do so.

**B. The Search Report and Presentation Are Not Adverse Party Admissions**

Applicant argues that the search and the Stratagem branding presentation constitute admissions by a party opponent, claiming that the search report was made "by [Opposers'] agent or employee on a matter within the scope of that relationship and while the relationship existed."

Fed. R. Evid. 801(d)(2)(D). If the statement is not the party's own, then the statement must be made by a party in a representative capacity.

Applicant claims that the trademark search “was created by Opposers in 2002 and produced during discovery,” citing the testimony of Ms. Passafaro. [App. Obj. at 19.] The portion of the testimony cited by Applicant identifies a “trademark search for the mark Alair performed in July of 2002 for the Fenwick & West firm in Palo Alto[.]” [Dkt. No. 22, Passafaro Dep. at 65:19–66:8.] The search report states that it was created by CORSEARCH, Inc., a well-known trademark search company.<sup>1</sup> [*Id.*, at App. Ex. 1 pp. 1–2.] Corsearch, a third-party vendor, is not an agent or representative for Opposers. [*Id.*] Therefore, the search report was not created by Opposers and is not Opposers' statement.

Applicant suggests that the search report “was conducted by Opposers' counsel.” [App. Obj. at 19.] Again, the search report was created by Corsearch. [Dkt. No. 22, Passafaro Dep. at App. Ex. 1 pp. 1–2.] The statements in the search were not made by Opposers' counsel. Accordingly, the statements in the search report are not admissions by a party opponent and therefore are not admissible under Fed. Rule 801(d)(2).

### **C. The Search and Branding Presentation Are Not Business Records**

Applicant argues that the branding presentation and the search report constitute business records. In order to be considered a business record, there must be testimony from a qualified witness that: (1) the records were made at or near the time of the event that was recorded; (2) the records were kept in the course of a regularly conducted activity; and (3) it was the regular practice of the business to make the records of that activity. Fed. R. Evid. 803(6). The Advisory Committee Notes advise that the rule covers those reports which are reliable due to the creator's

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<sup>1</sup> The Board has previously rejected Corsearch trademark reports as failing to prove that a mark is weak. *In re The Coca-Cola Co.*, Ser. No. 78/449,413 at \*8 n. 10 (TTAB 2007) [non-precedential].

“systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation.” *Id.* For example, applicant relies upon *Resolution Trust Corp. v. Eason*, where a loan examiner’s notes on a loan application were admitted as a business record because “he was an employee of the agency” and the statements were made “in the course of his duties.” 17 F.3d 1126, 1130 (8th Cir. 1994). Applicant relies on *U.S. v. Page*, where a lease agreement from a car dealership was admitted as a business record. 544 F.2d 982, 987 (8th Cir. 1976).

In contrast, Applicant has failed to establish that the search report qualifies as a business record. There is no testimony regarding when the records were made nor when the relevant events took place. The search was a one-time order and not part of a regularly conducted activity. Further, the information lacks the reliability that forms the basis of the rule as there would be no systematic or regular checking or verification of the statements made in the search. Nor was Corsearch under “a duty to make an accurate record as part of a continuing job or occupation.” The trademark search report is far different from an insurance agency’s use of a loan application as well as a lease agreement by a car dealership. Accordingly, Applicant fails to establish that the search report qualifies as a business record.

Similarly, Applicant has failed to establish that the consultant’s presentation qualifies as a business record. There is no testimony regarding when the records were made. There is no evidence that Stratagem ever made another presentation. There is no evidence regarding how Stratagem gathered, analyzed, or presented any statements made in the report. Nor was Stratagem under “a duty to make an accurate record as part of a continuing job or occupation.” Again, the presentation is far different from an insurance agency’s use of a loan application as

well as a lease agreement by a car dealership. Accordingly, Applicant has failed to establish that the branding presentation qualifies as a business record.

Finally, Applicant argues that both the search and the branding presentation were “created by a party” and therefore fall within the parties’ stipulation. App. Ev. Br. at 17. Again, Opposers did not create or perform the search, Opposers’ counsel did not perform the search, Corsearch performed the search. [Dkt. No. 22, Passafaro Dep. at App. Ex. 1.] Opposers did not create the presentation, marketing consultant Stratagem created the presentation. [*Id.* at 141:3–6.] Therefore, the documents do not fall within the stipulation.

Indeed, for this very reason, the stipulation specifically states that “documents . . . that were created by a party or Six Degrees are authentic [and] qualify as business records. . . .” [Dkt. No. 14, Ex. 26 ¶ 2.] Six Degrees is the marketing company that Applicant engaged to assist in Applicant’s branding process. [Dkt. No. 29, Wahr Dep. at 29:25–30:2.] Therefore, the stipulation clearly distinguishes between the parties and their outside consultants, further undermining Applicant’s claim that Stratagem’s presentation qualifies as a business record.

**D. The Documents Are Not Admissible for Non-Hearsay Purposes**

1. The Search Is Inadmissible to Establish Use of the Marks

Applicant argues that the search is admissible to show that “Opposers knew, prior to registering the ALAIR mark, that there were already many third-party marks containing AIR[.]” App. Ev. Br. at 17. “[I]t is well settled that a search report does not constitute evidence of the existence of a registration or use of a mark.” *Nat’l Football League v. Jasper Alliance Corp.*, 16 U.S.P.Q.2d 1212, 1215 n.3 (T.T.A.B. 1990). “The mere fact that applicant received the search report and its attorney’s letter is insufficient to charge it with knowledge of a third party use.” *Int’l House of Pancakes, Inc. v. Elca Corp.*, 216 U.S.P.Q. 521, 525 (T.T.A.B. 1982).

Accordingly, the search is not admissible to show that Applicant had knowledge of any third-party's use or registration of any of the marks identified in the search.

2. The Presentation Has No Purpose Other than to Prove the Truth of the Matter Asserted

Applicant argues the presentation is relevant for a non-hearsay purpose, namely that Stratagem's recommendation to rebrand the Alair® device "led Opposers to minimize ALAIR in advertising." App. Ev. Br. at 18. Besides having no legal support, the argument is factually inaccurate. Opposers rejected Stratagem's recommendation and continued to use the ALAIR® mark. [Dkt. No. 22, Passafaro Dep. 175:16-177:9.] Opposers also have not "minimized ALAIR® in advertising" as Applicant claims. App. Ev. Br. at 18. The ALAIR® mark is featured prominently in much of Opposers' advertisements and other promotional materials. [Dkt. No. 12, Exs. 16, 18; Dkt. No. 14, Ex. 63, 64, 65, 66, 67; Dkt. No. 22, Passafaro Dep. App. Ex. 17 at p. 2-3, Opp. Ex. 3, 4, 6, 7.] In fact, in developing its own brand [REDACTED] [REDACTED] [Dkt. No. 14, Ex. 28 at p. 8, Ex. 31 at p. 12, Ex. 32 at p. 39-43, Ex. 38, Ex. 41.] Not only is the ALAIR® mark prominently featured, but the evidence of record confirms that the public recognizes and utilizes the ALAIR® mark as a trademark for the goods. [*Id.*] These documents also confirm that Applicant was well aware of Opposers' rights in the ALAIR® mark.

Further, even if the Board were to admit the presentation for a non-hearsay purpose, the presentation has no probative value. The presentation was created in 2009. [*Id.* at 146:10-18; 154:2-8.] At that time, the FDA had not yet approved Opposers' medical device for commercial use, Opposers had not commercially sold a device, and Opposers were legally precluded from advertising the goods. [*Id.*] Since that time, Opposers have generated more than [REDACTED]

[REDACTED] advertising. [Opp. Tr. Br. at 32; Dkt. No. 22,

Passafaro Dep. Exs. 1, 2, 8.] Accordingly, the Stratagem’s conclusions and recommendations do not reflect the current strength of Opposers’ ALAIR® mark.

## **OPPOSERS’ CONFIDENTIAL RESPONSE TO APPLICANT’S OBJECTIONS**

### **I. MS. PASSAFARO’S TESTIMONY REGARDING MEDIA EXPOSURE IS ADMISSIBLE**

#### **A. MS. PASSAFARO’S TESTIMONY DOES NOT CONSTITUTE HEARSAY**

Applicant argues that Ms. Passafaro’s testimony constitutes hearsay, arguing that “a statement is inadmissible as hearsay if it is an out-of-court statement offered for the truth of the matter asserted in the statement.” App. Ev. Br. at 20. However, testimony regarding a witness’ experiences does not constitute hearsay but instead is direct evidence of an event that occurred. *Anthony’s Pizza & Pasta Int’l, Inc. v. Anthony’s Pizza Hldg. Co.*, 95 U.S.P.Q.2d 1271, 1273 (T.T.A.B. 2009).

Applicant does not identify what exact statement is hearsay, but references Ms. Passafaro’s statement that “We have had great press since actually before FDA approval . . . and rarely did it actually mention the company name. It was a focus on the device and the patient.” *Id.* [Dkt. No. 22, Passafaro Dep. at 57:7–57:2, 57:16–19.] Applicant’s cited passages do not contain any “out of court statements.” Ms. Passafaro merely testified to knowledge she has of events that actually occurred, namely, that Opposers “had great press” and that the stories had a “focus on the device and the patient.” Ms. Passafaro testified to her own experiences, not what she heard or read. Therefore, the testimony is admissible direct evidence rather than inadmissible hearsay. *Anthony’s Pizza & Pasta Int’l Inc.*, 95 U.S.P.Q.2d at 1273.

#### **B. MS. PASSAFARO’S TESTIMONY DOES NOT VIOLATE THE BEST EVIDENCE RULE**

Applicant also claims that Ms. Passafaro’s testimony violates the Best Evidence Rule because Opposers did not produce the actual articles. App. Ev. Br. at 20. The Best Evidence

Rule provides that “an original writing, recording, or photograph is required in order to prove its content.” Fed. R. Evid. 1002. However, the Advisory notes to the rule make clear that an event may be proved by non-documentary evidence, even though a written record of it was made.” *Id.* Indeed, it is well-established the rule does not “require production of a document simply because the document contains facts that are also testified to by a witness.” *Allstate Ins. Co. v. Swann*, 27 F.3d 1539, 1543 (11th Cir. 1994); *O’Brien v. Ed Donnelly Enter., Inc.*, 575 F.3d 567, 599 (6th Cir. 2009); *Simas v. First Citizens’ Fed. Credit Union*, 170 F.3d 37, 51 (1st Cir. 1999). Accordingly, Ms. Passafaro’s testimony that the Alair System “appeared on Good Morning America, the CBS Morning Show, Wall Street Journal, San Francisco Chronicle, New York Times” does not violate the best evidence rule: it is an independent fact that exists separate and apart from the actual press coverage.

Applicant argues, without factual support, that “Opposers strategically chose not to submit the reports into the record,” arguing that “the reports actually make no mention of the ALAIR mark.” App. Ev. Br. at 21. However, Applicant submitted a copy of Popular Science magazine, which named “The Alair Bronchial Thermoplasty System” as the Best of What’s New Award in the Health category in 2010. [Dkt. No. 12, Ex. 16; Dkt. No. 14, Ex. 67.] The Wall Street Journal article states “The thermoplasty device, called the Alair System, travels inside the bronchoscope and has an array of electrodes on its tip that extends and expands to contact the airway walls.”<sup>2</sup> The USA Today article states “the Alair system, rolling out this month, offers the first method of physically altering spasm-prone airways.”<sup>3</sup> The ABC News article states “Asthmatx’s Alair System employs bronchial thermoplasty, which uses radiofrequency wave-generated heat to burn away lung tissue that impairs breathing and causes wheezing and

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<sup>2</sup> <http://www.wsj.com/articles/SB10001424052748704865104575588262923189320>.

<sup>3</sup> [http://usatoday30.usatoday.com/news/health/2010-05-04-asthma-alair\\_N.htm](http://usatoday30.usatoday.com/news/health/2010-05-04-asthma-alair_N.htm).

coughing spasms.”<sup>4</sup> The San Francisco Gate Chronicle even includes pictures and captions of “the Alair system” and the “Alair Catheter,”<sup>5</sup> along with other news articles.<sup>6</sup> Accordingly, Applicant’s arguments are unsupported and false, and these numerous articles provide further support to Ms. Passafaro’s testimony that the ALAIR® device has received significant media coverage.

## II. OPPOSERS’ INTERNET EVIDENCE DOES NOT CONTAIN INADMISSIBLE HEARSAY

Applicant argues that Opposers’ internet evidence is inadmissible to establish the truth of the matter asserted. The TBMP provides that internet printouts “are admissible and probative only for what they show on their face, not for the truth of the matters contained therein, **unless a competent witness has testified to the truth of such matters.**” TBMP § 704.08(b). Ms. Passafaro testified that asthma, emphysema, and chronic bronchitis all fall within the spectrum of obstructive lung diseases. [Dkt. No. 22, Passafaro Dep. at 180:11–181:20.] Ms. Passafaro’s testimony addresses the truth of the matters asserted in these articles, namely, that chronic bronchitis, emphysema, and asthma are all considered “obstructive lung diseases” and therefore these documents do not constitute hearsay.

Further, these articles are admissible for non-hearsay purposes, namely, demonstrating that clinics, doctors, and medical reference websites all have made statements regarding the relationship among these conditions and that these statements are available to the public. For example, WebMD and Wikipedia are popular information resources and identify asthma, chronic bronchitis, emphysema, and COPD as types of obstructive lung diseases. [Dkt. No. 12, Exs. 19,

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<sup>4</sup> <http://abcnews.go.com/Health/Healthday/health-highlights-oct-29-2009/story?id=8951360>.

<sup>5</sup> <http://www.sfgate.com/health/article/Bronchial-thermoplasty-can-help-chronic-asthma-3169621.php#photo-2304113>.

<sup>6</sup> <http://www.foxnews.com/health/2010/05/04/new-radical-treatment-severe-asthma.html>;  
[http://www.qchron.com/editions/eastern/treating-asthma-in-adults/article\\_8998fa08-cf74-56ea-b914-7acf0159958f.html](http://www.qchron.com/editions/eastern/treating-asthma-in-adults/article_8998fa08-cf74-56ea-b914-7acf0159958f.html); <http://www.news4jax.com/news/new-asthma-treatment-available-at-uf-health/20777084>.

20.] Even if the statement is not admitted for the truth of the matter asserted, the evidence establishes that the statements were made and that the websites are available to the public, suggesting that the public will associate the conditions. The Johns Hopkins Medicine webpage for its “Obstructive Lung Disease Clinic” states that “the obstructive lung disease clinic see patients with asthma, chronic obstructive lung disease, emphysema, chronic bronchitis, and other diseases characterized by airway narrowing or obstruction.” [*Id.* Ex. 21.] The same also applies to the University of Chicago Refractory Obstructive Lung Disorders Clinic website. [*Id.* Ex. 23.] Even if the statements are not admitted for the truth of the matter asserted, the fact that John Hopkins hospitals advertises its specialty medical services to this small subset of conditions suggest that clinics, doctors, and patients will associate the conditions and their treatments. Likewise, the Johns Hopkins Health Alerts article states that “like asthma, COPD is an obstructive lung disease; it includes bronchitis and emphysema.” [*Id.* Ex. 22.] Even if this statement is not true, it demonstrates that the medical community associates the conditions as obstructive lung diseases. The article from the American Lung Association entitled “The Link between Asthma & COPD” also demonstrates that the medical community and the public associate the two diseases. [*Id.* Ex. 24.] The fact that medical institutions, medical reference websites, doctors, clinics, and the American Lung Association all identify asthma, bronchitis, emphysema, and COPD as “obstructive lung diseases” demonstrates that the public and medical community recognize an association between them, even if the statements are not admitted for the truth of the actual statements within the articles.

### **III. DR. SHARGILL’S DECLARATION CONSTITUTES PROPER REBUTTAL TESTIMONY**

Applicant argues that the declaration of Dr. Narinder Shargill and other evidence submitted during Opposers’ rebuttal period constitute improper rebuttal evidence. Rebuttal

testimony is admissible “for the purpose of denying, explaining or discrediting the facts and witness adduced by [an] applicant[.]” *Data Packaging Corp. v. Morning Star, Inc.*, 212 U.S.P.Q. 109, 113 (T.T.A.B. 1981) (citation omitted).

Here, the question of registrability is based upon the goods and services as identified in the application and registrations. *Stone Lion Capital Partners, LP v. Lion Capital LLP*, 110 USPQ2d 1157 (Fed. Cir 2014). Applicant’s case in chief relied upon these identification of goods descriptions, which are identical. Medical devices for the treatment of pulmonary diseases necessarily include medical devices for the treatment of obstructive lung diseases because pulmonary diseases are lung diseases.<sup>7</sup>

However, Dr. Wahr testified that (1) there is no relationship between asthma and emphysema, bronchitis, and COPD; (2) that the goods in the real world will be different; and (3) doctors would never use a medical device for an indication for which it is not labeled. [Dkt. No. 29, Wahr Dep. at 82:14–24, 93:4–97:5.]

In order to rebut this evidence, Opposers presented the declaration of Dr. Shargill to demonstrate that, contrary to Dr. Wahr’s testimony, physicians are allowed to use, and in fact do direct the use of, medical devices for non-indicated uses. [Dkt. No. 24, Ex. 73 ¶¶ 6, 7.] Dr. Shargill’s testimony also rebuts Applicant’s improper attempt to narrow and restrict its goods. Even if testimony may seem relevant to a principal case, if the rebuttal testimony is used to rebut an applicant’s improper attempt to restrict its identification of goods description based on actual use, then the testimony constitutes proper rebuttal testimony. *Visual Info. Inst., Inc. v. Vicon Inds. Inc.*, 209 U.S.P.Q. 179, 182–83 (T.T.A.B. 1980). As in *Visual Info.*, Opposers were forced

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<sup>7</sup> “Pulmonary” is defined as “relating to, functioning like, associated with, or carried on by the lungs.” Merriam Webster Medical Dictionary, <http://beta.merriam-webster.com/medical/pulmonary>.

to provide rebuttal testimony to address the incorrect statements made by Dr. Wahr in an attempt to artificially limit Applicant's goods, channels of trade, and classes of consumers.

Applicant's claim that this evidence constituted evidence for Opposers case-in-chief is inaccurate. Whether doctors use a medical device for non-indicated uses is not necessary or part of a likelihood of confusion claim. Opposers had no reason to include such testimony in its case-in-chief.

Applicant also objects to Dr. Shargill's testimony regarding Opposers' Ex. 69 on the ground it constitutes inadmissible hearsay. App. Ev. Br. at 27. However as noted above, printed documents do not constitute hearsay if "a competent witness has testified to the truth of such matter." TBMP § 704.08(a). Dr. Shargill has testified to the truth of these statements and therefore such statements do not constitute hearsay.

Further, the statements in Exhibit 69 regarding the overlap of asthma and COPD are admissible for non-hearsay purposes. The exhibit shows that the Global Initiative for Asthma and Global Initiative for Chronic Obstructive Lung Disease collaborated on a report addressing patients who show symptoms of both asthma and COPD. Even if the individual statements in the report are not considered for the truth of the matter asserted, the report is admissible to show that these two institutions believe there is a relationship, and that the public has been exposed to claims regarding this relationship.

Applicant argues that Dr. Shargill's statements from physicians regarding the use of the ALAIR® device to treat COPD are also inadmissible hearsay. However, these statements are admissible for non-hearsay purposes. The fact that physicians believe the ALAIR® device could treat COPD is relevant regardless of whether the statements are true. Therefore, Dr. Shargill's testimony and the underlying documents are admissible for these non-hearsay purposes.

#### IV. DR. NUNBERG'S REPORT IS ADMISSIBLE AND RELEVANT

Applicant argues Dr. Nunberg's testimony is inadmissible because his report supposedly fails to consider "the degree of sophistication or knowledge of the average purchaser." App. Tr. Br. at 30. However, the legal authority cited by Applicant does not support its position. The Board in *Ferro Corp.* merely reasoned that the *meaning* of the marks should be considered in the commercial context; it did not require that the *pronunciation* of the mark be considered in the commercial context if the evidence of record establishes that the commercial context contributes to the meaning of the marks. *Ferro Corp. v. Nicofibers, Inc.*, 196 U.S.P.Q. 41, 45 (T.T.A.B. 1977) ("[t]he words 'UNIFORM' and 'CONFORM', as revealed by this record, have and project to the trade distinctly different meanings."). Applicant's reliance on *Gen. Cigar Co.* is similarly misplaced. That case did not even involve a likelihood of confusion claim but instead whether the applicant committed fraud by withholding from the Trademark Office the meaning of the applied-for mark in the Taino language "spoken by the indigenous population of the Dominican Republic." *Gen. Cigar Co. v. G.D.M. Inc.*, 45 U.S.P.Q.2d 1481 (S.D.N.Y 1997). Again, this decision addressed the meaning of trademarks, not the pronunciation. Accordingly, Applicant's criticism of Dr. Nunberg's report is misplaced.

Applicant also criticizes Dr. Nunberg for assuming that some of the users and patients will speak Spanish. Applicant's claim that Dr. Nunberg needs to be "an expert in the demographics of the healthcare industry" in order to conclude that some people in the U.S. speak Spanish is unpersuasive. In fact, the 2012 U.S. Statistical Abstract of the United States created by the U.S. Census Bureau found approximately 35.5 million individuals in the U.S., about 12%,

speak Spanish.<sup>8</sup> Contrary to Applicant's assertion, the population of the U.S. is a fact which is "not subject to reasonable dispute" and for that reason the Board has previously taken judicial notice of such facts by relying upon these same U.S. Census Reports. *In re Isabella Fiore, LLC*, 75 U.S.P.Q.2d 1564, 1566 n.5 (T.T.A.B. 2005). Moreover, given the fact that Applicant's mark begins with the well-known Spanish word "hola," a consumer need not speak fluent Spanish in order to mistakenly pronounce the HOLAIRA mark as if it were a Spanish word.

Applicant also asserts that there is no evidence that pulmonologists speak Spanish. As noted in Applicant's Reply Brief, patients are included in the normal channels of trade for medical devices. Opp. Reply Br. at 7. Applicant's claim that patients are irrelevant [REDACTED]. Opp. Reply Br. at 7-8. Accordingly, the patients' perspective is, in fact, relevant, and Dr. Nunberg's testimony is therefore admissible.

### CONCLUSION

For the foregoing reasons, Opposers respectfully request that the Board grant Opposers' objections to Applicant's evidence. Opposers also request that the Board deny Applicant's request to exclude Opposers' properly submitted trial and rebuttal testimony.

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<sup>8</sup> 2009 American Community Survey, Table 53. Languages Spoken at Home: 2009, available at <http://www2.census.gov/library/publications/2011/compendia/statab/131ed/tables/12s0053.xls>, and at <http://www.census.gov/library/publications/2011/compendia/statab/131ed/population.html>.

