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[PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 21-90022

GEORGE RUHLEN,
CRP/CRE PONCE DE LEON OWNER, LLC,
CRP/CRE PORTFOLIO VENTURE, LLC,
CRP/CRE MEMBER, LLC,
J. ALLEN BOBO,
LUTZ, BOBO, & TELFAIR, P.A.,

Petitioners,

versus

HOLIDAY HAVEN HOMEOWNERS, INC.,

Respondent.

Petition for Permission to Appeal from the United States District Court for the
Middle District of Florida

D.C. Docket No. 6:21-cv-00174-CEM-EJK

Before: ROSENBAUM, NEWSOM, and BRANCH, Circuit Judges.
BY THE COURT:

This case is before us on a petition for permission to appeal. The plaintiffs, a group of current and former mobile homeowners and their homeowners' association, filed this action in Florida state court against numerous defendants, alleging violations of the Florida Antitrust Act and the Americans with Disabilities Act. The plaintiffs framed their suit as a "representative action" filed pursuant to Florida Rule of Civil Procedure 1.222.

The defendants removed the case to the United States District Court for the Middle District of Florida based on the ADA claim and the Class Action Fairness Act. CAFA allows removal of a "class action," which it defines to mean "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. §§ 1453(b), 1332(d)(1)(B).

In an amended complaint, the plaintiffs omitted their ADA claim and added other state-law claims, including one alleging violations of the Florida Mobile Home Act, Fla. Stat. § 723.001 *et seq*. Under that count, the homeowners' association reiterated that it was authorized to file the action in its "representative capacity under Rule 1.222 of the Florida Rules of Civil Procedure and Section[] 723.075" of the Florida Statutes. The district court then *sua sponte* remanded the case to state court. In so doing, the district court determined that federal-question jurisdiction no longer existed because the amended complaint asserted only state-law claims and that CAFA didn't provide jurisdiction because a claim brought in a representative capacity under Florida Rule of Civil Procedure 1.222 "is not a class action, as that term is understood for CAFA jurisdiction."

The defendants then filed with this Court a petition for permission to appeal. Before deciding whether we should grant the defendants' petition, we must determine whether we have jurisdiction to consider their appeal. We hold that we do not.

As a general rule, we may not review a district court's decision to remand a case based on its determination that it lacks subject-matter jurisdiction. *See* 28 U.S.C. § 1447(d); *Hunter v. City of Montgomery*, 859 F.3d 1329, 1333 (11th Cir. 2017) (citing *Thermtron Prods., Inc. v. Hermansdorfer*, 423 U.S. 336, 345–46 (1976)). As relevant here, however, there is a statutory exception to the general rule that applies where the appeal is "from an order of a district court granting or denying a motion to remand a class

action to the State court from which it was removed." 28 U.S.C. § 1453(c)(1).

While this case may involve a "class action" that was "removed" from a "State court"—that is the crux of the parties' dispute—neither party here ever filed a "motion to remand" the suit to state court. Rather, the district court *sua sponte* remanded the case. Accordingly, we must decide whether the phrase "an order of a district court granting or denying a motion to remand a class action" covers a district court's *sua sponte* remand order.

For better or worse, § 1453(c)(1)'s text is best interpreted not to encompass a district court's decision to remand *sua sponte*. Black's Law Dictionary defines the term "motion" as "[a] written or oral application requesting a court to make a specified ruling or order"—and thus, we think, clearly contemplates party initiation. *Motion*, Black's Law Dictionary (11th ed. 2019). Even though we sometimes say—and indeed, Black's says—that a court acting *sua sponte* does so "on its own motion," *Sua Sponte*, Black's Law Dictionary (11th ed. 2019), that shorthand colloquialism doesn't accurately capture reality; the court in that instance does not actually "request[]" anything of itself, nor does it grant or deny anyone else's request.

Numerous sources corroborate our conclusion that, in ordinary legal parlance, a "motion" is a request or an application *made by a party*. Bouvier's Law Dictionary, for instance, explains—like Black's—that a "motion is presented to a court . . . by one party." *Motion (Movant or Move)*, The Wolters Kluwer Bouvier Law

Dictionary: Desk Edition (Stephen Michael Sheppard ed., 2012). So too, legal encyclopedias explain that "[t]he term 'motion' generally means an application made to a court or judge to obtain a rule or order directing some act to be done in the applicant's favor in a pending case," 56 Am. Jur. 2d Motions, Rules, and Orders § 1 (2020) (footnotes omitted), that "[t]he term 'motion' generally means an application made to a court or judge for the purpose of obtaining a rule or order directing some act to be done in favor of the applicant in a pending case," 60 C.J.S. Motions and Orders § 1 (2020) (footnotes omitted), and that a "motion is a request for relief, usually interlocutory relief, within a case," *id*.

Accordingly, we find ourselves constrained to conclude (colloquialisms aside) that when a court *sua sponte* orders a remand, it is not "granting" its own "motion" within the meaning of § 1453(c)(1)—any more than it would be "denying" its own motion in the absence of such an order. For good or ill, the ordinary meaning of the word "motion" refers to a request or an application made by a party; it does not contemplate something a court does on its own. *In re Wild*, 994 F.3d 1244, 1257 (11th Cir. 2021) (en banc) ("[W]e assume that the legislative purpose is expressed by the ordinary meaning—not the idiosyncratic meaning—of the words used." (quotation marks omitted)).

Our dissenting colleague disagrees because she believes that Congress's "clear intention" in enacting § 1453(c)(1) was to include *sua sponte* remands. We readily admit the *possibility* that Congress "inten[ded]" § 1453(c)(1) to cover instances in which a district

court *sua sponte* remands a case to state court, as well as those in which the court issues an order "granting or denying a motion to remand." But "[i]t is the *text's* meaning, and not the content of anyone's expectations or intentions, that binds us as law." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 398 (2012) (quoting Laurence H. Tribe, "Comment," *in* Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 65, 66 (1997)). Accordingly, when interpreting a statute, our "inquiry both begins and ends with a careful examination of the statute's language." *Wild*, 994 F.3d at 1255. We "must presume that a legislature says in a statute what it means and means in a statute what it says there." *CRI-Leslie, LLC v. Comm'r of Internal Revenue*, 882 F.3d 1026, 1033 (11th Cir. 2018) (quotation marks omitted). We simply aren't at liberty to "plumb a statute's supposed purposes and policies in search of the [legislature's] intent." *Wild*, 944 F.3d at 1255.[1]

The dissent contends that our interpretation of § 1453(c)(1) produces an absurd result. And again, we can agree that omitting

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[1] We recognize, as our dissenting colleague notes, that at least one of our sister circuits has expressly disagreed with the interpretation of § 1453(c)(1) that we embrace here. In construing that provision to cover *sua sponte* remand orders, the Ninth Circuit asserted that doing otherwise "would be inconsistent with CAFA's clearly expressed intention." *Watkins v. Vital Pharms., Inc.*, 720 F.3d 1179, 1181 (9th Cir. 2013). But the only expression of intent to which that court pointed was the provision's text. For reasons explained above the line, we simply don't think that § 1453(c)(1)'s plain terms express the intent that the Ninth Circuit assumed.

sua sponte orders from the statute's scope may seem a little (or perhaps more than a little) odd. But the absurdity bar is a high one, and "'[s]omething that 'may seem odd . . . is not absurd.'" Scalia & Garner, *Reading Law*, at 237 (ellipses in original) (quoting *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 565 (2005)). As Justice Story famously—and graphically—explained, the absurdity exception to the plain-meaning rule governs only where "applying the provision to the case would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application." 1 Joseph Story, *Commentaries on the Constitution of the United States* § 427, at 303 (2d ed. 1858). We just don't think that this case meets the "monstrous[ness]" threshold.

Because the remand in this case was not ordered upon the motion of any party, § 1453(c)(1)'s exception doesn't apply here. The result may be an odd one, but it's the one that the statute's plain language requires. "If Congress thinks that we've misapprehended its true intent—or, more accurately, that the language that it enacted . . . inaccurately reflects its true intent—then it can and should say so by amending" § 1453(c)(1). *CRI-Leslie*, 882 F.3d at 1033.

Because we lack jurisdiction to review the district court's *sua sponte* remand, the Petition for Permission to Appeal pursuant to the Class Action Fairness Act is **DENIED**.

ROSENBAUM, Circuit Judge, Dissenting:

I disagree with the majority's conclusion that we lack authority to grant the petition for permission to appeal the district court's sua sponte order remanding the case to state court. Not only can we consider the petition, but this case presents a novel issue in our Circuit that warrants a merits panel's consideration. I therefore respectfully dissent from the denial of the petition for permission to appeal.

The majority concludes that we lack authority to entertain the petition based on its interpretation of 28 U.S.C. § 1453(c)(1), which provides, in relevant part, that "a court of appeals may accept an appeal from an order of a district court granting or denying a motion to remand a class action to the State court from which it was removed . . . ." More specifically, the majority finds that "an order of a district court granting or denying a motion to remand a class action" cannot include an order of a district court that sua sponte remands a class action. This hypertechnical reading of CAFA is refuted by the broader view of the common understanding of the statutory language, the clear intention of the statute as revealed by its context, the absurd result of reading the statute as the majority does, and other circuits' understanding of § 1453(c)(1)).

Before I explain why, I must respond to the majority's suggestion in taking the words "clear intention" from my preceding

sentence out of context to suggest that I discern Congress's "clear intention" by relying on something outside the traditional toolbox for construing statutes. I don't. But unlike the majority, I consider the textual language *and* its position within the overall statutory scheme. And that is just as surely a part of statutory interpretation as evaluation of the language. Indeed, "[t]he definition of words in isolation . . . is not necessarily controlling in statutory construction. A word in a statute may or may not extend to the outer limits of its definitional possibilities." *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006). The Supreme Court has explained, "oftentimes the meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *King v. Burwell*, 576 U.S. 473, 486 (2015) (cleaned up). And "[o]ur duty, after all, is to construe statutes, not isolated provisions." *King*, 576 U.S. at 486 (cleaned up). So any interpretation of "motion" without consideration of the surrounding text and meaning of the statute is an incomplete one.

With that in mind, I return to the statutory analysis. To start, I note we have never held that a district court's sua sponte remand order in a case removed under CAFA did not fall under the purview of 28 U.S.C. § 1453(c)(1). And our cases reviewing CAFA remand orders have never implied that our review was possible only because the order resulted from a party's filing of a motion. *See, e.g.*, *Anderson v. Wilco Life Ins. Co.*, 943 F.3d 917, 924 (11th Cir. 2019); *Dudley v. Eli Lilly & Co.*, 778 F.3d 909, 911 (11th Cir.

2014); *S. Fla. Wellness, Inc. v. Allstate Ins. Co.*, 745 F.3d 1312, 1315 (11th Cir. 2014).

Not only that, but we have defined "*sua sponte*" as meaning "[w]ithout prompting or suggestion; *on its own motion*." *See Velchez v. Carnival Corp.*, 331 F.3d 1207, 1210 (11th Cir. 2003) (emphasis added) (quoting *Black's Law Dictionary* 1437 (7th ed. 1999)). And the Supreme Court has similarly characterized sua sponte decisions by the district court as "on its own motion." *Wachovia Bank v. Schmidt*, 546 U.S. 303, 316 (2006). In other words, it is fair and reasonable to understand a court's sua sponte remand as court's "granting . . . [of] [its own] motion to remand a class action," meaning a sua sponte remand fits within the language of § 1453(c)(1).

Indeed, the circuits that have explicitly or implicitly addressed the issue have all concluded that an order remanding a case removed based on CAFA jurisdiction does not become unreviewable simply because it was remanded sua sponte. As the Ninth Circuit has explained,

> We do not read § 1453(c)(1)'s authorization of an appeal as limited only to district court orders made in response to a party's "motion." Sua sponte orders are, literally, orders issued when the court acts "on its own motion." Moreover, it is well established that district courts may address questions of subject matter jurisdiction sua sponte. If CAFA permitted review

> of remand orders issued only in response to a party's motion to remand, district court orders remanding class actions sua sponte would be insulated from appellate review. Such a result would be inconsistent with CAFA's clearly expressed intention that class actions are exempt from the general jurisdictional rule that district court remand orders are not reviewable on appeal.

Watkins v. Vital Pharms., Inc., 720 F.3d 1179, 1181 (9th Cir. 2013) (footnotes and citations omitted); *see also Kenny v. Wal-Mart Stores, Inc.*, 881 F.3d 786, 789 (9th Cir. 2018) ("We have jurisdiction to review the district court's *sua sponte* remand order pursuant to 28 U.S.C. § 1453(c)(1)." (citing *Watkins*, 720 F.3d at 1180–81)).

Outside the Ninth Circuit, the Seventh and Eighth Circuits have implicitly held that sua sponte remand orders in cases removed under CAFA are reviewable under § 1453(c)(1). *See Fox v. Dakkota Integrated Sys., LLC*, 980 F.3d 1146, 1151 (7th Cir. 2020) (reviewing a sua sponte CAFA remand); *Dalton v. Walgreen Co.*, 721 F.3d 492, 494 (8th Cir. 2013) (same). And in an unpublished decision, the D.C. Circuit acknowledged that a sua sponte remand order was "properly before this court as the remand order falls within section 1453(c)(1)." *In re U-Haul Int'l, Inc.*, No. 08-7122, 2009 WL 902414, at *2 (D.C. Cir. Apr. 6, 2009) (Rogers, J., dissenting from majority's decision to *decline* jurisdiction over appeal). In fact, I have been unable to find any court of appeals decision

holding that sua sponte orders remanding CAFA cases are wholly insulated from appellate review; today, we become the first.

In so doing, we articulate an interpretation of § 1453(c)(1) that undermines what the statutory context of § 1453(c)(1) reflects Congress intended to do. Congress included the "granting or denying a motion to remand" language to ensure that orders dealing with remand in CAFA cases are not subject to the § 1447(d) jurisdictional bar or to the final-judgment rule. An order denying a motion to remand would obviously not qualify as a "final decision" and would therefore ordinarily be unappealable. 28 U.S.C. § 1291. But in CAFA cases, such orders are subject to immediate appellate review. Congress added the language not to exempt sua sponte orders from review, but to subject all orders about remand to immediate appellate jurisdiction.

Had Congress intended to expose only those orders about remand issued in response to a party's filed motion, it easily could have drafted the statute to say that the court of appeals may review orders "granting or denying a **party's** motion to remand." The majority's conclusion that we lack jurisdiction "produce[s] a result demonstrably at odds with the intentions of [the statute's] drafters." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 242 (1989) (internal quotation marks omitted).

Even if we assume that the majority's hypertechnical interpretation of the statute is correct, textualism has its limits. And it hits them here. We do not apply a literal reading of the statute

when "the disposition required by the text is . . . absurd." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000). But that's what the majority's construction requires: an absurd result. If the majority's interpretation of "motion" is correct, then Congress thought it important enough to make a special exception to the final-judgment rule and § 1447(d) appellate bar so orders granting (or denying) a party's motion to remand in a CAFA case may be immediately appealed, but it completely shielded from review of any type exactly the same result when the court remands the CAFA case on its own motion. I can conceive of no logical reason why the same action should be exposed to two opposite results, depending on whether a party made a motion before the court issued its order. Nor does the majority offer any convincing reason that Congress would have viewed sua sponte orders as an exception to the rule of immediate appellate review it imposed on remand orders in response to a party's motion.

That the result is absurd is emphasized even more by Congress's intent as shown in CAFA's legislative history. To be sure, we consult legislative history, at most, only when a statute is ambiguous. *United States ex rel. Hunt v. Cochise Consultancy, Inc.*, 887 F.3d 1081, 1089 (11th Cir. 2018), *aff'd,* 139 S. Ct. 1507(2019). And as I've explained, here, the plain meaning of the statute endows us with authority to immediately review a sua sponte order remanding in a CAFA case, so I reference the history only to put a bigger exclamation point on the absurdity of the majority's proposed "plain meaning" of the statute.

The Senate Report on the bill that eventually became CAFA included the following explanation of § 1453(c): "The purpose of this provision is to develop a body of appellate law interpreting the legislation without unduly delaying the litigation of class actions." S. Rep. No. 109-14, at 49 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 3, 46. Nowhere in this history is any indication of an intent to differentiate orders that are prompted by a party's motion from orders that are sua sponte. To the contrary, the objective of facilitating speedy review of remands in class actions applies just as strongly to both.