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Boston Scientific Corporation and	)	
Asthmatx, Inc.	)	
Opposers,	)	
	)	
v.	)	
	)	Opposition No. 91215699
Holaira, Inc.	)	
	)	
Applicants.	)	
	)	

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**CERTIFICATE OF SERVICE BY MAIL**

STATE OF MINNESOTA    )  
                                          ) ss.  
COUNTY OF HENNEPIN    )

Elizabeth K. McDermott, of the City of Minneapolis, County of Hennepin, in the State of Minnesota, states that on the 2<sup>nd</sup> day of December, 2015, she mailed by First Class mail, a true and correct copy of:

- 1) Opposers' Confidential Trial Brief;
- 2) Opposers' Non-Confidential Trial Brief;
- 3) Opposers' Confidential Reply in Support of Objections to Applicant's Evidence and Opposers' Confidential Response to Applicant's Evidentiary Objections
- 4) Opposers' Non-Confidential Reply in Support of Objections to Applicant's Evidence and Opposers' Non-Confidential Response to Applicant's Evidentiary Objections; and
- 5) Appendix.

in the above-captioned action to the following last known address of record for Applicant, to-wit:

Barbara J. Grahn  
OPPENHEIMER WOLFF & DONNELLY LLP  
200 Campbell Mithun Tower  
222 South Ninth Street  
Minneapolis, MN 55402-3338

  
Elizabeth K. McDermott

**APPENDIX TO OPPOSERS' CONFIDENTIAL REPLY IN SUPPORT OF  
OBJECTIONS TO APPLICANT'S EVIDENCE AND OPPOSERS' CONFIDENTIAL  
RESPONSE TO APPLICANT'S EVIDENTIARY OBJECTIONS**

Non-U.S. Patent Quarterly Decisions

1. *Allstate Ins. Co. v. Swann*, 27 F.3d 1539 (11th Cir. 1994)
2. *O'Brien v. Ed Donnelly Enter., Inc.*, 575 F.3d 567 (6th Cir. 2009)
3. *Simas v. First Citizens' Fed. Credit Union*, 170 F.3d 37 (1st Cir. 1999)
4. *Resolution Trust Corp. v. Eason*, 17 F.3d 1126 (8th Cir. 1994) (included in Applicant's Appendix)
5. *U.S. v. Page*, 544 F.2d 982 (8th Cir. 1976) (included in Applicant's Appendix)

27 F.3d 1539  
United States Court of Appeals,  
Eleventh Circuit.

ALLSTATE INSURANCE COMPANY,  
Plaintiff–Counterclaim Defendant–Appellant,  
v.  
Terry SWANN and Pamela  
Swann, Defendants–Appellees,  
Donald L. Rayburn, Defendant–  
Counterclaim Plaintiff–Appellee.

No. 92–6803. | Aug. 9, 1994.

Homeowners insurer brought action against insureds and mortgagee seeking declaration that it had no liability under policy for fire losses. The United States District Court for the Northern District of Alabama, No. CV–90–C–1957–M, U.W. Clemon, J., entered adverse judgment against insurer. Insurer appealed. The Court of Appeals, Conway, District Judge, sitting by designation, held that: (1) exclusion of testimony of underwriting manager for homeowners insurer was harmful error, and (2) insurer could not for first time on appeal make separate misrepresentation claim against mortgagee based on insureds' misrepresentation in insurance application.

Affirmed in part, and reversed and remanded in part.

#### Attorneys and Law Firms

\*1540 Steven F. Casey, Alan T. Rogers and Michael D. Freeman, Balch & Bingham, Birmingham, AL, for appellant.

Charles R. Crowder, Leila Hirayama Watson and David C. Johnson, Johnson & Cory, P.C., Birmingham, AL, for Donald Rayburn.

Thomas B. Hanes, Barnett, Noble, Hanes & Sparks, Birmingham, AL, for Terry and Pam Swann.

Appeal from the United States District Court for the Northern District of Alabama.

Before ANDERSON and BIRCH, Circuit Judges, and CONWAY\*, District Judge.

#### Opinion

\*1541 CONWAY, District Judge:

Allstate Insurance Company (“Allstate”) appeals an adverse judgment following a jury trial concerning whether, and to what extent, Allstate was liable for fire losses under a homeowners insurance policy. For the reasons that follow, we affirm in part and reverse in part.

#### I. FACTS AND PROCEDURAL HISTORY

Terry and Pamela Swann (“the Swanns”) owned a house insured under a homeowners policy issued by Allstate. Donald L. Raburn (“Raburn”) was identified in the policy as a mortgagee. In the application for insurance, the Swanns represented that Mr. Swann was in the property management business. In May 1990, a fire destroyed the Swanns' home.

In September 1990, Allstate filed a declaratory judgment action against the Swanns in the United States District Court for the Northern District of Alabama. In its initial complaint, Allstate sought a declaration that it had no liability under the policy for the fire losses because the Swanns set the fire, or caused it to be set, and made material misrepresentations in the insurance application and claim processes. Allstate later amended its complaint to add Raburn as a defendant. In the amended pleading, Allstate alleged that during its claims investigation, Raburn misrepresented to Allstate the extent and validity of his mortgage interest. Allstate sought a declaration that it was not liable to Raburn under the homeowner's policy and that Raburn's mortgage was invalid and unenforceable. Alternatively, Allstate sought a declaration specifying the extent of Raburn's mortgage interest. Thereafter, Raburn counterclaimed against Allstate for breach of the insurance contract.

The case was tried in March 1992. Allstate introduced evidence that the fire was incendiary. Allstate also presented circumstantial evidence of the Swanns' alleged motive for setting the fire. Allstate's evidence linking the Swanns to the fire was likewise circumstantial.

Allstate also introduced evidence that the Swanns misrepresented Mr. Swann's occupation in the insurance application. Mr. Swann testified that during some years, most of his income came from gambling, rather than from real estate. R. 54 at 88.<sup>1</sup>

After Mr. Swann testified, Allstate called one of its homeowners underwriting managers as a witness, for the purpose of establishing that Allstate would not have issued the policy to the Swanns had it known that Mr. Swann earned his living from illegal gambling. On direct examination, Allstate's counsel asked the underwriting manager, John Looby, the following question:

At the time the policy was issued to Terry and Pamela Swann, if the applicant had stated on his application that he derived his income from gambling, would Allstate have issued the policy?

R. 55 at 340. Counsel for the Swanns objected, without stating any grounds, and the district court sustained the objection. After Allstate's counsel explained what Allstate sought to prove through the witness, the district judge stated:

First of all, I take it there's an objection for best evidence. Are these underwriting guidelines written, Mr. Looby?

R. 55 at 340. Mr. Looby responded "yes, sir", whereupon the district judge sustained the objection. Allstate's counsel then remarked that all of the underwriting guidelines were not written, after which the district judge instructed him to ask his next question. Later, out of the presence of the jury, Allstate's counsel proffered that

... Mr. Looby would testify that if Mr. Swann had provided a true statement on his application regarding the source of his income the policy would not have been issued, that their principles prohibit in fact the issuance of policies to people that earn their living in that fashion.

R. 55 at 379–80.

After Allstate rested its case, the district court directed a verdict against Allstate on its misrepresentation claim against the Swanns. The district court likewise directed \*1542 a verdict in Raburn's favor on the separate misrepresentation claim against him and on Allstate's claim that the mortgage was invalid. Raburn was also granted a directed verdict on his counterclaim for breach of the insurance contract.

The defendants did not present any evidence. After they rested, the case was submitted to the jury. In answers to special interrogatories, the jury stated that neither of the Swanns had willfully burned the home, or caused it to be burned. The jury also determined the pre-fire market value of the house, and the actual cash value of the home's contents which were destroyed by the fire. Finally, the jury determined the amount of money owed by the Swanns to Raburn under the mortgage. The district judge entered a single judgment awarding \$377,873.30 to the Swanns and \$203,704.92 to Raburn. Allstate filed a motion for new trial, which the district judge denied.

Allstate appeals (1) the district judge's entry of a directed verdict in the Swanns' favor on Allstate's misrepresentation claim, (2) the district judge's jury instruction concerning an insurer's burden of proving arson based on circumstantial evidence, and (3) the district judge's refusal to give Allstate's requested special jury interrogatory concerning its arson claim. We consider only the propriety of an evidentiary ruling underlying Allstate's first issue on appeal, and the separate question of whether Allstate has waived any appeal as to Raburn.

## II. DISCUSSION

### A. *Exclusion of Mr. Looby's Testimony.*

[1] We first must determine whether Allstate has waived its right to challenge the district judge's exclusion of Mr. Looby's testimony. Allstate did not list this particular ruling in its statement of the issues in the initial brief. Instead, Allstate phrased the issue as "Whether the lower court erred in directing a verdict on Allstate's misrepresentation claim where the insured misrepresented his occupation on his application for insurance." Allstate's initial brief seems to suggest that there was sufficient evidence, independent of Mr. Looby's testimony, to create a jury issue on Allstate's misrepresentation claim. However, Allstate also extensively discussed the exclusion of Mr. Looby's testimony in its initial brief. Allstate quoted verbatim the question posed to Mr. Looby, the exchange between the district judge and counsel contemporaneous with the court's exclusion of the evidence, and Allstate's proffer of Mr. Looby's anticipated testimony. Although Allstate's initial brief does not contain citations to legal authority pertaining specifically to the evidentiary ruling, the brief at least raises the suggestion that the trial court erred in excluding Mr. Looby's testimony. Moreover,

after the Swanns' counsel noted, almost in passing, in the answer brief that Allstate had not attacked the evidentiary ruling, Allstate filed a reply brief that directly challenged and discussed the ruling.

[2] Issues that clearly are not designated in the initial brief ordinarily are considered abandoned. *FSLIC v. Haralson*, 813 F.2d 370, 373 n. 3 (11th Cir.1987). However, briefs should be read liberally to ascertain the issues raised on appeal. *Id.*; *United States v. Milam*, 855 F.2d 739, 743 (11th Cir.1988) (citing *Haralson*); *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 504 (5th Cir.1981).

Viewed liberally, Allstate's initial brief raised the issue of the propriety of the district judge's exclusion of Mr. Looby's testimony. Allstate preserved the issue of the evidentiary ruling in the lower court, extensively discussed the circumstances of the ruling in its initial brief, and specifically argued the point in its reply brief. Under these circumstances, application of the waiver rule would be unduly harsh.

[3] [4] [5] Having determined that the evidentiary ruling is before us, we next address whether the trial court erred in excluding Mr. Looby's testimony on the basis of the "best evidence rule." Evidentiary rulings are reviewed under an abuse of discretion standard. *Sherrin v. Northwestern Nat'l Life Ins. Co.*, 2 F.3d 373, 377 (11th Cir.1993).

Rule 1002, Federal Rules of Evidence, states

To prove the content of a writing, ... the original writing ... is required, except as \*1543 otherwise provided in these rules or by Act of Congress.

Though somewhat expanded, Rule 1002 "is otherwise a conventional restatement of the so-called 'best evidence' rule." 5 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 1002[01], at 1002-3 (1993). Except as provided in Rule 1002, "there is no general rule that proof of a fact will be excluded unless its proponent furnishes the best evidence in his power." *Id.* Rule 1002 requires production of an original document only when the proponent of the evidence seeks to prove the content of the writing. See *United States v. Howard*, 953 F.2d 610, 612 & n. 1 (11th Cir.1992); *United States v. Tombrello*, 666 F.2d 485, 491 (11th Cir.), cert. denied, 456 U.S. 994, 102 S.Ct. 2279, 73 L.Ed.2d 1291 (1982). It does not, however, "require production of a document simply because the document contains facts that are also testified to by a

witness." *United States v. Finkielstain*, 718 F.Supp. 1187, 1192 (S.D.N.Y.1989).

The district court abused its discretion in excluding Mr. Looby's testimony pursuant to the best evidence rule. The question posed to Mr. Looby did not seek to elicit the content of any writing; therefore, Rule 1002 was not implicated. Although Mr. Looby testified that he was familiar with Allstate's underwriting guidelines, and his answer to the question undoubtedly would have been based in part on the contents of those guidelines, Mr. Looby would not necessarily have been required to state the contents of the guidelines in order to answer the question.

[6] We next address the question whether the district judge's error was harmless. The harmless error standard applies to erroneous evidentiary rulings. *Aetna Cas. & Surety Co. v. Gosdin*, 803 F.2d 1153, 1159 n. 12 (11th Cir.1986).

Generally, the Swanns contend that entry of directed verdict was nevertheless proper because Allstate did not present any evidence on "one or more" of the necessary elements of its misrepresentation claim. For the necessary elements of an insurer's misrepresentation defense (in this case, actually a misrepresentation claim) under Alabama law, the Swanns cite *Dempsey v. Auto Owners Ins. Co.*, 717 F.2d 556 (11th Cir.1983). In *Dempsey*, this court listed the following elements of such a defense:

- (1) the statements were false and made with intent to deceive;
- (2) the statements related to matters materially affecting the risk; and
- (3) the insurer relied upon the statements to its detriment.

*Dempsey*, 717 F.2d at 560.

The Swanns concede that Allstate presented some evidence that a misrepresentation was made in the application. They maintain, however, that Allstate did not introduce any evidence that the misrepresentation materially affected the risk, or that Allstate relied on the misrepresentation to its detriment (elements 2 and 3 of the *Dempsey* test).

Allstate characterizes *Dempsey* as merely stating one way an insurer may void a policy based on an insured's misrepresentations. Allstate argues that it was not required to prove the second and third *Dempsey* elements in order

to establish a *prima facie* misrepresentation defense under Alabama law. To support this argument, Allstate cites *Ala.Code* § 27-14-7 (1993). In pertinent part, that statute provides:

(a) All statements and descriptions in any application for an insurance policy or annuity contract, or in negotiations therefor, by, or in behalf of, the insured or annuitant shall be deemed to be representations and not warranties. Misrepresentations, omissions, concealment of facts and incorrect statements shall not prevent a recovery under the policy or contract unless either:

- (1) Fraudulent;
- (2) Material either to the acceptance of the risk or to the hazard assumed by the insurer; or
- (3) The insurer in good faith would either not have issued the policy or contract, or would not have issued a policy or contract at the premium rate as applied for, or would not have issued a policy or contract in as large an amount or would not have provided coverage with respect to the hazard resulting in the loss if the true facts had been made \*1544 known to the insurer as required either by the application for the policy or contract or otherwise.

Allstate also relies on *Stephens v. Guardian Life Ins. Co. of Am.*, 742 F.2d 1329 (11th Cir.1984). In *Stephens*, this court stated:

[Section] 27-14-7 furnishes three separate grounds for the rescission of a policy. The most innocent misrepresentation will afford a reason to rescind if the truth is either material to the risk or, even if immaterial, would have caused the particular insurer acting in good faith to have declined coverage in the amount and at the rate obtained by the applicant.

*Id.* at 1333 (footnote omitted).

[7] *Stephens*, rather than *Dempsey*, controls. *Dempsey* does not even mention the Alabama statute, while the more recent *Stephens* case directly, and correctly, construes it. Moreover, *Stephens* relies on a 1982 Alabama Supreme Court decision<sup>2</sup> construing the statute, while *Dempsey* cites older Alabama cases. Finally, *Stephens* is more analogous because it, like the instant case, involved an alleged misrepresentation in an

application for insurance. *Dempsey*, by contrast, involved a post-loss misrepresentation. Accordingly, Allstate is correct in maintaining that it was not required to introduce evidence that the Swanns' misrepresentation was material to the risk, or that Allstate relied on the misrepresentation to its detriment, in order to make out a *prima facie* misrepresentation claim.<sup>3</sup> Rather, Allstate need only have presented evidence that the Swanns made the misrepresentation, and that Allstate would not have issued the homeowners policy had it known the actual facts.

[8] The district court excluded the only evidence Allstate offered to support its position that the company would not have insured the Swanns but for the misrepresentation. Had that evidence been admitted, Allstate would have made out a *prima facie* misrepresentation claim, requiring submission of that claim to the jury. Since the district judge's ruling precluded Allstate from establishing a *prima facie* claim, it cannot be characterized as harmless error.

#### **B. Mortgagee Raburn.**

[9] Raburn argues that Allstate did not raise any issue, theory or claim against him in its initial brief. Allstate counters by pointing out that the lower court entered one judgment for Raburn and the Swanns, and contends that the first issue raised in its initial brief attacks the judgment rendered in favor of Raburn. Response of Appellant Allstate Insurance Company to Raburn's Motion to Dismiss Appeal at p. 1.

Allstate's argument is flawed. The "misrepresentation claim" referenced in Allstate's first appellate issue is Allstate's misrepresentation claim against the Swanns, not against Raburn. As previously noted, Allstate had a separate misrepresentation claim against Raburn for alleged post-loss misrepresentations. Allstate did not appeal the trial court's directed verdict for Raburn on that claim.

Apparently, Allstate now contends that its first stated appellate issue implicitly encompasses the argument that if Mr. Swann made a misrepresentation in the application, the policy was void as to everyone, including Raburn. Raburn counters that this may have been the argument Allstate intended to make, but there is no such argument in Allstate's initial brief. Rather, the argument first appeared in Allstate's response to Raburn's motion to dismiss the appeal. Moreover, Allstate has not disputed Raburn's contention that no such argument was advanced at trial.

Generally, an appellate court will not consider an issue that is raised for the first time on appeal. *In re Pan Am. World Airways, Inc.*, 905 F.2d 1457, 1461–62 (11th Cir.1990). Allstate has waived the argument it now seeks to make against Raburn. Because Allstate has not raised any grounds that warrant reversal as to Raburn, the judgment \*1545 entered in Raburn's favor is due to be affirmed.

Based on the foregoing, the judgment of the district court is REVERSED as to the Swanns and AFFIRMED as to Raburn. The case is REMANDED for a new trial as to the Swanns. We deem it unnecessary to reach the other issues raised by Allstate.

**All Citations**

27 F.3d 1539, 40 Fed. R. Evid. Serv. 1483

**III. CONCLUSION**

**Footnotes**

- \* Honorable Anne Callaghan Conway, U.S. District Judge for the Middle District of Florida, sitting by designation.
- 1 Throughout this opinion, the notation "R. \_\_\_ at \_\_\_" refers to the trial transcript.
- 2 *National Sav. Life Ins. Co. v. Dutton*, 419 So.2d 1357 (Ala.1982).
- 3 Even if evidence of materiality and detrimental reliance were required, Mr. Looby's excluded testimony was sufficient to create a jury issue on those elements.

575 F.3d 567  
United States Court of Appeals,  
Sixth Circuit.

Teresa O'BRIEN, et al. (No. 07-4553); Jessica Dellarussiani, et al. (No. 08-3184), Plaintiffs-Appellants,  
v.

ED DONNELLY ENTERPRISES, INC.,  
and Ed Donnelly, Defendants-Appellees.

Nos. 07-4553, 08-3184. | Argued: Dec. 2, 2008. | Decided and Filed: Aug. 5, 2009.

**Synopsis**

**Background:** Employees brought action alleging employer failed to pay wages in violation of Fair Labor Standards Act (FLSA) and Ohio law. The United States District Court for the Southern District of Ohio initially certified employees as a class under FLSA. Class moved for sanctions for spoliation of evidence, which was denied. Following discovery, employer moved to decertify class. The District Court, George C. Smith, J., 2006 WL 3483956, granted motion. Lead plaintiffs and opt-in plaintiffs proceeded individually. Parties moved for summary judgment and to strike. The District Court, 2007 WL 3025340, granted partial summary judgment and dismissed complaint as to opt-in plaintiffs, and, 2007 WL 4510246, granted employer's motion to strike and partial summary judgment as to lead plaintiffs. The District Court, 2008 WL 183299, awarded attorney fees and costs to opt-in plaintiffs. Appeal was taken.

**Holdings:** The Court of Appeals, Arthur J. Tarnow, District Judge sitting by designation, held that:

- [1] employer's offer of judgment rendered opt-in plaintiffs' claims moot;
- [2] FLSA did not bar district court from awarding attorney fees to opt-in plaintiffs based on work done on decertified class action;

[3] opt-in plaintiffs were not entitled to liquidated damages under Ohio law;

[4] opt-in plaintiffs were not similarly situated to lead plaintiffs;

[5] genuine issue of material fact existed as to whether employer was or should have been on notice that litigation requiring missing time sheet change approval reports as evidence might ensue;

[6] district court abused its discretion in striking portions of lead plaintiffs' summary judgment affidavits; and

[7] genuine issue of material fact existed as to whether employer required employee to report to work earlier than she clocked in.

Affirmed in part, reversed in part, and remanded.

White, Circuit Judge, filed opinion concurring in part.

**Attorneys and Law Firms**

**\*571 ARGUED:** Lisa A. Wafer, Ferron & Associates, Columbus, Ohio, for Appellants. Loriann E. Fuhrer, Kegler, Brown, Hill & Ritter, Columbus, Ohio, for Appellees. **ON BRIEF:** Lisa A. Wafer, John W. Ferron, Jessica G. Fallon, Ferron & Associates, Columbus, Ohio, for Appellants. Loriann E. Fuhrer, Kegler, Brown, Hill & Ritter, Columbus, Ohio, for Appellees.

Before: MOORE and WHITE, Circuit Judges; TARNOW, District Judge.\*

TARNOW, D. J., delivered the opinion of the court, in which MOORE, J., joined. WHITE, J. (p. 603), delivered a separate opinion concurring in part.

**OPINION**

ARTHUR J. TARNOW, District Judge.

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\*572 These appeals involve two related cases in which former employees of two McDonald's franchises allege that their employer refused to pay the employees the wages that they were due, in violation of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b); the corresponding Ohio statute; and other Ohio law. For the reasons that follow, in the *Dellarussiani* appeal, we affirm the district court's entry of judgment pursuant to the defendants' Fed.R.Civ.P. 68 offer of judgment, except that the issue of attorney fees is remanded to the district court. Having achieved all the relief that they could hope to get on their most important claims, the *Dellarussiani* plaintiffs no longer have a stake in these claims in the *O'Brien* case. As for an Ohio Prompt Pay Act claim, which plaintiffs lost in *Dellarussiani* on summary judgment, and as to common-law claims pleaded in *O'Brien* but not in *Dellarussiani*, the appeal is not moot, though these claims will be barred by *res judicata*. Therefore, defendants' motion to dismiss the *Dellarussiani* plaintiffs from the *O'Brien* appeal is granted in part, but denied in part as to the Prompt Pay Act and common-law claims. Though we disagree with the standard that the district court applied in deciding whether the *O'Brien* plaintiffs were "similarly situated" under the FLSA, we affirm the decertification. We do so, because in view of our dismissal of most of the *Dellarussiani* plaintiffs' claims from the *O'Brien* appeal, there is only one possible opt-in plaintiff who could join the lead plaintiffs in *O'Brien*. But the district court correctly observed that this particular opt-in plaintiff failed to allege that she suffered from any unlawful practices. She is clearly not similarly situated to the lead plaintiffs. Nor are the *Dellarussiani* plaintiffs, who have only a few extant supplemental claims, similarly situated to the lead plaintiffs, given that these claims will inevitably be barred by *res judicata*. Therefore, we affirm the district court's decertification of the collective action. That leaves the claims of the lead *O'Brien* plaintiffs. As to the lead plaintiffs, we reverse the district court's grant of summary judgment in defendants' favor as to the lead plaintiffs' "off the clock" claims and vacate the grant of summary judgment as to the lead plaintiffs' claim that their time-sheets were improperly altered.