So, in my view, we have the authority to grant the petition here. And I think we should. The petition raises an issue of first impression in our circuit: whether an action brought under Florida Rule of Civil Procedure 1.222 is a "civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action," such that it should be considered a "class action" under CAFA and thus removable to federal court. 28 U.S.C. §§ 1453(b); 1332(d)(1)(B). The Florida Supreme Court adopted Rule 1.222 because "the unique features of mobile home residency call for an effective procedural format for resolving disputes between park owners and residents concerning matters of shared interest." *See Lanca Homeowners, Inc. v. Lantana Cascade of Palm Beach, Ltd.*, 541 So. 2d 1121, 1123 (Fla. 1988). This issue involves an intersection between state and federal law. The development of the law would benefit from this Court's

determination of whether Congress's intent in enacting CAFA was to make cases filed under rules like Florida Rule of Civil Procedure 1.222 subject to removal to federal court.

For these reasons, I respectfully dissent.

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

VINTAGE MOTORS OF SARASOTA, INC.,

Appellant,

v.

MAC ENTERPRISES OF NORTH CAROLINA, LLC,

Appellee.

No. 2D21-590

March 11, 2022

Appeal from the Circuit Court for Sarasota County; Andrea McHugh, Judge.

Thomas M. Fitzgibbons, Sarasota, for Appellant.

Daniel P. VanEtten and Fred E. Moore of Blalock Walters, P.A., Bradenton, for Appellee.

LUCAS, Judge.

Vintage Motors of Sarasota, Inc., appeals a final judgment entered against it after a nonjury trial. The circuit court deemed

that the plaintiff below, MAC Enterprises of North Carolina, LLC's attorney's fees were "actual damages" under the Florida Deceptive and Unfair Trade Practices Act. That was error, and it necessitates reversal of the judgment.

MAC Enterprises is in the business of restoring used and vintage cars; Vintage Motors is in the business of selling them on consignment. The two companies had worked together on a number of transactions in the past, but the present controversy revolves solely around a restored 1965 Porsche. MAC Enterprises contacted Vintage Motors to assist it in selling MAC Enterprises' Porsche. The car was delivered on consignment to Vintage Motors, who then identified a potential New Jersey buyer. After some back-and-forth, Vintage Motors sold the Porsche to the buyer in April of 2017 for the agreed upon price of $48,000.

Initially, the buyer had expressed dissatisfaction to Vintage Motors regarding some of the restoration work. Nevertheless, the sale closed, the buyer received the car and its title, and Vintage Motors was fully paid the price that MAC Enterprises, Vintage Motors, and the buyer had all agreed on. But Vintage Motors failed to inform MAC Enterprises that the sale had been completed.

Indeed, Vintage Motors' principal, Martin Godbey, represented to MAC Enterprises that the buyer had refused to close on the sale and that Vintage Motors still had possession of the Porsche. Mr. Godbey later admitted he had stonewalled the owner of MAC Enterprises for forty-five days about the status of the sale: "I led Mr. [Mac]Donald to believe that the closing of the car was going on longer than it did." Vintage Motors also ignored MAC Enterprises' request to return the Porsche.

By June 2017, MAC Enterprises had retained an attorney who drafted and sent a demand letter to Vintage Motors. The day after the attorney's demand letter was e-mailed, Vintage Motors communicated with MAC Enterprises that it would wire the funds from the sale, less its commission, to MAC Enterprises. MAC Enterprises accepted the funds, and then it filed a lawsuit against Vintage Motors.

MAC Enterprises' second amended complaint included one count against Vintage Motors for violation of sections 501.201-.213, Florida Statutes (2017), the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), a second FDUTPA count against Mr. Godbey, one count against Vintage Motors for breach of fiduciary

duty, one count against Vintage Motors for fraud, and one count against Mr. Godbey for fraud. The circuit court held a bench trial on November 5, 2020, and entered a final judgment on December 16, 2020.

With respect to the two FDUTPA counts, the court weighed the evidence and testimony presented and concluded that MAC Enterprises had prevailed as to part of its claims. The court determined that Mr. Godbey, on behalf of Vintage Motors, had lied to MAC Enterprises and that Vintage Motors' conduct constituted a violation of FDUTPA.[1] The court concluded that MAC Enterprises had sustained actual damages in that it "had to hire counsel and paid the attorney $3,500 to recover the $42,300 [for] Mac Enterprises." The final judgment awarded MAC Enterprises the $3,500 attorney's fee as the sole component of damages. The court concluded that Vintage Motors had also breached a fiduciary duty to MAC Enterprises but that the damages MAC Enterprises sustained on that count were "duplicative" of the damages awarded

[1] The court only found in favor of MAC Enterprises as to the first FDUTPA count (against Vintage Motors), not the second FDUTPA count (against Mr. Godbey, individually).

in the FDUTPA count. The court found in favor of Vintage Motors and Mr. Godbey as to both fraud claims.

The discrete issue Vintage Motors presents in this appeal is whether fees spent on an attorney can comprise an element of "actual damages" under FDUTPA or "damages" in a common law breach of fiduciary duty claim. That is an issue of law that we review de novo. *Alachua County v. Watson*, No. SC19-2016, 2022 WL 247086, at *6 (Fla. Jan. 27, 2022) ("Since the merits of this case only concern statutory interpretation, our review is de novo." (citing *GTC, Inc. v. Edgar*, 967 So. 2d 781, 785 (Fla. 2007))); *Blackboard Specialty Ins. Co. v. YTech-1428 Brickell, LLC*, 314 So. 3d 536, 538 (Fla. 3d DCA 2020) ("[A] trial court's legal conclusions in final judgments are reviewed de novo." (citing *Palm Garden of Healthcare Holdings, LLC v. Haydu*, 209 So. 3d 636, 638 (Fla. 5th DCA 2017))). We conclude that attorney's fees, although awardable as ancillary to a successful FDUTPA claim, are not a substantive component of FDUTPA's "actual damages," nor are they "damages" under a common law breach of fiduciary duty claim.

Section 501.204(1) of FDUTPA states that "[u]nfair methods of competition, unconscionable acts or practices, and unfair or

deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." Section 501.211(1) of the act provides a private civil cause of action to anyone aggrieved by a statutory violation.[2] Subsection (2) of section 501.211 defines the scope of relief under this cause of action: "In any action brought by a person who has suffered a loss as a result of a violation of this part, such person may recover actual damages, plus attorney's fees and court costs as provided in s. 501.2105."

When construing statutes, we have followed the Florida Supreme Court's instruction that "legislative intent is the polestar that guides us," and that "[t]he primary source for determining legislative intent is the language chosen by the [l]egislature to express its intent." *See Money v. Home Performance All., Inc.*, 313 So. 3d 783, 786 (Fla. 2d DCA 2021) (quoting *Donato v. Am. Tel. & Tel. Co.*, 767 So. 2d 1146, 1150 (Fla. 2000)). More recently, the

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[2] In construing the statute, courts have concluded that the elements of a private FDUTPA claim are (1) a deceptive or unfair practice; (2) causation; and (3) actual damages. *See TLO S. Farms, Inc. v. Heartland Farms, Inc.*, 282 So. 3d 145, 148 (Fla. 2d DCA 2019) (citing *Rollins, Inc. v. Butland*, 951 So. 2d 860, 869 (Fla. 2d DCA 2006)).

Florida Supreme Court invoked the U.S. Supreme Court's explanation of our role in interpreting statutes:

> [W]hen called on to resolve a dispute over a statute's meaning, [we] normally seek[] to afford the law's terms their ordinary meaning at the time [the legislature] adopted them. The people who came before us are entitled, as well, to have independent judges exhaust "all the textual and structural clues" bearing on that meaning. When exhausting those clues enables us to resolve the interpretive question put to us, our "sole function" is to apply the law as we find it.

Alachua County, 2022 WL 247086, at *6 (second, third, and fourth alterations in original) (quoting *Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 (2021)).

Reading the statute at issue here, we have a rather obvious textual and structural clue that FDUTPA's definition of "actual damages" does not encompass attorney's fees. FDUTPA's text sets apart "attorney's fees" from "actual damages" with an intervening comma and the word "plus"—a word that, in this context, connotes "having, receiving, or being in addition to what is anticipated."[3] Standing alone, that would be a decisive indication that the

[3] *See Plus*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/plus (last visited Feb. 24, 2022).

legislature meant to distinguish these two terms from one another.[4] *See State v. Bodden*, 877 So. 2d 680, 685 (Fla. 2004) ("As we have explained, '[t]he legislature is presumed to know the meaning of words and the rules of grammar, and the only way the court is advised of what the legislature intends is by giving the generally accepted construction, not only to the phraseology of an act, but to the manner in which it is punctuated.' " (alteration in original) (quoting *Fla. State Racing Comm'n v. Bourquardez*, 42 So. 2d 87, 88 (Fla. 1949))).

Apart from phrasing and grammatical conventions, the common law distinguishes damages, as an element of a civil claim, from attorney's fees, which are usually ancillary to recovery on a civil claim. *See CCM Condo. Ass'n v. Petri Positive Pest Control, Inc.*, 330 So. 3d 1, 6 (Fla. 2021) (construing offer of judgment statute and observing that "[a]ttorney's fees and costs are not damages"

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[4] To be sure, in some contexts, "plus" might hold a somewhat more holistic or inclusive meaning—for example, when a commercial advertises a product for $29.99 "plus shipping and handling," one would understand that the total price to be paid will have to include the cost of shipping and handling. But note, even in this scenario, the separate cost of shipping and handling is distinguished as something unique from the product's underlying sale price.

(citing *First Specialty Ins. Co. v. Caliber One Indem. Co.*, 988 So. 2d 708, 714 (Fla. 2d DCA 2008); *Golub v. Golub*, 336 So. 2d 693, 694 (Fla. 2d DCA 1976) (noting that costs are not part of damages and are "recoverable by the successful party as an incident to the main adjudication"))); *Cheek v. McGowan Elec. Supply Co.*, 511 So. 2d 977, 979 (Fla. 1987) ("[T]he recovery of attorney's fees is ancillary to the claim for damages."); *Orkin Exterminating Co. v. Petsch*, 872 So. 2d 259, 263 (Fla. 2d DCA 2004) ("Attorney's fees are not damages." (citing *Scottsdale Ins. Co. v. Haynes*, 793 So. 2d 1006, 1009 (Fla. 5th DCA 2001))). And "it is ordinarily assumed that the legislature is aware of the state of the common law when it enacts or amends a statute." *Parsons v. Culp*, 328 So. 3d 341, 349 (Fla. 2d DCA 2021); *cf. Baskerville-Donovan Eng'rs, Inc. v. Pensacola Exec. House Condo. Ass'n*, 581 So. 2d 1301, 1303 (Fla. 1991) ("[S]tatutes should be construed with reference to the common law, and we must presume that the legislature would specify any innovation upon the common law." (alteration in original) (citing *Ellis v. Brown*, 77 So. 2d 845, 847 (Fla. 1955), *overruled in part on other grounds by Garner v. Ward*, 251 So. 2d 252 (Fla. 1971))).

Finally, Florida courts construing FDUTPA have consistently defined the statute's provision of "actual damages" to mean "the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties." *See Rollins, Inc. v. Butland*, 951 So. 2d 860, 869 (Fla. 2d DCA 2006) (quoting *Rollins, Inc. v. Heller*, 454 So. 2d 580, 585 (Fla. 3d DCA 1984)); *Rodriguez v. Recovery Performance & Marine, LLC*, 38 So. 3d 178, 180 (Fla. 3d DCA 2010) (same); *Fort Lauderdale Lincoln Mercury, Inc. v. Corgnati*, 715 So. 2d 311, 314 (Fla. 4th DCA 1998) (same). In sum, the plain meaning of section 501.211's text, the common law's treatment of damages as being distinct from attorney's fees, and the district courts' consistent interpretation of section 501.211(2) leads us to conclude that actual damages under FDUTPA cannot include attorney's fees incurred in bringing the FDUTPA action. The circuit court erred when it concluded otherwise.

We are unpersuaded by the alternative basis for affirmance MAC Enterprises suggests—that its $3,500 attorney's fees could be deemed a component of damages under its fiduciary duty claim

(which the circuit court declined to award as "duplicative" of the damages it had incorrectly awarded under the FDUTPA claims). As we have already observed, the element of damages in common law claims, such as breach of fiduciary duty, does not ordinarily include attorney's fees. *See, e.g.*, *Cheek*, 511 So. 2d at 979. And from our review of the record, MAC Enterprises provided no other basis to substantiate its damages under any of its claims.

We, therefore, reverse the final judgment and remand for the circuit court to enter a judgment in favor of Vintage Motors.

Reversed and remanded.

KHOUZAM and BLACK, JJ., Concur.

Opinion subject to revision prior to official publication.

Third District Court of Appeal

State of Florida

Opinion filed March 9, 2022.
Not final until disposition of timely filed motion for rehearing.

Nos. 3D21-2344 & 3D21-2437
Lower Tribunal No. 20-8460

Corey Shader, et al.,
Petitioners,

vs.

ABS Healthcare Services, LLC, et al.,
Respondents.

Writs of Certiorari to the Circuit Court for Miami-Dade County, William Thomas, Judge.

Carlton Fields, P.A., and Benjamine Reid, Alan Grunspan, and Clifton R. Gruhn, for petitioner Corey Shader; Cozen O'Connor, and James A. Gale, Samuel A. Lewis, David M. Stahl, and Jonathan E. Gale, for the Kratos petitioners.

Boies Schiller Flexner LLP, and Carlos M. Sires and Sigrid S. McCawley (Fort Lauderdale), for respondents.

Before LOGUE, LINDSEY, and LOBREE, JJ.

LOGUE, J.

Petitioner Corey Shader, a non-party below, and the Defendants below have filed separate petitions for a writ of certiorari seeking to quash the same discovery order issued by the trial court. We have consolidated the petitions. One of the Defendants, Richard Ryscik, and the non-party Corey Shader were deposed and portions of their testimony regarding financial and business matters were designated as confidential pursuant to a procedure established in a protective order entered by the trial court. Subsequently, the Respondents, the plaintiffs below, filed a motion to de-designate Ryscik's and Shader's testimony pursuant to a procedure established in the same protective order. The trial court granted the motion, de-designating the testimony and authorizing its public use. The Petitioners seek to quash that order.

The twist in this case is that the protective order and the designation of the material as confidential occurred before the case was submitted to arbitration but the motion to de-designate and the court order de-designating occurred after the case was submitted to arbitration.

The question presented is whether the authority to interpret and apply the trial court's interlocutory pre-trial protective order entered prior to the case being submitted to arbitration lies with the trial court or the arbitrators during the pendency of an arbitration. We hold that, during the pendency of

the arbitration, the arbitrators have exclusive authority to determine these matters. To decide otherwise would mean that disputes arising in the course of the arbitration out of interlocutory pre-trial court orders (including basic discovery disputes) would need to be referred back to the judicial process in contravention of the purpose of arbitration which is to provide a dispute resolution process outside of the court system. Accordingly, we issue the writ.

BACKGROUND

This matter stems from a lawsuit in which ABS Healthcare Services, LLC and Health Option One, LLC (collectively, "Plaintiffs") sued Kratos Investments LLC, Health Team One LLC, Complete Vital Care LLC, Health Essential Care LLC, and Richard Ryscik (collectively "Defendants") over an alleged scheme to steal Plaintiffs' business. The Defendants moved to compel arbitration. The trial court denied the motion. Then, as part of the management of the case, the trial court entered a protective order governing discovery.

The protective order allowed both parties and non-parties to designate documents or testimony as confidential so long as the information was "entitled to confidential treatment under the applicable legal principles."

Materials so designated were required to be treated as confidential until the designating party agrees otherwise in writing "or a court otherwise directs."

The protective order provided that a party opposing the designation of the materials as confidential "may file a motion challenging a confidentiality designation at any time if there is good cause for doing so, including a challenge to the designation of a deposition transcript or any portion thereof." Even after a motion was filed, however, the designated information was to be protected "until the court rules on the challenge."