**I. Factual and Procedural Background**

The defendants in this case are Ed Donnelly and the corporation that he and his wife own, Ed Donnelly Enterprises, Inc. *O'Brien* J.A. 150. Defendants bought two McDonald's stores in Bellefontaine, Ohio in February 2002. *O'Brien* J.A. 155.

For varying lengths of time between 2002 and 2004, plaintiffs worked in at least one of these two stores. They earned wages between \$6.25 and \$9.00 per hour. *O'Brien* Appellants' Br. at 7.

Plaintiffs allege that there were two main ways in which defendants and their managers paid plaintiffs less than what they had earned. The first practice involved requiring plaintiffs to work "off the clock," that is, before they had punched into, or after they had punched out of, the computerized system that tracked employees' start, end, and break times.

\*573 The second manner in which plaintiffs claim they were cheated is this: plaintiffs say that defendants electronically altered the times that had previously been entered by the timekeeping system when an employee punched in or out of work. These edits, according to plaintiffs, reduced the total number of hours recorded in the employees' payroll reports to a number less than what the employees had actually worked.<sup>1</sup>

In *O'Brien v. Ed Donnelly Enterprises, Inc., and Ed Donnelly*, plaintiffs brought the following claims: the first cause of action was for violations of the FLSA; the second, for violations of Ohio's corresponding wage-payment law, O.R.C. § 4111; the third, for violations of Ohio's Prompt Pay Act, O.R.C. § 4113.15(B); the fourth, for fraud; the fifth, for breach of contract; and the sixth, for promissory estoppel.

The district court initially certified a class of plaintiffs under the FLSA. The ultimate class of plaintiffs (two lead plaintiffs and eight opt-in plaintiffs) moved for sanctions against defendants for spoliation of evidence. This request was denied. After discovery, the district court found that the opt-in plaintiffs were not similarly situated and decertified the

class, dismissing the eight opt-in plaintiffs without prejudice. All plaintiffs but one appealed the decertification order, and this appeal is before this court. Retaining the same counsel as used in the *O'Brien* action, six opt-in plaintiffs refiled individual suits, which were consolidated as *Dellarussiani v. Ed Donnelly Enterprises, Inc., and Ed Donnelly*. Stevie LeVan, another opt-in plaintiff, did not file an individual action, but joins the *O'Brien* appeal.

The two lead plaintiffs in *O'Brien* proceeded individually in that case. After striking several affidavits as inconsistent with prior deposition testimony, the district court granted summary judgment in favor of the defendants against both plaintiffs. The two *O'Brien* plaintiffs appealed this final judgment and several of the evidentiary decisions made by the district court. This appeal is also before this court.

Each of the *Dellarussiani* plaintiffs filed a three-count complaint. Count I claimed violations of the FLSA; count II claimed violations of the corresponding Ohio statute; and count III alleged that defendants were required to pay liquidated damages under Ohio law, separate from any FLSA damages. Defendants made an offer of judgment pursuant to Fed.R.Civ.P. 68 with regard to counts I and II. Defendants offered to pay \$6,142.20 (the full amount of claimed damages for counts I and II) plus reasonable attorney fees as determined by the district court. The offer allowed the district court to decide count III on the merits. The *Dellarussiani* plaintiffs rejected the offer; however, the district court found that defendants' offer of judgment mooted counts I and II. The district court entered judgment in favor of the *Dellarussiani* plaintiffs in the amount of the offer on counts I and II.

The district court also determined reasonable attorney fees and costs to be \$6,024.94. In making this determination, the district court found that the bills submitted by the *Dellarussiani* plaintiffs' counsel included time spent both on the unsuccessful *O'Brien* case and the successful *Dellarussiani* case. In addition, the bills did not properly explain what expenses \*574 were incurred in preparation solely for *Dellarussiani*. The district court awarded attorney fees and costs only for the work it determined was done solely for the *Dellarussiani* action, even though some of the evidence used in *Dellarussiani* was gathered during the *O'Brien* action.

Regarding count III, the district court granted defendants' motion for summary judgment, finding that the wages in

question were in dispute. According to the district court, under Ohio Rev.Code § 4113.15(B), if wages are in dispute, an employer is not liable for liquidated damages. The *Dellarussiani* plaintiffs appealed the district court's entry of judgment on counts I and II, the attorney-fees award, and the grant of summary judgment on count III. Defendants filed a motion with this court to dismiss the *Dellarussiani* plaintiffs from the *O'Brien* appeal, asserting that the *Dellarussiani* plaintiffs' claims in *O'Brien* were mooted by the district court's entry of judgment in the *Dellarussiani* plaintiffs' favor.

## II. The *Dellarussiani* suit

The six *Dellarussiani* plaintiffs contend that the district court erred (1) when it considered defendants' offer of judgment, (2) when it dismissed counts I and II of their complaint for mootness in view of the offer of judgment, (3) when it refused to award any attorneys' fees that were incurred in *O'Brien* while prosecuting the *Dellarussiani* plaintiffs' claims, and (4) when it granted summary judgment in defendants' favor on count III. We affirm the district court's disposition of these issues, except as to the award of attorney fees.

### A. Considering the offer of judgment

Plaintiffs maintain that the district court abused its discretion by even considering the offer of judgment, because Fed.R.Civ.P. 68(b) states that “[e]vidence of an unaccepted offer is not admissible except in a proceeding to determine costs.”

[1] The district court considered the offer of judgment on defendants' Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction. Both the district court and the defendants explain that a district court can consider an offer of judgment to determine whether a claim is moot, in order to ascertain whether there is a justiciable case or controversy under Article III of the Constitution. In other words, an offer of judgment cannot be used to support or challenge the merits of a claim and to thereby influence the trier of fact. *See Hopper v. Euclid Manor Nursing Home*, 867 F.2d 291, 295 (6th Cir.1989) (“The rule contemplates that whether jury or judge tries the case the decisionmaker will be unaware of the extraneous fact that an offer of judgment has been made. This ensures that the trier of fact will not be influenced in its evaluation of the case by any knowledge of a rejected offer or the consequences thereof.”). But a Rule 68 offer can be used to show that the court lacks subject-matter jurisdiction. *See Greisz v. Household Bank (Ill.), N.A.*, 176 F.3d 1012, 1015 (7th Cir.1999) (an offer of judgment that encompasses

the relief claimed “eliminates a legal dispute upon which federal jurisdiction can be based,” because “[y]ou cannot persist in suing after you've won”); cf. *Drs. Hill & Thomas Co. v. U.S.*, 392 F.2d 204 (6th Cir.1968) (government offered, though not pursuant to Rule 68, to give more money to tax-refund claimant than was claimed and district court correctly dismissed the claim as moot).

[2] We agree with the Seventh Circuit's view that an offer of judgment that satisfies a plaintiff's entire demand moots the case and reject the plaintiffs' contention that the offer of judgment could not be considered. We also note that our decision \*575 does not implicate *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 922 (5th Cir.2008). That court held that a Rule 68 offer of judgment cannot moot a lead plaintiff's FLSA claim when the lead plaintiff timely moves for collective certification, because the motion relates back to the lead plaintiff's filing of the complaint. Of course, if the court eventually denies the motion, then the lead plaintiff represents only herself, and her claim is moot. Contrary to the *Sandoz* plaintiff, the *Dellarussiani* plaintiffs did not purport to bring a collective action, so we are not concerned that the *Dellarussiani* plaintiffs have been picked off by defendants to avoid the onslaught of a putative collective action.

[3] We disagree, however, with the Seventh Circuit's view that a plaintiff loses outright when he refuses an offer of judgment that would satisfy his entire demand. See *Greisz*, 176 F.3d at 1015 (barring recovery of any damages or attorney fees when the plaintiff refused an offer of judgment for the full amount of damages plus reasonable costs and attorney fees). Instead, we believe the better approach is to enter judgment in favor of the plaintiffs in accordance with the defendants' Rule 68 offer of judgment, as the district court did in this case, following the lead of district courts in the Second Circuit. See *Greif v. Wilson, Elser, Moskowitz, Edelman & Dicker LLP*, 258 F.Supp.2d 157, 160–61 (E.D.N.Y.2003); *Ambalu v. Rosenblatt*, 194 F.R.D. 451, 453 (E.D.N.Y.2000).

### ***B. Mootness of counts I and II in view of offer of judgment***

Plaintiffs maintain that the district court erred in dismissing counts I and II for mootness. In particular, plaintiffs argue that the defendants' offer of judgment did not include attorneys' fees and costs.

[4] True, the defendants' offer did not offer a number certain for plaintiffs' attorneys' fees. But the defendants did offer

to pay costs accrued and a reasonable attorneys' fee to be determined by the court. *Dellarussiani* J.A. 281. Plaintiffs do not argue that they could have obtained anything more for their substantive claims in counts I and II than what the defendants offered. The only issue is whether an offer of judgment which offers to pay a reasonable attorneys' fee as later determined by the court—but which does not offer to pay whatever sum reported by opposing counsel—moots the FLSA and corresponding Ohio claim in this case.

The district court noted that offers of judgment with language similar to defendants' offer have been deemed by other district courts sufficient to moot the claims at issue. See *Ambalu*, 194 F.R.D. at 452; see also *Greisz*, 176 F.3d at 1014 (defendant who offered judgment of “\$1,200 plus reasonable costs and attorneys' fees” in a Truth in Lending Act case was “offering [plaintiff] more than her claim was worth to her in a pecuniary sense”). Furthermore, the FLSA does not entitle a prevailing plaintiffs' counsel to get whatever fee counsel claims. Rather, under the statute, the “court ... shall ... allow a reasonable attorney's fee.” 29 U.S.C. § 216(b). Defendants' offer to pay the reasonable attorneys' fee as determined by the court is consonant with the statutory language which requires that the court “allow” the reasonable fee when it awards a judgment to a FLSA plaintiff.

Plaintiffs also contend that the offer did not purport to satisfy plaintiffs' claim for liquidated damages under Ohio Revised Code § 4113.15(B). However, the offer was only extended as to counts I and II. *Dellarussiani* J.A. 281. Count III, which entailed plaintiffs' claim to liquidated damages under Ohio law, proceeded to summary judgment. See *infra* Part II.D.

\*576 Therefore, the district did not err when it dismissed counts I and II as moot in view of the offer of judgment.

### ***C. Reasonable attorneys' fees***

[5] Plaintiffs' counsel incurred fees of roughly \$6,000 in this case and \$150,000 in *O'Brien*. *Dellarussiani* J.A. 42. The district court determined that the reasonable fee to which plaintiffs' counsel were entitled did not include the *O'Brien* fees. *Dellarussiani* J.A. 47. We review under an abuse-of-discretion standard. *Wells v. New Cherokee Corp.*, 58 F.3d 233, 239 (6th Cir.1995).

Plaintiffs contend that the *Dellarussiani* plaintiffs' claims were prosecuted primarily in *O'Brien*. But the district court and defendants reason that the statute authorizes an award of fees only in “the action” where a plaintiff prevails. 29

U.S.C. § 216(b) (“The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney’s fee to be paid by the defendant, and costs of the action.”) (emphasis added); *Dellarussiani* J.A. 44. The plaintiffs did not prevail in *O’Brien*, and therefore, say defendants, any fees incurred in *O’Brien* cannot be awarded.

[6] Such a wooden reading of the statute is unnecessary, and at a different point in the district court’s opinion, the court appears to acknowledge this. See *Dellarussiani* J.A. 46 (district court expressing difficulty in determining “how much time was spent on tasks in the *O’Brien* matter that were necessary, not redundant, and contributory to the success of the six plaintiffs” on counts I and II of *Dellarussiani* ). The reality is that discovery concerning the *Dellarussiani* plaintiffs’ claims took place in *O’Brien*. Expenses that plaintiffs’ counsel incurred while trying to obtain collective-action certification in *O’Brien* should not be attributed to prosecution of the *Dellarussiani* plaintiffs’ particular claims, unless these expenses benefitted the *Dellarussiani* plaintiffs’ individual claims. For instance, fees for depositions in *O’Brien* that uncovered the facts surrounding the *Dellarussiani* plaintiffs’ claims, even if the depositions were conducted as part of the *O’Brien* plaintiffs’ effort to obtain collective-action certification, should not be rejected on the basis of the FLSA.

Consonant with our conclusion that the statute does not bar the district court from awarding attorney fees incurred in the *O’Brien* suit for the *Dellarussiani* plaintiffs’ claims, the proper amount of attorney fees is an issue remanded to the district court. We do so notwithstanding the inadequacy and perhaps even the impropriety in the billing records that plaintiffs’ counsel had originally presented to the district court. The plaintiffs can have one more opportunity to present records that reflect fees incurred in pursuit of and which benefitted the *Dellarussiani* plaintiffs’ claims on which they prevailed pursuant to the Rule 68 offers that included reasonable attorney fees.

Plaintiffs are advised, however, that *Hensley v. Eckerhart*, 461 U.S. 424, 435, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) does not entitle them to the entirety of their fees incurred in *O’Brien*. As we explained in *Imwalle v. Reliance Medical Products, Inc.*, 515 F.3d 531, 554–55 (6th Cir.2008), *Hensley* held that a prevailing plaintiff’s lodestar amount—that is, the hours expended multiplied by the hourly billing rate—cannot be reduced for lack of overall success if some claims were successful and others were unsuccessful, when all of those

claims “are based on a common core of facts or are based on related legal theories.” *Imwalle*, 515 F.3d at 554. *Hensley* does not mean that all of the fees in *O’Brien* can be recouped, even if *arguendo* \*577 the claims of all of the *O’Brien* plaintiffs, including those who splintered off to *Dellarussiani*, were based on a “common core of facts.”

Addressing some of defendants’ concerns, we note that, absent a specific showing of benefit to the *Dellarussiani* plaintiffs, fees cannot be recovered for expenses incurred for the claims of *O’Brien* plaintiffs who did not file suit in *Dellarussiani*, nor for the claims of the lead plaintiffs in *O’Brien* who remained after the collective action was decertified.

#### D. Liquidated damages under Ohio’s Prompt Pay Act

[7] Count III of the *Dellarussiani* complaint sought liquidated damages available under Ohio Revised Code § 4113.15(B), also known as the Prompt Pay Act or the Prompt Payment Act, which states:

Where wages remain unpaid for thirty days beyond the regularly scheduled payday or, in the case where no regularly scheduled payday is applicable, for sixty days beyond the filing by the employee of a claim or for sixty days beyond the date of the agreement, award, or other act making wages payable *and no contest*[,] court order or *dispute* of any wage claim including the assertion of a counterclaim *exists accounting for nonpayment*, the employer, in addition, as liquidated damages, is liable to the employee in an amount equal to six per cent of the amount of the claim still unpaid and not in contest or disputed or two hundred dollars, whichever is greater.

(Emphasis added).<sup>2</sup> The district court found that disputes accounting for nonpayment of the wages claimed by plaintiffs did exist and that therefore as a matter of law, plaintiffs could not receive liquidated damages. See *Dellarussiani* J.A. 28. So the trial court granted the employer’s motion for summary judgment on count III. We agree.

The district court correctly reasoned that Ohio law requires that a dispute accounting for nonpayment precludes the award of liquidated damages to a wage claimant. *See, e.g., Jones v. Select Indus. Corp.*, 2006 WL 1705201, at \*6 (S.D. Ohio 2006) (“where the employer disputes the wage claim, no liquidated damages are due”). Plaintiffs contend that there was no dispute in this case, because the employer never informed its employees that the employer was disputing the employees' entitlement to certain wages. *Dellarussiani* Appellants' Br. at 36. But the statute does not require such interaction between an employer and an employee. And even though the cases cited by defendants involve situations where an employer had to decide whether wages were due as a matter of policy, nothing in the statute limits a dispute accounting for nonpayment to such situations. *See Fridrich v. Seuffert Construction Co., Inc.*, 2006 WL 562156, at \*4 (Ohio Ct.App.2006) (deciding that “dispute existed as to whether Seuffert Construction's vacation policy required the payout for unused vacation days”); *Haines & Company, Inc. v. Stewart*, 2001 WL 166465, at \*3 (Ohio Ct.App.2001) (holding that where parties disputed whether certain commissions were “wages” under Prompt Pay Act, a “contest” existed, meaning no liquidated damages were available). \*578 We see no reason why a factual dispute over the hours worked could not suffice as a dispute accounting for nonpayment.

Next, plaintiffs suggest that the district court's broad interpretation of what constitutes a dispute allows any recalcitrant employer to reflexively invoke the safe harbor that a dispute existed. *Dellarussiani* Reply Br. at 9.<sup>3</sup> That, according to plaintiffs, would render as surplus the statute's provision of liquidated damages.

But there could be situations where, under the district court's interpretation of the statute, the liquidated-damages provision could come into play. Suppose an employer had promised to pay a certain sum, and the employees agreed that this sum was their due wage. However, a clerical glitch prevented the sum from being delivered to the employees. In such a situation, the employer could not reasonably maintain that a “dispute” accounted for nonpayment. Likewise, if an employer were short on incoming cash, and consequently had to delay paying its employees, but conceded the employees' entitlement to payment, the employer could not reasonably argue that a “dispute” accounted for nonpayment. Further, because application of the statute's safe harbor requires that there be a contest, court order, or dispute of a wage claim accounting for nonpayment, it is proper to focus on whether

the asserted dispute accounts for the nonpayment. Thus, it is not the case that any recalcitrant employer can simply declare that there is a dispute and then retroactively insulate its actions.

Concerning *Dellarussiani*, the defendants disputed that they owed anything more than what they paid their employees according to the employer's own payroll records. Contrary to plaintiffs' argument, the offer of judgment does not undermine the existence of a dispute accounting for nonpayment, because the Rule 68 offer did not concede liability; it was a procedural tool to encourage the quick resolution of litigation. *Dellarussiani* J.A. 281–82.

Plaintiffs suggest that a jury decide whether a dispute existed. *Dellarussiani* Appellants' Br. at 36. However, plaintiffs have failed to raise a genuine issue of material fact, as required under Rule 56, as to whether defendants' disputes with the plaintiffs count as “dispute[s]” under the statute. The district court examined the facts surrounding each of the plaintiffs' claims and concluded that a dispute accounting for nonpayment did indeed exist. *Dellarussiani* J.A. 32–38. The district court framed its inquiry as one determining whether the evidence demonstrated “a reasonable basis upon which Defendants disputed” the plaintiffs' claims. Although asking whether the defendant has a “reasonable basis” for disputing the claims \*579 does not flow directly from O.R.C. § 4113.15(B), the district court's “reasonable basis” gloss aided its consideration of whether there was a genuine issue regarding whether there was a contest or dispute “accounting for nonpayment.” Plaintiffs have not shown that the district court erred in concluding as a matter of law that there was no genuine issue of material fact whether there was a contest or dispute accounting for nonpayment. Even if plaintiffs may have provided evidence creating an issue of fact as to whether the underlying FLSA and wage-payment violations occurred, that evidence, even when viewed most favorably towards plaintiffs, does not suggest that there was no dispute accounting for nonpayment. Rather, the evidence, even when viewed in the required light, establishes that a contest or dispute regarding defendant's liability for further wages accounted for its nonpayment.

Alternatively, if plaintiffs had evidence that the wages were withheld even though defendants conceded or reasonably had to concede that the wages were due, such evidence—like evidence about clerical glitches or cash-flow problems—could create a triable issue of fact on the Prompt Pay Act claim. But in our case, the plaintiffs have no such evidence:

the reason that the lawsuit has continued is that defendants do not concede that the wages claimed by plaintiffs are due. Therefore, the district correctly granted summary judgment in defendants' favor on count III.

### **III. Motion to dismiss Dellarussiani plaintiffs from O'Brien appeal**

Arguing that we lack subject-matter jurisdiction due to mootness, defendants move to dismiss from the *O'Brien* appeal the plaintiffs who splintered off from the *O'Brien* case following decertification so that they could file individual claims in *Dellarussiani*. The motion is granted in part and denied in part. We explain why in four parts: (A) mootness due to *Dellarussiani* judgment on counts I and II; (B) defendants' argument that mootness of the FLSA claim necessarily renders any supplemental claims moot; (C) the hurdle of *res judicata* for the *Dellarussiani* plaintiffs' Prompt Pay Act claim in *O'Brien*; (D) and the *res judicata* bar against the common-law claims that *Dellarussiani* plaintiffs have in *O'Brien*.

#### **A. Mootness due to Dellarussiani judgment on counts I and II**

Because we affirm the district court's entry of judgment in the *Dellarussiani* plaintiffs' favor on counts I and II, any of the plaintiffs' corresponding claims in *O'Brien*—claims that they hope to maintain if the district court's decertification is reversed on appeal—are now moot. There is no longer a live controversy as to the FLSA and the corresponding Ohio wage-payment claim, *Gottfried v. Med. Planning Servs., Inc.*, 280 F.3d 684, 691 (6th Cir.2002), because there is no other relief that plaintiffs could obtain on those claims in *O'Brien*, given our overall affirmance of the district court's rulings in *Dellarussiani* and our remand of the attorney-fees issue in *Dellarussiani*.

#### **B. Defendants' argument that mootness of the FLSA claim necessarily renders any supplemental claims moot**

Defendants suggest that our inquiry stops here, because the only claim in *O'Brien* that is statutorily capable of proceeding collectively is the FLSA claim. Appellees' Reply in Supp. of Mot. to Dismiss at 3. Given that the FLSA claim that the *Dellarussiani* plaintiffs had in *O'Brien* has been mooted by the judgment entered in *Dellarussiani* pursuant to the Rule 68 \*580 offer, the collective-action device is unavailable, according to defendants' theory, for the *Dellarussiani* plaintiffs' supplemental claims that remain in

*O'Brien*. Defendants maintain that because the *Dellarussiani* plaintiffs' appeal in *O'Brien* seeks reinstatement into a collective action, the unavailability of this vehicle means that their appeal is moot.

We reject this argument. In general, as we discuss in Part IV.A, if a FLSA lead plaintiff also brings supplemental state claims and then seeks certification as a collective action, a district court evaluates whether the opt-in plaintiffs are “similarly situated” under 29 U.S.C. § 216(b). If the opt-in plaintiffs are similarly situated to the lead plaintiffs, it does not make sense to suggest, as defendants seem to, that only the FLSA claims may proceed collectively, while the supplemental claims would have to proceed individually or would be required to run in parallel to the collective action only by satisfying the more stringent requirements of Fed.R.Civ.P. 23. *See, e.g., Molina v. First Line Solutions*, 566 F.Supp.2d 770, 789–90 (N.D.Ill.2007) (declining to certify a parallel Fed.R.Civ.P. 23(b)(3) class of supplemental claims alongside a FLSA collective action, but allowing any opt-in plaintiffs to pursue supplemental claims as part of a collective action). To disjoin FLSA and supplemental claims in the manner proposed by defendants would defeat the purpose of supplemental jurisdiction, which is to facilitate the resolution of claims that are so closely related to claims for which federal jurisdiction originally lies that the supplemental claims are part of the same case or controversy as the claim independently invoking federal jurisdiction. *See* 13D Wright, Miller, Cooper, & Freer, *Federal Practice and Procedure* § 3657 at 317 n. 4 (3d ed. 2008). Notwithstanding the lack of express statutory authority in the FLSA for collective certification of non-FLSA claims, supplemental claims by definition are treated as part of the same controversy animated by a particular employee's FLSA claim. *See* 28 U.S.C. § 1367(a).