Pursuant to the terms of the protective order, Petitioner Corey Shader, a non-party below was deposed and portions of his deposition testimony were designated as confidential.

Shortly afterwards, however, this Court reversed the trial court's denial of arbitration and ordered the matter submitted to arbitration pursuant to a written agreement to arbitrate "in accordance with Commercial Arbitration Rules of the American Arbitration Association pursuant to the laws of the State of Florida governing arbitration." Kratos Invs. LLC v. ABS Healthcare Servs., LLC, 319 So. 3d 97, 99-100, 102 (Fla. 3d DCA 2021). The trial court duly entered a stay of the court proceedings and sent the matter to arbitration.

Several months later, while the arbitration was still pending, the Plaintiffs filed a motion in the trial court to de-designate portions of Corey Shader's testimony. After initially expressing concerns over its authority to lift the stay entered when the case was pending in arbitration, the trial court entered an order expressly lifting the stay and de-designating Shader's testimony.

ANALYSIS

"To grant certiorari relief, there must be: '(1) a material injury in the proceedings that cannot be corrected on appeal (sometimes referred to as irreparable harm); and (2) a departure from the essential requirements of the law.'" Fla. Power & Light Co. v. Cook, 277 So. 3d 263, 264 (Fla. 3d DCA 2019) (quoting Nader v. Fla. Dep't of Highway Safety & Motor Vehicles, 87 So. 3d 712, 721 (Fla. 2012)).

Certiorari jurisdiction is present here because "an order requiring the disclosure of confidential 'cat-out-of-the-bag' information is precisely the type of order that can cause irreparable harm." Rousso v. Hannon, 146 So. 3d 66, 71 (Fla. 3d DCA 2014) (citing Allstate Ins. Co. v. Langston, 655 So. 2d 91, 94 (Fla. 1995)) (granting certiorari to quash order requiring disclosure of third party's financial information). In this regard, "[d]iscovery orders that require the disclosure of claimed confidential information are reviewed with

greater caution than those that are simply burdensome or costly due to overbreadth." Id.

The question of whether the trial court's order at issue represents a departure from the essential requirements of law is a closer question. This concept means something greater than "the mere existence of legal error." Haines City Cmty. Dev. v. Heggs, 658 So. 2d 523, 528 (Fla. 1995). As repeatedly explained by our Supreme Court:

> Since it is impossible to list all possible legal errors serious enough to constitute a departure from the essential requirements of law, the district courts must be allowed a large degree of discretion so that they may judge each case individually. The district courts should exercise this discretion only when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice.

Nader, 87 So. 3d at 722 (quoting Combs v. State, 436 So.2d 93, 95–96 (Fla.1983)). "This standard, while narrow, also contains a degree of flexibility and discretion." Id. at 723 (quoting Heggs, 658 So. 2d at 530). Moreover, our Supreme Court has recognized that "'clearly established law' can derive from a variety of legal sources, including recent controlling case law, rules of court, statutes, and constitutional law." Allstate Ins. Co. v. Kaklamanos, 843 So. 2d 885, 890 (Fla. 2003). "Accordingly, a district court may grant a writ of certiorari after determining that the decision is in conflict with the relevant

statute, so long as the legal error is also 'sufficiently egregious or fundamental to fall within the limited scope' of certiorari jurisdiction." Nader, 87 So. 3d at 723.

The relevant statute here is Florida's Arbitration Code. §§ 682.03–682.15, Fla. Stat (2021). The statute squarely places discovery matters relating to an arbitration within the authority of the arbitrators. Among other things, the Florida Arbitration Code generally gives the arbitrator the authority to "permit such discovery as the arbitrator decides is appropriate in the circumstances," § 682.08(3), Fla. Stat., and enforce these rulings by "issu[ing] subpoenas for the attendance of a witness and for the production of records and other evidence at a discovery proceeding, and tak[ing] action against a noncomplying party to the extent a court could if the controversy were the subject of a civil action in this state." § 682.08(4), Fla. Stat.

More to the point at issue here, the Code also specifically provides that the arbitrator's authority extends to protective orders. It empowers the arbitrator to "issue a protective order to prevent the disclosure of privileged information, confidential information, trade secrets, and other information protected from disclosure to the extent a court could if the controversy were the subject of a civil action in this state." § 682.08(5), Fla. Stat.

Of course, "an order of referral [to arbitration] is an interlocutory order, and as a statutory matter, the trial court retains jurisdiction during the pendency of the stay and until final judgment." Ocala Breeders' Sales Co. v. Brunetti, 567 So. 2d 490, 492 (Fla. 3d DCA 1990). Nevertheless, the Code also mandates the stay of the judicial proceeding after referral to arbitration: "[i]f the court orders arbitration, the court on just terms shall stay any judicial proceeding that involves a claim subject to the arbitration." § 682.03(7), Fla. Stat. (emphasis added). See also Chemstar Corp. v. Stark, 634 So. 2d 794, 795 (Fla. 3d DCA 1994) ("Any proceedings involving an issue subject to arbitration under the Florida Arbitration Code must be stayed when the order for arbitration is made.").

"[T]he effect of a stay of proceedings is to prevent the taking of any further steps in the action during the period of the stay . . . ." Ocala Breeders', 567 So. 2d at 492. In short, "[o]nce a matter has been voluntarily submitted to arbitration, a trial court lacks authority to become involved in the arbitration." Sea Vault Partners, LLC v. Bermello, Ajamil & Partners, Inc, 274 So. 3d 473, 477 (Fla. 3d DCA 2019).

Under this law and related law, we have held that a court departed from the essential requirements of law by asserting jurisdiction over discovery after a matter has been referred to arbitration. Macro Cap. Corp. v. The

Soffer Grp. ex rel. Soffer, 822 So. 2d 525, 526 (Fla. 3d DCA 2002); Greenstein v. Baxas Howell Mobley, Inc., 583 So. 2d 402, 403 (Fla. 3d DCA 1991) (issuing writs of certiorari to quash orders governing discovery after a matter has been referred to arbitration).

Respondents contend that the plain language of the order at issue requires designated material to be kept confidential "until a court otherwise directs." They go so far as to maintain that testimony and documents produced and designated as confidential under the protective order cannot be disclosed to the arbitrator for any purpose, even for the purpose of seeking a de-designation of the documents or materials. Respondents accurately report the plain language of the protective order. This plain language, however, must yield to the law described above which mandates a stay in the trial court once arbitration is ordered, prohibits the trial court from becoming involved in the arbitration, and authorizes the arbitrator to take charge of discovery—including the issuance of protective orders—during the pendency of the arbitration.

Accordingly, we issue the writ and quash the trial court order under review as such matters are left to the arbitrators during the pendency of the arbitration.

Petition granted. Writ issued.

[PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 20-12422

MELISSA COMPERE,
VALDO SULAJ,
ALVARO BETANCOURTE,
ALBA CASTILLA,
SLAGJANA KOVACHEVSKA,
ALDALYNNE ALDANA,
DANIEL PACHECO,
SANTOS RIVERA,
WILLIAM CAMERON,
ADAM JAGODA,
ALEJANDRA LAVALLE,
ANTONIO SCIANCALEPORE,
MERVE BUDOK,
ARBER LUKOVIC,
VIOLETA MARKOVIC,

TAMAS CZOMBOS,
PABLO CANO,
LUIS LUCIANO,
GORDON MACK,
RONALDO ESCALONA,
ODALYS BURGOS,
MUNEVVER KOC,
MEHMET BAYKARA,

Plaintiffs-Appellants,

DIEGO VARGAS,

Plaintiff,

versus

NUSRET MIAMI, LLC,
d.b.a. Nusr-et Steakhouse, a Florida limited liability company,
NUSRET GOKCE,
an individual,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida
D.C. Docket No. 1:19-cv-20277-AHS

Before BRANCH, GRANT, and BRASHER, Circuit Judges.

BRANCH, Circuit Judge:

Restaurants regularly add mandatory service charges or gratuities to customers' bills. This appeal is about whether such charges are "tips" under federal employment law, an issue of first impression in the Eleventh Circuit. If the mandatory service charges are tips, federal law would generally prohibit restaurants from using the fees to pay minimum and overtime wages to employees. But if the charges are not tips, establishments may apply them toward employee wages.