So far, we have explained that an opt-in employee with FLSA and supplemental claims can have both of those claims certified as part of a collective action where a lead plaintiff has FLSA and supplemental claims. That is the background for the situation we face, where a lead plaintiff has FLSA and supplemental claims, but an opt-in employee only has supplemental claims.

In *Exxon Mobil Corp. v. Allapattah Services*, Justice Ginsburg explained the Court's unanimous understanding that 28 U.S.C. § 1367(a) confers supplemental jurisdiction in cases where one plaintiff has a claim invoking federal-question jurisdiction, 28 U.S.C. § 1331, but other plaintiffs

only have state claims. 545 U.S. 546, 587–88, 125 S.Ct. 2611, 162 L.Ed.2d 502 (2005) (Ginsburg, J., dissenting); see *id.* at 559, 125 S.Ct. 2611 (majority opinion) (“If the court has original jurisdiction over a single claim in the complaint, it has original jurisdiction over a ‘civil action’ within the meaning of § 1367(a), even if the civil action over which it has jurisdiction comprises fewer claims than were included in the complaint. Once the court determines it has original jurisdiction over the civil action, it can turn to the question whether it has a constitutional and statutory basis for exercising supplemental jurisdiction over the other claims in the action.”); see also *Lindsay v. Gov’t Employees Ins. Co.*, 448 F.3d 416, 423 (D.C.Cir.2006) (analyzing *Allapattah* and holding in a case involving FLSA and state-law claims that “so long as the district court has original jurisdiction over a single claim, it may exercise supplemental jurisdiction over any additional claim that forms part of the same Article III case or controversy”). Under *Allapattah*, § 1367(a)’s requirement that the section only apply “in any civil action \*581 of which the district courts have original jurisdiction” is clearly satisfied when a single claim invoking federal-question jurisdiction exists. Thus, an inquiry whether supplemental jurisdiction exists over state-law claims need only examine whether the state claims are so closely related to the federal claim that the state claims form part of the same Article III case or controversy as the federal claim.

Therefore, as long as someone in a collective action has a FLSA claim, employees who are similarly situated can be part of the collective action, even if the other employees only have supplemental claims. Accordingly, if for some reason, a particular employee or group of employees did not have viable FLSA claims, due to mootness or claim preclusion, for instance, but had extant supplemental claims, a court would examine whether these employees were still similarly situated to the lead plaintiffs, which they may or may not be.

[8] The short of our discussion is that we have jurisdiction to consider whether the *Dellarussiani* plaintiffs, who have only supplemental claims that are still alive, could still be part of the collective action, were we to remand the case for recertification. Even though the *Dellarussiani* plaintiffs’ FLSA claim in *O’Brien* is now moot due to the *Dellarussiani* judgment, the FLSA only requires an analysis of whether these plaintiffs are similarly situated to the lead plaintiffs whom they would join upon a putative remand for recertification of the collective action. That similarly-situated analysis is not mooted by the lack of a FLSA claim on the part of the employees who seek to opt into the collective action.

### C. Res judicata and the Dellarussiani plaintiffs’ Prompt Pay Act claim in O’Brien

[9] We turn therefore to the other supplemental claims. With respect to the plaintiffs’ third claim in *O’Brien* for liquidated damages under Ohio’s Prompt Pay Act, O.R.C. § 4113.15(B): In *Dellarussiani*, this claim died on summary judgment, and above, we explain why we affirm the district court’s disposition of count III. But the *Dellarussiani* plaintiffs still have a Prompt Pay Act claim in *O’Brien*. Mootness typically would not bar the *Dellarussiani* plaintiffs’ § 4113.15(B) claim in *O’Brien*, in view of their loss at summary judgment on an identical claim in other litigation. Ordinarily, when a claim has already been resolved in a prior suit, mootness is invoked as a bar to subject-matter jurisdiction when “full relief” has been accorded by the prior tribunal. See, e.g., *Davis v. Sun Oil Co.*, 148 F.3d 606, 611 n. 4 (6th Cir.1998). Indeed, this is the case for counts I and II of *Dellarussiani*: plaintiffs have already won on these claims in *Dellarussiani*, and there is nothing more for them to win on a putative remand in *O’Brien*, particularly since we are remanding to the *Dellarussiani* district court the issue of what attorney fees can be recouped. That is why the *Dellarussiani* plaintiffs’ are dismissed from the *O’Brien* appeal as to their FLSA and O.R.C. § 4111 claims.

[10] [11] But with regard to the Prompt Pay Act claim for liquidated damages, the *Dellarussiani* plaintiffs in *O’Brien* are not, strictly speaking, barred by mootness but by claim preclusion. This fine distinction is worth discussing, because if mootness were to apply when a losing party received an adverse ruling but persisted in seeking relief in a subsequent suit, a federal court sitting in that subsequent suit would be required to *sua sponte* inquire into its own subject-matter jurisdiction over the previously losing party’s claim. In other words, whether *res judicata* applied would be probative \*582 of whether the subsequent claim was moot and whether the claim was justiciable. But Fed.R.Civ.P. 8(c) clearly frames *res judicata* as an affirmative defense, which means that it can be waived and that it does not go to subject-matter jurisdiction. See *O’Connor v. Pierson*, 426 F.3d 187, 194 (2d Cir.2005). Therefore, losing a claim on summary judgment in a previous suit does not moot such a claim in a subsequent lawsuit. Rather, the subsequent claim is barred under the doctrine of claim preclusion. See *Ohio Nat. Life Ins. Co. v. U.S.*, 922 F.2d 320, 325 (6th Cir.1990).

Under Sixth Circuit Rule 27(d)(1), “[m]otions to dismiss ordinarily may not be filed on grounds other than lack of jurisdiction.” This rule favors denying the defendants’ motion to dismiss as to the *Dellarussiani* plaintiffs’ Prompt Pay Act claim in *O’Brien*, because claim preclusion, not mootness, is the obstacle that plaintiffs face on this claim. The individual *Dellarussiani* plaintiffs could then conceivably be recertified into a collective action along with the lead plaintiffs in *O’Brien*, given our conclusion, which we discuss later in Part IV.A.2, that the district court applied the wrong standard in decertifying the collective action in *O’Brien*. However, on remand, the defendants would surely raise *res judicata* and ask the district court to dismiss the extant *Dellarussiani* plaintiffs’ claim once and for all. *Res judicata* in this instance is an “insurmountable hurdle” that has mootness-like effects. See *Myer v. Americo Life, Inc.*, 469 F.3d 731, 733 (8th Cir.2006).

[12] Rather than grant the defendants’ motion to dismiss the *Dellarussiani* plaintiffs’ appeal in *O’Brien* as to their Prompt Pay Act claim, we instead choose to avoid transgressing the boundary between mootness and claim preclusion. The motion is denied as to the claim for § 4113.15(B) liquidated damages, but we find that under § 216(b) of the FLSA, the *Dellarussiani* plaintiffs are not “similarly situated” to the lead plaintiffs in *O’Brien*, given the inevitable preclusion of both the Prompt Pay Act claims and the common-law claims, as discussed next in Part III.D. Therefore, on the merits, we affirm the district court’s decertification of these plaintiffs’ Prompt Pay Act claim. Thus, the *Dellarussiani* plaintiffs are unable to rejoin the collective action. Technically, they could attempt to file individual actions, as we are affirming the district court’s decertification and dismissal *without prejudice* of their claim. But such suits would be nipped in the bud by the affirmative defense of claim preclusion.

#### **D. Res judicata and Dellarussiani plaintiffs’ common-law claims in O’Brien**

Finally, we must consider whether the *Dellarussiani* plaintiffs’ appeal from the decertification order in *O’Brien* is moot as to common law claims pleaded in *O’Brien*. Because the FLSA and common-law claims appear to be based on the same alleged conduct, we are skeptical that the district court would afford any more relief upon a putative remand on the common-law claims in *O’Brien* than what the plaintiffs already received on counts I and II pursuant to the offer of judgment in *Dellarussiani*. Nevertheless, we cannot say as a matter of law how the disposition of a FLSA claim affects the

common-law claims. That would require an analysis of the elements of and remedies offered by the common-law claims compared to the FLSA claim. It is possible that a federal claim could be moot while a supplemental claim based on the same conduct might not be.

The doctrine that would definitively bar the *Dellarussiani* plaintiffs from pursuing \*583 their common-law claims in *O’Brien* upon a putative remand is claim preclusion, not mootness. Therefore, for the reasons discussed in the previous section, we have subject-matter jurisdiction over the *Dellarussiani* plaintiffs’ appeal as to the common-law claims, and the motion to dismiss is accordingly denied with respect to these claims.

The plaintiffs pled for common-law relief in *O’Brien*, but not in *Dellarussiani*. See *O’Brien* J.A. 11–14; *Dellarussiani* J.A. 4–6. Because the district court dismissed the *Dellarussiani* plaintiffs from *O’Brien* without prejudice, the *Dellarussiani* plaintiffs could have brought the common-law claims in *Dellarussiani*. But they did not. Therefore, they will inevitably be barred by *res judicata*. We affirm the decertification in *O’Brien* as to the *Dellarussiani* plaintiffs: they are not similarly situated under the FLSA to the lead plaintiffs, because they will not have any claims grounded in the actionable conduct. They have nothing left to litigate in *O’Brien*, as all of their claims in *O’Brien* are moot or will be claim-precluded.

#### **IV. The O’Brien suit**

Therefore, only the two lead *O’Brien* plaintiffs and Stevie LeVan are now parties to the appeal from the *O’Brien* district court’s decertification order. After we discuss why the district court’s application of the “similarly situated” language from the FLSA was partly in error, we explain why the district court’s decertification of the collective action will be affirmed. We then discuss the district court’s evidentiary and summary-judgment rulings concerning the two lead *O’Brien* plaintiffs.

##### **A. Decertification**

The Fair Labor Standards Act provides a private cause of action against an employer “by any one or more employees for and in behalf of himself or themselves *and other employees similarly situated.*” 29 U.S.C. § 216(b) (emphasis added).

Unlike class actions under Fed.R.Civ.P. 23, collective actions under FLSA require putative class members to opt into the class. See 29 U.S.C. § 216(b) (“No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.”). These opt-in employees are party plaintiffs, unlike absent class members in a Rule 23 class action. See 7B Wright, Miller, & Kane, *Federal Practice and Procedure* § 1807 at 474 n. 13 (3d ed. 2005).

The district court followed a two-stage certification process, as many courts do, to determine whether the opt-in plaintiffs and lead plaintiffs were similarly situated. See *id.* § 1807 at 487 n. 48. After the initial conditional certification of the class, the parties entered into discovery. At the second stage, the district court reviewed the evidence produced during discovery and decertified the class for two main reasons. First, the district court stated that each claim presented by each plaintiff would require an extensive individualized analysis to determine whether a FLSA violation had occurred, frustrating the “collective consideration of common questions of fact and law.” *O'Brien* J.A. 72. Second, the alleged violations were not based on a broadly applied, common scheme, nor were the violations widespread even among the plaintiffs, who constituted only a small fraction of the total number of potential collective-action members. See J.A. 69. Specifically, out of the 426 potential collective-action members, the district court noted that evidence produced through discovery revealed that only five of the ten plaintiffs alleged that their time-sheets were altered, only five alleged that \*584 they were required to work off the clock, and three plaintiffs failed to allege that they suffered from either practice. *Id.*

### 1. Standard of review

[13] The Sixth Circuit has not previously announced its standard for reviewing a district court's certification rulings in the FLSA context. But the Eleventh Circuit reviews collective-action-certification decisions for abuse of discretion, and even the plaintiffs suggest that the court apply this deferential standard. See *Anderson v. Cagle's, Inc.*, 488 F.3d 945, 953–54 (11th Cir.2007). We adopt this standard.

### 2. The meaning of “similarly situated”

[14] The Fair Labor Standards Act does not define “similarly situated,” and neither has this court. However, district courts have based their final-certification decisions on

a variety of factors, including the “factual and employment settings of the individual[ ] plaintiffs, the different defenses to which the plaintiffs may be subject on an individual basis, [and] the degree of fairness and procedural impact of certifying the action as a collective action.” See 7B Wright, Miller, & Kane, *supra*, § 1807 n. 65 at 497; *Anderson, supra*, 488 F.3d at 953. The lead plaintiffs bear the burden of showing that the opt-in plaintiffs are similarly situated to the lead plaintiffs. See 7B Wright, Miller, and Kane, *supra*, § 1807 at 476 n. 21. Showing a “unified policy” of violations is not required, though. See *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1095 (11th Cir.1996) (suit alleging age discrimination under Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–34, which incorporates by reference the enforcement provisions of the FLSA). *But see Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1214 n. 8 (5th Cir.1995) (for conditional certification so that notice to putative class members could be sent, court required that plaintiffs allege that they were victims of a single decision, policy, or plan infected by discrimination), *overruled on other grounds by Desert Palace, Inc., v. Costa*, 539 U.S. 90, 123 S.Ct. 2148, 156 L.Ed.2d 84 (2003); *Thiessen v. Gen. Elec. Capital Corp.*, 267 F.3d 1095, 1105 (10th Cir.2001) (same).

Plaintiffs argue that they did indeed allege two common ways by which the employer violated the FLSA, namely, (1) that the defendant made employees work off the clock, and (2) that the employer or its agents improperly edited employees' time punches after the fact, thus cutting the hours for which plaintiffs were paid. Both the district court and the defendant note that to determine whether a particular violation of the FLSA took place in this case requires an individualized analysis that examines the facts of each alleged violation. For this reason, the district court decertified, determining that individualized issues predominated.

But such a collection of individualized analyses is required of the district court. Under the FLSA, opt-in plaintiffs only need to be “similarly situated.” While Congress could have imported the more stringent criteria for class certification under Fed.R.Civ.P. 23, it has not done so in the FLSA. See *Grayson*, 79 F.3d at 1096 (section 216(b)'s “similarly situated” requirement is less stringent than Rule 20(a) requirement that claims “arise out of the same action or occurrence” for joinder to be proper, or even Rule 23(b)(3)'s requirement that common questions predominate for a 23(b) (3) class to be certified). *But see Shushan v. Univ. of Colo. at Boulder*, 132 F.R.D. 263, 266–67 (D.Colo.1990) (applying Rule 23 to collective actions under 216(b) for purpose

of effective management of litigation). The district court implicitly and improperly applied a Rule 23–type analysis when it reasoned that the \*585 plaintiffs were not similarly situated because individualized questions predominated. See *O'Brien* J.A. 70. This is a more stringent standard than is statutorily required.

[15] Granted, it is clear that plaintiffs are similarly situated when they suffer from a single, FLSA—violating policy, and when proof of that policy or of conduct in conformity with that policy proves a violation as to all the plaintiffs. In the instant case, proof of a violation as to one particular plaintiff does not prove that the defendant violated any other plaintiff's rights under the FLSA. Nevertheless, the plaintiffs are “similarly situated” according to § 216(b). Furthermore, it is possible that representative testimony from a subset of plaintiffs could be used to facilitate the presentation of proof of FLSA violations, when such proof would ordinarily be individualized. See *Morgan v. Family Dollar Stores, Inc.*, 551 F.3d 1233, 1263–65, 1279–80 (11th Cir.2008) (as amended) (determining that although proof of exemption from FLSA's overtime-pay requirements might appear to be individualized, certain plaintiffs' representative testimony could be used to show exemption's inapplicability, as all plaintiffs in collective action were similarly situated), *petition for cert. filed*, 77 U.S.L.W. 3596 (U.S. Apr. 15, 2009) (No. 08–1287). We do not purport to create comprehensive criteria for informing the similarly-situated analysis. But in this case, the plaintiffs were similarly situated, because their claims were unified by common theories of defendants' statutory violations, even if the proofs of these theories are inevitably individualized and distinct. The claims were unified so, because plaintiffs articulated two common means by which they were allegedly cheated: forcing employees to work off the clock and improperly editing time-sheets. We do not mean to require that all collective actions under § 216(b) be unified by common theories of defendants' statutory violations; however, this is one situation where a group of employees is similarly situated.

Plaintiffs offer their own interpretation of what “similarly situated” means. Instead of arguing that Rule 23(b)(3) predominance should not be a criterion for § 216(b) collection actions, plaintiffs say that putative collective-action members whose “causes of action under the FLSA accrued at about the time and place in the approximate manner of the named plaintiff would be similarly situated” to the lead plaintiffs. See *O'Brien* Appellants' Br. at 20 (citing *Pritchard v. Dent Wizard Intern. Corp.*, 210 F.R.D. 591, 595 (S.D.Ohio

2002)). Defendants explain that those cases cited by plaintiffs arise in situations where a court has to decide whether a certain class of employees is exempt from the FLSA's overtime-pay requirements. Those cases, argue defendants, lend themselves to collective adjudication because common questions predominate. For instance, a court can easily decide whether all the dent-removal technicians (as in *Pritchard*) are exempt from overtime-pay requirements, without having to examine the specific factual situation of each dent-removal technician.

While we agree with plaintiffs that “about the time and place in the approximate manner” is a starting point for understanding what “similarly situated” means, such an interpretation can result in a standard that is more demanding than what the statute requires, unless one excludes Rule 23 predominance from being an implicit requirement for § 216(b) collective actions. And protecting § 216(b) in this way is what we have outlined above. We do not suggest that aspects of Rule 23 could never be applied to a FLSA collective action. Rather, applying the criterion \*586 of predominance undermines the remedial purpose of the collective action device.

As for the argument that the alleged unlawful practices—making employees work off the clock and altering the time-sheets—were not alleged by all of the plaintiffs, this argument ultimately requires us to affirm the decertification. Stevie LeVan is the only opt-in plaintiff who could possibly benefit from the recertification of the collective action. Unlike the *Dellarussiani* plaintiffs, LeVan had opted into *O'Brien* but did not pursue her claim in *Dellarussiani*. As the district court observed, LeVan is clearly not similarly situated to the lead plaintiffs, because she failed to allege that she suffered from either unlawful practice. *O'Brien* J.A. 69 (district-court opinion), 289 (LeVan Dep. at 33). And as we explained in Part II, the *Dellarussiani* plaintiffs cannot be recertified because some of their claims are moot and the others will be claim-precluded, leaving them without any claims to pursue and necessarily excluding them from being “similarly situated” under § 216(b).

In general, though, a district court should examine whether partial decertification is possible, when faced with the situation where a subset of the plaintiffs fail to allege violations of the FLSA. The option of partial certification is important to consider, because it counters the argument that a collective action must be totally decertified if some members are not similarly situated to the others. In general, plaintiffs

who are not similarly situated—for instance, plaintiffs who did not allege suffering under either unlawful practice—could be dismissed while keeping intact a partial class. Plaintiffs who do present evidence that they are similarly situated to the lead plaintiffs should not be barred from the opportunity to be part of a FLSA collective action, because the collective action serves an important remedial purpose. Through it, a plaintiff who has suffered only small monetary harm can join a larger pool of similarly situated plaintiffs. See *Hoffmann-La Roche, Inc., v. Sperling*, 493 U.S. 165, 170, 110 S.Ct. 482, 107 L.Ed.2d 480 (1989). That pool can attract effective counsel who knows that if the plaintiffs prevail, counsel is entitled to a statutorily required reasonable fee as determined by the court.<sup>4</sup> In the age-discrimination context, which also requires that opt-in plaintiffs be similarly situated for certification of a collective action, “Congress has stated its policy that ADEA plaintiffs should have the opportunity to proceed collectively.” See *Grayson*, 79 F.3d at 1096. As some district courts have noted, “imposing any additional restrictions from Rule 23 would be contrary to the broad remedial goals” of the FLSA and its sister statutes—such as the Equal Pay Act, 29 U.S.C. § 206(d), and the ADEA, 29 U.S.C. § 626(b)—which incorporate the same statutory language concerning collective actions. See 7B Wright, Miller, and Kane, *supra*, § 1807 at 481 n. 25, at 468–69 nn. 2–3.

A final word on the parties' less persuasive points. Defendants note that some of the plaintiffs were managers and therefore could not be “similarly situated.” This is not a compelling argument, because managers could also have been cheated by defendants. Also, in their reply brief, plaintiffs mischaracterize the reasoning of the district court, implying that the district court decertified the class because plaintiffs alleged two ways, instead of one way, \*587 in which the plaintiffs suffered violations. As discussed, the district court decertified because it did not see how plaintiffs' claims, even if based on two theories of how the FLSA violations were committed, could be adjudicated but in an individualized manner.

### **B. The lead plaintiffs in O'Brien**

Having affirmed the district court's decertification of the collective action, we turn to the claims of the lead plaintiffs in *O'Brien*. The district court denied their motion for sanctions due to spoliation, granted defendants' motions to strike plaintiffs' affidavits, and in the end, granted defendants' motion for summary judgment. We conclude that spoliation may have taken place; therefore, this issue is remanded for

the district court's consideration. As for the district court's other evidentiary rulings, the affidavits should not have been stricken. Apart from any consideration of the effect of possible spoliation sanctions on the merits of the lead plaintiffs' claims, we disagree with the district court in part and reverse as to the lead plaintiffs' off-the-clock claims. We vacate the district court's entry of summary judgment on the lead plaintiffs' time-sheet—alteration claims, so that the district court may revisit this disposition once it decides the spoliation issue.

### **1. Spoliation**

In a motion for discovery sanctions, plaintiffs alleged that the defendants intentionally lost or destroyed some of the Time Punch Change Approval (TPCA) Reports. *O'Brien* J.A. 55. In addition to seeking monetary sanctions, the employees wanted the district court to infer that the missing reports would have been adverse to the employer. *Id.* at 4. These TPCA reports were printed by defendants' computer system at the end of each day, but the computer system itself only held the past 72 days in backup. *O'Brien* J.A. 161–62. Plaintiffs maintain that these reports are the only records that would reveal improper changes made by defendant to the time-sheets punched by the employees. See *O'Brien* J.A. 178–79.

[16] Although a district court's discovery rulings are reviewed for abuse of discretion, see *U.S. v. Guy*, 978 F.2d 934, 938–39 (6th Cir.1992), we reverse the district court and remand for its consideration whether it was reasonably foreseeable that the missing reports would be needed in future litigation.

[17] The magistrate judge's opinion, adopted by the district court, reasons that destruction or loss of evidence before notice of the *O'Brien* lawsuit is not a basis for sanctions. *O'Brien* J.A. 60. That is true, but the issue here concerns *when* the defendant was or should have been on notice that litigation requiring the missing reports as evidence might ensue. See *John B. v. Goetz*, 531 F.3d 448, 459 (6th Cir.2008) (duty to preserve evidence is triggered when a “party has notice that the evidence is relevant to litigation or ... should have known that the evidence may be relevant to future litigation”). The magistrate judge appears to assume that the defendant was on notice only when the *O'Brien* lawsuit was filed. However, the district court should consider whether the defendants should have been on notice earlier than the date of the filing of the *O'Brien* suit.

As the district court has not yet considered whether the employer was on notice of its duty to preserve evidence before the *O'Brien* lawsuit, we do not conclude in the first instance that spoliation did take place. Rather, the district court can consider facts which could suggest that the employer should have anticipated that the missing records needed to be preserved. For instance, \*588 plaintiffs assert that within four to six weeks after buying the McDonald's stores, defendant Donnelly learned that the prior owners had been sued by a former employee who claimed she had not been paid wages due her. See *O'Brien* Reply Br. at 7.<sup>5</sup> Plaintiffs also maintain that Donnelly knew that one of his managers was changing employees' time records by inserting breaks and that one of the managers was making employees work off the clock. See *O'Brien* Reply Br. at 7, 9–10.<sup>6</sup>

If the district court concludes that spoliation did take place, the district court can consider, under its inherent authority, whether it was negligence or bad faith that motivated the defendants and relatedly, what sanction, if any, should be imposed. *Adkins v. Wolever*, 554 F.3d 650, 653 (6th Cir.2009) (en banc).

Plaintiffs also argue that the defendants were under a duty to preserve for longer than 72 days the electronic versions of the TPCA reports. *O'Brien* Appellants' Br. at 29. But plaintiffs provide no authority for that proposition. What matters is whether the employer produces the reports in discovery, in either hard copy or electronic form.

Defendants also maintain that they did in fact produce payroll records which show the hours worked. *O'Brien* Resp. Br. at 27. However, the payroll records would not show whether edits were made by defendants to employees' time-sheets. The TPCA reports are therefore relevant to one of plaintiffs' theories of how the alleged FLSA violations happened. Defendants may argue that any edits were made for good reason, see *id.*, but the question of whether the edits were proper is separate from defendants' obligation to produce relevant, non-privileged discovery materials. Finally, defendants argue that of the missing reports, all but two pertain to the time period before the lawsuit was filed. See *O'Brien* Resp. Br. at 26. But as stated above, the district court should consider whether the defendant had a duty to preserve the records even before *O'Brien* was filed.

## 2. *O'Brien*

Plaintiffs appeal the district court's decision to strike portions of an affidavit that O'Brien filed with her summary-judgment papers because they allegedly conflicted with portions of her prior deposition testimony. The district court based its decision on the rule that "a party cannot create a genuine issue of material fact by filing an affidavit, after a motion for summary judgment has been made, that essentially contradicts [her] earlier deposition testimony." *Penny v. United Parcel Serv.*, 128 F.3d 408, 415 (6th Cir.1997).

The district court found that O'Brien "twice testified that the first thing she did when she walked into the restaurant was clock in." *O'Brien v. Ed Donnelly Enters., Inc.*, No. 2:04–CV–00085, 2007 WL 4510246, at \*3 (S.D.Ohio Dec. 18, 2007) (emphasis in the original). The two sources the court looked to were (1) pages 45 and 46 of O'Brien's deposition testimony in another case, *Rogan v. Ed Donnelly Enterprises*, and (2) O'Brien's deposition in this case. *Id.*

However, plaintiffs pointed out that O'Brien also testified at her deposition in the instant case that O'Brien performed work tasks before clocking in. Defendants' \*589 argument as to this was that "the testimony 'was given by O'Brien after she had already testified under oath twice to the contrary, after consultation with her lawyer, and upon questioning from her own lawyer at her deposition,' " and "that [t]his belated testimony—given with assistance of counsel—is no different from the submission of an inconsistent affidavit." *Id.* (quoting defendants' brief). Faced with O'Brien's subsequent deposition testimony that she worked before clocking in, the court framed the question before it accordingly: "The essential question Plaintiffs' argument poses under [*Reid v. Sears, Roebuck & Co.*, 790 F.2d 453 (6th Cir.1986)] is whether there is a compelling reason to allow deposition testimony that conflicts with prior testimony, where such conflicting testimony clearly would not be allowed if it were contained in an affidavit." *O'Brien*, 2007 WL 4510246 at \*4. The court looked to the purpose behind barring subsequent contradictory affidavits—"screening out sham issues of fact" (quoting *Reid*)—and decided to strike the conflicting portions of the O'Brien affidavit. The court reasoned accordingly:

In the instant case, Plaintiff O'Brien twice testified—once during deposition in the *Rogan* case, and once during deposition in the instant case—that the first action she took upon arriving at work was clocking in. (*Rogan* O'Brien Depo. at 45–46; O'Brien Depo. at 37). Plaintiff O'Brien's subsequent testimony that Ed Donnelly told her to clock in half an hour late directly conflicts with her two prior

statements. The fact that Plaintiff O'Brien twice stated that she clocked in before starting work, and only once stated that she performed work before clocking in is of only minor importance. It is more than simple arithmetic that convinces this Court that Plaintiff O'Brien's later conflicting testimony should not be allowed. Plaintiff O'Brien's testimony during deposition in the instant case—at a new time, in a new place, in a new action, under circumstances removed from her prior testimony in the *Rogan* case—serves as an independent reaffirmation of the testimony she originally provided during deposition in *Rogan*. It is this entirely consistent reaffirmation of her testimony in *Rogan* that convinces this Court that Plaintiff O'Brien's subsequent testimony looks like a discrepancy that creates a “transparent sham” and not a discrepancy that creates “an issue of credibility ... or go[es] to the weight of the evidence.” *Bank of Illinois* at 1169–70. Accordingly, Defendants' Motion to Strike is well-taken with respect to the conflicting portions of the O'Brien Affidavit.

*Id.*

[18] We hold that the district court abused its discretion when it struck portions of O'Brien's affidavit. *See Seay v. Tenn. Valley Auth.*, 339 F.3d 454, 480 (6th Cir.2003) (applying abuse-of-discretion standard to district court's ruling on motion to strike evidentiary submissions). We consider the evidence chronologically—first, the *Rogan* deposition; then, the deposition in the instant case; and finally, the affidavit filed with appellants' summary-judgment papers.

#### **a. Rogan deposition**

The district court found that O'Brien's testimony in the instant case was an “independent reaffirmation” of her deposition testimony in the earlier *Rogan v. Ed Donnelly Enterprises, Inc., et al.*, case. The court looked to pages 45–46 of the *Rogan* deposition, where O'Brien testified that her first action upon arriving at work was to clock in. However, the *Rogan* deposition *itself* contains conflicting testimony. A few pages earlier in O'Brien's deposition \*590 of April 4, 2005 in *Rogan*, O'Brien testified about the various tasks she would perform when opening the store:

Q. ... Will you explain what you did to open the store; that is, getting in, what you turned on, that sort of thing.

A. Oh, boy. It's been a while.

Q. I understand.

A. Go in, you turn on some nights [sic], because it was dark. The fryer had to be turned on. *Then* you go boot up the computers for the register, the computer for the registers; count the drawers; put the drawers in; turn on the registers.

J.A. 355 (O'Brien *Rogan* Dep. 42) (emphasis added). Thus, at one point in the *Rogan* deposition, O'Brien testified that she would do a series of tasks *before* she turned on the registers.

Shortly thereafter, however—after testifying about those tasks—she was specifically asked about clocking in:

Q. How did you clock in in the morning?

A. On the cash register.

Q. Okay. Did you have to turn it on before you clocked in?

A. I believe you could do that when you walked in.

Q. Okay.

A. *You just had to turn on the register.*

Q. Okay. So as you would walk in, you would—

A. Clock in your number.

Q.—clock in *and then* go about doing the things you described, turning on the computer in the back, the fryer, that sort of thing, correct?

A. *Yes.*

J.A. 226–27 (O'Brien *Rogan* Dep. 45–46) (emphasis added).

The district court only cited to the latter portion of O'Brien's deposition in *Rogan*, in which O'Brien testified that she would clock in first. *See O'Brien*, 2007 WL 4510246, at \*3–4 (citing O'Brien Dep. 45–46). Yet, the earlier portion of her *Rogan* testimony indicates the opposite—that O'Brien performed certain tasks *before* turning on the register and clocking in. Therefore, the testimony in the *Rogan* case was internally inconsistent.

#### **b. Deposition in the instant case**

Months later, at the November 21, 2005 deposition in the instant case, opposing counsel read *part* of O'Brien's previous testimony in the *Rogan* case back to her—the part about clocking in—and plaintiff affirmed that it had

been transcribed accurately. The following exchange then occurred:

Q. So is that the way it would work, that you would go in and then you would *clock in* at the register *and then go about doing the other duties* that you had as opening manager?

A. Yes. Poke in your number and then—you had to turn on the lights so you could see.

Q. Turn on the lights because it's the middle of the night?

A. Yes.

Q. And then *the first thing you would do is you'd clock in at the registers*, correct?

A. Yes.

Q. So that's the first thing you would do before you'd go on and do the other things?

A. You clock in and you turn on the fryer and just keep walking backwards.

J.A. 206–07 (O'Brien Dep. 36–37) (emphasis added). It is clear from this testimony that the first thing O'Brien would do after arriving in the morning, after turning on the lights so that she could see, was clock in—that she would clock in *before* performing \*591 her other tasks. Moreover, she testified she “clocked in approximately the same time every day,” which was when she “came to work”:

Q. So you clocked in *at the time that you came to work* and clocked out at the time you left?

A. Yes.

J.A. 208 (O'Brien Dep. 40) (emphasis added).

However, later in O'Brien's deposition in the instant case, her attorney conducted some direct examination with the stated purpose of “clarify[ing] some testimony from earlier.” J.A. 215 (O'Brien Dep. 76). On direct examination—after at least one recess had occurred<sup>7</sup>—the following exchange occurred:

Q. You also testified earlier that you would clock in in the mornings when you would come in to work, right?

A. Yes.

Q. Did you ever perform any work tasks *before* you would actually clock in?

A. Yes.

Q. What work tasks would you perform?

A. Turn on the lights. *Turn on the fryer, the prep tables, the grill, the oven. Count—unlock the safe, pull out the register drawers and count the money there, count the safe. Turn on the computers. Turn on the computers, you'd clock in, put the drawer—the register drawers in the registers.*

Q. Is there a—how long would you say it took for you to perform those tasks before clocking in?

A. About 15 minutes.

Q. Was there any reason you didn't clock in as soon as you would come into the restaurant in the morning?

A. *Ed told me not to.* He said it only took an hour to open the store. But I knew from working for KCJ. It took about an hour and a half. Because if your computers didn't come up, you had to be on the phone with the computer company getting help to bring those up. Otherwise you had no registers and you had to take your orders by hand and calculate by hand.

J.A. 216–17 (O'Brien Dep. 77–78) (emphasis added).

Later in the deposition, defense counsel resumed their examination of O'Brien. O'Brien testified that the schedule would have her set to come in an hour before the restaurant opened, but she would come in at approximately 4:30 a.m. to have additional time to perform tasks before the restaurant opened:

Q. And you did that on a volunteer basis?

A. No.

Q. Well, Mr. Donnelly told you not to come in until an hour before the restaurant opened, right?

A. He said it only took an hour to open the restaurant, but it took closer to an hour and a half.

Q. But your instructions from your employer was to come in an hour before the restaurant opened, right?

A. *To clock in.*

Q. Did Mr.—well, *your instruction* was to *come in an hour before the restaurant opened, right?*

A. Yes.

\* \* \*

\*592 Q. *Mr. Donnelly never instructed you to come in an hour and a half before the restaurant opened, correct?*

A. Correct.

\* \* \*

Q. [Your manager] Nancy never instructed you to come in an hour and a half before the restaurant opened?

A. No.

Q. ... [D]id you ever tell Ed that you were coming into the restaurant more than an hour before?

A. I told him that I come in at approximately 4:30 so I could have a good opening and the restaurant would open on time.

Q. And is that when he said, no, come in at 5:00?

A. He said it only takes an hour to open the store. *And he didn't want me clocking in until closer to 5:00.*

Q. He never agreed to pay you for any time more than an hour before the store opened, correct?

[Objection]

A. I don't believe there was an agreement.

Q. He never said, I'll pay you for more than an hour before the store opened, correct?

A. He only wanted to *pay* for an hour because he thought that's all you needed. And you did need more.

J.A. 218–20 (O'Brien Dep. 80–82) (emphasis added).

O'Brien's deposition testimony in the instant case, like her deposition testimony in the *Rogan* case, is internally inconsistent. Admittedly, the more favorable testimony for O'Brien is testimony that her attorney elicited from her after a recess. The district court was convinced that this was an attempt to create a “sham” issue of fact because O'Brien's initial deposition testimony in the instant case

was “an independent reaffirmation of the testimony she originally provided during deposition in *Rogan*.” *O'Brien*, 2007 WL 4510246, at \*4. Indeed, the court concluded, “[i]t is this *entirely consistent reaffirmation* of her testimony in *Rogan* that convinces this Court that Plaintiff O'Brien's subsequent testimony looks like a discrepancy that creates a ‘transparent sham’ and not a discrepancy that creates ‘an issue of credibility ... or go[es] to the weight of the evidence.’ ” *Id.* (emphasis added) (quoting *Bank of Ill. v. Allied Signal Safety Restraint Sys.*, 75 F.3d 1162, 1169–70 (7th Cir.1996)).<sup>8</sup> As shown above, however, the *Rogan* testimony itself was not consistent. There is no real discrepancy between O'Brien's two depositions. If anything, what the O'Brien testimony in the instant case reaffirms is that her *Rogan* testimony was *likewise* internally inconsistent. That O'Brien could be inconsistent in both her depositions regarding this subject may indicate a lack of credibility on her part or go to the weight of the evidence.<sup>9</sup>

### c. Affidavit

In her affidavit filed at the summary-judgment stage of this case, O'Brien averred the following:

\*593 6. Throughout my employment with Defendants, as an opening shift swing manager, I routinely reported to work for Defendants at the North store at 4:30 a.m. on weekdays and Saturdays. And, when I worked on Sundays, I routinely regularly reported to work at 5:30 a.m.

7. I was required to report for work at these early times so that I, and other crew members at the North store, could perform necessary tasks to open the restaurant and begin serving food to customers at the time the North store when it [sic] opened to the public.

8. These opening job tasks included turning on the lights, turning on the computers, warming up the grills and fryers, turning on and placing drawers in each of the five cash registers and preparing salads, yogurt parfaits and breakfast foods.

9. Even though I was required to report to work at 4:30 a.m. during the week, and 5:30 a.m. on Sundays, Mr. Donnelly instructed me not to clock in on the cash register until closer to 5:00 a.m., and 6:00 a.m., on Sundays. And, I followed Mr. Donnelly's instruction in this regard.

10. As a result, Defendants' timekeeping records relating to my hours of work do not reflect all of the time that I worked at the North store.

J.A. 330–31.

O'Brien's initial testimony in her deposition in the instant case that she clocked in first before performing other tasks only unambiguously contradicts the last sentence of paragraph 9 of the affidavit—that O'Brien *followed* Donnelly's instruction not to clock in until a certain time. But as discussed above, other testimony suggests that, consistent with the affidavit, Donnelly also instructed O'Brien to not clock in until a certain time. O'Brien never testified at her deposition that Donnelly instructed her to clock in when she arrived. Indeed, she testified at her deposition that Donnelly did not want her clocking in until closer to 5:00 and only wanted to pay her for an hour.

[19] [20] In short, the deposition testimony in *O'Brien* and *Rogan* did not speak with one voice. In *Aerel, S.R.L. v. PCC Airfoils, L.L.C.*, 448 F.3d 899, 908 (6th Cir.2006), we explained that when deciding the admissibility of a post-deposition affidavit at the summary-judgment stage, the district court must first determine whether the affidavit “directly contradicts” prior sworn testimony. The internal inconsistencies in O'Brien's testimony mean that the affidavit did not directly contradict the prior deposition testimony. Because there is no direct contradiction, then, the court must not disregard the affidavit, unless the court determines that the affidavit “constitutes an attempt to create a sham fact issue.” *Aerel*, 448 F.3d at 908 (citing *Franks v. Nimmo*, 796 F.2d 1230, 1237 (10th Cir.1986)). One of the factors to consider in determining whether the affidavit tries to create a sham fact issue is whether the affiant was cross-examined during earlier testimony. *Aerel*, 448 F.3d at 909. This factor matters, because a party who is cross-examined but nevertheless offers unequivocal testimony, only to be contradicted by a later affidavit, has indeed tried to create a sham fact issue. *See generally Franks*, 796 F.2d at 1237 (citing *Camfield Tires, Inc., v. Michelin Tire Corp.*, 719 F.2d 1361, 1364–65 (8th Cir.1983) for factors to consider whether sham fact issue exists). That is not the case here, because “the alleged inconsistency created by the affidavit existed within the deposition itself.” *Kennett–Murray Corp. v. Bone*, 622 F.2d 887, 894 (5th Cir.1980). The district court should not have disregarded the affidavit.

**\*594 d. Summary Judgment**

[21] [22] Yet this portion of paragraph 9 of the affidavit is not essential for the Rule 56 analysis:<sup>10</sup> a genuine issue of material fact had already been “raised by the deposition even without consideration of the affidavit.” *Kennett–Murray*, 622 F.2d at 894.

The remaining portion of paragraph 9 and a portion of paragraph 7 remain to be considered. O'Brien claims in paragraph 9 that she “was required to report to work at 4:30 a.m. during the week, and 5:30 a.m. on Sundays.” This apparently conflicts with O'Brien's deposition testimony, discussed above, that Donnelly “never instructed [her] to come in an hour and a half before the restaurant opened”—nor did Nancy, her manager. To avoid a conflict with this deposition that *would* call for the affidavit to be stricken as an attempt to create a sham dispute of fact, this portion of the affidavit should be read in a limited manner—*i.e.*, that O'Brien “was required” to report to work at those earlier times, but not that Ed Donnelly or Nancy (O'Brien's manager) required her to do so. By interpreting this sentence as O'Brien feeling required—perhaps by what *she* deemed to be the demands of the job—to report early, the affidavit does not conflict with her deposition and is therefore not subject to being stricken. Indeed, her deposition testimony supports such a reading: Donnelly only wanted to pay for an hour of prep time while, according to O'Brien, “you did need more.” This reading of this portion of paragraph 9 and of the similar language in paragraph 7 saves them from being stricken, but effectively neutralizes their usefulness for plaintiffs. Nevertheless, the inconsistencies within the *O'Brien* and *Rogan* depositions, when read with the affidavit, reveal a genuine issue of material fact.

The other aspect of the affidavit that should be considered is paragraph 10, which significantly overlaps with plaintiffs' legal claim on which the district court proceeded to grant summary judgment to defendants that O'Brien worked “off the clock.” Paragraph 10 of the affidavit reads as follows: “As a result, Defendants' timekeeping records relating to my hours of work do not reflect all of the time that I worked at the North store.” Though defendants moved for it to be stricken, it is not clear that the court struck it. *See O'Brien*, 2007 WL 4510246, at \*2 (noting that “Defendants ask the Court to strike paragraphs 6–11,” but then listing the “at-issue paragraphs” of the O'Brien Affidavit as paragraphs 6–9). We assume it was effectively stricken because the court struck the paragraphs preceding it, on which it explicitly relied.

Striking or disregarding paragraph 10 (to the extent the court did so) and granting summary judgment to defendants on O'Brien's "off the clock" claim was erroneous. Admittedly, a colorable argument can be made that this court should affirm the district court's grant of summary judgment for defendants as to O'Brien's "off the clock" claim notwithstanding our ruling that the district court should not have stricken portions of the O'Brien affidavit. Plaintiffs' FLSA claims are of two varieties: \*595 that defendants improperly altered the plaintiffs' time records and that defendants did not pay plaintiffs for time worked "off the clock." As for the latter, O'Brien testified at her deposition as follows:

Q. So you clocked in at the time that you came to work and clocked out at the time you left?

A. Yes.

Q. So assuming that the computer accurately accepted the information you punched into it and that it wasn't later changed, the computer records would reflect the actual time that you worked?

A. The computer records would.

J.A. 208 (O'Brien Dep. 40) (emphasis added). This italicized testimony is damaging to O'Brien's "off the clock" argument. Of course, it is only damaging if one assumes that the computer records were accurate and were not later changed.

Therefore, before we discuss whether the deposition testimony just cited extinguishes plaintiff's off-the-clock theory, we have to discuss the time-sheet—alteration theory. Plaintiffs provide no evidence to support an allegation that the time records were subsequently altered to O'Brien's detriment. Plaintiffs write in their appellate brief that "[d]iscovery in the case below revealed that, on many occasions, Appellees' managers improperly changed many of the Appellants' recorded hours of work in order to pay them less than they were due." Appellants' Br. 11. They cite multiple sources for this argument—none of which, as far as we can determine, support either O'Brien's or Prater's time-sheet—alteration claim. Moreover, as the district court observed, O'Brien testified at her deposition that she has no personal knowledge whether her time records were altered by Ed Donnelly Enterprises or Ed Donnelly himself—that, aside from being told by her attorney that her time records were altered, she has never heard that her time records had been altered by Ed Donnelly Enterprises. J.A. 211–12 (O'Brien Dep. 50–51). Thus, O'Brien's allegation regarding

her time records is unsupported and thus insufficient to survive summary judgment. However, the district court's reconsideration of the spoliation issue may alter its summary-judgment analysis of the alteration claims. Therefore, we vacate the grant of summary judgment.

Returning to the off-the-clock theory: Assuming, then, that the computer was accurate and was not subsequently changed, O'Brien's deposition testimony that the computer records reflected her actual time worked would initially seem to imperil O'Brien's "off the clock" claim. To the extent the subsequent affidavit contradicts this testimony (as paragraph 10 of the affidavit does) it would seem to not have been error to strike it. However, this excerpt of O'Brien's deposition testimony should be read in context. The question preceding this testimony about computer records concerned clocking in: O'Brien answered "Yes" to the question of whether she "clocked in at the time that [she] came to work and clocked out at the time [she] left." *See supra*. Although this is also not helpful testimony for O'Brien, we have already discussed how she later contradicted this testimony in the same deposition, and how the *Rogan* deposition was unclear on this point as well. Thus, the conflicting testimony within the depositions raises a genuine issue of material fact as to the off-the-clock claim which precludes summary judgment for defendants on this theory.

Defendants raise one other argument. According to defendants, even if the affidavit is considered and a factual dispute exists as to whether O'Brien clocked in first or worked first before clocking in, defendant is not liable under the FLSA because \*596 there is no evidence that defendants knew that O'Brien was working without compensation. Appellees' Br. at 37. But O'Brien's deposition testimony clearly creates a genuine factual issue, because she asserts that Donnelly knew that she was working off the clock. *See* J.A. 223 line 22 (O'Brien Dep. at 89).

Thus, the district court did not err in granting defendants' motion for summary judgment as to the claim that O'Brien's time records were altered. However, because the district court's ruling on spoliation might create a fact issue as to the alteration claims, we vacate the grant of summary judgment. The district court did err in striking portions of O'Brien's affidavit and thus erred when it granted defendants' motion for summary judgment as to O'Brien's "off the clock" claim.

### 3. Prater

Plaintiffs appeal the district court's decision to strike portions of the affidavit and other documentation filed at the summary-judgment stage by plaintiff Dallas Prater. The district court struck or otherwise disregarded paragraphs 6–9 of the affidavit as inadmissible hearsay; paragraphs 10–13 for violating the Best Evidence Rule; paragraphs 15–16 for being inconsistent with deposition testimony and thus barred by the rule discussed above; and exhibits 6 and 7 and paragraph 14 of the affidavit (which is based on exhibit 7) because the exhibits do not qualify as “pedagogical devices,” which is what the plaintiffs argued that they were. *O'Brien*, 2007 WL 4510246, at \*4–10. We consider each in turn.