Nusret Miami, LLC is an upscale steakhouse in Miami, Florida. It is owned by Nusret Gokce, a chef and internet celebrity also known by the nickname "Salt Bae."[1] Since opening in November 2017, the restaurant added a mandatory 18% "service charge" to customers' bills. It collected these payments and redistributed them to certain employees on a pro rata basis to cover Nusret's minimum and overtime wage obligations. To do so, the restaurant used a provision in the Fair Labor Standards Act ("FLSA") exempting certain retail and service establishment employers from paying overtime wages if, as relevant here, "the

[1] For clarity's sake, we will refer to Nusret Gokce and Nusret Miami—the two defendants—collectively as "Nusret."

regular rate of pay" of employees exceeds one and one-half times the applicable minimum hourly rate. *See* 29 U.S.C. § 207(i).

In this collective action under the FLSA, the plaintiffs—a group of tipped employees at Nusret ("Employees")—challenge Nusret's compensation scheme. The Employees allege that from November 1, 2017, through January 18, 2019, the restaurant paid them less than the required federal minimum and overtime wages and forced them to participate in an illegal tip pool with non-tipped employees. The heart of their argument is that, although their portion of the service charges exceeded the statutory wage requirements (*e.g.*, some employees made over $100,000 per year), Nusret still violated the FLSA because the 18% "service charge" was not a service charge, but, in fact, a tip. And because tips are not part of the Employees' "regular rate of pay," the restaurant could not use them to offset its wage obligations under the FLSA. *See, e.g.*, *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 424 (1945) (explaining that "[t]he regular rate by its very nature must reflect all payments which the [Employer and Employees] have agreed shall be received regularly during the work week"); 29 U.S.C. § 207(e). The district court rejected the Employees' argument and granted summary judgment to Nusret. The Employees timely appealed.

The primary issue before us is whether Nusret's mandatory 18% "service charge" is a tip under the FLSA and associated regulations. The Employees say that the charge is a tip; Nusret says it is a bona fide service charge. The classification of this charge is

dispositive of this appeal. To wit: If the charge *is* a tip, the FLSA barred Nusret from using that money to satisfy its minimum and overtime wage obligations to the Employees. But if the charge is *not* a tip, Nusret could use it to meet its wage obligations under the FLSA, and the district court properly granted summary judgment.

After careful review and with the benefit of oral argument, we agree with the district court that the service charge was not a tip and could lawfully be used to offset Nusret's wage obligations under the FLSA.[2] Accordingly, we affirm.

I. Background

A. Factual Background

Nusret's menu informs customers of the service charge: "For your convenience an 18% service charge will be added to your final bill and will be distributed to the entire team."[3] Separate from

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[2] The Employees also appeal the denial of their motions to extend the pretrial and trial deadlines and the deadline for responding to Nusret's motion for summary judgment, as well as a motion for deferred consideration of summary judgment—all for the purpose of conducting the in-person deposition of Nish Patel of Paperchase Accounting, Nusret's outside accountant, which was delayed because of the COVID-19 pandemic. The Employees hoped Patel's testimony would reveal that Nusret did not report the service charges in its tax returns. As explained further below, we need not reach these issues given our holding that Nusret's service charge was not a tip no matter how it was treated for tax accounting purposes.

[3] At first, Nusret referred to the charge as an "automatic gratuity" and not a "service charge." At some point between November 2017 and April 2018, the restaurant began calling it a "service charge." Yet in every relevant legal

the service charge, customers can add a voluntary, discretionary gratuity by writing in the desired amount on a blank line on the final receipt or by leaving cash tips. The service charge, however, is non-negotiable. Although restaurant managers have the discretion to remove it from the bill when a customer complains about the service or food, the record contains no evidence that the customer has the discretion to negotiate or remove the charge.

The service charge payments never went directly to restaurant employees. Instead, Nusret would process the bill and the service charge (and credit card tips) through a point-of-sale system ("POS System"). Nusret would then distribute the collected service charges—minus 2.65% for credit card processing fees—to employees using a point system to give each employee a pro-rata share of the total.[4] Nusret would also distribute the additional gratuities to tip-eligible employees.

Nusret's pay structure for the Employees changed slightly over the relevant period: From November 2017 through April

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respect, the service charge remained the same throughout the period at issue in this appeal. And the Employees advance no argument turning on this change in nomenclature.

[4] The Employees dispute Nusret's claim that the service charges were distributed to service employees only (*i.e.*, non-managerial, tipped employees), pointing to the lead plaintiff's deposition testimony that the money was distributed to some employees who performed non-tipped work. This dispute is immaterial, because, as explained below, the service charges were not tips, so it is irrelevant whether Nusret paid some of that money to non-tipped employees.

2018, the restaurant paid the Employees an hourly rate and overtime wage and a pro rata share of the collected service charges. Starting on April 30, 2018, however, the restaurant eliminated the hourly rate for the Employees and instead satisfied its wage obligations exclusively through the service charges.

Nusret explained to its employees that the new pay structure was lawful under 29 U.S.C. § 207(i), which exempts certain employers from paying overtime wages if: (1) "the regular rate of pay of such employee is in excess of one and one-half times the minimum hourly rate"; and (2) if "more than half [the employee's] compensation for a representative period (not less than one month) represents commissions on goods or services." 29 U.S.C. 207(i).

In 2017, Florida's minimum wage was $8.10 per hour; in 2018, it was $8.25 per hour; and in 2019, it was $8.46 per hour. From November 1, 2017 through January 1, 2019—the period at issue in this lawsuit—Nusret paid the Employees amounts ranging from $23.68 to $51.58 per hour.

B. Procedural History

On January 18, 2019, Melissa Compere, a former Nusret server, initiated a collective action complaint[5] on behalf of herself and similarly situated service employees against Nusret Miami and

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[5] Like class actions, a collective action under the FLSA permits the aggregation of claims by multiple plaintiffs against a defendant, but unlike the prerequisites for class certification in Fed. R. Civ. P. 23, the FLSA requires only that the employees be "similarly situated." *See* 29 U.S.C. § 216(b).

Gokce for "unpaid minimum wage compensation, unpaid overtime wage compensation, liquidated damages, return of tips wrongfully taken, and other relief under the Fair Labor Standards Act of 1938." *See* 29 U.S.C. § 216(b) (providing for a collective action of "similarly situated" employees against employers who violate the provisions of the FLSA). The district court granted her motion for conditional certification and certified a collective action of former and current Nusret service employees who worked at the restaurant from November 2017 to January 1, 2019.

The Employees alleged that, "[t]hroughout the majority of [lead plaintiff Compere's] employment as a tipped employee at Nusret Steakhouse," she "and others similarly situated . . . were only paid a share of the tips collected," and therefore were paid no wages at all, in violation of the FLSA's minimum and overtime wage requirements. They also alleged that "non-tipped employees" and "management" improperly participated in the tip pool, which also violates the FLSA. *See* 29 U.S.C. § 203(t) (defining "tipped employee" as any employee "engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips"); *id.* § 203(m)(2)(B) (providing that employers "may not . . . allow[] managers or supervisors to keep any portion of employees' tips").

Nusret filed an answer stating that the Employees "have been fully compensated for all hours worked in accordance with the applicable provisions of the FLSA."

(i) *Discovery*

During discovery, Employees sought to depose Nish Patel, the corporate representative of Nusret's accounting firm, Paperchase, on the restaurant's treatment of the service charge for financial and tax purposes. Patel's deposition was set for March 20, 2020, in Miami, Florida. But on March 17, 2020, the Employees moved to extend the deadline to file pretrial motions, claiming that, "[t]oday, Defendant's counsel advised that Mr. Patel would not be able to come to Miami, Florida, for his scheduled deposition on March 20, 2020, because he has self-quarantined" at home in New York City and that Compere herself was also quarantined due to the COVID-19 pandemic. Although the filing never explicitly demanded an in-person deposition of Patel, the Employees insisted that they could not take Patel's deposition—which they described as "critically important"—without him traveling to Miami. The district court granted the motion and extended the pretrial motions deadline to April 20, 2020. And then on April 16, 2020, the parties jointly moved to further extend the deadline another sixty days, in part because the Employees had yet to depose Patel due to COVID-related restrictions.

While the joint motion to extend the relevant deadlines was pending, Nusret moved for summary judgment on April 20, 2020. Shortly before the May 4 deadline for responding, the Employees filed for a 30-day extension. And then on Monday, May 4, the Employees responded to Nusret's motion for summary judgment along with a motion to defer consideration of summary judgment

because they had been unable to depose Patel due to the pandemic, *see* Fed. R. Civ. P. 56(d) and (e). The district court denied the Employees' motions for an extension and for deferred consideration of summary judgment.

(ii) *Summary Judgment*

In its motion for summary judgment, Nusret contended that the 18% fee was a bona fide service charge and that the undisputed record evidence showed that the Employees were compensated well above the statutory wage rates. Nusret argued that the critical feature of a tip, unlike a service charge, is that the decision to pay a tip (and how much to pay) is entirely within the customer's discretion. Service charges, in contrast, are mandatory. Because Nusret did not allow customers to refuse to pay the service charge, it was not a tip.

The Employees responded that, for the 18% fee to be a bona fide service charge (and not a tip), Nusret was required to report the payments in its gross receipts on its tax returns. According to the Employees, there is a genuine issue of fact as to whether Nusret reported the service charges in this way, and summary judgment was therefore inappropriate. The Employees also suggested that the charge was not mandatory because managers had discretion to remove it from the bills of dissatisfied customers.

Soon after, the district court granted Nusret's motion for summary judgment, concluding that the restaurant satisfied the 29 U.S.C. § 207(i) exemption because: (1) it was a retail or service

establishment; (2) it was undisputed that at all relevant times Compere's "regular rate of pay" was more than one and one-half times the minimum wage; and (3) more than half of the Employees' compensation for the relevant time consisted of commissions on goods or services. The district court called the Employees' argument that the service charge was actually a tip "erroneous as a matter of law and untenable as a matter of fact." Citing the definition of a tip set forth in 29 C.F.R. § 531.52,[6] the district court noted that Nusret's service charge was not paid directly to the Employees, nor did customers have a right to direct who would receive the service charge. The district court also noted that at least one court had observed that "the essential element of a tip is its voluntary nature," and that Nusret's customers had no choice but to pay the service charge. Accordingly, the court held that because the service charge was not

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[6] This regulation defines a "tip" as:

> [A] sum presented by a customer as a gift or gratuity in recognition of some service performed for the customer. It is to be distinguished from payment of a charge, if any, made for the service. Whether a tip is to be given, and its amount, are matters determined solely by the customer. . . . Only tips actually received by an employee as money belonging to the employee may be counted in determining whether the person is a "tipped employee" within the meaning of the [FLSA] and in applying the provisions of section 3(m)(2)(A) which govern wage credits for tips.

29 C.F.R. § 531.52.

a tip, it was properly considered part of the Employees' "regular rate of pay" so Nusret could lawfully use it to pay employee wages.[7] Summary judgment was therefore appropriate, the court said, because Nusret's compensation scheme complied with the FLSA. This appeal followed.

* * *

On appeal, the Employees challenge the district court's grant of summary judgment to Nusret. They also appeal the denial of the joint motion to extend the pretrial and trial deadlines; the Employees' motion for extension of time to respond to Nusret's motion for summary judgment; and the Employees' motion for deferred consideration of the motion for summary judgment—all of which, they argue, should have been granted to give them time to conduct the deposition of Paperchase representative Nish Patel.

II. Discussion

A. The Service Charge

This Court reviews the grant or denial of summary judgment *de novo*, "applying the same legal standards used by the district court." *Yarbrough v. Decatur Hous. Auth.*, 941 F.3d 1022, 1026 (11th Cir. 2019). "At the summary judgment stage, facts must be viewed in the light most favorable to the nonmoving party only if there is a genuine dispute as to those facts." *Scott v. Harris*, 550

[7] The district court also found that "the undisputed evidence supports [that] the service charge became part of the Steakhouse's gross receipts."

U.S. 372, 380 (2007) (quotation omitted). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

The parties do not dispute that if the service charge is properly considered part of the Employees' "regular rate of pay," Nusret satisfied its overtime and minimum wage obligations under the FLSA because the Employees were paid well above 1.5 times Florida's minimum wage per hour.[8] But if the service charge counts as a tip, Nusret was not eligible to use those payments to satisfy its wage obligations under 29 U.S.C. § 207(i)'s overtime exemption[9] because tips cannot count toward the hourly "regular

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[8] The restaurant attached the following table to its motion for summary judgment purporting to show the lead plaintiff's pay for a representative period, and the Employees do not dispute its accuracy.

Check Date	Work	Days	Hours	Gross Pay	Hourly Rate
06/01/2018	05/14/2018	05/27/2018	79.30	$ 2,890.61	$ 36.45
06/15/2018	05/28/2018	06/10/2018	68.63	$ 2,373.02	$ 34.58
06/29/2018	06/11/2018	06/24/2018	76.22	$ 2,520.69	$ 33.07
07/13/2018	06/25/2018	07/08/2018	52.58	$ 1,798.91	$ 34.21

[9] 29 U.S.C. § 207(i) provides, in full:

> No employer shall be deemed to have violated subsection (a) by employing any employee of a retail or service establishment for a workweek in excess of the applicable workweek specified therein, if (1) the regular rate of pay of

rate of pay."[10] *See Walling*, 325 U.S. at 424 ("[T]he regular rate refers to the hourly rate actually paid the employee for the normal, non-overtime workweek for which he is employed."); *see also* 29 U.S.C. § 207(e) (defining "regular rate" in part, as including "all *remuneration for employment* paid to, or on behalf of, the employee" (emphasis added)).[11]

> such employee is in excess of one and one-half times the minimum hourly rate applicable to him under section 206 of this title, and (2) more than half his compensation for a representative period (not less than one month) represents commissions on goods or services. In determining the proportion of compensation representing commissions, all earnings resulting from the application of a bona fide commission rate shall be deemed commissions on goods or services without regard to whether the computed commissions exceed the draw or guarantee.

Section 207(a) (referenced above in § 207(i)) provides for a forty-hour workweek and one and one-half times compensation for time worked over forty hours. *Id.* § 207(a)(1).

[10] The "regular rate" of pay is calculated by dividing the total compensation an employee receives by the total number of hours worked. 29 C.F.R. § 778.118. And to be clear, this case is not about whether tips are part of the regular rate of pay (they are not, and neither party claims otherwise), but rather whether Nusret's mandatory service charge is a tip.

[11] As quoted above, the regular rate of pay includes "remuneration for employment paid to . . . the employee" but it does not include, for example, "sums paid as gifts" or, in general, "[s]ums paid in recognition of services performed." And DOL regulations explain that, outside of circumstances not applicable here (*i.e.*, where an employer claims a "tip credit" under 29 U.S.C. § 203(m)), tips "need not be included in the regular rate" because they "are not

For the reasons explained below, we hold Nusret's service charge was not a tip under the FLSA or other DOL regulations and was therefore part of the Employees' "regular rate of pay." Accordingly, the unrebutted record evidence shows that the restaurant satisfied its wage obligations under the FLSA.

The FLSA defines neither "tip" nor "service charge." But as noted in Department of Labor ("DOL") regulations, the critical feature of a "tip" is that "[w]hether a tip is to be given, and its amount, are matters *determined solely by the customer*." *See* 29 C.F.R. § 531.52(a) (emphasis added). Distinct from "a payment of a charge, if any made for the service," a tip is presented by a customer "as a gift or gratuity in recognition of some service performed for the customer." *Id.*

By this measure, Nusret's service charge is not a tip. Critically, whether and how much to pay are not "determined solely by the customer." Indeed, those decisions are not determined by the customer at all. As the lead plaintiff, Compere, conceded in her deposition, "[Employees] were told that the service charge was supposed to be mandatory as if it was an item that a person ordered it, it had to be on the check."

Moreover, our conclusion that Nusret's charge was not a tip is bolstered by another DOL regulation providing "examples of amounts not received as tips" and speaking directly to the type of

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payments made by the employer to the employee as remuneration for employment within the meaning of the Act." 29 C.F.R. § 531.60.

charge at issue. *See* 29 C.F.R. § 531.55. Section 531.55 (a) explains that:

> A compulsory charge for service, such as 15 percent of the amount of the bill, imposed on a customer by an employer's establishment, is not a tip . . . .