**a. Affidavit ¶¶ 6–9**

Paragraphs 6–9 of Prater's affidavit read as follows:

6. Throughout my employment with Defendants, I often noticed significant discrepancies on my paycheck as compared with the actual number of hours I worked for Defendants.

7. At the time I worked for Defendants, I wrote down the number of hours I worked in a ledger to compare with my paychecks. And, on at least four occasions, I noticed that my paychecks did not reflect all the hours I had noted working in my ledger.

8. As a result, I complained to Chad Totche, the restaurant manager at the North store, on at least two occasions about the apparent shortages in my pay.

9. On those occasions, Mr. Totche told me that he would look into the pay discrepancy and get back to me, or words to that effect. But, Mr. Totche never did follow up with me.

J.A. 333. The district court struck these paragraphs as inadmissible hearsay. *O'Brien*, 2007 WL 4510246, at \*5–6. The district court pointed to Prater's testimony, as characterized by the district court, that, “without his ledger, he does not know whether he worked overtime in any given week, and he has no recollection of when he worked on any given day.” *Id.* at \*5 (citing Prater Dep. 83, 98). The district court also pointed to Prater's testimony that, as the district court put it, “he cannot identify any overtime for which he claims he was not paid without referencing the ledger.” *Id.* Thus, the district court concluded, Prater's testimony that he was underpaid “is based entirely on his recollection of the information contained in the personal ledger. In 2003, however, Plaintiff Prater threw away his ledger and pay records. Consequently, Defendants argue that

any testimony about the information stated in the ledger amounts to inadmissible hearsay.” *Id.* (citations omitted).

The district court agreed with defendants' argument that testimony about the contents of the ledger—beyond the fact \*597 that Prater kept a ledger—is inadmissible hearsay and should be stricken. “[T]he Court can consider the statements to show that Plaintiff Prater created a ledger. The Court, however, will disregard Plaintiff Prater's attestations regarding the contents of the ledger.” *Id.* at \*6.

[23] The district court erred when it disregarded these paragraphs of Prater's affidavit. First, paragraphs 6 and 9 and most of paragraph 8 in Prater's affidavit do not discuss the ledger. Second, the statements in the affidavit are not hearsay. As plaintiffs argue,

Prater's testimony merely describes the actions he personally took in the past.... Prater's affidavit properly describes that he **personally** wrote down the hours he worked in a ledger because he believed Appellees were shorting him hours and wages in his paychecks. Prater's testimony regarding his use of the ledger, which itself is not in evidence because Prater later misplaced it, is not an out of court statement made by someone other than the declarant that is offered for the truth of the matter asserted.

Appellants' Br. 37–38 (citation omitted; emphasis in the original). The affidavit does not purport to introduce the contents of the ledger as evidence. Rather, it shows that Prater kept a ledger (a fact the district court said it could consider; *see supra*), that he “noticed” at least four times that the ledger diverged from his paychecks as to the number of hours worked, and that, “[a]s a result,” he complained to Chad Totche. His affidavit provides a foundation for why Prater believes he was cheated by defendants; it might also be used to corroborate or dispute any testimony by Totche. Though the ledger's contents themselves may be inadmissible (for example, to prove that the ledger *actually* diverged from Prater's paychecks), what Prater remembers he noticed in the ledger is admissible for the purposes plaintiffs offer this portion of the affidavit.

Thus, the district court swept too broadly when it declined to consider Prater's "attestations regarding the contents of the ledger." *O'Brien*, 2007 WL 4510246, at \*6 (emphasis added).

**b. Affidavit ¶¶ 10–13**

Paragraphs 10–13 of the Prater affidavit read as follows:

10. As an opening shift crew member, I routinely reported to work for Defendants at the North store at 4:00 a.m.

11. When I reported to work at 4:00 a.m., I often times had to wait for an opening shift manger [sic]-including Chad Totche, Angela Tall and David Clark-to arrive at the North store to open the restaurant.

12. Once an opening shift manager had arrived at the North store, I would begin working right away without clocking in because the opening shift managers told me they would clock me in at 4:00 a.m., which was the time I arrived at the North store.

13. In this lawsuit, Defendants produced some of my timekeeping records relating to showing the times that restaurant managers clocked me in on Defendants' computer system. However, my beginning work times, as entered by the restaurant managers on Defendants' computer and reflected on Defendants' timekeeping records, are later than the time I usually reported to work for Defendants, which was 4:00 a.m.

J.A. 333–34.

In evaluating these paragraphs, the district court was mindful of Prater's previous deposition testimony—most importantly, it seems, the following colloquy:

**\*598 Q.** Are you telling me, though, that every time that you worked it was in accordance with the schedule at the restaurant?

A. Yes.

J.A. 257 (Prater Dep. 73).

Based on this deposition testimony, the district court ruled that paragraphs 10–13 of the affidavit violated the Best Evidence Rule, which states that "[t]o prove the content of a writing ..., the original writing ... is required, except as otherwise provided in these rules or by Act of Congress." Fed.R.Evid. 1002. The court acknowledged that plaintiffs correctly pointed out that Rule 1002 does not apply when

the proponent of the evidence is not seeking to prove the contents of the writing. The court then characterized plaintiffs' argument as to Rule 1002's application to the instant case:

Plaintiffs conclude that the Rule is inapplicable here because Mr. Prater's testimony is not offered to prove the contents of the schedule, but instead is offered to establish his actual hours of work, and to demonstrate that Defendants' timekeeping records are inaccurate. In other words, Plaintiffs assert that the Prater Affidavit is not disputing the content or accuracy of the schedules, but instead it attests to when Plaintiff Prater reported to work.

*O'Brien*, 2007 WL 4510246, at \*7 (citation omitted). The court rejected this argument:

Plaintiffs' argument, however, ignores Plaintiff Prater's prior deposition testimony in which he testified that he always worked in accordance with the written schedules. If Plaintiff Prater always reported to work in accordance with the written schedules, the best evidence of when Plaintiff Prater reported to work on any given day is in the written schedule for the day. Consequently, Fed.R.Evid. 1002 operates to bar testimony that Plaintiff Prater's scheduled start time was anything other than what is presented in the written schedules.

*Id.* (citation omitted).

Alternatively, the court ruled that the testimony was barred as inconsistent with Prater's prior deposition testimony:

Plaintiff Prater testified that he always reported to work in accordance with the written schedules. The written schedules reflect that Plaintiff Prater was never scheduled to begin work at 4:00 am during his first period of employment with Defendants. Accordingly, Plaintiff Prater's attestations that he routinely

reported to work at 4:00 a.m. are inadmissible contradictions of his prior deposition testimony.

*Id.* (citation omitted).

[24] [25] The district court's decision to disregard these paragraphs in the affidavit was error. First, these averments themselves were not offered to "prove the content of a writing." By its terms, that is the only time that Rule 1002 applies. The district court concluded that the averments in the affidavit were deficient because they were not "the best evidence of when Plaintiff Prater reported to work on any given day." *Id.* (emphasis added). The best evidence to prove that contention may be the schedules, but requiring the best evidence available (here, apparently, the schedules) to prove something besides the "content" of the schedules is not what the Best Evidence Rule demands. See *Allstate Ins. Co. v. Swann*, 27 F.3d 1539, 1543 (11th Cir.1994) ("Rule 1002 requires production of an original document only when the proponent of the evidence seeks to prove the content of the writing. It does not, however, require production of a document simply because the document contains \*599 facts that are also testified to by a witness.") (citations and internal quotation marks omitted); see also *Simas v. First Citizens' Fed. Credit Union*, 170 F.3d 37, 51 (1st Cir.1999) (quoting *Allstate* for the proposition that "there is no general rule that proof of a fact will be excluded unless its proponent furnishes the best evidence in his power" and reasoning that a plaintiff "can prove he filed a loan application simply through his own trial testimony" and does not need to furnish the application).

Second, this affidavit does not contradict the deposition when the deposition is construed in the light most favorable to plaintiffs, as is required at the summary judgment stage. The questions immediately preceding the colloquy quoted above concerned any "days" that Prater was scheduled to work but did not work, and vice versa. Thus, when read in context, it seems Prater's statement that "every time" that Prater worked he worked in accordance with the schedule was only testimony as to the *days* he worked. By contrast, these paragraphs in the affidavit concern the *hours* that Prater alleges he worked on the days he worked. Thus, there is no contradiction—especially not one that would call for Prater's affidavit to be disregarded. The district court was in error when it ruled otherwise.

*c. Affidavit ¶¶ 15–16*

The court granted defendants' motion to strike paragraphs 15 and 16 of the Prater affidavit as being inconsistent with prior deposition testimony. The affidavit states:

15. On approximately nine occasions, I arrived for work at the North store in the morning and was instructed by one of the North store managers that I was needed to work at the South store because it was short staffed. Then, on thee [sic] occasions, I traveled to the South store to work a shift as a grill cook. But, I did not clock in at the South store to record my hours of work.

16. Instead, I was told by the South store managers that one of the North store managers would clock me in and out at the North store. However, none of the records Defendants produced in this lawsuit show any of my work hours at the South store, which averaged ten hours per shift.

J.A. 334. The district court ruled that these paragraphs conflict with Prater's deposition testimony—that, as the district court put it, Prater "admitted that he has no independent recollection of when he worked or of how much time he worked on any given day. He also admitted that he has no knowledge of ever having worked off the clock at the South store. Finally, Plaintiff Prater testified that he never worked ten hours without pay [.]" *O'Brien*, 2007 WL 4510246, at \*8 (citations omitted).

[26] The district court erred. Prater at his deposition answered "Well, yeah" to the question about whether it would be "very hard sitting here today [i.e., at the deposition] for me [i.e., opposing counsel] to ask you particular days of the year back in 2002 how many hours you worked or when you showed up that day, wouldn't it?" J.A. 261 (Prater Dep. 83). Thus, the question was whether it would be "very hard" to "ask" such a question. (Emphasis added.)<sup>11</sup> This question followed a query to which Prater acknowledged he did not know the answer and that it would be "hard to remember," but that query was worded as follows: "And other than \*600 that generalized recollection, if I asked you a particular week, like, the first week in November of 2002, do you know whether you worked overtime *that week* from your memory?" *Id.* (emphasis added).

Later in the deposition, the following colloquy occurred:

Q. And for any of the days that we would go through here in these time punch records, you don't have any independent recollection of when you worked on those days, do you?

A. No. Not right offhand, no.

J.A. 262 (Prater Dep. 98). First, we note the qualification that Prater does not have any such “independent recollection” “right offhand.” This is not a clear admission that Prater has no independent recollection. Second, it is not clear what an “independent recollection” is or why a recollection of events of several years ago that is *not* “independent” would be insufficient. Third, and probably most importantly, the question involves a potential day-by-day inquiry—for each date, Prater would be asked when he worked—but the paragraphs of Prater's affidavit in question do not allege any specific dates. Indeed, the affidavit implicitly acknowledges that Prater does not know the specific dates, as it states that Prater arrived at the North store and was instructed to go to the South store on “*approximately* nine occasions.” (Emphasis added.)

Finally, Prater disputed an exhibit shown to him at his deposition that said he worked 10 hours off the clock on September 18, 2002:

Q. Do you have any understanding of why someone would say you worked 10 hours on that day off the clock?

A. No, I wasn't working no 10 hours off the clock without getting paid for it. Maybe 5, 10, even 15 minutes, but not 10 hours.

J.A. 269–70 (Prater Dep. 107–08). After a brief discussion off the record, Prater then testified as follows:

A. That's why I ain't got no records. That might be when I worked at south store.

Q. What do you mean, when you worked at the south store?

A. There was times I went down to the south to work for them down there. When I went in they needed—they would call and said they needed somebody down there, so I would go down there and work. And whoever the manager was in charge would say that they would punch us—punch me in, I—because I would ask them if I would wait until I got down there and punch in or what. And they say, no, we'll punch you in here. So, you know, I went on down and worked.

J.A. 270 (Prater Dep. 108). Opposing counsel accused Prater of changing his testimony, but Prater explained:

A. Well, because I forgot about me going down to the south store and working.

Q. Do you know whether or not you were punched in when you went to the south store to work?

A. No, I do not.

Q. So you don't know of having ever worked 10 hours off the clock at the south store, do you?

A. That's right. I don't mind giving them a few minutes, but ten hours, not [sic].

J.A. 271 (Prater Dep. 109).

Here, Prater is testifying in the present tense: as of his deposition, he does not know whether someone else punched him in when he went to the South store and whether he worked off the clock at the South store for ten hours. Such testimony is admittedly not helpful for plaintiffs' \*601 case. But the affidavit does not contradict this testimony—paragraph 16 of the affidavit only says that “none of the records Defendants produced in this lawsuit” show any of his work hours at the South store. In other words, Prater may not personally know whether he was punched in, but he could still discern whether the records produced by the defendants reflect the hours that he asserts he worked. Moreover, paragraphs 15 and 16 are consistent with Prater's deposition testimony explaining needing to go down to the South store, that he would not punch in himself, and that he was told that a North store manager would clock him in at the North store. The district court's characterization that “Prater *alleges in his affidavit* that he is claiming he worked ten-hour days without pay at the South store” (*O'Brien*, 2007 WL 4510246, at \*8 (emphasis added; citing paragraph 16 of affidavit)) is technically erroneous.

For all these reasons, the district court erred when it struck these paragraphs in the Prater affidavit.

**d. Affidavit ¶ 14; Exhibits 6 and 7**

[27] [28] [29] The district court disregarded plaintiffs' exhibits 6 and 7, and thus paragraph 14 of Prater's affidavit which was based on exhibit 7, because the exhibits do not qualify as “pedagogical devices” as defined by *United States v. Bray*, 139 F.3d 1104, 1111 (6th Cir.1998),<sup>12</sup> which is what the plaintiffs claimed they are.<sup>13</sup> The court found that the portions of the exhibits that were based on portions of plaintiffs' affidavits that the court already found to be inadmissible were themselves inadmissible. The court also

observed that “the exhibits are not accurate representations of the evidence.” *O'Brien*, 2007 WL 4510246, at \*10.

[30] Since these exhibits are pedagogical devices and are not *themselves* evidence, it does not matter whether the district court considered them or not. Any decision by a district court to strike or otherwise not consider a “pedagogical device” at the summary-judgment stage would be, at most, harmless error. A pedagogical device is not evidence. On a motion for summary judgment, such a device is offered merely to “aid” the court. If a district judge—for whatever reason—believes that a pedagogical device would not help him or her to rule on a motion for \*602 summary judgment, such a device is, by definition, useless.<sup>14</sup>

#### e. Summary judgment

Plaintiffs articulate two theories of recovery: that plaintiffs' time records were changed to their detriment and that plaintiffs worked “off the clock.” The first theory fails as to Prater, and the district court was not in error when it entered summary judgment for defendants as to that claim. Prater has testified that managers would “fix[ ]” the time-in and time-out when necessary, but he was not aware of any such changes being inaccurate. *See* J.A. 256 (Prater Dep. 67); *see also* J.A. 268 (Prater Dep. 106). He also testified that he has no knowledge of anyone intentionally altering his hourly time records or anyone else's hourly time records. J.A. 274 (Prater Dep. 141); *see also* J.A. 258 (Prater Dep. 77). As stated, though, we vacate the district court's grant of summary judgment, because the spoliation issue remains open for the district court to consider on remand.

However, given the evidentiary rulings above, the district court erred when it granted defendants' motion for summary judgment as to Prater's “off the clock” claim. We reverse and remand.

#### 4. Burden of proof

[31] [32] Plaintiffs raise another argument on appeal, which the district court did not discuss in its opinion, but which pertains to our decision to affirm the grant of summary judgment on some of plaintiffs' claims. To begin with, a “FLSA plaintiff must prove by a preponderance of evidence that he or she ‘performed work for which he [or she] was not properly compensated.’ ” *Myers v. Copper Cellar Corp.*, 192 F.3d 546, 551 (6th Cir.1999) (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686–87, 66 S.Ct. 1187, 90 L.Ed. 1515 (1946), *superseded by statute on other*

*grounds as stated in Carter v. Panama Canal Co.*, 463 F.2d 1289, 1293 (D.C.Cir.1972)). To determine the extent of damages, the plaintiff can “prove his or her ‘under-compensation’ damages through discovery and analysis of the employer's code-mandated records. However, if the employer kept inaccurate or inadequate records, the plaintiff's *burden of proof is relaxed*, and, upon satisfaction of that relaxed burden, the onus shifts to the employer to negate the employee's inferential damage estimate.” *Id.* (emphasis added) (citing *Mt. Clemens Pottery*, 328 U.S. at 687–88, 66 S.Ct. 1187).

[33] Plaintiffs imply that their claims should not have been dismissed on summary judgment because they only needed to satisfy this lesser initial burden, as the defendants' records were inaccurate and inadequate. However, *Mt. Clemens Pottery* and its progeny do not lessen the standard of proof for showing that a FLSA violation occurred. Rather, *Mt. Clemens Pottery* gives a FLSA plaintiff an easier way to show what his or her damages are. When an employer keeps inaccurate or inadequate records, for a FLSA plaintiff to show what his or her damages were, a FLSA plaintiff does not need to prove \*603 every minute of uncompensated work. Rather, she can estimate her damages, shifting the burden to the employer. If the employer cannot negate the estimate, then the “court may award damages to the employee, even though the result be only approximate.” *Mt. Clemens Pottery*, 328 U.S. at 688, 66 S.Ct. 1187. In short, *Mt. Clemens Pottery* does not help plaintiffs show that there was a violation under the FLSA. It would only allow them to prove damages by way of estimate, if they had already established liability. Plaintiffs' failure to show a genuine issue of material fact as to the time-sheet—alterations claims required the district court's entry of summary judgment against them, though as discussed, the grant of summary judgment is vacated for the district court to revisit the spoliation issue.

#### V. Conclusion

We reverse the district court's rulings with regard to the affidavits presented by the lead plaintiffs on summary judgment. And we vacate the entry of summary judgment against plaintiffs on the time-sheet—alteration claims, because we have also remanded for the district court's consideration whether sanctions for spoliation are warranted. This may alter the merits of the summary-judgment analysis of the lead plaintiffs' time-sheet—alteration claims.

The district court's decertification of the collective action in *O'Brien* is affirmed. Regarding *Dellarussiani*, the entry of judgment in plaintiffs' favor due to mootness, as well as the

**O'Brien v. Ed Donnelly Enterprises, Inc., 575 F.3d 567 (2009)**

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entry of summary judgment in defendants' favor are affirmed, with the exception that the issue of the attorney fees awarded in *Dellarussiani* is remanded to the district court.

Accordingly, the district court is AFFIRMED IN PART and REVERSED IN PART. Defendants' motion to dismiss the *Dellarussiani* plaintiffs from the *O'Brien* appeal is GRANTED IN PART, but DENIED IN PART as to the Prompt Pay Act and common-law claims. These cases are REMANDED for further proceedings consistent with this opinion.

WHITE, Circuit Judge, concurring in part.

I concur in the majority opinion except with regard to its determination that the *Dellarussiani* plaintiffs' common-law claims in *O'Brien* are necessarily barred by res judicata. I would leave such a determination to the district court on remand.

**All Citations**

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**Footnotes**

- \* The Honorable Arthur J. Tarnow, United States District Judge for the Eastern District of Michigan, sitting by designation.
- 1 Through the same counsel who represent the *O'Brien* and *Dellarussiani* plaintiffs, employees at these same two McDonald's restaurants had sued the former owner in October 2001. The employees alleged that employee time records had been improperly edited in violation of the FLSA. See *O'Brien* Resp. Br. at 2; *O'Brien* Reply Br. at 7.
- 2 Although the statute says that a claimant may be entitled to 6% of the unpaid claim, plaintiffs claimed roughly \$12,000 in Ohio liquidated damages compared to the roughly \$6,000 they sought in counts I and II. See *Dellarussiani* Resp. Br. at 6. At oral argument, defendants' counsel explained that the \$12,000 figure was tallied by adding \$200 for each alleged violation.
- 3 Plaintiffs cite *Twaddle v. RKE Trucking Co.*, 2006 WL 840388 (S.D. Ohio 2006) as an instance where a trial court ruled that liquidated damages under O.R.C. 4113.15(B) are available, even though defendants disputed liability on certain claims. *Twaddle*, at \* 13, \*2. *Twaddle*'s analysis of liquidated damages under Ohio law was truncated. The court thought it was for the trier of fact to decide whether the defendant employer could show it acted with "good faith." A showing of good faith would allow the employer to avoid liquidated damages under FLSA. See 29 U.S.C. § 260 ("if the employer shows to the satisfaction of the court that the act or omission giving rise to such action [under § 216(b)] was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the [FLSA], the court may, in its sound discretion, award no liquidated damages or limit liquidated damages") (emphasis added). However, O.R.C. 4113.15(B) does not contain this language about good faith or reasonable grounds. It is not self-evident that FLSA law on liquidated damages should control the interpretation of a "dispute ... accounting for nonpayment" under Ohio statute.
- 4 But see *Greisz v. Household Bank (Ill.), N.A.*, 176 F.3d 1012, 1013 (7th Cir. 1999) (in Rule 23 context, "[t]he smaller the individual claim, the less incentive the claimant has to police the class lawyer's conduct, and the greater the danger, therefore, that the lawyer will pursue the suit for his own benefit rather than for the benefit of the class.")
- 5 Although the reply brief cites particular pages of Donnelly's deposition transcript, those pages are not included in the joint appendix or the supplemental appendix.
- 6 Here again, the reply brief cites and reproduces excerpts from one Chad Totche's deposition transcript, but those pages are not included in the appendices.
- 7 See J.A. 215 (*O'Brien* Dep. 76) (noting that a "short recess" was taken right before concluding defendants' portion of the deposition).
- 8 Given such reasoning, it seems doubtful that the district court would have recognized the attempted creation of a sham discrepancy if there had been no *Rogan* deposition at all.
- 9 Moreover, in the Seventh Circuit case of *Bank of Illinois v. Allied Signal Safety Restraint Systems*, which defendants and the district court cited, the prior statements that were made under oath in a judicial proceeding were made in a child custody hearing and in responses to interrogatories. See *Bank of Ill.*, 75 F.3d at 1165. That case does not stand for the proposition that testimony in a later portion of a deposition may be disregarded when it conflicts with testimony in an earlier portion of the same deposition. Cf. also *Srisavath v. City of Brentwood*, 243 Fed.Appx. 909, 911–12, 917 (6th Cir. 2007) (cited by plaintiffs at Reply Br. 18).

- 10 A district court's order granting summary judgment is reviewed *de novo*. *Ciminillo v. Streicher*, 434 F.3d 461, 464 (6th Cir.2006). In reviewing a motion for summary judgment, we must determine whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law. *Patton v. Bearden*, 8 F.3d 343, 346 (6th Cir.1993). When deciding a motion for summary judgment, the court must view the evidence and draw all reasonable inferences in favor of the nonmoving party. *Matsushita Electric Industrial Co., v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).
- 11 Such a reading of the question is far from charitable to defendants, but on summary judgment such a reading is appropriate, as the testimony must be reasonably read in the best light for the nonmovant.
- 12 This court understands a "pedagogical device" to be:  
an illustrative aid such as information presented on a chalkboard, flip chart, or drawing, and the like, that (1) is used to summarize or illustrate evidence, such as documents, recordings, or trial testimony, that has been admitted in evidence; (2) is itself not admitted into evidence; and (3) may reflect to some extent, through captions or other organizational devices or descriptions, the inferences and conclusions drawn from the underlying evidence by the summary's proponent. This type of exhibit is "more akin to argument than evidence" since [it] organize[s] the jury's examination of testimony and documents already admitted in evidence." Trial courts have discretionary authority to permit counsel to employ such pedagogical-device "summaries" to clarify and simplify complex testimony or other information and evidence or to assist counsel in the presentation of argument to the court or jury.  
*Bray*, 139 F.3d at 1111 (internal citations omitted).
- 13 Although plaintiffs initially state in their brief that their "damage calculations are proper *evidence* under Fed.R.Civ.P. 56(c)," they then go on to argue that their "damage calculations are *not evidence themselves*, but are the consolidation of evidence adduced from relevant and admissible evidence already presented to the district court in this case. Therefore, Appellants' damage calculations are proper *pedagogical devices* that should have been considered by the district court." Appellants' Br. 42, 45 (emphasis added).
- 14 Note that this discussion is restricted to a court's consideration of a motion for summary judgment and other proceedings in which there is no jury present to consider evidence. A district court does not have license to keep any pedagogical device it wishes from a jury's eyes. *Cf. Bray*, 139 F.3d at 1111 (noting that trial courts have "discretionary authority" to permit the use of such devices). Furthermore, note the obvious limit that a district court does not have license to disregard whatever *evidence* it wants to. We are only discussing "pedagogical devices" characterized as such by the party that brings them before the court.

170 F.3d 37  
United States Court of Appeals,  
First Circuit.

Victor E. SIMAS, Plaintiff, Appellant,

v.

FIRST CITIZENS' FEDERAL CREDIT UNION  
and Barbara M.W. Silva, Defendants, Appellees.

No. 98-1450. | Heard Dec. 8,  
1998. | Decided March 2, 1999.

Former vice-president of credit union brought action alleging that credit union and its president violated whistleblower provision of Federal Credit Union Act (FCUA) by retaliating against him for having informed National Credit Union Administration (NCUA) that credit union had made suspect loan. The United States District Court for the District of Massachusetts, Robert B. Collings, United States Magistrate Judge, entered summary judgment in favor of credit union and president. Former vice-president appealed. The Court of Appeals, Cyr, Senior Circuit Judge, held that issues of material fact existed as to whether credit union took adverse employment actions against vice-president, including directing him not to contact NCUA.

Vacated and remanded.

Bailey Aldrich, Senior Circuit Judge, concurred and filed opinion.

#### Attorneys and Law Firms

\*41 Philip N. Beauregard, with whom Law Offices of Beauregard & Burke was on brief for appellant.

Michael P. Duffy, with whom Harvey Weiner and Peabody & Arnold LLP were on brief for appellees.

Before TORRUELLA, Chief Judge, ALDRICH and CYR, Senior Circuit Judges,

#### Opinion

CYR, Senior Circuit Judge.

Victor E. Simas appeals the district court judgment which dismissed his complaint charging First Citizens' Federal Credit Union ("Citizens") and its president and CEO, Barbara

M.W. Silva, with violating the "whistleblower" provisions of the Federal Credit Union Act, 12 U.S.C. § 1790b(a) (FCUA or "the Act"), by retaliating against him for having informed the National Credit Union Administration ("NCUA") that Citizens, notwithstanding its longstanding policy, had made a suspect commercial loan to a member of its board of directors. We vacate the district court judgment and remand for further proceedings.

#### I

#### BACKGROUND

The district court opinion thoroughly explicates the factual background underlying the present claim. *See Simas v. First Citizens' Fed. Credit Union*, 996 F.Supp. 76 (D.Mass.1998). Accordingly, we restrict our opening recitation to the essentials.

At all relevant times, Simas was a vice-president under Silva's supervision, with primary responsibility for all delinquent loan collections. In September 1993, Simas \*42 learned that Silva's friend, Louis Xifiras, was about to default on an undersecured commercial loan with an outstanding balance approximating \$831,000. Simas considered the circumstances surrounding the 1990 loan to Xifiras suspicious. For one thing, Silva herself had arranged the loan, the largest in Citizens' history, even though Xifiras was serving on the Citizens board of directors at the time and intended to use the proceeds to acquire commercial real estate. Citizens had a longstanding policy against making commercial loans. Moreover, several Board members expressed concern that the \$1,030,000 real estate appraisal, prepared by an appraiser selected by Xifiras, was inflated. Furthermore, Xifiras and Lisa Grace, Silva's daughter and Citizens' senior vice-president for mortgage loans, were rumored to be involved in an extramarital affair. Finally, Ms. Grace personally presented the Xifiras loan application for Board approval.

Simas alerted Silva to his concerns, then asked Citizens' internal auditor to conduct an investigation. The auditor declined. When Simas persisted, the auditor complained to Silva. Simas thereafter informed the auditor that if she chose not to investigate internally, he might be forced to report his concerns to the NCUA or the press.

In October 1993, Silva sent Simas a memorandum advising that his repeated “irrational” and “aggressive” verbal harangues about the Xifiras loan were causing the internal auditor “emotional distress.” She characterized Simas’ announced intention to contact the NCUA or the press as “threats to the credit union,” and his concerns about the Xifiras loan as totally unwarranted. She suggested that Simas was making trouble because he was unhappy with his own working conditions and she explicitly warned that he would be *terminated immediately* if the “verbal harassments [or] unwarranted charges or threats” occurred again. Shortly thereafter, Silva removed Simas from all responsibility for the Xifiras loan. Following this “final warning” from Silva, Simas was informed by Citizens’ senior vice-president that he believed Silva should have fired Simas for “stirring [up]” the Xifiras matter.

After Xifiras defaulted on the Citizens loan and declared bankruptcy, the commercial real estate securing the loan was appraised at \$538,000. As required by law, Silva reported the loss to the NCUA. Fearing for his job in the event he chose to pursue the Xifiras matter internally, Simas promptly reported his concerns to the FBI and NCUA.

Thereafter, Simas “experienced an abrupt and substantial change in the way that he was treated by [Citizens].” Coworkers shunned him, socially and professionally. Citizens disapproved his car loan application for the first time ever. Although Citizens ultimately approved his education loan application, it did so over Silva’s active opposition. Simas was stripped of many work-related privileges consistently accorded him in the past; including (1) attending board of directors meetings, (2) supervising employees in the credit department, (3) approving credit-card applications, (4) personal access to the file vault, and (5) serving as Citizens’ acting president in Silva’s absence. Silva also refused to consider Simas’ request for promotion to a vacant vice-presidency, removed him as network administrator, denied him permission to attend a business-related seminar, and refused his request for a cellular phone. These adverse employment actions were unprecedented.

In January 1994, the NCUA conducted its annual audit of Citizens, devoting an “unusual” amount of time to consultations with Simas. Its audit report noted “the presence of adverse conditions and trends [which] [i]f left unresolved ... will jeopardize the financial condition and/or operations of [Citizens].” The NCUA found that the Xifiras loan had been made “without the support of a

comprehensive written Member Business Loan program” and that it was improperly preferential in its terms and conditions to a compensated member of the board of directors. The NCUA cited Citizens for allowing Xifiras to engage his own appraiser, directed Citizens to cease making business loans to its members, and ordered that it notify its surety bond carrier of all regulatory violations. Citizens’ board of directors accepted the NCUA report. Thereafter, the \*43 NCUA requested that several Citizens’ directors resign, including Silva.

In March 1994, Citizens’ new internal auditor recommended that Simas start looking for another job. After locating a lesser paying job at another bank, on May 2 Simas submitted his resignation to Citizens, effective May 13. Silva, however, made the resignation effective immediately, and directed that Simas be escorted from the credit union premises in full view of his coworkers, several of whom questioned him about the reason for the unprecedented treatment. In reporting Simas’ accelerated “resignation” to the NCUA, Silva characterized Simas as “a disgruntled employee” with access to confidential information. Later, she defined the term “disgruntled employee” as including one who might come into work and shoot his fellow workers.

In due course Simas brought suit against Citizens and Silva in federal district court, alleging violations of the FCUA “whistleblower” provisions, *see* 12 U.S.C. § 1790b(a), together with several pendent state-law claims, including wrongful termination, defamation, and tortious interference with an advantageous relationship. Following discovery, both defendants moved for summary judgment on all claims.

[1] The district court granted summary judgment on the FCUA claim, concluding that Simas had not generated a trialworthy dispute as to whether the treatment accorded him after September 1993 was sufficiently adverse to constitute either a “constructive discharge” or “discriminat[ion] ... with respect to compensation, terms, conditions, or privileges of employment,” within the meaning of section 1790b(a). Finally, the pendent state-law claims were dismissed for lack of supplemental jurisdiction. *See* 28 U.S.C. § 1367(c)(3).

## II

### *DISCUSSION*<sup>1</sup>

### A. The Statutory Framework

One of several federal “whistleblower” statutes, the FCUA provides in pertinent part:

No insured credit union may discharge or otherwise discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to the request of the employee) provided information to the [National Credit Union] Board or the Attorney General regarding any possible violation of any law or regulation by the credit union or any director, officer, or employee of the credit union.

12 U.S.C. § 1790b(a)(1). Should a federal credit union violate section 1790b, the aggrieved employee may bring suit for compensatory damages and “other appropriate actions to remedy any past discrimination.” *Id.* § 1790b(c).<sup>2</sup>

[2] In according safeguards against retaliation to credit union employees who report potential irregularities, Congress intended to “enhance the regulatory enforcement powers of the depository institution regulatory agencies to protect against fraud, waste and insider abuse.” H.R.Rep. No. 101–54(I), at 308 (1989), *reprinted in* 1989 U.S.C.C.A.N. 86, 103–04. Since the case law interpreting section 1790b itself is extremely sparse, however, the courts have looked to case law construing comparably-phrased anti-retaliation provisions in other federal employment-discrimination statutes, such as Title VII, 42 U.S.C. § 2000e *et seq.*, the Americans with Disabilities Act (ADA), *id.* § 12101 *et seq.*, and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.*, as well as other federal whistleblower statutes, such \*44 as the False Claims Act (FCA), 31 U.S.C. § 3730(h), the Safety Transportation Assistance Act (STAA), 49 U.S.C. §§ 31105(a)(1)(A), and FIRREA § 1831j(a)(1) (providing § 1790b-type coverage to employees of all “insured depository institutions” “with respect to ... the terms, conditions, or privileges of employment”). We follow their lead. *See LaRou v. Ridlon*, 98 F.3d 659, 663 n. 6 (1st Cir.1996).

### B. Burdens of Proof

[3] [4] Many of these federal anti-retaliation statutes require the claimant to make a three-part prima facie showing that: (1) the claimant engaged in the protected activity (e.g., filed a complaint or reported information to the government); (2) the defendants subjected the claimant to some materially adverse employment action, and (3) a causal connection existed between the protected activity and the adverse action. *Cf. BSP Trans, Inc. v. United States Dep't of Labor*, 160 F.3d 38, 46 (1st Cir.1998) (STAA whistleblower provision); *Hernandez-Torres v. Intercontinental Trading, Inc.*, 158 F.3d 43, 47 (1st Cir.1998) (Title VII retaliation); *Hodgens v. General Dynamics Corp.*, 144 F.3d 151, 161 (1st Cir.1998) (Family and Medical Leave Act). Even under these analogous statutes, however, “[t]he [claimant’s] initial burden to establish a prima facie case of discrimination is ‘not onerous’ ... [and] ‘[a]ll that is needed is the production of admissible evidence which, if uncontradicted, would justify a legal conclusion of discrimination.’” *Brennan v. GTE Gov't Sys. Corp.*, 150 F.3d 21, 26 (1st Cir.1998) (emphasis added; citation omitted); *see also Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253–54, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981).

[5] Under yet other anti-retaliation statutes, moreover, the claimant’s prima facie burden on the third or “causation” element is further eased, so as to require only a showing that the protected activity was a “contributing factor” in the adverse action, not necessarily its substantial or motivating cause. *See Frobose v. American Sav. and Loan Ass'n of Danville*, 152 F.3d 602, 612 (7th Cir.1998) (FIRREA § 1831j(a)(1)). Indeed, Citizens and Silva acceded to the latter prima facie standard below, *see Simas*, 996 F.Supp. at 86, and we accept their concession in addressing the merits on appeal. *See, e.g., Clean Harbors Envtl. Servs., Inc. v. Herman*, 146 F.3d 12, 22 (1st Cir.1998) (“Both parties have accepted this [allocation of the BOP] as the standard and we do not reexamine it.”).

[6] [7] Once the claimant makes a prima facie showing, a presumption of retaliation arises and the burden shifts to the defendants. With respect to the former category of anti-retaliation statutes, *see supra* Section II.B, ¶ 1., only the burden of production passes to defendants, *i.e.*, requiring them merely to articulate not prove a nondiscriminatory motive for their actions. *See Alvarez-Fonseca v. Pepsi Cola of Puerto Rico Bottling Co.*, 152 F.3d 17, 24 (1st Cir.1998); *Clean Harbors*, 146 F.3d at 21–22 (STAA). Once defendants meet their minimal burden of production, the initial presumption of retaliatory motivation is removed from

the calculus, and the claimant must bear the burden of proving that the nondiscriminatory motive articulated by defendants is pretextual and the real motive was the claimant's decision to exercise the "whistleblower" rights endorsed by the applicable statute. See *Hazel v. United States Postmaster Gen.*, 7 F.3d 1, 3 (1st Cir.1993).

[8] [9] Under the latter variety of anti-retaliation statute, however, see *supra* Section II.B, ¶ 2., the entire burden of persuasion passes to defendants, who must then adduce *clear and convincing* evidence that the alleged adverse actions would have been taken regardless whether the claimant had engaged in the protected whistleblower activity. See *Frobose*, 152 F.3d at 612 (FIRREA § 1831j(a)); see also *infra* note 8. Unlike section 1831j(a), however, section 1790b contains no explicit burden-of-proof allocation. Nevertheless, these defendants acceded below to the more plaintiff-friendly burden-shifting paradigm utilized under section 1831j(a), see *Simas*, 996 F.Supp. at 86, which thereby became the law of the case. See *Clean Harbors*, 146 F.3d at 22.

**\*45 C. Summary Judgment Rulings**

**1. Defendants' Knowledge of the NCUA Contacts by Simas**

The summary judgment motion submitted by Silva and Citizens asserted two grounds for dismissing the FCUA claim; namely, that Simas failed to adduce competent evidence from which a jury rationally might infer that (1) defendants were aware of Simas' contacts with the NCUA prior to his resignation; and (2) their adverse employment actions were consequential enough to constitute either a "constructive discharge" or "discrimination."

Silva unambiguously attested that she could not have retaliated against Silva for contacting the NCUA, because she never knew whether he had carried out his threat to do so until after he had submitted his resignation on May 2, 1994. See, e.g., *Lewis v. Gillette, Co.*, 22 F.3d 22, 24 (1st Cir.1994) (noting that claimant normally cannot establish the requisite causal connection without establishing that "the alleged retaliators knew of the protected plaintiff's activity"). After defendants filed their summary judgment motion, Simas promptly filed a motion for continuance, pursuant to Fed.R.Civ.P. 56(f),<sup>3</sup> in which his counsel asserted that he recently learned from a "highly reliable source" that Michael DeBarros, formerly a Citizens senior vice-president and CFO, had overheard Silva declare in early 1994 that she believed it was Simas who had prompted the NCUA auditor to take such a special interest in the Xifiras loan. Simas' counsel then

contacted DeBarros' counsel, who refused to allow his client to file an affidavit out of fear that "Silva might attempt to retaliate against [DeBarros]." Nonetheless, DeBarros' counsel indicated that DeBarros would submit to a deposition under subpoena.

[10] The district court bypassed the question whether Simas had adduced sufficient evidence as to Silva's knowledge. Instead, it rested its grant of summary judgment for defendants on the independent ground that Simas had not adduced enough evidence of a constructive discharge or sufficiently "adverse employment actions." Thus, the district court denied the Rule 56(f) motion as moot. On appeal, however, defendants urge us to affirm on this alternative ground. See *Sammartano v. Palmas del Mar Properties, Inc.*, 161 F.3d 96, 97 n. 2 (1st Cir.1998) (appellate court may affirm summary judgment on any ground apparent in the record). We now address the infirmities in their present position.

First, despite Silva's attestations to the contrary, we seriously question whether Simas needed the DeBarros testimony to survive summary judgment. After all, there is no dispute that Silva knew by the *fall of 1993* that Simas had threatened to contact the NCUA, see *supra* Section I, ¶ 3., and since there is no evidence that any other Citizens employee ever made such a threat, the January 1994 targeted audit of the Xifiras loan documents was a good deal more than a subtle hint that Simas must have alerted the NCUA. Thus, even absent the DeBarros deposition a jury would not have been compelled to conclude that Silva was unaware that Simas was the likely "whistleblower." See *Perez-Trujillo v. Volvo Car Corp. (Sweden)*, 137 F.3d 50, 54 (1st Cir.1998) (court cannot resolve genuine credibility issues at summary judgment).

[11] [12] [13] [14] [15] Furthermore, the summary judgment record discloses no principled ground which would preclude the reasonable possibility that the DeBarros deposition would bear the expected fruit. Defendants argue, without citation to authority, that Simas' Rule 56(f) motion was defective because he relied on inadmissible hearsay (e.g., the unnamed "highly reliable source")—rather than his personal knowledge—to conclude that DeBarros could provide the damaging evidence.<sup>4</sup> Their argument fundamentally confuses \*46 Rule 56(f)'s requirements with those in Rule 56(e) ("Supporting affidavits ... shall set forth such facts as would be admissible in evidence....").

[16] "[A] Rule 56(f) proffer need not be presented in a form suitable for admission as evidence at trial, so long

as it rises sufficiently above mere speculation.” *Resolution Trust Corp. v. North Bridge Assocs.*, 22 F.3d 1198, 1206 (1st Cir.1994) (citing *Carney v. United States*, 19 F.3d 807, 813 (2d Cir.1994)). “This is as it should be, for Rule 56(f) is best understood as a complement to other provisions contained in Rule 56, allowing the opposing party to explain why he is as of yet unable to file a full-fledged opposition, subject to the more harrowing evidentiary standard that governs under Rules 56(e) and 56(c).” *Id.* at 1206–07. Thus, reliance on hearsay is not, *per se*, a dispositive defect under Rule 56(f).

Furthermore, the Rule 56(f) motion filed by Simas did not rely exclusively on the information provided by the unnamed source, but also on the personal knowledge counsel had gained in subsequent consultations with DeBarros' counsel, who confirmed that DeBarros feared retaliation were he to testify against Silva. The latter evidence would provide rational support for Simas' counsel's suspicion that the DeBarros testimony would prove damaging to Silva. *See id.* at 1207 (finding Rule 56(f) motion valid where multiple sources supported recited facts).

On the present record, therefore, Simas appears to have satisfied all five preconditions for obtaining a Rule 56(f) continuance. *See supra* note 4. “When all five requirements are satisfied ... a strong presumption arises in favor of relief ... [and the movant] should be treated liberally.” *Id.* at 1203. Thus, since the district court never resolved the Rule 56(f) motion on the merits, we cannot affirm its summary judgment ruling on the alternative ground suggested by defendants.

## 2. The Adverse Employment Actions

### (a) Constructive Discharge

The FCUA prohibits a federal credit union from engaging in two distinct types of retaliatory employment action: (1) an actual or constructive “discharge”; or (2) other “discriminat[ion] ... with respect to compensation, terms, conditions, or privileges of employment” short of discharge, or what we have sometimes labeled “adverse employment actions.” *See* 12 U.S.C. § 1790b(a)(1). The complaint alleged that Citizens constructively discharged Simas,<sup>5</sup> which necessitated that he show that Citizens imposed “working conditions so intolerable [ ] that a reasonable person would feel compelled to forsake his job rather than to submit to looming indignities.” *Vega v. Kodak Caribbean, Ltd.*, 3

F.3d 476, 480 (1st Cir.1993); *see also Sanchez v. Puerto Rico Oil Co.*, 37 F.3d 712, 719 (1st Cir.1994).

The district court concluded, however, that the various “indignities” to which Simas had been subjected were “nothing more than minor slights,” *Simas*, 996 F.Supp. at 83, which did not rise to the level of “constructive discharge.” It suggested further that the Simas complaint alleged *only* a constructive discharge, and no other adverse employment actions. *See id.* at 84 (citing \*47 *Serrano–Cruz v. DFI Puerto Rico, Inc.*, 109 F.3d 23, 28 (1st Cir.1997)). It stated that, like the plaintiff in *Serrano–Cruz*, Simas had merely alleged damages for “loss of income and employment benefits, loss of personal reputation, and other financial losses ... *and little, if anything, else*,” *id.* (citing Complaint ¶ 32) (emphasis added), and, further, that these economic damages flowed exclusively from Simas' decision to leave his job, rather than from defendants' imposition of adverse working conditions in the months preceding his resignation.

Even assuming *arguendo* the premise that the constructive discharge standard under the FCUA would require proof of more intolerable employment actions than its “discrimination” standard, we need not determine whether the Rule 56 proffer established a prime facie case of constructive discharge since Simas unquestionably alleged “adverse employment actions” as well. *See infra* Section II.C.2(b). Thus, *Serrano–Cruz* is inapposite, both legally and factually.

Unlike Simas, Serrano resigned rather than accept transfer to a different position—at the same salary—which she considered demeaning. We affirmed summary judgment for the former employer because, “by not accepting the newly created and ambiguous position, Serrano foreclosed the possibility of presenting concrete evidence, rather than mere assertions, to a jury regarding the [intolerable] nature of her new working conditions.” *Serrano–Cruz*, 109 F.3d at 27. In determining that Serrano had failed to frame her complaint alternatively to allege actionable “adverse employment actions” short of discharge, we noted that all the damages she alleged were purely economic—*e.g.*, lost income—flowing entirely from her decision to reject the transfer and resign, and not from other indignities (*i.e.*, gradual reduction in her job responsibilities) allegedly suffered in the months preceding the transfer. *Id.* at 28.

By contrast, the Simas resignation did not foreclose judicial assessment of the adverse working conditions allegedly

imposed by Citizens, most of which *preceded* his resignation. Nor can we agree with Citizens that Simas alleged “little” more than economic damages. Paragraph 32 in the complaint, cited by the district court, alleged “loss of income and employment benefits, loss of personal reputation, other financial losses, and *mental and emotional distress*.” (Emphasis added.) Moreover, although paragraph 32 is part of the defamation count, and not the FCUA count proper, paragraph 36 of the FCUA count expressly realleges and incorporates paragraph 32 by reference. *See also* Complaint Prefatory ¶ 21 (alleging that Simas “was the object of anger and scorn from his superiors, and *he was suffering emotionally and physically as a result*”) (emphasis added).