Id. § 531.55(a). We simply cannot distinguish between Nusret's service charge and this example. The only difference between the two—that Nusret's service charge is 18% of the final bill and the example is only 15%—is obviously immaterial. Nusret's charge was therefore a service charge and not a tip.[12]

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[12] Our reading of the FLSA and DOL regulations is in line with the Fourth Circuit's decision in *Wai Man Tom v. Hospitality Ventures LLC*, 980 F.3d 1027 (4th Cir. 2020), where our sister circuit held that a restaurant's automatic gratuity of 20% for parties of six or more was not a "tip" and could be used to offset the restaurant's minimum and overtime wage obligations. *Id.* at 1038. The court considered and rejected the employees' argument that the charges were tips because the manager would sometimes remove them from the bill. Relying only on the definition of "tip" in 29 C.F.R. § 531.52—and not mentioning the other regulations discussed here or "gross receipts"—the court emphasized that "the material issue is not whether customers always paid a twenty-percent automatic gratuity. The material issue is *who* determined whether and how much to pay." *Id.*

Our holding is also supported by an opinion letter from the DOL Wage and Hour Division on a similar question. That letter opined that a chauffeur service's "imposed gratuity" of 15%, which the company transferred directly to the chauffeur, was not a "tip" even though "[t]his imposed gratuity would not be included in the company's gross receipts." *See* DOL Opinion Letter, 2005 WL 3308602 (Sept. 2, 2005). Agency interpretations in opinion letters are "'entitled to respect' . . . to the extent that those interpretations have the

The Employees disagree. Their argument rests mainly on the theory that a service charge is a tip unless an employer "include[s] the service charges in their gross receipts for tax purposes." Because, according to the Employees, Nusret has failed to show that it included the service charges in its federal tax returns, there is a genuine issue of material fact as to whether the service charge is a tip, thereby precluding summary judgment.

Contrary to the Employees' contention, Nusret's tax forms are irrelevant. To be sure, 29 C.F.R. § 531.55(b) provides another example of an "amount[] not received as [] tip[]," and reads: "[a]s stated above, service charges *and other similar sums which become part of the employer's gross receipts* are not tips for the purposes of the Act," *id.* (emphasis added). But this section merely provides "examples" of non-tips. It does not purport to define—for purposes of the FLSA—"tips." By contrast, § 531.52(a) does. *See* 29 C.F.R. § 531.52(a) ("A tip is . . . ."). And, as discussed above, that definition of "tip" does not encompass Nusret's service charge.

Moreover, the "service charges and other similar sums" example in subsection (b) cannot be fairly read to require that an employer include a service charge in its gross receipts for tax purposes to avoid treating it as a tip. First, (b) references the example of a service charge in subsection (a) through the "as stated above" language and thereby reiterates that service charges are not

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'power to persuade.'" *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1994)).

tips for purposes of the FLSA. *See id.* § 531.55(b). Second, nothing in the text of subsection (b) affirmatively requires that the service charges be included in the employer's gross receipts to not be considered a tip; it simply gives examples of non-tips. [13] Third, the

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[13] The Employees point to several district court decisions holding that the relevant sums must be recorded in the employer's gross receipts to be considered a service charge countable toward the employer's wage obligations. *See, e.g.*, *Hart v. Rick's Cabaret Int'l, Inc.*, 967 F. Supp. 2d 901, 927–30 (S.D.N.Y. 2013); *Henderson v. 1400 Northside Drive, Inc.*, 110 F. Supp. 3d 1318, 1322 (N.D. Ga. 2015); *Shaw v. Set Enters., Inc.*, 241 F. Supp. 3d 1318, 1328–29 (S.D. Fla. 2017). Of course, we are not bound by the decision of any district court. But, in any event, these cases are distinguishable because they involved clubs where customers paid fees, in cash, as well as tips, directly to dancers. In contrast, the service charges paid by Nusret's customers never went directly to employees, but went directly to Nusret through its POS system.

The Employees also cite one circuit court decision, *McFeeley v. Jackson Street Ent., LLC*, 825 F.3d 235 (4th Cir. 2016), in which the Fourth Circuit held that a performance fee paid by club patrons directly to dancers, which the dancers kept for themselves, was not a service charge for FLSA purposes. *Id.* at 245–46. The court stated that one prerequisite to use the "service charge" as an offset to an employer's overtime and minimum wage obligations is that "the service charge 'must have been included in the establishment's gross receipts.'" *Id.* (quoting *Hart*, 967 F. Supp. 2d at 929). *McFeeley* is not persuasive as it relates to this case because it is factually distinct—it's another case in which charges and tips were both paid in cash directly to the dancers. Moreover, we are far more persuaded by the later Fourth Circuit decision in *Wai Man Tom*, discussed above in footnote 12, which considered a scenario much closer to our case and held that a mandatory 20% gratuity was not a tip. *See Wai Man Tom*, 980 F.3d at 1038.

And even assuming that service charge payments must be included in an employer's gross receipts to constitute a bona fide service charge, the record

Employees have cited no binding authority for reading an "include in gross receipts *for tax purposes*" requirement into the FLSA or its accompanying regulations. Such a requirement is absent even from 29 C.F.R. § 531.52(b), which mentions gross receipts. Pointing to no binding authority, the Employees ask this Court to ignore the plain text of the regulations and read an additional recordkeeping requirement into the FLSA's already extensive and burdensome requirements. We decline to do so.[14]

The Employees also argue that Nusret's service charge was not, in fact, mandatory because managers had discretion to remove the charges on the bills of dissatisfied customers (much like a manager might "comp" an entrée). But what the Employees miss is that the relevant question is whether the decision to pay the given sum is "determined solely by the *customer*." *See* 29 C.F.R. § 531.52(a) (emphasis added). Here, it is not. The customers had

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evidence on this issue demonstrates that Nusret satisfied this requirement. Black's Law Dictionary defines "Gross Receipts" as "[t]he total amount of money or other consideration received by a business taxpayer for goods sold or services performed in a taxable year, before deductions." *Gross Receipts*, Black's Law Dictionary (11th ed. 2019). Here, the undisputed record evidence shows that Nusret received the service charges and recorded them in its POS system before redistributing them to employees. Thus, the charges "bec[a]me part of [Nusret's] gross receipts." *See* 29 C.F.R. § 531.52(b).

[14] To be clear, we give no opinion on whether Nusret complied with federal tax law in its treatment of the service charge on its tax returns. Our holding is simply that Nusret's tax returns are irrelevant to determining whether the service charge is a tip.

no ability to determine on their own whether they would pay the service charge. It is irrelevant that *managers* would sometimes remove the service charge for dissatisfied customers.

Accordingly, we agree with the district court that Nusret's mandatory 18% service charge was a bona fide service charge and not a tip because it was a "compulsory charge for service," and the decision to pay it—and the amount to pay—were not "determined solely by the customer." *See* 29 C.F.R. §§ 531.52, 531.55.

B. Discovery and Rule 56(d) Motions

As discussed above, the Employees unsuccessfully sought extensions of the pretrial and trial deadlines and the deadline for responding to the motion for summary judgment, as well as deferred consideration of summary judgment to conduct the in-person deposition of Nish Patel of Paperchase, Nusret's outside accountant, which was delayed because of the pandemic. The Employees expected Patel "to confirm that the service charges were not included in [Nusret's] gross receipts," which they asserted would have defeated Nusret's § 207(i) exemption.

Because we hold that, as a matter of law, Nusret's mandatory 18% service charge was not a "tip" no matter how it was treated on Nusret's tax returns, Patel's purported testimony

would have made no difference.[15] We therefore do not reach the Employees' argument about the denial of these motions.

* * *

Accordingly, we affirm the district court's award of summary judgment to Nusret.

AFFIRMED.

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[15] In its discovery requests, the Employees also sought the restaurant's monthly and annual financial statements, tax returns, and cash flow statements, along with other financial documents. The Employees do not dispute that Paperchase produced these documents, nor do they dispute their authenticity. And in any event, Nusret affirmatively "concede[d]" that it "did not report the service charges on its corporate tax returns nor pay sales tax on them" in its reply in support of summary judgment.