[17] Thus, the Simas complaint alleged ongoing emotional damages of a type that arose at the time the defendants imposed the adverse employment actions and long before he resigned, culminating in his humiliating exit from the employment premises under the personal escort ordered by Silva. *See Viqueira v. First Bank*, 140 F.3d 12, 16 (1st Cir.1998) (noting that complaints are to be liberally construed). These noneconomic damages are fully and independently recoverable under the FCUA. *See* 12 U.S.C. § 1790b(c)(2) (broadly allowing plaintiff to recover “compensatory damages”); *cf. Hogan v. Bangor and Aroostook R.R. Co.*, 61 F.3d 1034, 1037 (1st Cir.1995) (emotional harm compensable under ADA). Thus, we may bypass the constructive discharge claim.

(b) “*Adverse Employment Actions*”

[18] We now turn to the sufficiency of the Rule 56 proffer, wherein Simas attested to an extended series of “abrupt and substantial change[s] in the way he was treated as an employee” after he first expressed concerns regarding the Xifiras loan. *See supra* Section I.

[19] [20] At summary judgment the trial court must consider a defendant's alleged conduct both in context and in totality, not merely assess the respective allegations in isolation. *See Calhoun v. Acme Cleveland Corp.*, 798 F.2d 559, 562–63 (1st Cir.1986) (rejecting “divide-and-conquer” defense strategy); *see also Coffman v. Tracker Marine*, 141 F.3d 1241, 1246 (8th Cir.1998) (“[The] court looks at the *combined effect* of \*48 the employer's actions to determine if there was discrimination”) (emphasis added; citation omitted). Thus, otherwise minor slights, relentlessly

compounded, may become sufficiently “adverse” to warrant relief under the FCUA.

At the outset we focus on an important consideration—given short shrift by defendants—which sharply distinguishes the present action from the more typical retaliation case. Normally, employers do not leave behind direct evidence of their discriminatory animus, such as express declarations of their retaliatory intentions. Therefore, generally the plaintiff-employee must make do with circumstantial evidence, leaving it to the jury whether to infer from the nature of the materially adverse employment conditions that the defendant-employer harbored a retaliatory animus.

In the present case, however, Simas adduced both circumstantial and *direct* evidence of Silva's retaliatory animus. In her October 8, 1993 memo, Silva not only complained that Simas had harassed the internal auditor, but stated directly to Simas that the charges he made about the Xifiras loan were “unwarranted,” and that if he persisted in making “unwarranted charges or threats [to report his suspicions to the NCUA],” he would be terminated immediately. So too, Citizens' senior vice-president told Simas that he thought Silva should have fired Simas outright for “stirring [up]” the Xifiras matter. *See, e.g., Frobose*, 152 F.3d at 616 (affirming denial of summary judgment for employer in § 1831j retaliation case where president's express antagonism toward plaintiff was echoed in antagonistic remarks made by other senior officers).

The term “making unsubstantiated charges,” as employed in the Silva memo, is amply expansive to encompass Simas' report to the NCUA, and Silva's express intention to terminate Simas likewise bespeaks a premeditated plan to punish him for the same activity. Given that Silva orchestrated the loan for her friend Xifiras in the first instance, and that the concerns Simas voiced about the loan eventually proved anything but “unwarranted,” a jury reasonably could conclude that the sole intent of her October 8 memo was to prevent Silva's regulatory violations from coming to the attention of the appropriate federal authorities.

So construed, these direct retaliatory expressions by Silva could be considered materially adverse employment actions which *sufficed* to preclude summary judgment for defendants. *See Hernandez-Torres*, 158 F.3d at 47 (“adverse employment actions [may include] ... unwarranted negative job evaluations”).

[21] [22] Section 1790b prohibits discrimination relating to “conditions” of employment. Although the term “conditions” may mean merely the physical setting in which one’s work is performed, (*e.g.*, reassignment to a remote cubicle), it is not so limited in scope as to exclude illicit supervisory directives conditioning continued employment upon *prohibitions* against employee conduct which is authorized by federal laws governing employer-employee relations. Thus, the explicit direction from Silva that Simas refrain from exercising his federal legal right to contact the NCUA clearly came within section 1790b.

If nothing else, Congress intended that section 1790b deter federal credit unions from expressly dissuading their employees in exercising the statutory right to report suspected regulatory violations. In our case, it is no exaggeration to observe that the “not-so-veiled” threat made by Silva, which by its terms was self-perpetuating, hung like a sword of Damocles over Simas’ head.<sup>6</sup> \*49 Moreover, pursuit of the Xifiras loan investigation by Simas was in no sense *ultra vires*, since it is difficult to conceive a “condition” more materially adverse to the proper performance of the fiduciary duties of the senior vice-president for loan collections.

At this juncture, of course, we do not suggest that a jury would be compelled to construe this direct evidence adversely to defendants, who presumably would contend that (i) Silva truly believed the Xifiras loan was not problematic,<sup>7</sup> (ii) Simas raised his concerns in bad faith because he was disgruntled with what he perceived as Silva’s preferential treatment of her daughter to the detriment of other Citizens officers; and (iii) Silva’s memo sought only to urge Simas to cease his overly aggressive efforts to initiate an *internal* investigation, and keep any intentions to contact the NCUA to himself.

[23] Be that as it may, any such credibility determinations are for the factfinder at trial, not for the court at summary judgment. *Perez-Trujillo*, 137 F.3d at 53. “[T]rial courts should ‘use restraint in granting summary judgment’ where discriminatory animus is in issue.” *DeNovellis v. Shalala*, 124 F.3d 298, 306 (1st Cir.1997) (citation omitted).

[24] Further, given defendants’ concessions regarding the allocation of burdens of proof, *see supra* Section II.B, the Silva memo would support a finding that whatever other motives Silva may have harbored (*e.g.*, her pique at Silva’s alleged badgering of the internal auditor), a retaliatory motivation was at least one “contributing factor” in her

campaign to oust or silence Simas. Thus, the burden of persuasion would pass to the defendants to adduce clear and convincing evidence that they would have engaged in the same litany of alleged employment actions even if Simas had not contacted the NCUA. *See Frobose*, 152 F.3d at 615 (“Given that the burden of proof on this point is assigned *to the defendant*, and questions of intent and credibility will often be raised, particular care must be taken to resolve all doubts in favor of the plaintiff.”)(emphasis added; citations omitted).<sup>8</sup>

In all events it is unnecessary to determine definitively whether the direct evidence, *standing alone*, demonstrated a materially adverse employment action. At a minimum the direct evidence necessarily colors and informs the circumstantial evidence of the adverse employment action which followed. “ ‘[T]erms, conditions, or privileges’ is pretty open-ended language ... [which] obviously includes opportunities that are not strictly entitlements, and a number of cases have extended coverage to slights or indignities that might seem evanescent.” *Randlett v. Shalala*, 118 F.3d 857, 862 (1st Cir.1997). “Typically, the employer must either (1) take something of consequence from the employee, say, by discharging or demoting her, reducing her salary, or divesting her of significant responsibilities, or (2) withhold from the employee an accouterment of the employment relationship, say, by failing to follow a customary practice of considering her for promotion after a particular period of service.” *Blackie v. State of Maine*, 75 F.3d 716, 725 (1st Cir.1996). “Determining whether an action is materially adverse necessarily requires a *case-by-case* inquiry. Moreover, \*50 the inquiry must be cast in objective terms. Work places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer’s act or omission does not elevate that act or omission to the level of a materially adverse employment action.” *Id.* (emphasis added; citations omitted).

[25] Our review leads us to conclude that these employment actions, viewed in aggregate, could be considered “materially adverse.” The fact that Citizens did not reduce Simas’ salary or benefits, though plainly relevant, is not conclusive. *See Serrano-Cruz*, 109 F.3d at 26 (ADEA); *Collins v. State of Illinois*, 830 F.2d 692, 702–03 (7th Cir.1987) (Title VII).

The district court overlooked the crucial, undisputed fact that Silva withdrew from Simas all responsibility for the Xifiras account. *See Burlington Indus. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 2268, 141 L.Ed.2d 633 (1998) (conduct

is adverse employment action if it “constitutes a significant change in employment status, such as ... reassignment with significantly different responsibilities”); *Collins*, 830 F.2d at 703 & n. 7 (describing various changes to basic aspects of the job). As the vice-president for collections and credit, Simas' core responsibility was to collect delinquent loans, and the \$838,000 Xifiras loan was by far the largest Citizens loan.<sup>9</sup> Thus, Simas clearly was not acting *ultra vires* in investigating the Xifiras loan. Rather, there can be no serious question that removing Citizens' chief loan and collection officer from any responsibility whatever for its largest outstanding loan represented a very substantial divestment of responsibility. Thus, since the FCUA implicitly focuses on individuals like Simas insiders with an optimal opportunity to uncover improprieties it would be ironic to hold that a jury could not even *consider* whether Silva's decision to take the Xifiras loan account away from Simas constituted an adverse employment action.

There was evidence that Simas had been divested of other responsibilities and perquisites as well. For example, Simas attested that he had been stripped of his supervisory authority over credit department personnel and the power to approve credit-card applications. *See Dahm v. Flynn*, 60 F.3d 253, 258–59 (7th Cir.1994) (noting that “terminating [plaintiff's] supervisory authority over other employees” may constitute an adverse employment action) (First Amendment retaliation). Yet the district court found this evidence too vague and conclusory to survive summary judgment because Simas “proffer[ed] no facts to explain the extent of his prior authority and the significance of the ‘removal.’ ” *Simas*, 996 F.Supp. at 85. We cannot agree.

[26] [27] [28] [29] It is axiomatic on summary judgment, of course, that “the nonmoving party ‘may not rest upon mere allegation or denials of [the movant's] pleading, but must set forth specific facts showing that there is a genuine issue’ of material fact as to each issue upon which he would bear the ultimate burden of proof at trial.” *DeNovellis*, 124 F.3d at 306 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)); *Smith v. Stratus Computer, Inc.*, 40 F.3d 11, 12–13 (1st Cir.1994). Nor may the court accept the nonmovant's subjective characterizations of events, unless the underlying events themselves are revealed. *See Santiago v. Canon U.S.A., Inc.*, 138 F.3d 1, 6 (1st Cir.1998). On the other hand, the competence of the nonmovant's own testimony is treated no differently than that of any other potential trial witness. Thus, the nonmovant's statements

normally pass muster *provided* they (1) are made “on personal knowledge” of the facts or events described; \*51 and (2) neither depend on inadmissible hearsay nor (3) purport “to examine the [movant's] thoughts as well as their actions.” *See, e.g., Maiorana v. MacDonald*, 596 F.2d 1072, 1079–80 (1st Cir.1979); *see also* Fed.R.Civ.P. 56(e).

Although pithy, the attestations made by Simas adverted to such facts and events. Simas undoubtedly would have direct personal knowledge of his *own* job functions, including whether he had exercised authority over credit department personnel and approved credit-card applications in the past. Therefore, his attestations are statements of *fact*, not subjective characterizations. Thus, while the defendants may present evidence contesting their truth, to the extent they do so they simply preclude summary judgment for *either* party. *See Brennan*, 150 F.3d at 26 (plaintiff's prima facie burden is “ ‘not onerous’ ... [and] ‘[a]ll that is needed is the production of admissible evidence which, *if uncontradicted*, would justify a legal conclusion of discrimination.’ ”) (emphasis added). Nor can we say that no rational jury could conclude that these two privileges were consequential, if for no other reason than defendants' own concession that Simas' official job title was vice-president of collections *and credit*. *DeNovellis*, 124 F.3d at 308 (“ [A]t the summary judgment stage the judge's function is not ... to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.’ ”).

In a similar vein the district court ruled that the contention that Simas had been denied a car loan could not demonstrate an adverse employment action. *Simas*, 996 F.Supp. at 83. Defendants argue that (1) they have no record of the loan application and Simas failed to adduce a copy; and (2) Simas failed to attest to facts demonstrating that he was otherwise qualified to receive a car loan. Neither argument is valid.

[30] First, “there is no general rule that proof of a fact will be excluded unless its proponent furnishes the best evidence in his power.” *See Allstate Ins. Co. v. Swann*, 27 F.3d 1539, 1543 (11th Cir.1994) (citation omitted). Thus, Simas can prove he filed a loan application simply through his own trial testimony. *See* Fed.R.Evid. 1002 (“To prove the content of a writing, ... the original writing ... is required, *except as otherwise provided in these rules* or by Act of Congress.”) (emphasis added); Fed.R.Evid. 1004(1) (original document need not be produced if the original was lost or destroyed, except where party opposing admission proves the proponent lost or destroyed the original in bad faith);

Fed.R.Evid. 1004(3) (original need not be produced if it was under the control of the party against whom it was offered, which did not produce it at hearing); *see also United States v. McMahon*, 938 F.2d 1501, 1509 n. 4 (1st Cir.1991).

Second, Simas attested to the *fact* that Citizens had always approved his loan applications in the past, without objection. At least absent evidence that his financial condition had changed, this constituted competent evidence that Citizens considered Simas financially qualified to receive such loans. *See Blackie*, 75 F.3d at 726 (“[U]nder certain circumstances an employer's inaction can operate to deprive an employee of a privilege of employment that an employee had reason to anticipate he would receive.”). Hence, Simas met his *prima facie* burden of proof, and the burden of persuasion thereupon shifted to defendants to show the true reason for the loan denial.<sup>10</sup> Finally, we cannot say that the denial of a car loan must be considered inconsequential *per se*.

Simas likewise attested that he was denied unfettered access to the file vault. The only rejoinder from defendants is that Citizens banned all officers, not only Simas, from accessing the vault, and that Simas was permitted \*52 to obtain any file he wanted through a vault clerk. These claims are flawed as well.

For one thing, Simas was only required to attest that the new vault-access procedure was materially adverse. As vice-president in charge of collections, his need for vault access was evident. Moreover, in light of Silva's October 8 memo, a jury reasonably could find the timing of the new procedure especially suspect, since it interposed a vault clerk between Simas and important bank documents at precisely the time Silva sought to deter any further investigation of the Xifiras loan by Simas. Requiring Simas to make a request for a specific document from a vault clerk clearly had two adverse effects: (1) Simas could not anonymously examine documents in the vault; and (2) Silva could learn from the vault clerk precisely which files Simas was examining. Although Silva explained: “We were having a problem with the vault[,] of officers going into the vault, and pulling files and never being replaced [,]” her decision to make the new vault-access procedure applicable to all bank officers does not preclude a finding that she harbored an illicit motive in doing so; that is, to reduce access to information by Simas.<sup>11</sup> Thus, the burden of persuasion would pass to defendants to show by clear and convincing evidence that the new vault-access procedure was necessary for reasons independent of Simas' threats to alert the NCUA.

[31] [32] [33] Finally, although the evidence of yet other adverse employment actions may be less compelling, it is not so obviously makeweight as to *compel* inferences in defendants' favor.<sup>12</sup> Since we are required to assess defendants' conduct in context and in totality, rather than piecemeal, *see Calhoun*, 798 F.2d at 562–63; *Coffman*, 141 F.3d at 1246, we conclude that summary judgment on the FCUA claim was improvidently granted, and must be vacated. The state-law claims for defamation, wrongful termination, and tortious interference with an advantageous relationship must be reinstated as well, since the district court dismissed them solely for lack of supplemental jurisdiction. *See Alexis v. McDonald's Restaurants of Mass., Inc.*, 67 F.3d 341, 354 (1st Cir.1995) (remand on state-law claims warranted where federal claim is reinstated).

*The district court judgment is vacated and the case is remanded for further proceedings consistent with this opinion. Costs are awarded to appellant.*

**SO ORDERED.**

BAILEY ALDRICH, Senior Circuit Judge, concurring. Judge Cyr's opinion, which I entirely accept, reads very persuasively. So, however, does the district court's. In choosing to go along with the later one, I note several matters. To begin, whistleblowers face many obstacles. In the first place, they face those whom they charge, and the higher up those persons, the more difficult they are to meet. In the second place, whistleblowers face others who, if not directly concerned, know on which side their bread is buttered. These obstacles must always be remembered. It must also be remembered that whistleblowers are Congressionally approved, rather than everybody's enemy.

Next, it is to be noted that there is an odor pervading this case. Consider the exceptional, \*53 indeed unique, size of the loan; the way it was granted, particularly the selection of the appraiser; and the relationship of the parties in interest, specifically, the fact that the borrower sat on the credit union's board of directors at the time and was allegedly involved in an extramarital affair with its senior vice-president for mortgage loans. Consider also, at least in passing, the amount that the collateral proved to be below the indebtedness, not to mention the required excess. This all produced a substantial odor that

cannot be made to disappear simply by attacks that may be voiced against the plaintiff individually.

All Citations

With all this in mind, I note that this is summary judgment. 170 F.3d 37, 14 IER Cases 1577

Footnotes

- 1 A summary judgment ruling is subject to *de novo* review and all facts in genuine dispute are to be viewed in the light most favorable to the nonmovant in determining whether trialworthy issues exist or the movant was entitled to judgment as a matter of law. See *Shorette v. Rite Aid of Maine, Inc.*, 155 F.3d 8, 12 n. 2 (1st Cir.1998).
- 2 Neither of the statutory defenses prescribed in the FCUA is implicated in the present case. See *id.* § 1790b(d) (relief unavailable where plaintiff “deliberately cause[d] or participate[d] in the alleged violation of law or regulation,” or “knowingly or recklessly provide[d] substantially false information to such an agency or the Attorney General”).
- 3 Fed.R.Civ.P. 56(f) provides: “Should it appear from the affidavits of a party opposing the [summary judgment] motion that the party cannot for reasons stated present by affidavit facts essential to justify the party’s opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.”
- 4 Normally, a Rule 56(f) motion must: (1) be made within a “reasonable time” after the filing of the summary judgment motion; (2) place the district court on notice that movant wants the court to delay action on the summary judgment motion, whether or not the motion cites Rule 56(f); (3) demonstrate that movant has been diligent in conducting discovery, and show “good cause” why the additional discovery was not previously practicable with reasonable diligence; (4) “set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist,” and “indicate how the emergent facts, if adduced, will influence the outcome of the pending summary judgment motion”; and (5) attest that the movant has personal knowledge of the recited grounds for the requested continuance. See *C.B. Trucking, Inc. v. Waste Management, Inc.*, 137 F.3d 41, 44 & n. 2 (1st Cir.1998); *Resolution Trust Corp. v. North Bridge Assocs.*, 22 F.3d 1198, 1202–03 (1st Cir.1994). Although defendants contested the latter three criteria below, their appellate challenge is confined to the fourth and fifth criteria.
- 5 Moreover, Simas implies that he was *actually* discharged, pointing to Silva’s retaliatory decision to accelerate the effective date of his resignation and to cause him to be unceremoniously escorted out of the credit union. See *supra* Section I, ¶ 7. Given our disposition of the appeal, see *infra*, it is not necessary to resolve this implicit contention.
- 6 See, e.g., *Frobose*, 152 F.3d at 615 (finding genuine factual dispute generated by president’s letter chastising loan officer for pressing investigation of suspicious undocumented loan, and warning plaintiff “you fully understand the basis from which future management decisions will be made,” a warning which “reasonably could be construed as an official and not-so-veiled threat of retaliation”) (§ 1381j retaliation case); *Walleri v. Federal Home Loan Bank of Seattle*, 83 F.3d 1575, 1580 (9th Cir.1996) (affirming denial of summary judgment for employer where defendants threatened to remove plaintiff as examiner-in-charge unless she changed her unfavorable report to regulatory authorities); *Lao Chua v. St. Paul Fed. Bank for Sav.*, No. 95–C–2463, 1995 WL 472773, at \*3 (N.D.Ill. Aug.8, 1995) (refusing to dismiss § 1831j retaliation case where defendants told plaintiff not to report to federal authorities that they had ordered him to divulge his secret code, and physically prevented plaintiff from reporting their planned regulatory violation).
- 7 Conversely, however, even a good-faith belief by Silva that the charges were unwarranted would not entitle her to deter Simas from exercising his § 1790b rights. Section 1790b does not require that the information provided be proven true, so long as the informant did not knowingly or recklessly provide false information. See *supra* note 2.
- 8 Likewise, in a Title VII case where the claimant adduces *direct* (rather than circumstantial) evidence of discriminatory animus, and the defendant adduces some countervailing evidence that its motives were “mixed” (*i.e.*, some discriminatory, some not), the burden of *persuasion* passes to the defendant to show that it would have taken the same actions even if the improper criterion had played no part in its decisionmaking. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244–45, 258, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989); *Clean Harbors*, 146 F.3d at 21–22 (same under STAA); see also *Frobose*, 152 F.3d at 617. In order to uphold summary judgment for defendants, therefore, we would have to conclude that the direct evidence *compelled* a jury verdict in their favor, which is simply not possible on the present record.
- 9 See *DeNovellis*, 124 F.3d at 306 (holding that divesting employee of consequential assignments and responsibilities establishes an adverse employment action); see also *Coffman*, 141 F.3d at 1245 (“Coffman also had her duties at work changed, including the loss of her responsibility for ordering coil and extrusion, important raw materials in the manufacturing of boats at the Bolivar plant. These ordering duties represented a substantial part of Coffman’s job as

inventory control manager."); *Vasbinder v. Ambach*, 926 F.2d 1333, 1343 (2d Cir.1991) (in First Amendment retaliation case, defendant "promptly stripped [plaintiff] of his most significant duties"); *cf. Underwood v. District of Columbia Armory Bd.*, 816 F.2d 769, 777 (D.C.Cir.1987) (affirming judgment for defendant on retaliation claim where duties of which plaintiff was divested "were only a minor adjunct to her regular position").

10 Although Simas may have abandoned the argument on appeal, the same is true of his attestation that he was denied promotion to a vacant vice-presidency. The district court discounted this evidence because it was undisputed that Citizens' board of directors voted not to fill the vacant position; hence denial of the Simas application could not have been discriminatory or retaliatory. *Simas*, 996 F.Supp. at 86–87. Given Silva's influence over the Board, however, the burden of persuasion would shift to defendants to show by clear and convincing evidence that the Board had not left the position vacant because Simas applied for it, biding its time until Simas had been ousted from his job.

11 The same reasoning applies to the contention that Simas was no longer allowed to attend meetings of the board of directors, where one reasonably might expect the Xifiras loan default to be a topic of debate. *See Coffman*, 141 F.3d at 1245 ("There was also evidence that Tracker Marine excluded Coffman from some management meetings that, as inventory control manager, she would have been expected to attend.").

12 Simas attested that coworkers shunned him, both socially and professionally. While social ostracism alone is rarely actionable, professional ostracism may be, at least where the plaintiff can show that defendants incited or encouraged coworkers to shun him, and plaintiff suffered some material harm resulting from his inability to consult with his colleagues on matters of business. *See, e.g., Parkins v. Civil Constructors of Ill.*, 163 F.3d 1027, 1039 (7th Cir.1998); *Flannery v. Trans World Airlines, Inc.*, 160 F.3d 425, 428 (8th Cir.1998); *Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686, 693 (8th Cir.1997); *McKenzie v. Illinois Dep't of Transp.*, 92 F.3d 473, 485 (7th Cir.1996). Also, Simas attested that Citizens' new internal auditor told him in March 1994 that he should start looking for another job. *Cf. Serrano–Cruz*, 109 F.3d at 27–28 (noting that express suggestions that plaintiff resign are probative of constructive discharge).